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EDITORIAL

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

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

It is divided into two main sections:

Two general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting litigation and dispute resolution work.

Country question and answer chapters. These provide a broad overview of common issues in litigation and dispute resolution in 44 jurisdictions, with the USA being sub-divided into seven separate state-specific chapters.

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

Special thanks are reserved for the contributing editors Greg Lascelles and Julia Steinhardt of Covington & Burling LLP for their invaluable assistance.

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

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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Key Considerations for Parties in Foreign Proceedings Seeking to Access Evidence from Third Parties Based in England and Wales

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Introduction

1. In the global landscape that underpins many commercial disputes, access to evidence held by third parties based in a different jurisdiction can be a matter of great strategic importance.
2. In many jurisdictions, such evidence – both oral and written – can be accessed through a mechanism provided for in the Hague Convention[1] that can be used to compel third parties to produce evidence for foreign proceedings that are already ongoing. The Hague Convention is a multilateral treaty that was signed in 1970, and has been adopted in some form by more than 50 Member States. It aims to create standardised procedures through which requests can be made for evidence held in different jurisdictions.
3. The English courts are experienced with handling Hague Convention requests for compelling third parties to produce evidence for use in foreign proceedings. In practice, parties make requests in the originating court (i.e., the court where proceedings are ongoing) and that court makes a request to the foreign court, in which it asks the foreign court to make orders that will allow access to evidence held by third parties who are within the receiving court's jurisdiction. In our experience, the originating court tends to adopt what the requesting party has put together, rather than correcting it and seeking to bring it in line with the receiving court's requirements. It is therefore important for parties that seek to take advantage of this process to be aware of specific rules that shape the application of the Hague Convention in England when framing their requests.[2]
4. In this chapter, we provide an introduction to these rules, giving an overview of how third parties who are based in England and Wales may be compelled to produce witness or documentary evidence for use in foreign proceedings that are already underway in jurisdictions outside of the EU.[3] We begin by considering the statutory law and case law, before examining the procedure for accessing first oral, and then written, evidence for use in foreign ongoing proceedings.

The Legal Principles

5. A court in a foreign jurisdiction can issue a request for an English court to take evidence and provide it to the receiving court through the Hague Convention procedure referred to above. This is done via a letter of request (sometimes known as a 'letter rogatory'). As alluded to above, despite being issued by a foreign court, the applicant's letter of request must be drafted to incorporate various English legal principles in order to maximise its chance of success.
6. These principles include: (i) legal principles laid out in the UK Evidence (Proceedings in Other Jurisdictions) Act 1975 ("**EPOJA**"), which contains the express reservations under which the UK signed the Hague Convention; and (ii) additional principles embodied in previous decisions by the English court.

Statute

7. Among others, there are two specific sections of EPOJA that limit the scope of letters of request from foreign courts to the English courts.
8. Section 2(3) EPOJA prevents the English courts from ordering steps that would not be permissible in their ordinary proceedings. In general, there is no English procedure for orally deposing witnesses (whether "in chief" or by way of cross-examination) before the trial. Other legal systems do allow such depositions to take place before trial, and some go further by allowing witnesses to be orally deposed in order to understand where evidence might lie. This type of order for the purpose of understanding where evidence might lie would not be obtainable in the English court system, which has no equivalent procedure. However, a compromise has been reached to satisfy the rights of foreign courts to request evidence under the Hague Convention mechanism. In the context of such requests from foreign courts only, oral examinations may be permitted for the purpose of gathering evidence (in the form of statements by the witness) for use in foreign proceedings. The purpose of such examinations should be narrowly framed around gathering specific evidence for trial, rather than a purpose that would be more alien to English law, such as discovering where as yet unidentified evidence might lie. As such, questions in oral examinations should relate to facts rather than documents, and be similar to the questions that could be asked in an examination in chief at an English trial.
9. Section 2(4) EPOJA prevents English courts from ordering parties to:
   - declare the existence of documents relevant to foreign proceedings that are, or have been, in their control;[4] or
   - produce documents that are not specified in the order as being particular documents that seem or are likely to be in the party's control.

Case law

10. The English court will generally "strive to give effect to the request of the foreign court unless it is driven to the clear conclusion that it cannot properly do so" (*Re State of*

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Norway's Application [1987] 1 QB 433). Therefore, it is in the best interest of applicants to understand the circumstances in which the English court is likely to conclude that it is improper to grant such requests for evidence by foreign courts.

11. Although each application will turn on different facts, previous decisions help to indicate the types of considerations that are likely to drive such conclusions. Key issues include the line of enquiry that is pursued through the request, the breadth of documents requested and whether this could be deemed as too wide or oppressive, the request's purpose, and the clarity or precision of the request.

12. It is crucial to ensure that the line of enquiry sought is framed in accordance with what is permissible under English law, regardless of what might be allowed in the originating jurisdiction. In *Re State of Norway's Application (No. 1) [1987] 1 QB 433*, the English court refused to grant a request that it considered to be an "impermissible fishing expedition", which could not exist in English procedure. This case involved a Norwegian court request for an oral examination of two UK-based witnesses. The judge explained that by an "impermissible fishing expedition", he referred to a roving enquiry by means of the examination and cross-examination of a witness, which was not designed to establish allegations of fact by means of their evidence, but to obtain information which could lead to obtaining evidence in general support of the requesting party's case. In addition, he explained that it would not be permissible to seek evidence for a preliminary purpose such as pre-trial discovery.

13. Requests that pursue a questionable purpose under English law risk being narrowed or rejected altogether by the English courts, making their stated purpose an important consideration during the initial drafting phase. As stated above, the English court may refuse requests that seek to identify new evidence for pre-trial discovery purposes (see para. 26 below), rather than for use in a trial, or may alternatively choose to insert provisions that confirm this restriction within the relevant executing order, rather than refusing the request entirely. For example, in *Golden Eagle Refinery Co Ltd v Associated International Insurance (Unreported), 19 Feb 1998 [1998] Lexis Citation 2245*, an order was appealed due to the fact that it sought pre-trial discovery, which is permissible in the US, but not under English law. The judges ultimately decided that the order had a dual purpose, seeking to pursue both discovery enquiries that were not permissible under English law, and testimony for use at trial, which would be permissible under English law. To enable the permissible purpose, they upheld the order, but imposed restrictions on the conduct of the oral examination to prevent pursuit of the impermissible purpose.

14. The English court may also refuse requests that it considers to be vague, uncertain or imprecise in scope. In *State of Minnesota v Phillip Morris [1998] ILPr 170*, for example, a request sought oral discovery from four former employees of the British American Tobacco group. The potential witnesses resisted the request on the basis that, among other issues, its terms were too uncertain and imprecise in scope, extending over a 40-year period, and would therefore not be permissible under English procedure. The decision confirmed that the request was too broad, and that although the English court will seek to assist a foreign court wherever it is practical or appropriate, such as by amending requests through deletion where minor amendments are sufficient to resolve uncertainties, witnesses must be given sufficient clarity regarding the scope of the evidence about which they will be examined.

15. In addition, the English court will not grant requests that it deems to be too wide or oppressive. In *First American Corp v Sheikh Zayed Al-Nahyan [1998] 4 ALL ER 439*, a request sought to orally examine witnesses regarding the losses of a company during 1980, which took place six years prior to the time when those witnesses had first become involved with the company. This was held to be unnecessary and oppressive.

16. Similarly, the court may refuse requests that seek broader document production than that which would be permitted under section 2 EPOJA. For example, in *Smith v Philip Morris Companies, Inc [2006] EWHC 916*, a letter of request which was issued at the discovery stage of proceedings was found to have terms that were unjustifiably wide-ranging, investigating many topics that were unrestricted in terms of date or subject-matter. This decision emphasised that witnesses should know within reasonable limits the scope of the subjects that will be raised in oral examination. The court therefore found that the request was so wide that it could not be modified or made subject to conditions, and set it aside.

Procedure

General procedure

17. English court proceedings are governed by the civil procedure rules ("**CPR**") and related practice directions ("**PD**"). CPR Part 34 and PD34B set out the English procedure for compelling witnesses to provide evidence for use in foreign proceedings.

18. Where individuals who may be witnesses are resident or domiciled in England or Wales, or where the documents sought are physically located in England or Wales, the English courts will have jurisdiction. In addition, individuals who are from outside of the EU but are physically present in England or Wales can be served in connection with English court applications.

19. The first step should be to draft a letter of request from the foreign court under the standardised procedure enabled by the Hague Convention. As this chapter makes clear, that letter of request should be informed not only by the originating court's requirements, but also with an eye to maximising the chance of making a successful application for a court order in England and Wales.

20. The originating court's original signed request should then be provided to an English lawyer, who can file a 'without notice' application with the High Court for the letter of request's execution as an English court order. This type of application should disclose all facts that are material to the application, as the respondent will be unable to present their case to the court at this stage (PD34A para. 6). The application should include an application notice and witness statement from the English lawyer, which should exhibit the letter of request and provide background information regarding the request and clarifications where required, in addition to a draft order for the court (CPR 34.17). In cases where the draft order includes a request to orally examine a witness, it should also suggest an examiner and a list of proposed questions (CPR 34.17). The examiner must be an English-qualified barrister or solicitor selected from a list of court-appointed examiners.

21. After they have been submitted to the court, a judge will consider the application based on a review of the documents. This will not usually involve a formal hearing.

22. Assuming that the judge agrees to issue the order, the applicant's representative can serve the order on the third party. At this stage, the third party will choose whether to comply with the order, or apply to set it aside. Any costs spent by the third party in complying with the order must generally be reimbursed by the applying party.

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23. To set the order aside, the third party must apply to the court outlining the reasons for challenge and the relevant facts in a witness statement (CPR 23). The applicant may respond by filing a replying witness statement. Following this, both parties will participate in an oral hearing before a judge.

24. Assuming that the application for a court order requiring fulfilment of the terms in the letter of request is successful, oral examinations (if requested) should be held before, and documents (where requested) should be provided to, the appointed examiner. Dates for compliance will be set out in the court order.

Nature of evidence

25. The court's practices will vary depending on the type of evidence sought.

Oral evidence

26. As set out above, oral examinations are held before an examiner. Court orders may additionally contain directions for the applicant; for example, to provide a list of proposed questions, or the documents on which it plans to rely, to the examiner in advance of the oral examination. An oral examination should be for the purpose of gathering specific evidence for trial, rather than for pre-trial discovery aimed at identifying previously unknown documents or evidence. As such, questions should relate to facts rather than documents, and should generally remain similar to the questions in any list provided in advance of the examination (although minor variations in the context of dialogue during the oral examination would be unlikely to pose an issue).

27. Although oral examinations may be held in private offices, CPR 34.9(1) requires them to be "conducted in the same way as if the witness were giving evidence at trial" (subject to any directions in the court order). This restricts the questions that the requesting party can ask to those which it could properly ask at trial (see also PD34A para. 4.5). When participating in an oral examination on behalf of the applicant, questions should not go beyond those that would be appropriate during an examination-in-chief in the English court, and in particular should not stray into the realms of cross-examination.

28. In general, the applicant's legal representative will put questions to the witness. The witness' legal advisor may be present and can object to questions on the basis of privilege, or if he or she believes that the witness: (i) would be incapable of making an informed judgment on the subject of a question (*R v Rathbone, Ex Parte Dikko [1985] QB 630*); or (ii) could not be compelled to answer a question in the jurisdiction of the requesting court (section 3(1)(b) EPOJA).

29. Although the scope of permissible questioning is not dealt with specifically under CPR 34, the Treasury Solicitors' Guide to Letters of Request advises that "it is of particular importance not to go beyond the proper scope of the examination" as laid out in the letter of request. This is because this could give rise to a justified complaint by the other party, for example, because it "only refrained from arranging representation in the belief that the examination [would] be strictly confined to the limits of the Letter of Request and would have wished to be represented if the scope were in any way widened".[5]

30. The examiner has a relatively passive role in oral examination proceedings, and will merely observe unless asked to state a view regarding a question's permissibility. He or she will generally accept assertions of witness incapacity where questions are objected to, merely recording the details of objections (apart from those based on legal privilege) (PD34A para. 4.5) and his or her opinions regarding their validity.

31. Where a question is objected to, witnesses can choose whether or not to answer. If a witness decides to refrain from answering, the applicant can apply to the court for an order compelling the witness to answer. The court can then decide whether or not to uphold the objection, taking into consideration the principle that it is better for responses which are inadmissible in the foreign court's jurisdiction to be recorded, than for responses which could have been admitted to be absent, given that the foreign court can always decide to exclude improper answers from proceedings after they have been given (*R v Rathbone, Ex Parte Dikko [1985] QB 630*).

32. Following the examination, the examiner and witness will review and sign a full examination transcript prepared by a court reporter, which will then be sent to a senior High Court judge for certification and provision to the foreign court (PD34A para. 4.12(4)).

Documentary evidence

33. Additional requirements apply to requests for documents, in comparison to requests for an oral examination. Section 2(4) EPOJA restricts requests for documents to "particular documents specified in the order as being documents appearing… to be [or] likely to be, in [the party's] possession, custody or power". This specifically restricts the courts from granting requests that seek to require parties "to state what documents relevant to the proceedings to which the application for the order relates are or have been in [their] possession, custody or power". On this basis, the English court is likely to conclude that requests which seek any or all relevant documents in connection with a specific matter are too wide.

34. The decision in *Re Asbestos Insurance Coverage Cases [1985] 1 WLR 331* addressed EPOJA's terminology of 'particular documents' in detail, strictly interpreting this language as requiring the order to specify particular documents. Although several documents may be referred to compendiously, each specific document *must be* clearly indicated. The court is unlikely to entertain hypothetical or speculative requests for documents whose existence is not known.

35. For example, it would be more difficult to pursue a request for "any internal company emails, if existing, regarding [subject] and sent by [names of various individuals] on any date" than it would be to pursue a request for "the ten emails sent in 2014 by [name] to [name] regarding [subject] on [insert specific dates]". Conjectural documents that might or might not exist will fail to meet the requirement of particularity: in each case, it must be possible to show, based on evidence that the requested documents actually exist (or previously existed).

Endnotes

1. The Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 1970.

2. This is all the more important because if a request is challenged and the requesting party loses, it will have to pay the challenger's costs, given that the English courts operate a system of costs under which, in general, the loser pays for the costs of the dispute.

3. This chapter focuses on accessing evidence for use in foreign proceedings that have already commenced outside of the EU. Among other things, it does not deal with the position in connection pre-action disclosure against third parties (known as Norwich Pharmacal orders). The relevant regime for requests by EU Member State courts is governed by the Taking of Evidence Regulation (Regulation (EC) 1206/2001).

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4. The term 'control' refers to any document that is or has been within the party's possession, custody or power.
5. Treasury Solicitor's Guide to Letters of Request, June 2007, page 15, available at: http://webarchive.nationalarchives.gov.uk/20100210171843/http://www.tsol.gov.uk/Publications/letter_of_request.pdf.

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Commencing a Class Action in the Netherlands

Koen Rutten

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Introduction

Currently, Dutch law does not provide for a "US-style" class action in the sense that a large group of individuals can collectively bring a claim for damages to court. This limitation is likely to be removed in the not-too-distant future. On 16 November 2016, a legislative proposal was submitted to Parliament, aiming to clear the way for collective actions for damages under Article 3:305a of the Dutch Civil Code ("DCC"). However, pursuant to Article 3:305a, DCC does provide for a collective action to protect common or similar interests of parties whose rights or interests are affected, although there are specific limitations on the use of this collective action. Another possibility is to assign a claim to a claim vehicle. In this chapter we will discuss some of the main aspects of the requirements to be met on the basis of recent case law in the Netherlands.

Cause of Action of the 305a Organisation

1.1 Five requirements

In order for a (so-called) 305a organisation to have a cause of action, it must meet five requirements (Article 3:305a(1) DCC): (1) it must be a foundation or association with full legal capacity; (2) it must have an adequate object clause in its articles; and (3) the interests which the 305a organisation represent must be similar and thus qualify for consolidation. Furthermore: (4) the 305a organisation must, in the given circumstances, have made sufficient efforts to achieve the progress made by conducting consultations with the defendant; and (5) the interests of the persons on whose behalf the action is brought are sufficiently safeguarded (Article 3:305a(2) DCC), which includes that the 305a organisation must have sufficient cause of action in the legal action (Article 3:303 DCC).

The requirement (1) that the 305a organisation must be a foundation or association with full legal capacity, which has a procedure by virtue of Article 3:305a BW, will not be discussed in this chapter, because this requirement is not often the subject of discussion. Despite the considerable degree of clarification of the framework for these requirements, it still occurs in practice that a 305a organisation does not meet these requirements, or a good number of them. Given the overlap in the case law of the past year, in which multiple admissibility requirements are often discussed for each decision, this case law will be discussed below in a continuous manner without further subdivision.

1.2 The Den Haag Court, 18 October 2017 (ECLI:NL:RBDHA:2017:11807)

A decision that covers virtually all admissibility requirements concerns the class action against Aegon in respect of the Sprint plan share-leasing product. In this case, the Den Haag Court was requested, following on from previous successful class actions, to render another judgment on the question of whether Aegon had violated its duty of care, due to a number of specific aspects of this product. For instance, the Supreme Court had already confirmed a judgment by the Amsterdam Court of Appeal, i.e. that Aegon had failed to perform its special duty of care in respect of the offer of this product, and the Supreme Court ruled that the so-called court of appeal formula of the Amsterdam Court of Appeal for calculating the damage of the individual investors could withstand the test of criticism. A 305a organisation that was not a party in the class action proceedings previously conducted brings, briefly put, an action to obtain a more comprehensive judicial declaration than had already been awarded and argues that the former court of appeal formula should be amended.

After the Den Haag Court, with reference to the parliamentary history, had given an extensive "lecture" on the (formal) admissibility requirements of Article 3:305a(1) and (2) DCC, the Court arrived at the following conclusions, which we will summarise below, given the size of this chapter:

- the 305a organisation has sufficient knowledge and skills to conduct the proceedings, in view of its actual activities in the past, in accordance with the object clause contained in its articles (ground 4.10);
- the fact that the 305a organisation is funded entirely by a commercial organisation that handles the administrative side of the legal action and which has engaged the lawyer, and which has made a "no cure, no pay" agreement with the individual participants to the amount of 20% of a positive result, does not preclude this, because (i) acting partly or wholly for commercial gain does not (yet) involve "impure" commercial motives, and (ii) the 305a organisation is transparent about this construction – while it cannot be said that its role is illusory, there is a construction to circumvent the law or abuse of rights (grounds 4.11–4.12);
- a 305a organisation must meet the requirements set out in the Claim Code, even if it was formed 12 years ago, does not qualify as a "claim or *ad hoc* foundation" and consists solely of volunteers, since its purpose is to conduct class actions and to negotiate settlements (ground 4.13);

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- even though the 305a organisation's failure to comply with the Claim Code is undermining its credibility, it need not lead to inadmissibility in the circumstances of the case; for example, if it is established – as in the present case – that the 305a organisation does not have a profit motive, is managed by unpaid volunteers who are themselves partly affected by the outcome of the proceedings and who are transparent about their financing arrangements and the involvement of another company that supports them, it cannot in itself be considered to be inadmissible (ground 4.14);
- the admissibility, however, also depends on whether the action brought serves the objectives of a class action, namely, whether more effective and efficient legal protection can be expected than in individual dispute resolution, and, as in this case, it should be considered whether the "new" class action, following on from previous class actions, offers such additional legal protection (ground 4.17):
  - which does not apply – as in the present case – in the event of accusations made in previous class actions but which have proved unsuccessful or have not (yet) been assessed, in the absence of new facts or evidence, and in addition, it has not become apparent how many of the parties involved still actually support the class action and have a concrete cause of action in doing so with a claim that has not (yet) become time-barred, in which case the representativeness requirement will not have been met, which is not formally laid down in the law but is nevertheless of material importance (ground 4.16);
- that the absence of authority of *res judicata* (binding force) of decisions in previous class actions for individual members from the membership, and the 305a organisation that was not a party to them does not affect this, because Article 3:303 DCC requires that the 305a organisation (and its members) has sufficient cause of action in the legal action (grounds 4.18–4.24); and
- that, without the need for additional legal protection, the claim is therefore inadmissible because there is no evidence to suggest "*that the legislator, in the event of a total or partial definitive dismissal of a legal action in the context of a class action, also wished to create the possibility of a repetition of moves in a new class action at the initiative of another interest group on the basis of solely new arguments (essentially: calculation examples), without new facts or evidence. Nor would it justify departing from the normal rule of procedure, which is to defend one's own interests*" (grounds 4.25–4.26).

The above leads the Den Haag Court to conclude that "*a situation does not arise in which, without the consolidation of interests as established by the interest group, efficient and/or effective legal protection against the threat of impairment of these interests could be made considerably more difficult*", as Article 3:305(1) DCC requires, whereby "*insufficient facts were put forward to make plausible that a sufficiently representative group of parties involved will ultimately benefit from the class action if the claim is allowed*", as required by the final sentence of Article 3:305(2) DCC.

1.3 The Den Haag Court, 28 June 2017 (ECLI:NL:RBDHA:2017:7072)

The third requirement – that the interests should be similar and thus suitable for consolidation – was also addressed in another collective usury case against Aegon, in which it was previously held that the claim in respect of 112 of the 115 investment products was inadmissible, because the 305a organisation had failed to comply with its obligation to furnish facts to the effect that these products had "*very similar product characteristics to (one of) the three sample products and that they had been created in the same, or at least comparable, manner*". In its judgment of 28 June 2017, the Den Haag Court ruled on the admissibility of the 305a organisation's claims with regard to the remaining three 'sample products' – KoersPlan, VermogensPlan and FundPlan – for which it had elaborated its statements concretely. The Court ruled that the interests with regard to these sample products were sufficiently similar, even though it had been established that these products – which have in common that they were offered by Aegon – differed from each other and could not be mutually equated. In this context, the Den Haag Court only assesses whether the interests for each sample product are sufficiently similar. This is the case since each sample product had the same product characteristics, was "*predominantly*" concluded through a broker and was offered with "*more or less*" similar documents. The conclusion is that, for each sample product, "*both the manner in which the specific products are offered and concluded and the contract documentation are sufficiently uniform to allow an assessment of the reproaches without examining the situation of the individual policyholders*". This is not yet sufficient for the 305a organisation, because the fact remains that the three sample products *were* different from each other. However, this is not, or is no longer, an impediment, according to the Den Haag Court.

In view of this, there seems to be an informal consolidation of legal actions by means of a single legal action instituted by a 305a organisation. This is intended to prevent a 305a organisation that wishes to take legal action against a single defendant, because of the same reproach with regard to various (investment) products (services or (undisclosed) communications), from having to do so via separate proceedings, provided that for each product the obligation to furnish facts is fulfilled and that the actions brought are aimed at protecting similar interests that are suitable for consolidation. In our view, this is a desirable outcome.

Aegon also argued in this case that the 305a organisation had no (or no longer had) cause of action, the fifth requirement, because a "total solution" had been offered for the products in question in the form of product improvements (rendering the accusations obsolete), which had been approved by a large majority of the foundations' members (97% and 98.6%). With regard to that point, the Court rejected Aegon's defence on two grounds: on the one hand, the 305a organisations had based the claims on the "new" reproach that was not included in Aegon's overall solution; and on the other hand, the fact that the overall solution was widely supported and accepted by the members of the 305a organisations is not in itself an obstacle to conducting the class actions.

1.4 The Den Haag Court, 18 October 2017 (ECLI:NL:RBDHA:2017:11809)

The third requirement was also up for discussion in the class action of the Dutch Section of the International Commission of Jurists against the Dutch State. The 305a organisation claimed a judicial declaration that the Dutch State was liable for unlawful administrative jurisdiction against a former Afghan officer who had fled to the Netherlands and whose application for asylum had been rejected. The Dutch State argues that the claim, due to unlawful case law, by its nature is not suitable for a class action, because in such a case the individual circumstances of the case are decisive. The Den Haag Court rules otherwise. The Court rules that a 305a organisation can represent interests in bundled cases in which the same (consistent) standard has (wrongly) been applied in the government judicial system, in which the relevant (objective) facts and circumstances are the same (such as the nationality and former position of the refugee). The fact that only one specific case is

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submitted in such a class action is not a hindrance in that context, if it is expected that there are more similar cases in which the (consistent) standard has been applied.

The third requirement is also under discussion in the above-mentioned class action by the 305a organisation Milieudefensie and Adem against the Dutch State with the aim of improving air quality. It follows from this judgment that the 305a organisation rejected the judicial declaration sought on two grounds (even though the Court ruled that the Dutch State had acted in violation of the European Directive by failing to comply with limit values for air quality in the Netherlands in due time). First of all, it was ruled that the damage suffered by the members of the 305a organisation had not been made sufficiently plausible, as a result of which there was no cause of action in the judicial declaration sought. That ruling is in itself correct. After all, insofar as the members do not suffer any damage (or at least that this has not been made sufficiently plausible), the judicial declaration sought will not offer any added value to the members. Only if the 305a organisation (also) represents its own (patrimonial) cause of action in the class action on the basis of its articles could this be different – for example, in the Urgenda climate case; but according to the Court, such an (idealistic) interest on the basis of the articles did not occur in this case. It follows from the second ground for rejection, i.e. that the claim is of such individual nature – given the concrete circumstances of the case for each individual – that a class action is unsuitable for consolidating the interests, that even if the damage suffered by the members had been made sufficiently plausible, the 305a action still could not succeed. This is because the legal position of individuals is not sufficiently equal.

In our opinion, the Court took a detour here, leading to a confusing outcome; it should have been concluded that the 305a organisation had no cause of action because the interests were not suitable for consolidation in view of the individual nature of the claim, in respect of which it could subsequently be left undecided whether the damage had been made sufficiently plausible by the 305a organisation, which is the basis of the Court's consideration. After all, the Court will not discuss that legal issue.

1.5 The Court of Rotterdam, 21 June 2017 (ECLI:NL:RBROT:2017:4800)

Finally, there is the fourth requirement: prior consultations, on pain of inadmissibility. In the above-mentioned judgment on the class action instituted by "*Dier & Recht*" against two dog breeders, the Rotterdam Court ruled that this requirement should not be interpreted too strictly. The fact that the requirement for prior consultation referred to in Article 3:305a(2) DCC is or has become more of a formality is also evident from the judgment of the Gelderland Court on the class action of trade unions against Monuta, and a judgment of the Den Haag Court regarding the foundation Stichting "*We Gaan Ze Halen*". Consequently, last year's case law again confirms that the requirement for prior consultation to guarantee a "*serious invitation to consult*" is not (or is no longer) judged too strictly. The only purpose of the requirement still seems to be to prevent interest groups from taking any action that might result in an attack on another party. Sufficient for the content of the prior consultations was that the defendant was informed by the 305a organisation of its position. The fact that the exact positions are only tightened up later in the summons and during the 305a proceedings does not impede this, if the reproach remains the same in essence. It would be wise for the 305a organisation to send its (translated) correspondence by registered post (in the defendant's language), because it bears the burden of proof in the event of a dispute about receipt (Article 3:37 DCC) on pain of inadmissibility.

Assignment of Claims

Pursuant to Dutch law, claims can be assigned to a third party, who can initiate proceedings and sue for damages in its own name. This practice of bundling claims is common in the Netherlands. The claims are usually brought by a claims vehicle; for example, a foundation, in its own name, having obtained a large number of claims through an assignment from parties that have allegedly suffered a loss as a result of (for example) a cartel.

An assignment can also be combined with a class action pursuant to Article 3:305a DCC. Based on an assignment, the assignee exercises its own right of claim and is both the procedural and the substantive party in the proceedings. The assignee can then collect the claim for the benefit of the assignor. This requires the parties to envisage an actual transfer (Article 3:84(3) DCC). From a property law perspective, the claim from that moment on will be part of the acquirer's capital; the (305a) organisation. The transfer must be effected in a deed drawn up for that purpose and the transfer should be announced to the party against whom the right can be exercised (Article 3:94(1) DCC). This is a public assignment. In addition, the transfer could occur by means of an authentic or registered private deed drawn up for that purpose (Article 3:94(3) DCC). This is an undisclosed assignment. In the proceedings, the defendant can desire that a certified extract of the deed and the title are made available by the original creditor (Article 3:94(4) DCC).

It is no longer possible to institute a class action on behalf of parties who have already transferred their claims by assignment to the (305a) party in the proceedings, because they no longer possess the claim for damages. In that case, it is only possible to institute a class action on behalf of these parties as an alternative insofar as it is not principally established that the assignment was not effected in a legally valid manner. This does not alter the fact that, as is the case with a mandate, a convergence is conceivable if, partially on the basis of assignment, action is taken indirectly on behalf of a number of parties mentioned by name, for the benefit of which it is already desirable to claim damages and, partially by virtue of Article 3:305a DCC, to acquire a judicial declaration for members of the 305a organisation that have not (yet) assigned their claim to the (305a) organisation. In that context, compared to a mandate, assignment has the added advantage that new "assigned" claims can be added on the part of a 305a party after the proceedings have been instituted – through an increase of claim – while that is not allowed in the event of an expansion of the membership based on a mandate for the "new" members added after the summons has been issued.

An interesting decision regarding assignment in which there is no convergence with a class action (but it could have been conceivable) concerns the decision of the Amsterdam Court dated 13 September 2017 regarding an aviation cartel. On the basis of assignment, the foundation had acquired the claims from a large number of injured parties (Amsterdam Court, 13 September 2017, ECLI:NL:RBAMS:2017:660). This decision focuses on, among other things, the obligation to furnish facts and the burden of proof with regard to the legal validity of the assignment to the foundation. The Amsterdam Court ruled in summary that after entering the assignment documentation into the proceedings, it is up to the defendant to advance "*concrete indications*" in the context of its substantiated obligation to furnish facts that "*the assignor is not duly represented, did not want the assignment or that the assignment*

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did not have a legal consequence for any other reason". Despite a large number of defences against the legal validity of the assignment, the cartel members in this case failed to meet said obligation to furnish further facts. In absence of concrete indications, the Court therefore concluded that "*it has neither been stated nor proven that the assignment documentation was drawn up falsely or that the signatures placed thereon are falsified*".

Conclusion

Although the Netherlands does not have a "US-style" class action, it is clear that it has a lot of legal possibilities to claim damages on behalf of a group of individuals.

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Wijn & Stael is a leading law firm based in Utrecht with a modern and practical approach. We are well-known for our excellent quality of work in highly complex cases and our strong client relations. Wijn & Stael is a multi-niche law firm with a strong focus on corporate & financial litigation, restructuring & insolvency, Supreme Court litigation, M&A, real estate and employment law.

Our litigation and dispute resolution department consists of litigation specialists who are experienced in conducting proceedings, such as the Enterprise Division of the Amsterdam Court of Appeal and collective actions and settlements under the Dutch Class Action (Financial Settlement) Act (*Wet Collectieve Afwikkeling Massaschade*).

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Australia

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I. LITIGATION

1 Preliminaries

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

Australia has a common law system.

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

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

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

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

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

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

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

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

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

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

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

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

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

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

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

Each party will then prepare its evidence for use at the final hearing. In the Federal and some Supreme Courts, witnesses will not generally give their evidence-in-chief orally. Instead, written witness statements or affidavits are prepared by lawyers and served

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on the other side. Parties may also elect to engage expert witnesses, where required, to give evidence concerning fields of specialised knowledge [see question 8.4].

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

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

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

Some jurisdictions have procedures in place to expedite trials in certain circumstances, for example, there are judges dedicated to managing cases requiring expedition in the Supreme Court of New South Wales and County Court of Victoria. A party who seeks an expedited hearing will generally have to demonstrate grounds upon which their matter should take precedence over other cases before the court.

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

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

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

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

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

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

Costs budgeting rules exist in the Family Court of Australia, where parties can be required to exchange and provide to the court a notice outlining the party's actual costs, estimated future costs, and any expenses paid or payable to an expert witness. Otherwise, in other Australian jurisdictions, generally speaking, costs assessment and management procedures occur retrospectively.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

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

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

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

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

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

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

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

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

1.8 Can a party obtain security for/a guarantee over its legal costs?

Security for costs orders may be sought where a defendant alleges that the plaintiff will not hold enough funds to satisfy a costs order. The defendant asks the court to order the plaintiff to provide

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"security" to "protect" the defendant from this occurrence. The forms of security may include:

(a) money paid into court;

(b) payment into an interest-earning bank account under the control of a third party or solicitor for the plaintiff, who has given an undertaking regarding the circumstances as to when the money will be released;

(c) a bank guarantee in favour of the court to be held by the court until further order; or

(d) a deed of guarantee pursuant to which another entity agrees to guarantee payment of the amount to satisfy the costs order.

Applications for security for costs are discretionary. The court will consider and weigh the totality of the circumstances.

If the plaintiff fails to pay security in accordance with a court order, the court will order that the proceedings be stayed until the security is given.

2 Before Commencing Proceedings

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

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

In the Federal Court, the parties to a dispute are required to file a "genuine steps statement" which outlines the steps taken to constitute a sincere and genuine attempt to resolve the dispute.

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

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

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

3 Commencing Proceedings

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

Proceedings are commenced by filing an originating process and payment of the applicable filing fee with the registry of the court in which the claim is sought to be heard.

Rules relating to the service of an originating process can be located in the civil procedure rules of the relevant jurisdiction. For example, in New South Wales, an originating process must be personally served on each defendant; however, for most other documents, service can be effected by ordinary service which includes sending documents by post, facsimile and email (where the other party consents).

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

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

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

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

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

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

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

Another pre-action interim remedy which may be granted by Australian courts is preliminary (documentary) discovery. Orders for preliminary discovery are generally made where the applicant has made reasonable inquiries but still has insufficient information for the purpose of determining a prospective defendant's liability or whereabouts for the purpose of commencing proceedings, or deciding whether or not to commence proceedings against the prospective defendant.

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

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

- a summary of all the material facts on which the party relies; however, this should not include evidence by which the facts are to be proven;

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- adequate particulars of the claim as are necessary for the defendant to know the case it has to meet;
- the relief or remedy sought;
- a statement by a legal practitioner certifying that there are reasonable prospects of success; and
- often, an affidavit verifying that the allegations in the pleadings are true.

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

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

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

Pleadings can be withdrawn; however, this depends on what stage the litigation has reached. This is likely to lead to adverse cost orders and sanctions. If a defence is withdrawn, this is likely to lead to an application for summary judgment.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

The defence must address the following:

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

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

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

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

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

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

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

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

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

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

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

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

4.5 Can the defendant dispute the court's jurisdiction?

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

5 Joinder & Consolidation

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

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

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

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

5.3 Do you have split trials/bifurcation of proceedings?

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

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6 Duties & Powers of the Courts

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

Each Australian court has its own case allocation system.

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

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

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

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

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

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

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

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

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

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

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

6.5 Can the civil courts in your jurisdiction enter summary judgment?

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

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

Yes. A discontinuance of proceedings typically occurs once a settlement of the proceedings has been reached between the parties.

Australian courts have the power to order proceedings to be stayed in certain circumstances. For example, the court may stay the proceedings until such time as a plaintiff (who has been ordered to provide security) does so.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

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

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

In most jurisdictions, discovery may be ordered by the court or obtained by filing a notice to produce for inspection documents contained in pleadings, affidavits and witness statements filed or served by the other party.

General discovery involves discovery of all documents relevant to a fact in issue. While most jurisdictions permit an order for a general discovery to be made, the courts and the parties will usually avoid general discovery by limiting the documents to be discovered to those falling within a particular category or class.

In the Federal Court, the Federal Court Rules 2011 (Cth) provide that a party must not apply for an order for discovery unless it will facilitate the just resolution of the proceedings as quickly, inexpensively and efficiently as possible.

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

Under the evidentiary rules, a document includes any record of information stored or recorded by mechanical or electronic means. Most Australian courts have implemented practice guidelines in relation to the use of electronic technology in the discovery process. These practice guidelines encourage the use of technology for the listing and exchange of discoverable documents. They also set out the court's expectations for the management and disclosure of electronic documents and recommend a framework for that process.

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Australian courts are increasingly embracing the use of technology to reduce costs and increase efficiency in civil litigation; however, the technology of predictive coding is yet to be accepted as a valid tool in discovery.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

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

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

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

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

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

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

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

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

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

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

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

Documents obtained on discovery cannot be used for any purpose other than the proceedings in which they were disclosed. The "Harman Undertaking" is the implied undertaking given to the court by any party obtaining documents on discovery (or by virtue of some other compulsory process) that it will not use such documents (or any other information gained from them) for any collateral purpose.

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

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

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

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

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

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

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

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

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

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

Generally in Australia, witnesses provide written statements of their evidence, in the form of affidavits, statutory declarations or witness statements before the hearing. These documents are usually signed under oath or affirmed. These documents are then "read" onto the record in court, and serve as evidence-in-chief for that witness. Witnesses are then usually cross-examined and re-examined in court by Counsel.

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

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

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

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

The court will determine whether expert evidence is to be given concurrently. The court rules set out procedures for the conference of experts and the joint report.

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

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

9 Judgments & Orders

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

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

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

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

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

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

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

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

The registration and enforcement of foreign judgments in Australia is governed by both statute and by common law principles. Within the statutory regime, the Foreign Judgments Act 1991 (Cth) provides for the procedure and scope of judgments that can be enforceable within the statutory regime. Registering a judgment under the Act is a straightforward and cost-effective procedure.

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

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

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

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

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

A number of formal mechanisms exist in Australian courts which are designed to encourage the settlement of civil claims. Those that exist in the Federal Court are a good example.

In the Federal Court, legislation has been enacted with an object of ensuring that, as far as possible, parties take genuine steps to resolve

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disputes before certain civil proceedings are instituted. Under this legislation, a claimant is required to file a "genuine steps statement" which outlines the steps taken to constitute a sincere and genuine attempt to resolve the dispute.

Under the Federal Court Rules, parties must, and the Court will, consider options for alternative dispute resolution, including mediation, as early as is reasonably practicable. The Court has express powers to implement those options.

In addition, the Federal Court Rules prescribe offers to compromise. Such rules exist in most jurisdictions and they set out a process whereby offers of settlement may be made with resulting cost penalties.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

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

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

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

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

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

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

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

In Australia, there are no uniform laws or rules that govern the conduct of alternative dispute resolution mechanisms such as mediation or expert determination. Rather the laws and rules vary in different jurisdictions. In New South Wales, courts have the power to refer matters to mediation and make directions regulating the practice and procedure to be followed by the parties in a mediation.

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

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

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

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

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

Generally speaking, Australian courts are supportive of the different methods of alternative dispute resolution. For example, in the Commercial List of the Supreme Court of New South Wales, it is common for the court to order that the parties mediate before the matter is set down for hearing.

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

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

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

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

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

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2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

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

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Colin has defended some of Australia's most high-profile class actions involving complex consumer product and financial services claims. He has worked extensively with lawyers in other jurisdictions in the co-ordinated defence of multinational claims, developing international defence strategies and working with international expert witnesses. He also advises corporations and financial institutions on securities class actions and in regulatory investigations and inquiries.

Colin was named 'Product Liability Lawyer of the Year, Sydney' by 2013 *Best Lawyers Australia*. He is regularly voted by peers as one of Australia's 'best lawyers' in Litigation (2013) and Product Liability (2010–2013) by *Best Lawyers Australia*.

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When designing large-scale remediation programmes, Scott provides legal and strategic advice to management, and liaising between it, independent experts and clients to set the parameters of the programme and the operational implementation of the programme. This has included ensuring compliance with any regulatory regimes.

Scott's clients include retail and investment banks, mining and resources companies and Commonwealth and State government agencies.

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Austria

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I. LITIGATION

1 Preliminaries

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

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

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

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

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

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

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

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

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

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

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

The statement of claim ("*Klage*") is filed with the court and passed on to the defendant, along with an order to file a statement of defence ("*Klagebeantwortung*"). If the defendant replies in time, a preparatory hearing will be held, which mainly serves the purpose of shaping the further proceedings by discussing the main legal and factual questions at hand as well as questions of evidence (documents, witnesses, experts, etc.). In addition, settlement options might be discussed. After an exchange of briefs, the main hearing(s) follow. The average duration of first instance litigation is one year. However, complex litigations may take significantly longer. At the appellate stage, a decision is handed down after approximately six months. There are no expedited trial procedures available in Austrian civil litigation.

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

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

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

Legal costs comprise court fees and – if necessary – fees for experts, interpreters and witnesses. According to the Austrian Court Fees Act ("*Gerichtsgebührengesetz*"), the claimant (appellant) must advance the costs. The amount is determined on the basis of the amount in dispute. The decision states who should bear the costs or the proportion in which the costs of the proceedings are to be shared. Lawyers' fees are reimbursed pursuant to the Austrian Lawyers' Fees Act ("*Rechtsanwaltstarifgesetz*"). There are no rules on costs budgets; therefore, there are no requirements to provide a detailed breakdown for each stage of the litigation, or to identify costs and disbursements incurred already together with those estimated.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

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

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

If a foreigner files a lawsuit, upon a defendant's request, a security deposit for legal costs must be made unless an international agreement provides otherwise. This does not apply if the claimant has its residence in Austria, the court's (cost) decision is enforceable in the claimant's residence state or the claimant disposes of sufficient immovable assets in Austria.

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

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

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

1.8 Can a party obtain security for/a guarantee over its legal costs?

Upon request, a claimant residing outside the European Union may be ordered to arrange for a security deposit covering the defendant's potential procedural costs unless bi- or multilateral treaties provide otherwise.

2 Before Commencing Proceedings

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

No, there is not.

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

Limitation periods are determined by substantive law.

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

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

3 Commencing Proceedings

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

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

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

Within the EU, the Service Regulation (Council Regulation (EC) No 1348/2000) applies. Service to international organisations or foreigners enjoying immunities under public international law is effected with the assistance of the Austrian Ministry for Foreign Affairs. In all other cases, service abroad is effected in accordance with the respective treaties (particularly the Hague Convention on Civil Procedure).

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

Discovery proceedings do not exist.

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

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

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

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

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

Amendments to the pleadings are generally admissible.

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

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

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

Pleadings can be withdrawn at any time (even on an appeal's level before closure of the hearing), provided that the claimant withdraws the substantial right to claim. Without giving such waiver, the defendant would have to agree to the withdrawal. In any event, the claimant bears all costs, i.e. has to reimburse the opponent(s).

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

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

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

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

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

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

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

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

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

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

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

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

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

4.5 Can the defendant dispute the court's jurisdiction?

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

5 Joinder & Consolidation

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

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

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

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

5.3 Do you have split trials/bifurcation of proceedings?

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

6 Duties & Powers of the Courts

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

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

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

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

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

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

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

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

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

6.5 Can the civil courts in your jurisdiction enter summary judgment?

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

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

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

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

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

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

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

Rules on pre-action disclosure do not exist.

A party is not bound to present documents which concern family life if the opposing party violates obligations of honour by the delivery of documents, if the disclosure of documents leads to the disgrace of the party or of any other person or involves the risk of criminal prosecution, or if the disclosure violates any state-approved obligation of secrecy of the party from which it is not released or infringes a business secret (or for any other reason similar to the above).

There are no special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

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

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

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

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

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

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

No, there are no restrictions of this kind.

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8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

Evidence is taken during the course of the litigation, not before. The parties are required to produce the evidence supporting their respective allegations or where the burden of proof is on them, respectively.

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

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

Written witness statements are not admissible.

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

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

There are no depositions and no written witness statements.

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

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

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

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

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

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

9 Judgments & Orders

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

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

Concerning default judgments, see question 6.5 above.

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

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

The decision on costs is part of any court's final decision. It can be challenged separately. The prevailing party has to be reimbursed for all costs including lawyers' fees, calculated on the basis of the Austrian Lawyers' Fees Act to the extent it has prevailed ("*pro rata*").

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

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

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

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

The enforcement procedural rules are contained in the AEC.

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

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

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

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

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

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

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

An appeal against a judgment suspends its legal validity and – with few exceptions − its enforceability.

As a general rule, new allegations, claims, defences and evidence must not be introduced (they will be disregarded).

Other remedies are actions for annulment or for the reopening of proceedings.

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

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10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

The ACCP neither provides for obligatory settlements nor binding mediation or arbitration. Yet it is not uncommon that judges – at the beginning of trial – informally encourage parties to explore settlement options or turn to mediators first.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

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

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

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

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

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

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

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

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

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

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

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

Austrian courts may only intervene in arbitration matters when they are expressly permitted to do so under sections 577–618 ACCP. The intervention of courts is limited to the issuance of interim measures, assistance with the appointment of arbitrators, review of challenge decisions, decision on the early termination of an arbitrator's mandate, enforcement of interim and protective measures, court assistance with judicial acts that the arbitral tribunal does not have the power to carry out, decision on an application to set aside an arbitral award, determination of the existence or non-existence of an arbitral award and recognition and enforcement of awards.

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

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

The only available recourse to a court against an arbitral award is an application to set the award aside. This also applies to arbitral awards on jurisdiction. Such application to set aside is to be filed within three months from the date on which the claimant has received the award.

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

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

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An award may also be set aside if the matter in dispute is not arbitrable under domestic law and, finally, if the arbitral award violates Austrian public policy.

As to mediation, see question 1.2 above.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

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

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Freshfields Bruckhaus Deringer, Vienna.

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Languages:

German (native), English (fluent), French (basic).

Specialisation:

Litigation, especially commercial and civil law-related disputes.

Counsel and arbitrator in arbitrations, e.g. under the rules of the International Chamber of Commerce (ICC), the International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC), Swiss Rules, UNCITRAL (focus: commercial law; supply contracts; M&A; joint ventures; and construction).

Advice with regard to various matters of commercial, contract and construction law.

Establishment of businesses and regular advice on partnerships and corporations.

Mergers and acquisitions.

Directors' and officers' liability.

Publications:

Regular contributions to the litigation newsletter at the "International Law Office".

Austrian chapter to "The Willis Worldwide Directory of Directors and Officers Liability" (Willis, 2005).

Lectures on International Supply Contracts (ICC Austria).

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Belgium

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I. LITIGATION

1 Preliminaries

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

Belgium is a civil law country. The rules governing civil procedure are laid down in the Code of Civil Procedure ("**CCP**").

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

The civil court system consists of four distinct levels of ordinary courts: (a) the justices of the peace; (b) the courts of first instance, the labour courts and the commercial courts; (c) the courts of appeal; and (d) the Court of Cassation.

The justices of the peace only have jurisdiction over local matters and civil claims below EUR 5,000. Judgments rendered by the justices of the peace can only be appealed if the value of the claims concerned exceeds EUR 2,000. Appeals against judgments of a justice of the peace are generally heard by the courts of first instance.

The courts of first instance are Belgium's general courts and are divided into a section for cases regarding minors and family law, a criminal section, and a civil section, which has general jurisdiction over all civil claims not exclusively attributed by law to other courts. The commercial courts only deal with disputes between or against enterprises. Commercial courts are partially composed of lay judges, who are themselves business people and therefore have more knowledge of commercial practice.

Appeals against decisions by the courts of first instance and the commercial courts are heard by the courts of appeal, unless the value of the claim concerned does not exceed EUR 2,500, in which case the judgment becomes final immediately. The courts of appeal may re-examine the facts.

Against a judgment in second instance, a party may commence proceedings before the Court of Cassation, the highest court in civil and criminal matters. The Court of Cassation's scope of review is limited to procedural issues and the correct application of substantive law. As such, the Court of Cassation must accept the facts it is presented with as they are set out in the appeal's judgment.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

Ordinary civil proceedings are instituted by a writ of summons that has to be served on behalf of the claimant by a bailiff upon the defendant. The parties' lawyers will then exchange written submissions and exhibits according to the timetable set by the court. As a general rule, arguments that have not been set out in the written submissions are not admissible during the hearing. After the hearing, the court should render its judgment within one month.

The usual length of proceedings is 12 months in first instance and 18 to 24 months in appeal. In urgent matters, parties may also start summary proceedings, where a court order may be obtained within a few days or weeks. A court order rendered in summary proceedings only has an interim effect and does not bind the court taking a decision on the merits.

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

Exclusive jurisdiction clauses are binding and will be respected by Belgian courts as long as they are not contrary to any mandatory provisions or national or international law.

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

The costs of starting civil court proceedings in Belgium are limited to the costs of the bailiff serving the writ of summons (usually below EUR 500) and the court fees (between EUR 40 and EUR 375). In principle, each party bears its own legal costs. Only a lumpsum between EUR 90 and EUR 36,000, depending on the size of the claims involved, has to be paid by the losing party as a contribution towards the winning party's legal costs. There are no rules on costs budgeting.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

There are no particular rules about funding litigation. Litigation is predominantly funded by litigants themselves. Parties with

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insufficient income can apply for *pro bono* legal assistance that is paid for by the Belgian State. Fee arrangements with lawyers based completely on the outcome of a dispute (*pactum de quota litis*) are prohibited.

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

The debtor of a litigious right has the possibility to be released from the debt by reimbursing the assignee for the actual price of the assignment, together with the expenses, fair costs and interests. A matter is deemed litigious as soon as there is a case and controversy as to the merits of the right.

It is permissible for a non-litigant to finance these proceedings. In principle, there are no constraints to third-party litigation funding.

1.8 Can a party obtain security for/a guarantee over its legal costs?

A financial guarantee for costs and damages may be granted by the court upon application by the defendant when the claimant has his domicile outside of a Member State of the European Union, except if a treaty provides for an exemption of such a guarantee. The amount of the guarantee is determined by the court.

2 Before Commencing Proceedings

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

As a general rule, there is no particular formality to comply with before initiating proceedings. There are a number of exceptions; e.g. in disputes about rural leases, the plaintiff should first try to settle the case amicably in front of the court.

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

As a general rule, the limitation period for all claims, including contractual claims, is 10 years. The law does not clarify when this limitation period starts running.

The limitation period for tort claims is five years as from the day following the day on which the victim is aware of the damage as well as of the identity of the person which caused the damage. Nevertheless, the limitation period cannot be longer than 20 years after the day following the day on which the fact that caused the damage occurred.

There are numerous specific limitation periods, e.g. claims against sellers for latent defects must be brought within a short period of time.

Time limits are generally treated as a substantive law issue.

3 Commencing Proceedings

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

An action is normally brought by the service of a writ summoning the defendant to appear before the court for an introductory hearing on a certain date, which is set by the court's registrar. Alternatively, a joint statement of voluntary appearance signed by the parties can be filed with the court; again the registrar sets the date for the introductory hearing. The deemed date of service is the date of the notification of the writ of summons or the date of the filing of the voluntary appearance.

Within the European Union, service outside Belgium or service of foreign proceedings in Belgium is governed by the rules laid down in 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. In case of service outside the European Union, the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters will apply.

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

The President of the court of first instance or of the commercial court may grant provisional orders at very short notice. He has summary jurisdiction as long as the case is urgent but cannot issue judgments that either contain a declaration of rights or cause a change in the legal position of the parties (such as declaring a contract null and void). He should examine the merits of the case and issue a judgment in accordance with the probable rights of the parties. Summary proceedings are very useful in corporate or contractual disputes (e.g. to appoint an expert to advise whether a building contractor met his contractual obligations). They are brought either by the service of a writ of summons or, in case of exceptional urgency, by filing an *ex parte* request with the President of the court. A variety of summary proceedings are also available in unfair competition cases.

Various forms of preliminary seizures are available in order to obtain security for a claim, e.g. seizure of movable goods, seizure of immovable property and third party attachment (garnishment). In most cases, prior relief from the judge of seizures has to be obtained. In order to be allowed to seize the assets of a debtor, the debt must be certain, due and liquid, and the creditor must prove that the recovery of his claim would otherwise be in jeopardy because, e.g., the debtor is organising his own insolvency, making valuable assets disappear.

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

The writ of summons must contain the name and the domicile of both the plaintiff and the defendant, the facts on which the claim is based – there is no obligation to mention the legal basis of the claim, although it is of course good practice to do so – the claim itself, the court before which the claim is brought and the date of the introductory hearing.

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

Pleadings can be amended. However, if the claimant modifies his claim, the new claim should be based on a fact or a document mentioned in the original summons.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

The claimant may withdraw his claim at all stages of the proceedings by a withdrawal of proceedings or a withdrawal of claim. However, a withdrawal of proceedings should be accepted by the defendant, unless the withdrawal is made before the defendant has filed any statement of defence. The party making the withdrawal has to bear the costs of the proceedings.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

In his statement of defence, the defendant will reply to the writ of summons and, where applicable, bring a counterclaim or a defence of set-off. Of course, the defendant may also raise any possible pleas of lack of jurisdiction and inadmissibility of the claim or any other procedural issues. The statement of defence will also include all relevant facts.

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

The court will set the deadline for the defendant to submit his statement of defence. Normally, the defendant will have a time period of at least six weeks after the introductory hearing to file his statement of defence.

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

The defendant may force a third party to join the proceedings, as long as the arguments have not been closed. It may, however, not prejudice the rights of the intervening party with respect to previous orders already rendered in the proceedings. The court may order that certain discovery measures be carried out again, such as, e.g., an examination by an expert appointed by the court. The intervention may furthermore not delay the handling of the original claim. Finally, intervention may not occur for the first time at the appellate level when it is seeking an order against a party.

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

If a party fails to appear at the introductory hearing or at a later hearing, the plaintiff has the right to ask for a default judgment. Default proceedings do not imply that the court will automatically grant the claim of the plaintiff; the court must verify whether it has jurisdiction, whether the defaulting party was correctly summoned and whether the claim of the plaintiff is not manifestly ill-founded.

4.5 Can the defendant dispute the court's jurisdiction?

In some circumstances, the defendant may dispute the court's jurisdiction. This depends on international jurisdiction rules, national subject matter jurisdiction rules and national territorial jurisdiction rules.

5 Joinder & Consolidation

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

See question 4.3.

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

Yes, our civil justice system allows for the consolidation of two sets of proceedings in case of *lis pendens*, and in case actions are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

5.3 Do you have split trials/bifurcation of proceedings?

The court may decide to split trials and, e.g., decide first on its jurisdiction and then, if it has jurisdiction, on the merits of the case.

6 Duties & Powers of the Courts

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

Cases are allocated to the courts based on their subject-matter, the amount in dispute and the rules on territorial jurisdiction. In case of a dispute, the allocation is decided either by the district court or by the court seized. Within a given court, cases are allocated in accordance with its special regulations, enacted in a decision of the court's president, who will rule on disputes.

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

The case management powers of courts are limited.

The power to conduct the proceedings mainly lies with the parties themselves. In principle, litigants agree on a procedural calendar setting the terms within which briefs must be filed. Courts only impose a calendar lacking such agreement.

Parties can apply for interim measures to preserve their interests to the seized court (see also question 6.5) or in summary proceedings (see question 3.2). The costs are allocated in the final decision on the merits.

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

The courts' powers of compulsion are limited. Generally, the law does not provide for criminal sanctions for failure to obey a court order. Neither can the courts force parties to appear, the only sanction being that a default judgment may be rendered. Courts do, however, have the power to summon witnesses to appear. Failure to comply with such an order constitutes an offence.

In addition, courts have wide powers to maintain the order at the hearing and can take any necessary measures, including having a person who disturbs the hearing arrested.

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

Civil proceedings are conducted by the parties, and not by the courts. Hence, the courts' power to decide is limited to the issues submitted to them. They cannot raise other issues at their own motion, except for issues pertaining to public policy. In that case, courts may, after having heard the parties, dismiss a case or part of a claim as inadmissible or unfounded.

Courts can omit from their register cases that have been inactive for at least three years. Omitted cases can be reregistered at the request of a party upon payment of the registration taxes.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

In urgent matters, when necessary to preserve a party's interests or to gather evidence, courts can enter a summary judgment ordering provisional measures.

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

Proceedings can be discontinued or stayed for various reasons. Civil proceedings will, for instance, be stayed in case of pending criminal proceedings when there is a risk of conflicting decisions, or in case the court submits a request for a preliminary ruling to, e.g., the constitutional court or the European Court of Justice. Cases can be withdrawn (see question 3.5) or discontinued, e.g., at the parties' mutual request or when a party died or no longer exists, unless its rights and obligations are assumed by another party.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

Belgian law does not provide for discovery or depositions, and documents cannot be subpoenaed. There is one exception: courts can, at at their own motion or at a party's request, order the production of specific documents by a person (whether a party to the proceedings or not) if there are serious, concrete and concurring presumptions that this person holds documents containing proof of a relevant fact. The documents must be clearly identified; fishing expeditions are prohibited.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

Belgian law is not familiar with privilege, but persons who are bound by a duty of professional secrecy cannot be obliged to testify on facts covered by that secrecy or to produce documents relating to such facts.

Documents containing attorney-client communication can only be submitted as evidence in favour of the client and only by the concerned attorney or client and not by third parties.

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

See question 7.1.

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

See question 7.1.

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

See question 7.1.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

Each party bears the burden of proof of the facts it alleges.

The plaintiff should communicate its exhibits to the opposing party within eight days as from the introductory hearing. Thereafter, exhibits should be communicated together with the briefs and filed with the court at least 15 days before the hearing.

No exhibits may be submitted after the last trial brief, unless a party discovers a new and relevant fact and, at least 30 days before the hearing, requests permission to file additional briefs.

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

In commercial matters, the delivery of proof is free. In civil matters, courts are bound by a system of legal proof, entailing that the law determines which evidence is admitted and under what conditions, and that a hierarchy of proof applies.

The evidence used in court is very diverse and includes exhibits submitted voluntarily by a party or produced following a court order (see question 7.1), party testimonies, witness evidence, expert reports, decisive oaths, etc.

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

Belgian law does not provide for depositions (see also question 7.1). Parties can be ordered to appear in court to be heard, but unlike witnesses they cannot be forced. Neither do they take an oath.

Witness evidence, which is rare in commercial litigation, is governed by the CCP. Witnesses must be over the age of 15, be able to give evidence on a precise and relevant fact, take an oath and clarify their relationship to the litigants. Witness examinations are conducted by the court before the oral arguments; there is no cross-examination, but counsel may request the court to ask certain questions. Courts freely appraise the probative value of witness evidence.

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

Parties can submit expert reports drawn up at their request, but courts are rather reluctant to rely on such findings given the risk of bias.

In cases involving technical or specialist issues, courts frequently appoint an expert, on their own motion or at a party's request. The expert will organise meetings, receive information from the parties and conduct his investigation. He will communicate a preliminary report to the parties for comments, which should be addressed before drafting the final report. Courts usually endorse court experts' findings.

9 Judgments & Orders

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

Courts can issue different types of orders, ranging from orders to pay damages, over injunctions (which are more common in competition law and intellectual property disputes), to declaratory judgments. In case of non-monetary claims, the order may be accompanied by a penalty fine.

Physical coercion is not allowed; neither can criminal sanctions be imposed for non-compliance.

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

Courts can award damages, which should restore the injured party to the position it would have been in had the event causing the damage not occurred (principle of full compensation). Courts cannot award punitive damages.

Interest is added to any amount a party is ordered to pay. Different types of interest and rates apply. Excessive contractual rates may be reduced by the courts.

In principle, the losing party is ordered to pay the procedural costs (costs of summons, court taxes and lawyers' fees). Only a lumpsum can be claimed for lawyers' fees (see question 1.5).

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

The enforcement of foreign judgments is governed by the Belgian Code on private international law, international treaties or European regulations. Foreign judgments are automatically recognised but can only be enforced when granted an exequatur following an *ex parte* application. Only in exceptional circumstances will foreign judgments not be recognised or granted an exequatur.

Judgments can only be enforced after having been served. Judgments involving a monetary claim may be enforced through a seizure on real property or movable property or through garnishment. At a party's request and with a few exceptions, courts may induce compliance with judgments involving a non-monetary claim by imposing a penalty payment.

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

Appeal and opposition (i.e. against a default judgment) are the ordinary means of recourse, which should be lodged within one month after the judgment has been served. Depending on the subject matter and the amount claimed, some judgments are issued in first and last instance and, hence, cannot be appealed (see question 1.2).

An appeal before the Court of Cassation on points of law is only available against judgments that cannot be appealed. Another extraordinary means of recourse is third-party opposition by a person who was not a party to the initial proceedings but whose rights are affected by the judgment rendered.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

Formal obligations to try to settle a claim are exceptional. However, it always remains within the courts' discretion to facilitate a settlement.

Full or partial settlements reached between the parties pending proceedings may be enacted in a judgment, constituting an enforceable title.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

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

Arbitration is quite common in Belgium for commercial disputes, whilst other alternative dispute resolution mechanisms are less frequently used.

In 2015, an Ombuds service for consumers was created, which can receive complaints or mediate in business-to-consumer disputes. Some institutions, like CEPANI, also provide other alternative

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dispute resolution procedures, such as mini-trials. Exceptionally, parties will submit their dispute or a particular issue to an expert assessment.

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

Arbitration is governed by Part VI of the CCP, which is based on the UNCITRAL Model Law, and mediation by Part VII of the CCP. Other alternative dispute resolution mechanisms are governed by specific laws or regulations.

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

In principle, all pecuniary and non-pecuniary claims relating to rights over which parties can freely dispose (excluding claims about, e.g., personal state, capacity and family relationships), can be arbitrated or mediated. Some claims can only be arbitrated or mediated under certain conditions, such as certain matters falling within the jurisdiction of labour courts, disputes regarding the termination of exclusive distribution agreements, certain disputes regarding intellectual property rights and business-to-consumer disputes.

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

Provided that the other party invokes the exception of arbitration, courts will decline jurisdiction to hear a case initiated before them.

Subject to certain conditions, courts can provide assistance to arbitral tribunals, such as securing the attendance of witnesses, appointing a (new) arbitrator, deciding on a request to recuse an arbitrator, enforcing arbitral orders or an award, granting provisional measures in urgent matters or measures to gather evidence and annulling an arbitral award.

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

Unless parties agree otherwise, arbitral awards are final and cannot be appealed. Parties can initiate a claim to annul the arbitral award on specific grounds. Non-Belgian parties can waive this possibility to have the award annulled.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

CEPANI and the Ombuds service for consumers.

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Arcas Law is a boutique law firm that is specialised in risk management and dispute resolution. The firm assists and represents clients in negotiations, mediation, arbitration and litigation, from the lower courts up to the Court of Cassation, the Council of State and the Constitutional Court. Arcas Law has offices in Antwerp and Brussels.

With 25 specialist lawyers, Arcas Law has one of the largest dispute resolution teams in Belgium. Each lawyer specialises in one or more of the following areas of law: administrative and public law; banking litigation; commercial disputes; construction matters; corporate litigation; criminal law; healthcare; pharma & life sciences; insolvency disputes; insurance disputes; product liability; real estate; sovereign debt disputes; supreme court litigation; transport law; and white-collar crime.

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Brazil

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I. LITIGATION

1 Preliminaries

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

The Brazilian legal system is based on the civil law tradition (Roman-Germanic), notwithstanding the fact that some of its elements were conceived under the influence of common law institutions (*e.g.*, the writ of *mandamus* and the writ of *habeas corpus*).

In Brazil, the basic set of rules that govern judicial proceedings of a civil nature are those contained in the Brazilian Code of Civil Procedure ("CPC"). The previous version of the Code, dated 1973 (Federal Act No. 5,869/1973), was recently substituted by a new and overhauled version, which was enacted in March 2015 and entered into force in March 2016 (Federal Act No. 13,105/2015). This most recent version of the CPC is available online at http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2015/Lei/L13105.htm.

The CPC currently in force was conceived with the purpose of modernising the structure of Brazilian civil proceedings and meeting a general demand for a more flexible, expeditious and cost-efficient judicial process.

Although the CPC sets forth the fundamental guidelines for civil litigation before Brazilian courts, it would be a mistake to see it as an end in and of itself. This is the case because certain aspects of civil proceedings before Brazilian courts may vary significantly from case to case, depending on certain features of each particular proceeding (subject matter discussed, persons involved, claims asserted, amount in dispute, etc.). Additionally, specific rules contained in specific pieces of legislation may prevail over the general rules contained in the CPC, examples being: **(i)** the Writ of Mandamus Act (Federal Act No. 12,016/2009); **(ii)** the Public Civil Action Act (Federal Act No. 7,347/1985); **(iii)** the Brazilian Consumer Protection Code (Federal Act No. 8,078/1990); and **(iv)** the Small Claims Courts Act (Federal Act No. 9,099/1995); among others.

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

The Brazilian Constitution divides the judicial system into federal and state courts. Within each of those two main branches, there are also other subdivisions (specialised courts, subject matter under discussion, etc.).

The general rules of judicial organisation are set forth in Brazil's Federal Constitution, in procedural laws (the most important of which is the CPC) and in internal rules of the courts, and normally regulate jurisdiction based on the amount in controversy, the persons involved, and the subject matter. Brazil's Federal Constitution sets forth the circumstances under which cases should be tried before the federal courts (generally, cases involving matters of interest to the federal government).

The Federal Constitution ensures the right of appeal to the second instance in both federal and state branches. Under specific circumstances (usually, when the case involves a discussion pertaining to the interpretation of the Constitution and/or of federal statutes), the parties may also file, against decisions rendered by the second instance, appeals to Brazil's higher courts – the most prominent being: **(i)** the Superior Court of Justice ("STJ"); and **(ii)** the Federal Supreme Court ("STF").

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

The standard civil proceedings before state or federal courts start with the filing of the complaint before the lower civil courts. Depending on the circumstances, the judge may schedule a conciliatory hearing and, if the conciliation is successful, the proceeding will be finished. If the parties decide not to conciliate, the pleading stage of the proceedings will move forward. Regardless of whether a conciliatory hearing is scheduled or not, the defendant will have the opportunity to file an answer to the complaint (and potential counterclaims), and additional written statements may follow. Once the pleading stage of the case is concluded, the judge may determine that the production of additional evidence is necessary and, if that is the case, the proceedings will move to an evidentiary stage for the production of such evidence (*i.e.*, evidentiary hearings, taking of oral evidence and production of expert evidence).

After the taking of evidence and with all the necessary elements in hand, the judge will finally move the case to trial, rendering his/her judgment. This decision, as explained before, can be appealed to the second instance.

The first instance phase will generally last from one to five years, depending on the complexity of the case and the scope and length of the evidence production phase.

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It is important to reiterate that this general outline may vary from case to case, depending on the features of each particular proceeding and, consequently, the specific legislation that may apply to it. Lawsuits filed before small claims courts, for example, are subject to a different type of procedure, which tends to be more informal and expeditious.

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

When it comes to choice of jurisdiction clauses, Brazilian courts tend to recognise the will of the parties, provided that the agreement does not represent a violation of Brazilian public policy and that the clause itself is not abusive. Confirming this case law tendency, Article 25 of the new CPC expressly recognises the validity of choice of jurisdiction clauses contained in international contracts.

Notwithstanding that, Brazilian law sets forth certain situations over which Brazilian courts will hold exclusive jurisdiction. If Brazilian courts hold exclusive jurisdiction over a certain subject matter, parties are not allowed to choose the courts of a foreign jurisdiction to decide the case.

Notwithstanding the choice of a jurisdiction clause being acceptable under Brazilian law, some court decisions have stated that a Brazilian party has a right of process in Brazil as an indispensable means to ensure the justice, independently of whether the parties have agreed otherwise. Therefore, the election of a foreign jurisdiction may not eventually prevent completely the parties' right to file a lawsuit in Brazil and, consequently, a Brazilian judge's authority to accept and hear the claim.

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

The party who initiates proceedings must bear the costs related to the filing, including the court fees. Additionally, the party who files an appeal to the second instance must pay the costs associated with the appeal. Each court has a different method for calculating the court fees, but they usually reflect a percentage of the amount in dispute.

During the proceedings, in general, the parties must bear the costs associated with the procedural acts they take or require, and the plaintiff will usually be responsible for the costs associated with acts ordered by the judge at his/her sole discretion.

Upon a final decision, in most cases, the defeated party will be sentenced to pay the winning party all court fees paid during the proceedings and, additionally, an amount up to 20% of the amount in dispute as attorneys' fees to the winning party's counsel.

Under specific circumstances, parties who are unable to afford court fees may request legal aid and be exempted from paying them.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

There are no particular rules about litigation funding in Brazil.

In principle, therefore, parties are supposed to bear their respective litigation costs and fees. Financial aid may be requested by those in need. In such cases, the party is exempted from bearing the court fees while its inability to afford them lasts.

The Brazilian Bar Association allows lawyers to charge fees based on both contingency and conditional fees agreements. In certain sophisticated, large commercial cases, it is not unusual for legal fee arrangements to be based on hourly fees.

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

Generally, a party may assign either a claim or a cause of action depending on the nature of the right in discussion (some rights are personal and unavailable for assignment). Third party funding is generally seen as a viable option, despite the fact that it is not yet duly regulated in Brazil.

1.8 Can a party obtain security for/a guarantee over its legal costs?

In order to obtain security for/a guarantee over its legal costs, a party must demonstrate the fulfilment of the general requirements for the granting of a precautionary measure seeking to guarantee the result of the proceedings. Additionally, foreign plaintiffs without real estate in Brazil must, in certain circumstances, further post a bond in order to guarantee a potential obligation to pay litigation costs and attorney's fees to the opposing party.

2 Before Commencing Proceedings

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

In general, there are no particular formalities other than the payment of court fees and the preparation of a power of attorney.

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

Limitation periods are treated as a substantive law issue and they are mostly provided for in the Brazilian Civil Code. There are cases with different statute of limitation terms, as follows:

I. General rule: a party will have its right to file a lawsuit extinguished after 10 years of the starting date.

II. Specific situations: according to the Civil Code, there are cases with different statute of limitations terms, which may vary from one to five years.

III. Specific rules for specific situations provided for in specific laws.

Specific events defined in the Brazilian Civil Code can interrupt/toll or suspend the limitation periods.

It should be noted that, despite the provisions set forth in the Civil Code (which seem rather straightforward), the application of limitation periods to specific cases can involve a number of relevant details, which should be regarded on a case by case basis, with due consideration to the applicable case law.

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3 Commencing Proceedings

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

Civil proceedings are deemed commenced with the filing of the complaint and upon subsequent receipt by the judge, ordering the service of process.

Generally, summons in Brazil shall be made by court by means of **(i)** a letter delivered by an officer of the court; or **(ii)** a registered letter sent by the postal services. A copy of the complaint shall be attached to the court letter of summons in both cases. In very specific cases, summons may be made by a court clerk, if the person to be served appears at the clerk's office; by public notice; and by electronic means, as regulated by law.

As a rule, the deemed date of service is considered to be the date of return of the letter of summons – duly accomplished – to the respective court case records. In some cases of emergency injunctions, however, the deemed date of service may be considered to be the date of actual receipt of the letter of summons by the defendant.

Service of process of foreign parties is usually made through the issuance of a letter rogatory and, as a rule, the service of process of a Brazilian party in a foreign proceeding must also be made through a letter rogatory.

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

Parties may apply for interim measures before the commencement of the main lawsuit itself by filing a motion before the competent court. Essentially, the granting of such measures is conditioned on the fulfilment of two cumulative requirements: **(i)** the requesting party must demonstrate the reasonable possibility of success on the merits of the case (*fumus boni iuris*); and **(ii)** the requesting party must demonstrate the existence of a risk of harm to its rights and/or to the final result of the proceedings if the measure is not granted (*periculum in mora*).

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

The main elements of the complaint are, according to Article 319 of the Brazilian CPC, the facts, the claims, the law on which the claims are based and the relief sought. It is also necessary to indicate: **(i)** the court at which the case will be tried; **(ii)** names and qualification of the parties involved; **(iii)** an amount to be assigned to the lawsuit; **(iv)** evidence that the plaintiff intends to produce; and **(v)** the request that the defendant be summoned.

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

According to Article 329 of the CPC, the pleadings can only be amended, without the defendant's consent, before the defendant is duly summoned.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

Article 485, § 5º of the CPC establishes that, until the issuance of the first instance judgment, a plaintiff may request the withdrawal of its pleadings. If said withdrawal is requested after the filing of the defendant's answer, however, it will depend upon the defendant's consent.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

Based on Article 336 of the CPC, the defendant should raise all his/her arguments of defence at the first opportunity to participate in the case. For this reason, in most cases, defendants should make a full exposition of their version of the facts and considerations of law, as well as present every argument of defence available, even if some of those arguments demand the recognition of certain premises of the plaintiff's case (in general, this is not seen as an admission of the plaintiff's arguments). If the defendant fails to make a full exposition of its case, contesting each claim specifically, the plaintiff's allegations may be considered true.

According to the Brazilian Procedural Law, the defendant may bring counterclaims and/or present a defence of set-off.

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

As a general rule, the defendant's statement of defence (answer) should be filed within 15 days from the date that the official information on the service of process is attached to the court records. In specific cases, however (*i.e.*, designation of a preliminary conciliation hearing or mediation session), the 15 days term will be initiated after such events occur (and not after the date the official information regarding the service of process is attached to the case records).

There are special situations where the time limits may be longer, examples being: **(i)** when there are two or more defendants that are being represented by different attorneys and the case files are not processed electronically; and **(ii)** when the case involves public attorneys (public prosecutors, government attorneys, public defenders, etc.).

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

There are several mechanisms in Brazilian Civil Procedure whereby a defendant can seek to pass on the liability when there are other parties liable and they should also be considered defendants, or even initiate another legal action against a third party based on subsidiary liability.

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

According to Brazilian Procedural Law, if the defendant does not present its defence within the term established by law, the

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proceedings will continue and the final decision will be rendered on judgment "*in absentia*" (*revelia*). Brazilian Law also states that, in most cases, the absence of defence creates a relative presumption that the plaintiff's allegations are to be understood as true.

In certain situations, a defendant that fails to defend a claim may be represented by a curator *ad hoc*.

4.5 Can the defendant dispute the court's jurisdiction?

Yes, the Brazilian CPC states that the court's jurisdiction is one of the preliminary arguments that the defendant can bring into discussion in its answer.

5 Joinder & Consolidation

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

Yes – please refer to question 4.3 above. The joinder must be requested by the defendant in its answer to the complaint.

The third party can also request participation in ongoing proceedings. According to Brazilian law, if the third party is related to the legal relationship, the facts or the rights discussed in the proceedings, it may have the right (and, in some cases, the obligation) to join the proceedings as plaintiff or defendant, as the case may be.

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

The Brazilian CPC provides for consolidation of actions when two or more actions are considered related – when they have a common object or a common cause of action. If there is a relation or connection, the judge, on his/her own initiative or at the request of either of the parties, may order that actions filed separately be consolidated, for simultaneous decision, provided that both actions are at the same level of jurisdiction. Finally, when related actions proceed separately before judges under the same territorial jurisdiction, the one who was the first to order the summons is considered to have competence over the matter.

5.3 Do you have split trials/bifurcation of proceedings?

The Brazilian CPC currently in force brings the possibility of partial judgments of the merits of the case. In the previous system, the judge was supposed to decide the issues of merits in one single judgment.

6 Duties & Powers of the Courts

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

The Brazilian Federal Constitution and the CPC set out the general rules which determine the jurisdiction of each court. Among the civil courts – in both federal and state levels – cases are allocated depending on various criteria, including the amount in dispute, the persons involved and the subject matter of the claim.

Within the same court/tribunal, cases can be allocated by means of a specific matter (general civil matters, bankruptcy, corporate cases, family cases, arbitration-related cases, cases involving public entities, etc.).

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

Under Brazilian civil procedure law, the courts only have those powers pre-established in the CPC. Judges are the ones responsible for the conduction of the cases, assisted by their clerks and other relevant staff members.

It should be noted, however, that the new CPC sets forth the possibility of the parties negotiating, in certain cases (essentially, when the dispute involves disposable rights), procedural aspects of the case, and the judge will have the power to oversee such negotiations.

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

Brazilian law sets forth that courts may order the necessary measures to put into effect specific court protection, either *ex officio* or upon the parties' request. These measures may consist of establishing fines, search and seizures, removal of assets, or restraints on harmful activities. A party who disobeys judicial orders can also be subjected to criminal charges.

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

In most cases, Brazilian courts will not strike out part of a statement of case or dismiss a case entirely, based on the merits of the dispute (*i.e.*, with prejudice), at an early stage. Hence, it is more common for courts to observe the due process principle and allow the parties to present their case before rendering a decision on the merits – something that is usually made through one final judgment.

It is not uncommon, however, for Brazilian courts to strike out a statement of claim (partially or entirely) due to the inobservance of procedural requirements to sue. The judge can order the plaintiff to amend the complaint. In most cases, however, such dismissal will not prevent the plaintiff from filing the lawsuit again (dismissal without prejudice).

6.5 Can the civil courts in your jurisdiction enter summary judgment?

Yes. Usually, civil courts in Brazil will enter summary judgments when the merits of the case relate exclusively to matters of law, or if the merits relate to law and factual elements but there is no need for the taking of further evidence after the conclusion of the pleading stage (written statements). Other examples of circumstances where summary judgments may take place are cases of default judgment, defective pleadings or dismissal of proceedings without judgment on the merits.

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

Courts can judge a defective pleading or order the dismissal of proceedings without a judgment on the merits (without prejudice) essentially when: **(i)** a judge dismisses a plea in case core requirements of the procedure are missing; **(ii)** any of the legal suit conditions are not present; **(iii)** arbitration agreements have been inserted in the relevant contract and are invoked by the defendant; **(iv)** the plaintiff does not want to continue the suit; and **(v)** confusion of legal personalities occurs among the plaintiff and defendant.

The most common circumstances where courts can stay the proceedings are: **(i)** when the parties agree to do so; **(ii)** when one of the parties dies or loses procedural capacity; **(iii)** in cases of lack of jurisdiction, or the refusal of a judge; and **(iv)** in *force majeure* events.

Proceedings can also be stayed when the judgment on the merits depends: on the result of another case; on the declaration of the (in)existence of a legal relation that constitutes the core subject matter of another pending claim; or when it cannot be rendered before the verification of a specific fact or the production of certain evidence.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

Full disclosure is in principle not allowed in Brazilian civil proceedings. As a rule, each party will present the documents it finds fit to make its case, and additional documents may be presented if determined by the judge (at a party's request or *ex officio*).

If a party needs to obtain access to certain documents before the filing of a suit, it may file for a specific measure for the disclosure of documents. In that case, the interested party should specify which documents it intends to obtain and the purpose of such disclosure, indicating the facts that relate to the documents and the circumstances and grounds on which the party relies on itself to affirm that such document exists and is in the possession of the other party. The judge will not admit any denial of the other party in disclosing evidence when: **(i)** the party has the legal obligation to disclose evidence; **(ii)** the party made reference to such document in order to constitute it as evidence; and **(iii)** the document, by its content, is common to both parties.

There are no specific rules concerning the disclosure of evidence in electronic form.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

Based on Articles 388 and 404 of the CPC, a party or a third party may refuse to give deposition on privileged information or to exhibit a document or an object if the exhibition causes the publicity of facts that are under legal protection (or, in other words, which are confidential). There are other laws that may apply to this area.

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

The third party is in principle legally bound to present any document demanded by the court and which is in its possession. Restrictions and exemptions related to privileged documents/information, however, may also apply to third parties.

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

Specific disclosure may only be imposed upon authorisation by the competent court (see question 7.1).

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

Generally, a judge may admit the use of evidence produced in different proceedings, but will need to assess the weight of such evidence in light of the adversary system principle. Restrictions and exemptions related to privileged documents/information, however, may also apply in this case.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

The general rule of evidence reflected in the Brazilian CPC is set forth in Article 373, according to which the party which alleges one fact or argument (usually, the plaintiff) has the burden of proving such facts and arguments by all evidence-finding procedures admitted by law. On the other hand, the party who responds to such allegations (usually, the defendant) has the burden of proving the existence of any facts raised as an element that impedes, modifies or extinguishes the opposing party's right.

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

Parties may resort to all legal and morally legitimate means, even if not specified in the CPC, to prove the truth of facts supporting their claims or defences and to effectively influence the judge's findings. Among the admissible types of evidence are: **(i)** personal deposition of the parties; **(ii)** admission/confession (where a party admits the truth of certain facts contrary to its interests and favourable to those of the opposing party); **(iii)** presentation of documents (voluntarily or in compliance with a judicial order); and **(iv)** deposition of witnesses (taking of oral evidence).

The production of expert evidence is also admitted and it usually comprises examination, inspection and/or evaluation. As a rule, expert evidence is produced by means of a court-appointed expert who will give his/her report to the court, with the possibility of the parties appointing assistant experts to participate in the process and formulating specific questions to the court-appointed expert.

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

The Brazilian CPC does not provide specifically for witness statements. Instead, oral depositions are the most common method for the collection of witnesses' testimonies, although there are circumstances where the judge may refuse a party's request for such type of evidence.

In principle, any person can be a factual witness, with the exception of the legally disabled (with no legal capacity), the legally impeded/biased or conflicted persons. A witness is not obliged to testify about facts that could cause him/her damage, as well as those which are related to relatives, and when the witness must keep confidential information in relation to his/her profession.

Each party is allowed to call up to 10 witnesses, with at most three providing evidence on each fact. Certain limitations on the number of witnesses may also be imposed by the judge, depending on the circumstances.

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

A court can on its own initiative or at the request of a party determine the production of the necessary evidence. Courts can also reject a request made by a party of production of evidence (including expert evidence) when it deems such evidence as unnecessary.

As a rule, expert evidence is produced by means of a court-appointed expert who will give his/her report to the court, with the possibility of the parties appointing assistant experts to participate in the process and formulate specific questions to the court-appointed expert. In addition to the rendering of his/her report, the expert may be called upon to provide testimony at a hearing. In complex cases, the judge may indicate more than one expert, and the parties may each indicate more than one assistant expert.

Concurrent expert evidence is not common in Brazil, at least in litigation before state courts.

Court-appointed experts owe their duties to the court. Assistant experts, by their turn, are allowed to represent the interests and/or point of view of a particular party, but must remain technical and concerned with the main purpose of instructing the court.

9 Judgments & Orders

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

Brazilian courts are empowered to issue different types of relief through judgment including declaratory relief, constitutive relief, execution relief, conviction relief, writ of *mandamus* relief and inhibitory relief. Courts may also grant precautionary and anticipatory relief through interlocutory decisions requested by the parties in the form of injunctions. Punitive damages are not allowed under Brazilian law.

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

According to Brazilian law, local courts can only rule on matters strictly related to the parties' claims. Thus, if a party presents a claim concerning damages/interests/costs, local courts may rule on these matters.

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

Domestic judgments and decisions are automatically enforceable before Brazilian courts with competent jurisdiction.

Foreign judgments – whether arbitral or judicial – will, however, only be enforced before lower federal courts if the interested party obtains the recognition of such judgment by the Brazilian STJ.

Foreign interlocutory decisions transmitted through the issuance of a letter rogatory are also subject to proceedings before the STJ prior to the enforcement stage.

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

The basic rule is that against the first instance final decision, the defeated party may file an appeal (*apelação*) before the competent Court of Appeals, requesting the reform (total or partial) or the annulment of the first instance decision. Some interlocutory decisions may be challenged in the course of the proceedings by means of an interlocutory appeal (*agravo de instrumento*), also to be filed before the competent Court of Appeals.

Depending on the circumstances, it can also be possible to appeal against decisions rendered by Courts of Appeals (second instance) to the Brazilian STJ for subjects concerning federal law discussions, and to the STF, for cases related to constitutional issues. The requirements for the filing of those appeals are listed in the Federal Constitution, the CPC and the rules of procedure of the specific courts.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

The enactment of the Brazilian CPC currently in force was an important milestone for the ultimate goal of incentivising settlements and making such incentive a real public policy pursued by the State. Article 3 of the Code, in its paragraphs 2 and 3, provides that the State should, as much as possible, promote the consensual resolution of conflicts, and that mediation, conciliation and other consensual dispute resolution methods should be encouraged by judges, lawyers, public defendants and members of the Public Prosecutors' Office.

Several articles of the Code now provide for the designation of a mediation or conciliation hearing just after the filing of the complaint and prior to the pleading phase. Consequently, the Code now encompasses an entire session regulating the function of judicial conciliators and mediators.

Finally, as a general rule, the Code provides that the judge must promote, at any time of the proceedings, the self-composition of the dispute, preferably with the assistance of judicial conciliators and mediators.

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II. ALTERNATIVE DISPUTE RESOLUTION

1 General

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

Currently, Brazil can be considered as an arbitration-friendly jurisdiction. The Brazilian Arbitration Act was enacted in 1996 (amended in 2015) and the STF declared its constitutionality in 2001. Today, arbitration is a reality and is widely used, especially in complex cases and commercial and international contracts. Other ADR methods that are becoming more frequently used are mediation, conciliation and dispute resolution boards.

The Brazilian Arbitration Act (Law No. 9,307) provides that the arbitration proceedings shall comply with the procedure agreed upon by the parties in the arbitration agreement, which may refer to the rules of an arbitral institution or specialised entity.

During the arbitration proceedings, the principles of due process of law, equality of treatment between the parties, and the arbitrator's impartiality and free convincement must always be observed.

In May 2015, the Brazilian Congress enacted Federal Law No. 13,129/2015, which amended and expanded certain aspects of the Brazilian Arbitration Act and included important arbitration-related provisions, specially related to the participation of public entities in arbitration proceedings.

Along with the reform of the Brazilian Arbitration Act, a Mediation Act also came into force in 2015 (Federal Law No. 13,140/2015), regulating mediation within the Brazilian legal system for the first time. Before the enactment of the Mediation Act, some institutions specialised in alternative dispute resolution mechanisms were already prepared to administer mediation procedures in accordance with their own internal rules and were already in a position to provide interested parties with qualified bodies of mediators.

The Mediation Act established important rules on the use of mediation in Brazil and provides parties with an adequate level of predictability and assurance as to the institute's advantages, procedures, possible consequences, etc.

When it comes to the dispute resolution boards, the increasing number of infrastructure projects in Brazil is making the use of such dispute resolution method more and more common in construction cases. The Municipality of São Paulo, for example, even enacted legislation regulating the use of dispute resolution boards in the context of construction contracts concluded with the Municipality (Municipal Act No. 16.873/2018).

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

Arbitration proceedings are mainly governed by the Brazilian Arbitration Act (Federal Law No. 9,307/1996, as amended by Federal Law No. 13,129/2015) and Decree No. 4,311 of 2002, through which the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was incorporated within the Brazilian Legal System.

Mediation is governed by the Mediation Act (Federal Law No. 13,140/2015).

Both mediation and arbitration also find some level of regulation within the CPC – especially the interaction of such dispute resolution methods with state courts.

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

The Brazilian Arbitration Act establishes in Article 1 that those who are legally capable of entering into contracts are free to use arbitration in the resolution of disputes, provided that such disputes involve only disposable rights. As a consequence of these restrictions, there are certain areas of law in Brazil in which, based on the arbitrability requirements indicated in Article 1 of the Brazilian Arbitration Act, the use of arbitration may be subject to certain restrictions, with examples being family-related disputes, some environmental law disputes, criminal matters, etc.

There are still some questions and/or restrictions in relation to the use of arbitration in labour matters, consumer disputes, bankruptcy, and intellectual property, among others.

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

Brazilian local courts play an important role in guaranteeing the enforceability and efficiency of arbitration in Brazil. Should one of the parties resort to state courts to resolve a dispute arising out of an agreement containing an arbitration clause, the other party may argue the existence of such clause as an impediment for the judicial action, which shall be terminated. Indeed, according to the express provisions of the CPC, courts have to dismiss the action when parties have agreed to arbitrate. The place of arbitration, nationality of parties or applicable law do not influence the court's decision when determining the dismissal of the action based on an arbitration clause. Notwithstanding, some Brazilian courts have set aside arbitration clauses in situations where it was clear (at least in the court's view) that the arbitration agreement was null and void (*prima facie* doctrine).

Brazilian courts will issue interim or provisional measures in support of arbitration when the arbitral tribunal is not yet constituted, if the proper requirements are met. Arbitral tribunals can request local courts to enforce an interim or a provisional measure rendered in the arbitration by just formally asking the court to compel the party to comply with the decision.

Finally, the CPC enacted in 2015 also brought some important advancements related to the interactions between arbitral tribunals and state courts, with the main example being the concept of the arbitral letter (*carta arbitral*), an instrument created to permit arbitral tribunals to request direct assistance of national courts; for example, for the enforcement of provisional measures and other decisions arising out of arbitration proceedings.

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

Arbitral awards in Brazil are as binding as court decisions and are enforced accordingly. As a rule, arbitral awards may only be challenged by means of court actions for the declaration of nullity of such awards. In order to request the declaration of nullity of an arbitral award, parties should demonstrate the existence of one of the requirements provided for in Article 32 of the Brazilian Arbitration Act, which relates fundamentally to procedural issues (*i.e.* non-existence of an agreement to arbitrate, violation of due process, award rendered beyond the limits of the arbitration agreement, etc.). As a rule, there are no appeals against awards issued in arbitration proceedings and the merits of the arbitration cannot be re-examined by courts.

As mentioned in question 1.4, parties cannot be forced to mediate. A settlement agreement entered into within a mediation procedure will constitute an extrajudicial enforcement instrument, which can be enforced before state courts.

Settlement agreements reached in the course of legal proceedings may be enforced by state courts.

Expert determination decisions are not levelled as court decisions and therefore will not be binding upon the parties as a decision rendered by an arbitration tribunal.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

In our view, the most prominent alternative dispute resolution institutions in Brazil for commercial cases are: the Centre for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada ("CAM-CCBC"); the Chamber of Conciliation, Mediation and Arbitration of the Centre of Industries of the State of São Paulo ("CCMA-CIESP/FIESP"); the Business Chamber of Arbitration and Mediation ("CAMARB"); the Arbitration Chamber of the Getulio Vargas Foundation ("FGV"); and the Arbitration Centre of the American Chamber of Commerce ("AMCHAM").

In 2018, the International Chamber of Commerce expanded its Latin America operations and established a case management team located in São Paulo, followed by the opening of a hearing centre in the same location.

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PINHEIRONETO
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Founded in 1942, Pinheiro Neto Advogados is one of the largest law firms in Latin America and one of the most well established in Brazil. It is a full-service, 400-lawyer firm, with offices in the cities of São Paulo, Rio de Janeiro, Brasília and Palo Alto, CA. Pinheiro Neto Advogados is committed to delivering a high level of expertise in major areas of legal practice. Our diversified practice, coupled with an extensive network of legal correspondents in Brazil and an excellent relationship with prime law firms worldwide, enables us to offer a wide range of creative solutions for legal issues.

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British Virgin Islands

Scott Cruickshank

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I. LITIGATION

1 Preliminaries

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

The Territory of the Virgin Islands (as it is officially known) is a largely self-governing British Overseas Territory. The BVI has a common law system, based upon English law. It has its own legislative framework and has adopted some UK legislation (particularly with respect to the implementation of international treaties). English common law was extended to the jurisdiction by the Common Law (Declaration of Application) Act (Cap 13). The result is that English authorities, whilst not strictly binding as precedents, are persuasive, and, subject to differing authorities from the Eastern Caribbean Supreme Court, are routinely relied upon by the courts in the BVI. Authorities of other Commonwealth or common law jurisdictions, such as Canada and Hong Kong, are also frequently cited.

Civil procedure before the BVI courts is governed by the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 ("the CPR"), as amended from time to time, and the Civil Practice Directions. The CPR is largely based on the original Civil Procedure Rules of England and Wales, with important differences.

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

The superior court of record in the BVI is the Eastern Caribbean Supreme Court ("ECSC"), which also serves as the superior court of record for two other British Overseas Territories (Anguilla and Montserrat) and six independent Member States of the Organisation of Eastern Caribbean States ("OECS") (Antigua and Barbuda, the Commonwealth of Dominica, Grenada, St Christopher and Nevis, Saint Lucia, and St Vincent and the Grenadines).

The ECSC consists of:

(1) the High Court of Justice; and

(2) the Court of Appeal.

The Commercial Division of the High Court of Justice sits permanently in the BVI. The Commercial Court will hear claims and applications brought by litigants of any of the nine members of the ECSC, and they will then provide the criteria for a matter to be placed on the commercial list and proceed to the Commercial Court. The conditions are set out in CPR rule 69A.1:

(1) The matter must be a "*commercial claim*". This means any claim or application arising out of a transaction of trade and commerce and includes any claim related to:
   (a) the law of business contracts and companies;
   (b) partnerships;
   (c) the law of insolvency;
   (d) the law of trusts;
   (e) the carriage of goods by sea, air or pipeline;
   (f) the exploitation of oil and gas reserves;
   (g) insurance and re-insurance;
   (h) banking and financial services;
   (i) collective investment schemes;
   (j) the operation of markets and exchanges;
   (k) mercantile agency and usages; and
   (l) arbitration.

(2) The claim or value of the subject matter to which the claim relates must be at least US$500,000. However, a judge of the Commercial Division has the discretion to include in the commercial list a claim which does not satisfy the condition as to monetary value if they consider the claim to be of a commercial nature and it warrants being placed in the commercial list.

The Court of Appeal is an itinerant court, whose sittings rotate between the nine members of the ECSC. The Court of Appeal usually sits three times a year in Tortola (BVI) in January, May and September of each year, although more urgent matters may be dealt with in other jurisdictions as the need arises. Appeals from the Court of Appeal are sent to the Privy Council in the United Kingdom.

Other forums for dispute resolution exist but these are encountered infrequently in international practice. For instance, persons dissatisfied with decisions of the BVI Financial Services Commission may bring an appeal to the Financial Services Appeal Board. Alternatively, small contractual claims of under US$10,000 may be litigated before the Magistrates' Court.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

A civil suit is commenced by the court issuing a claim form, which is served on a defendant along with a statement of claim. The

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general rule is that a claim form must be personally served on each defendant (CPR rule 5.1) within six months of the date of issue for service within the BVI, and for service of a claim form outside of the jurisdiction, the period is 12 months. An application can be made to extend the time for service.

A defendant who disputes the claim or the BVI court's jurisdiction must file a defence and/or an acknowledgment of service, containing a notice of intention to defend within 14 days after the date on which the claim form was served (CPR rules 9.1 and 9.3). Where a defendant has filed an acknowledgment of service, they have 28 days after the date of service of the claim form to file a defence (CPR rule 10.3). Where a defendant fails to file either an acknowledgment of service or a defence within the time periods set out above, then judgment may be entered where CPR Part 12 allows it (CPR rules 9.2(5) and 10.2(4)). Where the court has given permission to serve the claim form and statements of case outside the jurisdiction, it will also make provisions for the dates by which filing and service of the acknowledgment of service and defence have to take place.

So far as is practicable, all applications relating to pending proceedings must be listed for hearing at a case management conference ("CMC") or a pre-trial review ("PTR"). If an application is made which could have been dealt with at a CMC or PTR, the court must order the applicant to pay the costs of the application unless there are special circumstances (CPR rule 11.3). However, this rule does not apply to matters heard in the Commercial Division (CPR rule 69B.5).

Upon the filing of a defence to a civil claim in the High Court, the court office will fix a CMC to be held no less than four weeks and no more than eight weeks after the defence is filed (CPR rule 27.3). If a party is represented by a legal practitioner, that legal practitioner, or one who is authorised to negotiate on behalf of the client and competent to deal with the case, must attend the CMC and any pre-trial review ("PTR") (CPR rule 27.4). The general rule is that at a CMC, the court must consider whether to give directions for: (a) service of experts' reports; (b) service of witness statements; or (c) standard disclosure and inspection. The court must fix a date for a PTR unless it is satisfied that, having regard to the value, importance and complexity of the case, it may be dealt with justly without one. The court must in any event fix: (a) the date on which a listing questionnaire is to be sent out by the court office to the parties; and (b) the trial window period or the trial date (CPR rule 27.5). The above rules do not apply to claims in the Commercial Court. Instead, the claimant must, no later than 14 days after the last party has served his defence, provide to the High Court Registry's Commercial Division Case Management Unit ("the Unit") an agreed written statement of the parties' best estimate of the length of the trial. If no agreement can be reached, then separate estimates must be provided by each party. If the longest estimate is more than one full hearing day, the Unit will fix a CMC for the first available date six weeks after the last defendant who intends to defend the claim has filed his defence. At the CMC, in addition to any orders or directions given pursuant to the court's general powers of management conferred by CPR rule 26.1, the court will ordinarily give directions as to:

(a) the nature and extent of any disclosure to be given;

(b) whether and to what extent witness statements are required, and whether in all the circumstances certain issues or factual matters can be more conveniently and economically dealt with by witness summaries (whether or not a party is or is not able to obtain a witness statement from the witness in question);

(c) the nature of any expert evidence to be called and the identity of the respective parties' experts and the timetable for exchange of experts' reports;

(d) whether it is appropriate for evidence on one or more matters in issue to be given by a single expert pursuant to CPR rules 32.9 and 32.11;

(e) whether the services of an interpreter will be necessary at trial;

(f) whether or not a pre-trial review should be held; and

(g) such other matters that appear appropriate.

Provided that a party has sufficiently indicated to the other parties, and to the court, his intention to apply at the CMC, it is not necessary for a party to make an application under CPR rule 28.5 for the disclosure of specific documents or under CPR rule 32.6 for permission to call expert evidence (CPR rule 69B.7).

For urgent matters, a party may file a certificate of urgency to seek an early hearing date or request the same at the case management conference stage. The certificate of urgency procedure is, on the whole, used for urgent applications. Apart from these regimes there are no expedited trial procedures.

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

The BVI court's jurisdiction is based on the proper service of a claim form. To serve outside of the jurisdiction, permission must be sought pursuant to CPR rule 7.3. Subsection (3) deals with claims about contracts. This provides that: "*A claim form may be served outside of the jurisdiction if:*

(a) a claim is made in respect of a breach of contract committed within the jurisdiction;

(b) a claim is made to enforce, rescind, dissolve or otherwise affect a contract or to obtain any other remedy in respect of a breach of contract (in either case) the contract;

(i) contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract;

(ii) is by its terms or by implication governed by the laws of any Member State or Territory;

(iii) was made by or through an agent trading or residing within the jurisdiction;

(iv) was made within the jurisdiction; or

(c) the claim is for a declaration that no contract exists."

In *OBM Limited v LSJ LLC*, Indra Hariprashad-Charles, J. cited the dicta of Farwell L.J. in *The Hagen* [1908] P 189 at page 201, holding that the "jurisdiction to subject a foreigner to the jurisdiction of the court has been described as extraordinary and should only be exercised with great care and it remains open to the court to stay a case on the basis of *forum non conveniens*". Hariprashad-Charles, J. held that, in deciding the *forum conveniens*, the court will look first to see what factors there are at which point in the direction of another forum. In that case it was noted that there was no exclusive jurisdiction clause, but rather a choice of law clause. Nevertheless, the court declined jurisdiction, citing the dicta of Brandon, J., in *The Eleftheria* [1969] 1 Lloyd's Rep 237 at page 246, where the court held:

"*It seems to be clear, however, that, in general and other things being equal, it is more satisfactory for the law of a foreign country to be decided by the courts of that country. That would be my view, as a matter of common sense, apart from authority.*"

From the above it can be seen that the BVI court is likely to demure to the provisions of an exclusive jurisdiction clause agreed to by the parties to a contract – a recent application of this can be seen in *Garkusha v Yegiazaryan and Others* BVIHCMAP 2015/0010. Subject to the general principle that agreements cannot be made to

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oust the jurisdiction of the court, the choice of jurisdiction agreed by contracting parties is on the whole respected. In appropriate cases, a choice of law clause may support an argument that the BVI is not the appropriate forum.

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

The costs of pursuing civil proceedings in the BVI depend on the level of court in which the claim is conducted. The Magistrates' Court, the High Court and the Commercial Division of the High Court each have their own costs regimes and court fees which are payable. In the case of fees, the Commercial Division is the most expensive, requiring, for example, the claimant to pay a fee of US$1,000 for each day of a trial.

CPR rule 64.6(1) provides the general rule – the court must order the unsuccessful party to pay the successful party's costs. The position is much the same with interlocutory applications. Where the interlocutory application is a procedural application of a type falling within CPR rule 65.11(3), the rules provide that the court "*must order the applicant to pay the costs of the respondent unless there are special circumstances*". The specified applications are: (a) applications to amend a statement of case; (b) an application for an extension of time; (c) an application for relief from sanctions; and (d) an application which could reasonably have been made at a CMC.

CPR rule 65.2 provides for no less than six categories of costs:

(1) fixed costs (CPR rule 65.4);

(2) prescribed costs (CPR rule 65.5);

(3) budgeted costs (CPR rule 65.8) (a party may apply to the court to set a costs budget);

(4) assessed costs on "procedural" applications (CPR rule 65.11);

(5) assessed costs (CPR rule 65.12); and

(6) costs in the Court of Appeal (CPR rule 65.13 (as amended)).

In the High Court, the starting point is that where the fixed costs rules do not apply (they apply only to claims for a sum of money in which judgment has been entered in default) then the prescribed costs rules apply. CPR rule 65.5 says that "the general rule" is that costs should be calculated in accordance with the appendices against the appropriate value of the claim. Where the claim is not for a sum of money, the value by default is deemed to be US$50,000 which produces a maximum costs recovery of US$7,500 under the amended rule. Formerly it would have been US$14,000. The court is invested with the discretion to determine the value of a claim. Such an application should usually be made at the CMC (see CPR rule 65.6(1)), but it appears that the court will be prepared to entertain such an application even after the conclusion of the proceedings, when the claim for costs comes to be assessed (see *Asiacorp v Green Salt* [2006] 5JBVIC 3102).

Prescribed costs operate to cap the costs which may be recovered *inter partes* to a proportion of the value of the claim (if awarded to the defendant), or to the sum recovered (if awarded to the claimant). By way of example:

- a claim worth US$50,000 will produce a costs recovery of US$7,500, assuming that it concludes at trial, and only US$3,375 if it settles when the defence is served; and
- a US$1.1 million claim will produce a costs recovery of US$96,750, assuming that it concludes at trial.

CPR rules 65.4 to 65.11 (and in particular the prescribed costs rules) do not apply to cases in the Commercial Division. Instead, a simple mechanism to assess costs has been adopted: at the conclusion of the trial the court will (in the absence of agreement) determine (a) which party should pay costs to another party, and (b) how much in principle (taking into account the provisions of rule 64.6 and any other matter appearing to the court to be relevant in the circumstances) of the costs of the receiving party are to be paid by the paying party. Once the Judge has determined these questions the matter will then be sent for assessment on the basis of those principles (CPR rule 69B.12 and *Olive Group Capital Limited v Gavin Mark Mayhew* BVIHC(Com) 2015/115). A similar process is undertaken in respect of applications in the Commercial Division, but these costs are to be assessed summarily unless the application lasted in excess of one hearing day (CPR rule 69B.11).

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

The BVI follows the English common law position in relation to the maintenance of litigation. The statutory developments in England in relation to conditional fees and contingency agreements do not apply within the context of contentious business in the BVI. Therefore, at present the common law rules against maintenance prevent lawyers practising in the BVI from entering into such agreements.

Except to the extent that it has arguably been disapplied by the rules in relation to prescribed costs, the indemnity principle applies to litigation in the BVI. A litigant will, therefore, be able to recover from his opponent only to the extent that he was contractually liable to his lawyers. Since the introduction of the Legal Professional Act 2015, the ability of a successful litigant to recover foreign lawyers' fees incurred in litigation had been challenged, and precise scope for recoverability was uncertain until the *Garkusha v Yegiazaryan and Others* BVIHCMAP 2015/0010 case, which was confirmed in *Shrimpton and Pitcairn Limited v Scriven and Others* BVIHCMAP 2016/0031.

Insurers can and do indemnify their insured in relation to litigation costs, but there is a very limited market for after-the-event litigation products.

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

It is not possible to assign legal title to a chose in action in the BVI. It remains possible for such rights to be transferred in equity. However, to do so, it will usually be necessary to join the assignor of the claim or cause of action to the claim.

As set out above, it is not possible for lawyers to enter into conditional or contingency fee agreements. There is uncertainty about whether it is lawful for non-lawyer third parties to fund litigation. Insurers can and do indemnify their insured in relation to litigation costs.

1.8 Can a party obtain security for/a guarantee over its legal costs?

The security for costs regime in the BVI is governed by CPR Part 24. A defendant, including a defendant to a counterclaim, may apply for an order requiring the claimant to give security for the defendant's costs of the proceedings. On a successful application, the amount and nature of the security to be provided is in the court's

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discretion. Before making an order, the court must be satisfied on evidence that it is just to make the order and one or more of the following are established: (a) some other person has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property recovered; (b) the claimant failed to give his address in the form, entered an incorrect address or has changed his address since the claim was commenced with a view to evading the consequences of litigation; (c) the claimant has taken steps with a view to placing its assets beyond the jurisdiction of the court; (d) the claimant is acting as a nominal claimant and there is reason to believe that the claimant will be unable to pay the defendant's costs if ordered to do so; (e) the claimant is an assignee of the right to claim and the assignment was made with a view to avoiding the possibility of a costs order against the assignor; (f) the claimant is an external company; or (g) the claimant is ordinarily resident out of the jurisdiction. On making an order for security for costs, the court must also stay the claim until such time as security for costs has been provided in accordance with the terms of the order, and if security is not provided by the date specified in the order, the claim or counterclaim is struck out. A claimant may invite the court, as part of its case management functions under CPR rule 26.1, to make a conditional order requiring a defendant to pay into court part or all of the claimant's estimated costs; such orders are rare.

2 Before Commencing Proceedings

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

There are no specific requirements in the CPR which must be complied with. However, it should be noted that, when making an order concerning costs, both the High Court and the Commercial Division are to have regard to "*the conduct of the parties both before and during the proceedings*" (CPR rule 64.6(6)(a)). There is support from the English authority that this includes the conduct of the parties before proceedings were issued (see e.g., *Groupama Insurance Co Ltd v Overseas Partner Re Ltd* (*Costs*) [2003] EWCA Civ 1846). In practice, it is normal in the BVI for parties to engage in pre-litigation correspondence prior to initiating a claim.

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

In the BVI, limitation periods are treated as a substantive rather than a procedural issue and may provide a complete defence to a claim. They are governed by the Limitation Ordinance (Cap 43). Section 4(1) of the Ordinance provides a limitation period of six years from the date on which the cause of action accrued in respect of actions based on simple contract or tort. Section 4(3) provides a limitation period of 12 years from the date on which the cause of action accrued in respect of actions upon a specialty. Further, Section 4(4) provides that an action shall not be brought upon any judgment after the expiration of 12 years from the date on which the judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

3 Commencing Proceedings

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

The process for commencing proceedings in the Commercial Court in the Territory of the Virgin Islands has very recently changed. As of the 12th November 2018 and pursuant to Rule 3(3) of the Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Statutory Instrument No. 87 of 2018, the Electronic Litigation Filing and Service Procedure will apply to all new Commercial Court proceedings.

The new E-Litigation system replaces the Judicial Enforcement Management System ("JEMS") which has currently been in use within all Courts of the Organisation of the Eastern Caribbean States ("OECS"), including the BVI, since the year 2000. This new E-Litigation solution is a web based/online application that will provide the court users, including all legal practitioners in the BVI, and stakeholders with access to assigned services anytime and anywhere and on any device including smartphones, tablets, laptops and desktops. The new E-Litigation will allow, amongst other things, Electronic Filing, Electronic Notifications, Electronic Payments, Electronic Case Management, Creation of Trial Bundles and Indices. The ECSC has provided Case Managers and Legal Practitioners with detailed user guides which cover the setting up of accounts all the way through to creating bundles. Although the system has not yet been operating for enough time to consider its success, it is a strong attempt to really transform the way litigation is undertaken in the OECS. In due course, it is hoped that the E-Litigation solution will provide increased operational efficiency, reduce operational costs and improve access and services to stakeholders. If successful, it will likely be expanded to all Courts in the OECS.

Proceedings are commenced in the BVI by issuing and serving a claim form. The claim form is issued at the High Court Registry and service is effected by the claimant. For commercial claims, these will now be started using the new E-Litigation Portal but service will still need to be effected by the Claimant in the usual fashion. The general rule is that the claim form must be served personally on each defendant (CPR rule 5.1). A claim form is served personally on an individual by handing it to, or leaving it with, the person to be served (CPR rule 5.3). Personal service must be proved by an affidavit (CPR rule 5.5). Service must be effected on a party's legal practitioner where they have been authorised to accept service on behalf of that party and the legal practitioner has notified the claimant in writing that he or she is so authorised (CPR rule 5.6). Service may be effected on a limited company in the following ways:

(a) by leaving the claim form at the registered office of the company;

(b) by sending the claim form by telex, fax or prepaid post or cable addressed to the registered office of the company;

(c) by serving the claim form personally on an officer or manager of the company at any place of business of the company which has a real connection with the claim;

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(d) by serving the claim form personally on any director, officer, receiver, receiver-manager or liquidator of the company; or

(e) in any other way allowed by any enactment (CPR rule 5.7).

Service may be effected on a firm or partnership in the following ways:

(a) by serving the claim form personally on a manager of the firm at any place of business of the firm or partnership which has a real connection with the claim;

(b) by serving the claim form personally on any partner of the firm; or

(c) in any other way allowed by any enactment.

However, if the claimant knows that a partnership has been dissolved when the claim is issued, the claim form must be personally served on every person within the jurisdiction whom the claimant seeks to make liable (CPR rule 5.8).

Service by post is proved by affidavit of service by the person responsible for posting the claim form to the person to be served (CPR rule 5.11).

There are also rules governing service on minors and patients.

A party may apply to the court for an order that an alternative form of service be permitted (CPR rules 5.13 and 5.14). In addition, a contract may provide for an agreed form of service (CPR rule 5.16).

The service of foreign proceedings is governed by CPR Part 7. *Nilon Limited and Others v Royal Westminster Investment S.A and ORs* [2015] 4 LRC 584 is the leading decision on service out of the jurisdiction in the BVI and has recently been applied in *Chi Hung Andy Chan and Others v Noble More Group Limited and Others* BVIHC 228 of 2016. A claimant has to satisfy the court of the following three requirements for service out:

(1) In relation to the foreign defendant, there is a serious issue to be tried on the merits (a substantial question of fact or law, or both).

(2) There is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given, i.e., the gateways. A good arguable case connotes that one side has a much better argument than the other.

(3) In all the circumstances, the forum being seized is clearly or distinctly the appropriate forum for the trial of the dispute and the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction. Lord Wilberforce in *Amin Rasheed Shipping Corporation v Kuwait Insurance Company* [1984] AC 50 said: "*In considering this question the court must take into account the nature of the dispute, the legal and practical issues involved, such questions as local knowledge, availability of witnesses and their evidence and expense.*"

The gateways under CPR rule 7.3 are for claims made:

(a) against someone on whom the claim form has been or will be served and:

(i) there is between the claimant and that person a real issue which it is reasonable for the court to try; and

(ii) the claimant now wishes to serve the claim form on another person who is outside of the jurisdiction and who is a necessary or proper party to that claim;

(b) for an injunction ordering the defendant to do or refrain from doing some act within the jurisdiction; or

(c) for a remedy against a person domiciled or ordinarily resident within the jurisdiction.

And also in relation to:

(a) claims in contract (where the contract provides for the BVI court to have jurisdiction or it was made within the jurisdiction or made by or through an agent trading or residing in the jurisdiction);

(b) claims in tort (where the act causing the damage was committed within the jurisdiction or the damage was sustained in the jurisdiction);

(c) claims concerning property if the whole subject matter of the claim relates to property within the jurisdiction;

(d) claims about companies if the subject matter of the claim relates to:

(i) the constitution, administration, management or conduct of affairs; or

(ii) the ownership or control of a company incorporated within the jurisdiction;

(e) claims about trusts if:

(i) a claim is made for a remedy against the defendant as constructive trustee and the defendant's alleged liability arises out of acts committed within the jurisdiction;

(ii) a claim is made for any remedy which might be obtained in proceedings for the administration of the estate of, or in probate proceedings as defined in CPR Part 68 relating to, a person who died domiciled within the jurisdiction; or

(iii) a claim if made for any remedy which might be obtained in proceedings to execute the trusts of a written instrument and the trusts ought to be executed according to the law of the BVI and the person on whom the claim form is to be served is a trustee of the trusts;

(f) claims for restitution where the defendant's alleged liability arises out of acts committed within the jurisdiction or out of acts which, wherever committed, were to the detriment of a person domiciled within the jurisdiction;

(g) claims under an enactment conferring jurisdiction on the court; and

(h) claims to enforce any judgment or arbitral award which was made within the jurisdiction or by a foreign court/tribunal and is amenable to be enforced at common law.

An application may be made to the court for permission to serve out of the jurisdiction without notice but must be supported by affidavit evidence setting out the grounds on which the application is made, the deponent believes that the claimant has a claim with a realistic prospect of success and in what place, within what country, the defendant may probably be found (CPR rule 7.5).

A claim form may be served out of the jurisdiction by the methods provided for in CPR rule 7.9 (service through foreign governments, etc.), rule 7.11 (service on a state), in accordance with the law of the country in which it is to be served or by the claimant or the claimant's agent personally (CPR rule 7.8). Where such service is impracticable, the claimant may apply for an order under CPR rule 7.8A for an order that the claim form be served by a method specified by the court.

Solely in respect of a Commercial Claim, and as a consequence of the new E-Litigation Portal, when attempting to serve a Defendant, the Claimant or their legal practitioner should include the relevant access code to allow the Defendant and/or their legal practitioner to access the E-Litigation Portal in order to partake in the necessary steps of the litigation. It has been suggested that the Commercial Court will be setting up a number of computer systems within the Court itself to allow individuals, who may not have access to a computer, to comply with the E-Litigation requirements.

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

A party may apply for, and the court has the jurisdiction to grant an interim remedy such as an injunction at any time, including after

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judgment has been given or before a claim has been made. The court may only grant an interim remedy before a claim has been made if the matter is urgent or it is otherwise necessary to do so in the interests of justice. However, unless the court orders otherwise, a defendant may not apply for an interim order before filing an acknowledgment of service (CPR rule 17.2).

CPR rule 17.1 sets out the list of interim remedies available to the court which include:

(a) an interim declaration;

(b) an interim injunction;

(c) an order authorising a person to enter any land or building in the possession of a party to the proceedings;

(d) an order directing a party to prepare and file accounts relating to the dispute;

(e) an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing order;

(f) an order for a specified fund to be paid into the court or otherwise secured where there is a dispute over a party's right to the fund;

(g) an order for interim costs;

(h) an order for the:

  (i) carrying out of an experiment on or with relevant property;

  (ii) detention, custody or preservation of relevant property;

  (iii) inspection of relevant property;

  (iv) payment of income from relevant property until a claim is decided;

  (v) sale of relevant property (including land) which is of a perishable nature or which, for any other good reason, it is desirable to sell quickly; or

  (vi) taking of a sample of relevant property;

(i) an order permitting a party seeking to recover personal property to pay a specified sum of money into the court pending the outcome of proceedings and directing that, if the party does so, the property must be given up to the party;

(j) an order restraining a party from:

  (i) dealing with any asset whether located within the jurisdiction or not; and

  (ii) removing from the jurisdiction assets located here;

(k) an order to deliver up goods;

(l) an order requiring a party to admit another party to the premises for the purposes of preserving evidence, etc. (search order); and/or

(m) an order for payment by a defendant on account of any damages, debt or other sum which the court may find the defendant liable to pay (order for interim payment).

Each interim remedy has its own criteria which needs to be met by an applicant. In relation to interim injunctions, the BVI court applies the test set out in the English authority of *American Cyanamid v Ethicon Ltd* [1975] AC 396: there must be a serious issue to be tried, damages would be an inadequate remedy, and on the "*balance of convenience*" test an injunction should be granted with particular regard to preserving the *status quo*.

In relation to freezing injunctions, the court will look to apply the principles set out in English authority, namely that the applicant can show that he has a good arguable case, failure to obtain an injunction would involve a real risk that any judgment would not be satisfied, and that it is just and convenient to grant the injunction (see *Polly Peck International plc v Nadir* [1992] 4 All ER 769). Following the Commercial Court's decision in *Black Swan Investments ISA v Harvest View Limited* (BVIHCV(Com) 2009/399), free-standing freezing injunctions in support of foreign proceedings may be obtained without the need for the same to be tied to a domestic cause of action in the BVI. Applicants for both ordinary and freezing injunctions will normally be required to provide an undertaking in damages and will often have to provide fortification of the undertaking.

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

Pursuant to CPR rule 8.6, the claim form must include a short description of the nature of the claim, specify any remedy that the claimant seeks and give an address for service in accordance with CPR rule 3.11. The claimant must set out in the claim form or in the statement of claim an account of all of the facts on which he relies, which must be as short as practicable. In addition, the claim form or the statement of claim must identify any document which the claimant considers to be necessary to his or her case and, in respect of the recovery of any property, the claimant's estimate of its value must be stated. Finally, the statement of claim must include a certificate of truth in accordance with rule 3.12 (CPR rule 8.7).

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

Part 20 of the CPR (as amended by the Eastern Caribbean Supreme Court Civil Procedure (Amendment) (No 2) rules (No 48 of 2014)) governs changes to statements of case. CPR rule 20.1(1) provides that a statement of case may be amended once, without the court's permission, at any time prior to the date fixed by the court for the first case management conference. However, CPR rule 20.1(3) provides that a statement of case may not be amended without permission if the change is sought to be made after the end of a relevant limitation period. This includes adding or substituting parties after such a period. In such circumstances the court, on an application, may allow an amendment to add or substitute a new claim, but only if the new claim arises out of the same or substantially the same facts as the claim for which the party wishing to change the statement of case has already claimed a remedy in the proceedings (CPR rule 20.2). The court will only allow an amendment to correct a mistake as to the name of a party where the mistake was genuine and not one which would, in all of the circumstances, cause reasonable doubt as to the identity of the party in question (CPR rule 20.2).

CPR rule 20.1(2) provides that the court may otherwise give permission to amend a statement of case at a case management conference or at any time on an application to the court. CPR rule 20.1(3) sets out the factors to which the court must have regard to when deciding whether to grant such an application. These are:

(a) how promptly the applicant has applied to the court after becoming aware that the change was one which he or she wished to make;

(b) the prejudice to the applicant if the application were refused;

(c) the prejudice to the other parties if the change were permitted;

(d) whether any prejudice to any other party can be compensated by the payment of costs and/or interest;

(e) whether the trial date or any likely trial date can still be met if the application is granted; and

(f) the administration of justice.

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3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

There is no limit as to when the claimant can abandon all or part of its claim. As a general rule, a claimant may discontinue all or part of a claim without the permission of the court. However, where an element of the claim has required any party to give an undertaking to the court or the court has granted an interim injunction, the permission of the court is required before the claimant can discontinue. Likewise, where a claimant has received an interim payment in relation to a claim, the claimant may discontinue only with the permission of the court or where the defendant who made the payment consents in writing. If there is more than one claimant, every claimant has to consent in writing or the court's permission is required to discontinue. If there is more than one defendant, the claimant may discontinue all or part of the claim against all or any of the defendants.

To discontinue, a claimant must serve a notice of discontinuance on every other party to the claim and file a copy of it following CPR rule 37.3. Discontinuance takes effect on the date when the notice of discontinuance is served, and a claim or that part of the claim is brought to an end on that date. The incidence of discontinuance does not affect any proceedings relating to costs or the defendant's right to apply to have the notice set aside.

Unless the parties agree or the court orders otherwise, a claimant who discontinues is liable for the costs incurred by the defendant against whom the claim is discontinued up to or before the date on which the notice of discontinuance was served. If only part of the claim is discontinued, the claimant is liable for the costs relating to the part discontinued and unless the court orders otherwise, the costs for which the claimant is liable will not be quantified until the conclusion of the rest of the claim. If a claimant discontinues a claim after the defendant has filed a defence and then makes a subsequent claim against the same defendant arising out of facts which are the same or substantially the same but has failed to pay the defendant's costs of the discontinued claim, the court may stay the subsequent claim until the outstanding costs have been paid.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

The requirements of a defence are set out at CPR rule 10.5. It must set out all of the facts on which the defendant relies to dispute the claim in a statement which must be as short as practicable. A defendant must say which (if any) allegations in the claim form or statement of claim:

(a) are admitted;

(b) are denied;

(c) are neither admitted nor denied, because the defendant does not know whether they are true; and

(d) the defendant wishes the claimant to prove.

If a defendant denies any of the allegations in the claim form or the statement of claim he or she must state the reason for doing so, and if the defendant intends to prove a different version of events from that given by the claimant, the defendant must set out his or her own version in the defence. In relation to any allegation which a defendant does not admit or deny and put forward a different version of events, the defendant must state its reasons for resisting the allegation. A defendant must also identify in or annex to the defence any document which is considered to be necessary to the defence.

A defendant is not permitted to rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there unless the court gives permission or the parties agree to the same (CPR rule 10.7).

It is also possible for a defendant to rely on a defence of set-off or to bring an ancillary claim against either the claimant (i.e., a counterclaim) or a claim against an additional party. A counterclaim or additional claim should be pleaded in the same way as a claim (CPR Part 18).

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

Generally, a defendant who disputes the claim or the BVI court's jurisdiction must file a defence in the period of 28 days after the service of the claim form. An acknowledgment of service containing a notice of intention to defend can be filed within 14 days after the date of service of the claim form (CPR rules 9.1 and 9.3). If no acknowledgment of service is filed within 14 days or no defence is filed within the prescribed time periods then judgment may be entered where CPR Part 12 allows it (CPR rules 9.2(5) and 10.2(4)).

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

Yes, it is possible for a defendant to bring an ancillary claim against a third party. This is pleaded in the same way as a counterclaim (see CPR Part 18).

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

CPR Part 12 contains provisions under which a claimant may obtain default judgment by an application in Form 7 made to the court office without trial where the defendant has failed to file a defence within the prescribed time periods or an acknowledgment of service.

Pursuant to CPR rule 12.4, a claimant may only obtain judgment for a failure to file an acknowledgment of service in respect of a claim for a specified sum of money. CPR rule 12.5 deals with judgments for a failure to defend, in all claims where the claimant has proved service of the claim form and statement of claim or an acknowledgment of service has been filed, but the period for filing a defence and any extension agreed by the parties or ordered by the court has expired.

Pursuant to CPR rule 12.9, a claimant may apply for default judgment on a claim for money or on a claim for delivery of goods against one or more defendants and proceed with the claim against the other defendants. However, if the claim cannot be dealt with separately from the claim against the other defendants, the court may not enter judgment against that defendant and must deal with the application at the same time as it disposes of the claim against the other defendants.

Following default judgment, unless the defendant applies for and obtains an order for the judgment to be set aside pursuant to CPR Part 13, the defendant will only be heard on the assessment of damages (provided that they give the appropriate notice in Form 31), the form of any other remedy, costs, the enforcement of the judgment and the time period for payment of the judgment debt (CPR rule 12.13).

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4.5 Can the defendant dispute the court's jurisdiction?

CPR rule 9.6 provides that a defendant will not lose any right to dispute the court's jurisdiction by filing an acknowledgment of service. Further, CPR rule 9.7 provides that a defendant who disputes the court's jurisdiction may apply to the court for a declaration to that effect, but he must first file an acknowledgment of service. Such an application must be made within the period for filing a defence, which includes any period of extension granted by the court, or by agreement of the parties.

Where the defendant has been served outside of the jurisdiction and contends that the court should not exercise its jurisdiction in respect of any proceedings, the defendant may apply to the court for a stay and a declaration to that effect. Again, before doing so the defendant must first file an acknowledgment of service if he or she has not previously done so (CPR rule 9.7A).

5 Joinder & Consolidation

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

The addition and substitution of parties is governed by CPR Part 19. CPR rule 19.2 provides that a claimant may add a new defendant to proceedings without permission at any time prior to the CMC. The claimant does so by filing at the court office an amended claim form and statement of claim. The same rule also provides that the court may add a new party to the proceedings without an application if: (a) it is desirable to add the new party so that the court can resolve all matters in dispute in the proceedings; or (b) there is an issue involving the new party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue. In addition, the court may order a new party to be substituted for an existing one if: (a) the court can resolve the matters in dispute more effectively by substituting the new party for the existing party; or (b) the existing party's interest or liability has passed to the new party. The court may add, remove or substitute a party at the CMC. However, the court may not add a party (except by substitution) after the CMC on the application of an existing party unless that party can satisfy the court that the addition is necessary because of some change in circumstances which became known after the CMC.

Special provisions apply in relation to adding or substituting parties after the end of a relevant limitation period. The court may only do so if: (a) the addition or substitution is necessary; and (b) the relevant limitation period was current when the proceedings were started. The same is only "*necessary*" if the court is satisfied that:

(a) the claim cannot properly be carried on by or against an existing party, unless the new party is added or substituted as claimant or defendant;

(b) the interest or liability of the former party has passed to the new party; or

(c) the new party is to be substituted for a party that was named in the claim form by mistake for the new party (CPR rule 19.4).

A person may not be added or substituted as a claimant unless that person's written consent is filed with the court office (CPR rule 19.3(4)).

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

Yes, CPR Part 26 provides the court with broad case management powers, including the power to consolidate proceedings. In so doing, the court is to have regard to "*the overriding objective*" set out in CPR rule 1.1(1) to "*enable the court to deal with cases justly*". CPR rule 1.1(2) provides that dealing justly with the case includes:

(a) ensuring, so far as is practicable, that the parties are on an equal footing;

(b) saving expense;

(c) dealing with cases in ways which are proportionate to the:

  (i) amount of money involved;

  (ii) importance of the case;

  (iii) complexity of the issues; and

  (iv) financial position of each party;

(d) ensuring that it is dealt with expeditiously; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

5.3 Do you have split trials/bifurcation of proceedings?

It is not unusual for the BVI court, and in particular for the Commercial Division, to order a split trial. This typically arises where an assessment of damages is likely to involve different evidence from that to be advanced on the issue of liability, and the court is of the view that a trial on the latter first is likely to save costs in the event that the claimant is unsuccessful. Again, the court has the power to order a split trial pursuant to its broad case management powers in CPR Part 26 and specifically CPR rule 26.1(3). In making any such order, the court is required to have regard to the overriding objective in CPR Part 1 as set out above (see, for example, *Moorjani Caribbean Limited v Ross University School of Medicine School of Veterinary Medicine (St. Kitts) Limited* SKBHCV 2013/0204).

6 Duties & Powers of the Courts

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

The majority of civil cases are heard in the High Court, for which there is no specific case allocation system. In order for a claim to be placed in the Commercial List of the High Court, the claim must be a "*commercial claim*" within the meaning set out in CPR rule 69A.1(2) and the claim or the value of the subject matter to which the claim relates must be at least US$500,000. However, the court has the discretion to include a matter in the commercial list notwithstanding that it has not satisfied the required monetary value if it "considers the claim to be of a commercial nature and warrants being placed in the commercial list" (CPR rule 69.1A(4)).

A commercial claim may be placed in the commercial list at the time that it is filed or on an application by a party at any time before the first CMC. In the former case, the legal practitioner for the claimant or applicant filing a claim must file, now electronically, a certificate to the effect that the claim is appropriate to be treated as a commercial claim and setting out facts relating to the claim that demonstrate this (CPR rule 69A.4). In addition, the court may place in the commercial list any

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claim or application of its own motion where it appears that the claim or application is a qualifying claim, and that it is appropriate for the claim to be placed in the commercial list. Where a claim is allocated in this way, any party may apply, and in the case of a claim proceeding by way of claim form, at any time before the close of pleadings for the claim to be transferred to another list (CPR rule 69B.2).

The Magistrates' Court also has jurisdiction to determine small contractual claims of under US$10,000.

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

The courts in the BVI have a broad range of case management powers set out in CPR Part 26 which they exercise to meet the overriding objective. See the answer to question 3.2 above regarding interim applications and the court's case management powers more generally. The general rule is that costs follow the event such that, depending on the applicable costs regime, at least some of the successful party's costs will be met by the losing party.

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

The BVI courts have a wide discretion to impose sanctions on a party that has failed to comply with a court order. These may include adverse costs orders against a party and/or a party's legal representatives and the striking out of pleadings. In extreme cases it may be possible to bring committal proceedings against a defaulting party pursuant to CPR Part 53.

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

Yes, CPR rule 26.3 provides that "*in addition to any other power under these rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that:*

(a) there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings;

(b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;

(c) the statement of case or the part to be struck out is an abuse of process of the court or is likely to obstruct the just disposal of the proceedings; or

(d) the statement of case or the part to be struck out is prolix or does not comply with the requirements of CPR Part 8 or 10" (form and content of claim form, statement of case and defence).

6.5 Can the civil courts in your jurisdiction enter summary judgment?

Yes, this is governed by CPR Part 15. Pursuant to CPR rule 15.2, the court may give summary judgment on the claim or on a particular issue if it considers that:

(a) the claimant has no real prospect of succeeding on the claim or the issue; or

(b) the defendant has no real prospect of successfully defending the claim or the issue.

However, CPR rule 15.3 prevents summary judgment being given in certain types of proceedings, such as admiralty proceedings *in rem*, probate proceedings and defamation.

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

The general rule is that a claimant may discontinue all or part of a claim without the permission of the court (CPR rule 37.2). See the answer to question 3.5.

The court has broad powers to "*stay the whole or part of any proceedings generally or until a specified date or event*" (CPR rule 26.1(q)). In doing so the court will look to meet the Overriding Objective set out in CPR Part 1, as discussed above.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

The rules governing the disclosure and inspection of documents are set out in CPR Part 28. The usual direction given by the court at a CMC is that the parties should give "*standard disclosure*". This means that a party must disclose all documents which are directly relevant to the matters in question in the proceedings (CPR rule 28.4). Pursuant to CPR rule 28.1(4), a document is "*directly relevant*" if:

(a) the party with control of the document intends to rely on it;

(b) it tends to adversely affect that party's case; or

(c) it tends to support the other party's case.

However, the rule in the English authority of *Peruvian Guano* is expressly disapplied.

As in England and Wales, there is an obligation to produce a list of documents by way of disclosure. A person who claims the right to withhold inspection of documents must make that claim within their list; for example, documents which are privileged.

Applications for pre-action disclosure and specific disclosure for a document or class of documents can also be made (*Yao Juan v Kwok Kin Kwok and Crown Treasure Group Limited* BVIHC(Com) 2013/0162).

There are no special rules concerning the disclosure of electronic documents nor any special practices for conducting e-disclosure.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

The rules have been codified in the Evidence Act, 2006 ("the Evidence Act") and largely follow English law. A party will not be required to disclose the contents of confidential documents or communications which were created for:

(a) the dominant purpose of providing legal advice;

(b) the dominant purpose of providing or receiving legal services in relation to anticipated or pending legal proceedings; or

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(c) the dominant purpose of preparing or conducting legal proceedings.

A party will also generally be exempt from disclosing documents which are marked "*without prejudice*" or "*without prejudice save as to costs*".

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

The English common law rule in *Norwich Pharmacal v Commissioners of Customs and Excise* [1974] AC 133 (disclosure orders against third-party wrong-doers) is followed in the BVI. It was relied upon extensively by JSC Bank in its quest to recover the fruits of the fraud said to have been perpetrated by its former chairman, Mukhtar Ablyazov. In *JSC BTA Bank v Fidelity Corporate Services & Others* [2011] JBVIC 2101, the Court of Appeal reversed a judgment of the Commercial Court Judge which doubted whether Registered Agents had the necessary degree of participation to the found jurisdiction to obtain relief against them. It has recently been applied in *PT Ventures SGPS SA v Tokeyna Management Limited* (BVIHC(Com) 2015/0134 and *UVW v XYZ (A Registered Agent)* BVIHC(Com) 108 of 2016. However, the BVI court will not permit a party to apply for a *Norwich Pharmacal Order* simply to strengthen its own case and will be less inclined to grant such relief if the applicant already knows of the location of assets, or the identity of a requisite party. The court will be especially slow to make such an order if the effect of it would be to pre-empt the disclosure that is likely to be given in the ordinary course under the CPR.

These principles were espoused in *Morgan & Morgan Trust Corporation Limited v Fiona Trust & Holding Corporation* [2006] ECSC J0403–5 and *TSJ Engineering Consulting Limited v (1) Al-Rushaid Petroleum Investment Company (2) Al-Rushaid Parker Drilling Limited* [2010] ECSC J0727–3. Bannister J emphasised that it is not open for litigants in foreign proceedings to seek to obtain information from BVI entities about their assets, which ought to be sought in the foreign jurisdiction where the main proceedings were under way (*Bascuñan and others v Elsaca and others* BVIHC2015/0128 applying *Osetinskaya v Usilett Properties Inc* BVIHC(Com) 2013/0037).

The receivers appointed at the behest of JSC BTA Bank by the English Commercial Court over certain assets of Mukhtar Ablyazov, established before the Court of Appeal in *Jeremy Outen et al. v Mukhtar Ablyazov* [2011] ECSC J1110–1 in November 2011 that it was within the arsenal of the court, when recognising a foreign receivership order, to order a wide class of third parties to provide such unspecified information or documentation to the receivers as they might reasonably request.

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

The courts in the BVI, as part of their case management functions or upon application by a party for specific disclosure or a *Norwich Pharmacal Order*, may make orders for disclosure of documents or classes of documents. *QVT Fund V LP et al v China Zenix Auto International Group Ltd et al* BVIHC(Com) 0026 of 2014 is a recent case example demonstrating the role the court plays in disclosure within civil proceedings.

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

CPR rule 28.17(1) provides that a party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, unless: (a) the document has been read to or by the court, or referred to in open court; or (b) (i) the party disclosing the document and the person to whom the document belongs, or (ii) the court, gives permission. In any event, the court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to in open court. Such an application may be made by any party or person to whom the document belongs.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

The rules governing the form of evidence in the BVI are set out in Parts 29–33 of the CPR, the Evidence Act 2006, the Oaths Act, 1911 and the common law. As set out above, under the CPR the parties are normally required to provide advance disclosure of all "*directly relevant*" material before trial. In the usual course, the court will give directions at a CMC for the exchange of expert reports and witness statements on which the parties seek to rely at trial. Hearsay evidence is admissible at trial provided that adequate notice identifying the hearsay notice is given to the other parties in advance.

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

The types of evidence which are admissible include: (i) expert evidence; (ii) witnesses of fact; and (iii) hearsay evidence provided adequate notice is given.

Pursuant to CPR rule 29.1, the court may control evidence to be given at any trial or hearing by giving appropriate directions, at a case management conference or by other means, as to:

(a) the issues on which it requires evidence; and

(b) the way in which any matter is to be proved.

Subject to the control exercised by the court set out above, expert evidence is permitted pursuant to CPR Part 32. This is generally required to be in written form and should be seen to be the independent product of the expert uninfluenced as to the form or content by the demands of the litigation. CPR rule 32.9 provides that the court may direct expert evidence on a particular issue to be given by a single expert.

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

Written witness statements of fact for each witness of fact are generally exchanged by the parties prior to trial and stand as the evidence-in-chief of the witnesses to be called. Witnesses giving evidence at court are normally cross-examined before the court. Reluctant witnesses may be compelled to attend court upon the issue and service of a witness summons (CPR Part 33).

The court may give leave for witnesses to give evidence by videolink.

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The rules governing the form of witness statements and affidavits are set out in CPR Parts 29 and 30. A party may apply for an order for a person to be examined before the trial or the hearing of any application (CPR rule 33.7). Generally (and subject to any directions given by the court), the examination must be conducted in the same way as if the witness were giving evidence at trial. With the consent of the parties, the court may order that the evidence of a witness be taken as if before an examiner, but without an examiner being appointed or present (CPR rule 33.9).

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

Part 34 sets out the rules governing experts and assessors. Pursuant to CPR rule 32.2, expert evidence must be restricted to that which is reasonably required to resolve the proceedings justly. CPR rule 32.3 provides that it is the duty of an expert witness to help the court impartially on matters relevant to his or her expertise and that this duty overrides any obligation to the person by whom he or she is instructed or paid. CPR rule 32.13 provides that an expert witness must address his or her report to the court and not to any person from whom the expert witness has received instructions.

CPR rule 32.4 sets out the way in which the expert is to carry out his or her duty. The expert must:

(a) provide independent assistance to the court by way of an objective, unbiased opinion in relation to matters within the witness's expertise;

(b) state the facts or assumptions upon which his or her opinion is based, and must consider and include any material fact which could detract from his or her conclusion;

(c) state if a particular matter or issue falls outside his or her expertise;

(d) state if the opinion of an expert witness is not properly researched with an indication that the opinion is no more than a provisional one;

(e) state if the expert witness cannot assert that his or her report contains the truth, the whole truth and nothing but the truth without qualification and give that qualification; and

(f) communicate to all parties any change of opinion on a material matter after service of the expert's report.

An expert may apply to the court for directions to assist them in carrying out their functions (CPR rule 32.5). Further, the court may direct a meeting of experts instructed by the parties and specify the issues which the experts must discuss (CPR rule 32.15). Thereafter, expert witnesses must prepare for the court a statement setting out which issues they agree and which issues they disagree, with the reasons for disagreeing. The court may direct expert witnesses to prepare an agreed statement of the basic "science" which applies to matters relevant to their expertise. There is no provision in the CPR for what is colloquially known as "*hot tubbing*" experts – the process of calling expert witnesses to give evidence and be cross-examined concurrently.

9 Judgments & Orders

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

The court has the power to make summary and default judgments (see above).

The court's judgment can be for damages (e.g., lost contractual profits) or an order that a defaulting party perform their obligations under a contract (equitable remedy of specific performance). The BVI court also has the power to give declaratory relief.

A wide variety of orders may be made by the court in the BVI, including but not limited to:

(a) injunctions (both prohibitory and mandatory);

(b) consent orders (agreement between the parties as to the terms of the order); and

(c) Tomlin orders (a form of contractual consent order, the terms of which are set out in a schedule which remains confidential to the parties, save for enforcement in the event of breach).

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

The court may award damages for loss, including economic loss. As in most other common law jurisdictions, damages are generally aimed at compensating a victim rather than at punishing a wrongdoer. Where the loss suffered is negligible, nominal damages are normally awarded. Every judgment debt carries interest at a rate of 5% *per annum* from the time judgment is entered until it is satisfied (Section 7 Judgments Act Cap 35).

See above in relation to the powers of the court relating to costs.

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

The court has a wide armoury of powers which enable it to enforce local judgments. Writs of possession or execution are available, which enable the bailiff to be instructed to enforce against land, or against goods, as the case may be. Attachments of debts or charging orders are also available, as are oral examinations, which permit the debtor to be examined in relation to their assets. In addition, the judgment summons procedure remains in wide use.

However, the reality of international commercial practice is that it is very rare to see companies registered in the BVI ("BVICs") which are either controlled or have assets within the jurisdiction. Even where assets exist within the jurisdiction, they will commonly be limited to shareholdings in other BVICs. In such cases, a local judgment will enable the judgment creditor to take advantage of the provisions of Part 48 of the CPR. This provides the court with the power to grant charging orders (and associated stop notices). But it is more common to see creditors making an application to appoint a liquidator to the defaulting BVIC debtor.

It is open to a creditor to apply for the appointment of a liquidator to a defaulting debtor company where the debt is not the subject of a *bona fide* dispute on substantial grounds (*Sparkasse Bregenz Bank v Associated Capital Corporation* [2003] ECSC JO618–5). In any case where a judgment (local or foreign) has first been obtained, this is usually easily established. In addition, the debtor company must not have the benefit of a counterclaim which exceeds its own liability to the creditor or reduces it to below the statutory minimum of US$2,000 (Rule 149 of the Insolvency Rules, 2005).

Enforcement of foreign judgments

Attempts to enforce foreign judgments and to convert them into judgments of the BVI court have been relatively uncommon in the past. Where it is desired to do so, perhaps in order to obtain a charging order over shares or apply for a receiver to be appointed by way of equitable execution to recover a judgment debt, foreign judgments may be enforced in the BVI at common law, or in limited instances, by statute.

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The statutory machinery is to be found in:

(1) the Foreign Judgments (Reciprocal Enforcement) Act (Cap 27) 1964; and

(2) the Reciprocal Enforcement of Judgments Act (Cap 65) 1922.

The Foreign Judgments (Reciprocal Enforcement) Act (Cap 27) 1964

Section 3 of the Foreign Judgments (Reciprocal Enforcement) Act (Cap 27) 1964 provides that the Governor in Council may nominate the High Courts of jurisdictions in which he is satisfied that "*substantial reciprocity of treatment will be assured as respects the enforcement in that foreign country of judgments given in the High Court*". Certain jurisdictions have purportedly been designated, but some doubt exists as to whether or not the designation exercise was carried out effectively.

The Reciprocal Enforcement of Judgments Act (Cap 65) 1922

No such doubts exist in relation to the earlier Reciprocal Enforcement of Judgments Act (Cap 65) 1922. However, as originally enacted, it applied only to judgments given in the High Court of England and Wales, and Northern Ireland and the Court of Session in Scotland. It has since been extended to the Bahamas, Barbados, Belize, Bermuda, Trinidad & Tobago, Guyana, St Lucia, St Vincent, Grenada, Jamaica, Nigeria and New South Wales (Australia).

Section 3(1) provides that an application for registration may be made within 12 months of the date of the judgment and the court may make an order when it is just and convenient for it to do so. Section 3(2) of the Act excludes judgments: which were obtained by fraud (Section 3(2)(d)); where an appeal is pending or the time for appealing has not expired (Section 3(2)(e)); or it would be contrary to public policy to enforce the award. The BVI court would generally look to English decisions as to the types of conduct which may affront public policy, but as a matter of policy in the BVI, the courts will not enforce, directly or indirectly, foreign tax claims. In *JSC BTA Bank v Mukhtar Ablyazov* [2014], the Court of Appeal held that it was not open to a defendant to use the test of just and convenient in Section 3(1) to challenge the underlying processes of the English Court where the tests set out in Section 3(2) had been met. In that case, the defendant wished to challenge the validity of the English judgment on the basis that he had filed an appeal with the European Court of Human Rights ("ECHR"). The court rejected the defendant's argument that his appeal to the ECHR represented an appeal of the English judgments and, noting that the criteria in Section 3(2) had been met, held that the judge had been correct to refuse to consider the defendant's case pursuant to a separate consideration of Section 3(1).

Section 3(2)(a) of the Act excludes registration of judgments obtained where the original court lacked jurisdiction, or where:

(1) in the case of a judgment debtor present within that jurisdiction he was not served with the proceedings (Section 3(2)(c)); or

(2) in the case of a judgment debtor not ordinarily resident or carrying on business within the jurisdiction of the home court, he did not submit to the jurisdiction of the court.

This takes a narrow view of jurisdiction. Many common law jurisdictions will assert jurisdiction over parties not present within the jurisdiction on the discretionary grounds that they are "*necessary and proper*" parties to ongoing litigation within that jurisdiction; however, in the BVI this does not apply.

Where the Act does apply, it has the undoubted advantage of simplicity. All that is required before a judgment may be registered and enforced as if it were a judgment of the BVI court, and is an application under Part 72 of the CPR. The application may be made without notice, but must be supported by evidence. The application must contain certain prescribed information and must exhibit:

(1) a duly authenticated copy of the judgment; and

(2) details of any interest which has become due under the law of the country in which judgment has been entered.

The simplicity of the without notice application is to be contrasted with the common law route, which is to sue on the judgment itself. The result is much the same, but it can take longer.

Enforcement at common law

At common law, the courts in the BVI will treat any final and conclusive monetary judgment as being a cause of action in itself under the doctrine of obligation by action, irrespective of the jurisdiction in which the judgment was obtained. There is no requirement of reciprocity.

The judgment creditor must:

(1) prove the judgment; and

(2) show that it is a final and conclusive monetary judgment for a specified sum.

If those matters are established, a retrial of the issues in the action will not be necessary. The creditor may instead apply for summary judgment under Part 15 of the CPR.

However, since the judgment creditor is proceeding by way of a fresh action, he will only be able to proceed in the BVI if he is able to serve the proceedings upon the judgment debtor by a means permitted by Parts 5 and 7 of the CPR.

It will still be possible to defeat an application for summary judgment, or indeed an action founded upon a foreign judgment, even one which is conclusive and made in respect of a specific sum, if:

(1) the foreign court did not have jurisdiction in the matter (i.e., the judgment debtor either did not submit to the jurisdiction, or was resident or carrying on business within the jurisdiction and was not duly served with the process);

(2) the foreign judgment includes penalties, taxes, fines or similar fiscal or revenue obligations;

(3) the judgment was obtained by fraud;

(4) recognition or enforcement of the judgment in the BVI would be contrary to public policy; or

(5) the foreign proceedings were conducted in a manner which infringed the rules of natural justice.

The position is more complex in relation to foreign judgments which are not for a specified sum of money. In those circumstances, the common law doctrine will not strictly engage, but the creditor may instead seek to avoid a re-trial of the issues by relying upon the equitable principles of estoppel, in essence by arguing that it would be an abuse of the process of the court:

1. to re-litigate matters decided before a court of competent jurisdiction – even where the judgment of the foreign court cannot be enforced at common law, it may nevertheless be possible to argue that the losing party should not re-litigate those issues that were decided by the foreign judgment; and

2. to litigate matters in subsequent proceedings which ought to have been advanced in the original proceedings – as a rule, the courts will expect a party to advance all of his case at the same time, so as to prevent the other party being vexed twice by the same matter (see the rule in *Henderson v Henderson* 1843–60 All ER Rep 378).

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

Where an appeal may be made only with the leave of the High Court or the Court of Appeal, a party wishing to appeal must apply for leave within 14 days of the order against which leave to appeal is

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sought. Where an application for leave to appeal has been refused by the High Court, an application for leave may be made to the Court of Appeal within seven days of such refusal (CPR rule 62.2). An application for leave to appeal may be considered by a single Justice of Appeal, who may give leave without hearing the applicant. However, if the judge considering an application for permission to appeal is minded to refuse leave, he or she must direct: (a) that a hearing be fixed; and (b) whether that hearing is to be by a single judge or the Court (CPR rule 62.2).

An appeal is made in the case of an appeal from the High Court by filing a notice of appeal (CPR rule 62.3). The notice of appeal must be filed: (a) in the case of an interlocutory appeal where leave is not required within 21 days of the date the decision appealed against was made; (b) in an interlocutory appeal where leave is required, within 21 days of the date when such leave was granted; or (c) in the case of any other appeal, within 42 days of the date when judgment is delivered or the order is made, whichever is the earlier.

Appeals from the Court of Appeal lie with the Judicial Committee of the Privy Council (the Privy Council), which is located in the United Kingdom. Any such appeals are governed by the Judicial Committee (Appellate Jurisdiction) Rules 2009 ("PC Rules") and accompanying Practice Directions. In cases where permission to appeal is required, no appeal will be heard by the Privy Council unless permission has been granted by the Court of Appeal or the Privy Council (PC rule 10). An application to the Privy Council for permission to appeal must be filed within 56 days from the date of the order or decision of the Court of Appeal or the date when the Court of Appeal refused permission. The Privy Council will normally consider permission applications on paper but may direct an oral hearing (PC rules 15 and 16). Where the Privy Council grants permission to appeal an appellant must, within 14 days of the grant of permission, file a notice of an intention to proceed with the appeal in the appropriate form (PC rule 17). Where permission has been granted by the Court of Appeal, an appellant must file a notice of appeal within 56 days of the date of the order or the decision of the court below granting permission or final leave to appeal (PC rule 18). Readers are directed to the PC rules and practice directions which govern the content and numbers of copies of documents which must be filed.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

No, there are not.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

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

The most frequently encountered method of alternative dispute resolution in the BVI is arbitration. However, at present, parties normally conduct their arbitrations in other jurisdictions (such as the London Court of International Arbitration) and then seek to enforce the terms of the awards in the BVI. Until now, the BVI has rarely been the seat of arbitration hearings but this has been addressed by the establishment of the BVI International Arbitration Centre ("BVI IAC") and recent changes to the BVI legislation.

On 23 January 2014, the BVI passed the Arbitration Act 2013 which came into force on 1 October 2014. The 2013 Act repeals and replaces the previous 1976 Ordinance. The New York Convention was also extended to the BVI from 24 May 2014.

The 2013 Act seeks to address a number of difficulties in the previous law. The 1976 Ordinance was based on a mixture of older English statutes and was widely considered to be unsuitable to deal with modern commercial litigation. The 2013 Act introduces the UNCITRAL Model Law on arbitration (as amended on 7 July 2006) to the territory with some minor exceptions. In addition, the fact that the New York Convention had not previously been extended directly to the territory meant that BVI arbitral awards were largely unenforceable outside of the jurisdiction.

An important change is that the definition of a convention state is now wide enough to include the United Kingdom, which will permit enforcement of awards from, for example, the London Court of International Arbitration ("LCIA"), which had previously been excluded under the former legislation. The 2013 Act also includes provision for the enforcement of arbitral awards from non-convention states, which may be refused where it is just to do so.

The Courts of the Eastern Caribbean have long encouraged mediation and other forms of alternative dispute resolution. By rule 27.7 of the CPR the court may adjourn a case management conference to enable settlement discussions, or a form of ADR, procedure to continue.

A process of court connected mediation was instituted by Practice Direction 1 of 2003, which created, in each ECSC territory, a national mediation committee. The Practice Direction confers upon the court jurisdiction to refer a dispute to mediation, and provides that the parties "*will not be allowed to opt out of the referral order to mediation, except by order of the Master or Judge and upon adducing good and substantial reasons*".

The BVI now has a growing number of qualified mediators. However, their services are infrequently (if ever) used in international commercial litigation.

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

Please see the answer to question 1.1 above.

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

In the BVI, virtually all commercial matters are capable of being referred to arbitration or mediation. At present, however, very little ADR takes place within the jurisdiction.

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

Please see the answer to question 1.1 above.

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

An arbitral award is binding and final. Parties can only appeal on a point of law and will not be able to do so where the right to appeal is not expressly provided for in an arbitration agreement, as the 2013 Act does not automatically provide for such a right.

Settlement agreements which are reached through mediation are contracts and are, therefore, enforceable as such if the requirements for a valid contract are satisfied. Where the court orders mediation, there is a requirement for the mediator to lodge a certificate of non-compliance if a party to the claim fails to attend the mediation session, whether or not its legal practitioners attend. In such circumstances, costs penalties may apply.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

The BVI International Arbitration Centre is the main alternative dispute resolution institution.

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Scott is the Managing Partner and Head of Litigation of the British Virgin Islands office. He has considerable experience in areas such as shareholder disputes, insolvency, fraud and asset tracing, trust litigation, and corporate and commercial disputes generally. Prior to relocating to the BVI in 2008, Scott was a barrister at the Scottish Bar where he built up a sizeable and successful practice as a corporate and commercial litigator. Scott routinely works with large city law firms, financial institutions and corporate and commercial clients based throughout the world with respect to large multi-jurisdictional disputes and transactions. He has considerable courtroom experience matched with an acute commercial acumen.

Chambers Global has variously described Scott as being "very thorough and professional, and provides fantastic client care" (2013); that he has "extensive experience in insolvency and trust litigation" (2014); that he is "always on the ball, very thorough, very personable and very easy to work with" (2015); that he is an "experienced practitioner who is well regarded, with sources highlighting his combination of detailed legal knowledge and good commercial judgement" (2016); that he has a "wealth of BVI litigation experience" and is "very efficient and very commercial" (2017); and that he is a "very nice guy with a sensible head on his shoulders" (2018). Scott is also a Fellow of INSOL International, being the first BVI Practitioner to have successfully completed the INSOL Global Insolvency Practice Course.

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LXP LennoxPaton

Lennox Paton is a leading offshore commercial law firm with offices in the Bahamas, the British Virgin Islands, and London. It is widely recognised for its expertise, professionalism, responsiveness and commitment to excellence. We have a team of multi-faceted lawyers whose diverse backgrounds and talents contribute valuable knowledge, experience and creativity to the firm and its clients.

The firm's thorough knowledge of the business and legal environment enables it to attend professionally and effectively to its clients' affairs. Lawyers in the firm are frequent contributors to various professional journals, speakers at conferences and seminars, members of Government and industry appointed task forces, committees and statutory bodies and are published authors.

The firm represents numerous financial institutions, both domestic and international, which complements the firm's large and diversified private client practice.

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Chapter 8

Canada – Québec

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I. LITIGATION

1 Preliminaries

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

Québec differs from the other Canadian provinces in that it has a Civil Law system for private law matters. The *Civil Code of Québec* governs most areas of private law and the rules governing civil procedure are found in the *Québec Code of Civil Procedure*. The public law system is, like the rest of Canada, based on Common Law.

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

The Civil Court system in Québec is comprised of the Court of Québec, the Superior Court, the Québec Court of Appeal and several specialised administrative tribunals.

The Court of Québec is a Court of first instance for criminal, penal, civil and youth matters. The Court of Québec has exclusive jurisdiction on civil matters where the amount claimed is less than $85,000. Actions for less than $15,000 are submitted to the Small Claims Court division of the Court of Québec.

The Superior Court is vested with an inherent jurisdiction to hear all matters not specifically assigned to another Court or adjudicative body. It has exclusive jurisdiction over certain matters, such as injunctions and class actions.

The Québec Court of Appeal is the highest Court in Québec and has appellate jurisdiction over all appeals from the Superior Court or the Court of Québec.

Decisions from the Court of Appeal can be appealed to the Supreme Court of Canada, though leave to appeal is required in civil matters.

Specialised administrative tribunals have jurisdiction to hear cases on specific subject matters.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

Civil proceedings are instituted when a plaintiff submits an originating application and serves the opposing parties. The parties must then conclude a case protocol within 45 days of service, which sets out the procedural steps and schedule. The parties have six months from filing the case protocol to ready their case for trial, though this deadline can be extended with the Court's permission. For family matters, this delay is one year.

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

Québec Courts will give effect to exclusive jurisdiction clauses unless an exception is provided for in law. For example, Québec Courts will have jurisdiction to hear disputes over consumer contracts involving a consumer residing in Québec, notwithstanding any exclusive jurisdiction clause in the contract.

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

Each party pays its own costs, though orders for costs are possible, both at the interlocutory and trial stage. Costs orders typically do not include extrajudicial costs or fees such as attorneys' fees, unless an abuse of process can be proven.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

Contingency fee or conditional fee arrangements are permissible and common. They require the Court's approval in class actions.

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

The assignment of claims is allowed in certain circumstances. Judges, attorneys, notaries or officers of justice may never acquire litigious rights.

Non-party litigants may finance proceedings, except in certain circumstances (for instance, in alimony claims in family matters) that have been declared against public order.

1.8 Can a party obtain security for/a guarantee over its legal costs?

Plaintiffs not resident or not domiciled in Québec may be required,

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on the defendant's motion, to provide a suretyship as security for legal costs in the matter.

2 Before Commencing Proceedings

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

Before initiating a civil action, and absent urgent circumstances, a debtor should be placed in default by way of a formal demand letter requiring the debtor to execute its obligations and specifying a reasonable deadline for the same. Proceedings should only be commenced after this deadline.

In some cases, the debtor can be in default by the sole operation of the law, in which case a formal demand is not necessary.

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

Limitation periods, known as "prescription" periods, can range from:

- one year: action for defamation, application by a surviving spouse to set a compensatory allowance, action to retain or obtain possession of real estate;
- three years (general prescription period): action to enforce any personal or movable real right for which the prescription period is not otherwise established; and
- 10 years: action to enforce immovable real rights, and execution of a judgment.

The starting point of prescription varies depending on the type of action.

A time limit that would normally expire on a Saturday or a holiday is extended until the following working day.

The parties may agree to suspend prescription for a period of six months or less, and may waive the benefit of any time already passed.

Prescription is a substantive law issue.

3 Commencing Proceedings

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

Civil actions are commenced by filing an originating application with the Court office before service to the other parties.

An originating application is deemed served on the date a person acknowledges receipt of the document or admits having received it.

International service is made in accordance with the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*; or, if a State is not a member to said convention, notification is made in accordance with Québec law or the law of the place where the proceeding is being served.

Service by other means than by bailiff, known as notification, is allowed for other applications or motions.

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

Plaintiffs may, before judgment, apply for an order to seize the defendant's property, provided there is reason to fear that recovery of the debt may otherwise be put in jeopardy. They may do so without a Court order regarding property over which they have specific rights set out by law.

Interlocutory injunctions and safeguard orders may also be granted when the applicant appears to be entitled to it, and when it is considered necessary in order to avoid serious or irreparable injury to the applicant. The balance of convenience and the urgency of the situation are also considered. *Anton Piller*, *Mareva* and *Norwich*-type injunctions are available.

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

An originating application must state its nature and purpose, and the facts on which it is based, as well as the conclusions sought. It must also state the parties' names, their domicile or residence, and indicate, if applicable, the capacity in which they are parties (other than personally).

An originating application must include a summons to the defendant and a list of exhibits in support of the application.

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

At any time before judgment, a party may amend a pleading without Court authorisation, provided doing so does not delay the proceeding, is not contrary to the interests of justice, does not result in an entirely new application having no connection with the original one and does not retract a judicial admission.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

A party may withdraw its pleadings at any time before judgment without Court authorisation, provided doing so does not delay the proceeding and is not contrary to the interests of justice. There are no consequences for withdrawing a pleading, so long as the party follows the prescribed procedure.

Plaintiffs may also discontinue an action. However, in that case, the legal costs are borne by the plaintiff, subject to an agreement between the parties or a decision of the Court.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

All defences are oral, unless the Court authorises a written defence. This is granted when the case presents a high level of complexity or other special circumstances.

A defence must contain all the grounds of law or fact, including any conclusions, that argue against granting in whole or in part the conclusions sought in the application.

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Defendants may bring counterclaims and raise any applicable set-off ("compensation" in Civil Law).

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

The defendant must notify and file an answer to the plaintiff's summons within 15 days.

The deadline for the notification and filing of the statement of defence is as agreed in the case protocol.

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

Defendants can implead third parties by serving a declaration of intervention setting out the grounds justifying the same.

Defendants intending to exercise a recourse against third parties may call them in warranty.

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

On application by the plaintiffs(s), the Court may issue a default judgment, including legal costs, against any defendant that fails to answer a summons or does not defend on the merits.

4.5 Can the defendant dispute the court's jurisdiction?

As a preliminary measure, defendants can dispute the Court's jurisdiction and ask that the case be referred to another jurisdiction (within the Québec judicial system only) or, failing that, that the action against them be dismissed.

5 Joinder & Consolidation

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

Provided that the conclusions sought are compatible, two or more subject matters or claims may be joined in one proceeding.

Two or more plaintiffs may join their claims and conclusions when their claims have the same juridical basis, are grounded on the same facts or raise the same points of law, or if circumstances permit.

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

Courts may order that two or more proceedings before the same Court between the same parties be consolidated, provided this does not result in undue delay or serious prejudice. This may occur even where the applications do not arise from the same source.

Courts may order the consolidation of two or more proceedings or of the evidence in two or more distinct proceedings.

5.3 Do you have split trials/bifurcation of proceedings?

The Court may split a proceeding if it deems it advisable in order to protect the parties' rights. The resulting applications are tried before the same judge, unless the chief justice decides otherwise.

For applications which have already been joined, a Court may order that they be separated and dealt with in different proceedings if it considers the splitting would better protect the parties' rights.

As part of its case management mandate, the Court may also hold trials on specific aspects of any one given proceeding. For example, in some cases, the issue of liability can be split from the issue of damages.

6 Duties & Powers of the Courts

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

There are case allocation systems for family and commercial matters, as well as for class actions.

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

The *Civil Code of Procedure* stipulates that the mission of the Court includes ensuring proper case management in keeping with the principles and objectives of procedure, such as proportionality. Judges must ensure that the measures and acts they order or authorise are proportionate, while having regard to the proper administration of justice.

Judges (as well as parties) have the power to convene case management conferences.

Interim applications can be made and are generally set out in the case protocol.

The same rules for costs on the merits apply to the costs for preliminary measures; i.e., the Courts have discretionary power to award costs.

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

Disobeying a Court order can lead to contempt of Court, including:

(1) payment of a punitive amount not exceeding $10,000 for contempt committed by a natural person, or $100,000 for contempt committed by a legal person or a group not endowed with juridical personality, in which case the judgment is executed in accordance with the Code of Penal Procedure; and

(2) performance, by the person or the person's officers, of compensatory community work, the nature, terms and duration of which are determined by the Court.

If the person refuses to comply with a Court order or an injunction, in addition to the sanction imposed, the Court may order imprisonment for the term it specifies, which may not exceed one year.

Other consequences of disobeying a Court direction can include the striking of pleadings and default judgment.

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

The Courts may strike immaterial allegations and abusive or illegal conclusions from any pleadings, but only upon application by a party. The Court may also similarly dismiss an action or counterclaim entirely. This may be done at a preliminary stage or after depositions, depending when the abusive nature of all or part of the pleading in question becomes apparent.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

Québec civil procedure does not provide for summary judgment. There is, however, a means of disposing of abusive claims summarily. While this procedure has been likened to summary judgments, it has a more narrow scope and dismissal can only be ordered in the clearest of cases.

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

Courts may stay proceedings in a variety of circumstances: as a conservatory measure, to conduct a settlement discussion, or when another pending case (on a related point) should be heard first. Any stay may be lifted, on application, if the grounds for the stay no longer exist.

Proceedings can be discontinued, on application of the plaintiff, though any cross-claim filed will continue.

Courts cannot discontinue an action on their own initiative.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

All exhibits to which a party intends to refer at the hearing must be listed and communicated to all parties. Documents that a party does not intend to use at trial need not be disclosed to the adverse party unless requested during discovery. The procedure and the time limits for communicating exhibits are determined by the parties in the case protocol.

The parties and their attorneys have the right to conduct oral or written examinations on discovery of the adverse parties, their representatives or any other person. The consent of the other parties or a Court order may be necessary in some cases.

Before or during the examination, the attorneys may ask for the communication of relevant documents relating to the issues at hand.

A person who expects to become a party to a dispute and has reason to apprehend that some necessary evidence might be lost or become difficult to produce may examine witnesses with the consent of the witnesses or a Court order.

There are no special rules regarding e-discovery, though it is encouraged by the Courts and the Bar.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

Solicitor-client privilege, known as professional secrecy, is protected by the *Québec Charter of Human Rights and Freedoms*. This privilege may be invoked by any person (or their attorney) as grounds for refusing to communicate documents or answering questions under oath. Other types of privileges include litigation privilege, settlement privilege as well as parliamentary or spousal privilege. It is possible for parties as well as their lawyers to revoke a privilege.

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

A third party in possession of a document or real evidence relating to a dispute can be required, on request of a party, to disclose it, present it to the parties, submit it to an expert or preserve it.

Third parties may be examined during pre-trial discovery with their consent or with the permission of the Court.

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

The parties set out the procedures as well as the timeline for the various steps during disclosure in the case protocol, which must be accepted by the Court. The Court's assistance is sought for ancillary such as compelling communication of documents or testimony, ruling on objections, extending or prolonging a deposition or ending any abusive deposition or document request.

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

There is an implicit undertaking of confidentiality in relation to all testimony and documents gathered during disclosure.

Parties may produce documents they received during disclosure into the Court record, after which they are no longer confidential.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

The rules of evidence are contained in the *Civil Code of Procedure* and the *Civil Code of Québec*. Certain rules relating to the admissibility of evidence are not codified in law and are instead found in jurisprudence.

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

At trial, oral and documentary evidence of fact is admissible. Only experts may testify as to their opinion, after having filed an expert report.

Evidence obtained under circumstances where fundamental rights and freedoms were violated is inadmissible, as is evidence that would tend to bring the administration of justice into disrepute.

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

At trial, Ordinary witnesses provide oral testimony at trial. However, a written statement may be accepted as testimony by the Courts, subject to certain conditions and the right to cross-examination.

Witnesses of fact can testify to facts of which they have personal knowledge; hearsay is therefore inadmissible in most instances.

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

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

The *Code of Civil Procedure* creates a presumption in favour of joint expert evidence. If the parties fail to agree on joint expert evidence, the Court will assess the merits of their reasons and impose joint expert evidence if it is necessary to do so to uphold the principle of proportionality without, however, jeopardising the parties' right to assert their contentions. In practice, however, joint experts remain rare.

The mission of all experts, regardless of whether they are Court-appointed or retained by a single party or both, is to enlighten the Court.

9 Judgments & Orders

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

Courts can order specific performance and monetary awards (including compensatory and punitive damages), and make appropriate orders in cases for which there is no specific remedy provided by law. Unlike in common law jurisdictions, specific performance is the primary remedy under civil law, and the Court may issue mandatory orders, injunctions or reprimands.

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

In general, monetary awards bear interest from the date of default of the debtor. Interest may be charged at the rate stipulated in a contract or, if no rate is stipulated, at the legal rate together with an additional indemnity.

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

Parties seeking the enforcement and recognition of a foreign judgment must apply to a Court for recognition ("homologation"). A Court will then verify whether the decision meets the requirements prescribed in the *Civil Code of Québec*, without examining the merits of the decision. A foreign judgment will be recognised, except in certain circumstances.

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

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

Leave to appeal will be required in certain circumstances.

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

An interlocutory order may be appealed with leave when it decides in part the merits of the case, or orders an action that cannot be remedied by the final judgment, or when it unnecessarily delays the trial.

However, an appeal from an interlocutory judgment dismissing an objection to evidence based on disclosure of privileged information is appealable as of right.

Judgments of the Court of Appeal in civil matters may be reviewed by the Supreme Court of Canada, but only with leave to appeal, which requires a question or issue of public importance.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

Parties must file a case protocol for every action, which is subject to Court approval. In the case protocol, parties must indicate any consideration given to private dispute prevention and resolution processes (e.g. arbitration, mediation, or negotiation) before referring their dispute to the Courts.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

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

The most frequently used methods of alternative dispute resolution are mediation, negotiation, and arbitration. Expert determination is available but, unlike mediation and arbitration, is not governed by the *Code of Civil Procedure*.

The Québec Ombudsman is an impartial and independent ombudsman who handles complaints regarding public services.

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

The arbitration agreement or the arbitral tribunal determines the applicable procedure to be followed in arbitration, failing which the *Code of Civil Procedure* provides for the basic procedure.

Mediation is governed by the rules in the *Code of Civil Procedure*.

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

Disputes relating to the status and capacity of persons, family law or other matters of public order may not be submitted to arbitration.

Arbitration clauses in consumer contracts are prohibited.

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

Subject to the terms of the arbitration agreement, the arbitrators have all the necessary powers for the exercise of their jurisdiction, including the power to render safeguard measures. This can include injunctions and seizures before judgment, though certain injunctions, including those affecting third parties, can only be rendered by the Superior Court.

The Superior Court has exclusive jurisdiction to issue *Anton Piller*, *Mareva* and *Norwich*-type orders, as well as to appoint judicial receivers.

On a party's application, the Court must apply an arbitration agreement and refer the parties to arbitration, unless it finds the arbitration agreement to be null.

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

Arbitral awards are binding and enforceable by Civil Courts through the homologation of the award. An arbitral award may not be appealed but may be challenged by applying for its annulment. A Court may only refuse homologation or annul an award in specific circumstances enumerated in the Civil Code of Procedure. No review of the merits of the decision is allowed.

A party may withdraw from or put an end to mediation at any time at its own discretion. Any settlement agreement reached through mediation does not need to be sanctioned by the Court but may be homologated to be enforced as a judgment.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

The *Institut de médiation et d'arbitrage du Québec* (IMAQ) is Québec's principal association and accreditation body of mediators and arbiters.

The ICC International Court of Arbitration is often used for international arbitration, as the ICC Arbitration Rules are well-known and understood amongst practitioners.

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The authors would like to thank Annike Flomen for her assistance in the preparation of this chapter. Annike joined the firm as a first year associate in 2017 after having completed her articling at Woods. Annike has both her common law and civil law degrees from McGill University.

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Canada – Excluding Québec

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I. LITIGATION

1 Preliminaries

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

The law in every province and territory except Québec is based on the common law system. Québec has a civil law system, as codified in the *Civil Code of Québec*. Public law in all provinces and territories is based on the common law.

The discussion below relates only to Canadian common law jurisdictions. Where these differ, the focus here is on Ontario, as it is the jurisdiction in which the authors primarily practise.

Each province and territory has its own set of rules governing civil procedure. In Ontario, for instance, civil procedure is governed by the *Rules of Civil Procedure* (the "Ontario Rules").

While the Ontario Rules are, in general, representative of the civil procedure rules in other provinces, litigants must be guided by the civil procedure rules of the province in which they are litigating.

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

Each province and territory has its own system of courts. Claims below a certain amount ($25,000 in Ontario) may be brought in Small Claims Court. Larger civil claims must be brought in Superior Court (in Ontario) or its provincial equivalent.

Appeals from Superior Courts are generally brought to intermediate appellate courts, known in most provinces as the Court of Appeal. Further appeal lies to the Supreme Court of Canada (the "SCC"). Leave to appeal to the SCC is required for all civil matters.

Canada has a parallel system of federal courts. The Federal Court has exclusive or concurrent jurisdiction over cases involving intellectual property, aboriginal law, maritime law, federal administrative law and claims by or against the federal government, while the Tax Court of Canada has jurisdiction over taxation matters. Appeals from both courts go to the Federal Court of Appeal, and then to the SCC in the event that leave is granted.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

The main stages of an action are:

- issuance of a statement of claim;
- delivery of a statement of defence;
- discovery of documents;
- oral examinations for discovery;
- setting down for trial;
- pre-trial conference; and
- trial.

In some jurisdictions, including parts of Ontario, mediation is a mandatory step for certain cases.

The deadlines for each of these steps vary by jurisdiction and the timeline will vary based on the complexity of the case.

Additionally, Ontario Rule 20.05 allows judges to order that an action proceed to what the Ontario Court of Appeal has called a "hybrid trial". In particular, where the court refuses a motion for summary judgment or grants it only in part (thus necessitating a trial), the judge may specify the material facts not in dispute, define the issues to be tried, and order that the action proceed to trial expeditiously. In addition, the court can demand that motions, discovery, and the submission of supporting materials occur expeditiously.

Ontario Rule 76 provides for simplified proceedings for certain actions. The rule is mandatory for all actions for money or property of $100,000 or less, although a party may choose to proceed under the simplified procedure for actions above that amount subject to certain rules. Introduced to reduce the costs of litigation, Ontario Rule 76 includes, among other things: limits on discovery; a choice between a summary trial and an ordinary trial; and simplified motions.

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

The SCC has held that forum selection clauses should be enforced unless there is a "strong reason" why enforcing the clause would be unreasonable or unjust. Recently, however, the SCC has demonstrated reluctance to uphold forum selection clauses in consumer or "click-through" contracts that may result in a significant disadvantage to consumers, particularly when constitutional or quasi-constitutional rights (such as privacy) are at stake.

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It is generally more difficult to get an anti-suit injunction from a Canadian court than to have domestic proceedings stayed in favour of another jurisdiction.

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

The cost of litigation in Canada varies depending on the complexity of the case.

The general rule is that the loser pays a portion of the winner's reasonable costs. In most cases, this amounts to "partial indemnity" (also known as "party-and-party") costs, which in Ontario usually amounts to approximately 25 to 50 per cent of the winner's actual legal fees. Where the losing party behaved unreasonably or acted in bad faith, the winner may be entitled to an increased measure of costs, known as "substantial indemnity" or "solicitor-client" costs.

Costs are discretionary, and a judge has the power to order that no costs be awarded where appropriate. A judge may even order that the winner pay the loser's costs.

Settlement offers may also play a role in costs awards. For example, in Ontario, where a plaintiff makes a settlement offer in accordance with Ontario Rule 49 and the judgment is as or more favourable to the plaintiff than the offer to settle, the defendant must pay substantial indemnity costs from the date of the offer.

There are no rules on costs budgeting.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

Contingency fees are permitted in Canada. They are common in certain types of litigation, including personal injury and class actions. There are exceptions to this, however. In Ontario, for instance, contingency fees are not allowed for criminal or family law matters.

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

As a general rule, a party is permitted to assign a cause of action. There are a number of exceptions to this, however, which are grounded in public policy.

Canadian courts maintain the common law prohibition against champerty and maintenance. While this no longer prohibits contingency fee agreements, it may limit other forms of third party litigation funding. Third party litigation funding does exist in Canada, but it is currently still in its infancy.

1.8 Can a party obtain security for/a guarantee over its legal costs?

Security for costs is available in Canada. In Ontario, it is governed by Ontario Rule 56.01, and is available where:

- the plaintiff is ordinarily resident outside Ontario;
- the plaintiff has brought another proceeding in Ontario or elsewhere seeking the same relief;
- the defendant has an outstanding unpaid costs order against the plaintiff;
- the plaintiff is a corporation and lacks sufficient assets in Ontario to pay the defendant's costs;
- the action is frivolous and vexatious and the plaintiff lacks sufficient assets in Ontario to pay the defendant's costs; or
- a statute entitles the defendant to security for costs.

Security for costs remains a discretionary matter for the judge, and courts may be reluctant to order security for costs against an impecunious plaintiff.

2 Before Commencing Proceedings

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

For the most part, there are no formalities required before initiating proceedings. However, formalities may be required by contract or under certain specific statutory regimes.

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

Each province and territory has its own limitation laws. In Ontario, the *Limitations Act, 2002* establishes a two-year limitation period for most claims. This period runs from the earlier of the day on which the claim became known to the plaintiff, and the day on which it was objectively discoverable. However, the claim generally must be brought within 15 years of the date the underlying event or omission occurred, regardless of discoverability or absent limited circumstances such as wilful concealment by the potential defendant.

Some legislation creates different limitation periods governing specific types of claims.

Judges in Ontario have no jurisdiction to waive or extend a limitation period, although in certain circumstances the period may be suspended or extended by contract.

The SCC has determined that limitation periods are substantive law. This has been codified by statute in certain provinces, including Ontario.

3 Commencing Proceedings

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

An action is generally commenced by issuing a statement of claim. However, where there is insufficient time to prepare a statement of claim, an Ontario plaintiff may commence an action by filing a notice of action (a shorter document), to be followed shortly by a statement of claim.

Under the Ontario Rules, a statement of claim may be served personally, or through a recognised alternative to personal service. This is generally done either by leaving a copy with an individual defendant, with an officer, director or agent of a corporation, or with the defendant's lawyer. The court may make an order for substituted

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service or dispense with service altogether where it is impractical for any reason to effect service. There are various rules that govern the deemed date of service.

In situations where Ontario courts presumptively have jurisdiction, a statement of claim may be served outside of the province by right. In all other cases, leave of the court is required.

Service outside Ontario may be effected by: (a) serving the central authority of a contracting state under the Hague Convention; (b) serving the statement of claim in the same manner as prescribed in Ontario; or (c) serving in a manner provided for by the rules of the jurisdiction, as long as it could reasonably be expected to come to the attention of the person being served.

The preferred method for serving a foreign claim in Canada is on the defendant's lawyer, if the lawyer agrees to accept service.

In certain circumstances, a civil proceeding may also be brought by way of application, which is a more summary procedure. An application is commenced by a notice of application, which must be served in the same way as a statement of claim.

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

A motion for pre-action interim relief may be brought in an urgent case. The moving party must undertake to commence proceedings forthwith: Ontario Rule 37.17.

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

The statement of claim must contain "a concise statement of the material facts" on which the plaintiff relies: Ontario Rule 25.06(1). The plaintiff should identify the cause of action on which they rely, and must plead facts that, if true, would establish every element of that cause of action. It should also identify the relief sought.

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

Pleadings can be amended without leave of the court up until the "close of pleadings": Ontario Rule 26.02(a). Pleadings are closed when the plaintiff has delivered a reply to every defence in the action, or the time for delivery of a reply has expired and every defendant who is in default in delivering a defence in the action has been noted in default.

After that, consent or leave of the court is required. However, leave must be granted unless the amendments would cause prejudice to the other side that cannot be compensated for with an adjournment or costs: Ontario Rule 26.01.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

A plaintiff may discontinue all or part of an action before the close of pleadings by filing a notice of discontinuance and by serving it on all parties who were served with the statement of claim. After the close of pleadings, leave of the court is required. However, an action can be discontinued at any time with the consent of all parties: Ontario Rule 23.01(1). Notwithstanding a plaintiff discontinuing the claim, a defendant may continue with any counter- or cross-claim: Ontario Rules 23.02 and 23.03.

A defendant may withdraw all or part of the statement of defence at any time by delivering a notice to all parties. If the whole of the statement of defence is withdrawn, the defendant will be noted in default: Ontario Rule 23.06.

A party who discontinues a claim is not precluded from starting the same or similar claim at a future time, but may be held liable for the costs of the discontinued action: Ontario Rule: 23.05. Similarly, a defendant cannot rely on the plaintiff's discontinued claim as a defence to a subsequent action, unless the order giving leave to discontinue or a consent filed by the parties provides otherwise: Ontario Rule 23.04.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

A statement of defence must conform to the rules described above for statements of claim. It must also specify which allegations are admitted or denied by the defendant and which allegations the defendant has no knowledge of. It should include any different version of facts and affirmative defences upon which the defendant intends to rely: Ontario Rule 25.07.

Yes, the defendant may bring a counterclaim if they wish, but must do so in the same document as the statement of defence: Ontario Rule 27.02. The defendant may also advance a defence of set-off.

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

The timelines depend on where the statement of claim was served. In Ontario, a statement of defence must be filed and served within 20 days of the service of the statement of claim if the defendant was served with the claim in Ontario. A defendant served elsewhere in Canada or in the United States must respond within 40 days, and a defendant served outside Canada or the United States must respond within 60 days: Ontario Rule 18.01. Each of these deadlines can be extended by 10 days unilaterally by serving and filing a notice of intent to defend, or further by agreement.

A defendant who misses these deadlines may still file a statement of defence unless they have been noted in default: Ontario Rule 19.01(5).

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

The Ontario Rules and those in other jurisdictions permit a defendant to bring a third party claim, so long as it arises out of facts related to the initial claim.

A third party claim is commenced by originating process in the same manner as a statement of claim, and must be responded to by a third party defence. In Ontario, a third party claim must generally be issued within 10 days after the defendant delivers a statement of defence or after the plaintiff delivers a reply. Such a claim may not be issued after the defendant is noted in default. However, a third party claim may be issued at any time with the plaintiff's consent or with leave of the court, which the court shall grant unless the plaintiff would be prejudiced: Ontario Rule 29.02.

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

If the defendant does not defend the claim, the plaintiff may note the defendant in default and obtain default judgment against the defendant without a trial: Ontario Rule 19.

The court may set aside a noting in default or default judgment on such terms as are just.

4.5 Can the defendant dispute the court's jurisdiction?

A defendant can dispute the court's jurisdiction by arguing that:

- extra-provincial service was not authorised by the applicable rules;
- an order granting leave for extra-provincial service should be set aside; or
- the court does not have jurisdiction *simpliciter* over the claim, or the court is not a convenient forum for the proceeding.

In Ontario and most other jurisdictions, these arguments should be raised before the defendant has filed a notice of appearance, notice of intent to defend, or statement of defence. Filing any pleading in an action may constitute attornment.

5 Joinder & Consolidation

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

Multiple plaintiffs or defendants may be joined in a single proceeding where the claims to relief arise out of the same transaction or occurrence, or series of transactions or occurrences, where a common question of fact or law may arise, or where joinder would promote the convenient administration of justice for some other reason: Ontario Rule 5.02.

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

Where two or more proceedings before the court pose common questions of fact or law or seek relief arising out of the same facts, the court may order that:

- the proceedings be consolidated;
- the proceedings be heard at the same time;
- the proceedings be heard consecutively;
- any of the proceedings be stayed until another proceeding is determined; or
- any of the proceedings be asserted by way of counterclaim in another proceeding: Ontario Rule 6.01.

5.3 Do you have split trials/bifurcation of proceedings?

Canadian courts have the inherent jurisdiction to bifurcate proceedings. However, this is the exception rather than the rule, and courts will only exercise their jurisdiction in clear cases.

6 Duties & Powers of the Courts

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

There is no general case allocation system in Canadian courts. There are local exceptions to this, however. In Toronto, for instance, the Commercial List is staffed by judges with experience in managing complex commercial litigation.

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

Case management is available in some jurisdictions. Where a case is assigned to case management, the court has extensive powers to supervise and control the progress of litigation. A judge or case management master may establish a timetable governing the progress of a case.

Parties may make a wide range of interim applications ("motions"), including:

- interim or interlocutory injunctions, including *Mareva* injunctions (freezing orders) and *Anton Piller* orders (search orders);
- motions for particulars;
- motions for security for costs;
- motions relating to the amendment of pleadings;
- motions to strike pleadings;
- motions to compel the production of documents or responses to questions in examinations for discovery; and
- motions for summary judgment.

As noted above, cost consequences are a discretionary matter for the judge or master hearing a motion. However, costs will usually be awarded to the successful party on a motion.

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

The primary and most common sanction is an adverse costs award. As noted above, courts can order that a party bear a higher-than-usual proportion of the other side's costs where that party is deemed to have acted unreasonably or in bad faith.

In extreme cases of a clear breach of a court order, the court has the power to hold a non-compliant party in contempt of court.

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

Canadian courts have the power to strike out all or part of a statement of claim for failure to disclose a reasonable cause of action, even where all pleaded facts are assumed to be true, or where the action is an abuse of process, is scandalous, frivolous or vexatious, or may prejudice or delay the fair trial of the action. This can occur before trial on a motion by one of the parties or at the initiative of the court: Ontario Rules 21.01 and 25.11.

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6.5 Can the civil courts in your jurisdiction enter summary judgment?

Canadian courts have the power to issue summary judgment in favour of any party, in whole or in part, without trial. This power is generally exercised when the court concludes that a trial would be unnecessary, or where no facts are in dispute.

Certain jurisdictions, including Ontario, have recently liberalised the rules governing summary judgment. Summary judgment is available "when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result": *Hryniak v. Mauldin*, 2014 SCC 7. See also Ontario Rule 20.

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

A court may stay a proceeding on such terms as it considers just. Specific examples of when the court may stay or dismiss an action include:

- the court has no jurisdiction over the subject matter of the action;
- the plaintiff lacks legal capacity to bring the action, or the defendant lacks legal capacity to be sued;
- the action is duplicative of other proceedings; or
- the action is frivolous, vexatious, or an abuse of process.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

Documents, including electronic documents, relevant to any matter in issue that are or have been in the possession, control, or power of either party must be disclosed.

Each party must provide all other parties with a sworn affidavit of documents listing all relevant documents, documents not produced on the basis of a privilege claim and documents that it no longer has in its possession.

Where it is necessary to obtain information before commencing an action, a "Norwich" order may be obtained to require a non-party to disclose information in its possession.

A party may request to inspect any or all non-privileged documents in the possession, control or power of another party.

The Sedona Canada Principles Addressing Electronic Discovery provide guidance specific to the disclosure of electronic documents. Among other things, these principles encourage proportionality in the discovery process and ongoing communication between the parties to facilitate the most reasonable and efficient process for preserving and sharing documents.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

There are three main types of privilege:

- solicitor-client privilege protects confidential communications between a lawyer and client relating to the seeking, formulating or giving of legal advice;
- litigation privilege protects all information created or communicated with the dominant purpose of responding to litigation, whether it has been commenced or only contemplated; and
- settlement privilege protects statements made in a good faith effort to reach a settlement or compromise of a dispute.

Solicitor-client privilege can apply to advice given by in-house counsel, so long as it constitutes legal and not business advice.

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

The party seeking disclosure by a non-party must bring a motion before the court. The test is whether the document is relevant to a material issue in the action, and whether it would be unfair to require the moving party to proceed to trial without the disclosure: Ontario Rule 30.10.

A non-party from whom disclosure is sought has the right to appear and object to the production.

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

Courts are generally not directly involved in discovery or disclosure unless a dispute arises. Where there is a dispute, courts have the jurisdiction to order the production of documents or to compel answers to questions asked in examinations for discovery, and to sanction parties with costs. In extreme cases, courts can dismiss a claim or strike a statement of defence for failure to comply with certain discovery obligations.

In Ontario, where parties fail to agree on a discovery plan, one can be imposed by the courts. Where a case is assigned to case management, courts play a more active role supervising discovery and setting a timetable.

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

At common law and under the civil procedure rules of most provinces and territories, there is a "deemed undertaking" that a party receiving documents or information from the discovery process may not use that information outside the litigation for which the documents or information were produced.

Exceptions to this rule include:

- use to which the disclosing party consents;
- use of evidence which is filed in court; and
- the party receiving the evidence can use it to impeach the testimony of a witness in another proceeding.

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8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

Each jurisdiction in Canada has an *Evidence Act*, which supplements the common law.

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

Relevant fact evidence is generally admissible, as long as its probative value outweighs its prejudicial effects. The main exception is the rule that hearsay is generally not admissible, unless the court is satisfied that it is reliable and necessary.

Expert opinion evidence is admissible if the court is satisfied that:

- the expert is qualified and independent;
- the evidence is relevant and necessary; and
- there is no other applicable exclusionary rule.

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

At trial, a party may call any fact witness whose evidence is admissible. If necessary, a party may compel a witness's attendance through a summons.

A party may conduct an oral examination for discovery of any party adverse in interest. A corporation may produce any officer, director or employee for examination, but the court has the power to order the examination of a particular corporate representative. Only one representative from a corporation may be examined without leave of the court. Leave of the court is also necessary to examine a non-party for discovery.

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

Expert evidence is permissible if the expert is qualified and the evidence is relevant and necessary, and not barred by any exclusionary rule. Although generally appointed by the parties, some jurisdictions, including Ontario, permit court-appointed experts.

Each jurisdiction imposes timelines on the serving of expert reports. In Ontario, expert reports must be served at least 90 days before the pre-trial conference, while responding expert reports must be served 60 days before the pre-trial conference: Ontario Rule 53.03. No more than three expert witnesses can be called by each side without leave of the court.

Regarding concurrent expert evidence, if an action proceeds to trial, the court may order that experts engaged by the parties meet to identify issues on which they agree and do not agree: Ontario Rule 20.05(2)(k). Concurrent expert evidence is not seen frequently in Canada.

Experts, whether appointed by the parties or by the court, owe their duties to the court. Expert opinion must be objective, unbiased and the independent product of the expert uninfluenced by counsel. Experts must provide evidence that is related only to matters that are within their area of expertise: Ontario Rule 4.1.

9 Judgments & Orders

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

Canadian courts have the power to make a wide variety of judgments and orders in law or equity.

Upon default judgment, summary judgment or after a trial, the court can grant judgment for monetary damages, specific performance, and/or injunctive or declaratory relief.

Courts also have broad discretion to issue a wide range of preliminary and/or procedural orders, depending on the circumstances, including orders:

- permitting amendments to a pleading;
- striking a pleading;
- staying or dismissing an action;
- requiring a party to post security for costs;
- compelling compliance with discovery obligations;
- relating to case management and scheduling;
- granting an interim or interlocutory injunction;
- relating to the structure and conduct of a trial;
- relating to the admissibility of evidence at trial; and
- enforcing a judgment.

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

Courts have broad powers to award damages, including:

- general damages;
- special damages for specific losses capable of precise calculation;
- prospective damages for losses not yet suffered;
- aggravated damages for mental distress; and
- punitive damages in exceptional cases where a party's conduct offends the court's sense of decency.

As noted above, costs are a matter for the discretion of the court.

Courts also have the power to order both pre-judgment and post-judgment interest on both a damages award and costs. Though an interest rate is prescribed by legislation, courts have the power to disallow or vary interest.

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

A domestic judgment can be enforced by getting a writ of seizure and sale, a garnishment order or a writ of sequestration. A creditor may conduct an examination in aid of execution (known as a "judgment debtor examination") to identify and locate a debtor's assets.

A party seeking to enforce a foreign judgment must commence proceedings in domestic courts. A Canadian court will usually recognise and enforce the decision of a foreign court as long as that court had a "real and substantial connection" to the dispute and the foreign order is not offensive to Canadian public policy.

In Ontario, the *Reciprocal Enforcement of Judgments Act* allows a judgment from any other province or territory (except Québec) to be enforced in the same manner as an Ontario judgment simply by registering it with the Ontario Superior Court of Justice.

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

A judgment or final order in Superior Court (as opposed to in Small Claims Court) can generally be appealed as of right to the appropriate Court of Appeal. In Ontario, the system is complicated slightly by the fact that certain judgments, including those under $50,000, are instead appealed to an intermediate court called the Divisional Court, which is itself a branch of the Ontario Superior Court of Justice.

Decisions of Courts of Appeal may be appealed, with leave, to the SCC.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

To promote settlement, statements made in a good faith effort to reach a settlement or compromise of a dispute are considered privileged. Such privilege allows parties to have open discussions, which are more likely to result in a settlement, without having their admissions used against them in court.

In some jurisdictions, including Ontario, pre-trial settlement conferences are mandatory. These conferences provide parties with an opportunity to discuss the issues in the action with a judicial officer with the goal of reaching a settlement without having to go to trial.

Finally, as noted above in question 1.5, settlement offers may also play a role in costs awards, giving parties an incentive to settle.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

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

The primary methods of alternative dispute resolution used in Canada are arbitration and mediation.

There is a strong presumption in favour of courts enforcing arbitration clauses. Where a valid arbitration clause exists, a court will stay judicial proceedings seeking to circumvent arbitration. Unless an arbitration agreement provides otherwise, Canadian arbitrators have the power to rule on their own jurisdiction. The parties, in conjunction with the arbitrator, have broad discretion as to how an arbitration will be conducted.

Mediation is also common in Canada. Many court systems offer mediation services. In some jurisdictions, including parts of Ontario, mediation is mandatory for certain cases.

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

Like the courts, arbitration is regulated by provincial and territorial legislation, with a separate system in place for matters within the federal jurisdiction (such as maritime disputes). Some provinces, including Ontario, have separate legislation dealing with international arbitration.

Ontario also has legislation regulating mediation, based on the United National Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation.

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

Although criminal matters are not arbitrable in Canada, courts are otherwise very reluctant to interfere with parties' autonomy to choose arbitration. In certain areas of law, for example consumer protection, statutes may invalidate clauses that purport to restrict access to the courts.

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

Canadian arbitration legislation gives arbitrators and courts concurrent jurisdiction over interim measures, unless the arbitration clause provides differently. There is some dispute over how this power should be exercised by courts. Some courts will grant relief if the usual test for such relief is met, regardless of the arbitration clause. Other courts, however, will refuse to grant relief unless the moving party can demonstrate that the arbitral tribunal is unable to grant the relief sought.

Arbitral tribunals in Canada lack the jurisdiction to grant interlocutory relief binding third parties, such as *Mareva* injunctions, so these remedies must always be sought from the courts.

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

The rules with respect to appeals differ across the provinces. Appeal rights may also be supplemented or (in some provinces) eliminated by the consent of the parties.

In Ontario, appeals from arbitration awards may be brought to the Superior Court of Justice. Unless the parties agree otherwise, however, appeals may only be brought on questions of law, and leave of the court is required.

Regardless of appeal rights, in most provinces a court has the jurisdiction to set aside an arbitral award on a number of grounds, including an invalid arbitration agreement, an award outside of the jurisdiction of the arbitrator, an improperly composed arbitral

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tribunal, manifestly unfair or unequal treatment of a party, a reasonable apprehension of bias on the part of the arbitrator, or an award obtained by fraud.

Mediation is not binding, and does not in itself result in enforceable awards. However, a release or settlement agreement entered into as a consequence of mediation is enforceable in court as a matter of contract.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

Major Canadian alternative dispute resolution institutions include ADR Chambers, the ADR Institute of Canada, and the British Columbia International Commercial Arbitration Centre.

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Blake, Cassels & Graydon LLP is one of Canada's leading business law firms, representing many of Canada's most prominent corporations, as well as international clients doing business in Canada. With offices in Montréal, Ottawa, Toronto, Calgary and Vancouver, and internationally in New York, London, Bahrain, and Beijing, the firm's strength across industry sectors and propensity to transfer knowledge and expertise between offices and practices is a key strength.

Blakes' national litigation and dispute resolution practice is one of the largest and most successful in Canada, representing Canadian and international clients on complex litigation in virtually every forum. The firm's approach to litigation focuses on understanding clients, exploring all methods of dispute resolution and litigating when appropriate. Blakes' litigators also work to help reduce litigation risk and the group has an extensive background in domestic and international commercial arbitration, and mediation.

For more information on our firm and our Litigation & Dispute Resolution Group, visit www.blakes.com.

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China

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I. LITIGATION

1 Preliminaries

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

The legal system of China is similar to the civil law system. Civil Procedure Law and the judicial interpretations on civil procedure are the main rules that govern civil procedure in China.

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

There are four levels in the civil court system, which are the District Court, the Intermediate Court, the Higher Court, as well as the Supreme Court. A case can be heard by two courts in different levels, and the court's decision of the second level or second instance is final. Specialist courts include military courts, intellectual property courts, financial courts, railway transportation courts, forest courts, maritime courts, etc.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

General procedures for first instance include filing and acceptance of lawsuits, services, pre-trial preparation, jurisdiction challenges, hearing, possible stay or termination of actions, and judgments and rulings, with a timeframe of six months, extendable with approval of the president of the court or the approval of its superior court.

Summary procedure applies to simple civil cases with clear facts, specific rights and obligations and non-major disputes at basic courts and their branches, in which a sole judge may adopt a simplified and convenient method to accept the lawsuits, summon the parties and witnesses, serve the lawsuit documents and conduct the trial, with a timeframe of three months.

For second instance, the timeframe is three months, extendable with the approval of the president of the court.

However, the timeframe only applies to domestic cases; there is no such timeframe for foreign-related cases.

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

Contractual exclusive jurisdiction clauses are recognised as long as they are in writing, conform to the principle of actual connection, and do not breach statutory exclusive jurisdiction.

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

Litigation fees payable to the court mainly include a case acceptance fee and application fee (for preservation measures, enforcement, etc.). In some cases, the travel, accommodation and living expenses and subsidy for missed work incurred by witnesses, interpreters and other experts maybe included. The plaintiff shall prepay the fees, which may be indemnified by the defendant if the plaintiff wins. There are specific standards for the litigation fee charged by the court, calculated on the value of the claims. There are no rules on costs budgeting.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

There are no particular rules on funding litigation. Contingency fee arrangements are not permissible in criminal cases, administrative cases, state compensation cases or collective litigations; but are permissible in civil cases involving property relationship, excluding marriage or inheritance, social insurances or minimum living costs, payments for supporting parents or minors, alimonies, pensions for the disabled or family of the deceased, welfare payments, or compensations for work-related injuries. In cases where a contingency fee is allowed, such fee should not exceed 30% of the amount stipulated in the engagement agreement.

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

According to the Civil Procedure Law, the plaintiff must be a citizen, legal person or other organisation with a direct interest in the case. In general, if a contract or property right is assignable under the law and the contract, the assignee will also obtain the right to bring a claim or action. So far, there is no statutory restriction for a non-party to finance the proceedings.

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1.8 Can a party obtain security for/a guarantee over its legal costs?

There are no such concepts under Chinese law.

2 Before Commencing Proceedings

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

According to the Civil Procedure Law, these conditions must be satisfied: (1) the plaintiff must be a citizen, legal person or other organisation with a direct interest in the case; (2) there must be a specific defendant; (3) there must be a specific claim and a specific factual basis and grounds; and (4) the action must fall within the range of civil actions accepted by the courts and within the jurisdiction of the court with which it is filed.

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

According to the General Rules of Civil Law, the statute of limitations in most cases is three years from the date on which a plaintiff knows or ought to be aware that the right is violated and the identity of the defendant is ascertained, unless otherwise provided by other laws. For example, it is two years for products liability and patent disputes, and four years for international contracts for the sale of goods or import and export of technology, as stipulated specifically by respective laws. However, no court protection would be granted after 20 years from the date of damage, unless in exceptional circumstances where a court may extend the limitations upon application of the plaintiff.

The statute of limitations does not apply to the following claims: (1) requests to cease infringement, remove obstacles, or eliminate danger; (2) requests for returning of real estate and registered chattels; and (3) requests for alimony, support money or maintenance.

The statute of limitations is treated as a procedural law issue.

3 Commencing Proceedings

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

The civil proceedings commence on the date a complaint is accepted by a court. The court will then serve the notice of litigation, together with the complaint and evidence, to the defendant. The general rule is that service must be evidenced by an acknowledgment of service, with the date of receipt stated (which shall be the date of service) and signature or seal affixed by the person to be served.

Subject to consent of the person to be served, the document may be served by way of facsimile, electronic mail or any other means through which the receipt of the document may be acknowledged, with the exception of judgments, rulings and mediation statements. Where a procedural document is served by any of the above-mentioned means, the date the faxed or emailed document reached the designated system of the party shall be deemed the date of service.

The court may serve documents on a party without a domicile in China in the following ways: (1) in accordance with the international treaty concluded between China and the country in which the person to be served lives; (2) through diplomatic channels; (3) if the person to be served is a Chinese citizen, through the Chinese embassy or consulate in the country in which such person lives; (4) on the agent *ad litem* appointed and authorised to accept service by the person to be served; (5) on its representative office, branch or business agent authorised to accept service within China; (6) by post if permitted by the law of the country in which the person to be serviced lives; (7) by facsimile, email and other means; and (8) by public announcement if the above means cannot be used.

Chinese courts and foreign courts may request mutual assistance in service of legal documents, investigation, collection of evidence, and other litigation acts pursuant to international treaties concluded or acceded to by China or in accordance with the principle of reciprocity. A foreign embassy or consulate in China may serve documents on, investigate, and take evidence from its citizens through the channels stipulated in the international treaties or through diplomatic channels where no treaty relations exist, provided that Chinese law is not violated and no compulsory measures are adopted. Except for the above, no foreign agency or individual may, without the consent of Chinese authorities, serve documents, carry out an investigation or collect evidence within China.

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

Where the legitimate rights and interests of an applicant (plaintiff) will be irreparably damaged if an application for preservation is not filed immediately under urgent circumstances, the applicant may, before commencing an action, apply to the court at the place where the property is located or at the place of domicile of the respondent (defendant) or that with jurisdiction over the case for taking preservative measures. The applicant shall provide security for the application.

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

The pleadings shall state: (1) the basic information of the involved parties, such as name, gender, age, race, occupation, and contact details etc., and for a legal person or other organisation, the details of its registered address and its legal representative or key person in charge should also be provided; (2) cause of action; (3) claims and facts; and (4) evidence, source of evidence, and the name and address of the witness.

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

Yes, a plaintiff may amend claims before the end of court debate, upon which the court shall re-designate the time limit for producing evidence.

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3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

Yes, a plaintiff may apply for withdrawal before the pronouncement of judgment, subject to the court's approval at its sole discretion.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

The defendant will normally rebut each of the plaintiff's claims based on the facts and legal grounds it alleged.

Yes, the defendant has the right to file a counterclaim before the conclusion of court debate.

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

The defendant shall submit its statement of defence in 30 days if the defendant is domiciled outside China, or 15 days if domiciled in China, after receiving the statement of claim. However, failure to submit a statement of defence within the time limit will not prevent the case from being adjudicated by the court and the defendant still has an opportunity to defend during the hearing. After receiving the statement of defence, the court shall serve it to the plaintiff within five days.

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

There is no such mechanism. However, if a defendant believes a third party should share the liability, the defendant can either file the claim (as a plaintiff) in a separate action, or request the court to summon the third party to join in the existing case as a co-defendant or third party.

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

Non-submission of defence will not affect trial by the court. In the circumstance that the defendant fails to attend the court hearing or submit any statement of defence, the court will render a judgment after reviewing the plaintiff's claims and evidence.

4.5 Can the defendant dispute the court's jurisdiction?

Yes, the defendant can challenge the court's jurisdiction during the period for filing the defence.

5 Joinder & Consolidation

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

Yes. If a third party believes that it has legitimate rights over the subject matter of ongoing proceedings, the third party can apply for joining in the ongoing proceedings. A court can also summon a third party if the outcome of the ongoing proceedings will impose liability on the third party.

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

Yes, the consolidation of two or more sets of proceedings may be allowed by the court. The circumstances include: (1) consolidation based on the subject of litigation, for example, one plaintiff raises claims against different defendants or different plaintiffs raise the same claims against one or more defendants; (2) consolidation based on the object of litigation, for example, claims and counterclaims against the same object; and (3) hybrid consolidation, for instance, the consolidation of the action in chief with the action brought by a related third party.

5.3 Do you have split trials/bifurcation of proceedings?

There are no such proceedings. However, a court can render a pre-judgment if parts of the facts are ascertained.

6 Duties & Powers of the Courts

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

Cases are allocated according to court level and territorial jurisdiction.

Within a civil court, the cases will be allocated according to their case nature. In general, the first civil division will mainly hear the cases of marriage and family, the right of personality, labour dispute, real estate and related contract disputes as well as rural land contract disputes. The second civil division will mainly hear cases of contract, corporate, security, insurance and bills disputes. The third civil division will mainly hear cases of intellectual property and competition disputes. The fourth civil division will mainly hear cases of foreign-related and Hong Kong-, Macao- and Taiwan-related disputes, as well as maritime and admiralty disputes.

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

There are no specific regulations on the courts' particular case management powers, neither on the rules regarding interim applications in this regard by the parties.

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

A party violating court rules may be reprimanded, ordered to leave the court, fined or detained. Individuals who seriously disrupt court orders or insult, threaten or physically abuse judicial officials will be prosecuted.

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

The courts do not have the power to strike out part of a statement of case. Likewise, there is no identical definition of what it is to "dismiss" a case under Chinese law, but the court can reject a case on the grounds that it lacks justified reasons or legal grounds.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

There are no rules regarding summary judgment under Chinese law.

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

Yes, the courts may stay the proceedings under certain circumstances; for example, one party has reasonable cause for not attending the proceedings, or the case in question is dependent upon the outcome of another case. Proceedings will be resumed after such circumstances disappear.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

The concept of disclosure does not exist under Chinese law thus there are no rules on disclosure.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

The same as for disclosure. The definition of "privilege" does not exist under Chinese law, and there are no rules on privilege.

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

There are no specific rules on disclosure by third parties.

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

There are no such proceedings.

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

There are no specific rules on disclosure.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

According to Civil Procedure Law, the basic rule of evidence is that the burden of proof falls on a party who put forward its claims. The evidence produced by either party must be cross-examined and verified before being admitted. Examination and verification of evidence shall focus on authenticity, relevance, and legitimacy.

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

Evidence which is authentic, legitimate and relevant is admissible. The photocopy evidence which is not verified by its original and the statement of a witness who fails to testify in court will not be admissible. A party may apply to the court to request individuals with specialised expertise to appear in court and provide an expert's opinion. If the expert fails to testify in court, the expert opinion shall not be admitted.

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

There are no particular rules in this regard. A witness shall and can only testify in court upon notification by the court. With the approval of the court, a witness may testify by way of written testimony, audio-visual transmission technology or by audio-visual testimony if he/she is unable to appear in court due to: (1) health reasons; (2) geographical distance or inconvenient transport; (3) *force majeure* such as natural disasters; and (4) any other legitimate reasons.

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

There are no specific rules in this regard.

9 Judgments & Orders

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

In general, a judgment is made for substantive matters and an order is given on procedural issues. Substantive judgment normally includes prestation, confirmation and alteration judgments.

An order will be rendered for the following matters:

(1) Non-acceptance of lawsuit.
(2) Objection to jurisdiction.
(3) Rejection of lawsuit.
(4) Preservation and prior enforcement.
(5) Approval or non-approval of withdrawal of lawsuit.
(6) Suspension or termination of litigation.

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(7) Correction of clerical error in a judgment letter.
(8) Suspension or termination of enforcement.
(9) Revocation or non-enforcement of an arbitral award.
(10) Non-enforcement of a debt instrument for which a notary public has vested mandatory enforceability.
(11) Any other matters which require ruling and resolution.

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

The court powers on damages/interests/costs of litigation are usually stipulated in substantive laws and the contracts between the parties, such as the Contract Laws.

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

No recognition procedure is necessary for a final domestic judgment, and it is enforced by the court of first instance.

Only a final foreign judgment is eligible for recognition and enforcement by a competent Chinese court. A court shall review such judgment pursuant to international treaties concluded or acceded to by China or in accordance with the principle of reciprocity after receiving the application for recognition and enforcement submitted by the winning party. If the court considers that such judgment neither contradicts the basic principles of the Chinese laws nor violates state sovereignty, security and the public interest, it may rule to recognise the foreign judgment and issue an enforcement order.

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

An appeal to a first instance judgment can be initiated by filing a notice of appeal within 15 days after such judgment is served. The appeal can be filed at the first instance court or the second instance court.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

There are no formal proceedings for such purpose, but settlement is encouraged by the courts.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

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

Arbitration and mediation are two frequently used methods, which are regulated by the Arbitration Law and the People's Mediation Law in China. In commercial areas, arbitration is a very popular method of dispute resolution in China. For mediation, there are two types of mediation commonly used in practice: court-presided mediation and out-of-court mediation.

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

The main laws are the Arbitration Law, Civil Procedure Law and People's Mediation Law, as well as relevant rules and regulations. The Labour Law and relevant rules and regulations govern labour disputes arbitration. Arbitration rules of various arbitration institutions, Administration Law, as well as general public policy govern or encourage mediation by court, arbitration tribunals and different levels and departments of government authorities.

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

According to Arbitration Law, the following disputes are not arbitrable: (1) disputes concerning marriage, adoption, custody, fostering and succession; and (2) administrative disputes which shall, in accordance with the law, be dealt with by administrative bodies.

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

The court will reject the case where there is a valid arbitration agreement between the parties, unless the other party does not raise an objection to the court's jurisdiction. The parties may, before or after the commencement of arbitration, seek court relief such as asset preservation orders.

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

Arbitral awards are final and binding between the parties under Chinese law, which means that there is no right of appeal from an arbitral award. The grounds to set aside or refuse enforcement of arbitration awards under the Civil Procedure Law of China are very limited, and are procedural reasons. The court presided mediation agreements signed by the parties cannot be appealed; however, a mediation agreement concluded out of the court is not final unless it has been confirmed by the court.

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2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

The major alternative dispute resolution institutions include: the China International Economic and Trade Arbitration Commission; the Beijing Arbitration Commission; the China Maritime Arbitration Commission; the Shanghai International Arbitration Centre; and the Shenzhen Court of International Arbitration.

Note

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Rui Bai Law Firm

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We can deliver integrated solutions with our specialists in banking and finance, corporate, M&A, regulatory compliance, intellectual property, aircraft and equipment leasing, litigation, arbitration and dispute resolution, labour and employment, and tax dispute resolution. We are able to deliver solutions to the most challenging business endeavour.

Our lawyers combine local market knowledge and international experience into a unique skillset. Our lawyers also combine extensive private practice law firm experience with in-depth understanding and knowledge working in-house. We put ourselves in our clients' shoes and we share a common language with the client.

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Denmark

Henrik Nedergaard Thomsen

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Kasper Mortensen

I. LITIGATION

1 Preliminaries

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

In the Danish legal system, legislation is the most important source of law. However, legislation by no means stands alone. Hence, other sources of law, including case-law, administrative practice, preparatory legislative works and principles of law may also be of paramount importance when deciding the state of the law.

As Denmark is a member of the EU, part of the Danish regulation is to be interpreted in light of the EU provisions on which it is based. Danish law is also to be interpreted in accordance with the European Convention on Human Rights, where applicable.

The Danish law of civil procedure is primarily regulated in the Danish Administration of Justice Act (*retsplejeloven*). In addition, certain regulation is found in other acts stipulating requirements regarding, e.g., prior exercise of a right of administrative appeal or compliance with the time limits for bringing proceedings in certain matters before the courts. Arbitration is governed by the Danish Arbitration Act.

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

There are two overall types of courts in Denmark:

- the ordinary courts, which consist of the Supreme Court, two high courts, 24 district courts, the Maritime and Commercial Court and the Land Registration Court; and
- the specialist courts, which consist of, *inter alia*, the housing tribunals, the Labour Tribunal, the Special Court of Review, the Special Court of Impeachment and the civil servants tribunals.

There is no special branch of administrative courts in Denmark. However, there are many administrative boards with their own legal framework which process complaints of decisions made by subordinate authorities. The proceedings are often in writing. It is sometimes a condition for bringing a complaint before the courts that such right of redress is exercised first.

The Danish Administration of Justice Act generally only applies to the ordinary courts. As a general rule, cases commence in the district courts, whereupon they may be appealed to the high court covering the area of the district court. Normally, it is not possible to bring an appeal to the Supreme Court for cases that have been tried in the high courts as second instance. However, leave of appeal may be granted (third instance leave) if the matter concerns a question of principle. The permission is not granted by the Supreme Court, but by a board, the Appeals Permission Board (*Procesbevilling-snævnet*), which consists of three judges, one attorney and one professor. If the matter is deemed by the District Court to be a matter of principle, it may be referred to the High Court as the court of first instance. If so, the decision may be appealed to the Supreme Court. Furthermore, a case regarding a claim less than DKK 20,000 may not be subject to appeal without a leave of appeal granted from the Appeals Permission Board.

Judgments delivered in the Labour Tribunal cannot be appealed.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

In general, there are two main stages in Danish civil proceedings – the pre-trial stage and the actual hearing.

The pre-trial stage:

A court case is initiated by the plaintiff filing a writ to the court. The defendant will then file a statement of defence if the defendant disputes the plaintiff's claim. The exchange of pleadings may take several months.

Then, further pleadings will often be exchanged and a pre-trial hearing (by telephone) held, during which the court discusses the matter with the parties. An expert opinion may also be requested at that stage. The duration of such expert opinion depends on the nature of the matter – from a few months to more than a year.

End of the pre-trial stage and the actual hearing:

When the matter has a set date for a final hearing, the court will stipulate the date when the pre-trial stage ends. After that date, new claims, allegations or evidence will not, as a general rule, be permitted. After the final hearing, the court will make its decision on the claims submitted. Normally, one to two months will elapse from the time of conclusion of the pre-trial stage until a final appealable judgment is delivered.

Sometimes the court will decide on procedural issues during the case, including on whether to admit certain evidence, whether to refer the matter to another court, etc. Such procedural issues may as a general rule be appealed during the case; however, this is often subject to prior leave from the Appeals Permission Board.

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In some cases, a decision may be made following a shortened procedure. This applies to, e.g., a restraining injunction against a person breaching the intellectual property rights of another. Either at the same time or not later than 14 days after such a decision, proceedings must be instituted to verify whether the party requesting the injunction is in fact in possession of the right claimed. If the preliminary decision is overruled, the party requesting the decision is obliged to pay damages for loss and compensation for injury to reputation to the other party.

In addition, it is as a general rule possible to have matters of a value of max. DKK 50,000 processed, according to rules involving a speedier and less expensive procedure.

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

The parties may, as a general rule, both before and after a dispute has occurred, agree that proceedings are to be heard in Denmark by a specific court. However, in certain instances, the courts in a specific country have exclusive jurisdiction and, therefore, such an agreement cannot be relied upon. Nor are the parties allowed to agree that a case is to be heard by a court which has no jurisdiction in respect of the substance of the matter. For example, the parties are not allowed to agree that the case is to be lodged with the Supreme Court as the court of first instance.

In addition, the parties may agree to resolve disputes by arbitration.

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

Institution of proceedings is subject to a court fee. The fee is DKK 500. If the value of the case exceeds DKK 50,000, an amount of DKK 250 is added plus 1.2% of the part of the value of the case that exceeds DKK 50,000.

However, the court fee cannot exceed DKK 75,000. If the matter concerns a review of an authority decision, the maximum amount of the fee is DKK 2,000. The same applies to certain other types of cases.

In addition to the fee payable, if the value of the matter exceeds DKK 50,000, a fee is to be paid for the final hearing (the trial hearing) or the written proceedings that might replace the trial hearing. The amount of the fee will generally be the same as for instituting proceedings.

As a general rule, it is the party making or requesting a procedural step which, provisionally, has to pay the costs in this respect.

The unsuccessful party to a case will normally have to compensate the costs of the successful party. Legal fees, however, are not covered according to actually realised costs, but will be determined according to certain rates where the financial value of the claim submitted will have an impact and, furthermore, whether an expert opinion has been involved.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

If the plaintiff meets certain financial conditions (income is lower than a specified amount), and certain conditions regarding the nature of the case are met, it will be possible to receive free legal assistance according to which, as a main rule, the Danish State will bear all costs of the proceedings.

The costs of legal proceedings may furthermore be covered by insurance covering legal expenses.

Pursuant to the Codes of Conduct laid down by the Danish Bar and Law Society, it is not permitted to enter into agreements to the effect that the attorney's legal fee is covered by a part of any proceeds achieved by winning the case (contingency fee/conditional fee arrangements).

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

Nothing can prevent a person from assigning his/her claim or interests in a legal proceeding to somebody else.

Nor will anything, in principle, prevent a third party from financing the costs of one of the parties of the proceedings. But such agreements are of no relevance to the relationship between the plaintiff and the defendant. If the plaintiff is ordered to pay the legal costs, the plaintiff will be liable to the defendant, irrespective of whether the plaintiff has assigned the claim or financing of the proceedings to a third party. If the plaintiff (except for free legal assistance matters) has no financial risk involved in the proceedings, the case will be dismissed, since in that case he/she will have no legal interest in having the case heard.

1.8 Can a party obtain security for/a guarantee over its legal costs?

A person being sued by someone whose residence or domicile is outside the European Economic Area may demand that the plaintiff provide security for the costs the plaintiff may be ordered to pay to the defendant. However, this does not apply if the plaintiff has its residence or domicile in a country where a plaintiff with residence or domicile in Denmark does not have to provide security for legal costs.

In addition, in a class action, the court may order that the representative member of the group provide security for the costs said member may be ordered to pay to the defendant. Members of the group may also be required to provide security when joining the group.

If the court gives a judgment in favour of the plaintiff because of a default on the defendant's part (default judgment), e.g. because the defendant has not responded to a writ of summons, the party in default may request a reopening of the case. The court may reopen the case on the condition of provision of security for the costs that the party in default may be ordered to pay to the other party.

2 Before Commencing Proceedings

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

Two conditions must be complied with. The party instituting the proceedings must have: i) standing to bring the proceedings; and ii) a legal interest in the outcome of the case. Within administrative law, in particular, there may be further conditions. In some cases, for example, it has been laid down by law that administrative means of redress must be exhausted before a matter is brought before the ordinary courts, and that leave of appeal to the courts of administrative decisions is not granted, for example, in the field of

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asylum, unless the matter involves particular points of law. It may also be agreed by an arbitration clause that any disputes concerning a specific legal relationship between the parties are to be decided by arbitration and not by the ordinary courts of law.

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

The main rule is that claims are time-barred three years after the earliest point in time in which the claimant was able to demand that the claim be complied with. If the claimant was unaware of the claim or the debtor, the limitation period runs from the day when the claimant became aware or should have become aware of the claim or the debtor. There are exceptions to this rule, such as a 10-year limitation period for claims established by an instrument of debt, a settlement or a judgment, a 30-year limitation period for claims involving personal injury compensation, and a 10-year limitation period for claims supported by a written agreement of contribution of capital into a company. Whether or not the matter is time-barred is a question of substantive law. In a number of matters where decisions of the authority are contested, time limits for bringing the decisions before the courts apply. Whether or not a time limit for bringing proceedings is exceeded is, as a point of departure, a matter of procedural law, but if the court is to examine the issue in more detail – for example, deciding on the date from which the time limitation in the specific matter is to be calculated – it may become a matter of substantive law.

3 Commencing Proceedings

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

Proceedings are initiated by the plaintiff's submission of a writ to the court. This is normally done by uploading the writ at www.minretssag.dk, which is an electronic portal used by all Danish courts. The court normally serves the writ by submitting it to the defendant's electronic mail box or email address. If so, the time of service of the writ is the time when the notice is registered in the relevant defendant's electronic mail box or the time of the court's submission of an email of service of writ. In matters where the defendant is not in Denmark and where the defendant has no Danish attorney at the time of service of the writ, the writ must be submitted for service abroad according to specified procedures.

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

It is possible to obtain a court order for preliminary injunction in a matter with a private defendant, or suspensory effect regarding compliance with a decision by a public authority. What is most important in this respect is the general requirement that there must be a risk of causing irreparable damage by awaiting a decision in the original proceedings.

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

In the writ, the plaintiff must provide an unambiguous identification of the parties to the case and a statement of case, submit claims that can be adjudicated and allegations in support of its claim. The plaintiff must furthermore provide information on a number of issues concerning the processing of the case, including whether the case is requested to be heard by the high court as the court of first instance.

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

The parties may amend and extend their claims, submissions and allegations and provide new evidence until the pre-trial stage is completed. After that time, the court may dismiss such new evidence if required to avoid a postponement of the final hearing – even if the opponent does not object. If the opponent does object to the new evidence, the court may still allow the evidence if the late submission of the evidence is excusable, if the opponent has sufficient opportunity for safeguarding its interests without postponing the final hearing, or if refusing permission may cause a disproportionate loss to the party submitting the new evidence.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

The plaintiff is entitled to withdraw the case and may do so until the case is set down for judgment. If the case is withdrawn, legal costs must be paid to the opponent, in that a case withdrawn is as a general rule considered a case lost.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

In order to safeguard its interests in the court case, the defendant must submit a statement of defence. The statement of defence must include, *inter alia*, the plaintiff's defence and possible counterclaim. In addition, the statement of defence must contain the factual and legal background of the defence and the possible counterclaim, as well as an indication of the evidence that the defendant will rely on.

If the defendant intends to submit an objection on a point of law concerning the jurisdiction of the court, standing or other formal issues, this must as a general rule be included in the statement of defence. It is possible to exclusively process objections on a point of law, such as an exceeded deadline for bringing the case, in the statement of defence if the defendant requests that the objection be heard in a separate trial prior to hearing the merits of the case.

Any failure to submit pleadings during the case or non-appearance in court meetings, including the final hearing, may cause judgment to be delivered in favour of the plaintiff if justified by the contents of the statement of case and other submissions.

Counterclaims may be submitted for separate judgment and compensation. Counterclaims for separate judgment may cause judgment to be delivered in respect of the claim as if the claim were

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submitted in a separate trial. Any counterclaims for compensation will cause the claim to be set off against the plaintiff's claim if the court finds in favour of the plaintiff's claim. Such claims may be submitted as a matter of course. Counterclaims for separate judgment, however, will depend on whether there is jurisdiction for the claim in Denmark or whether the claim arises out of the same contract or circumstances as those on which the plaintiff bases its claim. In addition, the counterclaim must be subject to the same procedural rules as those of the plaintiff's claim.

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

A minimum deadline of two weeks applies to the submission of statement of defence. The deadline may be extended if the defendant so requests.

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

A defendant may join a third party as a party to the proceedings and make a claim against such third party by submitting a third-party notice. The defendant is thereby able to, e.g., make a recourse claim against a third party.

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

If the defendant does not submit a statement of defence or if the statement of defence is incomplete, the court will, as a general rule, deliver judgment according to the plaintiff's claim if justified on the basis of the statement of claim and other submissions in the case. However, this does not apply if the plaintiff's claim is unclear or if the statement of case must be assumed to be essentially incorrect. In that case, the court will dismiss the case.

The administration of justice is based on the adversarial system, i.e. that the parties are responsible for finding and presenting evidence. The court may pose questions to the parties, but may not have regard to claims, views and evidence not submitted during the proceedings. This also applies to proceedings against public authorities.

The court may grant the defendant a deadline to remedy certain deficiencies in the statement of defence.

If judgment is delivered in favour of the plaintiff because of the defendant's non-appearance or failure to submit a statement of defence, it is in certain circumstances possible to ask that the case be resumed.

4.5 Can the defendant dispute the court's jurisdiction?

The court will ensure that the court has jurisdiction in terms of substance to hear the matter, and if not, the court will refer the matter to the proper court. If the matter cannot be referred, the matter will be dismissed.

If the matter is brought before a court which has no territorial jurisdiction, and the defendant has not in the statement of defence (or in certain circumstances, in a subsequent hearing) made an objection in this respect, the court will be deemed to be the proper venue. In a number of other circumstances, including if the defendant fails to submit a statement of defence, or if the courts in another EU country have exclusive jurisdiction, the court will decide whether it has territorial jurisdiction. If a legitimate objection is made against the court's jurisdiction, or if the court itself discovers that it has no jurisdiction, the matter will be referred, if possible, to the proper venue. This is not possible, e.g., if arbitration has been agreed but the arbitration tribunal has not been established, thus the matter will be dismissed from the courts.

5 Joinder & Consolidation

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

A third party may, by issuing a writ of summons, be joined as a party into a pending case, provided, among other things, that the claim is sufficiently linked to the pending court case. A third party with a legitimate interest in the outcome of a pending case may also join the case by means of non-party intervention in support of one of the parties. Public authorities may intervene as a non-party if it can be done without causing serious inconvenience to the proceedings, and if the outcome of the points of law of the case is of major importance to the public administration's processing of the same or similar questions.

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

Consolidation of several cases between – or claims against – the same parties is allowed at the initiative of either the plaintiff or the defendant, provided, among other things, that the claims are linked to such a degree that it is expedient to hear them jointly.

5.3 Do you have split trials/bifurcation of proceedings?

The court may decide that the pre-trial stage or the final hearing provisionally be limited to a part of the question(s) or claim(s) at issue, and that a separate ruling be given on the issue(s) concerned. Examples of such issues that may be separated for prior consideration are questions regarding the proper plaintiff or defendant, time limitation and jurisdiction.

6 Duties & Powers of the Courts

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

All proceedings are to be brought before a district court; however, certain types of cases are to be brought before the Maritime and Commercial Court. Matters of principle may be referred to the high court as the court of first instance. As a general rule, proceedings are to be brought at the home court of the defendant, but a number of exceptions apply under Danish and EU law. One of the exceptions under Danish law is that cases against central government authorities may be brought before the home court of the plaintiff.

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

The court sets the deadlines for the preparation of the case and the date of the final trial. If the plaintiff exceeds the deadlines, the case may be dismissed by the courts. If the defendant exceeds deadlines, the court may deliver a summary judgment in favour of the plaintiff. The parties may ask for extension of deadlines. As a general rule, such requests have no impact on the fixing of costs. The court is, moreover, authorised to order the parties to submit documents or to provide observations on matters of facts or law of significance to the case.

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

The court is empowered to impose various sanctions on parties that disobey the orders of the court. The sanctions depend on the nature of the order made by the court. The court may order for a party to be represented in the case by an attorney. Failure to obey the order by the plaintiff may cause the case to be dismissed; however, if the defendant disobeys the order, the court may deliver a summary judgment in favour of the plaintiff. The court may also order a party to provide certain evidence. If the party in question disobeys such orders, the court may draw adverse inferences from that fact, i.e. the failure to provide evidence will be to the detriment of the party in terms of evidence.

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

The courts may refuse to hear cases – both of their own motion and at the request of the opponent. Several circumstances may cause a case to be dismissed; for example, if the claim is not prepared in such a way as to provide the basis for delivering a judgment in the case, or if a party requests a judgment for matters which are contrary to general law and public policy. The court hearing a case as the court of first instance, however, may not dismiss a case summarily on the grounds that the claim made is manifestly ill-founded, e.g. if the claim is time-barred.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

In duly justified cases, the court may decide the case by summary judgment, in particular in circumstances where the defendant exceeds deadlines set by the court or fails to appear in the final trial of the case. The courts of first instance are authorised to make summary judgments in other instances as well, and it is quite common that the district courts exercise this authority in their judgments.

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

The court may stay proceedings – both during the pre-trial stage and during the final hearing. The most frequent cause for postponement is to obtain additional information of importance to the court's judgment of the case. Most often, one of the parties asks for the postponement, and in cases of repeated requests for postponement, the court will sometimes inform that party that no further postponements will be granted. Overall, the timely processing and decision of cases are of importance to the Danish courts.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

As a general rule, each party to a case decides which documents to include in the case, and the opponent is not entitled to see what other documents the party may possess. If a party intends to rely on documents in the opponent's possession and the party is able to explain which issues need to be clarified by the documents, the court may order the opponent to disclose the documents if the court finds that they are of significance to the court's ruling. The opponent may continue to refuse to produce the documents and, if so, the court may decide to draw adverse inferences on the evidence from that fact.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

Disclosure from a party to the case or a third party is, as a general rule, subject to the same limitations as witness statements. A doctor, for example, cannot be ordered to produce information in documents concerning which he would not be able to give evidence as a witness due to his duty of confidentiality. If the patient who is the subject of the information is ordered to give evidence concerning the matters in question, the patient may also be ordered to release the doctor from his duty of confidentiality so that the doctor can be ordered to produce information.

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

The requirements for ordering a third party to produce documents (third-party disclosure) are largely the same as those applicable to the parties to the case (disclosure by a party to the case). But the duty of third parties to disclose documents is the same as their duty to give evidence, and certain restrictions, therefore, apply. The court will often have to make decisions regarding third-party disclosure by balancing the interests of the parties to the case in the disclosure taking place and the third party's interests in the disclosure not taking place.

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

The role of the court is to decide whether the plaintiff's claim is sufficiently supported by the evidence relied on, regardless of whether the evidence is in documents or evidence given by one of the parties or witnesses. The parties may ask the court to order the opponent or a third party to produce documents. If the plaintiff does

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not produce the conclusive evidence, the court will find in favour of the defendant. If the defendant refuses to produce documents irrespective of having been ordered by the court to do so, the court may decide to draw adverse inferences on the evidence from that fact. The most important task of the court in respect of disclosure is often to decide whether the disclosure of the information and documents in question is necessary for the court's ruling in the case, or whether it is unobjectionable to make its ruling without the documents.

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

There are no restrictions on the use of documents and information obtained by disclosure if the documents and information are used for the proceedings. Release of the documents or information in any other context is subject to the general rules on processing and distribution of information.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

As a general rule, the parties decide which evidence and legal issues should be examined in the case. The court may, either at the request of one of the parties or on its motion, request the opponent to produce relevant evidence and may also bar unnecessary evidence. The evidence is for the court to assess and is not subject to particular rules. Even in the absence of a pending case, evidence may be taken before a court without a trial, including for use in a later case. In personal injury matters, special bodies have been established by law which deliver medical assessments on the nature of the personal injury or assessments of the extent and impact of the personal injury.

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

As a general rule, all types of evidence are admissible. The level of importance to attach to any particular evidence depends on the nature and the substance of the evidence. The most important types of evidence are documentary evidence, witness testimonies and expert surveys by specialists who can be examined in court. Expert opinions or expert witnesses are not widely used, in that expert surveys (i.e. a report based on an appraisal by experts appointed by the court) are preferred, but new rules invite their use to a wider extent. The court may bar unnecessary evidence, but is in general reluctant to do so. Evidence produced by an illegal or criminal act is also admissible in most cases, but the court will decide the level of importance to attach to such evidence.

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

Persons called as witnesses of fact are not allowed to make observations as experts when giving evidence. They are, therefore, only allowed to give evidence of their knowledge of the incident in the specific case. Written depositions on factual information may be used as documentary evidence and are sometimes used as an alternative to witness statements, provided that the court has no objections.

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

The court will admonish all witnesses to speak the truth. In all witness statements, the witness is required to refresh its memory before the meeting in court, and the witness must be questioned and be given the opportunity of giving a coherent explanation so that a clear, complete and truthful explanation is produced. In matters involving an expert survey, the court will appoint one or more experts who, on the basis of the questions of the parties, will often give both a written statement and an explanation in court. If the parties do not agree on the questions to be asked, the court will decide in its judgment whether there were unnecessary questions and, if so, have regard to that fact when the legal costs are to be decided. Expert statements obtained by one of the parties are allowed as evidence to a greater extent than previously if they were obtained before the institution of proceedings. If obtained after the institution of proceedings, their admissibility is less certain.

However, if one party obtains an expert statement before the institution of proceedings, the other party is allowed to obtain an expert statement under the same conditions, even if this is done after the institution of proceedings. Also, after mutual consent and permission from the court, the parties may, instead of or in addition to an expert survey, each obtain an expert statement to be used as evidence. If, at the same time, an expert survey is obtained, the evidential value of expert statements obtained by one of the parties will usually be rather limited. Concurrent expert evidence ("Hot Tub"), in which experts give their evidence concurrently, is to some degree practised in Denmark; pursuant to a new set of rules, experts can in some instances hear other experts give their evidence and may even consult each other before answering questions ("expert conferencing").

9 Judgments & Orders

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

The tribunals may give judgment, make a decision or issue an order. A judgment will usually end the processing of the matter before the court, even if matters are sometimes ended by the issuance of an order or the delivery of a decision. Decisions and orders are primarily used during the proceedings, including regarding the various procedural issues that may be raised during the case. A judgment must concern the legal relationship between the parties, e.g., whether the dismissal of the defendant by the plaintiff was valid, or concerning the payment of amounts. Matters of a more abstract nature, however, are not usually subject to judgment, e.g., whether the treatment of the plaintiff was in conformity with general guidelines.

The difference between a judgment, a decision and an order lies in the related requirements as to the amount of information to include in the rulings and whether the rulings are to be reasoned. Most requirements apply to judgments.

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

The Danish courts have jurisdiction to rule on liability in damages, interest and legal costs.

The rules on liability in damages are mainly found in the Danish Act on Liability in Damages (*erstatningsansvarsloven*), in a number of special acts and on a non-statutory basis. The rules on interest are laid down in the Danish Interest Act (*renteloven*). Moreover, agreements between the parties may include provisions regarding interest claims. The rules on legal costs are primarily laid down in chapter 30 of the Danish Administration of Justice Act. If a party is ordered to pay legal costs, this amount will bear interest from the date of the judgment.

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

As a general rule, decisions on financial claims by courts in EU Member States and in countries which are members of the Lugano Convention are recognised and enforceable in Denmark. The same applies to judgments given by a court of a contracting state to the Hague Convention on Choice of Court Agreements designated in an exclusive choice of court agreement. The application for enforcement is to be made to the enforcement court. However, in certain situations, questions of recognition may be tried by the ordinary courts.

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

The two-tier principle applies in Denmark, according to which it is usually possible to appeal a decision made by a court once. This applies to both questions of procedure and substance. However, there are substantial exceptions to this general rule, including that leave of appeal sometimes must first be obtained from the Appeals Permission Board. The two-tier principle applies irrespective of whether the ruling is made by a district court, the Maritime and Commercial Court or one of the high courts. Rulings made by the high court as the court of second instance cannot, as a general rule, be appealed. It is only possible to have the matter tried in the Supreme Court as the court of third instance if it concerns a matter of principle, and if leave from the Appeals Permission Board has been obtained.

Judgments made by a district court concerning an amount below DKK 20,000 cannot be appealed without leave from the Appeals Permission Board. The high court may furthermore dismiss an appeal if there is no prospect of a different result than that of the district court.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

During the entire course of the case, the court may mediate the matter, but the court has no authority to order the parties to negotiate a settlement or participate in mediation under the threat of sanctions.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

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

In Denmark, alternative dispute resolution is used extensively, in particular in commercial disputes, and there is a wide choice of alternative dispute resolution methods available.

Arbitration is widely used; both *ad hoc* and institutional arbitration. Several institutes handle arbitration cases. The Danish Institute of Arbitration processes all types of cases, whereas the Arbitration Board is reserved for construction matters. In the Danish Institute of Arbitration, the judges are usually appointed by the parties, whereas the chairman is appointed by the Institute. Expert judges usually participate in Arbitration Board cases. Both institutions offer mediation, conciliation and expert determination. These methods are used to a minor extent, but there is a trend towards, in particular, mediation as an attractive alternative to parties. Mediation is furthermore offered through the special institution, the Mediation Institute, and by individual mediators.

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

Arbitration is regulated in the Danish Arbitration Act, which to a wide extent follows the UNCITRAL Model Law of 1985. Alternative dispute resolution is not otherwise regulated by law in Denmark.

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

Criminal cases must be brought before the ordinary courts. The same applies to legal areas where the ordinary courts, by law, have exclusive jurisdiction. This applies to, e.g., cases regarding the dissolution of marriages and child custody. Under Danish law, the parties are not free to agree whether the conditions for divorce are complied with and, hence, that issue cannot be determined by alternative dispute resolution. However, the conditions for divorce may be solved by alternative dispute resolution. Also, public authorities may be a party to arbitration, but public law, e.g. the validity of a decision by a public authority, is normally not considered arbitral.

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

The Danish courts have the opportunity of offering court-based mediation (the same as mediation) in all cases, except in the cases

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when the courts have exclusive jurisdiction; see question 1.3. The courts have no authority to impose on the parties to participate in court-based mediation. Under the Arbitration Act, an arbitration tribunal may request the courts to issue an injunction which is to be in force until the substance of the matter has been decided by the arbitration tribunal. Danish courts will dismiss a case if the parties have legally agreed to arbitration, pursuant to article 8 of the Arbitration Act (*voldgiftslov*).

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

Arbitration awards are binding on the parties and may be enforced according to the rules of the Danish Administration of Justice Act (*retsplejeloven*). Arbitration awards cannot be appealed, but there is a possibility of bringing an arbitration award before the courts for the purposes of cancellation on the grounds that the award has material defects. Danish courts are traditionally reluctant to cancel arbitration awards.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

The major alternative dispute resolution institutions in Denmark are the following:

- *Voldgiftsinstituttet*, the Danish Institute of Arbitration, www.voldgiftsinstituttet.dk.
- *Voldgiftsnævnet for Bygge- og Anlægsvirksomhed*, the Danish Building and Construction Arbitration Board, www.voldgift.dk.
- *Mediationsinstituttet*, the Mediation Institute, www.mediationsinstituttet.dk.

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Kammeradvokaten
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With over 600 employees, Kammeradvokaten/ Poul Schmith is the largest private law firm in Denmark with extensive experience in both the public and private sectors. Our specialists cover practically all legal areas, and with almost 2,000 court proceedings every year, we have solid litigation experience.

We represent both public authorities and private companies.

We also advise local and regional authorities and semi-public enterprises.

The Legal Adviser to the Danish Government

In our capacity as the Government's Legal Advisor, we have an agreement with the Danish Government regarding the provision of legal assistance.

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Chapter 12

England & Wales

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I. LITIGATION

1 Preliminaries

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

The English legal system is based on the common law tradition. The English courts are bound by the principle of precedent (*stare decisis*). Civil procedure in England is governed by the Civil Procedure Rules (CPR) 1998, which are accessible online at http://www.justice.gov.uk/courts/procedure-rules/civil/rules.

The "overriding objective" of the CPR, which courts must always have regard to, is to enable the court to deal with cases justly and at proportionate cost, taking into consideration various factors, including ensuring that the parties are on an equal footing, saving expense, dealing with the case in ways which are proportionate and ensuring that it is dealt with expeditiously and fairly.

The English legal profession is split between solicitors and barristers. Solicitors deal with and represent the client on a day-to-day basis and provide contentious and non-contentious advice on law and legal strategy; barristers are normally instructed for highly specialised advice and for advocacy before the higher courts. Solicitor-advocates may also have rights of audience in the higher courts.

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

Civil proceedings in England can be conducted in the county courts or the High Court. More sizeable cases are dealt with by the High Court, which is divided into three divisions: the Queen's Bench Division (QBD); the Business and Property Courts (BPC); and the Family Division. Generally, the QBD deals with general claims in contract and tort and the BPC deals with disputes involving intellectual property, trusts and land (among others).

There are various specialist courts, including the Technology and Construction Court, the Commercial Court, the Admiralty Court, the Companies Court and the Patents Court, and these all fall under the umbrella of the BPC. The Commercial Court is generally regarded as the most appropriate forum in England to resolve international commercial disputes. Its practice and procedures are laid down in the CPR and the Commercial Court Guide.

Appeals lie with the High Court (from the County Court), the Court of Appeal, and the Supreme Court in the last instance. Matters which involve the application of EU law may be referred or appealed to the Court of Justice of the European Union.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

The main stages in civil law proceedings before the English courts are:

- issue of a claim form;
- service of process (i.e. the claim form) on the defendant(s);
- service of the parties' statements of case;
- allocation of the claim to a case management track (depending on the value and complexity of the case);
- disclosure of documents;
- exchange of witness and expert evidence;
- trial; and
- assessment of costs.

The CPR lays down strict procedural requirements for the various stages. These will be addressed where the individual stages are discussed in further detail below. The overall average duration of civil proceedings before the English courts (excluding appeals) varies between one and two years (but can sometimes be less). Appeal proceedings can take substantially longer, particularly if taken to the highest court in England and Wales (the Supreme Court) or if a reference or appeal is made to the Court of Justice of the European Union.

Two schemes for: (i) shorter trials; and (ii) flexible trials in the BPC have undergone two-year trials and have now been made permanent. These attempt to make commercial matters cheaper and more efficient, and to reduce trial lengths (aiming to conclude cases within a year) primarily through reducing requirements in evidence (documentary and oral) and submissions. A two-year pilot scheme will begin in 2018 relating to disclosure, that attempts to deal with the costs, scale and complexity of disclosure and includes obligations to give disclosure at the initial stage of pleadings and subsequent options for different disclosure models, with close oversight by the Courts.

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

The English judiciary takes a favourable approach to exclusive jurisdiction clauses. It will usually: (i) stay proceedings

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commenced before the English courts in breach of an exclusive jurisdiction clause prescribing a foreign dispute resolution forum; or (ii) grant an anti-suit injunction against proceedings commenced outside the European Union in breach of an exclusive jurisdiction clause in favour of the English courts.

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

Costs in civil proceedings before the English courts vary considerably, depending primarily upon the size and complexity of the case and the level of fees of the solicitors and barristers instructed. Costs "follow the event", so it is generally the loser who bears most of the costs of the proceedings. Exceptions to this rule exist, primarily depending on the conduct of the prevailing party over the course of the proceedings.

Unless agreed between the parties, costs will need to be assessed by the court. A substantial proportion of the costs incurred will generally be recoverable after assessment, but this is unlikely to amount to a full reimbursement.

The civil litigation costs system was comprehensively reviewed by Lord Justice Jackson, who published his final report in January 2010. The majority of Jackson LJ's recommendations took effect from 1 April 2013, including:

- the abolition (from that time) of recoverability by the successful party of success fees and after-the-event insurance premiums;
- the introduction of contingency fee agreements (also known as damages-based agreements) for contentious work (see questions 1.6 and 1.7 below);
- a new costs management procedure for claims with a value of less than £10 million allocated to the "multi track" (i.e. cases which are more complex in nature and valued in excess of £25,000), with certain limited exceptions;
- an additional costs sanction (equivalent to 10% of the amount awarded up to a limit of £500,000, and then 5% of any amount awarded in excess of that figure, up to a limit of £1,000,000) payable by a defendant who does not accept a claimant's reasonable "Part 36" offer (i.e. an offer to settle made in accordance with Part 36 of the CPR) and fails to beat it at trial (as described more fully at question 10.1 below); and
- a new test of proportionality for recoverable costs.

Where applicable, the new costs management procedure for claims allocated to the multi-track requires parties (except litigants in person) to file and exchange costs budgets setting out costs for each stage of the proceedings, at least 21 days before the first case management conference, if no other date is specified. If a party fails to file a budget when required to do so, they will be deemed as having filed a budget comprising only the applicable court fees. The parties are expected to try and agree their respective budgets, and to revise those budgets if circumstances require during the course of the proceedings. If parties are not able to agree their budgets, or revisions to their budgets, the issues in dispute will be referred to the court.

The court fee, payable by the claimant upon issuing the claim, is 5% of the value of the claim, capped at a maximum of £10,000.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

The English legal system is open to conditional fee arrangements between lawyers and their clients ("no win, no fee"). These agreements are limited to an uplift on the fees payable. The maximum uplift on a conditional fee arrangement is 100% of the normal fee. However, following the Jackson reforms (see question 1.5 above), the success fee is not recoverable as a cost from an unsuccessful party where the conditional fee agreement was entered into on or after 1 April 2013.

Contingency fee agreements (also known as damages-based agreements or DBAs) are permitted for all contentious business, excluding criminal and family proceedings. DBAs are a form of "no win, no fee" agreement between the client and their representative, whereby if the client is unsuccessful there will be no fee, but if the client obtains a "specified financial benefit" the representative will receive an agreed amount. This amount is determined by reference to the amount of financial benefit the client has obtained (i.e. the lawyer will usually receive an agreed percentage of the compensation received by the client).

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

The English public policy against "champerty and maintenance" aims to restrict the selling and funding of litigation. Champerty means funding an action in return for payment of a share of the proceeds of the action. Maintenance prevents a third party funding litigation in which the funder has no genuine commercial interest.

If a cause of action is assigned and the assignment offends the policy against champerty and/or maintenance (for example, if the assignee is to pass on a share of any proceeds of the litigation to the assignor or if the assignee has no genuine commercial interest in the claim), such assignment would not be valid. Rules prohibiting assignment have been gradually relaxed.

There is a growing trend for litigation to be funded by professional funders of litigation. The following non-exhaustive list of factors will be taken into consideration when determining whether such funding arrangements fall foul of the public policy against champerty and/or maintenance:

- the extent to which the funder controls the litigation;
- the amount of profit the funder stands to make;
- whether there is a risk of inflating damages; and
- whether there is a risk of distorting evidence (particularly relevant if the third party funds expert evidence on a contingency basis).

The general judicial trend is towards recognising the validity of commercial funding and limiting the role of champerty and maintenance in regulating such arrangements (however, should such arrangements infringe champerty and/or maintenance, they will be void and unenforceable). There is increasing pressure for statutory regulation to be introduced in order to control third-party funding.

1.8 Can a party obtain security for/a guarantee over its legal costs?

Once proceedings have been commenced, defendants may apply for security for costs against the claimant. The purpose of granting security for costs is to protect the defendant against the risk of being unable to enforce any costs order which the defendant may later obtain. There are a number of grounds on which security for costs can be applied for, the main ones being:

- the claimant (wherever resident) has taken steps to dissipate his assets;

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- the claimant is a company (wherever incorporated) and there is reason to believe that it will be unable to pay the defendant's costs (if ordered to do so); and
- the claimant is resident outside of the UK or the EU.

After one of the grounds is established, the court will have discretion and will take into account:

- if the claimant is resident outside of the UK, the ability to enforce any costs order in that jurisdiction;
- whether the claimant is resident in a signatory country to the European Convention on Human Rights, because requiring a party to provide funds that it is unable to raise may amount to a breach of its rights to a fair trial under Article 6(1);
- the likelihood of the claim succeeding;
- whether the claimant is able to comply with the order; and
- whether the claimant's financial position was caused by the defendant's actions.

It should be noted that a claimant can also make an application for security for costs where the defendant has brought a counterclaim.

An order for security for costs will require the claimant to pay a specified sum of money into court or provide a bond or guarantee for the defendant's costs.

The English courts have the power to grant costs orders against a third party in favour of a party to the proceedings. The court has wide discretion in making such orders and will only make such a costs order against a third party when it is just to do so (considering factors such as the amount of control which the third party had over the proceedings and whether it stood to gain from them financially).

2 Before Commencing Proceedings

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

Before commencing proceedings, the parties have to comply with certain pre-action procedures. Depending on the nature of the case, the requisite guidance will be set out in the relevant pre-action protocol and practice direction. The intention of the pre-action protocols is to provide a procedure for the exchange of information about the claim before the proceedings are commenced. This assists the parties in agreeing a settlement before commencing proceedings or, failing that, with the management of the proceedings.

The information provided by the intended claimant must be sufficient to enable the intended defendant to investigate and evaluate the prospective claim. The intended defendant's response must be reasoned and contain sufficient comment and detail to enable the intended claimant to evaluate and respond to any settlement offer made.

The court will expect all parties to have complied in substance with the terms of an approved pre-action protocol and will take this into account when making costs orders.

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

Under English law, limitation is a matter of procedural law and provides a complete defence to a claim. It is for the defendant to plead the defence.

The various limitation periods are laid down by statute, the most important of which is the Limitation Act 1980. The limitation period for contract and tort claims is six years, with the time starting to run respectively from the breach of contract, and generally from the date on which the cause of action occurred. In cases of claims founded on deed, the limitation period is 12 years, with time starting to run from the date of the breach of the deed. In certain limited circumstances, the limitation period may be extended; for example, in cases of fraud or concealment. As a general rule, limitation periods are counted from the day the cause of action arose.

The limitation periods set down in the Limitation Act 1980 are subject to any agreement between the parties to a dispute which varies such limitation periods.

3 Commencing Proceedings

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

In England, civil proceedings are started when the court issues a claim form (by stamping it with the seal of the court). However, certain interim remedies are available before the proceedings are commenced (for example, the court may allow inspection of property which may become the subject-matter of subsequent proceedings).

The claim form must contain a concise statement of the nature of the claim, the remedy which the claimant seeks and the value of the claim (if it is a claim for money).

If the defendant is in England, the claimant will have four months to serve the claim form. If the defendant is outside England, the claimant will have six months to do so. If these time limits are not complied with, the claim form expires and needs to be re-issued. However, these time periods can be extended by agreement between the parties or by an order of the court.

The method of service also depends on whether the defendant is in England, in the EU or outside the EU. However, if the defendant has instructed solicitors in England who are authorised to accept service, then the claim form must be served on those solicitors.

If the defendant is in England, the following methods of service are acceptable, with the deemed date of service depending on the method used:

- personal service;
- leaving the document at one of the places specified in the CPR, such as the defendant's usual or last known residence;
- first-class post;
- by fax; and
- email or other means of electronic communications (if expressly accepted by the other side).

A claim form is deemed served on the second business day after completion of the relevant method.

Permission of the English court is not required to serve proceedings on a defendant in the EU provided that the dispute concerns an obligation to be performed or harm done in England. Service may be carried out in accordance with the EU Service Regulation (1391/2007/EC) or by any method permitted by the law of the relevant country. The EU Service Regulation permits service by:

- post;
- direct service (if permitted by the state's domestic law);
- diplomatic or consular agents; and
- transmitting and receiving agencies designated by the state.

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Service needs to be effectively carried out under the EU Service Regulation – it cannot be deemed to be carried out.

Permission of the English court is required to serve proceedings on a defendant outside of the EU. Various "gateways" exist which would entitle the court to grant such permission; for example, if the claim is for an injunction ordering the defendant to do or refrain from doing something within the jurisdiction, the contract was made in, or breach of contract occurred in, England, or the claim is against a co-defendant who is a necessary or proper party to proceedings in England. England must also be the appropriate forum in which to hear the dispute.

Service may be carried out under the Hague Convention (if the country in which proceedings are to be served is a signatory to the Hague Convention) or through the judicial authorities or the British Consular authority in that country if the law of that country permits. The Hague Convention permits service in the following ways:

- through consular and diplomatic channels;
- by post (but the signatory country may have objected to this);
- through designated judicial officers; or
- under any bilateral agreement concluded between the signatory states.

As to foreign proceedings being served on defendants in England, this depends on whether the proceedings being served are from another EU Member State (in which case the EU Service Regulation will apply) or from outside the EU (in which case the Hague Convention will apply if the proceedings being served are from another Hague Convention signatory).

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

Under the CPR, the claimant can apply for pre-action interim remedies if:

- the matter is urgent; or
- it is otherwise desirable to grant the interim remedy in the interests of justice.

Under this heading, the English courts are empowered to grant a wide variety of injunctions, including freezing and search orders.

A freezing order seeks to freeze a party's assets, in particular bank accounts, in England or on a worldwide basis, in order to ensure that should judgment be entered against that party, the judgment can be enforced against those assets. The criteria which need to be satisfied for a freezing order to be obtained are:

- the applicant must have a "good arguable case" in the underlying proceedings;
- there is a real risk that the defendant will dissipate assets; and
- it would be just and convenient in all the circumstances to grant the order.

Applications for such orders are often made without notice to the other party when there is a need for secrecy or in cases of overwhelming urgency. The applicant will be under a duty to provide full and frank disclosure and disclose all material matters to the court if this application is made without notice. The defendant will have a subsequent opportunity to contest any order made.

An application for an interim remedy can also be made in relation to proceedings that are taking place, or will take place, outside the jurisdiction.

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

In England, the claimant's main pleadings are referred to as the particulars of claim. The particulars of claim should clearly set out:

- the names and addresses of the parties;
- the facts giving rise to the dispute;
- the claimant's claims and the essential elements of the underlying causes of action;
- sufficient reasoning for the defendant to know what case he has to meet; and
- the relief sought, including interest.

The claimant will also be able to reply to the defendant's defence, and that reply will also form part of the claimant's pleadings.

It should be noted that the case will be confined to the pleaded allegations and the duty is therefore on the claimant to put forward his case in as much detail as possible.

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

Generally speaking, amendments to a statement of case are allowed at any time before they have been served on the other party. If the particulars of claim have been served, they can only be amended:

- with the consent of the other party; or
- with the permission of the court.

Whilst the court often gives such permission, late amendments (i.e. just before or during trial) can be disallowed by the court. Amendments of causes of action following the expiry of the limitation period are only permissible where the new cause of action arises out of substantially the same facts as those that underlie the original claim.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

A claimant may withdraw all or part of its claim at any time by filing and serving a notice of discontinuance on every other party to the proceedings, in most cases without the permission of the court.

The permission of the court is needed in certain specified instances; for example, where the court has granted an interim injunction, any party has given an undertaking to the court, interim payments have been made or whether there are other claimants who have not agreed to discontinue.

A claimant who discontinues the claim is generally liable for the defendants' costs.

Once a claim is discontinued, the court's permission is required for the claimant to make another claim against the same defendant if it discontinued the claim after the defendant filed a defence, and the other claim arises out of facts which are the same or substantially the same as those relating to the discontinued claim.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

The defence must state:

- which allegations made in the particulars of claim the defendant denies;

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- which allegations the defendant admits;
- which allegations the defendant is unable to admit or deny (but must state the reasons for this inability), but on which he puts the claimant to proof;
- reasons for the denial of any of the allegations made in the particulars of claim and the defendant's defence against those allegations; and
- any alternative versions of the facts underlying the dispute.

Any allegations not addressed in the defence will be taken as admitted unless the defence on that allegation appears from other points made in the statement of defence. The defendant can make a counterclaim, provided he has a cause of action against the claimant and that the parties to the counterclaim can be sued in the same capacity in which they appear in the initial claim. A defence of set-off is available under English law (but this can be excluded by contract).

Where the defendant makes a counterclaim, the claimant will also have to file a defence to counterclaim.

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

For proceedings served within the jurisdiction, the statement of defence has to be filed at court and served upon the claimant within 14 days of service of the particulars of claim, unless the defendant has expressly acknowledged service of the particulars of claim, in which case the defence only falls due 28 days after service of the particulars of claim. The parties may agree to extend this period by up to a further 28 days. For proceedings served outside the jurisdiction, time limits vary depending on the country of service.

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

Under Part 20 of the CPR, a defendant may bring a claim (a "Part 20 claim") against a third party for an indemnity or contribution or some other remedy within the context of the existing proceedings, rather than commencing separate proceedings against that party. Once served with the Part 20 claim form, the third party becomes a party to the original action with the same rights of defence as all the other defendants.

Under the Civil Liability (Contribution) Act 1978, one of two persons who are liable for having caused the same damage may bring separate proceedings for contribution against the other person liable within a two-year time limit after the original judgment finding only the first person liable. If successful, the assessment of such contribution from the second defendant, generally, will be such as the court finds to be just and equitable, with regard to the extent of that person's responsibility for the damage in question.

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

If the defendant fails to defend the claim, a default judgment may be entered against him. A default judgment is a judgment in favour of the claimant without a prior trial before the courts.

Default judgment can be obtained if:

- the defendant fails to acknowledge receipt of the claim form within the requisite timeframe; or
- the defendant fails to file and serve a statement of defence within the requisite timeframe.

A default judgment can be set aside if the defendant can show a real prospect of defending himself.

4.5 Can the defendant dispute the court's jurisdiction?

The defendant can dispute the court's jurisdiction by issuing an application notice with evidence in support within 14 days of filing an acknowledgment of service (except proceedings before the Commercial Court, where the deadlines are longer). If a defendant wishes to challenge jurisdiction, he should indicate this on the acknowledgment of service and take no further steps in the action (bar the application to challenge jurisdiction). If any other steps are taken, the defendant may be taken to have submitted to the jurisdiction of the English courts.

5 Joinder & Consolidation

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

The CPR contains provisions for the joinder of any number of claimants or defendants as parties to a claim, provided there is a cause of action by or against each party joined.

The court, however, preserves a discretionary power to order separate trials in order to ensure the swift and efficient conduct of the proceedings.

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

Under the CPR, it is possible to consolidate closely connected claims on a similar subject matter between the same parties. Consolidation is only possible if there is a considerable overlap between the two claims, which are before the court at the same time, and there is a real risk of irreconcilable judgments in the absence of consolidation.

Viable alternatives to consolidation are an order by the court to the effect of sequential judgments on the two claims by the same judge or the stay of one of the claims pending determination of the other claim.

5.3 Do you have split trials/bifurcation of proceedings?

Under the CPR, the English courts have the discretion to allow split trials (for example, between liability and *quantum*) either of their own motion or upon application by the parties. The court will consider various factors when deciding whether to order a split trial, such as the inconvenience or detriment that such a split may cause, the cost and time saving, and the ease of splitting the issues.

6 Duties & Powers of the Courts

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

The English courts apply a track allocation system, according to which civil claims are allocated to one of three case management tracks, i.e. (i) the small claims track, (ii) the fast track, or (iii) the multi-track.

The small claims track provides an efficient and inexpensive procedure for simple claims worth no more than £10,000. The fast

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track aims to provide an equally streamlined procedure for resolving disputes which are valued between £10,000 and £25,000. The multi-track caters for the resolution of disputes whose value exceeds £25,000. However, claims worth less than £50,000 which have been commenced in the High Court will generally be transferred to a County Court, unless there is a specific requirement for them to be tried in the High Court.

Claims brought before the Commercial Court, Technology and Construction Court and the Commercial Circuit Court are automatically allocated to the multi-track.

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

Under the CPR, the English courts are obliged to manage cases actively. Active judicial case management includes:

- encouraging the parties to co-operate in the conduct of the proceedings;
- identifying the issues that require full investigation and trial and deciding summarily on those that do not;
- encouraging the parties to resort to ADR if the court considers this appropriate;
- facilitating the settlement of the dispute in whole or in part;
- controlling the process of the case in a cost-conscious and efficient manner by setting procedural timetables and giving other appropriate directions;
- keeping the parties' need to attend court to a minimum; and
- making full use of technology.

A whole range of interim applications are available to the parties, including the following:

- interim injunctions (such as freezing and search orders, see question 3.2 above);
- security for costs (see question 1.8 above);
- amendment of a statement of case (see question 3.4 above);
- orders for specific disclosure (see question 7.4 below); and
- costs sanctions and other coercive measures against a party that does not comply with the court's previous procedural directions.

In respect of hearings of one day or less, the court will usually make a summary assessment of the costs of the application the same day as issuing the order applied for.

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

Under the CPR, the English courts have powers to compel recalcitrant parties to comply with their orders and directions, the most widely used amongst which is the power to award costs orders. Disobeying a court order (or assisting a party to breach an order) may also be a contempt of court, punishable by imprisonment, fine and/or seizure of assets. The courts are also empowered to make a strike out order (see question 6.4 below) or draw adverse inferences in appropriate circumstances.

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

Under the CPR, the courts are empowered to strike out the whole or any part of a statement of case of their own motion or upon application by one of the parties. More specifically, the court may strike out a statement of case if it appears to the court that:

- the statement discloses no reasonable grounds for bringing or defending a claim;
- the statement constitutes an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
- there has been a failure to comply with a rule, practice direction or court order.

Generally, an application for an order striking out a statement of case will be made during the pre-trial stages of proceedings (and often together with an application for summary judgment). However, a court can exercise its power just before trial or even during the course of trial.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

Under the CPR, the English courts can enter a summary judgment in favour of the claimant without holding a full trial. This is possible where a claimant can show that the defence has no real prospect of success and there is no other reason why the case should go to trial.

The summary judgment procedure can also be invoked by defendants against weak or unfounded claims that lack any prospect of success and there is no other reason why the claim should be brought to trial.

The courts can further enter summary judgment of their own motion in order to prevent weak or unfounded cases from proceeding.

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

A claimant may discontinue:

- the whole or only part of the claim; and
- against all or only some of the defendants,

by filing and serving a notice of discontinuance.

Permission from the court is only required in exceptional circumstances, e.g. where an interim injunction has been granted in relation to a claim that is sought to be discontinued. There will be cost consequences if proceedings are discontinued.

The courts have case management powers to the effect of staying the whole or part of the proceedings on application of a party or of their own motion to ensure the efficient conduct of the proceedings. Proceedings are stayed on the acceptance by one of the parties of a "Part 36 offer" (i.e. an offer to settle which – if rejected – can have adverse cost consequences if not beaten at trial).

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

Under the CPR, the parties to proceedings are under a duty to give advance notice to each other of any material documentation in their

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respective control. This process is commonly referred to as "disclosure" and historically consisted of exchanging a list of relevant documents ("standard disclosure"), which are or have been in each party's control.

Parties are required to exchange information before the first Case Management Conference on the documents that they have which may be relevant to disclose and how they are going to go about locating and retrieving them. In respect of electronic documents, the parties may decide to exchange the optional Electronic Documents Questionnaire in which each party sets out its proposals for its own, and the other side's, disclosure of electronic documents.

Standard disclosure requires the parties to disclose the following documents:

- those on which a party relies for making its case;
- those which adversely affect its own case or another party's case; and
- those which support another party's case.

The factors relevant in deciding the reasonableness of a search include:

- the number of documents involved;
- the nature and complexity of the proceedings;
- the ease and expense of retrieval of any particular document; and
- the significance of any document which is likely to be located during the search.

If a full manual review would be "unreasonable", then searches for electronic documents can be done by keyword searches or other automated methods of searching (and these include predictive coding).

Documents that are not material to the case at hand do not require disclosure.

However, since the implementation of the Jackson reforms on 1 April 2013 (discussed in question 1.5 above), claims allocated to the "multi-track" (see question 6.1 above) no longer follow the "standard disclosure" process by default. Instead, CPR 31.5(7) provides six categories of order for disclosure, which the court may decide to make. These are:

- an order dispensing with disclosure;
- an order that a party disclose documents on which it relies, and at the same time request any specific disclosure it requires from any other party;
- an order that directs, where practicable, the disclosure to be given by each party on an issue-by-issue basis;
- an order that each party disclose any documents which it is reasonable to suppose may contain information which enables that party to advance its own case or to damage that of any other party, or which leads to an enquiry which has either of those consequences;
- an order that a party give standard disclosure; and
- any other order in relation to disclosure that the court considers appropriate.

Disclosure is followed by inspection of documents which are disclosed, are still in the parties' control and are not protected by privilege, whereby parties can request copies of those documents or physically inspect them (and their originals) where they are stored.

Parties to a dispute may be expected to disclose certain information prior to the commencement of proceedings as part of the pre-action procedures (see question 2.1 above). However, under certain circumstances, a party can also apply to court under CPR 31.16 to seek disclosure from a respondent who is likely to be a party to subsequent proceedings.

As referred to above, a two-year pilot scheme in the BPC will begin in 2018 relating to disclosure, that attempts to deal with the costs, scale and complexity of disclosure and includes obligations to give disclosure at the initial stage of pleadings and subsequent options for different disclosure models, with close oversight by the courts.

Electronic disclosure

CPR 31.7 requires each party to make a "reasonable search" for "disclosable documents". A "document" also includes a computer file. E-disclosure is the disclosure of electronically stored information.

PD 31B recognises that keyword searches may not be suitable if they find excessive quantities of irrelevant documents (for example, by duplication of documents in email and "cc" email chains), or fail to find important documents which ought to be disclosed (PD 31B.26). In such circumstances, the parties should consider augmenting automated searches with "additional techniques" (for example, by individual review of certain key documents or category of documents), and taking "such other steps as may be required to justify the selection to the court" (PD 31B.27).

Predictive coding

English courts have approved the use of predictive coding while undertaking e-disclosure. Predictive coding allows litigants to employ advanced analytical techniques to carry out disclosure. As such, predictive coding facilitates the review of documents using computer algorithms to produce other likely relevant documents based on the selection of existing relevant documents.

Before carrying out e-disclosure, the parties would normally agree to a predictive coding protocol by defining data size, margin of error and criteria for inclusion of documents (including, date range, custodians, and keywords).

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

The three principal categories of privilege in civil proceedings are:

- legal advice privilege, covering any confidential communications between a solicitor and his client for the purposes of giving legal advice;
- litigation privilege, covering confidential communications between a client and a third party or a lawyer and a third party, provided that litigation was contemplated or pending and the information was for the purposes of the litigation; and
- "without prejudice" privilege, according to which any "without prejudice" communications made orally or in writing with the intention of settlement are privileged and may not be disclosed to the court.

Documents that are classified as privileged must be "disclosed" by listing the existence of such documents (which may be and is most often done in a generic fashion, rather than by specific reference to the particular documents). However, they are not made available for inspection by the other side (if they are, privilege will be waived).

In addition, there is a privilege against self-incrimination, according to which a party may be able to object to the inspection of a document which may expose it to a criminal charge, that is not the object of the existing proceedings.

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

A court may make an order for disclosure against a third party under the CPR, where:

- the documents of which disclosure is sought are likely to support the applicant's case or adversely affect the case of one of the other parties to proceedings; and

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- disclosure is necessary to dispose fairly of the claim or to save costs.

A court may also order disclosure against a third party. The respondent must be a party who is involved in a wrong-doing, whether innocently or not, and is unlikely to be a party to potential proceedings but may have information relevant to these. An order can be obtained before or after proceedings have commenced and is often used as a means to identify the proper defendant to an action or to extract the necessary information to formulate the particulars of the claim.

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

The court's main involvement is in supporting the disclosure process by making disclosure orders. These normally seek to compel a party to perform its disclosure obligations (see question 7.1 above). Under the CPR 31.12, the court may make an order for specific disclosure or specific inspection.

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

Under CPR 31.22, any documents disclosed in a particular set of proceedings may only be used in those proceedings and for no other purpose. The CPR makes provision for a number of exceptions, including where:

- the document has been referred to by the court in a public hearing, unless the court orders otherwise;
- the court gives permission for the subsequent use of the disclosed documents for purposes other than those for which they were originally disclosed; or
- the parties agree to the subsequent use of the disclosed documents for other purposes.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

Under the CPR, the parties are required to make advance disclosure of all material documents before trial (see question 7.1 above). In addition, court directions may require the parties to exchange expert reports and statements of witnesses of fact they seek to rely on at trial. Hearsay evidence is admissible at trial if adequate notice identifying the hearsay evidence is given to the other party in advance.

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

Types of admissible evidence include: (i) expert evidence; (ii) witnesses of fact; and (iii) hearsay evidence (i.e. where the witness gives evidence of facts he has not personally experienced for the purpose of proving the truth of those facts), provided an appropriate notice is served prior to the trial (see question 8.1 above).

Under CPR 32.1, the court may control evidence by giving directions as to:

- the issues on which it requires evidence;
- the nature of the evidence which it requires to decide those issues; and
- the way in which the evidence is to be placed before the court.

Under CPR 35.4, leave of the court is required to adduce expert evidence and when a party applies for permission they must provide an estimate of the costs of the proposed expert and identify:

- the field in which expert evidence is required and the issues which the expert will address; and
- where practicable, the name of the proposed expert.

The order granting permission may specify the issues which the expert evidence should address.

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

Written witness statements for each witness of fact are normally exchanged by the parties before trial and stand as evidence-in-chief of the witnesses to be called. Witnesses presenting evidence at trial are traditionally cross-examined before the court.

Witness evidence via video link is admissible.

Reluctant witnesses may be served with a witness summons compelling them to appear before the court.

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

The Protocol for the Instruction of Experts (the "Protocol") and the CPR contain various requirements for instructing experts, preparing expert reports and giving expert evidence in court. Leave of the court is required to adduce expert evidence, and any application for permission will have to comply with CPR 35.4 (see question 8.2 above).

The instructions given to the expert must be clear and set out the purpose of requesting the expert advice or report. The expert must be provided with the Protocol, the relevant provisions of the CPR and the accompanying Practice Direction. Material instructions to experts are disclosable to the other side. Once a party has appointed an expert and this expert has been named, permission will be required to change the expert and such permission will normally only be granted on the condition that any report obtained from the named expert is disclosed.

The requirements imposed by the CPR for expert evidence include that such evidence must be independent, objective, consider all material facts and be updated if the experts' opinions/findings change.

The CPR also requires that expert evidence should be given in a written report (which will stand as the expert's evidence-in-chief). There are various requirements for the form and content of this report under CPR 35.10 and the accompanying practice direction; for example, it must give details of the expert's qualifications and state the substance of all material instructions on the basis of which the report was written.

As part of the Jackson reforms, the courts formally adopted concurrent evidence or "hot tubbing". This means that the court can, at any stage in proceedings and of its own volition, order that

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experts from like disciplines will give evidence in the witness box at the same time, rather than sequentially.

An expert witness has a duty to assist the court with his expertise. This duty overrides any obligation to the party instructing him.

An expert witness is not the same as an expert adviser. An adviser may be instructed by a party at any stage to advise on specialist or technical issues within his expertise. An expert adviser is not subject to the rules applicable to an expert witness. However, an expert adviser can then be appointed as an expert witness, as long as they are perceived to be independent.

9 Judgments & Orders

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

The court has the power to make summary and default judgments (see questions 4.4 and 6.5 above).

A court's judgment can be for damages (for example, lost contractual profits) and/or an order that one of the parties perform its outstanding obligations under a contract (i.e. specific performance) and/or any other form of declaratory relief (for example, declaration/statement as to legal rights and obligations).

The English courts are empowered to adopt a wide variety of orders, including the following:

- injunction orders, prohibiting a party from doing a particular act (prohibitory) or compelling a party to perform a particular act (mandatory);
- consent orders, evidencing a contractual agreement between the parties;
- Tomlin orders (a type of consent order which stays proceedings on agreed terms recorded in a confidential schedule); and
- provisional damages orders, which are normally confined to personal injury cases.

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

The English courts are empowered to award damages for loss suffered, including economic loss. Damages awarded by the English courts are aimed at compensating the victim for the harm suffered, and not to punish the wrongdoer. Where the loss suffered is negligible, damages awarded by the court will be nominal only. As such, punitive damages, whilst permitted, are very rarely awarded.

Traditionally, the English courts have the power to award costs of the litigation in accordance with the "costs follow the event" principle, whereby the loser usually pays the costs (see question 1.5 above). Departure from this principle is justified where the winner has displayed unreasonable behaviour during the course of the proceedings. Costs orders are generally discretionary.

The English courts are empowered to award interest on both damages and costs awards.

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

A domestic money-judgment can be enforced: (i) by means of a writ or warrant of execution granted by the court against the judgment debtor's goods; (ii) by a third-party debt order against the judgment debtor's bank account; (iii) by attachment of earnings against the judgment debtor's salary; or (iv) by obtaining a charging order.

A declaratory (non-money) judgment is complete in itself, since the relief is the declaration and does not need to be enforced.

A judgment from another EU Member State can be enforced in England under the Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels Regulation), or Regulation (EU) 1215/2012 (the Recast Brussels Regulation) for proceedings instituted on or after 10 January 2015. This situation will change with Brexit, but at this time, the exact future position is not clear.

The judgments of a number of Commonwealth and certain other countries can be enforced under the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933.

In cases of those countries not covered by the above enforcement regimes (a notable example being the USA), enforcement will be governed by the common law regime. This requires the commencement of fresh legal proceedings (with the foreign judgment being sued upon as a debt). Permission to serve these proceedings out of the jurisdiction may be necessary (see question 3.1 above).

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

Under the CPR, an appellant is generally required to apply for permission to appeal. Permission to appeal may only be given if:

- the court considers that the appeal would have a real prospect of success; or
- there is some other compelling reason for which the appeal should be heard.

The application for permission to appeal is normally made after judgment is delivered and if it is refused, the refusal to grant permission to appeal can itself be appealed (this is done on paper).

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

Although parties are able to make offers to settle at any stage in legal proceedings in whatever way they want, under Part 36 of the CPR, parties are able to make a specific offer to settle which can have certain cost consequences. There are specific requirements governing the content and timing of a Part 36 offer. If the offers are not accepted and the matter goes to trial then, if the outcome at trial is the same or less favourable than was proposed in the Part 36 letter, the party who did not accept will normally have to pay most (but not all) of the other side's legal costs and potentially interest on costs and, in some instances, interest on any damages award.

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II. ALTERNATIVE DISPUTE RESOLUTION

1 General

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

The most frequently used methods of alternative dispute resolution are arbitration and mediation.

The commonly cited advantages of arbitration over litigation in the English courts are privacy (meaning allegations made in the proceedings will not, as a matter of course, be known to the public), speed (due to the fact that the private arrangements made with arbitrators can mean that cases can happen as quickly as the parties and the arbitrators want them to – but this is very case- and party-dependent) and reduced cost (but this is not always the case). A further advantage is that an arbitral award may be easier to enforce in a foreign jurisdiction (under the New York Convention) than an English court judgment.

Mediation has become a widely accepted alternative dispute resolution mechanism in England, which is recognised by the CPR. At its most basic level, mediation is nothing more than a negotiation conducted through an intermediary. The mediation process is entirely confidential and benefits from the "without prejudice" privilege rule, according to which no communications made during the proceedings can be disclosed without the express agreement of the mediating parties in the event that no settlement is reached (save to the extent that there is a later dispute as to whether a settlement was actually reached). If successful, mediation concludes with a settlement agreement, which is enforceable as a contract (see question 1.5 below).

Expert determination is often used for disputes relating to matters such as rent reviews, valuation of shares in private companies, price adjustments on take-overs, construction contracts and information technology. An expert's determination is final and binding but can be subject to an appeal to the courts on very limited grounds. As opposed to arbitrators, expert determiners render "non-speaking awards", i.e. awards that do not set out (detailed) reasons for the final decision rendered.

Special tribunals exist for special purposes, such as employment and tax. The tribunals' service is equivalent and parallel to the court structure. There are two types of tribunals (the First Tier Tribunal and the Upper Tribunal), which have generic rules of procedure and a coherent system of appeals. The First Tier Tribunal hears appeals from governmental/civil service decision-makers (for example, the Tax Tribunal will hear appeals from decisions of the UK tax authority). The Upper Tribunal is a sort of administrative Court of Appeal. For example, the decisions of the Financial Conduct Authority and Tax Tribunal can be appealed to the Upper Tribunal. Strictly speaking, these are not a form of ADR, but a court process and so shall not be mentioned further.

The services of an Ombudsman are increasingly required in sector-specific industries, for example, within the context of the provision of financial services and utilities. An Ombudsman's powers are provided by statute. He will usually be mandated to facilitate a settlement between the complainant and the relevant provider or in the alternative, where a settlement fails, make a final decision.

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

Arbitration proceedings are governed ("law of the seat") by the Arbitration Act 1996, which applies to both domestic and international arbitration. Apart from the Arbitration Act, and depending on the parties' arbitration agreement, various institutional arbitration rules may find application, such as the rules of the London Court of International Arbitration and the Chartered Institute of Arbitrators or those of various London-based trade associations (see part II, question 2.1 below).

Mediation is not governed by any particular set of laws or rules. However, the UK implemented the European Mediation Directive, which applies to cross-border disputes and seeks to protect the confidentiality of the mediation process and ensure that when parties engage in mediation, any limitation period is suspended.

The services of an Ombudsman are governed by the relevant statute that gives rise to his mandate.

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

In England, virtually all commercial matters are arbitrable. Disputes involving criminal and family law matters are generally considered non-arbitrable.

Similar considerations apply to mediation, except that mediation proceedings are often used to resolve family disputes.

As mentioned previously (see part II, question 1.1 above), the Ombudsman's services are usually sector-specific and provided for by statute.

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

The courts tend to enforce arbitration agreements. The courts tend to grant anti-suit injunctions against a party that has commenced court proceedings abroad in breach of an arbitration agreement, unless those proceedings have been commenced in the court of an EU Member State.

The courts further play a supportive role in arbitral proceedings seated in England (unless the parties to the arbitral proceedings agree otherwise), lending their assistance in relation to the preservation of evidence or assets, the granting of interim injunctions and issuing of witness summons if necessary. In particular, the court is often involved before the Arbitral Tribunal is constituted.

Arbitral Tribunals seated in England are empowered to grant interim relief (i.e. orders for parties to do or not to do something before the hearing has actually taken place) and make orders for security for costs.

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Mediations generally require agreement by the parties to mediate. However, the court can order the parties to attend mediation. The Commercial Court has been encouraging mediation for the past 20 years and other courts also run schemes that promote ADR.

Where a dispute falls within the scope of a valid expert determination clause, a party will not have recourse to the courts to resolve such a dispute.

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

An arbitral award is final and binding but a party can appeal to the courts on a point of law, unless the arbitration agreement excludes this ability. Leave of the court to appeal the award is severely restricted under the Arbitration Act (and can even be excluded by the arbitration agreement) and the applicant must show, among other things, that the determination of the question of law will substantially affect the rights of the parties and that it is just and proper for the court to determine the question/dispute.

The arbitral award may be also challenged on the basis that: the Arbitral Tribunal did not have jurisdiction to decide the dispute; or there was a serious irregularity affecting the Arbitral Tribunal, the proceedings or the award (for example, the Tribunal failed to deal with all the issues that were put to it or was biased).

The New York Convention, to which England is a party, allows the enforcement of an English arbitration award across all the Convention countries in accordance with those countries' own laws. Likewise, the Arbitration Act provides for enforcement in England of an arbitration award rendered in another New York Convention country. The most common method of such enforcement is to seek a judgment of the English court in terms of the award (and that judgment can then be enforced as a judgment of the English court).

Settlement agreements which are reached through mediation are contracts and are therefore enforceable if the requirements for a valid contract are satisfied. Failure to at least consider mediation (or another form of ADR) is likely to lead to the court making a costs order that is detrimental to such a party.

An expert's determination is final and contractually binding on the parties, with very limited availability of an appeal. A court can order that an expert give reasons for the decision where the underlying expert determination clause in the agreement so provides.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

The major arbitration institution in England is the London Court of International Arbitration (LCIA).

Other more specialised, industry-related arbitration institutions are:

- the London Maritime Arbitrators' Association;
- the Grain & Feed Trade Association;
- the Federation of Oils, Seeds & Fats Association;
- the Sugar Association of London and the Refined Sugar Association; and
- the London Metal Exchange.

The leading mediation institution in England is the Centre for Effective Dispute Resolution (CEDR), which provides mediation services. The Panel of Independent Mediators (PIMs) is an organisation of leading mediators across the country.

Expert determination services can be provided through the CEDR.

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Finland

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I. LITIGATION

1 Preliminaries

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

Finland is considered to have a civil law system and the Code of Judicial Procedure (1734/4, as amended) is the main statute that governs civil proceedings. Arbitration is governed by the Arbitration Act (1992/967, as amended).

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

There are three levels in the Finnish civil court system. District Courts are the first instance. A District Court judgment can be appealed to the competent Court of Appeal. After the judgment has been rendered in the Court of Appeal, a party may petition the Supreme Court for a leave to appeal the matter. Leave to appeal is granted under certain conditions, for instance, if the matter has value as precedent. In practice, only a fraction of cases are granted leave to appeal.

Specialist courts handling civil law matters are, for instance, the Market Court (e.g. Public Procurement and IPR), the Labour Court (applicability of collective bargaining agreements) and the Insurance Court.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

Civil proceedings are divided into a preparatory stage and a main hearing. The purpose of the preparatory stage is to ensure that the main hearing may be conducted without interruption. During the preparatory stage, the parties will submit their written statements, specify their claims, agree on potential uncontested issues, and announce the evidence they are intending to rely on.

Once the preparatory stage has been concluded, the case will be argued in a main hearing during which evidence will be presented and witnesses heard. The length of the main hearing ranges from one to several days. The parties are not, as a main rule, allowed to present any new claims or new evidence at this stage. The principles of orality, directness and concentration of the trial are of the essence.

On average, the duration of a full trial on the merits in the first instance is a little over one year, but average durations vary locally.

It is possible to file a concise application for a summons if the claimant deems the matter undisputed. However, if the defendant contests the claim, normal proceedings are commenced.

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

The main rule is that the parties may agree on the forum for their dispute. However, in some cases, the local courts have exclusive jurisdiction. In business disputes, the main rule applies.

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

Trial costs vary based on the scope, type, and complexity of the case. Attorney's fees constitute the major part of litigation costs.

The principal rule is that the losing party is obligated to bear the reasonable and necessary costs of the opposing (winning) party. However, if the matter is non-discretionary, parties bear their own litigation costs, unless there is a special reason to obligate either one to pay a part or all of the opposing party's costs.

There are no other rules on cost budgeting, but costs that are deemed (on a case-by-case basis) too high or excessive for the purposes of the case in question cannot be recovered.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

There are no specific rules as to funding litigation. However, if a claim for legal costs is submitted, the Court must be able to evaluate whether the costs have been necessary and reasonable. Additionally, the Finnish Bar Association's Rules on Ethics apply to attorneys at law. Conditional fees and contingency fees are not prohibited by the Bar, but are, nevertheless, quite uncommon.

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

Assignment of claims are possible in discretionary matters and are subject to substantive law. There are some exceptions. There are no impediments for a non-party to finance the proceedings.

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1.8 Can a party obtain security for/a guarantee over its legal costs?

There are no rules pertaining to security for costs in civil proceedings in general, but it is unlikely that a Court would allow a party to demand security for/a guarantee over its legal costs from the opposing party. However, a claimant is usually ordered to deposit a security when applying for interim measures.

2 Before Commencing Proceedings

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

An action is initiated when a claimant submits a written application for summons to the registry of the District Court. If the application for summons does not comply with formal requirements set out in the Code of Judicial Procedure, the District Court will exhort the claimant to supplement the application.

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

The general limitation period for initiating proceedings in civil cases is three years (may be interrupted by notice). Time limits are treated as an issue of substantive law.

3 Commencing Proceedings

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

In civil proceedings, service of legal documents is generally the responsibility of the Court. At the request of a party, the Court may entrust responsibility for the service to the party.

Service may performed by several means. The document may be served by mail or by using a process server, i.e. a bailiff. A process server is commonly used if service by mail has been unsuccessful. Ultimately, if the defendant is not reached by the process server, service by public notice may also be possible.

As Finland is a member of the EU, service to another EU country is regulated by Regulation (EC) No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters. Finland has also ratified the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 1965.

If service is performed by mail (without confirmation of receipt), the deemed date of service is the seventh day after the posting of the document.

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

There are interim remedies available before commencing the proceedings and during the proceedings. The applicant must deposit a security to enforce an interim remedy if the Court deems it necessary. The executive official decides on the amount of the security, which is valued considering the amount of probable damage caused to the opposing party, if the interim measure is deemed groundless. An applicant who has unnecessarily resorted to a precautionary measure is liable to compensate the opposing party for damages and other expenses incurred.

An applicant for an interim measure must convince the Court that it is probable that he or she holds a receivable that may be rendered payable by an enforceable decision or that he or she holds some other enforceable right, and that there is a danger that the opposing party might hide, destroy or convey his or her property or take any other action endangering the payment of the receivable or the other right.

For possible interim measures, please see question 6.2.

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

The following main elements need to be stated in an application for a summons:

- Claims and the grounds for the claims. Preliminary arguments on the merits are usually submitted at this point as well.
- The contract or other document(s) on which the claim is based (appended).
- The claimant shall, if possible, state the evidence (for example, written evidence and/or witnesses) he intends to rely on.
- A claim for the compensation of legal costs may also be made.
- The basis for the jurisdiction of the court, unless it can be inferred from the application for a summons or the documents appended to it.

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

The main rule is that claims and the grounds for the claims may not be amended. However, there are exceptions to the rule. If there is a claim other than what has been claimed in the original application for summons, it may be added if it is based on a change of circumstances during the trial or if the party has not been aware of the grounds for the claim earlier. An additional claim may also be made if it is essentially based on the same legal grounds as the original claim.

A party may not invoke new legal facts or new evidence in the main hearing, unless there has been a valid reason for the failure to invoke the facts in time during the preparatory stage.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

The claimant may withdraw its pleadings as long as the defendant has not responded to the claim. After the response, the defendant has the right to demand the matter to be decided in spite of the withdrawal.

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4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

When responding to the application for summons, the defendant shall state the grounds for his objection and present the evidence, which he relies on in support of his defence.

Relevant documents and other written evidence shall be appended, if possible. The defendant may additionally submit a claim on legal costs. The defendant shall also at this point challenge the jurisdiction of the Court if there are grounds for such a challenge.

The defendant may claim set-off or bring a counter-claim. The defendant's claim has to be related to the same legal relationship. Consideration of the set-off or counter-claim may be performed in the same Court that has jurisdiction over the original matter, i.e. the claimant's pleading.

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

The Court will determine the time limit, and it depends on the matter and its circumstances. Usually, a minimum of 14 days is provided to the respondent for his response. A party may petition the Court for additional time if necessary.

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

A claim for damages or a claim for recourse or a comparable claim may be presented against a third party if the outcome of a matter may lead to the defendant having a consequential right against a third party. The defendant may bring an action on such a claim to be heard in the same proceedings with the present case.

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

In cases that are amenable to settlement, the judge will, on the request of the claimant, decide on the case according to the claims made by the claimant, if the defendant does not submit a statement of defence (default judgment).

A defendant against whom a default judgment has been issued has the right to petition for a re-trial within 30 days of being served notice of it. The application for retrial may be presented under certain conditions. If the default judgment was based on the failure of the party to present a written response or to appear in court, the appeal for retrial shall include grounds for amendment of the judgment that could have been relevant when the case was decided. In this case, the matter is taken up for a hearing so that it can be dealt with in detail and all evidence can be admitted.

If the defendant has responded to the action, but does not appear in the Court, the opposing party shall also have the right to have the case decided by a judgment and the right to present the evidence necessary for this purpose. However, in this case, the Court will examine the matter instead of issuing a default judgment.

4.5 Can the defendant dispute the court's jurisdiction?

Yes. The District Court may dismiss the matter, if a party submits objections as to the jurisdiction of the Court. The objection has to be made simultaneously when the respondent is exercising his right to be heard for the first time.

5 Joinder & Consolidation

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

Right to intervention exists under certain conditions. A third party has to state that the original matter concerns his right, in which case, he may be granted the right to participate in litigation alongside the claimant or the respondent. The third party must also submit probable cause for his right. There is also a possibility for the third party to join the proceeding on the initiative of a party. Again, a third party must present probable cause for his right in the matter.

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

Consolidation is possible in certain circumstances if the Court determines that it would be beneficial for the examination of the matters. Both actions have to be pending in the same Court. The Court must also be competent in both proceedings. The procedural rules applicable to both disputes shall also be the same.

In certain situations, consolidation is mandatory. For example, several actions brought by the same claimant against the same defendant simultaneously shall be heard in the same proceedings if they are based on essentially the same grounds. Counter-claims made by the defendant, such as an action against the claimant on a debt that is admissible for set-off, shall also be consolidated with the original proceedings.

5.3 Do you have split trials/bifurcation of proceedings?

It is under the discretion of the Court to decide on a split trial. Partial or intermediate judgments may be used in extensive cases if the Court considers it necessary. Partial judgments may be rendered when there are several independent claims examined in the same trial. A partial judgment is beneficial due to the fact that the enforcement may be initiated separately based on the partial judgment. An intermediate judgment is rendered when the resolution of a claim is a prerequisite for the Court decision as a whole.

6 Duties & Powers of the Courts

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

There are no formal rules on case allocation within the District Courts. Usually, judges are assigned cases at random. However, some Courts divide cases by type to certain departments.

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The proceedings in all IP dispute and invalidation cases, as well as the related preliminary injunction issues, have been centralised to the Market Court. Some particular matters, such as maritime law-related disputes, are settled within particular District Courts due to their subject matter.

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

Courts have an active duty to manage the case. For example, during the preparatory stage of the trial, the Court may actively pose questions to clarify the contentious issues in parties' statements. The Court may, based on its discretion, give orders on limitations to the parties and set the hearing dates.

There are interim remedies available. The Court may order the attachment of the opposing party's property and grant injunctive relief; i.e., prohibit the opposing party from doing something. The Court may also, under threat of a fine, order the opposing party to perform, or empower the applicant to do something or to have something done. The Court may order that property of the opposing party be placed under the administration and care of a trustee, or order other measures necessary for securing the right of the applicant.

The claimant needs to provide security for a potential claim for damages due to the interim remedy.

When the interim measure has been granted, the applicant shall, within one month, bring an action on the main issue before the Court.

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

The Court may impose a fine on a recalcitrant party, if the party was summoned to attend a hearing under threat of a fine and is, nevertheless, absent. The Court may have a party or a witness retrieved by the police if it finds it necessary. If a party does not comply with an order to produce a document, the Court may draw an adverse inference due to the non-compliance.

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

Yes. The Court shall refrain from issuing a summons and, at once, dismiss the action on the merits if the claimant's claim is manifestly unfounded. The Court may strike out the claim partially or totally, discontinue pre-trial proceedings or refuse to serve the claim if the claimant does not provide necessary supplementation upon request, or if the claim is incomplete to the extent that it cannot form the basis for proceedings. Further, during the proceedings, the Court may also strike out irrelevant or excessive evidence.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

In cases that are amenable to settlement, the judge will render a judgment in accordance with the claims made by the claimant if the defendant fails to submit a statement of defence (judgment by default). Also, if a party does not appear in the hearing where he is summoned, the Court can rule the matter in favour of the claimant. The defendant may apply for a re-trial in case a default judgment has been rendered.

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

The Court can decide to discontinue proceedings under certain conditions. For example, if the claimant was summoned to the main hearing under a threat of discontinuance in case of absence, the Court may act accordingly and discontinue the case. Also, if the claimant does not comply with the request of the Court to submit a written statement or does not attend a session, the case shall be discontinued by the Court.

Postponing the main hearing is possible under three conditions. The Court may stay the proceedings at this stage, if:

- a party or other person does not appear before the Court;
- new and important evidence has come to the attention of the Court, and it can only be admitted later; or
- an unforeseeable or important reason emerges which renders a stay necessary.

If it is important for the outcome of the case that an issue at another trial or in another proceeding is resolved first, or if there is another long-term impediment for the hearing of the case, the Court may order that the hearing be resumed after the impediment has ceased to exist.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

Formal discovery or disclosure as exercised in common law countries does not exist in the Finnish judicial system. The main rule is that parties are responsible for providing the Court with the relevant evidence for proving their claims.

However, the Court may, based on the request of a party, order the opposing party or a third party to produce specific documents. Prerequisites for ordering document production are the following: (i) the sought after document must be sufficiently specified; and (ii) its presumed relevance to the outcome of the case must be established. If a party does not present the documents ordered by the Court, the Court may impose a threat of fine or order an execution officer to enforce the production. Adverse inferences may also be drawn due to non-compliance.

The main rule is that document production by a court order requires that the respective legal proceedings are pending. Pre-action document production and preservation of evidence by a court order is usually only available in certain IPR matters.

There are no special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

The rules on privilege in disclosure are in most parts similar to the exemptions of giving a testimony in a main hearing.

A public official, a physician, a pharmacist, or a midwife, or the assistant of such a person, an attorney or counsel, a court-appointed mediator or an auxiliary mediator, or a priest may not present a

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document if it can be assumed that the document contains something on which he or she may not be heard on as a witness.

In addition, a witness may refuse to give a statement, which would reveal a business or professional secret, unless weighty reasons require that the witness be heard on the subject matter. In this case, the Court will examine the grounds for refusal. Partial production of a document may also be ordered.

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

The Court may order third parties to disclose relevant documents upon the request of a party.

Please see questions 7.1 and 7.2 on the rules of document production, which apply to third parties as well.

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

The Court decides on the production of documents if a party has requested it and if the prerequisites for document production are fulfilled. The Court may, if it deems necessary, order a person to present a document under threat of a fine or order that it be delivered to the Court by an execution officer. Before the person is ordered to present the document in court, he or she shall be granted the opportunity to give an explanation; i.e. comment on the possible obligation.

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

The Court may order a confidentiality obligation concerning the documents obtained by way of court-ordered document production. Otherwise, documents submitted to Court are publicly available and can be used by the parties and third parties.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

No specific provisions on standard of proof exist. In each case, the Court will assess the relevance, materiality and weight of the evidence that the parties present during the proceedings. The Court determines the outcome by applying the relevant law to the facts that have been established by the parties. Thus, evaluation of the evidence is based on the principle of free evaluation of evidence. Oral testimonies of the parties and witnesses are heard in the main hearing. The main rule is that the claimant must bear the burden of proof concerning its claim. No evidence needs to be presented regarding a notorious fact.

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

Written evidence and oral testimonies are admissible. Expert evidence, written and oral, may also be relied on. The Court may organise an inspection upon request. A written witness statement drawn up for the purpose of a pending or imminent trial may not be admitted as evidence, unless the Court admits it for a special reason.

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

As a rule, witnesses may not refuse to give evidence, but there are some exceptions to this rule. Please see questions 7.1 and 7.2 on such exceptions.

Evidence is presented at the main hearing. The statements made by witnesses are oral. Witnesses are not allowed to submit any written statements to the Court during their hearing.

If a case may be settled out of court, the party must list all the items of evidence during the preparatory stage of the proceedings. No additional evidence may be referred to once the main hearing has begun.

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

Expert evidence is usually presented in the form of a written statement issued by the expert during the preparatory stage of the proceedings. An expert witness may be appointed by either a party or by the Court.

Expert witnesses are heard orally in the main hearing, if a party insists on it and the hearing is not considered unnecessary. Expert witnesses can further be heard orally in case the Court considers it necessary. When heard, the expert witness must testify truthfully.

There are no particular rules regarding concurrent expert evidence under Finnish law.

9 Judgments & Orders

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

Civil courts can issue default judgments, injunctions, judgments granting affirmative relief, declaratory judgments, and constitutive judgments. Partial or intermediate judgments can be rendered as well. Please see question 6.2 for interim measures.

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

Due to the prohibition of enrichment, punitive damages are not allowed. Therefore, compensation is made according to the actual damage incurred. Courts may award damages and interests on claims. The Court may also rule on legal costs and the allocation of legal costs between the parties involved.

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

A domestic judgment is enforced by the local executive officers after the decision has become final.

Foreign judgments cannot be enforced without an international convention or a national provision forming the basis of the enforcement action. Enforcement procedures vary depending on the international rules applicable.

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For example, if a judgment has been rendered by a Court in a Member State of the European Union, the recognition and enforcement is performed in accordance with the rules set out in Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

In addition, there are conventions allowing for the enforcement of judgments within specific fields depending on the subject matter, such as the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children.

Arbitral awards may be enforced on the basis of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

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

The judgments issued by the District Courts are subject to appeal, unless appeal has been specifically prohibited. A party who wishes to appeal a judgment shall declare his or her intent to appeal no later than on the seventh day after the day when the decision of the District Court was rendered or made available to the parties. The deadline for lodging an appeal is 30 days from the day when the decision of the District Court was rendered or made available to the parties.

An appeal to the Supreme Court is subject to the Supreme Court granting leave to appeal. The Supreme Court may grant leave to appeal if the case has value as a precedent, if a procedural error has been committed in the proceedings or if there is another weighty reason for granting the leave to appeal.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

During the preparatory stage, the Court must enquire if a settlement is possible. It must encourage the parties to settle claims and it may also propose a settlement.

Court mediation is possible with the consent of all parties. The Court may confirm a settlement, after which it becomes enforceable.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

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

Arbitration is widely used in the business sector. Arbitration must be based on an agreement between the parties.

Mediation has gained more attention as an alternative dispute resolution in the past few years.

The Average Adjuster, an official appointed by the Ministry of Trade and Industry, issues rulings which concern maritime insurance cases in the event of an average.

The Finnish Financial Ombudsman Bureau and its Insurance, Banking and Securities Complaints Boards issue recommended resolutions to insurance, banking and securities disputes between a customer and a service provider.

In disputes between enterprises and consumers, the Consumer Disputes Board can give non-binding recommendations on the matter.

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

Arbitration is regulated by the Arbitration Act. It was inspired by the UNCITRAL Model Law on arbitration of that time. In general courts, a special form of mediation is used in civil disputes, which is regulated in the Act on Conciliation in Civil Disputes in General Courts (1015/2005, as amended).

Different alternative dispute resolution institutions in Finland also have their own rules which may become applicable, subject to an agreement by the parties.

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

As a general rule, if a civil law case can be settled outside of court, arbitration and mediation may be utilised. A clause in a contract, according to which a future dispute between a business and a consumer shall be settled in arbitration, will not be binding on the consumer. Arbitration is not applicable to non-discretionary matters.

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

The *lis pendens* rule applies to arbitration proceedings. If parties have agreed to arbitration in an agreement, and either party commences a regular court proceeding, the Court can dismiss the case, if a motion for dismissal is submitted by the opposing party. A party may petition the Court to appoint an arbitrator if the other party does not cooperate.

Pursuant to the Arbitration Act, the Court may, before or during the arbitral proceedings, grant interim measures based on a request by a party.

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

An arbitration award is final and non-appealable in general courts. However, if the arbitration award may be considered invalid

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pursuant to the Arbitration Act, e.g. due to an arbitrator exceeding his mandate, a party may challenge the award in general courts. An arbitration award must also comply with *ordre public*.

Settlement agreements that have been reached in mediation outside of court can be confirmed by the Court under certain conditions. After confirmation, the settlement agreement is enforceable in the same manner as judgments or decisions made by the Court.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

The Arbitration Institute of the Finland Chamber of Commerce administers arbitrations conducted under the auspices of its rules. The Institute appoints arbitrators and conciliators to both domestic and international cases.

The Arbitration Institute can also act as an appointing authority under the UNCITRAL Rules.

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Borenius Attorneys Ltd offers legal services in all aspects of domestic and cross-border dispute resolution, including conflict management and strategic planning. The dispute resolution team is one of the largest and most respected in Finland. It combines wide experience with knowledge of various industry sectors. In addition to civil proceedings, Borenius regularly represents Finnish and foreign clients in arbitration proceedings under various arbitration rules, as well as in *ad hoc* arbitration proceedings. Our experts frequently serve as arbitrators in domestic and international commercial proceedings.

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France

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I. LITIGATION

1 Preliminaries

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

The French legal system belongs to the civil law tradition. Civil procedure is governed by the rules set forth in the Civil Procedure Code (hereinafter "CPC").

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

The civil judicial system is structured as a three-tier pyramid.

The Courts of first instance, which together form the first tier or first degree of jurisdiction, include four major kinds of courts:

- "*Tribunaux d'instance*": such Courts have jurisdiction over any private dispute, provided that: (i) the disputed amount is lower than €10,000; and (ii) the law has not expressly conferred jurisdiction to another Court. These Courts also have exclusive jurisdiction over several matters (whatever the disputed amount), such as tenant disputes. In 2018, there were 304 "*Tribunaux d'instance*". A bill currently discussed in Parliament plans to merge them with the "*Tribunaux de Grande Instance*".
- "*Tribunaux de grande instance*": such Courts have jurisdiction over any private dispute, provided that: (i) the disputed amount exceeds €10,000; and (ii) the law has not expressly conferred jurisdiction to another Court. These Courts also have exclusive jurisdiction over several matters (whatever the disputed amount), such as intellectual property, real estate or family law. In 2018, there were 164 "*Tribunaux de grande instance*".
- "*Tribunaux de commerce*": such Courts have exclusive jurisdiction over commercial matters, including insolvency proceedings. They are run by non-professional judges elected from members of the commercial community. In 2018, there were 136 "*Tribunaux de commerce*".
- "*Conseils de prud'hommes*": such Courts have exclusive jurisdiction over employment disputes. In 2018, there were 210 "*Conseils de prud'hommes*".

The second tier is comprised of the Courts of appeal that hear appeals filed against all decisions rendered by the civil Courts of first instance. In 2018, there were 36 Courts of appeal.

The third tier of the civil Court system is the "*Cour de Cassation*". This Court exercises final control over decisions issued by the Courts of appeal. The "*Cour de Cassation*" is divided into four sections (civil section, commercial and financial section, employment section and criminal section).

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

A case is generally commenced by serving summons (see question 3.1), which must be handed out to the Court before which the claimant has decided to sue the defendant. Then the Court will schedule a timeline which generally includes an instruction phase ("*mise en état*") which can vary from one Court to another (see questions 3.2, 3.3 and 4.1).

During this phase, interim pre-trial hearings can also be scheduled, for example if a party raises a procedural issue and the judge considers it should be dealt with separately from the merits of the case (see question 6.2).

When the judge deems the case ready for trial, a pleading hearing on the merits is scheduled. During the pleading hearing, the parties only put forward their most important arguments. These rarely last more than an hour.

The time required for a case is rarely faster than one year. Appellate proceedings before the Courts of appeal or the "*Cour de Cassation*" often require 18 months. Case management is the duty of the Courts, and parties have no direct influence on it – although they may ask for delays when applying for continuances or time extensions to file briefs.

Accelerated proceedings on the merits may also be used ("*assignation à jour fixe*" or "*à bref délai*"). However, before serving summons on the defendant, the claimant must file a specific writ ("*requête*") in order to be authorised by a judge to benefit from these proceedings. The claimant must demonstrate the urgency of his case.

Summary proceedings ("*référé*") exist before most of the Courts, when the claimant is able to demonstrate the emergency of the case or its simplicity. Summary proceedings enable parties to obtain protective or urgent Court orders. Such orders, which are immediately enforceable, do not terminate the dispute as regards the merits of the case (see question 3.2).

The party who is unsatisfied with a judgment can lodge an appeal before the Court of appeal (see question 9.4).

A ruling rendered by the Court of appeal may be challenged before the *Cour de Cassation*.

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

Exclusive jurisdiction clauses can only be stipulated in contracts concluded between merchants, provided that such clauses are specified very clearly for both parties.

Such clauses are deemed invalid when opposed to a party who is not a merchant or who has not entered into the agreement containing the jurisdiction clause as a merchant.

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

Two types of legal costs are distinguished in the provisions of the CPC:

- The "*dépens*", which include: Court's fees and taxes; expert and translation costs; and bailiff's fee, *etc*.
- Other expenses which are not included in the "*dépens*", i.e. counsel fees mainly.

The "*dépens*" are usually paid by the party who loses the case. As for the other expenses, the judge can decide, whether he considers it to be fair, to sentence a party to cover the other party's counsel fees. However, the ruling rarely compensates the amounts actually paid by a party for its lawyer's fees.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

Since 2015, fee arrangements have been mandatory and they must be put in writing (as a leading principle). Fees must be fixed, at least partially. Contingency fees, if agreed upon between the lawyer and their client, cannot represent 100% of the legal fees.

A mechanism of State legal assistance also exists. It is granted depending on the level of resources of the applicant, who must be a natural person. If granted, the head of the local Bar appoints a counsel to the aided party. The counsel then receives a fixed fee from the State, and Court fees and costs related to the enforcement of judgments are borne by legal aid.

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

Third-party funding is not prohibited *per se* by ethical and professional rules of conduct but it is rarely used in France: its development is moderated by anti-laundering and banking regulations.

1.8 Can a party obtain security for/a guarantee over its legal costs?

The judge in charge of pre-trial motions may order a party to pay a sum of money as security for another party's legal costs. However, the French *Cour de Cassation* ruled in 2015 that the party asking for a provision for costs must prove that the obligation on the merits is not seriously disputable. The practice of ordering security for legal costs is not common in France.

2 Before Commencing Proceedings

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

The parties are required to attempt to settle any disputes amicably.

Therefore, the initial complaint ("*assignation*") must mention the steps that have been taken in attempt to settle the dispute out of Court, unless there is a legitimate reason relating to the urgency or the matter in question.

In practice, it is recommended for the plaintiff to send a formal notice ("*mise en demeure*") to the defendant before initiating a lawsuit to prove that an amicable solution has been sought.

If the parties fail to demonstrate that they have attempted to reach an amicable settlement to their dispute, the judge can suggest an attempt of conciliation or mediation (see section II).

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

Limitation periods were amended by Law n°2208-561 of 17 June 2008. Most provisions governing limitation periods, in civil cases, are provided for in article 2224 *et seq*. of the Civil Code).

In civil and commercial claims, the standard – default – legal limitation period for pursuing a claim or invoking a right is of five years.

However, specific limitation periods remain, such as:

(i) personal injury actions: 10 years;

(ii) actions for real estate issues and for damage to the environment: 30 years;

(iii) actions for hidden defects affecting the use of products: two years; and

(iv) non-compliance of goods: two years.

The limitation period starts running from the day the claimant knew or should reasonably have known the facts giving rise to the cause of action.

The limitation period is counted in days and is acquired on the last day of the completed term.

The statute of limitation cannot run or be suspended against the claimant who is facing a legal, a contract or *force majeure* impossibility to file a claim.

The statute of limitation may also be interrupted, in particular when a summons is issued.

This limitation period may to a certain degree be reduced or extended contractually (no less than a year and no more than 10 years).

3 Commencing Proceedings

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

The most common way to bring a case before a Court in France is by serving a writ of summons ("*assignation*"). However, cases may

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also be brought to the Court by a joint request or an application form filed by both parties. Most of the time, a summons is legally required and has to be served by a bailiff ("*Huissier de justice*") on the defendant.

Service is supposed to be personal on the defendant. Should the defendant be a company, or any legal person, the service has to be performed at its registered office, and delivered to one of its legal representatives. If personal service is impossible to perform, the bailiff must deliver a copy of the summons to a person present at the defendant's home if it is known, or at the place where the defendant resides. In any case, the bailiff has to leave a dated delivery notice at the defendant's home or residence informing him or her a copy of the summons has been delivered, the means by which service has been performed, and, if so, the identity of the person who received the copy.

If personal service cannot be performed and no one agrees to receive the copy of the summons, and after verifying that the defendant lives or resides where the delivery took place, the bailiff must leave a delivery notice stating that the service has been performed and that a copy of the summons must be collected at his or her office.

Service shall be performed on working days, between six o'clock in the morning and nine o'clock in the evening. It is deemed to be performed on the date upon which the bailiff went to the defendant's home or residence.

Service which has to be performed towards someone living or residing outside of France is made by the bailiff following the provisions of EU Regulation n°1393/2007 whenever the defendant is living, residing or present in another EU Member State. If not, a civil procedure treaty may apply to service of summons abroad. In the event that no treaty is applicable, the summons is generally served by the bailiff to the public prosecutor ("*Parquet*").

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

In the French civil justice system, claimants can obtain, under certain conditions, pre-action interim remedies before initiating a trial on the merits.

First of all, it is possible to apply for the authorisation to implement protective attachments over a debtor's assets which can be granted by a specialised jurisdiction called "*juge de l'exécution*". In order to obtain this legal authorisation, the creditor must prove that his or her claim is *prima facie* grounded and that there is a serious risk he or she will not be able to recover the amount of such claim. Once the authorisation has been obtained, proceedings on the merits have to be initiated within a month of the implementation of the protective measures. Otherwise, the measure will be cancelled. Once informed, the debtor can initiate a specific recourse against it, called "*mainlevée*", the aim of which is to cancel the effect of the authorisation previously given.

Second of all, it is possible to initiate summary proceedings before a specialised jurisdiction called "*juge des référés*", which is competent to order interim remedies providing the preservation of the claimant's rights after hearing both claimant and defendant's pleadings. Different situations may justify the intervention of the "*juge des référés*", such as an emergency, imminent threat of damage, or manifestly unlawful disturbance. Some other "*référé*" proceedings are more specific, notably proceedings to obtain an advance on damages, or an expert appointment.

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

As the claimant initiates the action, the summons are the first elements of his pleadings. Summons must specify the backgrounds of the claim, its nature and the grounds upon which the case is brought to Court. It must also be accompanied by a list of evidence supporting the claim. Once the defendant has answered in a written brief ("*Conclusions*"), the claimant may also respond, and so on.

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

Both parties are allowed to amend their pleadings during the instruction phase ("*Mise en état*"). From the moment this instruction phase is closed, amendments are no longer possible unless this phase has been reopened by the Court.

Briefs must be summary, which means that the last brief submitted is deemed to contain one party's complete argumentation in law and fact.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

In first instance, the claimant may withdraw his proceedings or action. Such withdrawal becomes perfect if accepted by the defendant. However, the defendant's acceptance is not needed if, at this stage, he has not presented any argument on the merits and any claim for inadmissibility ("*Fin de non-recevoir*"). A withdrawal of action ("*Désistement d'action*") prevents the claimant from bringing the case back to Court in the future, contrary to a withdrawal of proceedings ("*Désistement d'instance*").

Before Courts of appeal, the appellant may withdraw his or her appeal. Such withdrawal does not need to be accepted, except when it contains reservations and when the other party already cross-appealed or raised an incidental claim.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

The elements of the defendant's pleadings are similar to the claimant's ones. The defendant's written briefs must contain the grounds, in law and fact, upon which he defends the claim and a list of evidence supporting the defence.

In his written brief, the defendant is allowed to bring counterclaims and set-off defence.

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

Most of the time, there is no legal time limit within which the statement of defence has to be served. At the first Court hearing, the Court verifies that the defendant has received all the elements of the claim and defines a procedural schedule to inform both parties of the dates on which their pleadings have to be served.

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If the parties do not comply with such schedule, the Court may issue injunctions in order to force them to do so, failing which it may close the instruction phase and prevent a party from presenting arguments.

In accelerated proceedings ("*Procédure à jour fixe*"), the statement of defence has to be served within a reasonable time-frame prior to the hearing date, given that the pleadings are supposed to take place on this very same date.

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

Each time a defendant considers being guaranteed (legally or contractually) by a third party or sharing liability with a third party, such defendant may serve a summons on the third party to coerce him or her into joining the proceedings.

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

If the defendant does not defend the claim, a ruling may be issued against him or her solely on the basis of the evidence submitted by his adversary. Such ruling takes the form of a default judgment or a judgment deemed adversarial.

In such case, the defendant may appeal the ruling rendered against him or her.

The defendant may also be granted a specific legal recourse against the default judgment called "*opposition*", under two conditions (which qualify the default judgment):

- the reason why the defendant did not appear in Court is the absence of service of summons in person; and
- the judgment rendered against the defendant is final (not open to appeal or any recourse).

If an "*opposition*" is filed by the defendant (within a month following the date upon which the judgment has been served), the trial will take place again before the same Court.

4.5 Can the defendant dispute the court's jurisdiction?

The defendant can challenge the Court's jurisdiction but he or she must do so "*in limine litis*", before presenting any defence on the merits. Once such argument has been raised, challenging the Court's jurisdiction will not be admitted any longer.

Article 75 of the CPC also provides that the party disputing the Court's jurisdiction must provide the argument supporting his view and name the Court which has jurisdiction.

5 Joinder & Consolidation

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

A third party can be joined into ongoing proceedings, in first instance and before the Court of appeal, by way of:

- voluntary intervention, which may take the form of a main intervention (the third party raises his or her own claim) or of an accessory one (the third party intervenes to support the claim raised by another party); or
- forced intervention, served on the third party by means of summons, whenever one party considered such third party should guarantee him or her, or share liability with him or her.

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

Consolidation is allowed and may be decided upon the request of a party or directly by the Court whenever it appears that a link exists between the proceedings involved, justifying that they should be handled together. Such consolidation aims at providing a better administration of justice.

5.3 Do you have split trials/bifurcation of proceedings?

Split trials can be ordered under the same conditions applicable to consolidation (request of a party or directly by the Court). Trials must be split whenever it is justified by a better administration of justice.

6 Duties & Powers of the Courts

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

For Courts of first instance, a combination of subject-matter and territorial jurisdiction rules applies, as explained above (see question 1.2).

Cases are mostly allocated on a territorial basis for Courts of appeal.

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

Before the "*Tribunal de grande instance*" and the Court of appeal, a specific judge, respectively the "*juge de la mise en état*" and the "*conseiller de la mise en état*", is formally in charge of case management during the instruction phase and has exclusive jurisdiction over it.

This judge may issue rulings in order to handle temporary situations during the proceedings.

He may also issue rulings meant to prepare the case and collect evidence on the merits, such as ordering a party to serve a document as an exhibit, or ordering an expert report.

Cost rules are similar to those of rulings on the merits (see questions 1.5 and 8.4).

Before other Courts of first instance, although there is no formal instruction phase, another judge (the "*juge rapporteur*" for the "*Tribunal de commerce*" or the "*conseiller rapporteur*" for the "*Conseil des prud'hommes*") is generally in charge of scheduling hearings (so as to enable parties to exchange arguments and exhibits according to the adversarial principle – see section 8), and of interim applications.

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

The "*juge de la mise en état*" or other equivalent judges may issue interim injunctions for parties to file their submissions or serve their exhibits, especially when a party did not comply with the Court's schedule. Ultimately, before the "*Tribunal de grande instance*", the Court may close the instruction phase, thus preventing parties from raising new arguments.

The most extreme sanction for the parties' lack of diligence is to strike the case from the docket ("*radiation*").

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

Dispositive motions as defined in common law systems do not exist in the French legal system.

However, parties may apply for motions named "*exceptions de procédure*" (article 73 *et seq*. of the CPC) that allow the Court to close the case without reviewing it on the merits (for instance, lack of jurisdiction or claims for an action to be declared null and void).

All "*exceptions de procedure*" must be raised at the same time, "*in limine litis*", i.e. previous to any other defence.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

In French law, summary judgments on the merits do not exist: all claims will be answered within the final ruling on the merits.

Some disputes may be solved through summary proceedings ("*référé*") but "*référé*" rulings cannot be considered as an equivalent to summary judgments since they have no "*res judicata*".

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

Article 378 of the CPC allows Courts to stay proceedings until a specific event occurs.

Such an event may be the outcome of other related proceedings, of criminal investigations, of mediation or conciliation, or the performance of a task by a party.

The Courts decide freely whether to stay the proceedings or not and are not bound to motivate their decision.

The possibility of appealing such a decision is very restrictive: it must be allowed by the First President of the Court of appeal, for a serious and legitimate motive.

Also, the parties may voluntarily ask the Court to strike the case from the docket ("*retrait du role*"); for instance, if they need time to negotiate in view of a settlement. The case may be reintroduced into the listing if requested by the parties.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

Parties at trial must prove the facts they rely on to support their case, and judgments are solely based on evidence disclosed during the proceedings. Facts and evidence may be disclosed either spontaneously, or under the supervision of the Court. Parties are free to disclose facts or not to best support their case. Under French law, no duty of disclosure is applicable. Nevertheless, a judge can order or facilitate the production of evidence.

Before trial has commenced, a party may be allowed by a judicial order to seek and seize evidence at another party's premises. To obtain such an order, the seeking party would need to prove that the evidence would be necessary to bring its suit, and that it is at risk of disappearance.

The judge can also order a party to disclose certain documents (see question 7.4).

There are no special rules concerning the disclosure of electronic documents.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

As a core principle, all correspondence between French lawyers, and between clients and their lawyers, are strictly confidential and privileged. By contrast, confidentiality does not apply to correspondence with or between in-house lawyers. Lawyers, in their correspondence with other lawyers, are entitled to waive confidentiality by specifying that a document is "official" or "not confidential". When no specific mention has been added to the correspondence, it is deemed confidential. The possibility to waive confidentiality does not extend to correspondence containing information that is confidential by nature.

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

Articles 11 and 138 of the CPC provide that the judge may, upon petition of one of the parties, order the disclosure of all documents by a third party in the absence of any legitimate impediment to do so (e.g. professional secrecy or business secrecy).

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

During trial, if a party relies on evidence that is not under its control, the judge can order the other party to provide such evidence. Failure to cooperate may be sanctioned by the payment of a fine determined by the judge, except if a legitimate impediment is admitted (e.g. professional secrecy or business secrecy).

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

The parties can use the documents obtained by disclosure after trial.

However, a duty of confidentiality exists with regards to a document a party has obtained by disclosure if the judge considers such document covered by business secrecy.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

As a general principle, evidence is free and may be established by all available means (for instance, in commercial disputes).

A limited number of exceptions to this principle are provided by the law (for instance, a legal act involving an amount of over 1,500 euros must be proven in written form).

Moreover, evidence must be exchanged between parties according to the adversarial principle ("*principe du contradictoire*"): all facts that might influence the judge's decision must have been brought to the attention of all parties involved, sufficiently in advance for each of them to be able to analyse and challenge them. The judge must respect this principle himself and ensure that the parties respect it throughout the proceedings.

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

With the exception of the legal limitations described above, evidence is free and is freely assessed by Courts.

However, as opposed to evidence in criminal matters, evidence in civil matters must be obtained in a loyal manner, otherwise the Court may consider it inadmissible and suppress it from the case-file.

Admissible evidence cannot be obtained by fraud against a person's will, in breach of his or her privacy, or in breach of legal privilege ("*secret professionnel*", for instance, banking or criminal investigations secrecy), except if the professional himself is involved in the proceedings and needs to disclose the evidence for his own defence.

Some Courts, such as the "*Conseil de prud'hommes*", sometimes accept to deviate from this principle, considering that the evidence is indispensable to a party's rights to defence.

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

The CPC allows for witness testimony during trials. However, in practice, such testimonies are rarely used in civil litigation.

It is instead standard practice for parties to serve written statements by witnesses ("*attestations de témoins*") as exhibits.

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

Parties may ask the Court to appoint a judicial expert on a specific technical matter. The Court may also appoint an expert on its own initiative. The Court's decision details the expert's mission. It fixes a time limit for the expert's mission and assesses his fees.

An advance on the expert's fees is generally paid by the claimant. The Court determines the final amount of the fees and which party should bear them in its ruling on the merits.

A judicial expert's report is meant to provide independent advice to the Court.

The expert will be chosen from a list of experts registered by the Court of appeal. During his investigations, the expert must respect the adversarial principle.

Parties may challenge the expert's report by claiming that it is null and void (in particular, for breach of the adversarial principle).

Parties may also serve expert reports drafted by experts of their own choice. The opposing party will then try to challenge it and will often serve an expert's report of its own.

9 Judgments & Orders

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

French law enables claimants to introduce proceedings to obtain provisional measures ("*mesures conservatoires*") such as freezing orders, temporary injunctions, and provisional suspensions (see above, question 3.2).

Pre-action or pre-trial measures orders do not have "*res judicata*" on the merits but are provisionally enforceable *ipso jure* (article 484 *et seq.* of the CPC).

Decisions on the merits generally take the form of a judgment ("*jugement*") or an "*arrêt*" (Court of appeal).

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

There are no punitive damages under French law.

Compensatory damages may be pronounced by Courts to compensate an actual loss according to the principle of "full compensation for losses" ("*réparation intégrale*").

Any sum due by a person, following a Court decision, must be increased by interest rate (the "*taux d'intérêt legal*").

Interest runs starting from the date of the decision and is calculated according to the conditions provided for in the judgment, to the date of actual payment of the amount due and to the rate in force.

Courts can also order to the losing party to bear the *dépens* and *frais irrépétibles* (see above, question 1.5).

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

A prevailing party must retrieve an original of the ruling from the Court, and serve it (via a bailiff) to the losing party.

As regards enforcement within the European Union (EU), Regulation n°1215/2012 dated December 12, 2012 ("*Brussels I Bis*") is applicable to proceedings initiated after January 10, 2015. It allows direct enforcement of a judgment issued by a domestic Court of one Member State in another Member State.

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The prevailing party must obtain from the Court that originally issued the judgment a certificate stating that said judgment is enforceable in the Member State where it has been issued.

From then on, only a few limited grounds are open to the losing party to challenge the enforcement of said judgment – e.g. violation of public policy or due process.

As regards enforcement of judgments issued in a non-EU Member State, absent a bilateral enforcement treaty, enforcement may only be denied if: (i) the foreign Court had no jurisdiction over the case under French rules; (ii) the judgment was obtained by fraud; or (iii) the requested enforcement would breach public policy. Enforcement proceedings are initiated by a summons and are adversarial.

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

Any civil first-instance decision can be challenged before a Court of appeal, except judgments for less than €4,000, for which an appeal can only be filed on issues of law directly before the "*Cour de Cassation*".

An appeal has a suspensive effect unless the appealed judgment is subject to provisional enforceability. The Court of appeal views the first-instance decision both on factual and legal grounds.

Parties have one month from the notification of the judgment to lodge an appeal. The time limit can be reduced to 15 days namely for interim orders and decisions of the enforcement judge.

The time limit is extended by one month when the notified party is domiciled outside mainland France and by two months when the notified party is domiciled abroad.

Rulings rendered by the Court of appeal may be challenged before the "*Cour de Cassation*", which does not hear arguments on the facts and only focuses on matters of law. However, the filing of a recourse before the "*Cour de Cassation*" does not suspend the ruling issued by the Court of appeal. Actually, the party filing such recourse has the obligation to enforce the terms of the ruling to be able to have its case heard by the "*Cour de Cassation*".

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

A settlement agreement is a contract by which the parties, through reciprocal concessions, terminate a dispute; it is used as an alternative dispute resolution method.

Settlement agreements are governed by article 2044 *et seq.* of the Civil Code.

They prevent parties from initiating or continuing lawsuits based on the same grounds.

A distinction is made between out-of-court settlements (before any proceedings), and court settlements (during proceedings but before a final decision has been taken).

Settlements are encouraged in order to relieve congestion in Courts. Parties are also required to initiate conciliation or mediation before any dispute in certain matters (see section II).

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

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

a) Arbitration

France is a signatory of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (which came into force in France on September 24, 1959).

Today, France is a major place in the world for arbitration. The headquarters of the International Chamber of Commerce ("ICC") and of the International Court of Arbitration are based in Paris, which contributes to the development of international arbitration in France.

Arbitration in the French system depends entirely on the willingness of the parties, through an arbitration clause (before any dispute arises) or a compromise (when the dispute has arisen).

French law makes a fundamental distinction between domestic and international arbitration, allowing international arbitration to be governed by more flexible and permissive principles than those applying to domestic arbitration.

Arbitration may either be led "*ad hoc*" or by an arbitration institution, the most renowned one being the ICC.

b) Other ADR methods

The most popular ADR methods in France are mediation and conciliation. Both of them aim to reach an agreement for the resolution of a dispute, with the assistance of a third person.

Mediation is conducted by an extra-judicial mediator, who receives fees from the parties, whereas conciliation is conducted by a judicial conciliator. Conciliators are officers of the Court, who have at least three years of legal experience.

Mediation and conciliation may be suggested by a judge or by the parties in the course of proceedings. They may also be chosen by the parties through a contract clause, before any dispute arises: this is known as conventional mediation or conciliation.

Another less common ADR method exists: the participatory procedure, a negotiation mechanism implemented by the parties' lawyers.

ADR has been increasingly promoted in recent years as a cost-effective way to settle disputes, relieving overburdened Courts. Its further development is currently promoted by a new bill discussed in Parliament ("*Projet de loi de programmation de la justice*").

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

French arbitration law provisions are mostly contained in Book IV – "*Arbitration*" of the CPC (article 1442 *et seq*.) and articles 2059 to 2061 of the Civil Code.

Mediation and conciliation provisions are contained in Title VI of Book I of the CPC (article 127 *et seq*.). Other provisions regarding conventional mediation and conciliation are contained in Book V of the CPC (article 1530 *et seq*.).

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

Disputes related to civil status, capacity, divorce and judicial separation cannot be submitted to arbitration.

The same applies to disputes involving public entities and establishments, as well as disputes implying public order issues (article 2060 of the Civil Code).

There are no such restrictions for mediation and conciliation.

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

a) Arbitration

Parties may seek the assistance of the President of the "*Tribunal de Grande Instance*" as "*juge d'appui*" in order to have the arbitral tribunal constituted (article 1459 of the CPC). French Courts also have an exclusive jurisdiction for issuing provisional measures ("*mesures conservatoires*") regarding an ongoing arbitration (article 1468 of the CPC). They may also be asked by the parties to issue interim motions before or during the arbitration (article 1469 of the CPC).

b) Mediation and conciliation

As far as the other ADR methods are concerned, the CPC imposes compulsory conciliation or mediation before the beginning of legal procedures for certain matters (for instance, divorce and labour law disputes).

Moreover, at the beginning of legal proceedings or during their course, Courts often suggest mediation or conciliation to parties, as well as names of mediators/conciliators.

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

a) Arbitration

Domestic arbitration awards may be appealed on the merits, only if specified by the parties within the arbitration clause or compromise.

Annulment of both domestic and international awards may be solicited. It may be granted for a limited number of grounds; for instance, if the arbitral tribunal:

- lacked jurisdiction or wrongfully declined its jurisdiction;
- was not properly constituted;
- exceeded its mission or violated due process of law; or
- infringed public policy.

An arbitration award may also be fully reviewed by a Court in case of fraud.

b) Mediation and conciliation

Mediation and conciliation depend on the willingness of the parties. As a result, they are not compulsory, except when imposed by the law or by the parties themselves by contract (see above, section II, question 1.4).

Therefore, as a general rule, a Court may not sanction a party that refuses to mediate or conciliate.

However, in case of conventional mediation or conciliation prior to litigation, a party cannot bring a claim to Court without initiating mediation or conciliation; otherwise, the Court will declare the claim inadmissible and send the parties back to conciliation or mediation.

If the parties reach an agreement through a mediation or conciliation process, they can request the Court to homologate it. If homologated, the agreement benefits from the same legal force as a judgment and may be enforced as such.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

As mentioned above, the headquarters of the ICC are located in Paris.

Several other ADR institutions are located in France: the International Court of Arbitration; the Paris Center of Mediation and Arbitration; and the French Mediation Institute.

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Germany

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I. LITIGATION

1 Preliminaries

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

German law stands in the tradition of Civil Law. Therefore, the primary source of law is codified law, and courts are only permitted to interpret and apply the law. Additionally, court decisions are in general not binding for other courts. However, in practice, decisions of higher courts such as the Federal Court of Justice (FCJ) significantly influence lower courts' decisions. The whole procedure of civil litigation is codified in the German Code of Civil Procedure (*Zivilprozessordnung*, *ZPO*).

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

Jurisdiction is divided into five fields of law: the ordinary jurisdiction for civil and criminal law; the labour jurisdiction; the financial jurisdiction; the administrative jurisdiction; and the social jurisdiction. Each of them provides its own court system.

In civil proceedings, the subject-matter jurisdiction of the court of first instance is generally determined by the amount in dispute if no exclusive jurisdiction applies due to a specific matter of the case. For amounts in dispute up to EUR 5,000, local courts are competent; otherwise, regional courts have jurisdiction.

Decisions by the local courts can be appealed before the regional courts; first instance decisions by the regional courts can in turn be appealed before the higher regional courts. A second level appeal can only be brought before the FCJ on points of law.

While at local courts single judges hear cases, regional courts are organised in chambers of three judges. However, in practice, the majority of cases are heard by a single judge. The regional courts can designate chambers for specific disputes such as banking litigation, and they also have chambers for commercial disputes that are composed of one professional judge and two commercial judges, i.e. experienced businessmen.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

Civil proceedings start with the filing of the statement of claim with the court which will serve this statement on the defendant requesting him to respond. The case will either be heard directly in a so-called early first hearing (*früher erster Termin*), or written preliminary proceedings (*schriftliches Vorverfahren*) will be ordered in which the parties must submit further pleadings to support their legal opinion. Before the oral hearing commences, the court shall explore the parties' willingness to enter into an amicable settlement.

The duration of court proceedings strongly depends on the complexity of the case, the current workload of the respective court chamber or judge and the extent to which the taking of evidence is necessary. On average, court proceedings in the first instance take about one year. The same applies to the second instance.

A fast way to achieve an enforceable title in a pecuniary claim is summary proceedings for a payment order (*Mahnverfahren*). In cases where the defendant does not defend himself against the claim, this expedited procedure provides for the issuance of an enforceable title in a few weeks. Besides this, there are proceedings in which the claimant relies entirely on documentary evidence which, after a limited substantive examination, leads to provisional judicial protection (*Urkundenprozess*). Also, if a party wants to secure a specific piece of evidence before filing an action, it can apply for independent evidentiary proceedings (*selbstständiges Beweisverfahren*).

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

In domestic disputes, German law allows jurisdiction clauses only in certain cases. Jurisdiction clauses with consumers are generally invalid if agreed before a dispute arises. Further, a jurisdiction clause is not valid if the law stipulates exclusive jurisdiction for the respective dispute. The validity of a jurisdiction clause will be examined by any court the action was filed with. If the court decides that the clause is valid, it is legally binding, and any action filed with a non-competent court will be dismissed. In cross-border cases within the EU, the Brussels I Regulation (recast) is applicable.

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

Generally, the costs of civil court proceeding comprise court fees as set out in the German Court Fees Act (*Gerichtskostengesetz*), and out-of-court costs such as lawyer fees according to the German Act on Lawyer's Fees and Expenses (*Rechtsanwaltsvergütungsgesetz*). The amount of these costs depends on the amount in dispute. As a general rule, the losing party must bear the costs of the proceeding. If a party is only partially victorious, the costs will be split accordingly. Special rules on costs budgeting do not exist.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

Parties which are unable to bear the litigation costs can apply for legal aid (*Prozesskostenhilfe*) if their claim has a sufficient prospect of success and does not seem frivolous.

Contingency fee arrangements are generally not admissible under German law. An exception can only be made in individual cases where a party does not have the economic means to take legal action.

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

It is generally possible to assign claims, yet an assignment can be constrained by the parties' agreement. However, a claim brought by an assignee that was solely founded to act as claimant will be considered inadmissible if the assignee does not have the assets to pay the costs in case of defeat.

The enforcement of third-party rights is only admissible if permitted by law or in special circumstances when the claimant has its own legal interest in the case (such as an insolvency administrator).

Private litigation financing is an admissible financial service. Also, legal expenses insurances which cover all costs of legal disputes under their terms are a popular instrument.

1.8 Can a party obtain security for/a guarantee over its legal costs?

Courts can only demand security from claimants which do not have their habitual place of abode in a Member State of the EU or in a signatory state of the Agreement of the European Economic Area, if requested by the defendant.

2 Before Commencing Proceedings

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

Commencing proceedings does not regularly have any preconditions. Only in cases where state law stipulates otherwise, or parties previously agreed upon doing so, attempts by the parties of settling the dispute in front of a conciliation office before commencing proceedings are required.

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

The statute of limitation which is considered a substantive defence is governed by the German Civil Code (*Bürgerliches Gesetzbuch*, *BGB*) as the main source of substantive civil law. The law stipulates that the standard limitation period for claims is three years; however, exemptions do exist. For example, warranty claims are regularly limited to two years.

The standard limitation period commences at the end of the year in which the claim arose, and the creditor became aware of the facts that substantiate his claim.

All claims become statute-barred at the latest of 30 years after the act or event that caused the damage occurred.

3 Commencing Proceedings

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

Civil proceedings commence with filing a claim with the court which will serve it on the defendant upon payment of the court fees by the claimant.

The statement of claim and other pleadings including a substantive motion need to be served formally. Whilst the statutory rules provide various types of service, the statement of claim is usually served by registered mail with a return receipt. There is, however, also the possibility for the court to order service through a postman, an employee of the court or a bailiff by way of a service certificate.

The date of service will be noted on the certificate or the receipt and on the sealed envelope if the person was not found. If the service must comply with a time limit, the date on which the action was filed can be considered as the date of service as long as the court serves the claim to the defendant soon thereafter.

Within the EU, Regulation No 1393/2007 regularly applies for the service. It stipulates that service is executed either in the way of mutual legal assistance by the German courts following the rules of the *ZPO* or directly by normal mail to the addressee.

Beyond the scope of the Regulation, it is decisive whether an international agreement is applicable such as the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. Under the Hague Convention, the formal service follows either the rules of the *ZPO* or the rules of the country of origin unless obligatory provisions of German law conflict with it.

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

German law provides the seizure and the preliminary injunction as pre-action interim measures. The seizure only secures pecuniary claims or claims that can be converted into a pecuniary claim, while the preliminary injunction secures the realisation of other claims. The application must be filed with the court that has jurisdiction over the

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dispute. Applicants need to submit *prima facie* evidence on both a specific claim for seizure or preliminary injunction and a reason why interim legal protection is needed; i.e., why it is particularly urgent.

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

The statement of claim must include a designation of the competent court and the parties, a clear statement of the subject matter and grounds of the claim, as well as a specific motion. Further, it shall contain the amount in dispute and information about prior alternative dispute resolution attempts. It is also common to present legal arguments to point the judge in the right direction, though this is not a necessary requirement.

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

Before the claim is served on the defendant, there are no restrictions to amendments. Afterwards, the amendment of a claim is only possible if the court considers it to be expedient or the defendant consents to the amendment. However, statutory law provides that some modifications are not to be deemed as an amendment of the action and, therefore, are always admissible. This includes, *inter alia*, the situations in which – without any change to the cause of action – the statements made as to the facts and circumstances or the legal considerations are amended or corrected.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

Prior to the time at which the defendant makes his motion in the oral hearing, the withdrawal is generally admissible. Afterwards, the action cannot be withdrawn without the defendant's consent.

If the claimant withdraws his claim, he must bear the costs. Only if the occasion for bringing the action ceased to exist prior to the service of the claim on the defendant, the obligation to bear the costs will be determined at the court's equitable discretion.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

In the statement of defence, the defendant can state his view on the facts and legal assessment of the case. The defendant will also need to include his motion for dismissal of the action.

For reasons of procedural economy, the defendant can also file a counterclaim in the same proceeding if sufficient connexity to the claim exists. Raising the defence of set-off is also possible.

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

In case of an early first hearing, the limit is at least two weeks. If a written preliminary proceeding takes place, the court will first set the defendant a time limit of two weeks to declare his willingness to defend. Afterwards, it is common that the defendant is given another time limit of at least two weeks to submit his statement of defence.

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

If a party sued could indemnify itself through claims against a third party in a subsequent process, German law provides for the third-party notice (*Streitverkündung*). The third party can then choose to join the ongoing proceedings as an intervening party (*Nebenintervention*) on either side or abstain from joining. In any event, the judgment will have a binding effect in subsequent proceedings between the defendant and the third party. Notwithstanding the above, the joining of proceedings as an intervening party is also always admissible if a third person has a legal interest in the case.

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

If a defendant fails to defend, the court can pass a judgment by default (*Versäumnisurteil*) upon application by the claimant. If the defendant does not challenge the default judgment within two weeks, it becomes legally binding.

4.5 Can the defendant dispute the court's jurisdiction?

Challenging the court's jurisdiction is generally possible but needs to be done before the beginning of the oral hearing, as a non-competent court can become competent by the defendant making a motion in the oral hearing and failing to object to the court's lack of jurisdiction (*rügelose Einlassung*).

5 Joinder & Consolidation

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

Besides the third-party notice (see question 4.3 above), German law also provides for a joinder of several plaintiffs or defendants if there is a legal or factual connection between the claims. On this basis, the claimant can extend the claim against additional defendants even when the proceedings are already ongoing. Defendants, on the other hand, may also file a counterclaim not only against the claimant but also against third parties (*Drittwiderklage*).

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

The court may order several actions brought by the same or different parties to be consolidated if the claims which are the subject of those actions are legally connected or could have been brought with one action.

5.3 Do you have split trials/bifurcation of proceedings?

The court may order the separation of claims which were raised in one action if there are factual reasons for a separation, such as a presumably faster decision of the separated claim.

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6 Duties & Powers of the Courts

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

Within the competent court, case allocation is stipulated by the court's schedule of responsibilities (*Geschäftsverteilungsplan*). It guarantees the constitutional right to be heard by the statutory designated judge. In general, the allocation follows neutral characteristics such as the claimant's (first) name letters. However, for some specific subject matters, specialised court divisions can exist (see question 1.2 above).

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

Courts have various case management powers such as ordering attendance, separating or consolidating proceedings, scheduling hearings, etc. Parties also have various interim application rights such as applications for the extension of time limits, adjournment or stay of proceedings.

Even though these measures do not have an influence on the actual court fees that only refer to the amount in dispute, some measures, such as the obtaining of an expert opinion, can increase the costs the losing party has to bear eventually.

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

Judges have domestic authority and can expel any person from the court room for misconduct. In other cases of misconduct, for example when a witness does not appear to give testimony, the court can determine a fine or disciplinary detention. When a party misses a time limit, there will be no sanction, but it can lead to a dismissal of the claim or a default judgment. Also, the court may refuse late submissions by the parties due to the procedural principle of acceleration (*Beschleunigungsgrundsatz*).

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

The court will dismiss a case entirely if the action is not conclusive. However, before dismissing the claim, the court will ask the party to support their position. As soon as the oral proceedings have started, the court is empowered to render partial judgments if a part of the claim is unfounded.

Further, the courts of first level appeal and second level appeal are obliged to immediately deny leave to appeal without an oral hearing if, for example, the appeal manifestly has no chance of success.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

Summary judgments are in general not admissible. Exceptions only exist for special proceedings (see question 1.3 above).

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

The *ZPO* provides three types of temporary discontinuance:

- Interruption: Reasons for interruption apply *ipso jure*. Interruption of proceedings occurs if a party dies, insolvency proceedings have been initiated over one party or one party lacks the capacity to sue and to be sued.
- Suspension: Suspension of proceedings on the other hand needs to be ordered by the court. It is only admissible in the statutory cases. In the specific case of model case proceedings under the Act on Exemplary Proceedings in Capital Market Disputes (*Kapitalanleger-Musterverfahrensgesetz*), the court must suspend all proceedings that are reliant on the scope of the model case proceedings.
- Stay: The stay of proceedings is a particular case of suspension where both parties request the stay.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

German law does not know the principle of disclosure. Instead, the principle of party presentation (*Beibringungsgrundsatz*) applies which means that every party must substantiate its legal position by providing its own evidence. Only in cases where alleged facts could be proved by reviewing specific documents which are in the possession of one party, the court may order the production of these documents if those facts are disputed and relevant for the decision.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

There is no general concept of privilege under German law. If a court wants to order the production of documents (see question 7.1 above), when exercising its discretion, it must take the protection of private business secrets as well as the confidentiality of lawyer-client communication into account.

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

The court may also order third parties to produce documents if this can be reasonably expected of them and they have no right to refuse testimony.

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

Generally, it is each party's responsibility to produce the evidence it wants to rely on. The court orders document production only in exceptional cases (see question 7.1 above).

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

Due to the lack of specific provisions on disclosure, there are also no restrictions.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

The basic rule is that every party must prove the facts beneficial to it with the admissible types of formal evidence (*Strengbeweis*). However, substantive law provides for a few cases in which the burden of proof is shifted.

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

The means of formal evidence in civil proceedings are visual inspection, witness testimony, documentary evidence, party testimony, as well as expert opinion.

In urgent proceedings such as pre-action interim measures, it is also possible to only furnish *prima facie* evidence (*Glaubhaftmachung*) such as a statutory declaration *in lieu* of an oath.

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

The *ZPO* stipulates precise rules for evidence through witnesses. The summons need to formally include the parties' names and the matter of interrogation. Witnesses also need to be instructed on their duties, such as testifying truthfully and their rights to refuse testimony. After the instruction, the court will first examine the personal data of the witness and then all facts regarding the dispute. The parties then have the right to ask questions.

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

The rules on witnesses in general also apply to experts unless the *ZPO* stipulates otherwise. Experts are impartial and owe their duties solely to the court. The court evaluates the evidence and decides at its discretion or conviction. Private expert opinions, on the other hand, are not considered as a means of evidence but as a substantiated party submission.

Thus, concurrent expert evidence only occurs in exceptional circumstances, such as proceedings being consolidated after expert opinions have been submitted.

9 Judgments & Orders

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

There are three types of judicial decisions: while a judgment (*Urteil*) regularly will be passed only after an oral hearing, an order (*Beschluss*) means the decision of a court on a legal matter which is merely based on files. Further, judges have the right to exercise their case management powers by decree (*Verfügung*).

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

Courts may – within the boundaries of the law – rule on damages (no punitive damages) and/or interests, but cannot exceed the requests of the parties with their decisions.

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

The local courts or the local courts' bailiffs enforce German judgments.

For the recognition and enforcement of foreign judgments, which country they derive from is always decisive. Within the EU, the Brussels I Regulation No 1215/2012 (recast) applies. It stipulates that judgments issued by EU courts, in general, must be recognised without further proceedings. However, the German court may also request a translation of the judgment.

With respect to judgments rendered outside the EU, the requirements for recognition and enforcement depend on the existence of enforcement and recognition treaties between countries, such as the Lugano Convention or the Hague Convention of 2005. Under both conventions, judgment creditors must apply for a court order for a declaration of enforcement with the competent court. In absence of any treaty, the *ZPO* applies, which excludes certain judgments from recognition, e.g. those violating German public policy.

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

There are two levels of appeal: first level appeal (*Berufung*) is a remedy against judgments of first instance courts, allowing both a challenge of the factual findings and of the legal assessment. Judgments of first level appeal courts can be appealed solely on points of law by way of the second level appeal (*Revision*) to the FCJ. The purpose of the second level appeal is to develop and harmonise the law.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

Courts are always encouraged to find an amicable solution at any stage of the proceedings. Further, the law stipulates a reduction of the court fees if parties can agree on a settlement rather than a judicial decision.

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II. ALTERNATIVE DISPUTE RESOLUTION

1 General

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

Methods of alternative dispute resolution frequently used in Germany are:

- Mediation: Mediation is a structured, voluntary procedure for the constructive resolution of a conflict in which an independent mediator accompanies the parties of the conflict in their resolution process. The mediator does not take any decisions or formulate any recommendations or proposals for possible resolutions. He merely moderates and leads the parties through the mediation procedure. Eventually, the parties must find their own solution.
- Conciliation: In conciliation proceedings, the conciliator initially aims at a resolution of the conflict by the parties themselves. If the parties are unable to find a solution, the conciliator will shift in his role and render a conciliation award. The parties are free to decide whether they accept this verdict or not.
- Arbitration: Arbitration means legal proceedings in front of a non-state court. In contrast to the methods above, arbitrators must decide a case and their decision is legally binding for the parties. Arbitral awards are recognised and enforceable under German law. Arbitration is the most frequently used form of alternative dispute resolution.
- Expert Determination: Arbitrational decisions are also possible for a single factual or legal matter of a dispute.
- Adjudication: Adjudication means the establishment of a permanent decision-making board for a certain project. It is often used in construction projects. The decisions of adjudication boards are usually provisionally binding.

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

Mediation is regulated by the Mediation Act (*Mediationsgesetz*, *MediationsG*). The Act governs the education system for mediators, mediators' duties and a general framework for proceedings.

In arbitration, the parties will often choose procedural rules provided by a private arbitration institution such as the International Chamber of Commerce (ICC). If the parties did not agree on rules of procedure, the German arbitration law applies, which is governed by the 10th book of the *ZPO*.

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

The alternative dispute resolution methods were developed for commercial and civil matters. They can also be applied partially in labour law. In family law, the application of arbitration is not possible, but it is possible to consult a mediator.

In criminal law, the application of alternative dispute resolution is in general not admissible. Public law disputes may be arbitrable in only a few statutory cases.

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

Courts can help the parties to invoke the methods of alternative dispute resolution, for example, by ordering interim measures or obtaining information from public authorities, or by suggesting an alternative dispute resolution mechanism.

Parties may also apply for a decision about the challenge of an arbitrator if the arbitration court refuses to dismiss him. German courts may also be called upon in order to help with the enforcement of the arbitral awards.

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

The effects of alternative dispute resolution diverge since parties can autonomously agree on their conditions.

Sanctions for the refusal of meditation do not exist. The same applies for the violation of settlement agreements reached at mediation. However, in the future, meditation agreements could become enforceable internationally due to the so-called Singapore Convention, which is expected to be signed in 2019.

If conciliation is mandatory, the court may refuse to decide the case until the conciliation has taken place (see question 2.1 above).

Arbitration awards generally have a binding effect. The *ZPO* provides specific proceedings for the cancellation of arbitral awards within narrow boundaries. For example, parties may apply for a cancellation if the arbitration clause was void or the arbitral award violates public policy.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

With regard to conciliations, the German Ministry of Justice established a General Consumer Conciliation Body of the Centre for Conciliation (*Allgemeine Verbraucherschlichtungsstelle*) and maintains a list of other acknowledged consumer conciliation bodies that should help consumers and companies to find appropriate conciliators.

The major institution for arbitration is the German Institution of Arbitration (*Deutsche Institution für Schiedsgerichtsbarkeit*).

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Dr. Christian Schmitt has been a Partner at Linklaters LLP since 2017. He is highly experienced in complex litigation and regularly represents some of the most prominent members of the financial community and other businesses across a broad range of disputes, including insolvency litigation, banking and capital markets-related litigation and contentious regulatory matters. In his insolvency litigation practice, Christian acts for banks and businesses on a wide range of insolvency-related issues, such as rebutting and challenging insolvency (avoidance) claims, "waterfall" claims in insolvencies, and claims involving former managers of businesses, as well as acting for insolvency administrators on the same issues. In his banking and capital markets litigation practice, Christian advises on, *inter alia*, prospectus claims, misselling and mistrading issues, derivatives and swap litigation and investment advice liability. Christian represents clients in all courts and tribunals in Germany (except for the German Supreme Court) as well as being a certified business mediator.

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In her banking and capital markets litigation practice, Kerstin has gained significant experience in handling mass action cases including model case proceedings under the Capital Markets Model Case Act (*Kapitalanleger-Musterverfahrensgesetz*). In her commercial litigation practice, Kerstin advises national and international clients in complex disputes on contractual issues, including recourse claims against managers and claims for professional liability.

Kerstin also focuses her practice on internal and government investigations, both domestic and cross-border, in the field of white-collar crime as well as in compliance matters including advice on corporate criminal liability and public procurement law implications.

Kerstin represents clients in all courts and tribunals in Germany (except for the German Supreme Court) and is admitted as a solicitor (England & Wales).

Linklaters

Linklaters' dispute resolution lawyers have a stand-out track record of succeeding for our clients in the most sensitive and complex litigation and arbitration cases in Germany. Drawing on the expertise of 35 dispute resolution lawyers, we cover a broad spectrum of matters ranging from banking and capital market disputes over cartel damages matters, to post M&A disputes and product liability cases. We are known for our ability to draw upon very large, multi-specialised, multi-jurisdictional teams at short notice, which makes us one of the few firms (and on occasions the only firm) equipped to deal with the most challenging crises and disputes faced by the leading international financial institutions and corporates.

We are one of the first choice dispute resolution practices for complex, multi-jurisdictional disputes of particular importance (whether financially or reputationally) to our clients. We act on matters that are legally novel and therefore of particular significance to the market.

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Greece

Vassilios Ikonomidis

V. D. Ikonomidis and Associates Law Firm

Georgia Patili

I. LITIGATION

1 Preliminaries

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

Greek law belongs to the civil law tradition and is characterised by its codified system of legal provisions.

Civil Procedure in Greece is regulated by the Code of Civil Procedure (CCP).

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

The civil courts in Greece are broadly divided into the following categories: (1) the First Instance Courts; (2) the Courts of Appeal; and (3) the Supreme Court.

There are no specialist civil courts in Greece. However, as a matter of their internal organisation, Greek civil courts are divided in panels/units to which cases are allocated depending on their nature (e.g. commercial disputes, intellectual property, matrimonial matters, employment claims, etc.). Such regulation, however, does not necessarily mean that judges sitting on a particular panel have a specific specialisation in the area of law with which the panel deals.

Additionally, the CCP provides that certain cases (e.g. matrimonial disputes) are judged in accordance with certain simpler and speedier **special proceedings**.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

Ordinary civil proceedings are initiated by filing an action, a copy of which must be served on behalf of the applicant (claimant) upon the defendant, within 30 days from the filing date (or 60 days if the defendant resides abroad or is of unknown residence). Within 100 days from the submission of the action (or 130 days if the defendant is a foreign resident or his residence is unknown), the arguments (*protaseis*) of the parties as well as any documents and supporting evidence should be filed to the competent secretariat. Within 15 days from the expiry of the latter deadline, the parties have to submit their supplementary arguments in order to reply to their opponent's obligations. Within another 15-day period the composition of the court is defined, and at the same time a trial date is set. After the trial, the judgment of the court must be drawn up and sealed within a period of eight (8) months after the date of trial. However, it should be noted that the abovementioned deadlines, of which the target is the acceleration of the civil proceedings in Greece, are unfortunately not followed in practice.

In the case of special proceedings, a much speedier and simpler procedure is followed. Besides the filing and servicing of action, all other procedural steps (e.g. submission of arguments) can take place on trial, while three working days after the trial, the parties should submit their rebuttals to the other party's claims.

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

The settled case law in Greece retains a favourable stance towards exclusive jurisdiction clauses, by holding that the choice of a jurisdiction that confers more benefits to one party comparatively to the other does not in any case render the jurisdiction clause null or void. However, the exclusive jurisdiction clause is evaluated for its conformity with the accepted principles of morality and fair dealing. Therefore, it has been held by the Greek courts that if the recourse to a foreign jurisdiction results in considerable procedural obstacles, that renders the right of accessing the foreign judicial system practically impossible and, in this way, deprives the party of its legal rights, the exclusive jurisdiction clause is void (e.g. the inability for a party to exercise its legal rights by reason of its ignorance of the language of the said jurisdiction).

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

Generally, the costs of civil court proceedings can be divided in two categories, namely the costs that represent the lawyers' fees and those that correspond to the court fees.

The lawyer's fees can be agreed freely with the client, by means of written agreement. However, where such written agreement does not exist, the provisions of the Lawyer's Code have application. Regarding court fees, generally the party who has lost in the dispute has to bear the costs incurred by the opponent.

Trial costs vary according to the type and complexity of each case, and there are no specific rules on costs budgeting.

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1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

A party may be relieved from paying legal costs including representation fees if the following requirements are fulfilled: a) this party can prove that it is not capable of paying these costs and fees without depriving itself and its family from the necessary means for subsistence; and b) the specific claim does not seem to be profoundly unfair or unprofitable.

Under the Greek Lawyer's Code an agreement on contingency fees is valid. However, the consideration that the lawyer can receive under this agreement cannot be more than 20% of the subject of the legal proceedings.

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

The assignment of a claim/cause of action in Greece is subject to the requirements that are set out in the Civil Code (i.e. the debtor should be notified in order for the assignment to be valid, the assignment should not be limited by contract, etc.).

There is no direct prohibition for a non-party to litigation proceedings to finance those proceedings.

1.8 Can a party obtain security for/a guarantee over its legal costs?

The CCP provides the possibility that a defendant under certain exceptions may apply to the court for security for legal costs if there is an obvious risk of non-payment by the claimant in case it is ordered to pay such costs.

2 Before Commencing Proceedings

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

Generally, there are no pre-action requirements that must be complied with. However, the claimant may on a voluntary basis serve an extrajudicial notice on the defendant, setting out the claim and requesting a remedy.

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

Time limits are treated as a substantive law issue. According to the Greek Civil Code, the general rule is that a 20-year limitation period applies to all civil claims. However, there are several exceptions to this rule, in which shorter limitation periods have application. For instance, a five-year limitation applies to claims regarding lease payments.

The CCP also lays down certain circumstances under which the abovementioned time-limits may be suspended or interrupted (e.g. in case of *force majeure*).

Time normally runs from the day following the day on which the cause of action arose or from the day the claimant either discovers or could with reasonable diligence have discovered that a cause of action has arisen. It stops running when the originating process has been served.

3 Commencing Proceedings

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

Civil proceedings are commenced by filing an action (*agogi*) to the court, which should subsequently be served to the defendant.

Service can be made through a court bailiff instructed by the claimant to serve the action document on the defendant, or electronically if the legal document bears an electronic signature. The date on which the document is deemed to be delivered is when it has been physically submitted to the defendant or another acceptable person (e.g. family members). In the case that the delivery is made by electronic means, the document is deemed served when the sender receives back an electronic receipt.

Service outside Greece is effected in the majority of cases in accordance with the rules of Regulation (EC) No 1393/2007 or the rules of the Hague Convention of 15 November 1965.

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

Greek law provides a range of pre-action interim remedies that may be granted on application by either party if there is an urgent need or for the purposes of evading an imminent danger, which makes necessary the regulation of the situation until the trial or the issuance of a decision for the lawsuit. The most popular of these remedies include freezing injunctions, mandatory injunctions, prohibitory injunctions and interim payments. Their range is wide and the court is free to shape them as is deemed most appropriate. Interim remedies are of great importance, because of the very slow administration of Greek justice. Moreover, if there is a great urgency, an application can be made for a provisional order that may be granted ahead of an interim remedy.

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

The claimant should make reference to:

1) The court before which the trial takes place.
2) The type and the object of action, the facts on which the action is founded and a precise request for judicial relief.
3) Details related to the litigants (e.g. name, address, tax identification number).
4) Date and signature of the claimant or his lawyer.

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

The basis of the claim submitted cannot be amended. However, the claimant can supplement, correct or clarify his arguments, with the prerequisite that the basis of his claim is not changed. In addition,

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the claimant may limit the scope of his claim or make any ancillary (to the action) claims or request any substitute of the initial object of the claim.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

The action of the claimant can be withdrawn without the consent of the defendant only prior to the hearing of the case, and if arguments (*protaseis*) are submitted, only prior to the submission of such arguments by the defendant. In the case that the withdrawal is made subsequently, it cannot be accepted if the defendant does not consent and considers that he has a legitimate interest for continuing the legal proceedings.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

The statement of defence must point out the defendant's objections and allegations by indicating which of the claimant's allegations are admitted and which are denied. The defendant should also submit the evidence that accompanies and proves his allegations. The statement of defence can also contain a set-off argument.

If the defendant has a cause of action against the claimant, this can be raised by way of a counterclaim in the existing action, with the prerequisite that the court before which the initial action is filed is also competent (or a lower court is competent) for the counterclaim.

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

For ordinary civil proceedings, the defendant should file with the court his arguments within 100 days following the filing of the action by the claimant. In special proceedings, such arguments can be submitted on trial.

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

The law provides for three instances where the defendant may pass on or share its liability with a third party, by means of an impleader. First, when the notifying person is a party to a compulsory joinder (i.e. parties that are obliged by the law to bring or defend together a particular action or where no inconsistent judgments should be rendered between them); second, when the defendant in the main proceedings is in possession of the chattel or the immovable asset that is the subject matter of the dispute or when he holds the relevant right in the name of someone else; and third, when the notified party is liable for any debt, money or goods in respect of which he is or expects to be sued by any of the parties to the main proceedings (procedural guarantor).

The notified person in this case is free to intervene in the main proceedings; however, if defeated, he will be bound by the rendered judgment, which may be enforced against him as well.

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

In the case that the defendant is present during the trial and does not defend the claim, he runs the risk that the court considers that he admits the claims raised by the claimant.

If the defendant is absent from trial, the court initially verifies whether the action has been properly served to the defendant. For ordinary civil proceedings, provided that all procedural requirements are met, it is deemed that all the arguments and claims raised by the claimant against the defendant are admitted by the latter (Art. 271 CCP). On the contrary, in the case of special civil proceedings, the trial continues as if both litigants were present, notwithstanding the absence of the defendant.

4.5 Can the defendant dispute the court's jurisdiction?

The defendant can dispute the court's jurisdiction (Art. 263 CCP), by including this in his arguments.

5 Joinder & Consolidation

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

The CCP sets out the following mechanisms by which a third party can be joined into ongoing proceedings: (1) by making an intervention in favour of an existing litigant or independently of the existing litigants, as a full party; or (2) a third party can intervene in the legal proceedings on a litigant's impleader.

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

The court can (*ex officio* or after a litigant's application) order the consolidation of multiple sets of proceedings that are pending before this court if (a) the same procedure is applied for their evaluation (e.g. ordinary civil proceedings), (b) the consolidation facilitates or accelerates the conduct of the proceedings, or results in a reduction of expenses.

5.3 Do you have split trials/bifurcation of proceedings?

The court may, either of its own motion or upon an application of a party, order the bifurcation of proceedings (Art. 247 CCP).

6 Duties & Powers of the Courts

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

The allocation of cases between courts in Greece mainly depends on the financial value of the object of the claim. More specifically, the

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CCP provides for three types of courts of first instance: (a) the Court of the Peace, which is competent for claims up to €20,000; (b) the Single-Member Court of First Instance, which is competent for claims up to €250,000; and (c) the Multi-Member Court of First Instance, which is competent for claims worth more than €250,000. The territorial competence of the Court of First Instance is determined by the location of the residence of the defendant, as well as by other criteria (depending on the nature of the claim) such as the location of the disputed immovable property.

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

The Greek CCP contains very detailed provisions regarding the procedure and the steps that should be followed before the courts, thus active case management is an unknown matter in civil proceedings in Greece.

The following interim applications are available to the parties:

- Interim injunctions (such as freezing orders).
- Security for legal costs (see question 1.8).
- Applications for payment of the legal costs of the first trial, in the case that the claimant files a second action following the withdrawal of his initial action.
- Orders for disclosure (see question 7.4).

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

A Greek court has the power to impose sanctions in relation to any disturbance or failure to comply with an order or direction during a hearing (Art. 207 CCP provides for a fine ranging from €100 to €500 and for the possibility of imposing a 24-hour detention period).

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

In specific cases, the court has the power to reject a claim or part of it even before the assessment of the substantive validity of the claim (i.e. the factual background, evidence, etc.). This may happen for procedural reasons (e.g. one of the parties does not have the legal capacity to be a party to court proceedings) or legal reasons (e.g. when the claim cannot be based on a legal provision of the Greek civil code). In that case, the trial takes place normally and a judgment is issued that dismisses the case, without having had examined the substance of it.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

Civil courts cannot enter summary judgment.

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

The court may discontinue the proceedings in the case that the claim has been withdrawn or other factors make the hearing of the claim inadmissible (e.g. when the parties have settled their dispute before the court).

In addition, in certain circumstances the court is obliged to stay proceedings (e.g. in the case of death of a party), while in other circumstances the stay of the proceedings depends on the discretion of the court.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

In Greece there are no detailed provisions regarding disclosure, similar to those of common law systems. The general rule is that all the documents that are referred in the action of the claimant or that support the arguments of the claimant should be submitted to the court in order to prove the relevant arguments. In addition, the litigants or any third party are obliged to disclose the documents that may be useful as evidence (except if there are significant reasons for denying such disclosure). However, documents which are protected by the Legal Professional Privilege according to the Lawyer's Code cannot be used as evidence in the legal proceedings.

Disclosure pre-action is possible in three circumstances according to the CCP: (1) when there is an imminent danger of loss or destruction as a means of proof; (2) when it is deemed necessary that an object is examined in its present state; and (3) when the parties so agree.

An electronic document that includes an electronic signature is acceptable under the CCP like any other signed document that can be admitted in the legal proceedings. However, there are no special rules regarding the disclosure of such electronic documents.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

Under the CCP, there are certain privileges in favour of the witnesses and third parties. The main privileges that are stipulated are the following: the privileges of certain professions (e.g. the doctor's, the lawyer's profession, etc.), family privileges, privilege against self-incrimination as well as privilege of professional or artistic secrecy.

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

It is possible for disclosure by a third party to be requested by a litigant before the court (Art. 451 CCP), by means of an application against the third party during the course of the legal proceedings ("incidental application").

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

The court may order the disclosure of documents or records from parties or third parties if it considers such documents or records relevant for the proceedings or following a request submitted by any of the parties.

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

There are no relevant provisions in the CCP.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

The basic rule of evidence entails that the party who asserts a right/makes an argument bears the burden of proving the respective right or argument. However, in specific circumstances indicated in the CCP, the burden of proof is reversed (e.g. for consumer claims the service provider has to prove the absence of fault from his side.)

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

The CCP provides for the following classes of evidence: confession; autopsy; expert's report; documents; examination of parties; witness testimony; affidavits; and juridical presumptions.

Unless otherwise provided, all classes of evidence have the same probative value and the court evaluates the evidence at its absolute discretion. The court can take any evidence into account for its determination, even if it does not fulfil the typical requirements that are set out by the law by classifying it into the broad category of juridical presumptions. However, evidence that has been acquired in contradiction with the law (for instance forged documents) or the Constitution cannot be taken into account.

Moreover, an expert witness may be appointed by the court to give opinion in the circumstances of the cause of action only if the court rules that the matter calls for expertise knowledge (Art. 368 CCP). In practice, however, the parties appoint their own experts (Arts 391 and 392 CCP) known as "technical advisors".

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

For ordinary civil proceedings, no examination of witnesses takes place on trial, except if the court decides that such examination is necessary. In the latter case, the witnesses are obliged to appear to the case if they are summoned, otherwise a fine may be imposed on them. It is noted that the non-examination of witnesses on trial is a provision introduced in the CCP by virtue of the Law 4335/2015 for the purposes of acceleration of the administration of justice. However, witnesses are examined in cases of special proceeding (e.g. leases, interim measures, etc.).

Witnesses are proposed by any of the parties and come with the latter's diligence.

Witness statements (i.e. statements of truth which are not sworn) are not used in Greek civil proceedings. On the contrary, affidavits (sworn statements) may be given before a notary public or before a Justice of Peace.

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

According to Art. 368 CCP, the court can appoint one or more expert witnesses if there are issues that call for expertise knowledge (*ex officio* or after a party's request). In the case that more than one expert is appointed and the expert evidence is conflicting, the court evaluates this evidence freely according to its absolute discretion.

The expert owes his duties to the court and his opinion must be impartial.

9 Judgments & Orders

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

Judgments of Greek courts can be divided into the following categories: (1) final judgments; (2) non-final judgments regarding incidental or preliminary matters that arise during the course of the case; (3) injunctions; and (4) orders of payment (in connection with claims of pecuniary nature).

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

Greek courts have the power to make rulings on any loss suffered, interest and legal costs in the judgment.

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

The following types of judgments of national courts can be enforced: (a) judgments that have been appealed and a final decision has been issued thereon (or have not been appealed within the prescribed period of time); (b) first instance judgments which have been declared provisionally enforceable; (c) arbitration awards; (d) notarial deeds; (e) court records that contain the parties' compromise or specify the court costs; (f) payment orders and lease payments; (g) foreign judgments that are declared recognised and enforceable in Greece; and (h) any other document that is recognised as an enforceable title under the law.

Regarding EU Member States judgments, the provisions of the Council Regulation (EC) 1215/2012 have application regarding the enforcement of the judgment in Greece. For third countries (non-EU), foreign judgments are recognised and enforced according to Art. 323 CCP.

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

The CCP allows the filing of an appeal only for final judgments. The appellant must file an appeal notice in which he should set out the grounds on which it is alleged the decision is erroneous, in terms of procedure or substance. The appeal shall be filed within thirty

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(30) days following the service of the judgment by one party to the other, or within a period of three years from the date the judgment was drawn up and sealed by the court, but not served on the other party.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

The CCP provides parties with the possibility (prior to beginning an action) to submit an application before the Judge of Justice of the competent court, requesting their conciliatory intervention. In addition, litigants may even after the action is filed attempt to reconcile through negotiation, before the final judgment is issued. Finally, the court may at any stage of the trial invite the parties to apply for judicial mediation (or the parties may on their own initiative decide to apply for judicial mediation) and if they so agree to stay the court proceedings for a period of up to three months.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

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

The main alternative dispute resolution methods in Greece are the following: (1) **arbitration** which can take the form of domestic and international commercial arbitration; and (2) **mediation** that refers to the structured procedure where two or more parties attempt to reach a voluntary settlement agreement with a mediator's assistance. It should be noted that recently, Law 4512/2018 made an attempt to promote mediation procedures by establishing that certain private disputes should obligatorily be submitted to mediation (e.g. disputes connected with trademark infringement) prior to filing an action to the court. However, the applicability of this obligation has been postponed until 16th September 2019. Several other methods of dispute resolution are also recognised (**conciliation, banking ombudsman**, etc.) but their practical impact is minimal.

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

Domestic arbitration is regulated under the CCP, while international commercial arbitration is conducted according to the provisions of Law 2735/1999. The Mediation Act (Law 3898/2010) applies to any mediation procedures. Finally, the operations of the Greek Ombudsman are regulated by Law 3094/2003.

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

The applicability of ADR procedures presupposes that the parties are allowed to dispose of the subject matter of the dispute. Certain categories of disputes are excluded from ADR on the basis of concerns relating to public policy and to the protection of a presumably weak party (e.g. employment disputes).

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

The local courts can provide assistance in case the parties wish to invoke judicial mediation (see question 10.1).

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

Arbitral awards are binding upon the parties and immediately enforceable. The CCP provides certain exclusive grounds (e.g. that the award runs afoul of Greek Public Order) for the annulment of an award following a petition of a party before the competent Court of Appeal within three months from its notification.

In the event of mediation successfully resulting in a settlement, the mediator draws up a mediation agreement record, which can be submitted to the Court of First Instance where the mediation took place. Once submitted, the agreement becomes enforceable.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

Some of the major ADR institutions in Greece are the following: (1) the Arbitral Tribunal of the Athens Chamber of Commerce and Industry; (2) the Greek Centre of Mediation and Arbitration; (3) the Hellenic Chamber of Shipping; (4) the Piraeus Association for Maritime Arbitration; and (5) panels organised by the respective Bar Associations, the Technical Chamber of Greece and the Stock Exchange of Athens.

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She has in-depth knowledge and has advised many clients on civil and commercial law issues, commercial transactions, as well as on judicial enforcement procedures. Her expertise covers litigation and representation of clients in civil, commercial and corporate disputes.

Indicatively, she has handled cases regarding the following matters:

- Leasing agreements.
- Dispute resolution relating to any kind of civil and commercial agreements.
- Dispute resolution regarding civil and corporate law matters.
- Claims and enforcement.
- Tort claims of any kind.
- Unfair competition issues and disputes over intellectual property rights.
- Labour law issues.
- Data protection issues.

V.D.IKONOMIDIS LAW FIRM

"V. D. Ikonomidis and Associates Law Firm" was established in 2010 by Vassilios Ikonomidis and has its offices in Athens, 112 Vasilissis Sophias Avenue. The Law Firm handles litigation cases, as well as corporate, commercial and civil law issues. The Firm's aim is the provision of high quality legal services by combining experience and a long legal tradition with flexibility and understanding of the modern challenges that arise within the economic and business environments.

The scientific excellence of its members in different areas of law and the reliability and swiftness in handling the cases assigned ensure an integrated and interdisciplinary approach to the issues that may arise in the course of carrying out business activity, and constitute the basis of the Firm's successful course until today. The professional relationships of the Firm are characterised by continuity and mutual trust, with the Firm having established an ever-expanding clientele which includes Greek and international companies and groups, entrepreneurs, strategic investors and individuals.

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Guernsey

Martin Jones

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I. LITIGATION

1 Preliminaries

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

The legal system in Guernsey is historically based on Norman Customary law and is essentially now a common law jurisdiction with legal concepts familiar to both English and French lawyers.

Litigation in Guernsey is adversarial rather than inquisitorial. The Royal Court of Guernsey is the established court in Guernsey (supported by the Magistrate's Court) and procedure is governed by the Royal Court Civil Rules 2007 (**RCCR**).

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

The Bailiwick of Guernsey encompasses three separate jurisdictions: Guernsey; Alderney; and Sark. Alderney and Sark have their own separate courts of first instance, which have a right of appeal to the Royal Court of Guernsey (**Royal Court**).

In Guernsey, the Magistrate's Court has first instance jurisdiction for any civil action for recovery of a debt or damages in contract or tort up to the value of £10,000.

Larger disputes are heard in the Royal Court, which is made up of five divisions (on which, see below).

Most commercial disputes will be heard in the Royal Court sitting as the Ordinary Court. There are no specialist courts.

Appeals from the Royal Court lie to the Guernsey Court of Appeal and thereafter to the Judicial Committee of the Privy Counsel in England.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

Proceedings are commenced by serving a Summons and then tabling it in the form of a Cause before the Royal Court.

Once the Cause has been tabled, the Defendant has 28 days to file its Defence. This date can be extended by up to three months with agreement of either the parties or the court and thereafter by an order of the court. If a counterclaim is commenced, the Plaintiff must file its Defence to that counterclaim within 28 days (again, extendable by agreement or court order).

The claim will then be placed on the pleadings list and the court will normally list a case management conference to set directions for the next stages, including:

- disclosure;
- expert reports;
- witness statements;
- pre-trial review; and
- trial.

There is no fixed timeframe for these steps and it is normally flexible in accordance with the approach of the parties and the caseload of the court.

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

The Royal Court respects the autonomy of parties to submit to a jurisdiction of their choosing and will usually normally accept an exclusive jurisdiction clause. If the matter involves factors that can only properly be decided by a court in Guernsey, then the Royal Court may claim jurisdiction.

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

Lawyers' costs are usually charged on a time spent basis using hourly rates. The costs of civil proceedings are not fixed by law and Advocates and law firms set their own rates.

The winning party in litigation does not have an automatic right to recover costs and the court has discretion to make any order it sees fit. The normal rule is that costs follow the event. Costs can be ordered to be paid on either the standard or indemnity basis. There is a maximum recoverable rate recoverable for Guernsey Advocates.

Costs budgets are not required under Guernsey's procedural rules.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

Guernsey Advocates are not permitted to enter into contingency or conditional fee arrangements. Whilst parties normally fund

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litigation on a privately paying basis, insurance and third party funding is available. ATE premiums are not normally recoverable from the other party.

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

The Law of Property (Miscellaneous Provisions) (Guernsey) Law 1979 permits absolute assignment of a debt or other chose in action. An effective assignment must be in writing and express written notice must be served on the debtor or anyone else entitled to be informed.

Third party funding is permitted provided that any arrangement does not conflict with the principles of champerty and maintenance. Third party funders are not immune from the risk of a costs order in the event that the financed party is unsuccessful in litigation.

1.8 Can a party obtain security for/a guarantee over its legal costs?

The court can order a party to provide security for costs as it sees fit.

2 Before Commencing Proceedings

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

There are no formal rules for pre-action conduct in Guernsey, but parties normally engage in pre-action correspondence as a matter of good practice.

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

Limitation is known as "prescription" in Guernsey. Prescription is a substantive law issue and operates to extinguish the right to a claim, rather than barring the remedy.

The prescription periods of claims most commonly arising are:

- contract or tort – six years from the date on which the breach/damage occurred;
- personal injury – three years from the date action accrued, or date of knowledge if later;
- breach of trust – three years from the date of knowledge or delivery of final trust accounts; and
- realty – 20 years from the date the cause of action arises.

Prescription does not begin to run in claims involving a minor or patient without a guardian, or in circumstances of fraud or mistake where the plaintiff could not have discovered the fraud or mistake with reasonable investigation.

The prescription period stops when the claim is commenced by providing a summons for service to HM Sergeant.

3 Commencing Proceedings

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

A Summons must be served upon the Defendant and any other parties to proceedings via HM Sergeant. A Summons should be served personally or at that individual's home or on the registered office or place of business in the case of a company. HM Sergeant will provide a certificate of service.

Service can only be effected outside of the jurisdiction with the leave of the court. The court will be concerned with whether there is sufficient reason for that claim to be brought in Guernsey. The order to serve out will provide for the method and timing of service.

Foreign proceedings needing to be served in Guernsey should be provided to HM Sergeant to effect service. The HCCH Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters 1965 has effect in Guernsey.

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

The main interim remedies available pre-action include:

- freezing injunctions;
- search (Anton Piller) orders;
- Bankers Trust orders;
- Norwich Pharmacal orders;
- anti-suit injunctions; and
- the *Clameur de Haro* (an ancient Norman property injunction).

In appropriate circumstances the relevant application can be made on an urgent, without notice basis, whereupon the applicant has a duty to give full and frank disclosure of all material facts which will impact upon the court's discretion, whether or not they are in the applicant's favour, and the court will normally require a cross undertaking in damages.

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

The Plaintiff's pleading is set out in the Cause. The Cause must contain a statement of the material facts on which the Plaintiff intends to rely and confirm the relief sought, e.g. damages. The Plaintiff can also file a defence to any counterclaim against it. Subsequent pleadings include the *replique* (response to defence) and *duplique* (response to *replique*).

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

Pleadings can only be amended with the consent of the parties or the leave of the court.

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3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

Pleadings cannot be withdrawn without the consent of the parties or the leave of the court.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

Defences in Guernsey take a distinctive form. Firstly, the Defendant can plead *exceptions*:

- *exceptions de forme* is a request for further and better particulars of claim; or
- an *exceptions de fond* is a challenge to a substantive element of the claim, such as jurisdiction or prescription.

Exceptions should be pleaded first and followed by *Niances* and *Pretensions*. *Niances* are denials of fact and/or law and *Pretensions* are counter allegations of fact and/or law.

A Defendant can bring a counterclaim or a defence of set-off.

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

The Defence must be filed and served within 28 days of the Cause being tabled with the court. As detailed above, this can be varied by agreement between the parties or an order of the court.

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

The Defendant can make an application to the court to join a third party as co-defendant, for example for contribution or indemnity purposes. The Defendant must serve a Summons on that party to join them and provide any further pleadings or evidence that the court may require.

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

If the Defendant does not defend the claim then the court can order judgment in favour of the Plaintiff.

Either party can also apply for summary judgment on the basis that the other party has no real prospect of success.

4.5 Can the defendant dispute the court's jurisdiction?

A dispute to the court's jurisdiction should be pleaded as an *exception de fond*.

5 Joinder & Consolidation

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

Under Rule 37 of the RCCR, the court can order a party to be joined to ongoing proceedings where the court considers it just and convenient to do so for the determination of an issue.

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

Under Rule 31 of the RCCR, the court may order consolidation (*crochetées*) of actions, or stay of an action pending the outcome of another action in circumstances where there is a common question of law or fact, where rights of relief claimed arise from the same transaction or for any other desirable reason.

5.3 Do you have split trials/bifurcation of proceedings?

Under Rule 50 (2) of the RCCR the court has general powers in relation to the conduct of proceedings, including the power to decide the order in which issues are to be tried and make decisions on preliminary issues.

6 Duties & Powers of the Courts

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

Claims with a value lower than £10,000 should be commenced in the Magistrate's Court. Claims with a higher value are commenced in the Royal Court. There are five divisions in the Royal Court:

- the Court of Chief Pleas – mainly ceremonial, deals with admission of new advocates and reports under statutory duties;
- the Full Court – civil jurisdiction for applications for liquor licences, new cemeteries, planning and housing appeals and similar;
- the Ordinary Court – most commercial and civil litigation;
- the Court de Plaids d'Heritage – hears *Saisie* proceedings (enforcement of security or judgment debts against realty); and
- the Matrimonial Causes Division.

Cases should be issued in the appropriate division. There is no system of allocation to particular judges.

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

The Royal Court's case management powers are contained in Rules 38 to 45 of the RCCR. The Court actively manages cases. The Royal Court also has wide powers in relation to the conduct of proceedings under Rule 50 of the RCCR.

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Parties can make a wide range of interim applications for orders including injunctions, summary judgment, strike out, unless orders and security for costs. Costs are normally decided at the conclusion of the application, or an order is made for costs in the case.

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

Rule 56 of the RCCR gives the Royal Court power to impose sanctions for failure to comply with court orders. Parties can also apply for an unless order in relation to a non-compliant party under Rule 53.

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

The Royal Court has power to strike out all or part of a party's statement of case under Rule 52 of the RCCR. The court may strike out a pleading on the basis that it discloses no reasonable grounds, is an abuse of process or where there has been a failure to comply with a rule. The application can be brought at any time.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

The rules regarding summary judgment are contained in Rules 18 to 24 of the RCCR. Summary judgment can be entered in circumstances where the plaintiff or defendant's case shows no real prospect of success.

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

Under Rule 61 of the RCCR, a party may not discontinue or withdraw proceedings without the consent of all other parties or the leave of the court. The Royal Court has the power to stay the proceedings under its general powers in Rule 50 of the RCCR.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

Disclosure is covered by paragraphs 63 to 79 of the RCCR. The usual order is standard disclosure unless the court directs otherwise.

Parties have a duty to disclose any documents which are or have been in their control. This duty applies to documents the party intends to rely on, which support or adversely affect that party's case and documents required to be disclosed by any relevant practice direction.

There is no formal procedure for pre-action disclosure through the court unless the matter is a personal injury claim.

There are no special rules at present for dealing with disclosure of electronic documents.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

There are several recognised forms of privilege in Guernsey law, including legal advice and litigation privilege. Privilege permits parties to refuse inspection of documents which may otherwise be disclosable.

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

Interim applications can be used to obtain disclosure from a third party, such as an application for a Norwich Pharmacal Order or a Bankers Trust Order.

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

The Court's role in the disclosure process will be to make the appropriate orders for disclosure at the case management conference.

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

Rule 79 of the RCCR governs the use of documents obtained by disclosure. Documents obtained by disclosure may only be used for the purpose of the proceedings in which they were disclosed unless read out or referred to at a public hearing, with leave of the court or agreement of the parties.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

Evidence is normally compiled of documentary evidence through disclosure, witness evidence and expert evidence. Witness evidence is usually in the form of written witness statements which stand as evidence in chief. Witnesses are usually cross examined on their witness statements.

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

Documentary evidence, witness evidence and expert evidence are all admissible. The court will give directions on the evidence at a case management conference.

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

The rules on evidence are contained in the Evidence in Civil Proceedings (Guernsey and Alderney) Rules 2011. There are no particular rules in the RCCR regarding witnesses of fact, aside from paragraph 85 which deals with witness summonses.

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

The parties must obtain the permission of the court to adduce expert evidence. It should only be admissible if required to assist the court in relation to the subject of the dispute. The expert's overriding duty is to the court.

Expert evidence must be provided in accordance with the Evidence in Civil Proceedings (Guernsey and Alderney) Rules 2011.

9 Judgments & Orders

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

Judgment is usually given in the form of damages, which are ordered to compensate the party for the loss suffered, rather than being punitive. The court can also order interest on the damages awarded for the period in between the cause of action arising and the date of judgment. Interest will be simple interest and the current interest rate for judgment debts is 8%.

The Royal Court has the customary jurisdiction to grant final injunctions and can make an order for declaratory relief.

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

The Royal Court has complete discretion over the orders of damages, interest and costs in litigation. A successful party has no automatic right to costs, but the usual rule is that costs follow the event and costs are a matter for the court's discretion. Costs can be ordered on a standard or an indemnity basis.

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

A local judgment can be enforced in a number of ways; for example, by registering the judgment debt against the realty of the judgment debtor, garnishee proceedings or an *arrêt*.

Foreign judgments can be recognised and enforced in Guernsey pursuant to the Judgment (Reciprocal Enforcement) Guernsey Law 1957. If this law does not apply then any enforcement action will be on the basis of common law principles and it may be necessary to sue on the judgment in Guernsey.

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

Appeals from the Magistrates Court lie to the Ordinary Court in the Royal Court. Appeals must be in respect of a claim in excess of £200 and on a point of law.

The Guernsey Court of Appeal hears appeals from the divisions of the Royal Court including the Full Court, the Ordinary Court or the Matrimonial Causes division. Appeals to the Guernsey Court of Appeal are governed by the Court of Appeal (Guernsey) Law 1961 and the Court of Appeal (Civil Division) (Guernsey) Rules 1964.

Appeals from first instance are normally by way of a re-hearing and can be made in relation to a point of law, or if the value of the judgment is over £200. In some instances, leave to appeal must be obtained.

A Notice of Appeal must be filed within one month of judgment, unless this time limit is extended by the Court or in writing by the parties.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

There are no formal mechanisms by which parties are compelled to settle claims, but parties are encouraged to consider settlement in accordance with the overriding objective in the RCCR.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

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

Mediation and arbitration are the main forms of ADR used in Guernsey. ADR in general is voluntary and although the parties are encouraged to engage in ADR, they cannot be compelled to do so. However, if parties have entered into an arbitration agreement the court is likely to uphold it, and can order a stay in court proceedings where the matter should be dealt with through arbitration. Cost sanctions may be directed at parties who unreasonably refuse to engage in ADR.

The Channel Islands Financial Ombudsman can deal with certain types of disputes involving financial services firms, up to a maximum value of £150,000.

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

With the exception of arbitration, as the process is voluntary, the parties are free to agree their own rules as they see fit.

The Arbitration (Guernsey) Law 2016 provides the rules governing arbitration in Guernsey. It is similar to the UNICTRAL Model Law on international commercial arbitration.

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

ADR in Guernsey is a voluntary process and can only be used with the agreement of all parties (with the exception of arbitration, on which see above). In certain cases, resolutions reached with ADR may require the blessing of the court.

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

ADR in Guernsey is voluntary and the courts cannot compel parties to use it (unless the parties have entered into a binding arbitration agreement). The court generally encourages parties to engage in ADR if appropriate and may impose cost sanctions on parties who unreasonably refuse to engage in ADR.

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

If parties have a binding arbitration agreement they can apply to the Court for a stay of any proceedings which should be arbitrated. The court can impose cost sanctions on parties who unreasonably refuse to mediate. Settlement agreements are normally in the form of a contract between the parties and should not require agreement from the court except in special circumstances; for example, if the case involves a minor or someone who lacks capacity.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

The Chartered Institute of Arbitrators has a Channel Islands branch. Details can be found at: https://www.ciarb.org/our-network/great-britain/channel-islands/.

Mediation Guernsey (https://www.mediationguernsey.com/) provides information regarding the mediation services available in Guernsey. The Centre for Effective Dispute Resolution provides mediators to assist with resolving disputes in Guernsey.

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Martin Jones is a Founding Partner of Ferbrache & Farrell LLP and is the head of the firm's dispute resolution practice. He has significant local and international experience. Prior to setting up Ferbrache & Farrell LLP, he practised commercial litigation in Guernsey at two leading international offshore law firms.

Martin specialises in complex local and international commercial litigation including trust and regulatory matters, cross-border fraud claims, multi-jurisdictional insolvency matters, asset tracing and contract and tort claims. He also has substantial experience in property and construction disputes.

He qualified as a solicitor of England and Wales (currently non-practising) in September 1999. Martin relocated to Guernsey late in 2006. Martin was admitted as an Advocate of the Royal Court of Guernsey in 2012. Martin also regularly presents external and internal conferences and seminars and produces articles and briefings on various topics and issues of interest.

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Alison Antill is an Associate in the dispute resolution department of Ferbrache & Farrell LLP. Prior to qualification as a solicitor, Alison received a bursary from a leading offshore law firm and gained experience at several firms in Guernsey. She worked as a paralegal in a boutique litigation firm in the City of London.

Alison trained and qualified with a regional firm in Kent. Alison joined Ferbrache & Farrell LLP in October 2018. Alison specialises in commercial disputes including insolvency, contractual, debt, intellectual property and construction matters. Alison has also acted in professional negligence claims and has experience of family and employment cases.

Ferbrache & Farrell LLP is a Guernsey law firm, founded in October 2016. The firm brought together experienced Guernsey Advocates Gavin Farrell, Alastair Hargreaves and Martin Jones as partners with Advocate Peter Ferbrache as a consultant to focus on the areas of dispute resolution, property and corporate law. All of the firm's partners and staff previously worked at other large offshore law firms and have worked together on a cross-disciplinary basis. The firm acts for both Guernsey-based and international clients.

Ferbrache & Farrell has recently received recognition in the 2019 editions of leading legal directories just two years after opening.

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Chapter 18

Hungary

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I. LITIGATION

1 Preliminaries

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

Hungary has a continental law system, whereas comprehensive legal codes are adopted by the legislative bodies.

The civil procedure is governed especially by the Act CXXX of 2016 on the Code of Civil Procedure (the "**CCP**"), which is the most important and basic source of law for such proceedings. The new CCP entered into force on 1 January 2018 with the aim of establishing a modern code of civil procedure, complying with international standards and requirements, which shall ensure an effective way to enforce rights.

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

The civil court system in Hungary is ruled by Act CLXI of 2011 on the Organization and Administration of the Courts; however, the detailed rules of competence of the Hungarian courts are provided by the CCP.

In Hungary, the civil court system includes district courts (in Hungarian "*járásbíróság*"), regional courts (in Hungarian "*törvényszék*"), regional courts of appeal (in Hungarian "*ítélőtábla*") and the Curia as the Supreme Court (in Hungarian "*Kúria*").

The administrative and labour courts (in Hungarian "*közigazgatási és munkaügyi bíróságok*") may be considered as special courts; however, these are – at least presently – also integrated into the Hungarian court system. However, due to a reform recently adopted by the parliament, eight administrative regional courts ("*közigazgatási törvényszék*") and an administrative Supreme Court ("*közigazgatási felsőbíróság*") will be created as from 1 January 2020.

First-instance judgments are passed by district courts and regional courts. The new CCP defines the regional courts as courts with general jurisdiction, which have competence over all legal actions not referred to district courts by legislation. *District courts* have competence over, especially, property cases with an amount of dispute of up to HUF 30 million (*ca*. EUR 93,000), and actions concerning civil status and enforcement.

There are 20 *regional courts* in Hungary, one in each county of Hungary and one in Budapest. As mentioned above, the regional courts may proceed as first-instance courts, and also as courts of appeal.

In Hungary, five *regional courts of appeal* are operating. The regional court of appeal shall review appeals submitted against the decisions of district courts or regional courts and shall proceed in other cases referred to its jurisdiction.

The Curia is the highest judicial authority in Hungary; as such, it guarantees the uniform application of law. The decisions of the Curia on uniform jurisdiction are binding for other courts.

Judicial review of administrative decisions, actions relating to contracts of employment and other similar relationships, and other cases delegated by law fall within the jurisdiction of the *administrative and labour courts* in the first instance.

There is a simplified out of court civil action for the recovery of monetary claims, namely the *order for payment procedure*, which falls within the competence of a notary public. An overdue claim of a monetary nature, the amount of which does not exceed HUF three million (*ca*. EUR 9,300) may be enforced by way of an order for payment procedure only; however, claims of over HUF 30 million (*ca*. EUR 93,000) belong to the jurisdiction of ordinary courts.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

One of the most important aims of the new CCP is time efficiency. Since 1 January 2018, it has been compulsory for legal persons and their lawyers representing them, further to state authorities and courts, to submit/receive all communications electronically; paper-based communication is allowed only for natural persons.

The civil proceeding commences with the submission of a *statement of claim* to the court. The CCP prescribes what the compulsory elements of a statement of claim are.

The procedure has two main parts: (i) the case initiation/preparatory stage; and (ii) the hearing on the merits.

The purpose of the case initiation stage is to define the framework of the dispute, whereby an evidence-taking procedure is limited.

In the preparatory stage, the defendant is requested to file its written statement of defence within 45 days from the receipt of the statement of claim. Thereafter, the claimant has the right to submit a counter-memorial, to which the defendant is entitled to file a rejoinder.

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There must be at least 15 days between the delivery of the summons and the case initiation hearing. At the *case initiation hearing*, if any, the parties may present their case, and their requests for evidence taking. Once the case initiation hearing is closed, the court takes the necessary actions for summoning the *hearing on the merits*.

At the stage of *hearing on the merits*, the court shall take evidence within the framework of the case initiation process, and shall determine the case. At this stage, any change to case initiation statements is allowed only in a very limited scope. The court may attempt at any time during the proceedings to reach a settlement between the parties.

There is no expedited trial process available in Hungarian civil litigation.

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

Parties may agree in writing on a jurisdiction of a certain Hungarian court, which shall have exclusive competence, unless not expressly limited by law.

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

The costs of civil court proceedings mean all expenses a party has necessarily incurred during or prior to the proceedings, including court fees (duty fees), fees of lawyers, witnesses, experts, travel expenses, etc. The costs depend on the value of the dispute. In general, the court costs of the prevailing party shall be covered by the unsuccessful party. If both parties prevail partly, the costs are shared proportionally between them. There are no rules for cost budgeting, therefore no detailed breakdown of the estimated costs for the process is required. However, if the expert cost is estimated to be high, the court – at the party's request – shall instruct the expert to prepare a preliminary plan outlining his tasks and the estimated costs and expenses involved.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

Under certain preconditions, the CCP provides possibilities to any party, depending on its economic or personal circumstances, to claim for cost allowances, such as cost exemptions, suspension of payment of costs, reduced payment of court duty, exemption from the payment of lawyers' fees, etc.

The lawyer's fee is subject to the free agreement of the client and the lawyer. Contingency fee/conditional fee arrangements are also possible in Hungary; however, these may not be enforced before the court if their amount exceeds two-thirds of the total attorney's fee.

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

Assignment of claims depends on the legal relationship underlying the claim. As a general rule, if in such a legal relationship an assignment or other kind of legal succession takes place, the successor may join the case voluntarily, or the defendant's successor may be forced by the claimant to join the dispute.

The CCP includes no provisions for financing the proceedings by a non-party to litigation; however, there are specific provisions for advancing and/or bearing the costs by the state. There are no professional litigation funders in Hungary.

1.8 Can a party obtain security for/a guarantee over its legal costs?

A claimant with their residence, registered office or habitual residence *outside* the Member States of the European Union, or Member States being party to the Agreement on the European Economic Area, or any other State enjoying similar treatment under an international agreement, may be required to provide security for covering the defendant's court costs upon the defendant's request.

2 Before Commencing Proceedings

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

The new CCP requires no formality before initiating a civil proceeding.

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

In Hungary, time limits are treated as a substantive law issue and are governed by the Hungarian Civil Code ("*Polgári Törvénykönyv*", abbreviated "Ptk").

The failure to observe a time limit for exercising a right or for the enforcement of a claim leads to loss of the right only, if a legal act expressively orders so. Otherwise, time limits are not preclusive and the provisions on regular limitation periods shall apply.

Basically, the regular limitation period is five years from the day when the claim becomes due, unless the Civil Code itself includes a specific limitation period, for instance:

- claims for damages caused by a criminal act shall not expire even after five years, if such criminal act remains punishable for longer;
- three years for liability arising from hazardous operations;
- one year from the delivery date for warranty claims for lack of conformity; or
- ownership ("*in rem*") claims and the right to inheritance shall not lapse.

Parties may agree in writing on a limitation period deviating from the general limitation period set out by the Civil Code; however, an agreement excluding the limitation period shall be null and void.

Unless otherwise provided for in the Civil Code itself, expired claims may not be enforced in court; however, the expiry of a claim due to the lapse of the limitation period may *not* be taken into consideration *ex officio* in court or administrative proceedings.

Under certain circumstances defined by the Civil Code, the limitation period may be suspended or interrupted.

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3 Commencing Proceedings

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

A civil procedure is commenced by filing the statement of claim to the court. The service may be executed by post, usually by registered mail; however, this applies basically only for natural persons, since authorities, legal entities and all lawyers are obliged to use an electronic communication system, which was introduced into the Hungarian legal system in 2017. The deemed date of service is the day on which the document is taken over physically, or becomes available for view in the electronic communication system and becomes digitally confirmed.

In case of cross-border legal disputes, there are different rules for service depending on the location of the addressee. *Within the European Union*, the 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), repealing Council Regulation (EC) No 1348/2000, applies. For services to abroad *other than the European Union*, the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters applies, which Hungary joined in 2005.

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

Upon request, the court may order *provisional measures*, in order to hinder any alteration of the existing state, or prevent failure of the applicant's subsequent exercise of rights, or eliminate any harm the applicant may directly be exposed to, or under other exceptional circumstances.

Provisional measures may be requested and ordered *before filing the statement of claim* as well, if the time delay might cause significant damages or disadvantages.

It is also possible to apply for *ordering preliminary taking of evidence*, even before or after filing the statement of claim. The reasons for ordering such measures are also bound to the potential threat that a time delay or other difficulties might cause; for example, if the taking of evidence could not be performed successfully during the action or during any later stage thereof.

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

The statement of claim has basically three main parts: (i) introductory part; (ii) substantive part; and (iii) closing part.

In the introductory part of the statement of claim, the main information (name, address, court size, etc.) on the parties and the court shall be indicated.

In general, the substantive part of the statement of claim includes the "legal part" thereof. The claimant shall indicate the relief sought, the claimed right, the facts underlying the claim, causal relationship between the right to be awarded, the factual claims and the claim, and the evidence available to support factual issues.

The closing part of the statement of claim shall include the value of the dispute, proof of legal capacity of the parties, facts and legal provisions on which the competence and jurisdiction of the court is based, the amount of duty paid (court fee) and the mode of payment, or if no procedural fees are paid, the application for exemptions or allowances, if any, etc.

Should the statement of claim not contain any of the elements required by the CCP, it will be rejected by the court without providing a request for remedying deficiencies. However, it is possible to resubmit a corrected statement of claim within 30 days in order to keep the legal effects of (the previous) submission in force.

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

During the case initiation stage, amending the statement of claim is basically permitted only if the amended action originates from the same legal relationship as the previous one.

After the adoption of the ruling on closing the case initiation, the possibility of amending the action is even more limited (e.g. the party relies on a fact that came to his knowledge, or occurred thereafter, etc.).

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

The court may terminate the proceedings upon request at any time during the proceedings, even before the statement of claim is delivered, if the claimant has withdrawn the claim in its entirety.

The claimant may freely withdraw the claim before the defendant's written defence statement is presented, thereafter only upon the defendant's consent. Should the defendant fail to provide its consent within a timeline set by the court, the court shall terminate the proceedings according to the claimant's request.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

Similarly to the main elements of the statement of claim, the CCP includes a list of necessary information and data which shall be indicated in the statement of defence. Most importantly, the defendant shall respond to the claim; in general, it may request to dismiss the claim in part or full, or, it may include statements regarding partial or full acknowledgment.

The defendant is also allowed to bring a counterclaim, which shall be submitted within 45 days of receipt of the statement of claim, or contemporaneously with the written defence statement at the latest. The defendant shall also be allowed to set off his counterclaim against the claimant's claim within the same deadline applicable for the submission of a counterclaim.

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

The statement of defence shall be submitted by the defendant within 45 days as of receipt of the statement of claim.

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

Any party of the procedure, who – for the case of losing the procedure – wishes to enforce any claim against a third party, or is aware of a third party having a claim against him, can invite such third party into the procedure. Such third party is entitled to accept or to reject the invitation into the procedure at its own discretion. Should the third party accept such invitation, he can join the invitee as an intervener; however, the legal relationship between the invitee and the third party cannot be decided in the procedure at hand. Therefore, if a defendant intends to bring action against the third party, he must initiate a new and independent civil procedure.

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

If the defendant fails to submit its statement of defence within the given timeline, the court shall on the basis of its own motion (i.e. without a specific request of the claimant) issue an order against the defendant as requested in the claim served (so-called "*court order*").

4.5 Can the defendant dispute the court's jurisdiction?

Basically, the court shall take into consideration its lack of competence on its own initiative (*ex officio*). However, the lack of competence shall be ignored after the written defence statement is presented if the competence is dependent on the value of the dispute. The same applies for the jurisdiction issues, if the jurisdiction is non-exclusive.

5 Joinder & Consolidation

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

There are several mechanisms in Hungary whereby a third party can join an ongoing civil procedure.

One of them is the *intervention*, whereby a third party, who has a legal interest in the outcome of a civil process pending between others, may intervene on behalf of a party in the same interest in order to facilitate his success. Intervention is possible until the adoption of the ruling on finishing the case initiation stage by the court.

For *invitation to the civil process*, please see question 4.3.

Further, in case of a *succession*, the successor may also enter into the procedure – either voluntarily, or the legal successor of the defendant may enter into the procedure upon request of the claimant.

The defendant may *initiate the claimant to bring a third party into the action*, if such a third party claims the subject matter of the action in part or in whole for his own benefit; or, the defendant exercised a right in the name of such third party and the action is brought against the defendant in connection with such a right.

In case of an erroneous action, i.e. if the action is brought by the claimant against an improper person, he may bring such another person into the action as a defendant before the ruling on finishing the case initiation is adopted.

In the case of joinder of parties, the claimant is also entitled to bring further defendants into the action.

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

The court is entitled to consolidate ongoing proceedings in order to hear and determine the cases jointly if the subject matters of these cases are related, and if the ruling on closing the case initiation stage has not been adopted yet.

5.3 Do you have split trials/bifurcation of proceedings?

If the court deems it to be advantageous, it may order that certain claims enforced in one action, or certain segments of claims that can be separated, as well as certain issues in dispute that in general can be resolved individually, be heard and determined separately.

6 Duties & Powers of the Courts

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

Civil courts passing judgments at first instance are the territorially competent district courts and regional courts. Most generally, competence depends on the value of the dispute (e.g. property cases with an amount in dispute of up to HUF 30 million (*ca.* EUR 93,000) fall in general within the competence of district courts) and on the subject of the case.

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

One of the basic principles and aim of the new CCP, which entered into force in 2018, is effectivity.

The court and the parties shall aim to ensure that all facts and evidence required for determining the case be made available in an appropriate timeframe, in order that a judgment can be delivered only after one hearing. Within the framework given by the CCP, the court prescribes the deadlines for the parties for their submissions and other acts. However, parties may require a time extension, or apply for interim measures, or file other procedural motions. In case such requests are bound to costs, they will be dealt with as "costs of the procedure" and will be allocated at the end of the process, or – under certain circumstances – the requesting party has to advance them.

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

Parties late in performing any of the court's order or ruling may have a fine imposed on them, or their acts might be considered as "ineffective" by the court. There are also circumstances defined by the CCP when the court has no discretion right and a fine must be imposed on a party (e.g. a party alters its case initiation statement; however, it could have done so already in an earlier stage). If the defendant fails to submit its statement of defence within the given timeline, the court may issue a court order against him (see question

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4.4 above). In extreme cases, the civil court may also proceed for criminal sanctions, e.g. in case of parties or witnesses not telling the truth.

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

At the very early stage of the procedure, the statement of claim can be rejected due to several reasons defined by the CCP (e.g. it does not include the compulsory elements, Hungarian courts have no jurisdiction, "*res judicata*", court duty fee is not paid, etc.). In these cases, the statement of claim shall be rejected as a whole, even if reasons for rejection apply only for a part of it.

The CCP provides power to the courts to consider certain acts as "ineffective". For instance, in case a party fails to timely carry out a certain procedural act, it shall also be deemed to have no effect.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

There is one similar legal institution in Hungary to summary judgment, namely the court order (please see question 4.4 above). If the defendant fails to submit its statement of defence, the court may issue an order in line with the statement of claim without any further evidence taking or hearing.

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

The court may discontinue the civil proceeding *ex officio* due to several reasons, such as that the court has no jurisdiction, the death or dissolution of any of the parties, the parties failed to be present at the case initiation hearing, etc.

The court may also discontinue the proceedings *on application of the parties*, for instance if the claimant has withdrawn the claim, or the parties requested it mutually, etc.

The procedure may also be stayed, but only for four months, and only for the reasons defined by the CCP, e.g. parties jointly agreed to apply for staying the process, or if the hearing on the merits is missed by all parties, or if the party cannot be reached at the address given, and the other party did not provide another contact address upon judicial notice, etc. At the request of either of the parties, the proceedings shall be continued.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

There are no specific provisions relating to disclosure pre-action. The parties and their representatives, the expert and the public prosecutor shall have access to the documents of the case any time during the judicial proceedings without special permission – except to draft decisions and any dissenting opinion – and shall have the right to make for themselves copies or extracts thereof. The intervener and his representative shall be allowed access to documents of the case, and to make copies or extracts with the court's permission.

Other persons involved in the procedure shall have access to the documents of the case to the extent of their involvement, and be allowed to make for themselves copies and extracts thereof.

Regarding the disclosure of electronic documents, there are special rules for its technical implementation.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

In the Hungarian jurisdiction there are certain privilege rules, usually in case of witnesses, third parties or family members of the parties with the aim of protecting their personality, interests or protecting classified information, self-incrimination or conflict of interest.

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

Apart from the persons and bodies mentioned above, information on the proceedings may only be given to persons with legitimate interest in the conduct and/or the outcome of the proceedings. The presiding judge of the court seized – subject to verifying legal interest – shall authorise access to the documents and make copies and extracts thereof, and/or disclose the information necessary.

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

The court is responsible for providing access to the documents of the procedure, and to order third parties to hand out documents or objects in their possession.

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

There are a few restrictions and their main purpose is to ensure the protection of public interests. In cases where the hearing was held in a closed session for the sake of protecting classified information, those documents which contain classified information cannot be copied and no extracts can be made.

If the goal of the procedure is to decide whether the document in question is to be treated as public information, such document may not be inspected during the proceedings; however, after the final decision is adopted, it may be inspected and copied only in accordance with the judgment.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

As a general rule, the court is not bound to any formal requirements relating to taking and valuing the evidence and may freely use the arguments of the parties, as well as any other evidence deemed admissible for ascertaining the relevant facts of the case. The court – in rendering its decision – shall not be bound by the decision of any

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authority or by any disciplinary decision, nor by the facts contained therein. However, if the subject of the claim is a property right arising from a criminal act, the court may not declare in its decision that the sentenced person is not guilty of the criminal act as charged.

Unless otherwise provided for by an act, the burden of proof shall rest on the party alleging the fact which he wishes to be considered true by the court.

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

There is no exhaustive list of types of evidence in Hungary and the court is not bound to any formal requirements. However, the main means of evidence are documentary evidence, witness evidence, expert evidence, and inspection.

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

The witnesses are called by the presiding judge and they are obliged to attend the hearing. The witness may not be present at the hearing and the taking of evidence before questioning, and may leave the court room after being questioned only and if so permitted by the court.

If proposed by the party having requested the examination of the witness, the presiding judge may authorise that the witness be first questioned directly by the party having requested the examination of the witness, followed by the opposing party, when so requested by the opposing party. In that case, after the parties, the presiding judge and other members of the court chamber shall be entitled to ask questions to the witness.

There are no depositions in Hungary.

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

If specific expertise is necessary in order to ascertain the facts considered material for the case, an expert may be engaged in the civil procedure. The new CCP restricts the possibilities of the courts to appoint an expert *ex officio*, i.e. without the parties' request. On the basis of the new CCP, the court appoints an expert only if e.g. none of the parties requested the engagement of a private expert, or the reports of the private experts are contradictory. However, if the parties do not intend to engage a private expert, they may also request the appointment thereof by the court.

Only experts who are experts or *ad hoc* experts in accordance with the Act on Forensic Experts may be engaged or appointed. It is possible for both parties to engage a private expert; however, if the two expert opinions are contradictory, the court appoints a new expert. In general, the court shall appoint one expert for the same specific issue, and once the court has appointed an expert, no private expert may be engaged later on.

When appointing the expert, the court and the parties have to indicate the questions which the expert is required to answer.

The court can ask the expert to supplement the opinion, or in exceptional cases, the expert may also be summoned to the hearing. The expert owes his/her duties to the court, and the private expert owes his/her duties to his/her principal; however, in accordance with the applicable legal rules, experts must be impartial and independent when supporting third parties to decide on a specific matter.

9 Judgments & Orders

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

The civil courts may issue three types of rulings, namely (i) *court order*, in cases determined by the law (please see under question 4.4 above), (ii) *order* in all other issues of procedural nature, which may arise in the course of the proceedings, and (iii) *judgment* on the merits of the case.

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

The Hungarian courts have power to decide in their rulings and judgments on damages, interests and costs of litigation.

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

In domestic cases, if no appeal is filed against the judgment, the judgment becomes enforceable after the expiry of the deadline for fulfilment. The enforcement of the judgment falls within the competence of local courts and executors.

In case of foreign judgments, if the judgment has been issued in an EU Member State, the enforcement of the decision shall be executed according to the rules of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction, and the recognition and enforcement of judgments in civil and commercial matters. Generally, no additional measures or specific procedures are required in case of the recognition of intra-EU judgments.

Hungary is also a contracting party to the so-called "Lugano Convention" (Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).

In case a judgment passed in a country outside the EU needs to be enforced in Hungary, the provisions of international treaties shall apply.

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

The new CCP defines exactly which of the rulings of the courts may be appealed; judgments are appealable, but orders are only appealable if the CCP explicitly allows so. The deadline for filing an appeal is 15 days from the delivery of the judgment, and in most cases an appeal has a suspensory effect on enforcement. Appeals shall be filed with the court of first instance; however, the decision on the appeal falls within the competence of the courts of second instance, which are in most cases either the regional courts, or the regional courts of appeal.

The court of second instance reviews the first-instance proceedings in terms of legality and compliance with substantive law.

The court of second instance may (i) set the judgment aside and refer the case back to the court of first instance, or (ii) uphold the judgment if the appeal is considered unfounded, or (iii) decide on the merits of the case.

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There are also "extraordinary" remedies against final and binding judgments in Hungary, namely the "*retrial procedure*"; this may be requested especially, but not exclusively, if new evidence is presented by a party which would result in a favourable decision to such party if it had been originally also taken into consideration.

The other extraordinary remedy is the so-called "*review*", which always falls within the competence of the Curia. A motion for review may be submitted only under limited circumstances, especially on the grounds of infringement having an impact as to the merits of the case.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

The parties can use mediation mechanisms before or during the civil procedure. If the parties reach a settlement by way of mediation before the initiation of the procedure, the parties may also request the court to approve such settlement.

It is one of the court's tasks to attempt to arrange a settlement between the parties at any time during the procedure. If a settlement is reached by the parties, the court approves it, which has the same effect as a judgment.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

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

Arbitration: Arbitration is available in Hungary in cases of commercial disputes. The arbitration board can be *ad hoc* or permanent. A permanent arbitration institution is, for example, the Permanent Arbitration Court attached to the Hungarian Chamber of Commerce and Industry.

Mediation: Mediation was implemented into the Hungarian legal system in 2002. It is available for the parties in any stage of the procedure, and the court can also attempt to arrange a settlement between the parties. However, mediation is not yet a frequently used method in Hungary.

Tribunals/Special Courts: There are a few special tribunals, such as the Equal Treatment Authority, which deal with cases where the clients suffer discrimination. Also, in cases of copyright disputes, the parties can ask for an opinion from the Council of Copyright Experts.

Ombudsman: In cases when constitutional and human rights are affected or allegedly violated, the parties can turn to the Office of the Commissioner for Fundamental Rights.

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

The rules of arbitration can be found in Act LX of 2017 on Arbitration, a new Act which entered into force on 1 January 2018. The Permanent Arbitration Court attached to the Hungarian Chamber of Commerce and Industry has its own procedural rules, which have also been renewed this year. The other rules of alternative dispute resolution can be found in the relevant sectoral legislation (e.g. Act LV of 2002 on Mediation).

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

Arbitration proceedings shall not be applied in the case of legal disputes arising from consumer contracts and in special proceedings regulated in Part Seven of the CCP (e.g. guardianship actions, matrimonial actions, actions of origin, actions for custody of a child, labour cases, enforcement actions, etc.), and in the cases to be resolved in administrative proceedings.

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

The Act on Arbitration expressively states the role of ordinary courts in arbitration procedures. Such role includes tasks which are mainly supportive and remedial. For instance, if the parties to the arbitration procedure fail to nominate the arbitrator, or in the case where the exclusion of an arbitrator is not successful, or in case of uncertainties regarding the jurisdiction of an arbitration panel, any party may file a petition to the Metropolitan Regional Court to decide on the issue. The same ordinary court has jurisdiction on cases for setting an arbitral award aside.

The arbitral awards shall be enforced in accordance with the Hungarian rules of enforcement; the enforcement falls within the competence of the ordinary courts and executors.

Interim or provisional measures are decided by the arbitration panel; however, the interim measures of the arbitration panel shall be enforced in accordance with the rules of judicial enforcement by the ordinary courts. Provisional measures may not be subject to judicial enforcement.

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

Once binding, arbitration awards may not be appealed; however, they may be reviewed in normal court proceedings in an action for setting them aside.

An agreement made in conclusion of the mediation process shall not limit the parties' right to seek a solution for their dispute in court or by way of arbitration.

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2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

The most recognised alternative dispute resolution institute, in Hungary, Budapest, is the Permanent Arbitration Court attached to the Hungarian Chamber of Commerce and Industry (https://mkik.hu/en/court-of-arbitration), which was founded in 1949.

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András has more than 15 years of professional experience in high-profile disputes before the courts and international arbitrations, with outstanding multidisciplinary knowledge and experience. In these cases, he has successfully represented large, multinational and state clients in existing law enforcement forum as well as advising them on dispute resolution, foreign-, commodity-, wholesale trade and other energy issues.

Based on his prior professional experience in the Hungarian, German and EU parliaments as government officer at the Hungarian ministries, he has a unique ability to position all his cases and their predictable outcomes on the whole regulatory framework. He has experience in all the vertices of judicial proceedings, thus he is also able to handle his matters on the appropriate level in a cost- and resource effective manner. Also, from his previous role as project manager related to various energy development projects, he can straightforwardly recognise and align the interaction between a deal's legal framework and its core asset. He works seamlessly with clients' commercial and technical teams to ensure the project contracts not only match the commercial deal, but are also within the client's risk envelope.

András has been a major representative of our office for nearly five years, as well as a responsible energy law lecturer at Pázmány Péter Catholic University Faculty of Law and Political Sciences. Formerly he worked as a junior associate at an Austrian international law firm.

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Viktória has nearly 15 years of professional experience in M&A, due diligence, corporate and real estate law, as well as international arbitration, including investor-state and commercial disputes. She advises international and domestic clients, especially from real estate, commercial and advertisement sectors. Viktória previously worked at an Austrian and a German international law firm, where she primarily provided legal advice to Hungarian subsidiaries of foreign companies in the field of corporate, civil and commercial law.

Her impressive experience affords the flexibility required to service large corporations as well as small businesses and enables her to provide commercially relevant, pragmatic and pro-active advice in connection with all her practice areas. She has a comprehensive understanding of her clients' needs and attributes due consideration to the human dimension.

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India

Mulla & Mulla & Craigie Blunt & Caroe

Siddharth Thacker

I. LITIGATION

1 Preliminaries

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

India is a common law jurisdiction. The country itself is a federal union of 29 States and seven Union Territories. The Code of Civil Procedure 1908 ("**CPC**") provides the procedural framework for all civil litigation in India. In addition to the procedure prescribed by the CPC, the Supreme Court of India and the High Courts of each State have framed and adopted their own respective rules.

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

Despite the country being federal in setup, there is only one constitution, which is written in form. The Constitution of India provides for a single, integrated, multi-layered, hierarchical, judicial system. The apex of this system is the Supreme Court of India, which is the highest appellate Court in the country. Underneath the apex Court are 24 High Courts each having appellate, supervisory and administrative jurisdiction over the judiciary in their respective State or set of States and Union Territories. Three of these High Courts, *viz*. the High Courts of Bombay, Calcutta and Madras, are chartered High Courts founded pre-independence, under the Letters Patent granted by Queen Victoria in 1862. The three Chartered High Courts, unlike the other 21 High Courts, additionally enjoy original jurisdiction for civil and commercial disputes over their respective pecuniary jurisdictions.

Below the High Courts is a hierarchy of subordinate Courts of original jurisdiction comprising district and session Courts and the lowest level of Courts, *viz*. Courts of the civil Judge, *munsif* magistrate or judicial magistrate first class.

In 2016, with the passing and introduction of the Commercial Courts Act 2015, the CPC was amended to set up specialised commercial Courts to hear "*commercial disputes*" (as defined in the Act). In addition, there are also various specialist tribunals constituted by legislation to adjudicate disputes on specific subject matters, for example, consumer-related disputes, income tax, debt recovery, custom excise and service tax, intellectual property rights, etc.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

Court proceedings are adversarial in nature and the principles of natural justice have been recognised and enshrined in case law of the Supreme Court of India. The framework of the different stages in civil proceedings under the CPC is summarised below:

1. Institution of a Suit:

   A suit is instituted by lodging a plaint at the Court of first instance which has jurisdiction (i.e. territorial, pecuniary and subject). It must be lodged within the time period prescribed under the Limitation Act, 1963 ("**Limitation Act**").

2. Summons to Defend:

   Based on the principle of the *maxim audi alteram partem*, the Defendant is intimated by issuing a Summons, *inter alia*, calling upon him to appear in Court to present his defence. The Summons is signed by the Judge/officer appointed by such Judge and is sealed with the seal of the Court and thereafter served upon the Defendant by the Court.

3. Written Statement:

   Within 30 days from the Service of Summons, the Defendant is required to file a written statement setting out the defence, *inter alia*, dealing with every material fact alleged by the Plaintiff in the plaint. This period, however, can be extended up to 90 days.

4. Discovery, Inspection and Production of Documents:

   After filing of the pleadings by the parties, if it appears to either party that the nature of his opponent's case is not sufficiently disclosed in the pleadings, such party can call upon his opponent to disclose all material facts constituting the case of the opposite party and all documents in their possession that are relevant to the issue in the suit.

5. Framing of Issues:

   In light of the pleadings and documents filed by parties, the Court frames issues to ascertain the specific dispute between the parties and to narrow the area of conflict. It is the issues as framed that guide appropriate adjudication of the matter.

6. Examination of Witnesses:

   The parties to the suit are required to submit a list of the witnesses in support of their case. The CPC also provides provisions that empower Courts to enforce attendance of witnesses by issuing Summons.

7. Hearing:

   All cases brought before the Court are generally heard in open Court under superintendence of the Judge. However,

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where the requirement of the administration of justice makes it necessary for the Court to hold a trial *in camera*, the Judge will hold such trial where proceedings are not open to the public. Evidence of witnesses is generally taken orally in open Court in the presence and under directions of the Judge. However, since a considerable time of the Court was consumed on such procedural matters, changes have been made by the CPC Amendment Act, 2002 to enable oral evidence to be recorded by the Court Commissioner.

Oral arguments are advanced by the parties or their pleaders before the Court. For such oral arguments, the Court may fix time limits if it deems fit. The Court may also allow parties or their pleaders to submit written arguments, which form a part of the record.

8. Judgment:

Post the conclusion of the hearing, the Court pronounces its judgment in open Court. A judgment is to contain: (i) a concise statement of the case; (ii) points of determination; (iii) the decision thereon; and (iv) the reason for such decision.

9. Decree:

A decree follows the judgment. A decree is drawn up within 15 days from the date of the judgment. The Court may pass a preliminary decree or a final decree, depending on the nature of the case.

10. Execution of Decrees:

Parties may seek enforcement of a decree/judgment through the judicial process of the Court. A decree may be executed by the Court which passed it or by the Court to which it is sent to for execution. Under the Limitation Act, an application for execution for the enforcement of a decree is to be made within 12 years and, in case of mandatory injunction, within three years from the date of the decree.

11. Appeal:

An appeal can be made to the HC or the appellate Court from the subordinate Court, depending upon the jurisdiction prescribed in the CPC. The time limit is 30 days to 90 days, depending on the nature of the appeal.

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

The Supreme Court of India, in the landmark case of *A.B.C. Laminart Pvt. Ltd. v. A.P. Agencies, Salem* AIR SC 1239, set out the guiding principles as to when an Indian Court would recognise where to enforce an exclusive jurisdiction clause: where parties to a contract agree to submit disputes arising from the contract to a particular jurisdiction, the agreement would be valid, so long as the particular jurisdiction would otherwise also be a proper jurisdiction under law. Hence parties may:

- Elect to give one of two Courts who have concurrent jurisdiction exclusivity. An ouster of the jurisdiction of Court with concurrent jurisdiction by contract in such a scenario does not violate public policy.
- Parties are, however, not free to give a Court exclusive jurisdiction by a clause in the contract if such Court did not have jurisdiction absent in such clause. Such a clause is void, being opposed to public policy.

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

A Plaintiff is required to pay Court Fees to the State at the time of institution of the suit, depending upon the valuation of the suit by the Plaintiff. This is governed by the Court Fees Act, 1870 and the Suits Valuation Act, 1887. The quantum differs from State to State as this is administered by State legislation.

The rule of thumb for awarding costs in India is that "the loser pays". Unfortunately, costs awarded by Courts in India are nearly never on an indemnity basis. The CPC, however, provides compensatory costs for false and vexatious claims or defences and this provision is applicable only to suits and not to appeals. There are no specific rules on costs budgeting.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

Litigation funding is not specifically regulated in India. The Supreme Court of India has, however, opened the door by observing in its recent judgment, in the case of *Bar Council of India v. A.K.Balaji & Ors.* AIR 2018 SC 1382, that there appears to be no restriction on third parties (non-lawyers) funding litigation and getting repaid after the outcome of the litigation.

While it is technically open for an unconnected party with no interest to fund litigation, there is no such common practice of third-party funding and such practice has always been frowned upon. Any contract to fund litigation in India would need to meet the subjective criteria of Indian Contract law, and Section 23 of the Indian Contract Act 1872. Any contract is deemed to have an unlawful object and consideration if it involves or implies injury to the person or property of another, or a Court regards it to be immoral and/or opposed to the public policy of India. All such contracts are void.

Lawyers in India are not permitted to enter into a fee arrangement with a client wherein he or she is to receive a fee or share in proceeds that is contingent upon the outcome of litigation. This has been expressly provided for under Rule 20 of the Standard Rules of Professional Conduct and Etiquette issued by the Bar Council of India under Section 49(1)(c) of the Advocates Act.

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

The assignment of claims or causes of action would fall broadly into four categories:

- Category 1 would be those claims which are in the nature of debts secured by a mortgage of immovable property, a hypothecation or a pledge. Transfers related to these are not considered to be transfers to claims to property, but are considered under Indian law to be a transfer of the property itself. Hence any such transfer would need to be in writing and would need to comply with the relevant provisions of the Registration Act, Transfer of Property Act and the Indian Contract Act.
- Category 2 would be governed by Section 130 of the Transfer of Property Act 1882 ("**TPA**"). These comprise all claims relating to an unsecured debt, or a liquidated sum of money or a price or a beneficial interest in property whether present future, conditional or contingent. Such transfer would need to be effected in writing and would need to be signed by the transferor. Furthermore, it is recommended (while there is no legal requirement) that the Transferee give express written notice of such transfer to the debtor.
- Category 3 relates to claims arising under a Marine Insurance Policy or a Fire Insurance Policy. Such assignment is governed

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by the requirements of Section 135 of the TPA. These policies may be assigned in writing or by endorsement to an assignee, who on the date of such assignment is vested with title to subject of insurance (e.g. a purchaser/consignee of goods).

- Category 4 relates to a mere right to sue for claims in the nature of damages arising out of tort or compensation for fraud or for harm illegally caused etc. Claims of this nature are expressly prohibited from being transferred pursuant to Section 6 (e) of the Transfer of Property Act 1882.

With respect to third-party litigation funding, kindly refer to the answer to question 1.7.

1.8 Can a party obtain security for/a guarantee over its legal costs?

Any defendant may obtain an order for security of costs at any stage of its litigation, either on its own motion or a *suo-moto* motion of the Court. The Court is required to pass a reasoned order. An order as to security of costs is usually given when all of the Plaintiffs do not reside in India, or do not possess sufficient property, barring the property in question in the suit. The failure to pay security for costs as ordered could result in the dismissal of the suit itself.

2 Before Commencing Proceedings

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

There is as such no particular mandate prior to initiating proceedings; however, depending on the specific facts, a Court may require a legal notice to have been issued by the Plaintiff upon the Defendant calling upon the Defendant to comply with the demands put forth by the Plaintiff. Section 80 of the CPC, however, declares that no suit shall be instituted against the Government or against public officers in their official capacity, without issuing two months' notice in writing. This requirement can, however, be waived by the Court in cases of grave urgency, with leave of the Court.

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

The Limitation Act 1963 stipulates different time limits for different causes of action. If, however, such limitation period is prescribed under a specific statute (for, e.g., the Negotiable Instrument Act, 1881, the Consumer Protection Act, 1986, etc.), the limitation period under the specific statute will apply.

The period of limitation is calculated in the manner set out in Part III of the Limitation Act. Generally, the period of limitation begins from the day following the date on which the cause of action arises. Once time begins to run, it does so on a continuous basis, unless one of the exceptions in Part III apply; these relate to death, insolvency, proceedings filed before a Court with wrong jurisdiction, etc. If a party relies upon one of the exceptions stipulated in Part III, it is a requirement that such exception be specifically pleaded in the plaint.

The law of limitation in India is procedural law. However, it is important to keep in mind that while delays to file an appeal or an application are condonable by a Court, if sufficient reasons have been made out, any delay to bring about and file a suit beyond the prescribed period is fatal and any such action would be time-barred.

3 Commencing Proceedings

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

Civil proceedings are commenced by presenting a plaint (in duplicate) to the Court or the officer appointed on the Court's behalf. The Court registry is required to inspect the plaint to see whether it has complied with all the requirements of the CPC; thereafter, details of the suit are entered in the register of civil suits, with each entry being numbered in every year according to the order in which the plaints were admitted.

Once the suit is lodged and numbered, the Court issues a Writ of Summons calling upon the Defendant to file its written statement within a period of 30 days from the date of service.

Service of summons is usually done by the Court registry through the bailiff of the Court or by registered post or registered courier or by any other means prescribed under the rules of such Court. Upon an application of the Plaintiff, the Court may also permit the Plaintiff to effect service of the Writ of Summons.

The date of actual service is considered as the date of service in each of these cases. However, where the Defendant/his agent refuses to sign the acknowledgment or the serving officer after due diligence cannot find a Defendant, the Court in its discretion may also order Service of Summons by an advertisement in daily local newspaper(s) in the area in which the Defendant is last known to have resided/carried on business/personally worked for gain, or by affixing the summons on the door of the Defendant's last known address. The date of such advertisement or affixation shall in such case be the deemed date of service.

India is a signatory to the Hague Convention on the Service abroad of Judicial and Extra Judicial Documents and Civil and Commercial Matters. It has also entered into bilateral arrangements with certain countries. Service abroad is thus effected pursuant to the methods prescribed under these international arrangements.

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

There is no provision for pre-action interim remedies. However, once the proceedings are instituted, the Plaintiff can apply for interim remedies in the form of temporary and interlocutory injunctions. Separate application (Notice of Motion and/or Chamber Summons depending on the relief sought) seeking such remedies is filed in Court to protect the interest of the applicant. Three criteria for obtaining interim remedies are as follows:

(i) the applicant has a *prima facie* case;

(ii) in case injunction is not granted, grave, irreparable loss and injury will be caused to the applicant; and

(iii) balance of convenience lies in the applicant's favour.

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

The main elements of a Claimant's pleading, namely the plaint, must set out the following:

(i) Name of the Court in which the suit is brought.

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(ii) Name, description and place of residence of the Plaintiff and Defendant.

(iii) Whether the Plaintiff or Defendant is a minor or of unsound mind, a statement to that effect.

(iv) Facts constituting the cause of action and when it arose.

(v) Facts showing that the Court has jurisdiction.

(vi) A statement of the value of the subject matter of the suit for the purpose of jurisdiction and Court fees.

(vii) Relief claimed; simply or in the alternative.

(viii) Where the Plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished.

(ix) If the suit is a representative suit, facts showing that the Plaintiff has an existing interest in the subject matter.

(x) The precise amount claimed if the suit is for recovery of money.

(xi) If the suit is for accounts/mesne profits/a debt which cannot be determined, the approximate amount or value.

(xii) Interest and liability of the Defendant in the suit.

(xiii) Where the suit is time-barred, the grounds upon which the exemption to the law of limitation are claimed.

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

Pleadings can be amended by either party with leave of the Court at any stage of the proceedings but before commencement of trial. Amendments seeking to alter or substitute a cause of action on the basis of which the original claim was raised or the defence taken are not allowed.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

Yes, it is possible for a Claimant to withdraw its plaint; however, unless leave of the Court is sought and sufficient cause shown, such withdrawal would be with prejudice and the principles of *res judicata* would apply.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

The written statement/statement of defence must contain specific denials. It is not sufficient for a Defendant to deny generally the grounds alleged by the Plaintiff. The Defendant must specifically deal with each allegation of fact which he does not admit to be the truth, except damages.

The Defendant in a suit may in addition bring a counterclaim/claim or defence of set-off. The Defendant must bring his counter-claim against the claim of the Plaintiff or any right or claim in respect of a cause of action accruing to the Defendant against the Plaintiff. The Defendant can file his counterclaim before he has delivered his defence/written statement or before the time limit for delivering his defence/written statement has expired.

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

The Defendant must file his written statement in Court within 30 days from the date of Service of Summons on him. If the Defendant fails to do so, the Court may allow such filing within a time period set by the Court. Such time period cannot, however, exceed 90 days from the date of Service of Summons.

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

Yes, under the Indian civil justice system the Defendant can pass on liability by bringing an action against a third party. However, the Court will ensure that the action brought against the third party is within that particular Court's jurisdiction.

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

In the event the Defendant does not appear when the suit is called out for hearing, the Court will continue the proceedings on the allegations contained in the plaint and may pass an order directing the suit to be heard *ex parte*. This can be so only if it is proved that the Summons was duly served upon the Defendant. In the event it is not proved that the Summons was duly served, the Court will direct the second Summons to be issued and served on the Defendant.

4.5 Can the defendant dispute the court's jurisdiction?

Yes, the Defendant can dispute the Court's jurisdiction, i.e. place of suing, competence of a Court with reference to pecuniary limits of its jurisdiction, provided such objection/dispute was taken at the earliest possible opportunity.

5 Joinder & Consolidation

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

Yes, a third party can be joined into ongoing proceedings in appropriate circumstances at the Court's discretion. All persons can be joined in one suit as Plaintiffs or Defendants in the circumstances when any right to relief in respect of or arising out of the same act or transaction is alleged to exist against such persons, whether jointly or severally.

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

Yes, so long as it is not inconvenient and is in the interests of justice, multiple suits may be tried jointly where a Plaintiff may unite in the

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same suit several causes of action against the same Defendant, or the same Defendants jointly. Further, any Plaintiffs who have causes of action in which they are jointly interested against the same Defendant or the same Defendants jointly may unite such causes of action in one suit.

5.3 Do you have split trials/bifurcation of proceedings?

Where it appears to the Court that any joinder of Defendants will embarrass or delay the trial of the suit, the Court may order a separate trial or pass such orders to expedite the process in the interest of justice.

6 Duties & Powers of the Courts

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

Each Court has a Chief Judge/Justice/Magistrate who is the master of rolls of that Court and assigns types of matters to the various Judges in each Court by subject area jurisdiction as well as chronological order of cases. These assignments are periodically shuffled at the discretion of the Chief Judge.

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

Courts in India have inherent powers to manage cases under the CPC, depending on the relief claimed.

A party can make interim applications for security, temporary injunction or the appointment of a receiver. The Court can make interim cost orders against the parties depending on the nature of default.

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

Courts have inherent powers to punish a party for contempt of Court with simple imprisonment, a fine or both.

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

Courts in India have the power to strike out unnecessary matters/part of a statement of case if it causes a delay in the fair trial of the suit or abuses the process of law.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

Yes, Civil Courts may enter summary judgments as per the rules of the summary procedure, provided under Order 37 of the CPC.

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

The Supreme Court and the High Courts have the power to discontinue or stay the proceeding on an application made by an aggrieved party. The aggrieved party must show that the continuance of the proceeding prejudices his case.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

Where a Plaintiff sues upon a document or relies upon a document in his possession or power, such Plaintiff is required to, under the provisions of the CPC, produce such document in Court when the plaint is presented. A copy of the document is required to be filed along with the plaint. Where a document which is relied upon is not in the possession of the Plaintiff, the Plaintiff must state in whose possession or power such document is in. Documents relied upon in relation to facts admitted by the opposite party need not be disclosed. There are no specific rules prescribed presently for disclosure of electronic documents.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

Under Indian law, a "without prejudice" privilege is attached to communications that are genuinely aimed at settling a dispute before it goes to trial/litigation. Such communication would be privileged from being disclosed in any Court proceedings.

Any confidential communication between a legal advisor and client in relation to the subject matter of the dispute or litigation is privileged. However, if such a person offers himself as a witness, he may be compelled to disclose any such communication as the Court may deem necessary to be known in order to explain any evidence which such person has given.

Further, no person who is or has been married shall be compelled to disclose any communication made to him during marriage by his spouse. Additionally, the spouse receiving the communication is not permitted to disclose such communication unless the disclosing spouse or representatives in interest consent, except in cases between such married persons.

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

A trial Judge has the power to call witnesses not called by either party, without their consent, if he considers that course to be necessary in the interest of justice.

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

The CPC makes specific provisions for "Discovery and Inspection". The Court has the discretion to grant leave for the delivery of interrogatories for the examination of the opposite party.

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The Plaintiff or Defendant can with the permission of the Court deliver interrogatories in writing for an examination of such interrogatories.

The Court additionally has the power to, at any time during the pendency of a suit, pass an order directing the production of any documents by any party to the suit, upon oath, which are or have been in such party's possession or power.

Where a party has been directed to produce documents but has not done so, the Court has the power to draw an adverse inference against such party. Further, where a witness refuses to answer, the Court may presume or draw an inference that the answer would be unfavourable if given.

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

Once a document has been disclosed, there are no prescribed restrictions as to its use in the suit proceedings; however, only documents relevant to the issues in dispute in the suit can be used as evidence.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

The basic rules of evidence are stipulated under the CPC and the Indian Evidence Act, 1872.

The basic principles which underlie the law of evidence in India are:

(1) evidence must be confined to the matter in issue;

(2) hearsay evidence will not be admitted; and

(3) the best evidence will be entertained in all cases.

The Court may entertain secondary evidence if justification is established that documents of primary evidence have been lost or destroyed.

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

Though the terms "relevancy" and "admissibility" are commonly used as synonyms, their legal implications are quite distinct. A fact which may be relevant may not be admissible – for instance, communication between spouses or between an advocate and client.

Relevant evidence is *prima facie* admissible unless excluded for some reason. Irrelevant evidence, on the other hand, is not admissible. A relevant fact is one which, when applied to another, would be so related according to the common course of events, and which proves or renders probable the past, present or future existence or non-existence of the other.

A relevant piece of evidence may become inadmissible only on the application of a rule or discretion, based on convenience or policy.

When the Court is required to form an opinion on certain subjects such as foreign law, science or art, identity of handwriting or fingerprints, the opinion of a person skilled on such a subject becomes relevant. In general, expert evidence is not safe to rely upon without seeking independent and reliable corroboration. However, once the experts' evidence is accepted by the Court, it ceases to be the opinion of the expert and becomes the opinion of the Court.

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

The witness in his affidavit deposes to the facts of the case and is called in Court to facilitate the trial. The witness is called for examination or cross-examination and if necessary re-examination, as per the rules laid down in the CPC and the Indian Evidence Act, 1872.

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

The law relating to Opinion of Experts or commonly known as "expert opinion" is enumerated under Section 45 to Section 51 of the Indian Evidence Act, 1872. An expert is appointed for his unique skill and knowledge in areas of foreign law, science and arts to assist the Court in better adjudicating the dispute before it. The expert owes a duty to the Court to be impartial and unbiased. The Act does not specify any rules on how the expert report must be prepared or expert evidence must be given; however, the expert is expected to be unbiased and present his findings on the basis of the relevant facts at hand. There are no rules regarding concurrent expert evidence in India.

9 Judgments & Orders

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

Civil Courts in India are empowered to issue two types of judgments: interim judgments and final judgments. While interim judgments do not terminate a case and are instead for the purpose of advancing the proceedings, a final judgment resolves all the contested issues and concludes the case.

However, an Order is a direction or mandate of a Judge or a Court directing that something be done or that there is a prohibition against some act.

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

Indian Courts have discretionary powers to award damages, interests and costs of the litigation, as provided under the CPC. The Courts can impose compensatory costs in respect of false or vexatious claims or defences.

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

India is not a signatory to any international multilateral convention for the purposes of enforcing judgments/decrees. Enforcement thus depends upon India's bilateral ties.

The provisions for enforcing a foreign decree/judgment have been made in the CPC. Pursuant to Section 44A of the CPC, a holder of a decree passed by a Superior Court in a reciprocating country may execute the foreign decree in the same manner as if a Civil Court in India passed the foreign decree. This procedure is initiated by filing

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an application seeking execution in the executing Court, along with a certified copy of the foreign decree, and a certificate of the Superior Court certifying the extent to which the foreign decree has been satisfied. The executing Court is normally the district Court in whose jurisdiction the subject matter of the decree is located.

The executing Court may refuse to execute the judgment/decree where it finds that any of the following conditions are met:

(a) the judgment has not been pronounced by a Court of competent jurisdiction;

(b) the judgment has not been given on the merits of the case;

(c) it appears on the face of the proceedings to be founded on an incorrect view of international law, or a refusal to recognise the law of India in cases in which such law is applicable;

(d) it is found that the judgment was obtained in proceedings that were opposed to the principles of natural justice;

(e) the judgment was obtained by fraud; or

(f) the judgment sustains a claim founded on a breach of any law in India.

The statute of limitations applicable for such enforcement would be the time period prescribed under Indian Law.

In the case of foreign judgments/decrees from non-reciprocating countries, there is unfortunately no prescribed procedure for automatic enforcement. Such foreign judgment/decree may only be executed by way of filing a suit upon the judgment in the competent Court of civil jurisdiction.

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

The CPC sets out a list of which orders are appealable. The rules pertaining to appeals are found in Order 51 of the CPC. An appeal is preferred by a memorandum setting out the grounds of appeal being signed by the appellant or his attorney. This must be accompanied by a copy of the impugned judgment.

The filing of an appeal and its admission does not automatically operate as a stay of the impugned judgment; a separate stay must be obtained in this regard.

Where the appeal is against a decree for money, the appeal Court will require security to be furnished in respect of the amount disputed in appeal.

An appeal lies to the Supreme Court only if the case involves a substantial question of law of general importance.

No appeal is permitted from a decree or judgment that is passed by both parties.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

Yes, the *Lok Adalat*, which means people's Courts, have been established by the government, and settle disputes through conciliation and compromise. The *Lok Adalat* is presided over by a sitting or retired judicial officer as the chairman, with two other members, usually a lawyer and a social worker. The Government of India has designated several ombudsmen for the redressal of grievances and complaints from individuals in the banking, insurance and other sectors being serviced by both private and public bodies and corporations.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

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

Arbitration, Conciliation and Mediation, are the methods of alternative dispute resolution available and frequently used in India.

Post the 2015 amendments to the Arbitration and Conciliation Act 1996 ("**AA**"), arbitration in India is a time-bound process, with the Arbitral Tribunal having to render its award within a period of 12 months from the Arbitral Tribunal's formation. The AA is based upon the UNCITRAL Model Law and Rules. The provisions for conciliation under the AA are based on the UNCITRAL Conciliation Rules 1996.

The AA is divided in four parts. Each part governs a different aspect of the arbitration and conciliation process: Part 1 governs domestic commercial arbitrations; Part 2 governs the enforcement of foreign awards in line with India's commitments under the Geneva and New York Conventions; Part 3 governs the conciliation process; and Part 4 contains supplementary provisions.

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

Please see the answer to section II, question 1.2 above.

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

Yes, a non-exhaustive list of such matters is: (i) insolvency matters; (ii) matrimonial causes (except matters pertaining to settlement terms of separation of divorce); (iii) testamentary matters involving questions on the validity of a will; (iv) disputes pertaining to a suit under Section 92 of the CPC; (v) proceedings for appointment of a guardian; (vi) industrial disputes; (vii) criminal proceedings; (viii) disputes relating to charitable trusts; (ix) matters pertaining to the dissolution or winding up of a company under the Companies Act, 1956; (x) disputes relating to tittle to immovable property in a foreign country; (xi) matters relating to possession of leased premises governed by the Bombay Rent Act; (xii) disputes pertaining to taxation and public rates; and (xiii) admiralty suits that are pending *in rem*.

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

Section 89 of the CPC empowers a Court to transfer cases pending before it (with consent of parties) for alternative dispute resolutions

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if, in its opinion, there exists a possibility of an amicable, peaceful and mutual settlement.

Arbitration is a creature of contract; while a Court may encourage arbitration and alternative dispute resolution, they have no power to force parties into such methods of dispute resolution.

The AA also empowers a party to approach a Court and seek interim relief prior to the commencement of an arbitration. Once arbitration is invoked, a party may only approach the Arbitral Tribunal for interim reliefs unless there is sufficient cause to approach the Court.

The one unique feature of the AA is that Courts in India are specifically empowered to grant interim relief pursuant to Section 9 of the AA in aid of foreign seated arbitrations.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

Any party aggrieved by the award may challenge it under Section 34 of the AA. The challenge must be filed within a period of 90 days from receipt of the award. Courts in India may only set aside an award if satisfactory proof is furnished by the party challenging the award that one of the criterion stipulated in Section 34 is met.

A settlement agreement entered into between parties pursuant to the conciliation process under Part 3 of the AA has the same force as an arbitration award and is binding.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

The ICC, LCIA and SIAC are the international arbitral institutions which are both widely active as well as accepted by Indian Parties. In addition, India also has local arbitration institutions like the Indian Council of Arbitration and the Mumbai International Arbitration Centre.

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Mr. Thacker focuses on acting for clients in significant disputes, many of which have a multi-jurisdictional focus. His experience ranges over a number of industries, including oil & gas, finance, real estate, construction, shipping, insurance and various kinds of manufacturing and services. He represents clients before various Courts in India and appears in both *ad hoc* and institutional arbitration, seated both in and outside India. His experience involves disputes relating to, amongst other things, corporate acquisitions, joint ventures, EPC contracts, supply chain contracts, and the obtaining of freezing orders and financial defaults under various financial instruments.

While Mr. Thacker exclusively practises Indian law, he is qualified as a solicitor in both India and England & Wales, and is admitted as an attorney in the State of New York. Prior to re-joining the firm in 2012, he worked in the London and New York offices of two leading international US law firms.

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Ireland

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

Ireland is a common law jurisdiction. The key sources of law are the Irish constitution, parliamentary legislation, European Union law, and the common law (previous decisions of the Irish superior courts). The civil Irish superior courts are the High Court, the Court of Appeal, and Supreme Court and they have strong judicial review powers, with the jurisdiction to invalidate parliamentary legislation on the basis that it is incompatible with the Irish constitution or EU law.

Irish civil procedure is governed by three sets of rules of court:

- the Rules of the Superior Courts (applicable to the Supreme Court, Court of Appeal and High Court);
- the Circuit Court Rules (applicable to the Circuit Court); and
- the District Court Rules (applicable to the District Court).

Where the Circuit or District Court Rules are silent as to applicable procedure, the Rules of the Superior Courts will generally apply.

Further, the Courts generally have broad case-management powers. The Commercial Court, in particular, has strict case-management procedures. Detailed case-management rules for the normal High Court have also been recently enacted, but are not yet in force.

1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

There are five levels of civil courts in Ireland and one specialist court.

1. The District Court

   The District Court is the lowest Irish court. Ireland is divided into 23 District Court areas organised on a regional basis. Where a claim does not exceed €15,000, it should be brought in a District Court (unless the District Court is not entitled to hear that type of claim, e.g. it cannot hear defamation cases). Statute sets out the rules governing which District Court area is the proper jurisdiction for a matter – e.g. a District Court is entitled to exercise jurisdiction where the defendant is ordinarily resident within the relevant District Court area.

   Civil decisions of the District Court can be appealed to the Circuit Court. Appeals proceed by way of a full rehearing and the decision of the Circuit Court is final.

2. The Circuit Court

   The Circuit Court is a level above the District Court. Ireland is divided into eight circuits organised on a regional basis. Where a claim does not exceed €75,000 (or €65,000 in a personal injuries claim), it should be brought in a Circuit Court. Again, the rules governing which Circuit Court has jurisdiction over a claim are set out in statute.

   As set out above, the Circuit Court also acts as an appeal court for appeals from the District Court.

   The High Court acts as an appeal court from the Circuit Court in civil matters. Appeals proceed by way of a full rehearing and the decision of the High Court is final.

3. The High Court

   The High Court is established by the Irish Constitution. It is the highest court in which original civil proceedings can be initiated. It has unlimited monetary jurisdiction and hears civil cases exceeding €75,000 in value. Cases are usually heard by one judge, who determines both the factual and legal questions in dispute. Juries are only used in defamation and civil assault claims. There are specialist judges for competition, arbitration, and admiralty cases.

   As set out above, the High Court also acts as an appeal court for appeals from the Circuit Court.

   Normally, an appeal of a High Court decision will be to the Court of Appeal. However, in exceptional circumstances, where a matter of general public importance is at issue or where the interests of justice require, a High Court decision can be appealed directly to the Supreme Court.

4. The Court of Appeal

   The Court of Appeal has jurisdiction to hear appeals in civil proceedings from the High Court. Decisions of the Court of Appeal can be appealed to the Supreme Court if the Supreme Court is satisfied that the case involves a matter of general public importance or if it is in the interests of justice to hear the appeal.

5. The Supreme Court

   The Supreme Court is the court of final appeal in Ireland. In most circumstances, the Supreme Court can determine whether it hears an appeal from the High Court or Court of Appeal based on the general public importance of the matters at hand or on whether the interests of justice require the Court to hear the matter.

   EU law is supreme to Irish law in the sphere of Ireland's obligations as a Member State of the EU. As such, as there is no appeal from the Supreme Court, the Supreme Court has a duty to refer questions of EU law to the Courts of Justice of the European Union before deciding such issues (unless EU law is clear on the issue).

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6. Specialist court – the Commercial Court

The Commercial Court is a specialist division of the High Court, established to expeditiously and effectively resolve complex high-net worth commercial cases (generally with a value in excess of €1 million) and intellectual property proceedings. Strict case-management rules are applied to ensure cases progress in a much quicker manner than ordinary High Court proceedings. Parties have to apply for entry to the Commercial Court and there is no automatic right of entry.

As the Commercial Court is a division of the High Court, appeals from the Commercial Court can similarly be made to the Court of Appeal or the Supreme Court, depending on the circumstances of the matter.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

The main stages of Irish civil proceedings will depend on the type of proceedings being brought. That said, there are broadly four main stages for typical contract or tort claims, which are outlined below. The focus below is on High Court civil proceedings. While there are some differences between High Court procedure and Circuit and District Court procedure, generally these four stages apply.

1. Pleadings

(a) Summons

Most High Court proceedings are initiated by an originating summons. The summons alerts the defendants that an action is being taken against them and gives them an opportunity to enter an Appearance to defend the action.

A summons may be served within 12 months from having been issued, after which it lapses. However, an application can be made to the Court to renew the summons for a further six months.

(b) Appearance

A defendant is generally required to enter an Appearance within eight days of having being served with a summons. Consent should be sought from the plaintiff before entering the Appearance outside of the initial eight-day period. If the defendant fails to enter an Appearance, the plaintiff can proceed to seek judgment against the defendant.

If any question mark arises in respect of the Court's jurisdiction to hear the claim, the defendant should consider filing a conditional Appearance.

(c) Statement of Claim

The plaintiff's primary pleading is the Statement of Claim, which should set out the details of the claim being made against the defendant, so that the defendant knows the claim they have to meet at trial. As such, it should set out the relevant facts and the basis for the damages claim.

The Statement of Claim should be delivered to the defendant within 21 days of the defendant's Appearance being filed. Outside of that time period, the plaintiff should seek the defendant's consent to the late delivery of the Statement of Claim, before delivering same. In theory, the defendant can apply to have the proceedings struck out if the Statement of Claim is not delivered within the 21-day period.

(d) Defence

The defendant is required to deliver a Defence within 28 days of delivery of the Statement of Claim. The Defence should set out what elements of the Statement of Claim are admitted or denied. If the defendant has a claim against the plaintiff, they can serve a Defence and Counterclaim within the same period.

If the defendant fails to deliver a Defence, the plaintiff can apply to seek judgment. However, the Court will generally give the defendant every opportunity to deliver a Defence.

Where a defendant is of the view that the Statement of Claim lacks sufficient detail for the defendant to know what claim they have to meet, the defendant can raise a Notice for Particulars, identifying elements of the claim which require greater clarity.

Depending on the circumstances, the above timings can be extended with the consent of the other party or with the permission of the Court. The Court will generally exercise its discretion to extend timelines if it is just to do so, but there could be accompanying costs consequences.

In the Commercial Court, a full timetable for pleadings is usually agreed or directed at the first directions hearing. That timetable will be rigidly enforced.

2. Discovery

Normally, the pleadings will be considered to be closed with the delivery of a Defence. At this point the issues in dispute between the parties should be clear. The next main stage of the proceedings will be the discovery process. This involves both parties seeking from each other information and documents which are relevant and necessary to resolving the issues in dispute and the saving of costs. This process is discussed in more detail in section 7 below.

The timing of the discovery process varies widely depending on the complexity of the matters at hand and the volume of documents at issue. Again, stricter deadlines will be imposed in Commercial Court cases to ensure the case progresses effectively.

3. Witnesses & Legal Submissions

After discovery, the parties will normally prepare factual and expert witness statements, as well as legal submissions, in preparation for the trial of the proceedings.

In the Commercial Court, the parties will be directed to exchange factual and expert witness statements, as well as legal submissions. Again, this will be part of the proceedings' timetable, and that timetable will be strictly enforced by the Court unless there are good reasons to depart from it.

Similar directions can be made in non-Commercial Court High Court proceedings, but are not the default approach.

The Court can also direct expert witnesses to meet to identify common ground in advance of the trial (see question 8.4).

4. Trial

The final main stage of the proceedings is the trial. The parties will present their evidence and make their legal arguments to the Court. The length of trials varies greatly and depends on the complexity of the issues and the volume of material to be put to the Court.

1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

The Irish courts will enforce exclusive jurisdiction clauses, unless there is a good reason not to do so.

Further, EU law requires most Member States to enforce such clauses. Ireland has similar obligations pursuant to the Hague Choice of Court Convention in respect of contracting parties to that convention.

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1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

The costs of civil proceedings vary widely depending on the complexity of the issues, the volume of the evidence, and the court in which the proceedings are being brought.

Both solicitor and barrister costs normally reflect the amount of time spent on the matter. Both can provide estimates and it is usual for solicitors to charge hourly rates.

The successful party is generally awarded their costs against the unsuccessful party, but the matter is entirely within the Court's discretion. A successful party whose damages award does not reach the monetary jurisdiction of the court in which the proceedings were taken will usually be penalised on costs. For example, if the High Court awards a plaintiff €50,000, the plaintiff will usually have to pay a portion of the defendant's costs because that claim fell within the Circuit Court's monetary jurisdiction and therefore should have been brought in that court.

Unlike in other Irish courts, there is a specific scale of costs in the District Court, which attributes values which may be claimed in relation to elements of the conduct of District Court proceedings.

There are no formal rules on costs budgeting in Ireland. However, at the outset of any engagement, solicitors are required to provide their clients with their proposed fee for the work, a fee estimate for the work, or with their hourly rates. They must also make clear to the client that they may be liable for the other party's costs if they are unsuccessful in the litigation.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

Ireland has traditionally had restrictive rules around litigation funding. It is not permissible for a third party to maintain proceedings where they have no legitimate interest in the outcome of the litigation. Similarly, a third party cannot fund litigation in return for a portion of the award if the litigation is successful. To do so would constitute champerty.

However, certain types of funding are permitted in limited circumstances. It is permissible for a third party to fund litigation in circumstances in which that party has a legitimate interest in the outcome of the proceedings. For example, the shareholder of a plaintiff company could be entitled to provide litigation funding on the basis that they have a legitimate interest in the plaintiff pursuing the litigation. If the plaintiff company is unsuccessful in the litigation, it is possible for the successful defendant to seek (a portion of) their costs against that legitimate litigation funder.

Contingency/conditional fee arrangements are not permissible, although *no win, no fee* arrangements are permitted. Therefore, a legal team may agree not to charge the client unless the claim is ultimately successfully resolved in the client's favour. However, a solicitor may not charge their fee on the basis of a percentage of the award to their client.

After-The-Event insurance has been held by the Irish courts to be permissible if it meets certain requirements. Such insurance allows parties to buy insurance against the risk of being unsuccessful in the litigation.

1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

The Irish Supreme Court has recently confirmed that the assignment of a claim or a bare cause of action to someone who has no connection with the underlying claim is void as a matter of public policy. Such an assignment is considered to fall within the scope of champerty.

There is an unsettled exception to the above principle, which may arise when the assigned litigation rights are incidental to a *bona fide* transfer of other related rights (e.g. where a property is sold and litigation rights attaching to the property are assigned as part of the sale).

Further, subrogation (e.g. where an insurance company takes over the defence of the insured's proceedings) is permitted in Ireland.

The rules in relation to non-party litigation funding are set out at question 1.6.

1.8 Can a party obtain security for/a guarantee over its legal costs?

Generally, a party can seek security for costs against a plaintiff company, regardless of where the company's registered office is.

However, it is much more difficult to get security against a personal plaintiff, particularly if they reside in Ireland or elsewhere in the EU.

However, security can be sought against any type of plaintiff in respect of the costs of discovery.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

A solicitor must advise their client of the option and advantages of mediation before proceedings are issued. Proceedings will not be permitted to go forward unless the solicitor files a statutory declaration confirming they have complied with this requirement.

In personal injuries action, there can also be requirements to get authorisation from the State's claims assessment body (the Personal Injuries Board) before issuing proceedings.

Although there is no requirement to do so, a plaintiff's solicitor will usually send a warning letter to the defendant before initiating legal action, calling upon them to admit liability. Such a letter can be taken into account by the Court when considering costs awards.

If there is more than one potential defendant, the plaintiff's solicitor will usually write to all potential defendants calling upon the proper defendants to identify themselves. The letter will warn that, if necessary, all potential defendants will be sued and that the plaintiff will not be responsible for the costs of any party ultimately found not liable.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

There are statutory time limits for commencing proceedings in Ireland. However, where the cause of action has been concealed by fraud, this will normally extend the relevant time period.

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Most claims based on breach of contract or tort must be brought within six years of the action accruing.

A defamation claim should normally be brought within one year of the publication (but this can be extended to two years in certain limited circumstances).

Claims relating to land generally should be brought within 12 years.

A personal injuries claim must be commenced within two years from when the plaintiff knew or ought to have known they had a claim.

Arguments as to whether a claim is time-barred should be pleaded as part of the defendant's Defence.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

High Court proceedings are usually commenced by having a summons issued by the court office. Once issued, the summons must be served on the defendant. The procedure is broadly similar for commencing proceedings in the District and Circuit Courts.

Individuals can be served by handing them the document (i.e. personal service), or by sending the summons to them by registered post. Companies can be served by ordinary post or by leaving the documents at the company's registered address. Where postal services are used, the summons is deemed to be served on the date it would normally be expected to be delivered.

If proceedings are being served in another EU Member State, the summons should be appropriately endorsed with the basis for the Irish court's jurisdiction in the matter. The summons can then be lodged with the County Registrar who will transmit the documents for service by the relevant agency in the other Member State. Depending upon the circumstances, service through diplomatic or consular agents, service by registered post, or direct service may also be permitted. A somewhat similar process is required to serve documents in a contracting party to the Hague Service Convention. In those circumstances the summons must be lodged with the Master of the High Court. A plaintiff must apply to the Court for leave to serve documents outside of the jurisdiction if EU law or the Hague Service Convention do not apply.

The surest method of service of foreign proceedings in Ireland is through the Master of the High Court. Depending on whether EU law, the Hague Service Convention, or neither applies, and whether there is compliance with the relevant requirements, the Master of the High Court will direct for service to be effected.

3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

Interim and interlocutory injunctions are available as pre-action interim remedies in Ireland. The objective of these injunctions is to maintain the *status quo* between the parties until there has been a full hearing of the proceedings.

Interim injunctions are granted *ex parte* (i.e. without the opposing party present). Such applications are usually reserved for urgent or emergency cases. Interlocutory injunctions are granted after a hearing with all parties present. In granting such an injunction, the Court has to be satisfied that there is a serious issue to be tried, that damages are not an adequate remedy, and that the balance of convenience lies in favour of granting an injunction. The applicant will be required to give an undertaking to pay any damages suffered by the other party as a result of the injunction if the applicant is ultimately unsuccessful in the substantive proceedings.

Quia timet injunctions, Mareva injunctions, Anton Piller Orders, and Norwich Pharmacal Orders are also available as pre-action reliefs in Ireland.

3.3 What are the main elements of the claimant's pleadings?

As set out at question 1.3 above, the claimant's main pleading will be the Statement of Claim. The main elements of that pleading will be the relevant facts of the claim and the basis for the relief sought. Where the claimant pleads fraud or fraudulent misrepresentation, there is an onus on the claimant to provide detailed particulars of the fraud. A High Court Statement of Claim must also disclose details around any intention to call expert evidence, if applicable. In personal injuries and defamation proceedings, the claimant must swear an affidavit verifying the alleged facts.

If the defendant is of the view that the Statement of Claim is not sufficiently clear as to enable them to know what case they have to meet, the defendant can raise a Notice for Particulars, seeking further details about the claim.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Pleadings can be amended without leave of the Court within certain time limits. After that, the parties must apply for leave to amend. The Court will allow amendments where they are necessary to determine the issues in dispute between the parties. However, leave may not be granted where the amendment would prejudice the other party.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

Pleadings can be withdrawn. At the early stages of proceedings, the plaintiff can withdraw their claim in whole or in part without leave of the Court, but will be liable for the defendant's costs incurred in dealing with the withdrawn elements.

Further, to encourage settlement, the plaintiff can withdraw their claim in whole (but not in part) at any time before the proceedings are set down for trial, with the consent of the defendant and without the leave of the Court. It is up to the parties to agree costs between them in these circumstances.

Otherwise, the plaintiff must apply for leave of the Court to withdraw their claim in whole or in part and the Court will exercise its usual discretion in relation to costs.

A defendant must seek leave from the Court to withdraw their Defence or counterclaim, in whole or in part. Again, the Court will exercise its usual discretion in respect of costs in such circumstances.

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4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

As set out in question 1.3, the main element of a Defence is the identification of what parts of the Statement of Claim are admitted or denied. Elements of the Statement of Claim which are not denied are deemed to be admitted, and denials should be substantive.

Specific defences, such as the claim being barred by contract or statute, or the applicability of contributory negligence, should be expressly pleaded in the Defence and pleaded separately to the admissions and denials.

A defendant can include a claim for set-off or counterclaim in their Defence. Again, this should be expressly and separately pleaded.

As with the plaintiff's Statement of Claim, a High Court Defence should also disclose details around any intention to call expert evidence in respect of any element of the defendant's Defence or counterclaim.

4.2 What is the time limit within which the statement of defence has to be served?

A Defence should be delivered within 28 days of delivery of a High Court Statement of Claim. The same period applies in the District Court, while a slightly shorter period (theoretically 21 days) applies in the Circuit Court.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

A defendant can pass on or share liability by joining a third party to ongoing proceedings. This procedure is discussed in detail at question 5.1.

A defendant can also seek contribution against a co-defendant or third party where both are concurrent wrongdoers (i.e. they are both responsible for the same loss caused to the plaintiff). In certain circumstances, a defendant who has been found liable or who has settled with the plaintiff can initiate new proceedings seeking contribution from a concurrent wrongdoer who was not a party in the plaintiff's proceedings. However, unless the original proceedings were settled, there is a strong preference for such a concurrent wrongdoer to be joined as a third party to the original proceedings. The Court can refuse a contribution claim where the defendant seeking contribution failed to join the concurrent wrongdoer in the original proceedings without good reason.

4.4 What happens if the defendant does not defend the claim?

The consequences of not defending a claim depend upon the type of claim being made. If the claim is for liquidated damages, the recovery of land, or the delivery of goods, a plaintiff can get final judgment in the matter from the court office.

If the matter is for unliquidated damages, the plaintiff can issue a motion for judgment in default. The plaintiff can also make an application for a hearing to assess the damages claimed.

4.5 Can the defendant dispute the court's jurisdiction?

A defendant can dispute the Court's jurisdiction by filing a conditional Appearance and applying to the Court to set aside service on the basis that the Irish courts do not have jurisdiction to hear the matter.

If the defendant files an unqualified Appearance, they may be deemed to have accepted the Irish court's jurisdiction in the matter.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

A plaintiff can apply to the Court to join a third party as a co-defendant in ongoing proceedings where relief is sought against that third party which relates to the complaint being made in the ongoing proceedings. While such an order will normally be granted if the application is stateable, it may be refused where the joinder of the co-defendant would delay the trial of the proceedings.

A defendant can also apply to the Court to have a third party joined to the proceedings by way of a Third Party Notice. Such an application can be made where the existing defendant claims that:

(a) it is entitled to contribution or an indemnity from the third party;

(b) it is entitled to relief against the third party which is related to or connected with the plaintiff's proceedings, and the relief sought is substantially the same as some of the relief claimed by the plaintiff; or

(c) the same or connected issues arise between the defendant and the third party as arise between the plaintiff and the defendant.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Pending proceedings can be consolidated by order of the Court. Any party can apply for such consolidation. In determining whether the order should be granted, the Court considers whether:

(a) there are common questions of law or fact arising in the proceedings;

(b) there is a substantial costs saving and convenience to the consolidation; and

(c) the consolidation could lead to confusion or the risk of a miscarriage of justice.

5.3 Do you have split trials/bifurcation of proceedings?

Where several causes of action are being tried in the one set of proceedings, the Court can order separate trials if it is of the view that the issues cannot be conveniently tried together.

Issues of law can also be tried as preliminary issues at the outset of the trial on the application of either party, by the consent of the parties, or if the Court deems it convenient. The parties must agree the relevant facts before a preliminary issue will be heard.

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Issues of law and fact can be tried on a modular basis, if so ordered by the Court. Such modular trials are sometimes invoked in complex proceedings, where it is convenient to hear certain disputes in advance of the main trial, on the basis that the resolution of those disputes could ultimately save time and costs.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

Case allocation occurs in the High Court with the President of the High Court having overall responsibility for allocation. There are different court lists to deal with specialist matters (e.g. Commercial, Competition, Maritime, Judicial Review, etc.). Particular judges are responsible for those lists and specialist cases are assigned to the judge who deals with that list. Parties must apply for admission to the Commercial Court list (by way of an affidavit and Notice of Motion).

In the lower courts, the President of the respective court is responsible for managing the list, but there are no specialist lists at those levels.

6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Courts have inherent case management powers and may issue directions or orders to assist with determining the proceedings in a just, expeditious and cost-effective manner (e.g. on format of proceedings, timetables and defining issues between parties).

A new case management system has also been introduced to provide for greater case management and judicial control over litigation. These rules are intended to increase efficiency and reduce the duration of hearings in the High Court, making the process more organised and cost-efficient. The Commercial Court and Competition List have already been operating on a similar case-management basis for a number of years and the new rules will extend this to cases in the Chancery and Non-Jury lists. The rules have not yet been put into practice in their entirety.

The case management system allows Judges to make orders for pre-trial conferences, timetables and costs, etc. and provide for the sharing of expert reports and expert engagement. There is also scope for judges to appoint a court expert.

Failure to comply with a case management order can result in a party bearing the costs of an application to compel compliance.

6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

The Court can order a non-compliant party to bear the costs of any application or motion brought to compel the party to comply with a court order or direction.

In certain cases a non-compliant party may have its case struck out.

The Court may also make a finding of civil contempt. The Court has a broad range of powers for civil contempt (up to unlimited powers of imprisonment, or sequestration of assets for a corporate entity). The legislature is currently debating a bill to put the law of contempt on a statutory footing.

6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

Irish Courts have the power to strike out all or part of a case if the pleading discloses no reasonable cause of action or answer, if the pleadings show the action or defence is frivolous or vexatious, if the party has failed to comply with court orders, if the case is an abuse of process or if the case is bound to fail.

The Court also has the power to strike out proceedings for inordinate and inexcusable delay.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

Summary judgment can be entered where the claimant can show that they are entitled to the relief sought and that there is no defence to the action. Summary judgment can also be entered if the defendant fails to serve its defence.

6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

A claimant or defendant may apply at any stage for an action, or part of an action, to be discontinued, either indefinitely or for a defined period.

A claimant may discontinue or withdraw an action without the Court's leave either (i) before the defence is served or before taking any step in the proceedings (but he must pay the defendant's costs), or (ii) before the case is set down for trial if the defendant consents. A defendant must seek leave of the Court to withdraw a defence or counterclaim.

Common examples would be to allow the parties to explore a settlement or alternative dispute resolution. If a party seeks judicial review of a decision or order the High Court may stay the proceedings pending the outcome. In personal injuries cases, the proceedings may be stayed if the claimant has not complied with certain requirements in respect of the summons.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

Basic rules of disclosure

In Ireland, this is known as discovery and is governed by the relevant Court rules.

It begins with a party issuing a request for voluntary discovery (usually after the pleadings have closed). An agreement between the parties for voluntary discovery has the effect of a court order. In High Court proceedings, the parties must stipulate the exact categories of documents which they require and provide reasons. The onus is on the party seeking the documents to show that they are relevant and necessary and that the request is proportionate.

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The issues in the case need to be defined prior to discovery (as it is not a tool to identify causes of action). The documents must be (or have been) in the party's possession, power or procurement and must be relevant. The perceived sensitivity, confidentiality, significance or importance of a document does not affect the question of whether it is discoverable; once the document is within a category it is considered responsive and must be discovered. However, privileged documents (see question 7.2) do not need to be disclosed.

Where the parties do not agree on voluntary discovery, an application for discovery may be made to the Court. The Court has a broad discretion and may order discovery in terms set out in the Notice of Motion or in amended terms. In 2018, the Court of Appeal held that discovery should not be ordered unless all other available options had been properly explored.

The parties then each provide a sworn affidavit detailing the existence of relevant documents, which can then be inspected by the other party.

Pre-action disclosure

There is no provision for pre-action disclosure in the Irish Court rules. However, the Courts have previously recognised Norwich Pharmacal Orders which are sought to identify the defendant to an action. For such an Order, the Court will look for proof of wrongdoing before granting the Order. A recent application for a Norwich Pharmacal Order in Ireland was refused on the grounds that it could endanger the life of the third party.

Classes of documents not requiring disclosure

See question 7.2 on privilege.

Disclosure of electronic documents

Electronic data is subject to the same rules as traditional discovery and must be disclosed as part of the discovery process. Parties must preserve evidence which may be relevant and this obligation extends to evidence which is stored electronically. The Irish courts have approved the use of predictive coding and technology-assisted review in the discovery process as the volume and complexity of e-discovery has grown.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

Privilege entitles a party to refuse to produce a document or to disclose its contents. Privilege can be relied on in the discovery stage and also later in the proceedings.

There are a number of types of privilege recognised in Ireland and the definition of a lawyer includes solicitors, barristers and in-house counsel:

- Legal advice privilege protects communications between lawyers and their clients where the communications are for the dominant purpose of seeking or providing legal advice.
- Litigation privilege protects confidential communications between a client and their lawyer and third parties, where the dominant purpose is to prepare for actual or reasonably apprehended litigation. The privilege only lasts for the duration of the proceedings themselves but can be extended to cover closely related actions.
- Common interest privilege arises when one party voluntarily discloses a privileged document to another party who has a common interest in the subject matter of the communication or in the litigation which the document relates to.
- Without prejudice privilege covers written or oral communications for the purpose of a genuine attempt to settle a dispute.

7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

It is possible to seek discovery against a non-party. However, a high standard of proof is required and any order will be at the Court's discretion. The document sought must not be reasonably available to the applicant by other means. Costs will be borne by the applicant.

7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

The Court makes the Discovery Orders (where the parties have not agreed). The Courts can exercise discretion and must decide whether the requested documents or search parameters are relevant and necessary to dispose of the case properly.

7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

Documents disclosed on foot of an Order for discovery are subject to an implied undertaking that they will only be used for the purposes of the action. To use the documents for any other purpose is considered contempt of court. An application can be made to the Court to vary or release this undertaking.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

Although the primary form in which evidence is received at trial in Ireland is through oral testimony, factual and expert witness statements are exchanged prior to trial in commercial litigation proceedings.

The general principle is that witnesses give evidence in person in open court. The Commercial Court can facilitate testimony by video link if necessary. In appropriate cases, the Court can also provide for alternative modes of testimony including evidence on affidavit, by response to interrogatories or by evidence before a commissioner or examiner. However, the Court will not authorise evidence on affidavit where there is a *bona fide* requirement for the particular witness to be cross-examined.

Ireland has not adopted the 1970 Hague Convention and if overseas witnesses are unwilling to co-operate, it would not be possible to compel them by way of subpoena. However, an application can be made for Letters Rogatory to be issued by the Irish court to the Courts of the appropriate jurisdiction to seek their assistance in compelling the individual to give testimony. In practice, the procedures are similar to those under the Hague Convention.

If the witness is located in an EU State, then the taking of evidence from one Member State to another without recourse to consular and diplomatic channels is allowed.

Evidence of foreign law is provided by a report from an appropriately qualified lawyer from the jurisdiction concerned. The parties generally agree for such evidence to be given in a written report or affidavit (avoiding the necessity for the foreign lawyer to travel). Absent such agreement, or alternative orders, the normal rules apply and the foreign lawyer could be required to testify in person.

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There are a number of exclusionary rules governing the admissibility of evidence, including the rules against hearsay and the rule against opinion evidence (other than expert witnesses).

The standard of proof in civil proceedings is the balance of probabilities. The burden of proof rests with the party making the particular assertion.

The Courts permit evidence on affidavit in certain circumstances, e.g. pre-trial applications, cases suitable for summary disposal or cases unlikely to involve serious disputes of fact.

8.2 What types of evidence are admissible, and which ones are not? What about expert evidence in particular?

Oral evidence must usually be given; however, other types may also be admissible. These include:

- **Evidence on affidavit** – may be appropriate where the facts of the case are unlikely to be disputed.
- **Evidence on commission** – may be appropriate where a witness is situated abroad, unwilling to attend court or is unable to due to illness.
- **Documentary evidence** – admissible when the content of the document is proved. Sometimes proof of proper execution is also required.
- **Expert evidence** – admissible (including in the form of a written report) on issues considered to be within the witness' field of expertise. Such evidence is only permitted to the extent that it is required to enable the Court to properly deal with the matter.

8.3 Are there any particular rules regarding the calling of witnesses of fact, and the making of witness statements or depositions?

Parties are free to call any witnesses of fact whose evidence is relevant to the action. Other than in very limited circumstances, a Judge cannot call a witness without the parties' consent. However, a Judge may recall a witness.

Oral evidence must always be given on oath or affirmation, unless the witness is exempt (e.g. children under 14 or persons with a mental disability). Witnesses may, with the Court's permission, give evidence by video link.

A witness can be compelled to attend Court to give evidence (which requires an application for a subpoena). This is generally done when there is doubt as to whether a witness will give evidence voluntarily. Witnesses may also be compelled to bring certain documents with them when they give evidence.

Written witness statements are common in the Commercial Court and the new case management rules provide for their increased use in other cases (see question 6.2 above). The witness is then open to cross-examination on the contents of their statement. A witness statement must be in the witness's own words, but is usually prepared by a lawyer who has obtained all necessary information from the witness.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Are there any particular rules regarding concurrent expert evidence? Does the expert owe his/her duties to the client or to the court?

Expert evidence must be independent and objective, and the expert has an overriding duty to the Court.

Expert witnesses should not give evidence on matters outside their area of expertise or on matters within the knowledge of the Court.

In the Commercial Court, a judge may direct the experts to consult with each other and may guide the process. The Court may also restrict or exclude expert evidence on case management grounds.

The new case management rules require parties to disclose their intention to offer expert evidence in their pleadings, and summarise the expert's field and the subjects to be addressed. A summary of the expert evidence must be served a month before trial.

The rules also provide for expert debate, cross-examination and questioning of experts by judges and scope for judges to appoint an expert to assist the Court. The Court may also order a joint report between multiple experts.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

The High Court can award any common law or equitable remedy. Remedies include damages, declarations and other statutory remedies.

The lower courts are subject to jurisdictional limitations on the orders they can make.

The High Court can also make interim orders, e.g. an injunction to compel or prevent a party from doing something.

Steps must be taken by the relevant party to enforce a judgment.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

The Court determines the appropriate level of damages in a case. The Court has discretion to award interest on a damages award at the statutory rate of 8%. Costs are awarded by the Court at its discretion (see question 1.5 above).

9.3 How can a domestic/foreign judgment be recognised and enforced?

A domestic judgment can be enforced in the District Court using one of the following methods:

- a judgment mortgage can be registered against a property;
- an execution order permits seizure of goods by a publicly-appointed sheriff;
- an instalment order requires the judgment debtor to make payments at regular intervals;
- if the judgment debtor fails to make pay sums under an instalment order a committal order may be sought, which results in arrest and imprisonment;
- an attachment order/garnishee order can made in respect of a debt owed to the judgment debtor by a third party;
- appointment of a receiver to sell a judgment debtor's property and discharge the debt;
- a petition for the liquidation of a debtor company or bankruptcy proceedings against an individual; or
- a charging order can be made in respect of Irish Government stock, funds, annuities, or shares or stock held in a private or public Irish company or English company carrying on business in Ireland.

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Judgments obtained in another EU Member State are covered by the Brussel I Regulation (Recast). An *ex parte* application is made to the Master of the High Court on affidavit with the original judgment (or a certified copy) and a standard form certificate from the court officials in the relevant Member State containing details of the judgment.

Common law rules apply to the enforcement of foreign judgments outside the EU. The Irish Courts will not examine the merits but the judgment must be a money judgment made by a court of competent jurisdiction.

9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

See question 1.2.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

Lodgment procedure – a defendant can pay a sum of money into Court, and if the claimant is successful but is awarded less than the lodgment amount then the claimant may only be entitled to their costs up to the date of the lodgment, with the defendant being entitled to costs from the date of the lodgment.

Without prejudice offer to settle – where a without prejudice offer to settle is made in writing, the Court may take this into account when exercising its discretion in relation to costs.

The Mediation Act 2017 – provides that there may be cost implications for a party to refuse to consider mediation or to refuse to attend mediation if they have been invited to do so by the Court.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

The most popular types of ADR in Ireland are:

- arbitration;
- expert determination;
- conciliation;
- mediation; and
- specialist tribunals.

Arbitration – is a popular means of alternative dispute resolution for commercial disputes. The parties submit the dispute to an independent third party arbitrator for determination. It is a confidential process and the decision of the arbitrator (or arbitral tribunal) is final and binding. The format of arbitration broadly reflects Court proceedings. Parties may choose particular rules to apply to the arbitration. Those rules usually set out the mechanism by which the arbitrator is appointed.

Expert determination – is used for disputes requiring a specialist or niche area of expertise. The format is that of an evaluation by the expert who is an independent third party. This differs somewhat from arbitration where parties are more likely to adopt more adversarial positions. The process is confidential.

Conciliation – is broadly similar to mediation. However, a common form of conciliation in Ireland is construction conciliation which differs significantly from mediation. If the parties do not reach a negotiated settlement, the conciliator issues a recommendation which is binding on the parties, unless it is rejected by either of them within a prescribed time period. The recommendation is largely at the discretion of the conciliator who can make a recommendation most conducive to a settlement or one which is based on their opinion of the merits of the case.

Mediation – is a confidential dispute resolution process with an independent mediator who accommodates the parties in reaching a negotiated settlement. It is a voluntary and non-binding process until a settlement is reached. Mediation can be agreed by the parties as a term of the contract or can be agreed after the dispute has arisen, or can be suggested by the Court of its own volition. Under the Mediation Act, a claimant's solicitor must advise their client about mediation and swear a statutory declaration that they have done so.

Specialist tribunals – there are a number of specialist tribunals to deal with specific types of dispute in Ireland (on the basis that they are faster and more economical than other methods). Examples include the Residential Tenancies Board, the Labour Court, the Workplace Relations Commission and ombudsman facilities such as the Financial Services and Pensions Ombudsman.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

ADR mechanisms are generally governed by the contractual terms agreed between the parties (or the Court Rules where applicable).

In addition:

- **Arbitration** – is governed by the Arbitration Act 2010 which applies the UNCITRAL Model Law.
- **Mediation** – is a voluntary process agreed between the parties. But it is worth noting that the Mediation Act 2017 introduced provisions for a claimant's solicitor to advise their client on mediation before issuing proceedings and for the Court to recommend that parties consider mediation (although engaging in mediation remains voluntary).

1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Generally ADR can be used in relation to any dispute in Ireland except where public policy dictates that the matter must be dealt with by the Courts, or where the claimant is a child.

The Arbitration Act states that it does not apply to disputes which concern the terms and conditions of employment or the remuneration of employees. A consumer dispute where the arbitration clause is not individually negotiated (and which is worth less than €5,000) can only be dealt with by arbitration at the election of the consumer.

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1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, force parties to arbitrate when they have so agreed, or order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

The Arbitration Act (implementing the Model Law) obliges a Court to stay proceedings if the parties have entered into a valid arbitration agreement in respect of the dispute.

The Courts may also adjourn proceedings to allow parties to engage in ADR (either at the application or the parties or on its own volition).

Under the Mediation Act 2017, if the Court invites the parties to consider mediation and a party refuses (without good reason), then the Court may have regard to this in awarding costs (if it considers it just).

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

Arbitration awards are final and binding. There are very limited grounds on which a party can seek to set aside an award (and the Irish Courts are generally reluctant to intervene in arbitrations).

A party may challenge the outcome of an expert determination.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

There is no statutory ADR institution in Ireland but there are government-nominated ADR bodies in Ireland relating to specific sectors, for example:

- The Chartered Institute of Arbitrators, Irish Branch (Arbitration Scheme for tour operators).
- The Advertising Standards Authority of Ireland.
- The Financial Services and Pensions Ombudsman.
- The Competition and Consumer Protection Commission (CCPC) (for consumer disputes under the Alternative Disputes Resolution Directive).

A large number of lawyers, industry specialists and commercial bodies offer ADR services.

Lawyers (both barristers and solicitors) commonly act as mediators, arbitrators etc.

Members of specialist professional bodies also offer this service for relevant commercial disputes (e.g. engineers for construction disputes).

Acknowledgment

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A&L Goodbody has the largest and most experienced litigation and dispute resolution team in Ireland. Our Dublin and Belfast team provide an all-Island service. Our specialists work with clients to manage risk in all areas of their business and to resolve disputes in the most efficient and effective way. We are skilled in resolving disputes through litigation, arbitration, mediation and expert determination. In particular, we are experienced in managing large and complex cases and corporate crises strategically and commercially, including Irish legal issues which form part of a wider international issue.

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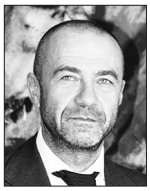
Italy

Raffaele Cavani



Munari Cavani

Bruna Alessandra Fossati

I. LITIGATION

1 Preliminaries

1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

Italy is a civil law jurisdiction. Rules on civil procedure are stated by the Code of Civil Procedure.

1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

The Italian civil court system is as outlined below.

First instance cases are heard by: (a) the justice of the peace, who sits as a single judge; or (b) the high court, which, depending on the case at issue (in particular in case of specialised divisions), may sit either as a collegium of three judges or as a single judge.

In the second instance: (a) decisions by justices of the peace may be appealed before the high court; and (b) a first-instance decision by the high court may be appealed before the courts of appeal, established by a collegium of three judges.

The highest degree is occupied by the Supreme Court of Cassation, except in cases of peculiar issues (matters of jurisdiction, issues on which the case law of the Supreme Court has shown material difference of opinions or important points of law) where it acts as a collegium of nine justices.

The high courts of the major cities have specialised civil divisions, which deal with matters concerning labour law, family law, corporate and commercial law (including intellectual property) and bankruptcy law.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

See question 1.2.

A trial in first instance lasts approximately three to four years; in second instance, from one to four years; while a proceeding before the Court of Cassation lasts from five to eight years. Amongst the expedited trial procedures, it is worth mentioning the injunction of monetary payments which is based on an overdue amount evidenced in written form. In this proceeding, the Court shall issue a payment order against the debtor within 60 days of its issuance.

1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

Parties may agree upon exclusive jurisdiction clauses in writing, unless in case of matters for which the Civil Procedure Code provides for the mandatory jurisdiction of a specific judge (see question 6.1).

1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

By way of principle, the litigation costs, which are usually estimated by each party independently, are imposed on the losing party. Legal counsels submit to the court their statements of the costs; the judge may exclude the payment of certain costs deemed excessive or unnecessary.

Furthermore, if both parties partially lose or the case has never been handled before or there is a change in the case law on the subject, the judge can offset, either totally or partially, the litigation costs between the parties.

Non-participation to both mediation and negotiation could negatively affect the decision of the judge regarding litigation costs.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

Nothing prevents parties from agreeing that the compensation of the attorneys be calculated as a percentage of the value of the litigation, or be totally excluded in the event of defeat (although such a scenario is unlikely).

1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

The attorneys, as well as judges, notaries and clerks of the court, are prohibited from buying (under penalty of nullity) any claims or credits that represent the subject matter of a dispute in which they are directly involved.

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Theoretically, the law does not exclude the possibility for third parties to finance the person seeking or involved in a process; however, this has rarely been seen in practice.

1.8 Can a party obtain security for/a guarantee over its legal costs?

Under the Italian laws, there are not any specific rules or regulations in terms of litigation funding. Moreover, please note that Italian lawyers cannot enter into a "*pactum de quota litis*" with their clients (i.e., an agreement by which a client promises to his/her lawyer a portion of the proceeds should the case be successful).

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

In certain matters, parties have to seek an out-of-court settlement by means of qualified mediators. Parties may also settle their dispute amicably by a written negotiation with the support of their lawyers (so-called "*negoziazione assistita*").

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

The Italian Civil Code provides for different statutes of limitation depending on the type of right that gives ground to the dispute.

The ordinary statute of limitation is 10 years.

In case of indemnification for torts, the statute is reduced to five years (two years for actions regarding the circulation of vehicles and ships). The five-year term also applies to actions for refunding interest or in corporate law matters. B2B agreements of sale of goods, freight, shipment assurance and brokering commissions have a statute of limitation of one year.

The above terms are mandatory, and such terms start from the date on which the right may be exercised. In case of a legal action, the statute of limitation is interrupted until the judgment, after which it starts to run again.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

The commencement of a civil proceeding takes place by serving the other party with a writ of summons. Certain kinds of action, such as protective remedies, injunctions, requests for seizure, attachments or enforcement orders or labour litigations, start by filing a petition to the competent court.

Main means of service are judicial officers, mail service or the lawyers themselves.

The service is considered to be properly carried out upon the receipt by the receiving party. In case of mail service, in any case the writ is deemed to be served after 10 days from its sending.

Should a service be made outside Italy and in an EU country, the writ of summons must be translated in the language of the recipient and served pursuant to Regulation CE No. 1393/2007. For service in a country outside the EU, unless in case of a bilateral convention between Italy and the relevant country, the Hague Convention of November 15, 1965 shall apply.

Should a service of foreign proceeding be made in Italy, the preferred method is represented by the *Ufficio unico degli ufficiali giudiziari* pursuant to the Hague Service Convention of November 25, 1981. Such office sits at the Court of Appeal of Rome.

3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

Parties can demand interim remedies either before the proceeding or during the proceeding. The remedy will be requested from the court competent to decide on the merits. Should a justice of the peace have jurisdiction, the interim remedy must be requested to the relevant high court.

Different kinds of interim remedies are provided for by law. Some are clearly defined: different kinds of seizures; reports of new works and of potential damage; and pre-trial technical investigation. If a situation does not fall within any of these remedies, a general remedy (paragraph 700 of the Civil Procedure Code) shall apply; in such a case, the judge may adopt those remedies that are deemed more suitable to the circumstances of the case.

All the remedies share some common features: they are granted on the basis of a summary inquiry, therefore the court has the authority to revoke them during the proceeding; and they are granted if the following two conditions are satisfied (the burden of proof lies on the claimant):

- the *fumus boni iuris* (that is, *prima facie* existence of the right claimed); and
- a *periculum in mora* (that is, a concrete risk, linked to the delay, for the right claimed).

In some cases (e.g., when service to the counterparty could jeopardise the claimant's right) the court may decide *inaudita altera parte*.

Certain remedies (in particular, seizures and attachments) are temporary, hence they must be followed by an action on the merits (otherwise the measure becomes ineffective) and are destined to be confirmed or revoked by the final judgment. Other remedies may be followed by the merits or not.

In addition, the parties may demand an injunction during the proceeding, which shall be ordered by the court in the case of uncontested sums.

3.3 What are the main elements of the claimant's pleadings?

The claimant's pleadings must contain a representation of facts and legal arguments related to the action, as well as advice for the defendant to present itself in front of the judge at the first hearing, whose date is to be indicated by the plaintiff.

3.4 Can the pleadings be amended? If so, are there any restrictions?

The pleadings may be amended exclusively as a consequence of the content of the statement of defence and within the term of the first writ of defence (to be filed with the court within 30 days from the first hearing).

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3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

Pleadings can be withdrawn upon the consent of both parties (personally or by means of their attorneys). The withdrawal may be declared either orally before the judge during a hearing or with written notice exchanged between the parties. Should the withdrawn pleadings be lawful, the judge dismisses the legal dispute. As for the consequences, the party who proposes the withdrawn pleadings must pay the legal fees occurred by the other party/ies, unless all the parties agree otherwise. The judge rules on the liquidation of the legal fees and such decision cannot be opposed.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

The statement of defence must point out the counterclaims of the defendant and any other objections that may not be ascertained *ex officio* by the judge (i.e., jurisdiction, offset, statute-barred claim).

4.2 What is the time limit within which the statement of defence has to be served?

At least 20 days before the first hearing, the defendant must file his or her statement of defence. Should he or she decide only to object the arguments of the claimant (and not other objections that may not be ascertained *ex officio*), the statement of defence may be filed directly at the first hearing.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

The defendant is entitled to summon third parties in a pending proceeding, by serving to them a writ of summons. To this end, the defendant must specify his or her intention to summon the third parties in the statement of defence, to be filed at least 20 days before the first hearing.

4.4 What happens if the defendant does not defend the claim?

The court verifies whether the service of the claim is correct and, in this case, declares the *absentia* of the defendant, which is allowed in Italy.

4.5 Can the defendant dispute the court's jurisdiction?

The defendant can dispute the court's jurisdiction under penalty of forfeiture in the statement of defence to be filed at least 20 days before the first hearing.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

The proceeding does not necessarily take place between the original parties. A third party might intervene on its own initiative or may be called by the parties (see question 4.3) or by order of the judge.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

The consolidation of different proceedings is required when there is a risk of possible conflicts of *res judicata*. Hence, it takes place (and it is mandatory) when the proceedings concern the same subject matter. In case of linked cases, consolidation is discretionary and may occur only in case of a favourable decision by the competent court.

5.3 Do you have split trials/bifurcation of proceedings?

The split of proceedings may take place in case of voluntary joinder or objective consolidation (i.e. when, on initiative of the claimant, several trials have been accumulated in the same proceeding, respectively for their subject matter or for an identity of the parties). The court can split proceedings, upon joint request of all parties or on its own initiative, when it is deemed necessary, due to the fact that the continuation of the joint discussion of the trial may delay or make the proceeding more onerous.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

The Italian civil court system allocates jurisdiction on the basis of: (a) the value; (b) the subject matter of the lawsuit; and (c) the territory.

The value of the lawsuit is that as determined by the parties in their requests to the judge. Based on the value, the competence of the judges of first degree is allocated as follows:

- justices of the peace are competent in lawsuits: (i) involving movables with a value not exceeding €5,000; and (ii) claims for damages originating from circulation of vehicles and ships, with a value not exceeding €20,000; and
- high courts have competence regarding any claims whose value exceeds those indicated above for justices of the peace, or when the value may not be determined by the parties.

The subject matter criterion entails that, should litigation concern one or more specific issues, then a judge will have exclusive jurisdiction regardless of the suit's value: the subject matter criterion prevails over the value criterion. The following rules apply:

- justices of the peace have exclusive jurisdiction over any litigation concerning the determining boundaries and compliance with distances governed by law (concerning, for

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instance, trees and fences), use of communal facilities among owners of apartments, and complaints among neighbours about noise, smoke, heat, emissions, vibrations, etc., above the accepted levels;

- high courts have exclusive jurisdiction over any litigation concerning taxes, status and capacity of individuals, rights deriving from honorific titles, complaints of document forgery, and enforcement proceedings;
- courts of appeal are competent for antitrust claims and the recognition and enforcement of foreign judgments and awards; and
- cassation has exclusive jurisdiction over certain matters, including questions of jurisdiction.

About territorial jurisdiction, Italian first-degree courts are divided among different districts. The following criteria apply to determine which court has jurisdiction:

- for individuals, the court having jurisdiction is that of the residence, or of the domicile, or, if these are unknown, of the abode of the defendant. The law provides some exceptions and remedies when the individual is not domiciled in Italy; and
- for legal entities, unless the law provides otherwise, the court having jurisdiction is that of the place where they have their registered offices, or alternatively, where they have their plants or a representative duly authorised to sue and to be sued.

Some special rules apply, and take precedence over the above. These include the following mandatory jurisdiction:

- for disputes concerning, rights *in rem*, the court having jurisdiction is that of the place where the immovable property is located;
- for disputes involving questions of possession, the court in the area where the fact has taken place will have jurisdiction;
- for inheritance disputes, the competent court is the court where the deceased had his or her last domicile; and
- for enforcement proceedings, the place where the assets are located; in the case of a credit of the debtor in relation to a third party, the place where the debtor resides, or for obligations to do or not to do, the place where the obligation should be fulfilled.

The law allows for an elective forum for disputes concerning obligations; in these cases the plaintiff can sue the defendant before the court of the place where the obligation has been undertaken or should have been fulfilled.

6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

The judge must settle the dispute, taking into account exclusively what the parties submit to the court. In order to do so, the judge must schedule specific deadlines for the submission of briefs of argument, documents and other evidence (such as witnesses).

In principle, courts do not have an inquisitorial role in civil proceedings; however, they can issue search orders, enquire after written information concerning acts and documents from public administration or summon a witness to testify and to decide the case upon the oath of the parties.

Parties can demand an interim application (see question 3.2) and the cost consequences are the same of the proceeding (see questions 1.5 and 1.6).

6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

Courts are not entailed to issue any sanction, but the court will take such behaviour into account in its decision.

6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

Courts have the power to strike out a part of a statement of the claimant or of the defendant, or of their lawyer, if this part is improper or offensive expression.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

Pursuant to applicable rules of law, the judge, after a brief evaluation of the case, can decide to proceed with a summary judgment. At the first hearing the parties shall indicate, under penalty of forfeiture, evidence and counter-evidence, unless the judge grants a postponement of the hearing and gives two mandatory terms for the writings indicating evidence (15 days) and for the indications of counter-evidence (a further 10 days).

6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

The court may stay the proceedings in any case in which it or another judge should firstly settle a dispute, the definition of which has consequences on the decision of the case.

The courts may stay also at the joint request of all parties.

In addition, the courts have the power to discontinue a proceeding in case of death or loss of capacity before the submission of the first writ of any party, of the death or other impediment of the lawyer.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

There is no duty on the parties preserving documents and other evidence pending trial. The parties are not obliged to share any relevant request and are free to disclose evidence or not. There is no step available to the claimant to assist in bringing an action, such as a pre-action exchange of documents.

There are restrictions on the disclosure of documents containing sensitive and personal data, as well as secret documents covered by legal privilege.

An electronic document, subscribed with a digital signature, satisfies the legal requirement of written form.

In terms of evidence, the document itself is freely estimated, taking into account its objective characteristics of quality and safety.

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7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

The parties may not file any confidential correspondence between counsel regarding the possible settlement of the case. As specifically provided in the lawyers' code of professional conduct, the only correspondence that the parties can file is the correspondence between counsel regarding the fulfilment of the obligation from a party to another one.

According to leading case law, advice from in-house counsel may not be qualified as privileged. This rule applies also to foreign in-house lawyers involved in Italian civil proceedings. In any case, according to their code of conduct, in-house counsel must also keep all information that they become aware of confidential until the end of their mandate.

7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

Parties can request the judge to order third parties to produce documents or to take measures aimed at gathering evidence.

7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

The court can order disclosure by the other party or a third party. However, parties may challenge the disclosure of documents if they have a legitimate reason to do so (legal privilege, medical secrecy or bank secrecy).

7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

With respect to disclosure, Italian law provides no duty of disclosure or discovery similar to common law jurisdictions.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

The basic rule of evidence entails that the party who wants to assert a right in court must prove the facts on which it is based. The burden of proving a fact rests on the one who invokes precisely that fact in support of its argument.

8.2 What types of evidence are admissible, and which ones are not? What about expert evidence in particular?

Evidence may be presented in a trial either orally or in writing. Oral evidence consists of witness statements, confessions and oaths. Written evidence consists of documents and witness statements.

Experts may be either court-appointed or appointed by any of the parties. The contributions of the experts are not considered as evidence.

8.3 Are there any particular rules regarding the calling of witnesses of fact, and the making of witness statements or depositions?

Testimonies and statements of witnesses may be authorised by the court only upon the request of the party with the specification of the name and the questions to be asked. In any case, the judge is not obliged to authorise them.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Are there any particular rules regarding concurrent expert evidence? Does the expert owe his/her duties to the client or to the court?

The expert witness is ordered by the judge to allow the acquisition of important information related to specific knowledge which is necessary to the court as guidance for its decision.

The rules relating to experts are set forth by the codes of civil and criminal procedure and by the regulations for their implementation, including sanctions in case of non-compliance with the duties that the experts must comply with. The expert is awarded by the court. The expert commits to duly respond to the "question" that the judge asks.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

The judicial measures (i.e. acts of the court) may be judgments, orders or decrees.

A judgment is the judge's ruling that decides on the merits of the case or of a part of it, or of one or more procedural issues.

An order regulates the development of the trial, and is pronounced before both parties.

Also, the decree regulates the development of the trial, but it is not pronounced before both parties.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Local courts have the power to determine the amount of the indemnification on an equitable basis, if it is difficult to assess the damages.

As a general rule, Italian civil courts do not provide for punitive damages, unless the recognition of foreign decisions on punitive damages is needed. Notwithstanding this, the system provides some meaningful exceptions:

- if the losing party has initiated or continued a civil proceeding in gross negligence or bad faith, the judge can condemn him or her to pay the winning party, in addition to legal fees and the compensation of the damages, a sum determined on an equitable basis, as a sanction for his or her violating behaviour;
- the court – unless the measure is manifestly unequal – can integrate an order to cease or refrain from certain behaviours, with a requirement to pay a sum of money for any violation of the order or for any day of non-compliance. Should the person to whom the court's order is addressed not comply with it, the beneficiary enjoys an enforceable title that allows him or her to proceed immediately for the payment of the relevant sum; and
- monetary compensation in cases of libel.

Local courts have the power to order costs (see questions 1.5 and 1.6).

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9.3 How can a domestic/foreign judgment be recognised and enforced?

The procedure of recognition and enforcement of foreign judgments is regulated by:

- EU Regulation 1215/2012;
- the Lugano Convention of 1988 (judgments in civil and commercial matters issued by judges of Iceland, Norway and Switzerland); and
- bilateral conventions between Italy and other countries.

Foreign judgments are recognised in Italy, without any further procedure being necessary, should all of the following requirements be met:

- applying the rules on jurisdiction laid down under Italian law, the foreign judge would have had jurisdiction;
- the writ of summons instituting the proceedings was duly served and the defendant's right to be heard was respected;
- the parties appeared in the foreign proceedings;
- the judgment is final and definitive under foreign law;
- the judgment is not in conflict with an Italian judgment that is final and definitive;
- no proceedings on the same subject matter and between the same parties are pending before an Italian court; and
- the foreign judgment is not contrary to Italian public policy.

The court of appeal located where the applicant seeks enforcement has jurisdiction over this matter.

9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

The appealing party must indicate in his or her writ the specific part of the decision to be appealed and the changes to the reconstruction of the facts made by the judge of first instance, as well as the circumstances of the breach of law.

An appeal must be presented within 30 days of the service of the judgment or – should no service have been made – within six months from its publication.

In the course of the first hearing, the judge evaluates the grounds of the appeal. Should the appeal, on a *prima facie* basis, not have a reasonable probability of being admitted, it will be declared inadmissible. In this case, the first-instance decision may be challenged before the Supreme Court only for matters of law (lack of jurisdiction, lack of motivation or insufficient or contradictory motivation, violation or wrong application of law). To the contrary, factual circumstances established at the appeal stage are final.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

See questions 1.1 and 2.1.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

The most popular method of alternative dispute resolution ("ADR") is represented by arbitration. Italian law provides for the following two types of arbitration:

- ritual arbitration: where the award has the same effect as the court's judgment. The party, in order to have an award enforced in Italy, shall deposit the award together with the arbitration agreement at the clerk's office of the competent court. The court, after a formal check, declares the award to be enforceable. Should any party not fulfil it, the other may seek an enforcement procedure; and
- informal arbitration: the award does not have the binding force of a judgment, but is qualified as an agreement between the parties. Hence, it cannot be automatically enforced through the same procedure established for the ritual arbitration award, but, given its contractual nature, any party may sue the non-fulfilling party for any breach of the agreement.

As for the number of arbitrators, if parties do not express otherwise, the panel will consist of three arbitrators.

Each party designates one arbitrator, and the third arbitrator is appointed by mutual agreement of the parties.

Parties may agree on a specific time limit for issuing the award. Should no agreement be made, the award will be issued within 240 days of the last acceptance of appointment by the arbitrators. However, the deadline can be extended:

- upon a joint request of the parties; or
- upon an application by a party or by an arbitrator before the competent court, for a maximum of 180 days, if there is the need to take evidence, conduct independent expertise, issue a partial award or replace an arbitrator.

The other most common ADR processes in Italy are:

- conciliation held before the Italian Securities Authority (CONSOB);
- arbitration in banking and finance disputes;
- conciliation concerning consumers' rights; and
- the "joint negotiation" (a popular process between a company and one or more consumer associations in respect of disputes involving more than one consumer sharing the same cause of action).

Mediation

Mediation on specific matters (*inter alia*, the right to seek compensation for: damages resulting from libel or medical liability; financial, bank and insurance agreements; condominium, rights *in rem*, divisions and inheritance disputes; lease agreements; company leases; and family agreements) is mandatory in civil and commercial proceedings.

Parties seeking judicial relief in the above-mentioned matters are required to seek a prior amicable resolution through qualified mediation organisations. For any matters other than the foregoing, mediation is only voluntary.

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Should the parties fail to seek ADR and, on the contrary, start a legal proceeding, the court must invite them to proceed the mediation and give them 15 days to submit their request to the mediation organisation.

At the first hearing, the parties decide whether to continue the mediation procedure (this cannot last longer than three months, unless both parties agree to renounce such term), and whether they can find common ground to amicably solve their dispute. If no agreement is reached or the parties at the first hearing decided not to continue the proceeding, they are free to devolve their dispute to the competent court.

The mediator draws up a report certifying the outcome of the proceeding and the agreement reached by the parties, if any. The agreement concludes the mediation, and is challengeable in the case of invalidity or nullity. An agreement reached in a mandatory mediation is immediately enforceable. In the case of voluntary mediation, an agreement will be immediately enforceable only if each party has been assisted by a lawyer; otherwise, parties shall submit the agreement to the court for its formal approval in order to make it enforceable.

Negotiation

Negotiation is mandatory in matters regarding: damages resulting from circulation of vehicles and ships; and requests of payment for any amount lower than €50,000, not including matters covered by the mandatory mediation.

The party who intends to start a legal action in any of the such matters, must invite in writing the counterparty to negotiate an amicable solution of the issue with the assistance of his/her lawyer.

The counterparty, within 30 days, may accept or decline the invitation in order to reach an amicable agreement; if he/she rejects the invitation or does not respond to it, the party is entitled to start the legal action (as to the consequences on the litigation costs in case of non-participation to the negotiation, see question 1.5).

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

The arbitrators can decide how to conduct the arbitration, according to the rules (if any) established by the arbitration agreement and, in any case, in compliance with the rules of fair process, which are compulsory under Italian law.

Mediation was introduced in 2010 – by Legislative Decree No. 28 – to relieve the burden affecting the Italian judicial system and to make dispute resolution faster, easier and cheaper.

Negotiation is regulated by Decree-law No. 132 of September 10, 2014 as amended by Law No. 162 of November 10, 2014.

1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Disputes over indefeasible rights (citizenship, divorce and other family law issues), and certain disputes over labour and social security benefits or contributions issues, cannot be settled through arbitration.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, force parties to arbitrate when they have so agreed, or order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

Courts can intervene in the process of an arbitration upon request of any of the parties to designate and substitute one or more arbitrators and decide on challenges to the arbitrators' appointment. Courts may also extend the deadline for issuing the final award. The above powers may be expressly excluded by agreement of the parties.

Furthermore, courts must support the arbitrators in the process of taking evidence and have the exclusive power to issue interim relief.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

A party may appeal before the courts an award for nullity or revocation.

The award will be considered null if:

- the arbitration agreement is void;
- the panel was not appointed in compliance with the arbitration agreement;
- the arbitrator did not have the powers to act in this capacity;
- the award decides on issues that were not raised by the parties or concerns issues that may not be submitted to arbitration;
- it does not contain the signatures of the arbitrators or the grounds of the decision;
- the deadline for the award had expired (provided that this objection was raised during the arbitration);
- the arbitrators failed to comply with any mandatory formal requirements;
- a formal award between the same parties and with the same subject matter already exists and it states the opposite of the new one;
- the rules of fair process were not complied with;
- it does not decide on the merit of the arbitration;
- it is contradictory;
- it does not take position on any specific issues or objections of the parties; or
- it does not comply with Italian public order.

The challenge of the award based on the breach of law or rules is admitted only if it is explicitly stipulated in the agreement or provided by the law.

The appeal for nullity must be presented before the competent court of appeal within 90 days of the service of the award or – should no service have been made – within one year from the last signature of arbitrators.

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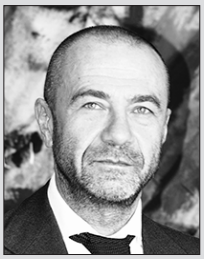
The award may be revoked if it is the outcome of the fraud of a party or an arbitrator, it is grounded on false evidence or material evidence is found after the award. These appeals need to be filed before the competent court of appeal within 30 days of the discovery of the new circumstance above.

Finally, an award may be subject to a third-party objection when its contents are detrimental to the latter, or the third party is a creditor or assignee of any of the parties and the award is the result of a fraud between the parties. No time limits apply to this objection.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

ADR processes have never been widely used in Italy.



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Japan

Nagashima Ohno & Tsunematsu

Koki Yanagisawa

I. LITIGATION

1 Preliminaries

1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

Japan is considered as a civil law jurisdiction and has adopted adversarial civil proceedings. No jury system has been adopted in the civil proceedings in Japan.

The Code of Civil Procedures and the Rules of Civil Procedures mainly govern the civil procedures in Japan.

1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

The Japanese civil court system is structured as a system of three instances. In ordinary civil cases, a plaintiff can file a complaint with a competent District Court as the court of first instance. A party has a right to file an appeal against a District Court judgment with a High Court having jurisdiction over the case (*koso* appeal), and it is possible to further file an appeal against a High Court judgment with the Supreme Court (*jokoku* appeal, and a petition for admission of a *jokoku* appeal). A *jokoku* appeal and a petition for admission of a *jokoku* appeal to the Supreme Court can be made for limited reasons set forth in the Code of Civil Procedures.

If the amount of the claim sought is 1,400,000 Japanese yen or less, a plaintiff must file the claim with a competent Summary Court, as opposed to a District Court, as the court of first instance. A party has a right to file a *koso* appeal against a Summary Court judgment with a competent District Court and then file a *jokoku* appeal against a District Court judgment with a competent High Court.

Regarding specialist courts, the Japanese court system established family courts to handle cases involving family matters, such as those relating to inheritance and marriage/divorce. The IP High Court was established in 2005 to handle intellectual property cases as the court of second instance. In addition, the Tokyo District Court, the Osaka District Court and other major District Courts have special divisions which handle cases requiring certain expertise such as intellectual property law, commercial law, administrative law, medical law, bankruptcy and insolvency law, labour and employment law.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

Japanese civil proceedings consist mainly of a series of hearing procedures and there is no clear distinction between a pre-trial stage and a trial stage.

On the first date of the hearing procedures, a plaintiff's complaint and a defendant's answer are officially submitted to the court. In subsequent hearing procedures, both parties submit their factual and legal arguments and evidence supporting their arguments to the court. While the facts admitted by the opposing party require no evidence and shall bind the court and both parties, the facts denied by the opposing party must be proved by evidence. Through such hearing procedures, the judge will identify the material issues in dispute, for which the court should conduct fact-findings through the examination of witnesses and other evidence. For such purpose of identifying the issues, the court may take procedures to extensively discuss issues and evidence with the parties, if appropriate. The court then holds an examination of witnesses. In general, witnesses are subject to cross-examinations in relation to the matters raised during direct examinations. Judges may supplementarily examine witnesses. Once the examination of witnesses has been concluded, the court closes the hearing procedures and then moves on to the rendition of judgment.

The Act on Expediting Trials provides that a period of two years should be a target period for the completion of the first instance of the civil proceedings. In practice, however, the duration of any given court proceeding will likely depend on the complexity of each case or the arguments and evidence submitted to the proceedings. On average, a court judgment in the first instance is rendered one-and-a-half to two years after the commencement of the lawsuit. If an appeal to the competent High Court is filed, it would generally take an additional year to obtain the High Court judgment. If an appeal to the Supreme Court is filed, it could take at least a further six months for the Supreme Court to render the final judgment and, in some cases, it could take more than a couple of years.

Regarding expedited trial procedures, the Labour Tribunal Proceedings handle relatively small labour and employment disputes, and the court must conclude the proceedings when or before three hearing sessions are held in principle.

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1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

Exclusive jurisdiction clauses are considered valid under the Code of Civil Procedures on the condition that such clauses are agreed upon by the parties in writing and specifically cover lawsuits based on a certain legal relationship. In addition, for international cases, exclusive jurisdiction clauses set forth in consumer contracts and labour contracts will be valid only when certain requirements are fulfilled, for the purpose of protecting the interests of consumers and employees.

1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

A plaintiff must pay a filing fee when initiating civil court proceedings, the amount of which is determined based on the amount of the claim sought. A plaintiff may recover the filing fee and other minor expenses such as travel expenses for witnesses from the defendant, pursuant to the final court judgment in favour of the plaintiff. On the other hand, the plaintiff may be required to pay minor expenses, such as travel expenses for witnesses, incurred by a defendant if the defendant prevails in the lawsuit. Each party has to pay its own attorneys' fees for civil court proceedings and may not recover such fees even if the party prevails in the lawsuit, in principle. There are no specific rules or regulations on costs budgeting under Japanese law.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

While the calculation formula for attorneys' fees solely depends on an agreement between the attorney and the client, it is relatively common in domestic cases that a client pays to its attorneys: (i) a retainer fee calculated by multiplying a certain percentage by the amount of claim sought in the lawsuit; plus (ii) a success fee to be calculated by multiplying a certain percentage by the amount of claim affirmed by the court. Attorneys can act for claimants on a contingency fee basis in Japan. Although 100% contingency arrangements are not specifically prohibited under Japanese law, the rules of ethics for attorneys may be interpreted to prevent such arrangements from being adopted, and such arrangements are rarely used under Japanese practice. It is also possible and common among international law firms to adopt an hourly charge arrangement.

1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

Under Japanese law, it is prohibited to assign a claim to a third party primarily for the purpose of having the third party file a lawsuit. On the other hand, there is no legislation prohibiting or specifically restricting litigation funding in Japan. As such, a plaintiff may file a lawsuit with third-party funding; however, it will be considered as a violation of the Attorneys Act if the third party who is not qualified as a Japanese attorney (*bengoshi*) provides legal advice to the plaintiff and takes a share of any proceeds from the lawsuit. It is also prohibited by the Attorneys Act to act as an intermediary between clients and attorneys for the purpose of obtaining remunerations therefrom.

1.8 Can a party obtain security for/a guarantee over its legal costs?

Insurance firms provide a scheme under which a defendant may share its risk of receiving a monetary judgment from the court subject to the relevant regulations. For instance, it is common for directors to insure themselves against the risk of shareholders' derivative lawsuits.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

Aside from a few exceptions, there is no particular formality with which plaintiffs must comply before initiating the civil proceedings in Japan. Exceptions include requirements to file a petition for review of certain orders rendered by the governmental entities (e.g., tax orders rendered by the tax authorities) before filing a lawsuit with the judicial court seeking a cancellation of such orders. Another example of exceptions is a requirement for a plaintiff to go through mediation proceedings before filing a lawsuit asserting a claim to increase or decrease the amount of rent of real estates against landlords.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Claims for compensation for damage caused by tort must be brought to the court within: (i) 20 years from the date on which the alleged tort occurred; or (ii) three years from the date on which the plaintiff first became aware of both the person who committed the alleged tort and the damage caused by the alleged tort, whichever period may elapse earlier. Other civil claims must be brought to the court within 10 years from the date on which the claim can be exercised, in principle. There are multiple exceptions for the aforesaid 10-year period, which includes a five-year limitation period for commercial claims.

Under Japanese law, the statute of limitations is treated as a part of the substantive law, in principle. The court may not uphold damage claims after the expiration of the 20-year period explained above, regardless of whether or not the defendant brings the defence of statute of limitation. On the other hand, even after the expiration of the three-year period for tort claims and the 10-year period for other civil claims, including the five-year period for commercial claims, the court may uphold the claims if the defendant does not bring the defence of statute of limitation.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

A plaintiff must submit to the court a complaint with a description of the claim sought as well as the causes of action. A plaintiff must pay

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a filing fee, the amount of which is determined based on the amount of claim sought (e.g., a fee of 50,000 Japanese yen must be paid for a claim in the amount of 10 million Japanese yen).

In order for the civil proceedings to be commenced, the court must serve a summons and a copy of the complaint on the defendant. As a primary means of service, the court clerk in charge will send a summons and a copy of the complaint to the defendant's domicile or principal office by special registered mail, and the service is completed upon receipt of the documents by the defendant. If a defendant refuses to receive the aforementioned documents, the court clerk can then send the documents again and deem that the service is completed at the time when the documents have been sent out again to the defendant, regardless of whether the documents are actually received by the defendant. If the domicile or the principal office of the defendant is unknown, a summons and a copy of the complaint can be deemed to have been served when two weeks have passed since the date on which the court posts a notice on its bulletin board that the court clerk is ready to deliver the aforementioned documents to the defendant.

Regarding the service on defendants outside Japan, it should be noted that Japan is a signatory of the Hague Service Convention and the Hague Civil Procedure Convention. In addition, Japan has entered into bilateral treaties on the service of process with several foreign countries. Accordingly, a summons and a copy of the complaint are typically served on the defendants in foreign jurisdictions in accordance with the aforementioned conventions or treaties.

Summons and other legal documents of foreign proceedings must be served on defendants located in Japan in accordance with the Hague Service Convention, meaning that the legal documents must be served on defendants in Japan through the Ministry of Foreign Affairs and the Supreme Court of Japan. It is generally considered that a service of legal documents on a defendant in Japan by means of direct international mail or courier shall be invalid.

3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

The Civil Preservation Act provides pre-action interim remedies such as provisional attachment and provisional injunction. A potential plaintiff can file a separate petition for such interim remedies with the court, typically in advance of filing a lawsuit on the merits. Generally, a plaintiff must demonstrate that they have claims to be preserved against defendant(s) and that there is a "necessity" for the interim relief, based on *prima facie* evidence, in order to obtain the interim remedies. In most cases, the court will require that a plaintiff provide a security deposit in advance of rendering an order of interim relief.

3.3 What are the main elements of the claimant's pleadings?

A plaintiff is required to describe in a complaint a purport of the claim sought, causes of action for the claim, and other facts relevant to the claim as well as legal arguments supporting the claim. It is particularly necessary for a plaintiff to plead the causes of action for the claim sought, namely, the facts constituting the elements of the claim. A plaintiff will further need to plead the facts constituting the elements of the rebuttals against the defendant's defence.

3.4 Can the pleadings be amended? If so, are there any restrictions?

While it is possible to amend the pleadings in principle, it would not be possible for a plaintiff to amend the pleadings of facts constituting the elements of the claim once the defendant has admitted such facts, unless the defendant gives consent to such amendment. In addition, the court may consider, in its fact-finding, that the amended pleadings are not credible.

It is possible for a plaintiff to amend the claims in the same proceedings on condition that there is no difference in the basis of such claims and the amendment to the claims will not cause undue delay in the proceedings. When the defendant already submitted a response to the initial claims on the merits, it is necessary to obtain consent from the defendant in order to amend the claims.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

While it is possible to withdraw the pleadings in principle, it would not be possible for a plaintiff to withdraw the pleadings of facts constituting the elements of the claim once the defendant has admitted such facts, unless the defendant gives consent to such amendment.

It is possible for a plaintiff to withdraw the claims until the judgment becomes final. When the defendant already submitted a response to the claims on the merits, it is necessary to obtain consent from the defendant in order to withdraw the claims.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

In responding to a plaintiff's claims set forth in a complaint, a defendant is required to submit a response to the complaint, which includes a request to the court to dismiss the claims, admission or denial of each of the plaintiff's factual and legal arguments, and the defendant's counter-arguments against the plaintiff's factual and legal arguments, including defence of set-off. In order to seek an early resolution of the case, the defendant may request the court to dismiss the claims due to reasons other than those on the merits, such as lack of jurisdiction and lack of standing. The defendant may file a counterclaim, which has connections with the claims brought by the plaintiff, with the same court.

4.2 What is the time limit within which the statement of defence has to be served?

Prior to the first hearing date (which is typically one week prior), a defendant is required to file a response to the complaint to describe whether to deny or admit the plaintiff's factual and legal arguments set forth in the complaint. If a defendant wishes to request the court to dismiss the claims due to reasons other than those on the merits such as lack of jurisdiction and lack of standing, the defendant must submit such defence at the same time as, or prior to, submitting its defence on the merits. Following the first hearing date, a series of hearings are held once a month or once every few months to exchange briefs and documentary evidence, and the defendant can submit defence on the merits during the course of the hearings.

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4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

There is a mechanism whereby a defendant gives a notice of lawsuit to a third party who has a legal interest in the result of the lawsuit, in that the defendant could pass on the liability to, or share its liability with, such third party. It is possible for such third party who received the notice to join the lawsuit as an assisting intervener. Once a third party receives such notice of lawsuit, such third party will not be allowed to dispute certain facts in a subsequent lawsuit with the defendant.

4.4 What happens if the defendant does not defend the claim?

If a defendant does not attend the first hearing date without submitting any response to a plaintiff's complaint, the court may deem that the defendant has admitted all the factual and legal arguments set forth in the complaint and may render a judgment in favour of the plaintiff.

4.5 Can the defendant dispute the court's jurisdiction?

Yes, defendants can dispute the court's jurisdiction. If a defendant wishes to request the court to dismiss the claims due to lack of jurisdiction, the defendant must submit such defence at the same time as, or prior to, submitting its defence on the merits.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

There is a mechanism whereby a third party can join an ongoing lawsuit as an assisting intervener, for the purpose of assisting one of the parties to the lawsuit if such third party has a legal interest in the result of the lawsuit (e.g., the defendant could pass on the liability to, or share its liability with, such third party in a subsequent lawsuit if the defendant loses in the ongoing lawsuit). Once the third party has joined the ongoing lawsuit as an assisting intervener, such third party will not be allowed to dispute certain facts in a subsequent lawsuit with the party whom the third party assisted.

There is another mechanism whereby a third party can join an ongoing lawsuit as an independent intervener by bringing an independent claim against both or either of the parties to the ongoing lawsuit. It is possible for a third party to join as an independent intervener if such third party's rights may be infringed as a result of the ongoing lawsuit, or if such third party's rights are the subject matter of the ongoing lawsuit.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Under the Code of Civil Procedures, if rights or obligations, which are the subject matter of the lawsuits, are common to two or more persons or are based on the same factual or statutory cause, these persons may sue or be sued as co-parties. The same shall apply where rights or obligations, which are the subject matter of the lawsuits, are of the same kind and based on the same kind of factual or statutory causes.

Moreover, under Japanese court practice, if multiple similar cases are filed with the same court, those cases tend to be assigned to the same division of the court so that the same judges can handle the similar cases, unless there are any circumstances that would give adverse effects on the efficiency of the procedures.

Similar actions could be grouped together for adjudication through "consolidation of hearing procedures" based on the discretion of the court, depending on circumstances such as the timing of filing a complaint, whether the subject matter is common to the multiple lawsuits at issue, and whether the same counsel is representing the cases.

5.3 Do you have split trials/bifurcation of proceedings?

The Code of Civil Procedures allows the court to split the hearing procedures involving multiple claims and/or multiple parties at the discretion of the court. If multiple hearing procedures are illegally consolidated or if multiple parties are illegally involved in the same hearing procedures as co-parties, the court must split the hearing procedures.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

Japanese civil courts typically have multiple civil affairs divisions that handle civil cases, and the court has discretion in allocating the cases to each division. Cases requiring certain expertise such as intellectual property law will be assigned to special divisions in some major district courts (e.g., Tokyo District Court and Osaka District Court).

6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Japanese civil courts have discretion to a certain extent in determining how to proceed with the hearing procedures. It is noteworthy that the civil courts can make an attempt to urge the parties to engage in settlement discussions at a time deemed appropriate during the course of the hearing procedures. Typically, the courts tend to suggest having settlement discussions immediately before moving to witness examinations or immediately after completing witness examinations. Parties may also ask the court to start settlement discussions at such times.

In some cases, such as those involving complicated technical issues in construction disputes or medical malpractice disputes, the court may temporarily assign the case to the mediation division where certain experts can be involved in the procedures to give opinions to facilitate the parties to exchange arguments and conduct settlement discussions.

We do not believe that Japanese courts have the particular case management power that would affect the costs borne by the parties.

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6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

The Act on Maintenance of Order in Courtrooms imposes sanctions on a person who disobeyed the court's orders issued for the purpose of maintaining the order in the courtroom. However, there is no concept of contempt of court under Japanese law.

The Code of Civil Procedures provides sanctions imposed by the court against a party to a lawsuit, with respect to the court's orders or directions concerning evidence. For instance, in the event that a party to a lawsuit does not follow the court's document production order, the court may deem that the opposing party's assertions concerning the document at issue are true.

6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

Japanese courts have the power to dismiss a part of a claim or to dismiss a claim entirely by a final judgment. Japanese courts may also render an interim judgment on preliminary issues, such as the court's jurisdiction over the case prior to reviewing the issues on the merits.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

Japanese civil court proceedings do not have a system of pre-trial procedures and Japanese civil courts do not enter summary judgment.

6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Japanese civil courts must or may discontinue or stay the civil proceedings in accordance with the Code of Civil Procedures.

For instance, in the event that a party to a lawsuit dies or is dissolved due to a merger, the court must stay the proceedings if no attorney for such party was appointed. In the event that a party receives a bankruptcy order, the court must stay the proceedings for a lawsuit relating to the properties subject to the bankruptcy procedures. In the event that a party to a divorce case dies, the court must discontinue the proceedings.

In the event that a party cannot continue to engage in the proceedings for unavoidable reasons for an unlimited period of time, the court may stay the proceedings. The proceedings shall stay in the event that the court cannot continue its duties due to natural disaster and other unavoidable reasons.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

Unlike in common law jurisdictions, there is no comprehensive discovery scheme (e.g., document production, depositions, and interrogatories) available in Japanese civil proceedings. While the civil proceedings are pending, a party may request the court to order the opposing party or a third party to produce particular documents, with certain limitations set forth in the Code of Civil Procedures. For instance, there is no obligation for a party to disclose: (i) a document relating to matters for which the holder or a certain related person is likely to be subject to criminal prosecution or conviction; (ii) a document concerning a secret in relation to a public officer's duties, which is, if produced, likely to harm the public interest or substantially hinder the performance of public duties; (iii) a document containing any fact which certain professionals (e.g., a doctor, an attorney-at-law, a registered foreign lawyer) have learned in the course of their duties and which should be kept secret; (iv) a document containing matters concerning technical or professional secrets; or (v) a document prepared exclusively for use by the holder. In order to render a document production order against a third party, it is necessary for the court to ask such third party's opinion in advance.

Under the Code of Civil Procedures, a potential plaintiff may obtain a court order of preservation of evidence before filing a lawsuit if there are circumstances where it would become difficult to use evidence, unless such evidence is reviewed in advance; this order essentially serves as an order of pre-action disclosure of evidence.

In addition, any person is allowed to peruse the case record of the civil proceedings, including briefs and evidence submitted by the parties, at the courthouse pursuant to the Code of Civil Procedures. However, the party to the case is entitled to file a petition requesting the court to render an order to restrict the perusal of documents constituting private information and trade secrets by any third party.

In the current Japanese civil proceedings, there are no special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

Unlike in common law jurisdictions, there is no concept of attorney-client privilege or other privilege to protect attorney-client communication or attorney materials under Japanese law.

However, under the Code of Civil Procedures, attorneys have the right to refuse testimony concerning the communication with the client and are not obliged to produce the documents exchanged with the clients. While clients do not have the right to refuse testimony concerning the communication with their attorneys, clients are not obligated to produce the documents exchanged with their attorneys under the prevailing view of the Code of Civil Procedures.

7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

Please see question 7.1.

7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

Under the Code of Civil Procedures, each party must submit documentary evidence by itself, in principle, and the court provides assistance for disclosure for the parties to a certain extent. For instance, as explained in question 7.1, the court may render, at the request of a party to the lawsuit, an order against the opposing party or a third party to produce particular documents.

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7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

A party to a lawsuit who obtained the documents through the court's order of production of documents may submit a part of, or the whole of, such documents as documentary evidence to the civil proceedings. Once the documents are submitted to the civil proceedings as documentary evidence, there is no restriction on the use of the documentary evidence by the parties unless the court renders an order of restriction on perusal of such documentary evidence, in which case the parties are obliged not to disclose such documentary evidence to any third party.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

Evidence must be submitted to the hearing procedures by the parties, and evidence that has not been submitted to the hearing procedures shall not be taken into consideration in finding facts as the basis of judgment to be rendered by the court. Parties must submit evidence in order to prove that the alleged facts constituting the elements of the claim or the defence are highly probable. When rendering a judgment, the court shall decide whether or not the allegations on facts are true in light of the result of the examination of evidence and based on its free determination.

8.2 What types of evidence are admissible, and which ones are not? What about expert evidence in particular?

Authenticity of documentary evidence must be attested in order for the evidence to be admissible as the basis of the judgment. There are no particular limitations on the forms of evidence that may be admissible. No hearsay rules are applied to evidence in Japanese civil proceedings. There are no specific rules on admissibility of expert evidence.

8.3 Are there any particular rules regarding the calling of witnesses of fact, and the making of witness statements or depositions?

A party to the lawsuit may make a request for witness examination to the court and the court determines whether or not such witness examination is to be conducted, taking into consideration whether it is necessary to conduct such witness examination for the purpose of finding the relevant facts. Upon making such request, a party usually submits a written statement of the witness in question to the court in order for the court to consider whether to call the witness. Depositions are not available in Japanese civil proceedings.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Are there any particular rules regarding concurrent expert evidence? Does the expert owe his/her duties to the client or to the court?

A party to the lawsuit may submit to the court, as documentary evidence, an expert report prepared by an expert appointed by such party. In order to examine the credibility of such report, the opposing party may request the court to conduct cross-examination of the expert.

Furthermore, a party may request the court to appoint an expert to provide an expert opinion and the court then determines whether or not it is necessary to appoint such expert. Once an expert is appointed by the court, such expert is obliged to give an expert opinion in the relevant field in which he/she has expertise.

There are no particular rules regarding concurrent expert evidence under Japanese law.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

Japanese civil courts are empowered to render a formal judgment to affirm or reject a claim on the merits after the hearing procedures are concluded. Regarding monetary claims, the courts may render a declaration of preliminary execution along with the judgment in favour of a plaintiff, which enables the plaintiff to preliminarily execute the judgment even if the defendant files an appeal (however, if the defendant files a petition for a court order to suspend the preliminary execution of the judgment upon filing an appeal, the court is likely to render such order on condition that the defendant submits a security deposit, the amount of which is determined at the discretion of the court).

The courts are also empowered to render a judgment rejecting a claim which does not fulfil prerequisites for bringing the claim to the court, such as the court's jurisdiction over the case.

Japanese civil courts are also empowered to render an order without going through the hearing procedures, which includes an order to produce documents described in question 7.1 and an order of provisional attachment under the Civil Preservation Act described in question 3.2.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Japanese courts have powers to make rulings on the delinquency charges and interests incurred for the claims on the merits in accordance with the relevant statute. They can also make rulings on which party shall bear the litigation costs, not including attorney's fees, when rendering a formal judgment on the merits.

9.3 How can a domestic/foreign judgment be recognised and enforced?

Domestic judgments with "title of obligation" (*saimu-meigi*), including a final and binding judgment and a judgment with declaration of preliminary execution, can be enforced by obtaining a certificate of obligation from the court.

Monetary judgments can be enforced by attaching the properties of the debtor. Judgments requiring conducts by debtor can be enforced by obtaining an indirect compulsory order under which the debtor must pay penalties for disobedience of the judgment.

A final judgment rendered by a foreign court can be enforced in Japan by obtaining an execution judgment from the competent Japanese court. In order to obtain such judgment, the foreign judgment must fulfil the requirements provided by the Code of Civil Procedures that: (i) the jurisdiction of the foreign court is admitted by local law or by treaty; (ii) the losing defendant has, (a) received the service of the summons or orders necessary to commence

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procedures, excluding service by public notice and other similar service, or (b) responded in the action without receiving the service; (iii) the contents of the judgment and the procedure are not contrary to the public order or good morals of Japan; and (iv) there is a reciprocal guarantee regarding the recognition of judgments between Japan and the relevant foreign jurisdiction.

9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

No specific grounds for an appeal to a High Court (*koso* appeal) are provided under the Code of Civil Procedures, and the grounds include error in fact-findings and the application of law in the judgment. An appeal to the Supreme Court (*jokoku* appeal) can be made on the ground that the High Court judgment contains a violation of the Constitution or on the ground that the procedures in the lower court contains any of the material illegalities set forth in the Code of Civil Procedures. In addition, parties may file a "petition for admission of a *jokoku* appeal", and the Supreme Court may accept the petition as a *jokoku* appeal if it deems that the case involves an important issue.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

During the course of civil proceedings, Japanese courts tend to seek an opportunity to suggest amicable settlement of disputes before the court (judicial settlement). It is common for the court to ask the parties whether there is any chance of judicial settlement immediately before moving to witness examinations or immediately after completing witness examinations (i.e., before concluding the proceedings to start preparing a judgment). Once the court considers that there is a chance of reaching judicial settlement, the judge tends to have discussions with a plaintiff and a defendant respectively, and make an attempt to form terms and conditions agreeable by both plaintiff and defendant, persuading the parties to make concessions. When an agreement is reached, it is put into the court record and the court record has the same effect as a final and binding judgment. Many civil cases are resolved by judicial settlements in Japan.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

In Japan, mediations, particularly civil mediation procedures before the court, are frequently used as a method of alternative dispute resolution. Mediation committee members, as opposed to professional judges, are in charge of handling the procedures and facilitating settlement discussions between the parties. Both parties may terminate the procedures at any time. Once the settlement terms are agreed by the parties, the settlement terms have the same effect as the final and binding judgment rendered by the court through formal lawsuits.

Arbitrations are also frequently used as a method of alternative dispute resolution. In particular, agreements on international commercial transactions involving Japanese corporate entities usually include an arbitration clause.

The Japanese Government has established administrative ADR bodies or systems providing opportunities for alternative dispute resolution in the field of labour and employment disputes, financial and insurance disputes, construction disputes and so forth.

In addition, certified dispute resolution business providers are providing various alternative dispute resolution procedures in specific areas of law and practice.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

The Civil Mediation Act governs the civil mediation procedures described in question 1.1. The Arbitration Act, which was enacted in 2003 in line with the UNCITRAL model law, governs the arbitration proceedings. The Act on Promotion of Use of Alternative Dispute Resolution was enacted in 2004 and provides the requirements for qualification of certified dispute resolution business providers.

1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Arbitration can only be used for disputes which can be settled between the parties. In the area of labour and employment law, arbitration agreements for individual labour relationships shall be void under the Arbitration Act. Arbitration agreements for contracts between consumers and business operators can be terminated by consumers under certain circumstances.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, force parties to arbitrate when they have so agreed, or order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

Japanese courts provide assistance to parties who wish to utilise alternative dispute resolution in various ways.

For instance, the court will force the parties to arbitrate by rejecting a claim brought to the court by the parties who have entered into an arbitration agreement which covers such claim. The Arbitration Act allows the court to issue interim orders such as provisional attachment under the Civil Preservation Act even before the arbitral tribunal is established and during the course of arbitration proceedings. The Arbitration Act also empowers the court to assist an arbitral tribunal and parties in taking evidence if the arbitral tribunal finds it necessary.

In addition, the court may order the parties to mediate in the civil mediation procedures in certain cases where it is necessary to obtain experts' opinions in order to further analyse the issues in dispute and facilitate settlement discussions between the parties.

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1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

Arbitral awards are final and binding and, therefore, there are no rights of appeal from arbitral awards under the Arbitration Act, provided that a party may file a petition for a court order to set aside arbitral awards if there are exceptional reasons specifically set forth in the Arbitration Act.

If parties reach a settlement through the civil mediation procedures, the settlement terms have the same effect as a final and binding court judgment rendered through formal lawsuits. Even if a petition for civil mediation is filed by a petitioner, a respondent is not obliged to attend the mediation procedures and the procedures will terminate if the respondent does not attend (while the Civil Mediation Act provides that an administrative fine is imposed on a party who did not attend without due reasons, it is unlikely that such fine is actually imposed).

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

The most major arbitration institution in Japan is the Japan Commercial Arbitration Association (JCAA) for both domestic and international cases. For domestic cases, arbitration centres established by local bar associations are frequently used. For disputes involving specific areas of law, the Japan Intellectual Property Arbitration Centre (JIPAC) handles intellectual property disputes. The Japan Sports Arbitration Agency (JSAA) handles sports-related disputes and the Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange (TOMAC) deals with commercial and maritime matters.

In order to initiate the civil mediation proceedings, a petitioner is required to file a petition with a competent Summary Court in principle, provided that it is possible to file a petition with a District Court if so agreed upon in writing by the parties.

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Korea

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

The Korean legal system is a civil law system, originally modelled on the German legal system.

Korean civil procedure is governed by the Korean Civil Procedure Act (KCPA) and its subordinate rules, the Rules of Civil Procedure.

While the KCPA is the main source of civil procedure law, there are several other laws which deal with specific aspects of civil procedure, such as the Civil Execution Act, the Debtor Rehabilitation and Bankruptcy Act, and the Family Litigation Act, among others.

1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

The Korean judicial system consists of three tiers, with the district courts as the lowest tier, followed by the high courts and then the Supreme Court. While no concept of *stare decisis* exists in Korea, in practice, the decisions of the Supreme Court are given considerable weight and are generally followed by lower courts.

The judicial system also consists of certain specialised courts: the Patent Court; the Family Court; the Administrative Court; and the Bankruptcy and Rehabilitation Court. Within the three-tier hierarchy of the Korean judicial system, the Bankruptcy and Rehabilitation Court, the Administrative Court and the Family Court fall within the third (lowest) tier, while the Patent Court falls within the second tier.

Korea also has a specialised Constitutional Court that is separate from the Supreme Court, but also occupies the highest tier in the judicial system. It handles constitutional issues such as the constitutional review of statutes, etc.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

The Pre-Trial Stage

A claimant initiates a civil action by filing a complaint with the competent court. The defendant has 30 days to file its answer. Thereafter, the parties can exchange briefs and further evidence in support of their positions.

The Trial

Trials consist of several hearings held at four- to six-week intervals, during which the parties can continue to file briefs and evidence and engage in oral arguments and witness examination. At the end of the trial, the court enters a written judgment.

From the filing of a complaint to a judgment, a Korean civil case will typically take between six months to two years at the first instance.

Expedited Procedures

Claims relating to money or negotiable instruments that are less than KRW 30 million (approx. USD 26,000) can be heard through small-claims proceedings, in which the court may recommend at the outset of the proceedings that the respondent accept the claims against it and render performance as sought by the claimant. The respondent can object to the court's recommendation within a period of two weeks, after which the dispute proceeds in trial proceedings.

A party that is owed money or other negotiable instruments can also apply for a payment order against the debtor. The court will issue a payment order in favour of the creditor unless it is convinced that the application is groundless. If the debtor raises an objection against the payment order within two weeks, the order loses effect, after which ordinary civil proceedings against the debtor commence automatically.

1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

The Korean courts will recognise an exclusive jurisdiction clause provided that the agreement on exclusive jurisdiction is made in writing and is made with respect to a specific legal relationship.

Where parties agree on the exclusive jurisdiction of a foreign court, the Korean courts will recognise the foreign court's exclusive jurisdiction as long as:

i) the subject matter of the case is not otherwise subject to the exclusive jurisdiction of the Korean courts;

ii) the foreign court is able to exercise jurisdiction over the case pursuant to its own laws;

iii) there is a reasonable link between the case and the foreign court; and

iv) recognising the foreign court's exclusive jurisdiction is not against the public policy of Korea.

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1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

The World Bank's *Doing Business* guide lists the cost of enforcing contracts in Korea at 12.7% of the claim amount.

While the courts generally follow the principle of the losing party bearing the costs, they also exercise their discretion to allocate costs fairly.

The Civil Procedure Costs Act and the Rules on Civil Procedure Costs provide detailed regulation on costs budgeting.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

There are no particular rules about third-party funding in Korea. (See response to question 1.7 below.)

Except for criminal cases, contingency fee/conditional fee arrangements are permissible under Korean law.

1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

Article 6 of the Trusts Act of Korea states that any trust, the main purpose of which is to have the trustee proceed with litigation pursuant to the entrusted rights, shall be null and void. Thus, the assignment of claims or causes of action purely for the purpose of pursuing litigation is prohibited.

There is no express prohibition on third-party funding under Korean law. Indeed, third-party funding remains an unfamiliar concept in Korea and there is little, if any, jurisprudence on the subject. As such, it is possible that in practice, cases of third-party funding may need to be examined to ensure compliance with, *inter alia*, the Trusts Act and the Attorney at Law Act, depending on the particular circumstances of each case.

1.8 Can a party obtain security for/a guarantee over its legal costs?

Under Korean law, the costs that a party can be ordered to compensate to another party are limited under the Civil Procedure Costs Act and the Rules on Civil Procedure Costs. Pursuant to Article 117 of the KCPA, a defendant may obtain security from the counterparty for such legal costs where (i) the plaintiff does not have its domicile, office or place of business in Korea, or (ii) based on the documents on record, it is obvious that the claims are groundless.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

No particular formalities need to be complied with prior to initiating proceedings.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Limitation periods are treated as an issue of substantive law in Korea.

Under Korean law, limitation periods start to run from the date a party becomes entitled to exercise the right in question, or in the case of the breach of a right to forebear, from the date the right is violated (Article 166 of Korean Civil Code (KCC)).

Different limitation periods apply to different types of claims. The limitation period:

i) for contractual claims in general is 10 years (Article 162 of the KCC);

ii) for claims arising out of commercial activity is five years (Article 64 of the Korean Commercial Code); and

iii) for tort claims is three years from the date on which the injured party becomes aware of the damage and the identity of the tortfeasor, but no later than 10 years from the date the tort was committed and the damages arose (Article 766 of the KCC).

Articles 163 and 164 of the KCC provide an exhaustive list of certain types of claims which are subject to shorter limitation periods, even though they may otherwise fall in one of the above categories.

The rights under a final judgment of a court can be exercised for 10 years after the judgment is rendered, regardless of the limitation period of the underlying rights (Article 165 of the KCC).

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

Civil proceedings are commenced by the plaintiff submitting a complaint with the competent court, which the court then serves on the defendant (Article 248 of the KCPA).

In Korea, service of process is carried out by the courts. The primary means of effecting service, and the deemed date of service in each case, are listed below:

i) Personal delivery by a mailman or a court official (the date on which the documents are received by the recipient).

ii) Delivery by mail (the date on which the documents are mailed by the court).

iii) Public notice on the court bulletin board, etc. (for the first service, the notice is deemed to have been served on the date two weeks after the notice is first placed, and for the notice of subsequent documents in the case, service is deemed to be effected on the following day after the notice is placed).

International service can be effected through the Hague Service Convention (the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters) or under the International Judicial Cooperation on Civil Cases Act, i.e. through letters rogatory (where service is to be made in a country that is not a member to the Hague Service Convention).

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3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

Parties can seek pre-action provisional remedies in the form of provisional attachments and preliminary injunctions by applying in writing to the court hearing the dispute or the court with territorial jurisdiction over the area where the subject matter of the provisional remedy is located.

For a provisional attachment, a party needs to demonstrate that it has a *prima facie* valid claim on the merits and that the attachment is necessary. An application for provisional attachment is heard *ex-parte* in most cases. For a preliminary injunction, a party needs to show a *prima facie* case and that future execution of a favourable ruling would be impossible or very difficult without the preliminary injunction. An applicant may be asked (and, in most cases, is asked) to provide security as a condition for being granted a provisional attachment or preliminary injunction.

3.3 What are the main elements of the claimant's pleadings?

The plaintiff's pleadings must contain the parties' names and other identification (such as addresses), the names of their counsel (if any), the remedies sought and the causes of action (Article 249 of the KCPA).

3.4 Can the pleadings be amended? If so, are there any restrictions?

A plaintiff may amend its pleadings up to the close of the last hearing, provided that (i) the underlying basis of the claims remains unchanged, (ii) the amendment does not cause significant delay to the proceedings, and (iii) the amended claims do not fall within the exclusive jurisdiction of a different court.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

A plaintiff may withdraw the whole or part of its suit at any time after filing the suit and before a final judgment is made in the suit (Article 266(1) of the KCPA). (It is important to note that a final judgment in this context refers to a judgment from which there is no further appeal, or for which the time-period for an appeal has expired.) Where the defendant has already made submissions in the suit, the claimant can only withdraw the whole or a part of its suit with the defendant's consent (Article 266(2) of the KCPA).

Where a plaintiff withdraws the whole or part of its suit after a judgment has been issued on the merits of the case (but where the judgment has not yet become final), the plaintiff will be prohibited from filing the same suit in future (Article 267(2) of the KCPA).

As a general rule, courts will allocate legal costs against the claimant in such cases, on the basis that the claimant did not succeed in its claims.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

A defendant is entitled to raise counterclaims or a defence of set-off. The defendant can raise counterclaims in the same proceedings as the claim. The procedure for raising a counterclaim is the same as that for claims.

4.2 What is the time limit within which the statement of defence has to be served?

Once a complaint is filed and properly served on the defendant, the defendant must submit an answer within 30 days (Article 256 of the KCPA).

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

Either party can invite a third party to join ongoing proceedings as an intervener, in which case the third party cannot later deny any incidence of liability established in the proceedings. If any liability is established against the original defendant, the original defendant can thereafter bring proceedings against the third party to pass on or share liability (Article 84 of the KCPA).

4.4 What happens if the defendant does not defend the claim?

If a defendant fails to submit a written answer in response to a claim, under Article 257(1) of the KCPA, the court may render a judgment without any further pleadings by deeming the defendant to have admitted the facts constituting the counts of the claim.

4.5 Can the defendant dispute the court's jurisdiction?

A defendant may dispute the court's jurisdiction before it makes its first oral submission on the merits. If it is found that the court that was originally approached does not have jurisdiction over a case, the case is transferred to the court of proper jurisdiction by the decision of the court with which the complaint was originally filed (Article 34 of the KCPA).

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

Third parties may be joined into ongoing proceedings in the following cases:

i) Where a third party claims that the whole or part of the object of the lawsuit actually belongs to the third party, or that the third party's rights are likely to be infringed as part of the result of the lawsuit, it can apply to become a party in the proceedings (Article 79 of the KCPA).

ii) Where the object of the lawsuit is one that can only be resolved if a third party is added to the proceedings, the third party may be joined as a co-litigant in the case (Article 83 of the KCPA).

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5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Two or more proceedings can be consolidated, provided that both proceedings are related, are of the same kind (i.e. civil cases can be consolidated with civil cases, administrative cases can be consolidated with administrative cases, etc.) and the court has jurisdiction over the consolidated proceedings (Article 141 of the KCPA).

5.3 Do you have split trials/bifurcation of proceedings?

While Korean courts may render interlocutory judgments (Article 201 of the KCPA), Korean courts do not usually bifurcate proceedings in practice, for example between liability and quantum stages or jurisdiction and merits stages.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

Cases are allocated based on the amount in dispute. Cases up to KRW 30 million (approx. USD 26,000) are subject to what may be called a small-claims track. (See question 1.3 above.)

Cases above KRW 30 million and up to KRW 200 million (approx. USD 176,000) are heard by single judges. Cases above KRW 200 million are heard by three-judge panels.

Notwithstanding the above, certain types of cases, such as those relating to negotiable instruments or financial institutions, are heard by single judges regardless of the amount in dispute. Other types of cases, such as those relating to intellectual property or a derivative suit, are heard by three-judge panels.

A three-member panel may also decide to refer a case to a single judge even though the case is originally allocable to the panel. Similarly, a single judge can also decide to refer a case to a three-judge panel.

6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

The courts have exclusive authority to manage a case. The courts (in consultation with the parties and/or their legal representatives) determine the schedule for the hearings. As part of its case management powers, the court has power to stay the proceedings and hold separate hearings for separate issues, such as interim applications.

6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

A court can impose a variety of sanctions if a party disobeys the court's orders or directions:

- If a party disrupts court proceedings, the presiding judge can order the detention of that person and/or the payment of a fine (Article 61(1) of the Court Organization Act).
- The presiding judge can prohibit a person from speaking at the hearing if the person does not comply with a court order (Article 135 of the KCPA).
- The court can prohibit the submission of an allegation or an application for the examination of evidence if a party fails to abide by the due dates set by the court (Article 147 of the KCPA).

6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

The Korean courts do not have the power to strike out all or part of a statement of case.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

There is no equivalent of a common law-style "summary judgment" under the Korean Court system.

6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Courts have the power to effectively stay the proceedings by exercising their discretion in setting the next procedural date (e.g., the hearing date or the judgment date).

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

In Korea, document disclosure is very limited in scope. Korea does not have a pre-action disclosure mechanism, and all disclosure takes place during the trial.

A party may request the court to have the other party disclose documents to be used as evidence in the case. In practice, document disclosure requests are infrequently used because Korean civil procedure allows very limited document disclosure.

There are certain classes of documents that are not disclosable. Documents that are prepared exclusively for the use of their holder, documents whose contents relate to matters that can be qualified as the holder's technical or professional confidential information, and documents held by a lawyer, patent attorney, accountant, etc., whose contents relate to confidential information connected to his/her work, are not subject to disclosure. In addition, documents held by certain relatives, where those documents may lead to indictment or punishment for a criminal offence, need not be disclosed (Article 344(2) of the KCPA).

There are no special rules or practices concerning the disclosure of electronic documents and the above principles apply *mutatis mutandis* to the disclosure of electronic documents.

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7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

Attorneys bear a confidentiality obligation which prohibits them from disclosing any confidential information learned in the course of performing their duties as an attorney (Article 26 of the Attorney at Law Act). The client, however, does not enjoy such protection and must comply with a court order to produce documents, regardless of legal or litigation privilege. In principle, in-house counsel are treated as employees of a company and thus may not refuse to testify or produce documents.

7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

A party may request the court to have third parties disclose documents relevant to the case. When requested, the court will question the third party before deciding if the third party should be directed to disclose documents (Article 347(3) of the KCPA). The court will only order a third party to disclose certain documents if the documents in question meet the requirements for disclosure under Article 344 of the KCPA (such as the ones listed in response to question 7.1 above).

7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

The court has a very central role in disclosure in civil proceedings in Korea. All requests for document disclosure by the parties have to be made to the court, after which the court can decide which documents the parties should disclose, and order the disclosure of those documents. The documents are then produced to the court, which, after examining the documents, includes them in the record.

7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

There are no restrictions on the use of documents obtained in disclosure, as long as the documents are used within the proceedings in which they were produced.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

A court determines whether or not an allegation of fact is true, based on its free and full conviction. In doing so, the court is required to take account of the whole purport of the pleadings and evidence.

8.2 What types of evidence are admissible, and which ones are not? What about expert evidence in particular?

Fact-finding in Korean courts is conducted by judges, and the KCPA confers wide discretion on the courts to determine whether or not an allegation of fact is true. Judges are therefore free to decide the admissibility or non-admissibility of evidence.

In the case of expert evidence, the court similarly has wide discretion to consider evidence and arrive at a conclusion based on its free conviction.

8.3 Are there any particular rules regarding the calling of witnesses of fact, and the making of witness statements or depositions?

Witnesses of fact may be presented by the parties with the permission of the court, which will call them by issuing summons.

Testimony and examination of witnesses is, generally, done orally before the court. However, a court may, if it thinks it reasonable, have a witness submit a written document as a substitute for oral testimony (Article 310 of the KCPA). Korea does not have the equivalent of depositions or interrogatories.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Are there any particular rules regarding concurrent expert evidence? Does the expert owe his/her duties to the client or to the court?

In Korean civil procedure, the court will normally appoint an individual (Article 335 of the KCPA) or an institution (Article 341 of the KCPA) as an expert to provide an expert opinion. There are no particular rules regarding concurrent expert evidence, and all experts owe their duty to the court, and not to the parties. A party can submit written analysis by an expert that it has privately retained, but it may have less evidentiary value than that of the court-appointed expert.

Further, Korean courts may appoint professional examiners and have them participate in the litigation procedures (Article 164-2 of the KCPA) to help the panel understand the case, especially in cases which require professional knowledge and experience such as construction, medical science, and intellectual property.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

There are three types of rulings in Korean civil procedure: judgments; decisions; and orders.

Judgments, *inter alia*, have to be rendered and pronounced by the court (i.e. by a judge or judges sitting as the court). Judgments, once final, have a *res judicata* effect.

On the other hand, decisions have to be rendered by the court (i.e. by a judge or judges sitting as the court), while orders are issued by individual judges. However, both do not have to be pronounced in court. Decisions and orders on substantive issues have a *res judicata* effect, whereas those relating only to procedural matters do not.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Damages: Courts can make rulings for the payment of pecuniary damages, both for non-economic damages and economic damages. In general, Korean civil procedure law does not provide for punitive damages, though some specific statutes do provide for treble damages for certain specific violations, such as the Fair Transactions in Subcontracting Act and the Personal Information Protection Act.

Interest: Korean law recognises both pre- and post-judgment interest. Pre-judgment interest is calculated from the date a payment becomes due, to the date that a judgment is rendered, at a rate (or rates) agreed by the parties or, alternatively, specified in law.

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For post-judgment interest, interest at a rate of 15% *per annum* will begin to accrue following the date a judgment is rendered up to the date of actual payment by the judgment debtor (Article 3 of the Expedition of Litigation Proceedings Act).

Costs: Courts are required to render a decision on costs in their judgments (Article 104 of the KCPA). In principle, the costs of a lawsuit are borne by the losing party (Articles 98 and 101 of the KCPA). The exact amount to be reimbursed by the losing party is determined in accordance with the Civil Procedure Costs Act and its subordinate rules. In the case of legal fees, the prevailing party's legal fees are only compensated up to a certain amount, based on the amount in dispute. The maximum possible compensation for legal fees in relation to the amount in dispute is provided in a table in the Rules Regarding Attorney Fees to be Included in Litigation Costs (issued by the Supreme Court).

9.3 How can a domestic/foreign judgment be recognised and enforced?

A domestic judgment, in principle, is enforceable when it is not subject to further appeal. However, in practice, it is enforceable as soon as it is rendered, because the first instance courts will issue an order for provisional enforcement together with the judgment.

For foreign judgments, Article 217 of the Civil Procedure Act states that a final and conclusive judgment by a foreign court shall be recognised only if the following requirements are met:

i) The foreign court's jurisdiction is recognised under Korean law.

ii) The judgment debtor was lawfully served a service of summons or a document equivalent thereto, or, alternatively, the judgment debtor participated in the foreign proceedings even without being served.

iii) The foreign judgment does not violate the public policy of Korea.

iv) The foreign jurisdiction in question provides the same or similar treatment in recognising judgments of the Korean courts (reciprocity).

9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

The grounds for appeal are much broader under Korean civil procedure than under most common law jurisdictions. An appeal can be made on both points of law and fact. An appeal must be made by filing a written motion of appeal with the court of original jurisdiction within two weeks from the original judgment being served (Article 396 of the KCPA).

On appeal to the appellate court, parties are allowed to introduce new evidence and arguments, and the court considers the case *de novo* and upholds or overturns the lower court's judgment as necessary.

A subsequent appeal from a judgment of the appellate court can be made to the Supreme Court, as the court of last resort. The grounds for appeal to the Supreme Court are strictly limited to questions of law.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

The Judicial Conciliation of Civil Disputes Act (the Conciliation Act) provides for judicial mediation. It empowers the court to refer disputing parties to compulsory mediation at the court's own discretion, and at any point during the proceedings. In addition, the court and/or the judge can recommend an amicable settlement on his or her own initiative (Article 225(1) of the KCPA). Unless a party objects within two weeks from the service of the written recommendation (Article 226 of the KCPA), it becomes final and enforceable and will have a *res judicata* effect (Article 231 of the KCPA).

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

Arbitration is a popular choice for dispute resolution for both domestic and foreign disputes. Korean courts are considered to be arbitration-friendly and their jurisprudence has to date been in line with international best practices.

Mediation is also a frequently used form of alternative dispute resolution. There are two main types of mediation in Korea: judicial mediation; and private mediation.

In judicial mediation under the Conciliation Act, the parties' dispute can be referred to mediation either by the parties themselves or by the court. If the parties are unable to reach a settlement through mediation, if the settlement reached is unreasonable, or if a party does not appear on the mediation date, the mediation judge can issue a decision in place of the settlement, which becomes binding if neither party objects to it within two weeks (Articles 30, 32 and 34 of the Conciliation Act).

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

The Korean Arbitration Act governs arbitrations seated in Korea, and the enforcement of arbitration awards rendered abroad (for foreign awards, the Korean Arbitration Act refers to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), where applicable). The previously extant Korean Arbitration Act was substantially amended by an act of the Korean parliament in May 2016. The amended Korean Arbitration Act came into force on 30 November 2016. (All references to the **Korean Arbitration Act** in this document are to the amended act, unless stated otherwise.)

For mediation, the Conciliation Act governs court-annexed mediation. There is no specific law in place for private mediation.

1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

In the case of arbitration, the Korean Arbitration Act allows (i) all property disputes, and (ii) any non-property disputes which may be settled by the parties through mutual settlement, to be resolved through arbitration (Article 3(1) of the Korean Arbitration Act).

Similarly, the scope of disputes that can be referred to mediation is also very broad. The Conciliation Act states that civil disputes may be referred to mediation (Article 2).

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1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, force parties to arbitrate when they have so agreed, or order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

Where the parties have concluded an arbitration agreement, upon request by a defendant, the courts will dismiss claims falling within the scope of the arbitration agreement (Article 9 of the Korean Arbitration Act) (that said, the court will not compel the parties to arbitrate). Courts are also empowered to grant provisional measures of protection in aid of arbitration (and often do) under Article 10 of the Korean Arbitration Act. Under Article 28 of the Korean Arbitration Act, courts can also provide assistance in the taking of evidence in aid of on-going arbitration proceedings. At the Tribunal's request, the court may also order a witness to appear before the arbitral tribunal or order a document-holder to produce certain documents to the arbitral tribunal.

In the case of mediation, the courts will assist judicial mediation under the Conciliation Act, effectively staying proceedings until the mediation has been concluded.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

Under the Korean Arbitration Act, arbitration awards, whether issued in Korea or abroad, are binding on the parties. Arbitration awards issued in Korea can only be set aside under very limited grounds (essentially the grounds under the UNCITRAL Model Law on International Commercial Arbitration). An arbitration award rendered outside Korea cannot be set aside in Korea. However, it can be refused enforcement in Korea in accordance with the New York Convention or the Korean Arbitration Act (the latter is only applicable where the award is rendered in a jurisdiction not signatory to the New York Convention).

Under the Conciliation Act, a settlement reached by the parties in a mediation has the effect of a settlement in court, which in turn has the effect of a binding judgment.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

The Korean Commercial Arbitration Board (KCAB) is the primary institution in Korea for the provision of alternative dispute resolution services. It provides both mediation and arbitration services. It recently launched its international wing, the KCAB International, to promote and facilitate international arbitration in Korea.

The Korean courts have also set up mediation centres across Korea, which can assist the courts by handling some mediation that would otherwise be handled by judges.

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Luxembourg

Arendt & Medernach SA

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

Luxembourg is a civil law country and has a codified legal system largely based on the French codes. The rules governing civil procedure are laid down in the New Code of Civil Procedure (*Nouveau Code de Procédure Civile*, hereafter the "*NCCP*").

1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

Luxembourg is divided into two judicial districts (Luxembourg and Diekirch). The District Courts (*Tribunal d'Arrondissement*) are the ordinary courts hearing all cases dealing with civil and commercial matters that are not attributed by law to another Court. They also hear appeals against decisions rendered by the Magistrate's Courts that exceed the sum of EUR 2,000. Special chambers of the District Courts are dedicated to the various civil law matters.

Furthermore, jurisdiction for juvenile and guardianship matters is conferred to a special section of the District Courts. The Magistrate's Courts (*Justice de Paix*) have jurisdiction for civil and commercial disputes that do not exceed the sum of EUR 10,000. Decisions handed down by the Magistrate's Courts that do not exceed the sum of EUR 2,000 are not subject to appeal. The NCCP also confers exclusive jurisdiction to the Magistrate's Courts without any limitation as to the financial stakes of the dispute in various specific matters, e.g. disputes with leaseholders or related to wages and pensions. Decisions rendered by the District Courts can be appealed before the Court of Appeal (*Cour d'appel*). The Court of Appeal has jurisdiction to make a new assessment of both the facts and the applicable legal provisions in its judgment. Appeals against judgments of the Court of Appeal may be filed before the High Court (*Cour de Cassation*). The High Court will only rule on matters of law (to the exclusion of facts). Alongside the Prosecutor-General's Office (*Parquet Général*), the Court of Appeal and the High Court form part of the Supreme Court of Justice (*Cour Supérieure de Justice*).

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

Ordinary civil proceedings are instituted by a writ of summons (*assignation* or *citation*) that has to be served on behalf of the applicant (claimant) by a bailiff upon the defending party. Except before the Magistrate's Courts, civil proceedings are normally in writing and representation by a lawyer registered as *Avocat à la Cour* with the Luxembourg Bar is mandatory. The claimant normally files the document instituting the proceedings with the competent court together with the supporting documents after having them duly communicated to the opposing party's lawyer. The parties' lawyers will exchange written submissions and exhibits according to the timetable set by the court. Once the parties' arguments have been sufficiently developed, the court will order the closing of the examination period and set the date of the hearing for the oral pleadings. Arguments or grounds of defence that have not been set out in the written submissions are not admissible during the oral pleadings. After the oral pleadings, the case is deliberated upon by the court who will set the date for the delivery of the judgment. The duration of first instance civil proceedings may vary depending on the number of parties involved and the complexity of the case, as well as the need for expert evidence. The usual length is between 12 and 30 months.

In urgent matters, parties may also start summary proceedings, where a court order may be obtained within a few weeks. However, a court order rendered by the judge sitting in summary matters will only have an interim or provisional effect pending final judgment in the case.

1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

Exclusive jurisdiction clauses are normally recognised by the Luxembourg Courts as long as they are not contrary to any mandatory provision of national or international law.

1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

The costs of civil court proceedings (*frais et dépens*) mainly includes the claimant's bailiff costs, fees of a notary or an expert possibly appointed by the court, and witness and lawyer expenses (*émoluments*). Normally, the unsuccessful party is ordered by the court to pay the judicial costs. These costs do not include lawyer

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fees, however. Normally, each party has to bear the costs of its own lawyer, except when a procedural indemnity (*indemnité de procédure*) is granted by the court to one of the parties (Article 240 NCCP). This procedural indemnity normally covers only a small portion of the total lawyer fees.

In addition, when damages founded on tortious liability are granted by the court, the lawyer fees of the claimant may be considered as being part of the damages he has suffered, so that the defendant will be ordered to bear them. Furthermore, when the judicial action brought against one party is considered as obviously unfounded, the claimant might also be ordered by the court to pay the lawyer fees of the defendant in full on the basis of an abuse of process.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

Apart from the lawyer's obligations to comply with its anti-money laundering duties, there are no particular rules about funding litigation in Luxembourg. Litigation funding should therefore be permissible as long as it does not put the party's lawyer benefitting from it into a situation of conflict of interest between the interests of his client and those of the funder(s). Fee arrangements based completely on the outcome of a dispute (*quota litis pact*) are prohibited for Luxembourg lawyers, however. Fees should normally be fixed based on account of the importance and complexity of the case, the amount of work done by the lawyer, the notoriety and the experience of the lawyer as well as the final outcome of the case.

1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

In Luxembourg, the principle "no pleas by prosecutor" applies. However, the assignment of claims or the subrogation of rights is normally possible, except for claims to uphold purely personal rights (*droits strictement personnels*), such as usufruct rights, habitation rights, authorisations or concessions granted by the public authorities, *etc.*). As explained in response to question 1.6, there are no constraints in principle to third-party litigation funding.

1.8 Can a party obtain security for/a guarantee over its legal costs?

A financial guarantee for costs and damages may be granted by the court upon application by the defendant when the claimant has his domicile or habitual residence outside of a Member State of the European Union, a Member State of the European Council, or a country with which Luxembourg is bound by an international convention providing for an exemption of such a guarantee (Article 257 NCCP). The amount of the guarantee is determined by the court.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

In Luxembourg, there are no pre-trial obligations. For instance, a claimant is not obliged to try to find an amicable solution to or to enter into negotiations with the opposing party before initiating legal proceedings. In ordinary civil proceedings, the proceedings are instituted by a writ of summons that is served on behalf of the claimant by a bailiff upon the defendant.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

The ordinary limitation period (*prescription*) for civil claims in contract and in tort is 30 years. The right to claim extinguishes after the 30-year period has elapsed. Several provisions of the Civil Code also provide for shorter limitation periods (*e.g.* two years for lawyer's fees, three years for wages, five years for lease payments, five years for action for annulment of contracts, two or 10 years for warranty claims against architects and construction companies, depending on whether minor or major works are concerned, *etc.*). For many shorter limitation periods applicable to demands of payment (*e.g.* claims for payment by merchants, claimants and lawyers), there is, after expiry, only a rebuttable presumption that payment has been made. Limitation periods are normally calculated in days and treated as substantive law issues.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

Ordinary civil proceedings are commenced by a writ of summons that is served on behalf of the claimant by a bailiff upon the defendant. Various provisions of the NCCP also provide for the introduction of different types of civil claims by way of an application filed with the court's registry. Except for civil proceedings that remain unilateral during a first stage (*e.g.* application in *exequatur*), the application is notified by the court's registry to the defendant by postal services. The deemed date of service is the date where the document instituting the proceedings is hand-delivered to the defendant or delivered to his domicile. Unless a different procedure is laid down in an international instrument, the service outside Luxembourg is carried out by the bailiff sending a copy of the writ of summons by registered mail with acknowledgment of receipt to the defendant's domicile or residence. If a foreign country does not recognise the service by postal services, the service is carried out through its diplomatic or consular agents.

In the majority of cases, the rules laid down in 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 or in The Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, will be applicable for service outside Luxembourg.

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3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

Several pre-action interim remedies are available in Luxembourg. Through interlocutory proceedings (*référé*), a party may obtain protective or other provisional orders from the President of the District Court, or the judge replacing him, in order to cease a manifestly unlawful disturbance, prevent the destruction of evidence or prevent an immediate risk of harm. Pending the outcome of a dispute, a receiver (*séquestre*) over assets may also be appointed through summary proceedings. In cases of emergency, the judge sitting in summary matters may order all measures which do not encounter any serious challenge or which the existence of a dispute justifies. Interlocutory proceedings may also be used to obtain a provisional order for payment (*référé-provision*) when the obligation to pay is not seriously disputable. Various forms of protective procedures are also available under Luxembourg law in order to obtain security for a claim, *e.g.* the third-party seizure proceedings (*saisie-arrêt*), the commercial conservatory seizure (*saisie conservatoire commerciale*), or the EAPO in cross-border situations within the European Union. The attachment procedure may normally be launched on the basis of an enforceable order or an authorisation from the President of the District Court or the judge replacing him, on an *ex-parte* basis.

3.3 What are the main elements of the claimant's pleadings?

Firstly the claimant has to show that he is entitled to and has legal interest in bringing an action before the court against the defendant. The facts upon which the claim is based shall also be clearly stated and be justified by pieces of evidence or exhibits. Furthermore, the claimant shall clearly indicate the object or purpose of his request (*objet de la demande*) and the legal grounds upon which the latter is based.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Possibilities to amend the object of the claimant's request (*objet de la demande*) are limited, and it is generally accepted that the document instituting the proceedings forms the judicial contract (*contrat judiciaire*) between parties. However, new legal means are normally admissible at every stage of the proceedings.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

The claimant may withdraw his claim at all stages of the proceedings by a withdrawal of proceedings (*désistement d'instance*) or a withdrawal of claim (*désistement d'action*). A withdrawal of proceedings only terminates the ongoing proceedings and does not prevent the claimant from bringing a new claim before court on the same basis, whereas the withdrawal of action definitely extinguishes the right on which the claim was based. However, once the defendant has submitted his first means of defence, an incidental claim or a counterclaim, the withdrawal of proceedings needs to be accepted by the defendant who has a right of refusal under certain conditions. An acceptance by the defendant of a withdrawal of action should normally not be required, regardless of the stage of the proceedings.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

In his statement of defence, the defendant should firstly raise any possible pleas of lack of jurisdiction and inadmissibility of the claim. Furthermore, the defendant should seek to prove that the facts and the legal means on which the claim is based are inaccurate. A counterclaim or request for set-off are normally admissible.

4.2 What is the time limit within which the statement of defence has to be served?

In ordinary civil proceedings, when the case has been filed with the court's registrar and allocated to the competent chamber, the court will set a deadline for the defendant to submit his statement of defence. Normally, a time period of six to eight weeks is allocated to the defendant and an extension might be granted upon request.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

The defendant may, under certain circumstances, summon a third party to join the proceedings (non-voluntary intervention) and request, for instance, that the latter should be ordered to hold him harmless in full or in part of any payment he could be sentenced to make to the claimant (*demande en garantie*).

4.4 What happens if the defendant does not defend the claim?

Where the defendant does not appear before the court to defend the claim after having been validly summoned, a judgment will be rendered in his absence. If the document instituting the proceedings was served personally upon the defendant, the judgment to be rendered will be deemed adversarial (*jugement reputé contradictoire*), whereas otherwise the judgment will be "in default" (*jugement par défaut*). Against a default judgment, there are normally two remedies available to the defendant: an opposition (*opposition*) before the same instance; and an appeal (*appel*) before the Court of Appeal. In contrast, only an appeal is admissible against a judgment deemed adversarial.

4.5 Can the defendant dispute the court's jurisdiction?

Under certain circumstances, the defendant may dispute the local (*compétence ratione loci*) and/or the material (*compétence ratione materiae*) competence of the court seized by the claimant.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

A third party may intervene in the proceedings on a voluntary basis or be summoned to join them. A voluntary intervention is

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admissible only if the third party would be entitled to bring third-party proceedings against the judgment to be rendered, which means that he must have a legitimate, personal and sufficient interest in the outcome of the case. The non-voluntary intervention is normally initiated by the defendant who has an interest in the judgment to be rendered being opposable to a third party, or who makes a warranty call against the third party (*demande en garantie*).

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

When the consolidation of two or more sets of proceedings (*jonction*) is ordered by the court, they will be ruled upon in one single judgment. Normally, the joinder of proceedings is ordered upon request of a party, especially when the cases are closely related or to prevent contradictory judgments.

5.3 Do you have split trials/bifurcation of proceedings?

The disjoinder of proceedings (*disjonction de l'instance*) might also be ordered by the court in the interest of a proper administration of justice.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

The District Courts comprise several chambers dedicated to different types of civil cases. The allocation of cases between the chambers is made by the President of the District Court.

6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

The pre-trial judge (*juge de la mise en état*) has extensive powers during the examination period of the case: the judge will set the time limits for the exchange of the parties' written pleadings and may invite the lawyers to respond to grounds on which they have not pleaded; order joinders and disjoinders of proceedings; decide to hear the parties; appoint a technical expert; or order the transmission, delivery and production of documents, *etc.*

6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

Where one of the lawyers pleading a case has not submitted a written statement within the given time limit, the pre-trial judge may go ahead and decide to close the examination period. Furthermore, when all of the parties' lawyers abstain from submitting their written statement within the given time limits, the pre-trial judge may, after requesting the lawyers' opinion, pronounce a reasoned dismissal order of the case. Finally, the court may, upon request of one party, impose a fine (*astreinte*) in conjunction with an order to enforce an obligation to act.

6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

As explained in response to question 6.3, the pre-trial judge might decide to issue a reasoned dismissal order of the case when the lawyers continuously abstain from submitting their written statements.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

The President of the District Court, or the judge replacing him, has jurisdiction to render summary judgments.

6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

According to the NCCP, the courts have to stay the proceedings in three cases: *(i)* when the outcome of criminal proceedings may have an impact on the solution to be adopted by the civil court (*le criminel tient le civil en état*); *(ii)* when a defendant residing in a foreign country has not appeared and no certificate of service or delivery has been received; and *(iii)* during the time required to conduct a mediation agreed upon by the parties. Furthermore, the courts may decide to stay the proceedings during a certain time in the interest of a proper administration of justice.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

Under Luxembourg law, there is no disclosure procedure as such in civil proceedings. In accordance with the adversarial principle, it relies upon each party producing in due time and on a voluntary basis the necessary evidence to justify its claims. If a party abstains from communicating its supportive documents, the court may, upon request, issue an injunction. Furthermore, the court may, under certain circumstances and even in pre-trial proceedings, order the production of specific pieces of evidence in possession of the opposite party or a third party. However, fishing expeditions are not permissible under Luxembourg law; and, in order to succeed in his request, the claimant has to prove, *inter alia*, which specific piece of evidence is concerned, that it is likely that the piece of evidence exists and is in possession of the opposite or third party, and that it is relevant for the outcome of the dispute. There are no specific rules for the production of electronic documents.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

As explained in the response to question 7.1, there is no disclosure procedure as such in civil proceedings, and consequently there are no specific rules on privilege either. However, information, correspondence or written documents provided by a client to a

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lawyer for the purposes of legal advice or litigation are normally covered by the lawyer's obligation of professional secrecy.

7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

As explained in response to question 7.1, third parties may only be obliged to disclose specific pieces of evidence under exceptional circumstances.

7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

As explained in the response to question 7.1, there is no disclosure procedure as such in civil proceedings under Luxembourg law, but the production of specific pieces of evidence may be ordered by the court under certain circumstances.

7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

As explained in the response to question 7.1, there is no disclosure procedure as such in civil proceedings. As a general rule, documents communicated during civil proceedings fall under the lawyers' obligation of professional secrecy and may only be used by them in the framework of the case in which they were actually disclosed. However, unless the parties are also bound by professional secrecy rules or contractual obligations of non-disclosure, they may use the disclosed documents in another context (as long as such usage remains legitimate and legal).

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

One of the basic principles of evidence in Luxembourg is that the burden of proof lies upon the claimant who requests the performance of an obligation. Furthermore, a debtor has to prove that he has fulfilled his obligation. For legal acts relating to claims exceeding EUR 2,500, a notarial or private deed must be executed and testimonial evidence is normally not admissible against or beyond a written instrument.

8.2 What types of evidence are admissible, and which ones are not? What about expert evidence in particular?

According to the Civil Code, the recognised types of evidence that may be admissible are written, documentary evidence, testimonial evidence, presumptions, confessions and declarations under oath. For technical questions or proof of a foreign law, the parties may produce expert evidence or the court may appoint an expert.

8.3 Are there any particular rules regarding the calling of witnesses of fact, and the making of witness statements or depositions?

As indicated in the response to question 8.1, testimonial evidence is normally not admissible against or where it goes beyond the content of written evidence. Indirect testimony on facts is also normally not admissible. The description of the facts to be proven by testimonial evidence must be sufficiently precise and relevant for the outcome of the proceedings. Witness statements shall be handwritten and certain mandatory particulars are foreseen by the NCCP.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Are there any particular rules regarding concurrent expert evidence? Does the expert owe his/her duties to the client or to the court?

A party may instruct an expert unilaterally, but in the majority of cases the court will appoint its own expert upon request by one of the parties in order to ensure that the expert is independent and impartial. Court experts have to observe the rules of adversarial debate during the whole expertise procedure and owe their duties to the Court. Normally, when the parties submit concurrent expert evidence, the court may appoint another expert in order to assist it in developing an impartial opinion.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

As explained in the response to question 3.2, the President of the District Court, or the judge replacing him, sitting in summary matters, has jurisdiction to render protective, interim or provisional orders (*ordonnances de référé*) which may, under certain circumstances, be obtained on an *ex-parte* basis. In ordinary civil proceedings, a distinction can be made between *(i)* final judgments (*jugements définitifs*) closing the proceedings by ruling on all the questions raised by the parties, *(ii)* partial judgments on the merits, and *(iii)* interlocutory judgments (*jugements purement avant dire droit*). An appeal is normally not admissible against purely interlocutory judgments that do not rule on the merits of a case and, for instance, only appoint a technical expert.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

As explained in the response to question 1.5, the unsuccessful party is normally ordered by the court to pay the costs of civil court proceedings (*frais et dépens*), which do not include lawyer fees. Furthermore a procedural indemnity (*indemnité de procédure*) may be granted by the court to one party (Article 240 NCCP), which normally covers only a small portion of the total lawyer's fees. In addition, when damages founded on tortious liability are granted by the Court, the lawyer fees of the claimant may be considered as being part of the damages he has suffered, so that the defendant will be ordered to bear them. Furthermore, when the judicial action brought against one party is considered as obviously unfounded, the court may award punitive damages and order the claimant to pay the lawyer fees of the defendant in full on the basis of an abuse of process.

9.3 How can a domestic/foreign judgment be recognised and enforced?

In ordinary civil proceedings, a domestic judgment becomes enforceable after having been served upon the opposing party by the claimant. Enforceability of a judgment of first instance is suspended when an appeal is brought against it (except when the provisional

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execution of a decision was ordered by the court). However, an appeal against a judgment rendered by the Court of Appeal has normally no suspensive effect and the judgment remains enforceable after having been served upon a party by the party seeking to enforce it. As regards foreign judgments, an *exequatur* procedure is normally required for their recognition and enforceability in Luxembourg, unless otherwise provided for by an international instrument.

9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

In ordinary civil proceedings and except where there is an extension on account of distance (*délai de distance*), the time limit for lodging an appeal is 40 days after the judgment at first instance has been served by a bailiff upon the opposing party. For default judgments, an appeal is admissible only after the 15-day time limit for opposition has expired. The appeal is lodged through a writ of summons served upon the appellant of the other party.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

According to the NCCP, it is part of the judge's mission to reconcile the parties. A complete or partial reconciliation of the parties may be recorded in the minutes signed by the judge and the parties. Such minutes constitute an enforceable title.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

The main alternative dispute resolution (ADR) methods in Luxembourg for civil and commercial cases are arbitration, mediation, the Consumer Ombudsman and the Ombudsman. Arbitration can provide a faster resolution of national and international disputes and offers a certain degree of confidentiality. *Ad hoc* arbitration is more often used than institutional arbitration, administrated in Luxembourg by the Arbitration Centre of the Chamber of Commerce in accordance with the procedural rules of the International Court of Arbitration. Conventional and judicial mediation may also be sought by the parties or by the judge. Mediation can be a very effective tool in the resolution of disputes between consumers and professionals, both of which may submit a complaint on goods and services purchased in Luxembourg to the Consumer Ombudsman. Finally, the Ombudsman receives and handles complaints of physical and legal persons against the public administration and mediates between them.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Arbitration and mediation are governed by Articles 1224 to 1251, and Articles 1251-1 to 1251-24 of the NCCP, respectively. The Ombudsman function was created by the Law dated 22 August 2003 establishing a mediator. The rules applying to the Consumer Ombudsman are set out in Articles 421-1 to Article 423-2 of the Consumer Code, as introduced by the Law dated 17 February 2016.

1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

A resolution by arbitration may concern all disputes relating to freely disposable rights; matters involving the status and the legal capacity of persons, divorce, separation, *etc.* are thus excluded. Furthermore, parties cannot resort to arbitration *(i)* in areas where the mandatory competence of a national jurisdiction is foreseen, and *(ii)* where the arbitral award may have an "*erga omnes*" effect and consequently affect third parties. Conventional and judicial mediation on civil and commercial matters are authorised where they do not concern *(i)* rights and obligations which are not at the parties' disposal, *(ii)* public policy provisions (*ordre public*) or (*iii*) the State's liability for acts taken or omissions made in the exercise of its public authority. The Ombudsman exclusively intervenes in relation to conflicts between individuals and public authorities. Complaints on financial services, travel agency services, postal and telecommunication services and water and energy supply fall outside the competence of the Consumer Ombudsman and are normally attributed to the national regulatory authorities of the different sectors.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, force parties to arbitrate when they have so agreed, or order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

If a mediation clause was validly agreed by the parties prior to the occurrence of the conflict, the court or the arbitrator must suspend the proceedings at the request of one of the parties and until the mediation is terminated. With the agreement of all parties, the court may also suspend ongoing proceedings and appoint a mediator. In case of a valid arbitration clause, the court before which an action is brought must decline jurisdiction upon request of one of the parties. Notwithstanding an arbitration clause, the President of the District Court, or the judge replacing him, remains normally competent to adopt interim measures.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

In order for a national or foreign arbitral award to become enforceable in Luxembourg, the President of the District Court must issue an enforceability order or grant an *exequatur*, as the case may be. An action for annulment lodged before the competent court

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against the national arbitral award is also envisaged by Article 1244 of the NCCP. Grounds for annulment may include the violation of public policy or defence rights, the absence of a valid arbitration agreement, or the violation of the adversarial character of the arbitral award. As to the enforceability of mediation agreements, a homologation must be granted by the competent national court according to the procedure set forth by Articles 1251-21 to 1251-24 of the NCCP. The recommendations issued by the Ombudsman and the solutions proposed by the Consumer Ombudsman are not binding instruments.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

Luxembourg's major ADR institutions include the Arbitration Centre, the Ombudsman, the Consumer Ombudsman, and the Centre of Civil and Commercial Mediation.

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Malaysia

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

The Malaysian legal system is primarily based on the common law legal system. The civil procedure in Malaysia is governed by the Rules of Court 2012 ("**ROC**").

1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

The civil courts in Malaysia are divided into the Subordinate Courts and Superior Courts. The Subordinate Courts consist of the Magistrate Courts and the Sessions Courts. The Superior Courts consist of three tiers – the High Court (which consists of the High Court of Malaya and the High Court of Sabah and Sarawak), Court of Appeal and Federal Court. There are also various specialist courts within the civil High Court such as the Construction Court, Intellectual Property Court and the Admiralty Court.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

There are generally four main stages in a civil proceeding, namely the filing and closing of pleadings, pre-trial case management, trial and post-trial submissions.

A civil action is generally commenced by the filing and service of a writ. A defendant then has 14 days to enter appearance to dispute the action. If no Statement of Claim was filed together with the writ, the plaintiff has 14 days after the entry of appearance to file and serve the Statement of Claim. The defendant then has 14 days to file and serve a defence and counterclaim (if any). Thereafter, the plaintiff has 14 days to file a reply to defence and a defence to counterclaim (if required). Pleadings will be deemed closed 14 days after the plaintiff serves a reply to defence, or if no reply is served, 14 days after the defence and counterclaim are served.

Thereafter, the action will be set down for pre-trial case management, where directions will be issued by the court to prepare the matter for trial; this will take approximately two to three months. Trial of the matter is then fixed, and at the conclusion of the trial, the court will usually allow counsels one to two months to prepare their submissions and reply submissions before a post-trial submission hearing is fixed. A judgment will then be delivered by the court.

There are no provisions for expedited trials in Malaysia. However, there are interlocutory applications that may be filed for the purposes of expediting the trial process, such as discovery applications and applications to dispose cases on points of law.

1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

The Malaysian courts would generally uphold exclusive jurisdiction clauses. However, because the courts' jurisdiction is provided by law under section 23 of the Courts of Judicature Act 1964 ("**CJA**"), it is ultimately a matter for the discretion of the court, having regard to all the circumstances of the particular case, whether to adjudicate upon the claim even where parties have agreed on an exclusive jurisdiction clause. Based on case law precedents, it can be seen that the courts will only override an exclusive jurisdiction clause and allow the matter to proceed in Malaysia where it can be shown to the courts that there are exceptional circumstances to justify a challenge to an exclusive jurisdiction clause.

1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

As a general rule, the losing party in a matter is required to pay legal costs to the winning party on a 'party to party' basis. In assessing and approving the quantum of getting-up fee that is to be paid, the court will consider the list of factors provided under Order 59 rule 16(1) of the ROC which includes factors such as the complexity of the matter, the specialised knowledge and responsibility required by the solicitor or counsel and the number and importance of the documents relied upon.

As for rules in relation to budgeting, Order 59 rule 10 of the ROC states that the court has a discretion to disallow any costs where it can be shown that the party's conduct had unnecessarily or unreasonably protracted, or added to the costs or complexity of those proceedings.

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1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

Section 112 of the Legal Profession Act 1976 ("**LPA**") explicitly prohibits contingency fee/conditional fee arrangements. However, under section 116 of the LPA, advocates and solicitors may enter into an agreement for costing contentious business and the list of considerations in determining the amount of legal fee is provided under rule 11 of the Legal Profession (Practice and Etiquette) Rules 1978, which includes factors such as the time, labour and skill required, the novelty and difficulty of the question involved and the amount in controversy.

1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

A statutory assignment of legal rights as well as all legal and other remedies for the same can be done under section 4(3) of the Civil Law Act 1956 ("**CLA**"). However, four conditions must first be satisfied, namely: (i) the assignment is in respect of a debt or other legal chose in action; (ii) the assignment must be in writing under the hand of the assignor; (iii) express notice in writing of the assignment must be given to the debtor, trustee or other person from whom the assignor would have been entitled to claim the debt or chose in action; and (iv) the assignment must be absolute and not purporting to be by way of charge only.

A non-party to a litigation proceeding is not permitted to finance proceedings under the Champerty Rule.

1.8 Can a party obtain security for/a guarantee over its legal costs?

Yes, a party that is defending a claim in court may make an application to court for security for costs to be provided. This is expressly provided under Order 23 of the ROC. Having regard to all the circumstances of the case, the court may grant an order for security for costs if it thinks just to do so. The most common grounds on which the court will grant security for costs includes where (i) the counterparty is a company or individual that is not a resident of Malaysia and has no assets within the jurisdiction; and (ii) the financial position of the counterparty is such that it would be impossible to recover legal costs even if the party is successful in defending the claim in court.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

There are no particular formalities that must be complied with before commencing proceedings. That said, parties may be bound by a mandatory negotiation/mediation clause in a contract whereby they are required to attempt settlement by negotiation/mediation before commencing proceedings in the event that the negotiation/mediation fails.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

The limitation periods which apply to different classes of claim can be found in the Limitation Act 1953 ("**LA**"). The limitation period for actions of contract and tort is six years from the date of the breach or tortious act. Actions to recover rent have a limitation period of six years from the date on which the arrears of rent become due. Actions to recover land, to enforce judgment and to recover a principal secured by a charge or to enforce a charge have a limitation period of 12 years. The limitation period for wrongful death claims by an estate of a deceased is three years from the date of death of the deceased. Actions for fraudulent breach of trust have no limitation periods. The issue of limitation is treated as a procedural law issue.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

Civil proceedings may be commenced either by way of a writ or an originating summons.

Applying Order 10 of the ROC, both writs and originating summons may be served either personally or by prepaid A.R. registered post to the defendant's last known address within one month from the date of issue. Where it is impracticable for any reason to serve on the defendant personally, substituted service (service by advertisement and posting at the last known address and in court) may be applied for. The writ or originating summons will be deemed to have been duly served on the date that is endorsed on the writ or acknowledgment letter or if by way of substituted service, 14 days after the last mode of substituted service.

The courts are usually exceedingly careful when granting leave for service out of jurisdiction, and generally, service out of jurisdiction must follow the rules of service provided by that country.

There is no expressly stated preferred method of service of foreign proceedings in Malaysia. It may be served in accordance to how a domestic proceeding may be served.

3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

There are several pre-action remedies available in Malaysia, such as injunctions, pre-action discovery and Anton Piller Orders.

The main criteria to satisfy for an injunction application is: (i) whether there is a serious question to be tried; (ii) whether damages would be an adequate remedy; and (iii) whether the balance of convenience tilts in favour of the applicant.

An application for pre-action discovery of documents may be made under Order 24 rule 7A(1) of the ROC for the purpose of or with a view of identifying possible parties to any proceedings. Importantly, the application must specify or describe the documents

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sought for and show that the documents are relevant to an issue of the claim and the person against whom the order is sought is likely to have or have had them in his possession, custody or power.

As for Anton Piller Orders, it is a special interim application under Order 29 of the ROC which, if granted by the court, would permit the plaintiff's representatives to enter into a defendant's premises to search and seize incriminating material or evidence which the defendant might destroy so as to defeat the ends of justice. The main criteria for obtaining an Anton Piller Order are: (i) that there must a strong *prima facie* case against the defendant; and (ii) that there is a real possibility that the defendant may destroy such materials.

3.3 What are the main elements of the claimant's pleadings?

A plaintiff only has to state the material facts relied on in its pleadings. Remedies claimed by the plaintiff must also be specifically stated. While general damages should be pleaded, the sum must not be stated.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Yes, pleadings can be amended at any stage of the proceedings but there are conditions. The general rule is that the amendment of pleadings is allowed to be made once without requiring leave of court before the close of pleadings. Under Order 20 rule 5 of the ROC, where pleadings are closed or deemed to be closed, the court may at any stage allow amendment of the pleadings on such terms as to costs or otherwise as may be just. Generally, the court will allow an amendment application when: (i) the application is done in good faith; (ii) the prejudice caused to the other side can be compensated by costs; and (iii) the amendments would not turn the suit from one character to another of inconsistent character. However, if the application is done at a later stage, a cogent and reasonable explanation as to the delay must also be provided.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

Under Order 21 of the ROC, a plaintiff may withdraw any particular claim against a defendant no later than 14 days after the service of the defence without leave of court. A defendant may withdraw any part of his defence at any time by serving the required notice on the plaintiff. If all parties to an action consent, a claim may be withdrawn without leave of court at any time before trial by producing written consent signed by all parties.

Save as stated above, there can be no withdrawal of any claim without leave of court. Generally, the court will allow such application with costs to be paid to the defendant.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

The defendant has to set out his version of material facts or answers to the plaintiff's pleadings. The plaintiff's pleadings must be specifically traversed or it would otherwise be deemed as admission by the defendant. The defendant can bring a defence of set-off and/or a counterclaim(s).

4.2 What is the time limit within which the statement of defence has to be served?

The statement of defence has to be served within 14 days from the date the statement of claim was served on the defendant, or 14 days after the time limit for entering appearance, whichever is later.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

A defendant may bring a claim for contribution, indemnity or the same relief or remedy claimed by the plaintiff, amongst others, against a third party which is not a party to the main action. A third party proceeding is a separate action from the main action between the plaintiff and the defendant.

4.4 What happens if the defendant does not defend the claim?

The plaintiff can apply for a default judgment against the defendant if the claim is not defended.

4.5 Can the defendant dispute the court's jurisdiction?

Yes, the defendant may dispute the court's jurisdiction under Order 12 rule 10 of the ROC by applying to the court to do so within the time limited for serving a defence.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

Under Order 15 rule 4 of the ROC, two or more persons may be joined together in one action as plaintiffs or as defendants with the leave of the court where some common questions of law or fact would arise, and all rights to the relief claimed in the action are in respect of or arise out of the same transactions or series of transactions.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Yes, under Order 4 rule 1 of the ROC, consolidation of proceedings is allowed where there is a common question of law/fact, the rights to relief claimed arose out of the same transactions, or there is some other reason desirable to court.

5.3 Do you have split trials/bifurcation of proceedings?

Parties may apply for bifurcation of proceedings at the pre-trial stage according to Order 33 rules 2 and 3 of the ROC. Bifurcation of proceedings is also common in complex arbitration disputes in Malaysia.

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6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

Civil cases in Malaysia are allocated according to the claimed monetary amount. Claims of RM100,000 or less will be allocated to the Magistrates Court. Claims of RM1,000,000 or less are allocated at the Sessions Court and claims for more than RM1,000,000 will be before the High Court.

Another factor that is considered when allocating cases is the subject matter of the claim. The Sessions Court has unlimited jurisdiction to try all actions and suits of civil nature on motor vehicle accidents, landlord and tenants and distress actions, but has no jurisdiction on matters relating to the title of immovable property unless consented to by parties.

The High Court has unlimited jurisdiction to hear cases of all matters and specific jurisdiction in matters relating to, *inter alia*, divorce and matrimony, admiralty, bankruptcy, probates and letters of administration.

6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Yes, the courts have power to make pre-trial case management orders and directions for just, expeditious and economical disposal of proceedings under Order 34 of the ROC. There are various interlocutory applications that may be made, such as applications for striking out, summary judgment, security for costs, discovery and/or injunctions.

The order for costs is at the discretion of the court; but generally, and applying Order 59 rule 1 of the ROC, the costs orders that may be made include: (i) the winning party to the application obtains costs of the application; (ii) costs of the application follow the outcome of the main proceeding; and (iii) costs are ordered to be paid by a particular party regardless of whether the party was the successful party in the application or not.

6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

The court has a wide discretion on sanctions that may be imposed. The court may dismiss the action, strike out the defence or counterclaim or make such other orders as it thinks fit.

6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

Yes, the court has, at any stage, a discretion under Order 18 rule 19(1) of the ROC to strike out a pleading and consequently order that action to be stayed or dismissed, or for judgment to be entered when the pleading: (i) has no reasonable cause of action or defence; (ii) is scandalous, frivolous or vexatious; (iii) is prejudicial and unjust; or (iv) is an abuse of court process.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

Yes, a plaintiff may obtain summary judgment against the defendant without trial when it can be shown that the defendant has no real defence or has filed a defence merely to delay proceedings.

6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Yes, the court may, upon application of a party, stay proceedings pending an arbitration decision or pending appeal.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

Order 24 of the ROC governs the rules on discovery in Malaysia. Generally, a party can obtain disclosure of relevant documents that are or have been in the possession, custody or power of the other party. Privileged documents, however, are not required to be disclosed. There are no special rules concerning the disclosure of electronic documents or rules for e-disclosure.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

Privileged documents involving public policy, affairs of state and legal privilege are not subject to discovery. Order 24 of the ROC for discovery is subject to any written law which authorises withholding documents if the disclosure would be injurious to public interest. Affairs of State privilege is usually confined to documents such as military secrets, international affairs and departmental policy documents. Legal professional privilege involves documents and communications made between a lawyer and their client for the purpose of litigation.

7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

Under Order 24 rule 7A(2) of the ROC, an application can be made for discovery of documents by a third party who is not a party to the proceedings.

7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

The court will decide whether a particular document is required to be disclosed or not.

7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

There are no express restrictions on the use of documents obtained

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by disclosure in Malaysia; but, generally, documents obtained by disclosure should only be used for the proceedings in which the documents were given.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

The rules of evidence can be found in the Evidence Act 1950 ("**EA**"). The basic rule of evidence in civil cases is that a party asserting a fact bears the burden of proving that fact on a balance of probabilities and must be proved using the best evidence rule.

8.2 What types of evidence are admissible, and which ones are not? What about expert evidence in particular?

The general rule is that all relevant evidence is *prima facie* admissible, subject to conditions such as hearsay evidence and the best evidence rule. Expert evidence is admissible if it falls under one of the areas set out in section 45 of the EA and the witness is competent and specially skilled in the area to give expert opinion.

8.3 Are there any particular rules regarding the calling of witnesses of fact, and the making of witness statements or depositions?

Under section 118 of the EA, all persons are competent as witnesses unless they are unable to understand the questions asked and give rational answers. In civil proceedings, examination-in-chief by the party who calls the witness is done by way of a prepared witness statement. The witness is then tested and challenged by the counsel of the other party during cross-examination. The party calling the witness will then have an opportunity to clarify the witness's evidence in re-examination.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Are there any particular rules regarding concurrent expert evidence? Does the expert owe his/her duties to the client or to the court?

Order 40A of the ROC sets out the requirements for expert evidence. Expert evidence is to be given in a written report signed by the expert and exhibited in an affidavit sworn to or affirmed by him, testifying that the report exhibited is his and that he accepts full responsibility for it. An expert report must, among other things, give details of his qualifications, details of any literature or other material which the expert has relied on in making the report, and contain a statement setting out the issues which he has been asked to consider and the basis upon which the evidence was given.

The court may direct a discussion between experts for the purpose of requiring them to identify the issues in the proceedings; and, where possible, reach an agreement on an issue. The court may also specify the issues which the experts must discuss. The expert owes his/her duty to the court.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

The civil courts in Malaysia are empowered to issue any types of judgments such as monetary judgments, default judgments and/or summary judgments and grant any reliefs and remedies in law or equity within the limits of their jurisdiction.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

The court has wide powers to award damages, interest and costs, subject to their monetary jurisdiction. The court also has the discretion to fix pre-judgment interest as it thinks fit, save for post-judgment interest, which is presently fixed at 5% *per annum*.

9.3 How can a domestic/foreign judgment be recognised and enforced?

A domestic judgment is recognised automatically and can be immediately enforced using any of the available enforcement methods.

A foreign judgment must be registered before it can be enforced. The requirements for registration are found in section 4 of the Reciprocal Enforcement of Judgments Act 1957 ("**REJA**"). One of the requirements for registration of foreign judgments is that the foreign judgment in question must be from a reciprocating country as provided in the list of countries. A foreign judgment from any other country cannot be registered under the REJA and must be enforced through common law proceedings, which essentially requires a proceeding to be brought and a domestic judgment to be obtained premised upon the foreign judgment. Once a foreign judgment is registered or a domestic judgment obtained premised upon the foreign judgment, the foreign judgment can be enforced just like a domestic judgment.

9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

The High Court can hear appeals from the subordinate courts under section 27 of the Courts of Judicature Act 1964 ("**CJA**"). However, no appeal can be brought to the High Court from a decision of a subordinate court where the amount in dispute or the value of the subject matter is RM10,000 or less, except on a question of law or where it is in relation to the maintenance of wives or children.

The party aggrieved with any judgment or order of the High Court may appeal to the Court of Appeal under section 67(1) of the CJA, subject to the limitations in section 68(1) of the CJA as stated in section I, question 1.2 above.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

Parties are encouraged to settle under Order 22B of the ROC which penalises a party in terms of costs and interests for not accepting a

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settlement offer if the judgment obtained by the other party is more favourable than its terms of offer to settle.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

The most common forms of alternative dispute resolution ("**ADR**") in Malaysia are mediation, arbitration and adjudication.

Mediation is a voluntary process governed by the Mediation Act 2012 in which communication and negotiations are facilitated by a third party who acts as the mediator. Parties are free to appoint their own mediator, but can request the Malaysian Mediation Centre of the Bar Council ("**MMC**") to appoint a qualified mediator from its panel if they are unable to arrive at a consensus. Successful mediation will result in the agreements being reduced into writing in a Settlement Agreement signed by the parties. Parties to unsuccessful mediation nevertheless may proceed to pursue litigation or arbitration. Parties maintain full control of the outcome and workings of mediation.

Arbitration is a private process of judicial determination by an independent third party who acts as an arbitrator that is governed by the Arbitration Act 2005 ("**AA**"). Arbitration is similar to court proceedings in that the arbitrator decides the outcome of the dispute like a judge, but the parties have discretion to decide on the number of arbitrators, the appointment of the arbitrator and the rules to be applied during the arbitration.

Adjudication is a new process for the resolution of construction disputes, recently introduced by the Construction Industry Payment and Adjudication Act 2012 ("**CIPAA**") and is being increasingly used in construction disputes.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Mediation processes are governed by the Mediation Act 2012. Arbitration processes are governed by the AA and Rules of the Asian International Arbitration Centre. Finally, as mentioned in section II, question 1.1, adjudication processes are governed by the CIPAA.

1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Under section 4 of the AA, any dispute that the parties have agreed to arbitrate may be arbitrated unless the arbitration agreement is contrary to public policy. Some disputes which have been found to be non-arbitrable are disputes relating to any act, duty or functions carried out by a statutory body in the exercise of its statutory powers and matters which fall under the scope of the summary determination procedure for defaults on a registered charge, as held in *Pendaftar Pertubuhan Malaysia v Establishmen Tribunal Timbangtara Malaysia & Ors* [2011] 6 CLJ 684.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, force parties to arbitrate when they have so agreed, or order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

Where there is a valid and enforceable arbitration agreement between the parties, the court may, upon the application of the party, grant a stay of proceedings under section 10 of the AA to compel the dispute to be referred to arbitration instead.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

Mediation processes are not binding and there are no sanctions for refusal to mediate. However, an arbitration award is final and binding and can only be set aside by an application to the High Court on very limited grounds. Similarly, expert determination processes are final and binding. Expert determination is a procedure whereby a dispute is submitted to one or more experts by agreement of the parties. An expert determination can only be set aside when there is evidence of fraud, partiality and fundamental error.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

The main arbitration institution in Malaysia is the Malaysian Institute of Arbitrators ("**MIArb**") and the Chartered Institute of Arbitrators ("**CIArb**"). Other alternative dispute resolution institutions include the Malaysian Mediation Centre ("**MMC**") and the Asian International Arbitration Centre ("**AIAC**").

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In *Chambers Asia-Pacific*, Jack was recognised as a Leading Individual in Dispute Resolution and the publication noted that he received "*extensive praise from clients*". He was also noted as an "*excellent litigator*" in *The Legal 500 Asia Pacific*, and was listed as a Local Disputes Star in *Benchmark Asia-Pacific*.

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Daphne graduated from the University of London with an LL.B. (Hons) degree in 2004 and was awarded book prizes for her outstanding performance in her second and final year LL.B. examinations.

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Netherlands

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

The Netherlands has a civil law tradition that is partially based on the French and partially based on the German system. This tradition lays emphasis on codification in which case law is merely an interpretation of statutory law. The rules of civil procedure are laid down in the Code of Civil Procedure. The Code is complemented by (litigation regulations) procedural rules of the courts.

1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

There are 11 courts of first instance. The courts have a *kanton* subdivision for small claims, regarding labour, tenancy, agency and consumer sales and loan disputes. Furthermore, there are four courts of second instance (i.e. appeal court).

The Enterprise and Business Court of the Amsterdam Court of Appeal (Enterprise Chamber) has exclusive competence to hear matters involving mismanagement and similar corporate issues. The Netherlands Commercial Court (NCC) is expected to open its doors in 2019 and will adjudicate commercial disputes between international (as well as national) companies. The NCC will consist of specialised judges and the proceedings, which are intended to be of a short duration throughout, will be conducted in English.

In addition, certain district courts accommodate divisions that are specialised in certain areas of law, such as intellectual property (The Hague) and shipping and transport (Rotterdam). Provided that certain statutory requirements are met, parties have the right to appeal to one of the four courts of appeal. Judgments of a court of appeal may be challenged in cassation at the Supreme Court.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

Claims lodged in ordinary civil proceedings are initiated by a writ of summons (statement of claim). Subsequently, the defendant files a statement of defence within 6–12 weeks. Thereupon the court will either order parties to appear before the court or (standard in complex cases) to submit additional written statements (timeframe: 12–24 weeks). An interim or a final judgment takes another 6–24 weeks. In case of motions, interim judgments and the rendering of evidence have varying timeframes. A provisional judgment in preliminary relief proceedings is obtained considerably more quickly, varying from the hearing or within one day (in cases of extreme urgency) to a couple of weeks.

With some courts, civil proceedings can be conducted already digitally. This is based on a quality and innovation programme (in Dutch: *Kwaliteit en Innovatie Rechtspraak*, KEI). This programme intends to bring increased efficiency with a stronger case management role for the court and its judge. As a consequence, shorter timeframes may apply for some stages in civil proceedings.

1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

Both the EU Regulation Brussels I (recast) and the Dutch Code for Civil Procedure allow for exclusive jurisdiction clauses, provided that they are agreed in writing. An exclusive jurisdiction clause is not allowed, or its application is limited in certain cases, including cases relating to the validity of registrations at public registries and in labour cases.

1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

Both the claimant and the defendant have to pay, within four weeks after (first) appearance, court fees that are contingent on the value of the claim. Parties pay for their own costs; the losing party is usually ordered to cover the litigation costs of the prevailing party (court fees, witness and expert fees and fixed legal fees, based on limited amounts for standard activities). The actual costs and attorney fees incurred by the prevailing party are seldom covered by the amount awarded (see also question 9.2).

Dutch attorneys are required under the Rules of Professional Conduct to discuss the financial consequences of their engagement and of any action. Because it is difficult to predict all eventualities, estimates are often used for well-defined procedural steps.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

Litigation funding by third parties is permitted in the Netherlands,

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except for funding by law firms. There are no particular rules on civil procedure regulating such funding. Lawyers in the Netherlands are prohibited under the Rules of Conduct from providing a '*no win, no fee*' service. Alternative '*fee arrangements*' that are dependent on the outcome of the case (such as basic fee and success fee) are permitted, but have to be reasonable, and the attorney's hourly wage must be cost-effective.

1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

Claims can be assigned to third parties subject to the conditions stipulated in Dutch substantive law. The right to assign a claim may be limited by contract. Third-party financing is allowed except for law firms.

1.8 Can a party obtain security for/a guarantee over its legal costs?

A security deposit can only be required from non-EU plaintiffs that reside in a country without a treaty with the Netherlands, prohibiting the action for a security deposit. Treaties prohibiting such an action include the Hague Convention on Civil Procedure and the Hague Treaty on International Access to Justice.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

Dutch law does not require any particular formality that the claimant must comply with before he initiates proceedings, except for payment of the court fee in advance. A notice of default will often be required in order to enforce one's rights. Pre-trial correspondence is required in cases of mismanagement brought before the Enterprise Chamber (section 2:349 Dutch Civil Code (DCC)) and class actions (section 3:305a DCC).

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

The right to claim specific performance or payment of consideration becomes time-barred after five years after the claim became due and eligible (two years in a consumer sale). The right to claim damages or a contractual penalty becomes time-barred after five years from the day after the injured person became aware of (a) the damage inflicted, and (b) the identity of the person liable. The right to demand the annulment of a resolution of a constituent body of a legal entity becomes time-barred after one year following the publication or notification thereof. Unless otherwise provided by law, a claim becomes time-barred after 20 years. Time limits are treated as a substantive law issue.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

There are two main types of civil proceedings in the Netherlands: initiated by summons (*dagvaarding*); or by an application (*verzoekschrift*). The proceedings by summons is used for ordinary civil suits, and the proceedings by application is used in disputes involving employment, leases, family and certain corporate matters.

The claimant is responsible for ensuring that service takes place. A bailiff serves the summons on the defendant, thereby formally notifying the defendant of the lawsuit. Subsequently, the claimant must file the summons with the Court Registrar before the last business day prior to the date of the formal court appearance as stipulated in the summons.

3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

Once a dispute is pending before the court, each party has the possibility of initiating an interim action or applying for injunctive relief. Examples of interim actions are: a motion contesting jurisdiction; inspection of documents or copies thereof; third-party claims; a request for joinder and intervention; referral and consolidation of cases; and provision of security for litigation costs. It is also possible to claim interim relief (a measure of a provisional nature) for the duration of the dispute and/or to claim an advance payment. Interim remedies can also be lodged in summary proceedings.

3.3 What are the main elements of the claimant's pleadings?

Besides the fulfilment of formalities and statutory required notifications, the pleadings must provide for a detailed description of the nature of the dispute describing the relevant facts, the legal grounds on which the claim is based and the relief sought, as well as setting out and refuting all arguments put forward by the defendant unless these are unknown to the claimant. The claimant must also indicate what evidence is available to support the claim, and list possible witnesses. The claimant must put forward everything important to the case.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Pleadings can be amended at any stage. The claim can be unilaterally decreased up to the moment the court is about to render judgment. The claim and its merits can be amended, adjusted or increased at any stage, unless opposed by the other parties, in which case the court will rule whether the adjustment is contrary to the due process of law and accordingly is not allowed.

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3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

Pleadings can be withdrawn at any stage with the consent of all parties. The claimant can unilaterally withdraw its pleadings, bearing the costs of the proceedings, unless judgment is scheduled.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

The statement of defence contains all reasoned formal and substantive defences as to the alleged facts, rights and points of law. It has to state all available evidence to the defendant, including witnesses. Any alleged pact of right that the defendant does not deny will be assumed to be correct. The defendant may forfeit the right to bring forward formal or substantive defences if he fails to do so in the statement of defence.

Motions for an impleader, to join cases and for referral to a different court have to be filed ultimately with the statement of defence. The statement of defence may contain a motion bar, an interim judgment and counterclaims.

The defendant may bring a counterclaim, to be filed together with the statement of defence, provided that the defendant in the counterclaim is sued, in the same capacity as it appears in the initial claim. The defence of set-off can be brought forward at any stage of the proceedings.

4.2 What is the time limit within which the statement of defence has to be served?

The statement of defence has to be filed with the court within six weeks after the pleadings have been lodged. In ordinary standard proceedings, postponement for another six weeks will be allowed with the consent of all parties for compelling reasons or in case of *force majeure*. In the latter cases and also in complex proceedings, normally further postponements are granted.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

The defendant may implead a third party in indemnification proceedings. A request to this extent is granted if it is conceivable that there is a legal relationship with this third party, based on which this party has a duty to indemnify the impleading party. No substantive connection between the claim in the main proceedings and the claim in the indemnification proceedings is required. The main proceedings and indemnification proceedings remain separate.

4.4 What happens if the defendant does not defend the claim?

A claimant may obtain a default judgment if the defendant fails to appear in court on the date of the formal court appearance. As long as the default judgment has not been rendered, the defendant may still appear in court and defend its case. The court will issue a default judgment awarding the claims of the claimant unless: (i) the claimant did not comply with the formalities; or (ii) the claim is considered to be *prima facie* unlawful or unfounded. If a default judgment is rendered, objection may be lodged within four weeks with the court that entered the default judgment by the defendant ruled against.

4.5 Can the defendant dispute the court's jurisdiction?

The defendant can lodge a motion to dismiss for lack of jurisdiction. This motion must be lodged prior to the statement of defence on the merits, or ultimately together with the statement of defence.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

By impleader, a third party can be involuntarily summoned by one of the parties in a separate third-party proceedings, which is dealt with concurrently with the ongoing proceedings (see question 4.3).

A third party who has an interest in the ongoing proceedings may apply for permission to join the lawsuit or to intervene in it in a joinder; the interested third party supports the position of one of the parties. In the case of an intervention, the interested third party takes up its own position in respect of both the claimant and the defendant.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Proceedings between the same parties can be joined (consolidated) if they concern the same subject matter. The same applies in the event of a close connection between proceedings, whether or not the same parties are involved. For consolidation, the proceedings need to be pending before the same court. If different courts are involved, the case may be referred to the other court. Such request for reference may be succeeded by a request for consolidation.

5.3 Do you have split trials/bifurcation of proceedings?

Although this possibility is not frequently used, bifurcation of proceedings has been developed in case law. Matters may be split for reasons of efficiency.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

As a general rule, cases are allocated in first instance to one of the 11 courts by geographical competence (derived from the residence of the defendant). Within the court, there is an allocation between the *kanton* division for small claims and particular disputes (see question 1.2) and the commercial division. Cases that fall within the competence of a specialised chamber are allocated to these divisions.

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6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Dutch courts have extensive management powers. Courts can instruct for a hearing at any stage in the proceedings.

In proceedings on the merits, the court may set a case management hearing (*regiezitting*) at the request of the parties or *ex officio*. This occurs mainly in complex and extensive civil disputes, involving multiple litigants. Issues which may be discussed are, for example: the order of the procedural actions; party rulings regarding preliminary questions; and continuing legal proceedings on party issues where additional investigation/taking of evidence such as witness examinations is desired.

The court is not bound to party applications except for the request of a plea, which has to be granted when parties did not forward a plea earlier in the proceedings.

6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

Every substantive order other than payment can be reinforced by penalty payments, which are forfeited to the claimant if the order is not performed (in time). Procedural orders cannot be reinforced by penalty payments. The court is allowed to draw the conclusions that it deems appropriate as to merits of the case if a party disobeys such an order.

6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

The courts may dismiss a case or strike out part of a statement of a case if the claim is inadmissible; for example, if the plaintiff does not have a cause of action. As a general rule, the court will dismiss a case in its final judgment after having followed the entire proceedings.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

The summary judges can render summary judgments providing injunctive relief. Moreover, an injunction for the duration of the dispute may be requested in proceedings on the merits already pending (see question 3.2).

6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

The courts are obliged to render a judgment in all areas that are brought before them. The court can stay proceedings in the interest of the proper administration of justice. It can discontinue a case that has been stayed for over half a year. Discontinued cases can be reopened at the motion of one of the parties.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

There are no discovery or disclosure procedures comparable to common law systems in the Dutch judicial system. However, there are instruments available for obtaining further information aimed at establishing the truth.

Interested parties may request inspection of (or copies or extracts from) documents, including electronic documents, from those who have these documents at their disposal. This action may be instituted in summary proceedings or as an interim action in ongoing proceedings. A request can be granted provided: (i) the requesting party has a legitimate interest in obtaining the information; (ii) the existence of the requested specific documents has been established to a sufficient extent (in order to prevent fishing expeditions); and (iii) the records concern a legal relationship to which the requesting party is a party.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

The rules on disclosure acknowledge professional (legal, medical and religious) privilege. In addition, the request for inspection of documents may be refused pursuant to serious reasons, which could, in a particular case, result in a privilege based on a statutory duty of confidentiality.

7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

By way of exception, the application for the production of exhibits may also be extended to a third party, provided that the requirements as set out in question 7.1 are met.

7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

The court will assess the fulfilment of the requirements set forth in question 7.1. It may order additional conditions for certain disclosures, e.g. to protect confidential information, such as depositing documents at the court registry, the blacklining of documents, penalty clauses in case of breach of confidentiality, etc.

7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

The court may, on the basis of substantial grounds brought forward by the opposing party, order certain conditions for disclosure (see question 7.5). If no such specific conditions apply, in general, the disclosed and obtained documents can be used in the proceedings without restrictions.

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8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

A party relying on legal consequences of facts or rights asserted by it will bear the burden of proving these facts or rights, unless a particular rule or the requirements of reasonableness and fairness entail a different division of the burden of proof, provided that the opposing party has challenged stated facts or rights. The claimant needs to provide evidence to substantiate its statements and bears the risk that its evidence is not conclusive in proving the existence of that fact or right. The opposing party has the right to provide refuting evidence. The procedural timing of sufficiently prompt and specific offers of proving (or refuting evidence) is extremely precise. The court has great discretionary power in the assessment of the evidence. For some kinds of evidence, exceptional statutory files apply.

8.2 What types of evidence are admissible, and which ones are not? What about expert evidence in particular?

In principle, all forms of evidence are admissible in civil lawsuits, even if these have been obtained unlawfully. Expert evidence may be furnished by submitting written expert evidence by one of the parties, or by having an expert examined as a witness. The court may, at the request of the parties or on its own motion, order an expert to provide an expert report or to be heard.

8.3 Are there any particular rules regarding the calling of witnesses of fact, and the making of witness statements or depositions?

Witnesses have a duty to appear and render their truthful testimony. If a witness fails to appear, the court can issue a warrant for their arrest. Witnesses enjoy several privileges, including professional privilege, the privilege from self-incrimination and from incrimination of relatives. Witnesses are questioned under oath by the presiding judge and by the parties. The court will draw up an official report of the questioning and a summary of relevant statements, to be signed by the witness.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Are there any particular rules regarding concurrent expert evidence? Does the expert owe his/her duties to the client or to the court?

A court-appointed expert has the duty to fulfil his appointment impartially and to the best of his ability. He must allow parties to comment on the draft report and to make requests; said comments and requests have to be included in the report, which needs to be reasoned.

Furthermore, parties have a duty to cooperate with the investigation of the expert. The court is free to weigh the expert report(s) and there are no specific rules regarding concurrent expert evidence.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

The courts are empowered to issue a wide range of judgments and orders, provided that the claimant has pleaded for its award and has legitimate interest. The most common awards are:

- payment orders, including the payment of consideration, (liquidated) damages and contractual penalties;
- injunction orders, including specific performance, prohibitory orders and mandatory orders;
- declaratory actions/decisions; and
- an authorisation for the claimant to procure the performance of the counterparty, at the latter's expense.

The courts may issue summary and default judgments as well as interim and final judgments.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Only compensatory damages are available; punitive damages are not available. The parties may mutually agree to a penalty clause, which can also be enforced via the court. Damages are in the form of money. At the request of the injured party, the court may rule compensation in another form, including restoration. The court can reduce damages if fairness so requires, but never to an amount lower than the amount of insurance coverage of the party against whom the order has been given.

Interest is, generally speaking, owed from the date that the obligation ought to have been fulfilled, even if that date was (long) before the judgment of the court. The rate of interest is statutory unless the parties have agreed to a different rate of interest.

The court may order the losing party to cover the litigation costs of the prevailing party, such as court, witness and expert fees, and may force compensation for legal fees (see question 1.5).

9.3 How can a domestic/foreign judgment be recognised and enforced?

In civil and commercial matters, the recognition and enforcement of judgments from EU Member States (except for Denmark) is laid down by the recast Brussels I Regulation and some other EU regulations. The recast Brussels I Regulation provides for enforcement without any requirement for declaration of enforceability.

9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

Appeals are lodged by the complainant by serving a notice of appeal to the other party within three months, calculated from the date of the judgment. The appeal period in preliminary relief proceedings is four weeks. The notice of appeal is not required to already contain the reasons for the appeal (grounds for the appeal). The defendants may lodge a cross-appeal, irrespective of whether the appeal period has already lapsed.

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The appeal may be used by complainants both to complain about inaccuracies in the judgment of the lower court, and to rectify their own failings in the previous legal proceedings. Both parties may put forward new facts and new arguments on appeal, unless this has been explicitly waived in the previous proceedings.

The only complaint that can be raised on appeal in cassation at the Supreme Court is that the appellate court interpreted or applied the rules of law incorrectly in its judgment, or that the judgment of the appellate court is incomprehensible in view of what the parties advanced at this court. There is, therefore, no place for new arguments or a discussion of the facts in cassation.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

Judges are expected to encourage a settlement. The court regularly orders a hearing to inquire about possible settlement at any stage of the proceedings. An out-of-court settlement can be recorded in an enforceable court record. The court facilitates parties in this, but does not grant any approval.

In addition, the Dutch system provides for a specific collective arrangement for the settlement of large-scale loss on the condition of court approval (WCAM). Agreements between collective interest groups and the party causing the large-scale loss can be declared generally binding at the Amsterdam Court of Appeal. This (published) generally binding declaration binds the entire group of injured parties, both in the Netherlands and abroad, and enables a settlement with an undetermined number of injured parties. There is no requirement that either the party causing the loss or the injured parties must have a tie with the Netherlands. WCAM proceedings thus can be, and have been, used for global settlements with no far-reaching connection to the Netherlands.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

Most arbitration cases are administered and facilitated by well-organised arbitration institutes, such as the Netherlands Arbitration Institute (NAI) or one of the many specialised arbitration institutes or those aimed at certain market segments, such as the court of arbitration for the building industry (RvA), the arbitration institution for the metal industry and trade, for transport and maritime cases (TAMARA), and recently for complex financial disputes (PRIME Finance). The procedure of binding opinions is organised in a similar manner and is facilitated by many of the aforesaid institutes. In addition, there are registers of advisers, with a specific background and expertise, charged with giving a binding opinion, such as, for example, the Register Valuators (affiliated with NIVR).

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Aforementioned arbitration institutes apply regulations, provide options and advocate contract clauses to be used by the parties. In addition, the parties can opt for an international arbitral tribunal.

The NAI can also be requested by parties to administer and facilitate regulated ending opinions and mediation procedures.

1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

In case of a legal relationship which can be determined solely by the parties, parties are in principle at liberty to opt for a form of extrajudicial (alternative) dispute resolution. In certain branches and in the area of consumer disputes, alternative dispute resolution – e.g., via the general terms and conditions – is regularly prescribed. An example of the area that is exclusively the province of the ordinary courts is the inquiry proceedings before the Enterprise Chamber. Inquiry law concerns an exceptional process in law that may result in a direct intervention in the structure of a company. The powers granted exclusively to the Enterprise Chamber may therefore not be placed in the hands of an arbitrator.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, force parties to arbitrate when they have so agreed, or order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

Since 2007, the Netherlands has fulfilled a pioneering route in the area of court-annexed mediation, and incorporates on a regular basis a provision permitting reference to mediation that applies to nearly all courts.

As to the enforceability of mediation and other types of mediation/negotiation clauses, such clauses have the status of a '*gentlemen's agreement*' to be observed in good faith.

If an arbitration clause has been agreed, the civil court declares that it lacks jurisdiction. An agreement for arbitration does not prevent access to the civil court in order, for example, to impose a prejudgment attachment or to initiate a provisional hearing of witnesses or experts.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

In respect of dispute resolution, clauses that have been declared applicable or that have been agreed on. There is tension between the

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pacta sunt servanda principle (that parties must do what they have agreed to do), and Article 17 of the Dutch Constitution and Article 6 ECHR, that guarantee the right of recourse to the ordinary courts.

In the event of an arbitration clause, the sanction for a party addressing a court directly is clear: in principle, the court must declare itself as lacking competence to hear the dispute (Article 1022 (1) DCCP).

It is established case law that where a court is directly or indirectly approached in a situation where a binding advice clause operates, the claimant will be disqualified from presenting its claims.

Complications may arise when a party finds itself obliged to take protective or urgent measures, for which the alternative dispute resolution scheme makes no provision. In such a case, cutting across the scheme, the option of recourse to a court (if needed in summary proceedings) must remain open to a party.

A clause stipulating the route to an amicable settlement/a mediator is generally seen as an 'additional' form of dispute treatment, and not as an interim exclusion of the regular legal approaches to law that are available.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

See section II, question 1.1: the Netherlands Arbitration Institute (NAI); specialised arbitration institutes, such as the court of arbitration for the building industry (RvA); for the metal industry and trade; for transport and maritime cases (TAMARA); and for complex financial disputes (PRIME Finance). Accredited (certified) mediators are registered with the Netherlands Mediation Federation, to mediate business disputes.

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Koen Rutten is an inspired and persistent lawyer. He understands the economic background of a matter. Koen specialises in corporate and securities litigation, banking and finance disputes, mass tort (class actions), and the corporate law advisory practice. He deals with court proceedings and arbitration, both domestic and international. Koen litigates frequently and advises his clients on matters such as shareholder disputes, guarantee claims, directors' and officers' liability, accounting and reporting rules and liability of the supervisory authorities on the financial markets.

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Carlijn Tjoa has the ability to quickly get to the heart of the matter and has a sharp pen. In addition, she is a pragmatic and committed lawyer who never loses sight of the fact that the client must actually be able to move forward with the solution she puts forward. Carlijn specialises in corporate law disputes; she primarily looks after the interests of businesses, shareholders and executive and supervisory directors. She appears regularly in inquiry procedures at the Enterprise Division, and she advises on and litigates in director liability matters.

Wijn & Stael is a leading law firm based in Utrecht with a modern and practical approach. We are well-known for our excellent quality of work in highly complex cases and our strong client relations. Wijn & Stael is a multi-niche law firm with a strong focus on corporate & financial litigation, restructuring & insolvency, Supreme Court litigation, M&A, real estate and employment law.

Our litigation and dispute resolution department consists of litigation specialists who are experienced in conducting complex and extensive proceedings, such as the Enterprise Division of the Amsterdam Court of Appeal and collective actions and settlements under the Dutch Class Action (Financial Settlement) Act *(Wet Collectieve Afwikkeling Massaschade*).

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Nigeria

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

Nigeria operates an adversarial legal system. Litigants assert their position before a judge personally or through Counsel, within the confines of defined laws/rules of court.

Proceedings are regulated by rules of courts of the various States.

1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

The court system is structured into two: (i) superior courts of record (SCR); and (ii) inferior courts (IC). SCRs are Constitutional creations (section 6(5) 1999 Constitution of Nigeria (amended) (Constitution)). The Constitution empowers National and State Houses of Assembly to establish courts on their respective legislative competencies (ICs).

Appeals lie from ICs to SCRs. From SCRs (High Court of a State (HC), Federal High Court (FHC) or National Industrial Court (NIC)) appeals lie to the Court of Appeal (CA) and, ultimately, to the Supreme Court (SC).

There are specialist courts in Nigeria. The Sharia Court of Appeal, Customary Court of Appeal, NIC, and FHC have exclusive jurisdiction over constitutionally defined subjects. There are also specialist tribunals such as Election Petition Tribunals and the Investments and Securities Tribunal.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

The stages and timeframe depend largely on the court (and applicable rules and legislations) where an action is commenced. For instance, in the HC, Lagos:

a. File and serve originating processes – five days.
b. File and serve defence and counter-claim (if necessary) – 42 days from receipt of originating processes.
c. File and serve reply to defence (14 days) and defence to counter-claim (if necessary – 42 days from receipt of counter-claim).
d. File and serve case management conference forms – 14 days of closing pleadings.
e. Case management conference – three months.
f. Trial – four to six months.
g. File, serve/adopt final addresses – 49–60 days after completing trial.
h. Deliver judgment – 90 days after adoption of final addresses.
i. Appeal (if necessary) – 14 days/three months for interlocutory/final judgment respectively.
j. Enforcement of judgment (depending on the nature of judgment) – one to six months.

Please note that the time period to do any of the foregoing may be extended by the court on cogent grounds.

Where there is no cogent defence, summary judgment procedure may be adopted. Under this procedure, judgment is entered without the necessity of a full trial. Such judgment is deemed a final judgment and can only be set aside on appeal. The advantage is that a claimant obtains final judgment, without delay.

Also, liquidated monetary claims (not less than one hundred million Naira), mortgage transactions/charge/securities or monetary claims by non-nationals and/or non-residents are screened and assigned for fast track procedure with the ultimate aim of completion within nine months (Order 56, High Court of Lagos State (Civil Procedure) Rules 2012 (Lagos Rules)).

1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

Subject to its constitutional powers/public policy, exclusive jurisdiction clauses are generally enforceable by Nigerian courts.

1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

Expenses for filing/serving court processes, professional fees, penalties for defaults and costs awarded against an unsuccessful litigant.

Litigants bear costs but in special circumstances, Counsel may be ordered to specifically pay costs (for default(s) or frivolous application(s)/suit(s)).

Beyond defined principles on costs in rules of courts, there are no rules on costs budgeting in Nigeria.

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1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

Litigants fund their proceedings. This is because Nigeria adopts the common law principle of champerty and maintenance which proscribes funding litigation by third parties on grounds of public policy. However, contingency fee arrangements are permissible under Rule 50 (1), Rules of Professional Conduct for Legal Practitioners, 2007 (RPC) (with the exception of criminal cases – Rule 50 (2)).

1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

Subject to specific legislations/rules, legal actions are enforceable either personally or through third parties in Nigeria (paragraph 3 (e), Fundamental Rights (Enforcement Procedure) Rules 2009, Regulation 14, Oil and Gas Free Zone Regulation 2003).

Further to paragraph 1.6 above, third-party funding is generally not recognised in Nigeria. However, not-for-profit organisations, government agencies and legal practitioners/firms may provide *pro-bono* (free or highly discounted) legal services to indigent litigants. Also, most rules of courts allow indigent litigants to sue/defend a suit *in-forma pauperis* (form of a pauper).

1.8 Can a party obtain security for/a guarantee over its legal costs?

A party may obtain such security by an application to court.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

Some legislation/rules of courts require compliance with certain pre-conditions for initiating proceedings. For instance, section 92, Nigerian Ports Authority Act, Cap. N126 Laws of the Federation of Nigeria (LFN), 2004 requires a claimant to issue pre-action notice to the Nigerian Ports Authority (NPA), stating the claim and reliefs to be sought before commencing a suit against NPA. Paragraph 2(2) (a and e), Preamble to Lagos Rules and Order 3 of the said rules mandate settlement attempts/attaching evidence of the same to originating processes.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Different classes of civil claims are subject to limitation laws in Nigeria, including actions against public officers for default in performance of public duty (three months), action for recovery of land (12 years), simple or quasi contracts, arrears of interest, and tortuous actions (six years) (except negligence, nuisance, damages, or breach of duty – three years).

The periods count between the time a cause of action accrues and filing a suit. Time does not count during the pendency of a suit. Time limitation is a procedural issue which may be raised in defence/objection, aimed at the dismissal of a suit.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

There are four modes by which civil proceedings may be commenced in Nigeria, to wit: Writ of Summons; Originating Summons; Originating Motion; or Petition. Each of these modes is applicable to the specific nature of cases. Procedurally, personal service is required. However, substituted service is allowed in peculiar cases with the court's permission.

Personal service is deemed on the date a defendant endorses receipt, and substituted service is deemed on the date of service through the means permitted by the court.

Subject to applicable rules of courts, processes may be served outside Nigeria with the permission of the court (Order 8 Rule 1, Lagos Rules).

Foreign proceedings are served by process servers. In appropriate cases, a judge may order substituted/other service of foreign process (Order 8 Rule 5(b) and 8, Lagos Rules).

3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

Nigerian courts are empowered to grant pre-action interim remedies. An applicant applies *ex-parte* (without notice to the other party) and must disclose urgency/imminent risks of irreparable damages.

3.3 What are the main elements of the claimant's pleadings?

It typically contains: introductory averments (descriptions of parties); body (chronological facts); and prayer/reliefs.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Yes, if its purpose is to determine real questions/issues between parties. Amendments are allowed subject to the court's permission and within timelines prescribed by the rules of court. Amendment is declined if it will cause injustice, etc.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

Yes, any time before receipt of a defence; with the permission of the court after receipt of a defence; or upon written/signed consent of parties.

Except consensual, withdrawal may occasion costs or other terms/conditions as a judge may order (Order 23, Lagos Rules).

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4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

A defence answers a claim in arranged paragraphs and may comprise one/or more of the following: admission; denial; confession; avoidance; objection in point of law; and/or set-off/counterclaim.

4.2 What is the time limit within which the statement of defence has to be served?

Although the rules of courts do not specifically state a timeline for service, it is customary to apply the timeline prescribed for filing. For instance, Lagos Rules (Order 15 Rule 1(2)) require that a defence be filed within 42 days of service of the claim.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

Under a third-party proceeding, a defendant may pass/share liability with a third party who may be joined to an ongoing proceeding (Order 13 Rule 19, Lagos Rules).

4.4 What happens if the defendant does not defend the claim?

There is a risk of entering default judgment (except for certain types of reliefs/claims which require plenary trial). Such judgment may be set aside by the judge on grounds of fraud, non-service or lack of jurisdiction.

4.5 Can the defendant dispute the court's jurisdiction?

Generally, a defendant is allowed to raise a jurisdictional objection at any time (although Order 29, FHC (Civil Procedure) Rules, 2009 (FHC Rules) qualifies/prescribes a timeline in given cases). Also, a court may raise the same and invite addresses from parties.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

A third party may be joined to ongoing proceedings as a claimant, defendant or third party. Generally, the purpose of such joinder is to assert/defend or take full/part of arising liability (Orders 9 and 13, FHC Rules and Lagos Rules respectively).

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Consolidation is allowed where the issues are the same in all cases and can be tried/determined at the same time. The order for consolidation may be made where two or more actions are pending between the same claimant and defendant, the same claimant but different defendants, different claimants but the same defendants, or different claimants and defendants.

5.3 Do you have split trials/bifurcation of proceedings?

Where a cause(s) of action cannot be conveniently tried or disposed of together, a judge may order separate trials or make necessary orders (Order 14 Rule 1, Lagos Rules).

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

Further to question 1.3 above, cases are assigned to judges by the chief/administrative judge of the courts after filing. In courts where case management conference (CMC) operates, the case file is returned for reassignment to a trial-judge at the close of CMC.

6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Not all courts operate CMC procedure in Nigeria. Where applicable, the judges consider and take appropriate actions to set out an agenda for the case, including ADR (alternative dispute resolution). Where there are defaults in attending/complying with CMC/scheduling orders, a claim may be dismissed (in case of a claimant) or judgment entered against a defendant (Order 25 Rule 5, Lagos Rules).

Ideally, applications are considered at this stage of proceedings. Parties can apply to amend pleadings, object on points of law, etc. Costs may be awarded after taking applications or at any stage of proceedings. Costs are payable within seven days of the order or a defaulting party/counsel may lose audience in court (Order 49 Rule 10, Lagos Rules).

6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

Such party may be held in contempt and committed to prison.

6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

Judges are empowered to strike out part/dismiss a case in appropriate circumstances. This may be done at any stage of the proceedings where such statement of case fails to disclose a reasonable cause of action, it is scandalous/frivolous/vexatious, prejudicial, may delay the fair trial of the action or amounts to an abuse of the process of court.

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6.5 Can the civil courts in your jurisdiction enter summary judgment?

Further to question 1.3 above, the courts can enter summary judgment in appropriate cases.

6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Further to question 3.5 above, proceedings may be discontinued upon filing the appropriate court process and subject to costs or other terms/conditions as a judge may order. Discontinuance may follow mutual settlement, weakness of a claim or to prevent an abuse of court process.

Proceedings may be stayed following a successful application by either party or solely at the court's discretion (subject to inviting addresses from parties). It may be done in aid/reference to arbitration, pending appeal or outcome of another suit, or in furtherance of stating a special case arising from the suit.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

Under the rules of courts, a party may make a written request (within seven days of the close of pleadings) to an opponent for discovery on oath of documents that are/have been in his possession/custody/power or control, relating to any matter in question in the case. An answer is required on oath, completely/truthfully within seven days (or as may be extended by court) of the request and thereafter dealt with at CMC. Disclosure is not obtainable pre-action but generally, information/documents of government/public institutions may be so obtained (with defined exceptions) under the provisions of the Freedom of Information Act, 2011. Disclosure will not be required where, from the nature of the case, the opponent must know that he should produce a document, or the same is already in court or admitted to be lost or immaterial to the case. The same rules apply to electronic documents and in addition, a certificate is required for admissibility (section 84(4), Evidence Act, 2011) (Evidence Act).

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

Subject to overriding legal requirements and/or powers of court, constitutional rights to privacy, the legal practitioner/client relationship, other professional privileges conferred by an Act, documents marked "without prejudice", marital communications, and non-disclosure agreements, are privileged.

7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

A third party may be compelled to produce a document by issuance (subject to payment of assessed court fees and cost) of a subpoena *duces tecum* signed by a judge. Such third party is viewed as a court witness, notwithstanding that the issuance of the subpoena is at the instance of a party to the proceedings. A subpoena is required to be served personally, except otherwise directed by court and a subpoena remains in force from issuance until trial. Also, a subpoenaed third party is under the legal obligation to attend and comply with the direction of the court, failing which he/she may be held in contempt (Order 32 Rules 10, 20, 24 and 25, Lagos Rules; section 253(2), Evidence Act).

7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

Issuance of directions/orders in the proceedings.

7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

There are none.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

Parties must lead evidence in support of pleadings and evidence can only be led on pleaded facts. Evidence must satisfy the requirements of admissibility (including relevance/being in admissible form). Note that under the provisions of Order 1 Rule 9(2), National Industrial Court (Civil Procedure) Rules, 2017 (NIC Rules), the NIC may depart from the rules of evidence in the interest of justice (the legality of this is debatable in view of section 256, Evidence Act which makes the Evidence Act/rules of evidence applicable to Nigerian courts, with few exceptions, which do not include the NIC).

8.2 What types of evidence are admissible, and which ones are not? What about expert evidence in particular?

Documentary evidence (including electronic), oral evidence, real evidence (any material thing other than a document), and opinions of experts are admissible evidence. Hearsay and opinions are inadmissible except as specifically provided for by law (sections 38 and 67, Evidence Act).

Expert evidence/opinions are admissible (subject to satisfying/demonstrating expertise) (section 68, Evidence Act).

8.3 Are there any particular rules regarding the calling of witnesses of fact, and the making of witness statements or depositions?

Except general rules applicable to subpoenaed witnesses (sections 218 and 219, Evidence Act) and requirements of frontloading a list and depositions of witnesses (rules of courts allow additions/substitutions as appropriate), a party/counsel is at liberty to call witnesses in any order or not call a witness at all. Note that by the application of either party or by court, witnesses on both sides may be ordered to be kept out of court or prevented from communicating when calling/examining a witness(es). The parties to the suit/counsel are exempted from vacating the court (sections

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212 and 213, Evidence Act). Where a witness is called, the rules of evidence are applied to conduct such proceedings (section 215, Evidence Act).

The frontloading system adopted in Nigeria requires the filing of witness statements/depositions alongside pleadings. Subject to rules of evidence, facts are proved by written depositions and oral examination of witnesses in open court (Order 32 Rule 1(1), Lagos Rules). Note that witness statements are deposed to at the registry of a court before a commissioner for oaths.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Are there any particular rules regarding concurrent expert evidence? Does the expert owe his/her duties to the client or to the court?

Beyond the general rules of evidence which regulate the conduct of trial, there are no special/particular rules on instructing/reporting/the evidence of an expert. An opponent is allowed to call/use an expert or expert evidence to discredit the evidence of another expert. A court may admit/reject the evidence of an expert where the same is credible/discredited. An expert owes his/her duty to the court.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

Nigerian courts are empowered by law and rules of courts to deliver judgment: summarily (in the absence of cogent defence); by default (where the defendant fails to attend/proffer a defence – see question 4.4 above); by consent (mutual agreement of parties); interlocutory (in between proceedings); final (at the conclusion of the trial); or based on admission.

The courts have powers to make interim/interlocutory/perpetual/preservative orders. These orders are typically made to preserve/prohibit or mandate/compel the doing of an act.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Subject to proof, Nigerian courts have inherent powers to make rulings on damages/interests/costs. The rules of courts prescribe a guide on how the powers may be exercised (Order 35 Rule 4; Order 49, Lagos Rules).

9.3 How can a domestic/foreign judgment be recognised and enforced?

A domestic judgment is a public document and can be recognised upon being entered and/or certified (Order 35 Rules 1, 2, 3, Lagos Rules, sections 104, 105 and 146, Evidence Act). The Sheriffs and Civil Process Act, Cap. S6 LFN 2004 (SCPA) provides for the various modes of enforcing judgment in Nigeria, notably: Writ of *Fieri Facias* (FIFA); garnishee; judgment summons; and writ of sequestration. See sections 20/25, 83, 55 and 82, SCPA respectively. In **Government of Gongola State v. Tukur (1988) 1 NWLR (Part 68) p. 39**, the Supreme Court enumerated the methods of enforcing different kinds of judgment as follows:

a. A judgment or order for the payment of money may be enforced by FIFA, garnishee, charging order, writ of sequestration or order for committal on judgment debtor summons.

b. A judgment for possession of land may be enforced by a writ of possession, a writ of sequestration or committal order.

c. A judgment for delivery of goods may be enforced by a writ of specific delivery or restitution or their value, a writ of sequestration or writ of committal.

d. A judgment ordering or restraining the doing of an act may be enforced by an order of committal or a writ of sequestration against the property of the disobedient person.

Foreign judgments are recognised in Nigeria either by common law action (fresh action with the foreign judgment as cause of action) or reciprocal enforcement procedure (countries with similar reciprocal arrangements with Nigeria). The Reciprocal Enforcement of Foreign Judgments Ordinance, Cap. 175 LFN and Lagos, 1958 (passed in 1922) and Foreign Judgments (Reciprocal Enforcement) Act, Cap. F35, LFN 2004 provide for the recognition of foreign judgments while the SCPA provides for enforcement.

9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

Further to question 1.2 above, a dissatisfied/interested party has a constitutional right of appeal (section 243) exercisable either with or without court permission (sections 241(1), 242 Constitution). To initiate an appeal, a Notice of Appeal must be filed within 14/90 days for interlocutory/final judgments respectively. Records of appeal must be compiled and transmitted within prescribed timelines (Order 8 Rules 1 and 4, Court of Appeal Rules, 2016 (CA Rules), except extended by court (Order 6 Rule 9, CA Rules). Failure to comply may lead to dismissal of appeal (Order 8 Rule 18(1) CA Rules). Typically, an appellant applies for stay of proceedings/execution/injunction pending appeal. This is to avert rendering the appeal nugatory (as a Notice of Appeal does not constitute stay). See **Coker v. UBA PLC (1997) 2 NWLR PT. 486 at p. 226**. Note, there is a constitutional bar on rights of appeal in cases where unconditional leave was granted to defend an action, and for an order absolute for dissolution/nullity of marriage where there was time to appeal against the *order nisi* but the party failed to do so (section 241 (2a and b) Constitution).

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

Further to questions 2.1 and 6.2 above, the CMC procedure facilitates the settlement process under the direction of court or referral to ADR. Failure to participate or comply with ADR orders/directives may lead to dismissal of the claim or judgment against a defendant (Order 25 Rules 1(2)(b), 2(m), and 6, Lagos Rules).

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II. ALTERNATIVE DISPUTE RESOLUTION

1 General

1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

Frequently used ADR mechanisms in Nigeria include: arbitration; mediation; negotiation; and conciliation.

Arbitration

Under this process, an arbitration tribunal is privately constituted (sometimes under the order of court) and empowered by an arbitration clause contained in the disputing parties' agreement. The dispute is settled in a judicial manner with an award which may be voluntarily obeyed or upon enforcement by a court. The award may also be set aside on defined grounds. Generally, the applicable law is the Arbitration and Conciliation Act Cap. A18, LFN 2004 (ACA).

Mediation

In a mediation process, parties submit their disputes to a neutral/uninterested third party known as a mediator. A mediator does not have the powers to make a binding decision but merely facilitates resolution of a dispute, with agreed terms reduced into an enforceable document. Most States in Nigeria have enacted laws on mediation and also some court rules have expressly provided for the same (Order 16, CA Rules).

Negotiation

In this process, disputing parties voluntarily enter into bargain either directly or through approved representatives. The settlement reached depends on the bargaining power of disputants which is channelled through either a win-lose or win-win approach. Where a settlement is achieved, it is binding and enforceable. Beyond the exercise of good faith, readiness to settle and the rule on privileged documents, no specific laws regulate this process.

Conciliation

Conciliation is another ADR mode which allows disputing parties to resolve their disputes through a conciliator in a less adversarial and private manner. The conciliator is guided by the Conciliation Rules and ACA. Terms of settlement are prepared by the conciliator for the parties' consideration (it may be rejected or amended as appropriate) and where duly executed, the same becomes binding and enforceable.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Further to section II, question 1.1 above, some of the legislation/rules include: (i) the Constitution (section 19 (d)); (ii) ACA – currently undergoing an amendment process before the National Assembly to include new/innovative provisions for the enhancement of arbitration and conciliation in Nigeria; (iii) rules of courts, for instance Lagos Rules and CA Rules; (iv) specific States' legislation, for instance Lagos State Multi-Door Court Law 2007, the Citizens Mediation Centre Law 2007, Lagos State Arbitration Law, 2009, etc; and (v) RPC – by Rule 15 (3) (d), a legal practitioner has a professional duty to inform his client of the option of alternative dispute resolution mechanisms before resorting to or continuing litigation on behalf of his client.

1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Yes, there are specific areas or subjects that are not amenable to ADR in Nigeria. For instance, matters relating to election petitions, winding up of companies, declaration of title to land, crimes (although it is arguable that a plea bargain, among other things which are codified in legislation, is a form of ADR), etc.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, force parties to arbitrate when they have so agreed, or order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

Nigerian courts provide interim or provisional measures of protection in support of arbitration. By the provision of Article 26 (3) of the Rules made pursuant to the ACA, a request for interim measures addressed by any party to court shall not be deemed incompatible with the agreement to arbitrate or as a waiver of that agreement. In **Owners of the MV Lupex v. N.O.C.S Ltd (2003) 6 S.C. (Pt. II) 62 at p. 73**, the Supreme Court of Nigeria held that a party to an arbitral proceeding may be permitted to institute an action for injunctive reliefs in court during the pendency of an arbitral proceeding, if there is a "strong, compelling and justifiable reason" for such an action.

Furthermore, in May 2017, the Chief Justice of Nigeria, Justice Walter Onnoghen, directed all heads of court in Nigeria to invoke their powers under the respective rules of court, to issue Practice Directions in support of arbitration clauses in contracts/agreements. The foregoing clearly shows the positive disposition of Nigerian courts towards enforcing arbitration clauses in contracts and ADR in general.

Further to section I, questions 2.1, 6.2 and 10.1 above, Nigerian courts can direct/order parties to mediate.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

Further to section II, question 1.1 above, if parties participate and endorse terms of settlement arising from the use of ADR, the same is binding and enforceable.

Arbitration awards are binding and may be voluntarily obeyed or enforced before a competent court in Nigeria (a State or Federal High Court). Such awards cannot be appealed but may be set aside (within three months from date of award) by a non-recognition application on limited grounds (section 29, ACA).

Failure to participate or comply with ADR orders/directives (including mediation) may lead to dismissal of the claim or judgment against a defendant (Order 25 Rule 6, Lagos Rules).

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The terms of settlement drawn up pursuant to a court-ordered/related ADR is sanctioned and entered as consent judgment by the court (Order 16 Rule 4, CA Rules). Such judgment is appealable only with the permission of the court (section 241(2)(c), Constitution). See **Abdulkarim v. Incar (Nig.) Ltd (1992) 7 SCNJ 366**. Although such consent judgment is a final judgment (and operates as estoppel on the issues therein), it may be set aside by the commencement of a substantive action and not by motion, in the same court. See **Dana Impex Ltd. v. Awukam (2006) 3 NWLR (Part 968) 544 at p. 556**. The aggrieved party/parties may need to demonstrate cogent vitiating elements such as fraud, mistake, misrepresentation or duress.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

The major ADR institutions in Nigeria include: Multidoor Court Houses operational in some States; Lagos Court of Arbitration; Regional Centre for International Commercial Arbitration, Lagos; Lagos Chamber of Commerce International Arbitration Centre; Citizens Mediation-Centre; and the Court of Appeal Mediation Programme under the auspices of the Court of Appeal.

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Chapter 28

Philippines

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

The Philippine legal system is primarily a civil law system, although it may be considered a mixed regime consisting of both civil and common law traditions. Civil procedure is governed primarily by the 1997 Rules of Civil Procedure, or Rules 1 to 71 of the Rules of Court ("**ROC**"), and various issuances promulgated by the Supreme Court.

1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

The first level courts are: Metropolitan Trial Courts for metropolitan areas; Municipal Trial Courts in Cities for locations in cities that are not part of a metropolitan area; Municipal Trial Courts in municipalities; and Municipal Circuit Trial Courts for areas comprising municipalities that are grouped together (collectively, "**MTCs**"). MTCs generally exercise jurisdiction over civil cases involving claims of which the value does not exceed PhP400,000 or PhP300,000, depending on the territorial jurisdiction of the court.

The Regional Trial Courts ("**RTCs**") are established in each region and consist of several branches. RTCs act as first level courts with general jurisdiction over cases outside the MTCs' jurisdiction and over appeals from decisions of MTCs. There are RTCs designated as special commercial courts and family courts.

The Court of Appeals is organised into 17 divisions. It reviews appeals from the RTC and quasi-judicial agencies. Two specialised courts that are on the same level are the Sandiganbayan, which hears cases against government officials for graft and corruption, and the Court of Tax Appeals, which generally has jurisdiction over tax and customs cases.

The Supreme Court is at the highest level of the judiciary, composed of 15 members that sit *en banc* or in three divisions of five justices each. It has the power to review judgments of lower courts and determine the existence of grave abuse of discretion by any government instrumentality.

There are also Shari'a Courts in Muslim regions that handle cases involving the Muslim code on personal law, which principally governs matters of marriage and inheritance.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

The main stages in civil proceedings are: (1) the filing of the complaint, issuance of summons and exchange of other operative pleadings, which generally take three to six months; (2) referral to two-stage mediation, pre-trial and discovery, which could take six months to one year; (3) trial proper, which, depending on the complexity of the case, number of witness and other exigencies, could take anywhere from six months to three years; and (4) rendition of judgment, which could take from six months to two years. While the ROC prescribes periods for both litigants and the court throughout the process, these are seldom observed in view of docket congestion.

There are expedited trial procedures for small claims cases and summary proceedings. Small claims cases involve payment of money where the value of the claim does not exceed PhP200,000, exclusive of interest and costs. Summary procedure is applied in all other civil cases, except probate proceedings, where the total amount of the claim does not exceed PhP100,000 or PhP200,000 depending on the territorial jurisdiction of the court.

1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

Exclusive jurisdiction clauses which use language that leaves no doubt as to the intention of the parties to vest jurisdiction exclusively in another country are usually upheld as valid. However, despite the existence of exclusive jurisdiction clauses, Philippine courts tend to still take cognizance of cases when they involve matters of public interest, such as labour cases. A Philippine court may also assume jurisdiction if it chooses to do so, provided that it is one to which the parties may conveniently resort to, is in a position to make an intelligent decision as to the law and the facts, and has or is likely to have power to enforce its decision.

1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

The costs of civil court proceedings include filing fees, counsel's legal fees, and witness and commissioner's fees as applicable. Costs are, as a general rule, borne by each party, but the court nevertheless has the power to adjudge the losing party liable for

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costs of the suit. As a general rule, a 2% filing fee based on the total amount of the claim is imposed. There are currently no rules on cost budgeting.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

There are no particular rules about funding litigation. Contingency fee arrangements are an internal matter between the litigant and counsel. As a rule, contingency fee arrangements are permissible so long as they do not amount to a champertous agreement, or one where the lawyer agrees to conduct the litigation in his own account and to receive as his fee a portion of the proceeds of the judgment.

1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

There are no constraints in assigning a claim or cause of action, for as long as the substituting party also has the requisite interest in commencing or maintaining litigation. The party must be a real party in interest, or one who stands to be benefited or injured by the judgment in the suit, or the party entitled to the avails of the suit. There are no particular rules about funding litigation except for the prohibition against champertous arrangements discussed above.

1.8 Can a party obtain security for/a guarantee over its legal costs?

Pending litigation, a party may, under certain defined grounds, obtain security by availing himself of the provisional remedy of attachment, where the property of the adverse party is attached as security for the satisfaction of any judgment that the court may eventually adjudge.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

Among the grounds for the outright dismissal of a complaint is the failure of a party to comply with a condition precedent. There is no particular condition or formality that applies to all cases. One condition precedent is the referral of certain cases to *barangay* (village) conciliation. No complaint may be filed in court involving any matter that is within the jurisdiction of the *barangay* unless no conciliation or settlement has been reached in that venue. Case law also holds that it is a condition precedent, before resorting to litigation, for a consignee to file a timely claim with the carrier, and for a plaintiff to comply in good faith with an agreement to refer a dispute to arbitration.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Prescriptive periods in filing cases are usually determined by substantive law, and range from one year to 30 years counted from the time the cause of action accrues. Generally, there is a five-year prescriptive period for actions except where the law or rules specify a particular period within which an action should be filed.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

After the filing of the initiatory pleading, the court shall issue a summons directing the other party to file a responsive pleading or answer within 15 days. Service shall be in person by handing a copy to the defendant, or by tendering it to him if he refuses to receive it. For justifiable causes, substituted service may be done by leaving copies of the summons at the defendant's residence with some person of suitable age and discretion, or by leaving the copies at the defendant's office with a competent person in charge therein.

Service to persons outside Philippine jurisdiction may be effected through extraterritorial service. It may only be done when the action either (1) affects the personal status of the plaintiff, or (2) relates to, or the subject of which is, property within the Philippines in which the defendant claims an interest and the action involves excluding the defendant from any interest thereto, or (3) involves property of the defendant that has been attached. It may be done by effecting personal service, or by publishing the summons in a newspaper of general circulation and at the same time sending a copy of the summons to the last known address of the defendant. The preferred mode is generally publication.

3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

Interim remedies are generally available only when a case is already pending. There are, as a rule, no pre-action remedies. When there is an arbitration agreement, however, the parties may request a court to grant them interim measures of protection, such as preliminary injunction or appointment of a receiver, before the constitution of the arbitral tribunal.

3.3 What are the main elements of the claimant's pleadings?

The complaint must state the ultimate facts comprising the plaintiff's cause/s of action, and state both the plaintiff and defendant's respective names and residences. It also needs to be verified by the plaintiff by executing an affidavit to the effect that he has read the pleading and that the allegations therein are true and correct of his personal knowledge or based on authentic records. It shall further contain a "Certification against Forum Shopping", in which the plaintiff certifies under oath that he has not commenced any action or filed any claim involving the same issues in any other court or tribunal.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Pleadings may be amended as a matter of right before a responsive pleading thereto is filed. Similarly, formal amendments to pleadings may be done at any stage of the action provided no prejudice is caused to the adverse party. All other substantial amendments, however, can only be done with leave of court.

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3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

In practice, pleadings may generally be withdrawn without leave of court before a response thereto is filed. Leave of court will not usually be withheld if no prejudice is caused to the opposing party.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

In the answer, the defendant shall specifically deny allegations that he does not admit by, as far as practicable, setting forth the substance of the matters upon which he relies to support his denial. Allegations not specifically denied are deemed admitted. Actions or defences founded upon written instruments, copied in or attached to a pleading, shall additionally be denied under oath.

The defendant shall raise all defences available to him, including the defence of set-off. Defences and objections not raised in the answer are deemed waived. The defendant may raise a counterclaim when it arises out of or is connected with the transaction or occurrence constituting the subject matter of the opposing party's claim, and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction.

4.2 What is the time limit within which the statement of defence has to be served?

The defendant shall file his answer to the complaint within 15 days after the service of summons, unless a different period is fixed by the court. It must likewise be served on the other party within the same period. Extensions of time to file the answer may be requested.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

A defendant may pass on or share liability with a person not yet a party to the action by filing a third-party complaint against that person. A defendant may also file a cross-claim against a co-defendant.

4.4 What happens if the defendant does not defend the claim?

If the defendant fails to file an answer, the plaintiff may file a motion to declare the defendant in default. If the motion is granted, the court may proceed to render judgment granting the claimant such relief as his pleading may warrant, unless the court, in its discretion, requires the plaintiff to submit further evidence.

4.5 Can the defendant dispute the court's jurisdiction?

The defendant may dispute the court's jurisdiction by either filing a motion to dismiss, raising therein the ground of lack of jurisdiction, and/or raise the jurisdictional challenge as an affirmative defence in the answer.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

In addition to the mechanism discussed in question 4.3 regarding the filing of a third-party complaint, joinder of parties is also allowed when any question of law or fact common to all such third-party plaintiffs or defendants may arise in the action.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Where two pending actions involve a common question of law or fact, the court may order a joint hearing or trial of any or all the matters in issue in the actions or even order the consolidation of the actions.

5.3 Do you have split trials/bifurcation of proceedings?

At the discretion of the court, bearing in mind the convenience of the parties or to avoid prejudice, a court may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue from such claims. The court may also suspend proceedings on the merits until it resolves jurisdictional challenges by the parties.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

The assignment of cases to the different branches of the MTC or RTC is done exclusively by raffle in open session and with adequate notice to interested parties. Certain cases, such as those involving family law or intra-corporate disputes, are raffled to specially-designated branches.

6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

During a pre-trial conference, the court shall consider, among other things, the possibility of an amicable settlement, possible submission to alternative modes of dispute resolution, simplification of issues, and the possibility of obtaining admissions. As regards interim applications, parties may avail themselves of provisional remedies, including preliminary attachment, preliminary injunction, writ of replevin, and receivership. This will entail an additional cost because a bond is generally required from the applicant before relief is granted.

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6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

Courts have the power to declare a person in contempt either summarily in case of direct contempt, or after the conduct of a hearing in case of indirect contempt. Persons declared in contempt of court may be punished with imprisonment and/or a fine at the discretion of the court. The ROC also authorises courts to dismiss cases where the plaintiff unjustifiably refuses to comply with an order.

6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

Courts have the power to strike out any pleading or parts thereof from the record when these are found to be sham or false, redundant, immaterial, impertinent, or contain scandalous matters. Courts also have the power to dismiss a case entirely when a meritorious motion to dismiss has been filed by the defendant. Even without a motion to dismiss, the court may on its own dismiss a case when it appears that any of the following grounds are present: lack of jurisdiction over the subject matter; existence of a pending litigation between the same parties for the same cause; when the case has been barred by prior judgment; and when the action has been barred by prescription.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

Summary judgments may be entered by courts when it is clear, after the defendant has filed an answer, that there exists no genuine issue or controversy as to any material fact, except as to the amount of damages.

6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Proceedings may be stayed upon a motion by the party to refer the case to arbitration pursuant to a valid arbitration agreement. The court may also suspend proceedings when the parties manifest an intention to negotiate a settlement of the case. A case may also be archived where the defendant cannot be served with summons. Lastly, a civil action arising from a criminal act shall be suspended when the criminal action for the same act is thereafter filed.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

Parties may avail themselves of depositions, either by oral examination or by written interrogatories, as a mode of discovery or disclosure. Depositions may likewise be taken prior to an action when a person desires to perpetuate his own or another's testimony. There are no classes of documents which as a rule do not require disclosure, nor are there special rules concerning the disclosure of electronic documents.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

The rules of privilege in civil proceedings include marital communications privilege, disqualification by reason of death or insanity of the adverse party, attorney-client privilege, priest-penitent privilege, physician-patient privilege, and public officer's privilege. There are also a few other privileges recognised in jurisprudence such as newsman or informer's privilege, trade secrets privilege, and executive and judicial deliberations privilege.

7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

Even persons not party to a case may be required to disclose information provided it is requested in accordance with the limits provided under the ROC. Third parties may also be subject to the court's subpoena power to require testimony or the submission of documents.

7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

The court's approval is, as a general rule, required before depositions may be taken. Courts may likewise issue commissions and letters rogatory in case the witness or the person who is to be deposed is outside of the Philippines. Courts also have the power to limit the scope of depositions, issue orders for the protection of parties or deponents, and punish for contempt those who unjustifiably refuse to answer questions during the taking of depositions.

7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

Depositions are generally admissible only when the person deposed can no longer testify in open court due to valid reasons such as, but not limited to, death, incapacity, or being outside of the jurisdiction of the court. When the person is able to testify, the deposition is inadmissible in evidence. Documents obtained through discovery may generally be used for any purpose.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

The basic requirement for admissibility of evidence is that it must be both relevant and competent. The evidence presented not only has a rational relationship with the fact proved, but it also must not be forbidden or excluded by any specific law or rule.

8.2 What types of evidence are admissible, and which ones are not? What about expert evidence in particular?

Evidence is characterised into either object evidence, documentary evidence, or testimonial evidence. All three are generally

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admissible provided the evidence is relevant and competent. Expert witness testimony is admissible provided that the matter to be testified to requires special knowledge, skill, experience or training. It is also required before an expert witness is allowed to testify that his expertise or qualifications in the particular field are established.

8.3 Are there any particular rules regarding the calling of witnesses of fact, and the making of witness statements or depositions?

A witness may only testify on facts of which he has personal knowledge. The number and names of witnesses which a party intends to present should be indicated in the pre-trial brief which is submitted during the pre-trial stage. No further witnesses shall be allowed to be presented or offered during the trial to support a party's evidence-in-chief without good reason and if no reservation is indicated in the pre-trial brief. As a general rule, the direct testimony of witnesses shall be in the form of a written judicial affidavit and they shall only take the witness stand for cross-examination, redirect, and re-cross examination.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Are there any particular rules regarding concurrent expert evidence? Does the expert owe his/her duties to the client or to the court?

There are no particular rules regarding instructing expert witnesses, preparing expert reports, and giving evidence in court. The probative value accorded to expert testimonies presented by the contending parties is left to the trial court's discretion. Expert witnesses, like any other witnesses, are under oath when they testify; hence, the expert arguably owes his duties to the court and not to the client.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

Apart from summary judgments as discussed in question 6.5, courts may also, upon motion, issue a "judgment on the pleadings" when the answer filed by the defendant fails to tender an issue, or otherwise admits the material allegations of the adverse party's pleading.

When an action is filed against several defendants, courts may issue "several judgments" wherein it only renders judgment against one or more of them, leaving the action to proceed against the others. When there are several claims, on the other hand, courts may issue a "separate judgment" which disposes of one issue or claim, leaving the rest to proceed.

Courts may likewise issue interlocutory orders which, unlike final orders, do not completely dispose of the case as they only deal with preliminary matters.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Costs are, as a general rule, borne by each party, but the court nevertheless has the power to adjudge the losing party liable for costs of the suit. Courts also have the power to order payment of interests and damages so long as the prevailing party has sufficiently proved its entitlement thereto.

9.3 How can a domestic/foreign judgment be recognised and enforced?

A domestic judgment may be enforced by filing a motion for execution in the court that rendered the decision which became final and executory. In case an appeal was perfected and it is the decision of the appellate court which became final, the motion for execution may be filed in the court of origin.

An action must be filed in the RTC for recognition of a foreign judgment. The foreign judgment may be repelled by evidence of want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact. It is thus the RTC's or the appellate court's decision upholding the foreign judgment that will be executed.

9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

As a general rule, an ordinary appeal is perfected by filing a notice of appeal with the court which rendered the decision or final order appealed from, and paying the corresponding appeal fee, within 15 days from notice of the decision or final order. For special proceedings, such as in estate proceedings or eminent domain proceedings, where multiple appeals may be taken, an appeal shall be taken by filing a notice of appeal and record on appeal within 30 days from notice of the decision or final order appealed from.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

Cases in general are referred to Court-Annexed Mediation ("**CAM**") before proceeding with the pre-trial conference. During CAM, a trained and accredited mediator assists the parties in exploring avenues for a settlement. If the parties do not settle, Judicial Dispute Resolution ("**JDR**") commences wherein the judge acts as a mediator and neutral evaluator who actively assists and facilitates negotiations among the parties for them to settle their dispute. Referral to CAM and JDR is generally mandatory except for cases that under substantive law cannot be compromised.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

In addition to CAM and JDR discussed in question 10.1, the alternative modes of dispute resolution available in the Philippines are arbitration, mediation, early neutral evaluation, mini-trial, mediation-arbitration, or any combination thereof.

Arbitration is a process in which one or more arbitrators, appointed in accordance with the agreement of the parties, or rules promulgated pursuant to Republic Act No. 9285 or the Alternative Dispute Resolution Act of 2004 ("**ADR Law**"), resolve a dispute by

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rendering an award. Mediation is a process in which a mediator selected by the disputing parties facilitates communication and negotiation, and assists the parties in reaching a voluntary agreement. Early Neutral Evaluation is a process wherein parties and their lawyers are brought together early in a pre-trial phase to present summaries of their cases and receive a non-binding assessment by an experienced person with expertise in the subject, to help the parties negotiate an amicable settlement. Mini-trial refers to a structured method in which the merits of the case are argued before a panel comprising of senior decision makers, after which the parties seek a negotiated settlement. Lastly, mediation-arbitration is a two-step dispute resolution process involving both mediation and arbitration.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

The ADR Law is the primary law as regards alternative modes of dispute resolution. Under the ADR Law, international commercial arbitration is primarily governed by the United Nations Commission on International Trade Law ("**UNCITRAL**") Model Law (1985), while domestic arbitration is primarily governed by Republic Act No. 876 (1953) or the Arbitration Law. There are likewise special laws governing arbitration in specific industries such as Executive Order No. 1008 or the Construction Industry Arbitration Law. The Philippine Supreme Court has issued Administrative Order No. 07-11-08-SC, otherwise known as the Special Rules of Court for Alternative Dispute Resolution.

1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

The ADR Law does not apply to cases involving labour disputes, the civil status of persons, the validity of marriage, any ground for legal separation of spouses, the jurisdiction of courts, future legitime of heirs, criminal liability, and those which according to substantive law cannot be compromised.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, force parties to arbitrate when they have so agreed, or order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

Court proceedings may be stayed upon a motion by the party to refer the case to arbitration pursuant to a valid arbitration agreement. A court may also dismiss a case on the ground of failure to comply with a condition precedent, or suspend proceedings if the plaintiff fails to comply with an agreement to arbitrate before commencing litigation.

Before the constitution of the tribunal, and after constitution of the arbitral tribunal and during arbitral proceedings, but only to the extent that the arbitral tribunal has no power to act or is unable to act, a request for interim measures of protection may be made with the court. These measures include preliminary injunction and appointment of a receiver, among other reliefs.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

Agreements reached through mediation have the force and effect of *res judicata*, or a judgment on the merits. Hence, no appeal may be taken therefrom. When a settlement agreement is reached, the parties may file the settlement agreement with the RTC. Where there is a need to enforce the settlement agreement, a petition may be filed by any of the parties with the same court.

Except for arbitral awards under the Construction Industry Arbitration Law, arbitral awards generally may not be reviewed on errors of fact or errors of law when a party applies to the court for a confirmation of the award. Courts may modify the award only based on evident miscalculation or an evident mistake in the description of any person, thing or property referred to in the award. Courts may also vacate the award entirely on specific jurisdictional and due process grounds set out in the ADR Law, the UNCITRAL Model Law and Republic Act No. 876, such as but not limited to, corruption, fraud, evident partiality on the part of arbitrators, and arbitrators exceeding their powers.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

The Philippine Dispute Resolution Center administers alternative dispute resolution proceedings in mostly commercial disputes. Preferred arbitral institutions outside of the Philippines, in our experience, are the Singapore International Arbitration Centre, the Hong Kong International Arbitration Centre, and the International Chamber of Commerce – International Court of Arbitration. Within the Philippine court system, the Philippine Mediation Center administers mediation during all stages of proceedings and the mandatory CAM during pre-trial. The Construction Industry Arbitration Commission administers arbitration proceedings over construction disputes.

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Mr. Songco has established a career primarily as a litigator. He handles civil and commercial litigation and arbitration cases, and is currently involved in handling the defence in several mass tort cases and in an environmental action before the Supreme Court. Mr. Songco served as a director of the Integrated Bar of the Philippines – Makati Chapter, from 2003 to 2005. He has been a lecturer in Mandatory Continuing Legal Education seminars since 2006. He has been cited as a key individual in dispute resolution by *Chambers Asia-Pacific*.

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Mr. Dee has represented numerous clients in all court levels and has extensive litigation and arbitration experience.

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Mr. Dee is currently advising foreign entities who have been improperly impleaded in a national inquiry concerning the impacts of climate change before the Philippine Commission on Human Rights, and is the lead partner in a case for the recovery by one of the country's largest real estate firms from the Philippine government of several prime properties worth billions of pesos.

Mr. Dee is the President of the Integrated Bar of the Philippines – Makati Chapter. He was an accredited lecturer on Pre-trial and Trial Skills in the Philippine Supreme Court's Mandatory Continuing Legal Education programme.

SyCip Salazar Hernandez & Gatmaitan ("**SyCipLaw**") was founded in 1945. It is the largest law firm in the Philippines, with offices in Makati City, the country's business and financial centre, as well as in Cebu, Davao and the Subic Freeport.

SyCipLaw offers a broad and integrated range of legal services. We have specialists in key practice areas such as mergers and acquisitions, energy, power, infrastructure, natural resources, transportation, government contracts, real estate, insurance, international arbitration, mediation, media, business process outsourcing, and technology.

SyCipLaw has a wide-ranging litigation practice in virtually all court levels – from the municipal trial courts and the regional trial courts, to the Court of Appeals and the Supreme Court, as well as in various administrative agencies. The firm also has a very extensive arbitration practice, being involved in foreign arbitration, international commercial and other domestic arbitration, and construction arbitration. Over the years, we have handled the most significant, high-value, and complex Philippine commercial law court cases and arbitration, a number of them against or with the Philippine Government. SyCipLaw is ranked by *Chambers Asia-Pacific*, *The Legal 500 Asia Pacific*, and *Asialaw Profiles* as a top-tier and highly recommended law firm for dispute resolution, arbitration, and litigation.

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Chapter 29

Romania

Chiuariu & Associates

Dr. Tudor Chiuariu

I. LITIGATION

1 Preliminaries

1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

The constitutional system of Romania is based on the separation and cooperation of the three powers: legislative; executive; and judicial. The judicial power comprises the courts of law, composed of immovable judges. Judges are selected based on merit, via open competition. Initial and continuous professional training is provided.

The procedure in Romania is governed by a civil law (continental or inquisitorial) approach. The rules of civil procedure, enshrined in the Civil Procedural Code, are adopted by law.

There is no binding precedent. The High Court of Cassation and Justice has to assure the unitary application of the law by the other courts through two instruments: the recourse in the interest of the law and the preliminary judgment.

The judges are bound to apply the law (not to decide based on what they consider to be equitable – *ex aequo et bono*) even *ex officio*, even where the parties failed to invoke a certain legal ground (*iura novit curia*). In exercising his power of appreciation, the judge has to take into account the general principles of law, the requirements of fairness and good faith.

The legal rules are organised into a hierarchy, having as its model the Kelsen pyramid of norms. The conformity of the legal rules with the Constitution is decided by a Constitutional Court, which is not part of the judiciary. Its decisions will produce effects only for the future, from the day they are published in the Official Journal.

Romania being a member of the European Union (EU), the EU mandatory rules have priority over the national rules, in case they collide. At the same time, Human Rights as enshrined in international binding documents, such as the European Convention of Human Rights, also take precedence over the domestic legislation, with the exception of when the internal rule is more favourable.

The civil procedure has to be fair, a concept which is developing continuously based on the European Court of Human Rights' case-law. The parties' rights of defence are guaranteed, as well as the adversarial character of the proceedings or the public, immediate and oral character of the trial. The panel assigned to judge the case has to comply with the principle of continuity, i.e. the same judge in front of whom the evidence was adduced and the pleas on the merits were delivered has to pronounce the judgment.

1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

The civil court system in Romania is structured in four layers, with specialised divisions/panels established in several domains – administrative judicial review, labour disputes, insolvency proceedings, intellectual property related claims, and family matters. The first level is the Local Courts ("*Judecătorii*"), to be found in important cities and smaller towns. The second level is the County Courts ("*Tribunale*"), one for each of the 41 counties and one for the capital Bucharest. The third level is the Courts of Appeal ("*Curți de Apel*"), 12 for the whole country, and on the fourth and last level is the supreme court, called the High Court of Cassation and Justice ("*Înalta Curte de Casație și Justiție*").

From the procedural point of view, the system has usually two and, for some cases, three levels of jurisdiction (see below question 9.4).

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

The main stages of a trial are: I. the regularisation of the claim, which includes the exchange of written documents: the claim, the defence, the response to the defence; II. the judicial inquiry phase, which includes the admission and the presentation of the evidence; III. the debates; IV. the deliberation and the pronouncement of the judgment; V. the drafting and the communication of the judgment; and VI. the exercise of the ways to appeal. The first instance cases usually take several months until the pronouncement of a judgment and one more month until the communication of the reasoned judgment. Some of the cases will be dealt with more urgency and with priority.

1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

The local judiciary recognises the exclusive jurisdiction clauses.

1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

The cost of civil court proceedings is relatively low compared to other jurisdictions. The cost of the proceedings has to be borne, at

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the beginning, by the claimant. He has to pay the judicial tax and the fees of his lawyer. If he does not pay the judicial tax, his action will not be processed and, after he is formally warned to pay, the action will be annulled. A judicial assistance system is in place for persons who cannot afford to pay the judicial taxes and/or the attorney fees. The judge will decide on such requests. The party which proposed a certain piece of evidence has to advance the costs related to its production in front of the court (e.g. the fee of the appointed and party experts, the travel expenses of the witnesses, the translation costs of the foreign drafted documents).

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

Third-party litigation is neither regulated nor prohibited by law. There is a system of legal aid for parties which cannot afford to support the costs of civil litigation. The conditional or success fee is provided for by the rules on the legal profession. Nevertheless, the *quota litis* agreement is forbidden by the Law on the Lawyer Profession and the Statute of the Bar Association. Therefore, a success fee must always accompany a flat/hourly fee.

1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

Any physical or legal person who has the full exercise of his/her civil rights can bring a claim before a court, if it is part of a dispute and justifies an interest. Despite the fact that it is not regulated by way of a special provision, third-party funding is permitted.

1.8 Can a party obtain security for/a guarantee over its legal costs?

There are no special provisions regarding security over legal costs. Nevertheless, the creditor can ask the court to institute the interim measure of a freezing order on the goods of the debtor, subject to deposit of a warranty, especially when he/she proves there is a danger that the debtor will try to hinder enforcement of the future judgment (see also question 3.2).

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

As a general rule, no prior formality to bringing a civil claim to court is imposed. In some cases, a prior procedure is provided by the law, such as in the judicial review of some administrative acts; there is an obligation for the person interested to address firstly, before it brings the action to the administrative court, the issuing authority of the damaging act asking for its revocation.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

In the legal system of Romania, the limitation means the termination of the substantive right to bring a civil action, after a period of time. The general limitation period for actions regarding a material object is three years. A special period of 10 years is set for property rights, for the moral or material damage caused through torture, violence or sexual assault or for environmental damages. A shorter period of two years applies to insurance and brokering and of one year to the restaurant and hotel services, to the medical services, and to the lawyers' fees to be claimed from their clients. The law has taken out from the scope of the limitation some categories of actions: the action for defending a non-material right (such as personality rights); the action for ascertaining the existence or non-existence of a certain right; the action for ascertaining the absolute nullity of a legal act; and the action for ascertaining the quality of the inheritor.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

The court can decide on a claim only if all parties were legally summoned or have presented themselves to the hearing, with very few exceptions, in very urgent cases. All summons are issued from the disposition of the judge. Irregular communication results in the nullity of the procedural act and, if it impedes the party from taking part in proceedings, it represents a ground for annulment of the judgment, through ordinary or extraordinary ways of appeal.

Usually, the court's communications are sent via ordinary mail (postal service), in a closed envelope, with confirmation of receipt and an ascertaining note. The court can use his own procedural agents in order to proceed with summons. Alternatively, the communication can be fulfilled via fax, email or other means of communication with confirmation of receipt. For example, in extreme cases, when one party could not be found in any other way, a Facebook ID was used in order to fulfil the summons procedure. In order the get the contact details of the parties, the court has direct access to the databases operated by the public authorities and institutions.

Parties which are abroad will be summoned through a known representative who resides in the country. If there is no such representative, but the domicile or residence from abroad is known to the court, he/she will be summoned there, with the receipt from the deposit of the summons to the domestic postal service representing the proof for the fulfilment of the summons procedure. The court will inform the persons living abroad with the occasion of the first communication that they have the obligation to designate a procedural domicile in Romania, where all the communications will be delivered. If the person does not comply, the court will continue to summon him/her abroad, following the above-mentioned procedure.

3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

Pre-trial interim remedies are available with the scope to ensure the effective enforcement of the judgment and the preservation of evidence. The claimant can request the court to order an interim freezing order on the goods of the debtor, subject to the deposit of a warranty, especially when he/she proves there is a danger that the

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debtor will try to avoid enforcement of the future judgment. A conservatory procedure in evidentiary matters is also available to the interested party.

3.3 What are the main elements of the claimant's pleadings?

The claim has to contain the identification details of the claimant and the defendant, their legal and conventional representatives, the object of the claim and its value, the description of the facts which gave rise to the dispute, the legal grounds on which the claim is based, the evidence proposed in order to prove the claim, and the signature of the claimant.

3.4 Can the pleadings be amended? If so, are there any restrictions?

The claimant can amend his action until the first hearing he is legally summoned to. After this, he can amend it only if all other parties expressly agree.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

The claimant can give up some of his/her pleadings at any point during a trial.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

The statement of defence has to contain the identification details of the defendant, his/her legal and/or conventional representatives, the procedural objections he/she raises, the reply to all the pleadings, the facts and the legal grounds on which the claim is based, the evidence proposed in defence for every prayer for relief, and the signature of the defendant.

The defendant can bring a counterclaim if he has claims which are derived from the same legal situation or one closely related to it, no later than at the same time as the statement of defence or, if the statement of defence is not compulsory, no later than at the first hearing when he/she was legally summoned.

4.2 What is the time limit within which the statement of defence has to be served?

The statement of defence has to be filed in 25 days from the moment the defendant received the claim. If the defendant fails to do so, he/she loses the right to propose evidence to be adduced and to raise objections, with the exception of those concerning public order.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

The defendant can pass/share liability by requesting the presence of another person alongside him as a party in the trial, through a warranty claim, if such third party can be held liable in relation to the main claim.

4.4 What happens if the defendant does not defend the claim?

Even if the defendant does not take any position regarding the claim and does not want to participate in the proceedings, the court will usually be careful in observing the adversarial nature of the proceedings. It will communicate to him/her further documents filed by the claimant, will continue to legally summons him and will send him/her the judgment.

4.5 Can the defendant dispute the court's jurisdiction?

The defendant can raise an objection on jurisdiction no later than the first hearing for which he was legally summoned in front of the court of first instance, with the exception of an objection on the general jurisdiction of the courts, which can be raised at any point during the trial.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

The civil justice of Romania is one of the most permissive regarding the joinder of third parties, voluntarily or forced, requested by the party or ordered by the court.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

If the objects of the different proceedings have a strong liaison, the last court seized can decide on their consolidation, in front of a court of first instance, for the purpose of a better administration of justice. If the claimant, the object and the cause of different proceedings are identical, the judge later seized will send the file to the first panel seized, for consolidation.

5.3 Do you have split trials/bifurcation of proceedings?

The bifurcation of proceedings is possible when it is in the interest of the better administration of justice, i.e. when one is delaying the other.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

Cases are allocated randomly by a computer-based system used in many EU jurisdictions, named ECRIS.

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6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

The court has to take all measures necessary in order to settle the case, with the observance of the general principles of civil procedure: fairness; reasonable time; adversarial character; and the rights of defence. Parties can request interim measures on freezing assets or accounts, temporary measures, conservation of proofs, temporary prohibitions related to IP rights, restriction orders, etc.

6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

Sanctions are procedural, such as ordering the stay of proceedings or even annulment of the action if the claimant does not comply with the instructions of the court and/or pecuniary fines of up to 1,000 lei (215 EUR).

6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

The court is bound by the will of the party to proceed with the claim, so it cannot strike out part of the statement of the case, except for the non-payment of the judicial fee at a very early stage of the proceedings, during the regularisation of the claim or as soon as it observed that the proper calculated fee was not paid.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

No, they cannot.

6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

The court can stay proceedings if there is a criminal case related to the claim where the judicial authorities have initiated criminal proceedings, or if the outcome of the case depends entirely or partly on the judgment to be delivered in another pending case, or as a sanction for the claimant (see above question 6.3).

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

The court can order disclosure from the opposing party, even pre-action, through the assurance of evidence procedure. There are no rules for the disclosure of electronic documents.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

The limits invoked to disobey the duty of disclosure are: privacy and dignity matters; the legal confidentiality obligation; and the right to not accuse himself, his partner and/or his close relatives.

7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

The court will summon the third party which possesses the document as a witness and he/she should present it. The private third party can refuse disclosure for the same reasons mentioned in question 7.2. Public bodies may decline disclosure if it relates to national security, public safety or diplomatic relations.

7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

The court orders it and can impose sanctions, and can even draw adverse inferences from the refusal.

7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

There are no restrictions.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

The burden of proof lies with the interested party. The evidence has to be proposed by the interested party and accepted by the court. The court itself can order for a certain piece of evidence to be produced if the interested party does not propose it or even oppose it. The evidence has to be produced before the court.

8.2 What types of evidence are admissible, and which ones are not? What about expert evidence in particular?

The means of evidence are provided by the law. The expert evidence is produced in the form of a report, drafted and presented to the court by the expert. Only exceptionally can the court ask the expert to present himself before the court to be heard.

8.3 Are there any particular rules regarding the calling of witnesses of fact, and the making of witness statements or depositions?

Persons in a close relationship or enemies of the parties, persons with limited capacity and persons convicted for false testimony cannot be called as witnesses. The deposition is taken in front of the court, under oath.

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8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Are there any particular rules regarding concurrent expert evidence? Does the expert owe his/her duties to the client or to the court?

The court sets the objectives to which the expert's report has to respond. The appointed expert owes his duties to the court, and the party expert owes the same to the party. They work independently, therefore do not have to agree on the same opinion.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

The judgment is the final act of the court when settling a civil trial, in the first instance. In the ways of appeal, the judgment is called decision. When issuing an interim or conservatory measure, as well as when taking other measures, the act of the court is separately called "*încheiere*".

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

The court has the power to rule on the damages, interests and the costs of litigation. If the costs of the litigation are asked within the same procedure as the main action which caused it, the party asking for it does not have to pay the judicial tax for the costs amount. If the party decides to ask for it later, by the way of an action on damages, he/she has to pay the judicial tax determined on the value of the costs. The claimant and the plaintiff can ask for their legal costs and present the proving evidence of such expenses until the closing of the debates.

9.3 How can a domestic/foreign judgment be recognised and enforced?

The foreign judgment is recognised, in principle, if it is final, was delivered by a competent court and there is reciprocity between Romania and the issuing state. The foreign judgment is enforced if the above-mentioned conditions are met and the decision is enforceable, according to the law of the issuing state.

9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

The common method of contestation against first instance judgments is the appeal ("*apel*"). The extraordinary way is the recourse ("*recurs*"). The losing party has the right to fill a recourse only in limited cases. The exception from the above-mentioned principle is the judicial review of the administration acts, where the only way of attack against first instance judgments is the recourse ("*recurs*"). Two other extraordinary ways of contestation are available – contestation in annulment and revision.

Almost all cases in the first instance are divided between Local Courts and County Courts, based on their value and complexity. Only the judicial review of the administration acts ("*contentieux administratif*") of a certain importance (like competition cases) are heard in the first instance by the Courts of Appeal, with a recourse to the High Court.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

The court can request the parties to personally attend a hearing in order to reach an amicable settlement. The court can organise a session for informing the parties of the advantages of mediation.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

Arbitration, mediation and administrative tribunals are frequently used in Romania. In certain administrative cases, the most prominent example being the disputes regarding the awarding of public contracts, a complaint to an administrative tribunal – optional, free of charge and subject to judicial review – is available to the interested party. The legislator tried to impose mediation as compulsory, but the Constitutional Court found this solution to be contrary to the Constitution, and therefore it remained optional.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Arbitration is regulated by the Civil Procedural Code and mediation is governed by Law 192/2006.

1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

The law prohibits arbitration in the domains of civil status, civil capacity, inheritance, family relations and the rights which parties cannot transfer. The state and public authorities may enter arbitration agreements only if authorised by law or international conventions. Public economic undertakings may not enter arbitration agreements if the law or their statute expressly forbid it.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, force parties to arbitrate when they have so agreed, or order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

The court has an important role in supporting arbitration. It can settle objections to the impartiality or independence of the members of the arbitral tribunal, order interim or freezing measures, ascertain

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facts, control certain measures of the arbitral tribunal such as the stay of the proceedings or the arbitrator fees and other arbitration costs, order the witnesses to be present in front of the arbitral tribunal, or fine the experts if they do not execute their duty assigned by the arbitral tribunal properly.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

The arbitration awards are final and enforceable and cannot be contested by neither ordinary way of appeal nor extraordinary way of recourse, being subject only to an action in annulment on law issues, based on nine grounds expressly provided for by the law, in line with the similar legislations of the states which recognise arbitration, based on the New York Convention.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

The ADR institution which is commonly referred to in Romania is the ICC International Court of Arbitration. The place of arbitration is sometimes set by the parties to be Bucharest. In sports dispute resolution, the cases are often referred to the Court of Arbitration for Sport (CAS/TAS).

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Russia

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

The Russian Federation has a civil law system with statutes being the primary source governing civil procedure. Precedents do not have binding force; however, lower courts often follow the position of higher courts, but do not rely on those directly (except for certain positions of the Supreme Court and the Constitutional Court).

The main sources of civil procedure are:

- the Commercial Procedure Code of the Russian Federation dated 24 July 2002 N 95-FZ ("APC");
- the Civil Procedure Code of the Russian Federation dated 14 November 2002 N 138-FZ ("CPC"); and
- Federal Law "On Enforcement Procedure" dated 2 October 2007 N 229-FZ.

1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

The Russian civil court system has two branches: the arbitrazh (commercial) courts and the courts of general jurisdiction. The arbitrazh courts have jurisdiction to resolve commercial disputes between legal entities or individual entrepreneurs with exclusive jurisdiction over corporate, intellectual property and bankruptcy matters. The courts of general jurisdiction handle all other types of disputes (mostly involving individuals).

Though the systems were very different, today both arbitrazh and civil courts comprise a four-level instances system: the first; appellate; cassation; and supervisory review. The system of general jurisdiction courts is, however, less straightforward and there are many caveats to properly identify each instance depending on the first instance court. The highest court instance is the Supreme Court of the Russian Federation.

There are also specialised courts within the civil court system including military courts and the Intellectual Property Court (the latter, however, has jurisdiction over the limited number of matters and is almost integrated with the arbitrazh courts).

The arbitrazh courts include first instance courts in each subject of the Russian Federation, 21 appellate arbitrazh courts, 10 circuit arbitrazh courts and the Supreme Court. The Supreme Court became the head for both court systems in August 2015 when the Supreme Arbitrazh Court was merged with it. Key positions and clarifications of the Supreme Arbitrazh Court remain in force.

The answers to the questions below are largely based on the arbitrazh court model and proceedings since the general jurisdiction courts' system is currently in a transitional reform stage.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

Stages of the civil proceeding in the Russian Federation include:

1. Sending a pre-action claim to the respondent (usually 30 days before filing a statement of claim).
2. Filing a statement of claim to the court and consideration of the case in the first instance (at least three months, though it can take much longer in practice).
3. Filing an appeal and participation in the appeal proceeding (at least two months).
4. Filing a cassation appeal (second appeal) and participation in the cassation proceeding in arbitrazh courts of the relevant circuit (at least two months).
5. A second cassation appeal is possible with the Supreme Court, but this is currently a selective process and permission needs to be granted by the judge of the Supreme Court to consider the case in panel (from three to nine months).
6. The final stage of the commercial proceeding is the supervisory review by the Supreme Court, in exceptional circumstances (from six to 12 months).

1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

The Russian courts generally enforce exclusive jurisdiction clauses unless they contradict with the statutory rules of exclusive jurisdiction of Russian or foreign state courts.

1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

The state duties for civil litigation are calculated in accordance with the Tax Code of the Russian Federation. For monetary claims, the calculation is based on the amount claimed, which ranges from 300 roubles and is capped at a maximum of 200,000 roubles.

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The general principle of the costs allocation is that the losing party pays all costs (including reasonable fees for representatives). However, under specific circumstances, the court may decide to split the costs or put the costs on the wining party if such party deliberately lengthened the proceeding or acted in bad faith.

There are no specific rules on costs budgeting in Russia, but, in case of expertise or some extraordinary actions required, the court could require the parties (or party) to allow additional fees to cover the relevant costs.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

There are no particular rules regulating litigation funding, including no prohibitions on third-party funding.

The approach of Russian courts toward contingency fees or conditional fees is controversial. On the one hand, there is a widespread opinion that a contingency fee for legal representation cannot depend solely on the decision of the court or public authority (Resolution of the Constitutional Court of the Russian Federation dated 23 January 2007 N 1-P). Therefore, according to this position, 'no win, no fee' agreements are not enforceable in the Russian courts, and, in such cases, the fees for representation will be calculated by the court taking into account the average market price for comparable services (Resolution of the Presidium of the Supreme Arbitrazh Court of the Russian Federation dated 24 July 2001 N 921/01).

On the other hand, some courts hold that contingency fees are legal if reasonable and proportionate to the services performed (for example, Information letter from the Presidium of the Supreme Arbitrazh Court of the Russian Federation dated 12 December 2007 N 121, Decision of the Arbitrazh Court of the Moscow Circuit dated 19 February 2015 N F05-4768/2014).

The most recent trend is that contingency fee agreements are not void as such, but do not allow the winning party to recover the success fee from the losing party, as they are private agreements between one party and its counsel (Ruling of the Supreme Court of the Russian Federation dated 26 February 2015 N 309-ES14-3167).

1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

Generally, the claim or cause of action can be assigned to a third party. However, sometimes such assignment is statutorily prohibited if the creditor's personality has significant importance (i.e., alimony or personal injury claims). The assignment can be performed at any stage of the proceedings, including during enforcement.

1.8 Can a party obtain security for/a guarantee over its legal costs?

There are no specific rules in this respect. Generally, there is no legal mechanism to request the court to grant a security for costs order from another party, and such remedy exists only in relation to freezing orders. But there is no prohibition on obtaining a guarantee over legal costs from the third party. This is not common in the market, and legal costs coverage can be found mostly as an insurance coverage.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

Prior to initiating the proceedings, parties must follow a mandatory pre-trial procedure for most contractual claims. For example, debt claims can only be filed at court 30 days after the claimant has sent to the debtor a request to pay. Corporate disputes among shareholders of a company require a notification to the company of the upcoming claim and substance of the dispute prior to the filing of the claim. Some actions require no pre-trial procedures.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Under Russian law, the limitation period is the question of substantive law. The Russian Civil Code (Civil Code) provides for two types of limitation periods: a general limitation period and a special limitation period.

Under the general limitation period, the claimant has three years to commence proceedings. This period starts from the day when the claimant learned (or should have learned) of the infringement of his or her rights and the identity of the defendant. In addition, there is an objective limitation period of 10 years, starting from the day of the violation of rights. A party is able to assert the three-year subjective limitation period as a defence within the 10-year objective long-stop period.

In the absence of a special limitation period, the general limitation period of three years applies. In some cases, the law provides for special limitation periods, such as:

- 20 days: for challenging the decisions adopted by the creditors' committee under the insolvency law;
- three months: for claims arising from alienation of shares in a nonpublic company in violation of pre-emptive rights;
- six months: for claims challenging decisions adopted by a meeting (on the condition that the claim is filed within two years after information about the decision became generally accessible to the participants), and for claims to enforce a 'preliminary agreement';
- one year: for claims filed in connection with the distribution of information damaging honour, dignity or business reputation; claims on challenging voidable transactions; claims on challenging public tenders; and claims seeking registration of a contract;
- three years: for claims against a carrier arising from the transportation of passengers and their luggage by inland vessels; and
- five years: for claims filed by the Russian Federation in connection with the provision and execution of state guarantees by the Russian Federation.

Special limitation periods are also subject to the 10-year objective period (see above). Additionally, the law establishes other rules with respect to special limitation periods, such as rules determining the commencement date.

The limitation period applies only upon application of a party to the dispute. Such application can be made at any stage before the court renders its final decision. Once a limitation period has lapsed, then, upon the motion of a party, it may serve as adequate grounds to dismiss the claim. However, if the lapse of a limitation period is not

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raised by a party, the court must consider the claim and render judgment regardless of the expiration of the limitation period.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

Civil proceedings are commenced by the claimant filing a statement of claim to the court. The claim can be filed by post or courier or in person. In addition, filing a claim in the commercial court can be made electronically. Once the court accepts the claim and commences proceedings, parties are notified about the hearing date and their obligations prior to the hearing.

It should be noted that the courts in large cities (such as Moscow) are very busy. Accordingly, if claims are filed in a court in such a city, hearings are likely to be delayed, and less time than normal will be allocated to oral hearings.

Service of foreign proceedings is performed in accordance with bilateral or multilateral treaties, most commonly under the Hague Convention 1965 on the Service Abroad of Judicial and Extrajudicial Documents.

3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

Pre-action interim remedies exist as preliminary injunctions and are largely used in Russia to protect proprietary interests of a claimant. In a ruling granting the injunction, the court should set out the period for submitting a claim (no more than 15 days). The application for preliminary injunction generally requires a counter security provided by the applicant (though not always).

3.3 What are the main elements of the claimant's pleadings?

The claimant's pleading must be in a written form and contain the following information (article 125 APC):

- the name of the arbitrazh court to which the claim is addressed;
- the names of the claimant and respondent and their addresses;
- the subject of the claim with reference to laws supporting the claim;
- necessary background information (facts) with evidence supporting the facts;
- an amount of the claim, if it may be assessed;
- calculation(s) of the amount claimed (or contested);
- proof of fulfilment of any pre-action procedures that might be provided by contract or law;
- evidence of any injunctive relief granted before the proceedings; and
- a list of exhibited documents.

The pleading should also include proof that copies of the statement of claim have been sent to the other parties as well as evidence of paying the state fee.

3.4 Can the pleadings be amended? If so, are there any restrictions?

The claimant may amend its statement of claim by changing either the subject matter of the claim or grounds supporting the claim at any time before the end of hearings in the first instance court.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

The pleadings can be withdrawn at any stage of the proceeding (provided that no counter-claim has been filled) before the final decision and, if appealed, before the appeal instance closes the oral hearings. By withdrawing the claim, the claimant loses its right to resubmit the claim with the same subject matter and based on the same legal grounds (so variations are possible in practice).

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

According to article 131 of APC, the statement of defence should contain the following:

- names and addresses of the claimant and respondent;
- objections to each argument of a statement of claim with legal and factual reasoning provided;
- a list of exhibited documents in support of the statement of defence;
- necessary contact information; and
- documents evidencing that copies of the statement of defence (with exhibits) have been sent to the other parties in the proceedings.

The defendant has the right to bring a counter-claim and/or claim a set-off.

4.2 What is the time limit within which the statement of defence has to be served?

There is no specific time limit for the statement of defence submission, and it should be submitted before the first hearing to allow for consideration by the court and other parties. It is common for the courts to establish a time period for submitting a defence, but there are no practical sanctions for failing to timely do so. In practice, parties are at liberty to submit new defence statements during the whole first instance consideration.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

There is no direct mechanism for a defendant to pass on or share liability by bringing an action against a third party, but a subsequent claim by the defendant against such party is possible. Generally, the defendant would request the court to include such party as a third party to the proceedings (which has large procedural rights), as the outcome would affect their relations.

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4.4 What happens if the defendant does not defend the claim?

If no defence is made against the claim, the court will take into account the claimant's arguments and render the decision in absence of a defence and/or the defendant. Therefore, a court's decision *in abstentia* is common.

4.5 Can the defendant dispute the court's jurisdiction?

The defendant can dispute the court's jurisdiction on the merits at any time prior to the first submission in the first instance court. If there is an arbitration (or another choice of jurisdiction) agreement between the parties, the court will not dismiss the case unless the defendant timely submits such objection.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

Third parties can join the ongoing proceeding before the final decision of the court of first instance is rendered. Generally, there are two types of third parties:

- a third party which has independent claims on the subject matter of the dispute. Such third party's legal status is very similar to that of the claimant, meaning that the third party has independent (from initial relief sought) claims against the defendant. To join the proceedings, the third party has to file a statement of claim to the same court; and
- a third party without independent claims on the subject matter of the dispute. Such third party does not have independent claims and joins the proceedings on the claimant's or the defendant's side, as the court decision may potentially affect such third party's rights and obligations. The third party can be joined in the proceedings upon its own request, upon request of a party of the case, or at the initiative of the court.

In either case, once the third party joins, the proceedings need to be started over.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

The arbitrazh court has the right to consolidate similar proceedings between the same parties on its sole discretion. Also, the proceedings can be consolidated if there is a possibility of rendering contradicting decisions, so it generally requires either the same parties to the dispute, or the same subject matter of the dispute between different parties.

The consolidation of the proceeding can be done at any stage prior to obtaining the decision of first instance.

5.3 Do you have split trials/bifurcation of proceedings?

The arbitrazh court has the right to split proceedings if it deems it necessary for effective dispute resolution, but this is not too common in practice.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

The default rule is that the claim is filed at the place of registration or location of the defendant. If such place is unknown, the claim can be filed at the place of the defendant's assets' location or the last known place of location of the defendant. Article 38 of APC provides for exclusive jurisdiction in particular cases. For example, a claim arising out of corporate relationships is submitted to the court of the place of location of the company, and a claim in connection with the immovable property is submitted to the court of location of such immovable property.

Within the court, cases are allocated between the judges according to their specialisation.

6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Distinct case management is rare in practice, as judges prefer to adhere to the general process under the Code but have wide powers to schedule hearings and generally determine the conduct of proceedings.

Under Russian procedural laws, the following interim measures are available to parties in civil proceedings in commercial and general jurisdiction courts, *inter alia*:

- arrest of funds in bank accounts or other property;
- prohibition on carrying out certain actions in relation to the subject matter of the dispute;
- obligation to continue certain activities;
- seizure of disputed property to be held by the claimant or a third party; and
- suspension of performance of a legal act, writ of execution or sale of the property.

The courts are allowed to impose other interim remedies, so the above list is not exhaustive, provided that such remedies are proportionate to the claim. Russian courts have the authority to order injunctions in support of arbitration proceedings (but these are not available in support of foreign court proceedings).

It should be noted that injunctions are not easy to obtain in practice.

6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

During the proceedings, the Russian court can impose administrative fines or remove from the courtroom the person who disobeys court orders or directions.

Once the decision of the court is rendered, failure to perform it may result in administrative and criminal liability. Also, the court may oblige the debtor to pay interest charged during the delay in the decision's execution.

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6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

Russian law does not entitle the courts to divide or strike out part of the statement of case, but, in a final judgment, the court may grant part of the claims and dismiss (or deny to consider) another. At the same time, the court may strike the case at the stage of acceptance if it is clearly filed in violation of the jurisdiction, or at the preliminary hearing without looking into the merits. It is not unusual for the judge to hear the entire case and then dismiss it. Further, the courts may use other remedies: leaving the claim without consideration or terminating the procedures (see question 6.6 below).

6.5 Can the civil courts in your jurisdiction enter summary judgment?

Arbitrazh courts may enter an equivalent of a summary judgment. The summary judgment is available for cases in which the claimed amount does not exceed a certain threshold defined in the code (quite low), and the debt is confirmed by indisputable evidence.

6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Russian courts are entitled to discontinue a case by leaving the claim without consideration or by terminating the proceedings.

Leaving the claim without consideration (e.g. if the claimant did not participate in court hearings for two or more times) does not prevent the claimant from filing the same claim again after rectifying the defects. Termination of the proceedings (e.g. if the parties concluded a settlement agreement) prevents the claimant from filing a claim again. The judge may not discontinue the case at the midpoint, and cases of non-participation of the parties will continue towards the judgment.

There are also cases when the court suspends proceedings. For example, if the expert examination is appointed, the proceedings are suspended for the examination period.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

There is no disclosure procedure in Russia similar to disclosure procedure in common law countries. Parties may only request the court to assist in locating and claiming evidence, but such evidence needs to be very precise and related to the subject matter of the dispute. No broad document collection is allowed.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

In general, Russian law does not recognise the concept of legal privilege for the parties' legal representatives, unless such representatives are attorneys-at-law (advocates), who are licensed members of the bar. However, even in that case, legal privilege is limited and basically means that such privileged documents cannot be used as evidence in a criminal case.

As a matter of Russian law, legal advice from an in-house lawyer (whether local or foreign) or outside counsel will not be considered privileged. Therefore, no objection can be made against including such documents as evidence. However, it will largely depend on the court whether it would be willing to review and consider the information provided in such legal advice and the weight that will be subsequently given to such evidence. Generally, it is rare in practice.

7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

There are no specific rules on disclosure procedure by third parties. However, the court has the power to require third parties to provide certain documents/evidence.

7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

As indicated above, there is no formal 'disclosure' process. A Russian court will review and examine any documents provided by a party if they are relevant to the case. If a party cannot obtain evidence itself, it may ask the court to assist by seeking an order requiring the defendant or any third party to provide evidence to the court. However, such a request must be very specific to the subject matter of the dispute, otherwise the court will deny it on the basis that it is too broad.

In the absence of such an order by the court, the parties have no obligation to share relevant documents with each other.

Under existing procedural rules, there is no duty of the parties to preserve documents and other evidence pending trial, although the court may draw inferences if key documents to the dispute have not been made available without a valid cause. In some cases (i.e. bankruptcy), lack of prime evidence can be grounds for personal liability of the controlling persons and directors.

7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

There is no general regulation, but particular procedural rules regulate the examination of documents containing legally protected 'secret information' (relating to bank secrets, commercial secrets, etc.) which cannot be made public.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

APC provides that all parties to a dispute have equal rights to present evidence and to participate in the proceedings. Each party to the proceedings has the burden to prove the facts and circumstances they refer to.

8.2 What types of evidence are admissible, and which ones are not? What about expert evidence in particular?

The evidence is admissible if provided in written form or as material evidence, explanations of the persons participating in a case, expert

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opinions, testimonies of witnesses, sound recordings or videotapes. Evidence received in violation of law is not admissible (e.g. by way of hacking).

8.3 Are there any particular rules regarding the calling of witnesses of fact, and the making of witness statements or depositions?

Witnesses must appear in person to give evidence, as otherwise their statements will not be accepted by the court. In practice, written documents would outweigh witness statements.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Are there any particular rules regarding concurrent expert evidence? Does the expert owe his/her duties to the client or to the court?

An expert or expert commission can only be appointed by the court, either with its sole discretion or upon request of the party. In such case, the court orders appointment of the expert and specifies the questions for his/her consideration and may invite the parties to suggest candidates. The expert or expert commission has to produce a written report with the following information:

- the time and place of conducting the expert examination;
- the reasons for conducting the expert examination;
- data on the state court expert institution and on the expert (surname, first name, patronymic, specialty, working record, scientific degree and academic status, office) entrusted with the conduct of the court expert examination;
- expert's acknowledgment of criminal liability for giving knowingly false testimony;
- questions posed to an expert or an expert commission;
- objects of examination and materials of the case presented to an expert for conducting the court expert examination;
- contents and results of the examination with an indication of methods used;
- an evaluation of the results of examination and conclusions with regard to posed questions and their substantiation; and
- other data in compliance with federal laws.

Materials and documents illustrating the opinion of an expert or an expert commission are to be attached to an expert opinion.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

Basically, the court's acts and judgments may be divided into four groups:

- rulings of the court relating to the procedural issues (e.g. a third party to join the proceedings). Such rulings are issued by the courts of any instance;
- court orders are issued by the courts of first instance as a result of summary proceedings. The court order is an enforceable executive document;
- judgments are issued by the courts of first instance as their final decision on the subject matter of the dispute; and
- decrees are issued by courts during appellate, cassation and supervisory review proceedings.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

By default, the winning party is entitled to make a claim against the losing party for recovery of court costs, including the court state fee and attorney's fee. However, if the party's abuse of procedural rights caused unnecessary delay and other damage, then the court may allocate costs on such party regardless of the outcome.

9.3 How can a domestic/foreign judgment be recognised and enforced?

Domestic judgment, provided it came into force, is subject to enforcement under Russian Law "On Enforcement Proceedings", with no further recognition. Generally, the court issues a writ of execution, which is a main execution document under the mentioned Law. However, some court decisions (e.g. court orders under summary judgment) are executive documents themselves and may be enforced directly.

Decisions of foreign courts are recognised and enforced by the Russian courts in accordance with international treaties and Russian laws.

9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

As a general rule, each party can appeal the decision of the court to a higher instance court and, in most cases, bring a further appeal against the appellate court decision to the 'cassation' (second appeal) court. The party bringing the appeal must prove that there have been substantial violations by the lower instance court through wrongful application of the law, wrongful interpretation of the facts or violation of mandatory procedural requirements.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

Parties are always welcomed to settle the disputes amicably. Courts encourage parties to do so and are often ready to postpone hearings if the parties are in settlement discussions, and settlement can be made at any stage, including during the enforcement.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

There are generally three types of alternative dispute resolution ("ADR") mechanisms that are legally recognised and used: negotiation; mediation; and arbitration (domestic and international). Negotiation is one of the more commonly accepted forms of ADR and is usually used as a first stage of dispute resolution.

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The second type of ADR is mediation, which is governed by a proper law. A mediation agreement is concluded in writing. As decisions of the mediator are not legally binding, compliance with the mediation agreement is based upon the principles of cooperation and good faith of the parties. There are discussions on making mediation agreements enforceable.

The third type of ADR is arbitration. The dispute can be referred to arbitration if there is a valid arbitration agreement between the parties and the dispute is arbitrable under Russian law (please see the response to question 1.2).

Expert determination is not recognised separately under law but exists in practice and is widely used in complex construction disputes as a variation of traditional negotiation.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Mediation is governed by the Federal Law N 193-FZ on an Alternative Procedure for the Settlement of Disputes with the Participation of an Intermediary (Mediation Procedure) dated 27 July 2010.

Domestic arbitration is regulated by Federal Law N 382-FZ dated 29 December 2015 on Arbitration (Arbitration Proceedings) in the Russian Federation.

The Law of the Russian Federation N 5338-1 dated 7 July 1993 on International Commercial Arbitration applies to international commercial arbitration, which is very close to the UNCITRAL Model Law 1985. The enforcement of the award is subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards dated 1958 (New York Convention), to which the Russian Federation is a party.

1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

There are several areas of law which cannot use arbitration as a means of alternative dispute resolution. The following disputes are not arbitrable:

- antitrust disputes;
- insolvency and bankruptcy disputes;
- disputes involving state registration matters (certain disputes on immovable property located in Russia, disputes concerning establishment or liquidation of legal entities and individual entrepreneurs, disputes involving intellectual property (trademarks, patents, etc.), and registration);
- family and inheritance law matters; and
- disputes arising from state procurement contracts (though this area is now about to become arbitrable, in limited institutions).

There are also some types of disputes that cannot be resolved in mediation.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, force parties to arbitrate when they have so agreed, or order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

Russian state courts have the following powers to provide assistance and supervision to arbitral tribunals (unless parties expressly waived most of such rights to apply to Russian state courts):

(i) granting interim relief;

(ii) assisting the arbitral tribunal in taking evidence (available only for institutional – not *ad hoc* – arbitration);

(iii) appointing and challenging arbitrators or terminating an arbitrator's mandate;

(iv) challenging an interim arbitration ruling on competence of the arbitral tribunal;

(v) setting aside arbitral awards; and

(vi) enforcing arbitral awards.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

Arbitral award is binding on the parties unless challenged or set aside. Once an arbitrazh court considers a case on challenging an arbitration award, its judgment enters into force immediately. The parties could appeal that judgment to the cassation instance (arbitrazh court of the relevant circuit) and then to the Supreme Court.

The decision of a mediator is not binding.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

The major alternative dispute resolution institution is The International Commercial Arbitration Court at the Chamber of Commerce and Industry (CCI) of the Russian Federation (https://mkas.tpprf.ru/en/), and the Arbitration Court at the Union of Entrepreneurs and Industrialists (https://arbitration-rspp.ru/) can resolve international, domestic and corporate disputes.

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Serbia

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

Serbia is a civil law jurisdiction. Its legal system is based on Roman law tradition and institutes. As is the case with other continental law jurisdictions, its sources of law are codified; hence court decisions are based on the Constitution, laws, other general acts, accepted international law rules and accepted international treaties. Civil procedure rules can be found in the following acts:

- Civil Procedure Act.
- Enforcement and Security Act.
- Courts Classification and Organization Act.
- Courts and Public Prosecutors (Seats and Jurisdictions) Act.

Case law is not a formal source of law, although it plays a very limited role in this sense. Namely, where ambiguities arise in the interpretation of legislation, the opinion of the Supreme Court of Cassation has a very authoritative role and the courts of lower instances tend to comply with its opinions, but they are not required to do so.

1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

Courts in Serbia are classed according to jurisdiction, i.e. courts with general and special jurisdiction. Courts of general jurisdiction are local courts, high courts, courts of appeal and the Supreme Court of Cassation. Courts of special jurisdiction are commercial courts, the Commercial Court of Appeal, misdemeanour courts, the Misdemeanour Court of Appeal and the Administrative Court.

Jurisdiction is determined based on the type of dispute, the parties (whether they are private individuals or legal entities), dispute value, etc.

Local courts hear cases between private individuals where the dispute value does not exceed EUR 40,000. Local court rulings can be appealed to the High Court (judgments in disputes where the dispute value does not exceed EUR 3,000) or the Court of Appeal. The High Court is the court of first instance in cases between private individuals when the dispute value exceeds EUR 40,000 (as well as in some specific types of disputes) and judgments in this case can be appealed to the Court of Appeal.

Commercial courts hear disputes between companies and other legal entities and their rulings can be appealed before the Commercial Court of Appeal.

There are two guaranteed instances in court decision-making in Serbia, while in certain cases prescribed by the law, an extraordinary legal remedy can be filed with the Supreme Court of Cassation.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

The main stages of civil proceedings in Serbia are as follows:

1) Filing an action.
2) Preparation for the main hearing.

   The court prepares for the main hearing on receipt of the action. Once the court satisfies itself that the action is admissible, it either serves the action on the respondent, in 15 days as of the filing of the same to the court, and notifies it of its duty to file a statement of defence within 30 days of receipt of the action, or in low-value disputes summons the respondent to a preliminary hearing (disputes not exceeding the Serbian dinar (RSD) equivalent of EUR 3,000 for disputes heard before the local courts, and the RSD equivalent of EUR 30,000 for disputes heard before the commercial courts).

   A preliminary hearing is scheduled to take place within 30 days' of the date the plaintiff was served with the defendant's statement of defence. By the end of the preliminary hearing, or the first main hearing where a preliminary hearing is not held, the parties must submit all evidence supporting their claims. They will not be allowed to submit evidence at a later stage unless they prove that it was impossible for them to do so or introduce them at the preliminary hearing, or at the first main hearing if a preliminary hearing was not held.
3) The main hearing.
4) Adjudication.

1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

Serbian courts have jurisdiction in proceedings if its competence in a dispute with an international element is explicitly stipulated by the law or international treaty. If the law or international treaty do not stipulate exclusive jurisdiction of Serbian courts for a certain type of dispute, the Serbian court shall be competent to solve a dispute if such competence stems out of provisions regulating territorial jurisdiction of local courts.

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Hence, the parties can agree in writing on the jurisdiction of a foreign court, save in cases where the law stipulates the exclusive jurisdiction of the Serbian courts. For example, Serbian courts have exclusive jurisdiction in disputes relating to title to or lease of real estate located in Serbia, while in disputes arising out of bankruptcy proceedings the court hearing those proceedings has jurisdiction, etc.

1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

There are court fees which can be found in the court fees tariff, and attorney's fees which can be found in the attorney's tariff. If there is a set dispute value, both court fees and attorney's fees are determined based on that value. Court fees are charged, for example, on the action and court ruling, with attorney's fees charged on the drafting of the actions, submissions, and hearing attendance. During the proceedings, it might be necessary to pay the costs of expert opinions, travel costs of witnesses, etc. These costs are usually paid by the party moving for the introduction of this evidence.

Hence, the general rule is that each party pays their own costs during the proceedings, but the losing party at the end of the proceedings is required to pay the entire costs of the dispute – both their own and those of the opposing party. Where a party succeeds in a dispute only partially, the court may order that costs be apportioned according to the parties' relative success in the dispute.

There are no formal cost budgeting rules. However, parties have a right for courts to adjudicate on their claims within a reasonable period, without delay, in line with a previously set time limit and in a cost-efficient manner.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

Funding litigation is not specifically regulated in Serbian law. However, a review of applicable law would suggest that it is forbidden. Namely, if parties to a dispute are not also the parties to the relationship giving rise to the dispute, then they lack capacity to be a party to legal proceedings (capacity to sue or to be sued), in which case the court would reject the action.

Based on the tariff of attorney's fees and costs, it is possible to agree that the attorney's fees be paid as a percentage *pro rata* to success in the proceedings, but the agreed percentage cannot be higher than 30%.

1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

As mentioned above under question 1.6, parties in a dispute must be parties in a relationship out of which the dispute itself arose in order to have capacity to sue or to be sued. However, it is possible for a third party (intervener) to join the dispute on the side of a party if it has a legal interest in that party winning the dispute. Its legal interest does not have to be the same as that of the party it is joining. That said, its legal interest in that party's success in the dispute inevitably needs to exist. If both parties agree, the intervener can take the place of the party that it joined and replace it in the dispute entirely. It is also possible to sell the contentious right itself, in which case the buyer would have legal interest to participate in a dispute, hence it would be allowed.

1.8 Can a party obtain security for/a guarantee over its legal costs?

When a plaintiff is a foreign national or a person without citizenship and is not residing in Serbia, he/she must, at the respondent's request, provide security to the respondent for the costs of the dispute. Where a reciprocal arrangement exists, foreign nationals may be exempt from the requirement to secure dispute costs.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

There are no formalities to comply with before initiating proceedings. However, it is common practice to communicate with the potential respondent before initiating proceedings in an attempt to resolve the matter amicably.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

The standard time limit for receivables is 10 years. However, shorter time limits apply to claims in specific cases. For example: claims for damages are time-barred after three years of the claimant learning of the damages and the person who caused such damage, but in any case claims for damages are time-barred after five years of the damage being caused; employment claims are time-barred after three years; receivables which are due annually, monthly or in other regular periods are time-barred after three years; mutual claims of legal entities under contracts for the sale and purchase of goods or services are time-barred after three years, whereby the time limit applies seperately to each good, service or work delivered; and all claims upheld by a court ruling become time-barred after 10 years, including receivables for which the law otherwise prescribes shorter time limits, etc.

A claim becomes time-barred once the statutory time limit lapses in which the claimant was entitled to demand fulfilment. This period starts to run on the first day after the date on which the claimant had the right to demand fulfilment of an obligation, and it expires on the last day of the legally prescribed time period. Time limits are not examined by the courts *ex officio*, rather an interested party must invoke it.

Time limits, i.e. statutes of limitation, are considered to be a substantive law matter and they are predominantly stipulated in the Contracts and Torts Act.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

The proceedings are initiated by filing an action, which is usually done by submitting it to the court or sending it by registered mail. Service by electronic means is provided for by law; however, the

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conditions are still not met for this manner of service in practice. Private individuals are served with the action at the address they have registered with the Ministry of Interior, whereas companies are served with the action at the company address registered with the Serbian Business Registers Agency.

The deemed date of service is the date the party received the relevant document. However, for court filing deadlines, and where a filing is sent via registered mail, it is deemed as having been submitted timely if it has been posted on the last day of the deadline.

When the law requires personal service (e.g. in the case of actions or judgments), if the addressee is not found at the given address, an attempted delivery notice is left for the addressee explaining that he/she can collect the submission at the court within 30 days of the attempted delivery. In this case, a copy of the submission is fixed to the relevant court's notice board. After the 30-day period elapses, it is deemed that the service has been duly effected.

If a document is to be served on private individuals, companies or to foreign nationals who enjoy immunity, service is being conducted through diplomatic channels.

If a party to a dispute lives/resides abroad and does not have a legal representative in the Republic of Serbia, the court will order the party to appoint a process agent. If a party fails to comply with this order, the court will appoint a process agent at that party's expense. If a party recalls the process agent without appointing another one, the court will serve that party with documents via the court notice board.

3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

Under the Enforcement and Security Act, an enforcement creditor can apply for interim remedies to the relevant court prior to, during, or after the relevant proceedings have taken place. Both monetary and non-monetary claims may be secured by way of a preliminary injunction, as well as undue, conditional and future claims. For a preliminary injunction to be imposed, an enforcement creditor must demonstrate the likelihood of its claim.

An enforcement creditor applying for a preliminary injunction to secure a monetary claim must demonstrate the likelihood that the enforcement debtor will prevent or significantly hinder the collection of that claim by selling or concealing its property or disposing of it otherwise. An enforcement creditor applying for a preliminary injunction to secure a non-monetary claim must demonstrate the likelihood that, in the absence of the injunction, the enforcement debtor will prevent or significantly hinder collection of the claim, or that the use of force could not be avoided or that irreparable damage would occur.

3.3 What are the main elements of the claimant's pleadings?

A pleading must contain certain particulars, such as: the name of the court, name and surname/company name of the respondent and their address as well as those of their legal representatives and attorneys (if any), the subject-matter of the action and signature of the plaintiff. A party also must indicate the facts and evidence to support its claims, if needed.

3.4 Can the pleadings be amended? If so, are there any restrictions?

A plaintiff can amend an action at any point before the conclusion of the main hearing. Amendment(s) to an action after it has been served on a respondent requires the respondent's permission, although the court can allow the amendment of the action even when the respondent opposes, if the court deems it appropriate in terms of finally resolving the relations between the parties, and once it satisfies itself that amending the action will not significantly prolong the proceedings.

An action can be amended in the following manner: changing the statement of claim: increasing the existing statement of claim: or putting forward a supplementing statement of claim along with the existing one. The plaintiff may also amend the action in respect of the identity of the respondent, i.e. the plaintiff may list another person/entity as the respondent instead of the initially indicated respondent. This requires that permission from the new respondent be obtained, and if the initial respondent has already commenced arguing the merits of the case, his or her permission is also required.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

Yes. An action can be withdrawn, without the respondent's permission, where done so before the respondent commences arguing the merits of the case. An action can also be withdrawn at a later stage, even after a final and binding ruling has been rendered; however, this requires the respondent's permission. If an action is withdrawn it is deemed to have never been filed and, consequently, it can be re-filed.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

A statement of defence must contain the same particulars as any other submission, as detailed under question 3.3 above. The respondent shall put forward its procedural objections and declare whether he/she recognises or contests the statement of claim. If the respondent contests the statement of claim, the statement of defence must contain facts and evidence supporting its contentions.

The respondent may, prior to the conclusion of the main hearing, file a counterclaim before the same court, if the subject-matter of the counterclaim is related to the subject-matter of the dispute, or if these two claims can be set off, or if the counterclaim moves that the court determine the existence of a certain right or legal relation, the existence of which would have an influence on the court's decision in respect of the statement of claim, either completely or partially. A counterclaim may not be filed if its subject-matter falls under the subject-matter jurisdiction of a higher-instance court or a different type of court.

4.2 What is the time limit within which the statement of defence has to be served?

The court serves the respondent with the action within 15 days of its filing with the court. The respondent must file a statement of defence within 30 days of the date when he/she was served with the action.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

If a defendant is sued as a holder of an object or as a beneficiary of a particular right, and claims to hold the object or exercise that right

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on behalf of a third person, the defendant must invite that person (predecessor) to join the litigation as a party in his/her place. This must be done in the statement of defence and if he/she is not served with an action and there is a duty to submit a statement of defence, then he/she must invite the predecessor prior to the conclusion of the preliminary hearing; or, if a preliminary hearing is not held, at the main hearing prior to arguments on the merits of the case being heard. The plaintiff's permission for the predecessor to join the litigation is required only if the plaintiff brings claims against the defendant, in respect of which there is no relevance as to whether the defendant is holding an object or exercising a right on behalf of the predecessor or not. If the predecessor is duly summoned but fails to appear at the hearing or refuses to join the litigation, the respondent cannot object to the due outset of the litigation.

4.4 What happens if the defendant does not defend the claim?

If the respondent fails to file a statement of defence within a given time limit, the court shall render a judgment upholding the claim (default judgment), provided that: 1) the defendant is served with the action properly, containing a notice concerning the consequences of the failure to file a statement of defence; 2) the facts supporting the action are not at odds with the evidence presented by the plaintiff or commonly known facts; 3) legitimacy of the action stems from the facts stated in the action; and 4) no commonly known facts exist that would indicate the respondent was justifiably impeded from replying to the action. In addition, if the defendant was not required to file a statement of defence, a default judgment will be entered against him if he fails to appear at the preliminary or first main hearing.

4.5 Can the defendant dispute the court's jurisdiction?

Yes. The defendant can challenge the court's jurisdiction in the statement of defence, or where he/she has not been served with an order to respond to the action, at the preliminary hearing; or, if a preliminary hearing was not held, at the main hearing prior to arguments on the merits of the case being heard.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

A person having a legal interest for one of the parties to succeed in a litigation pending between other parties may join that party. An intervener may join the litigation at any stage of the proceedings, up to and including the moment that the judgment becomes final and binding, as well as during proceedings resumed upon submission of an extraordinary legal remedy. Each party may contest the right of an intervener to participate in the proceedings and move that the court reject his/her application to join the proceedings, and the court may refuse participation by an intervener without obtaining prior declaration of the parties if it finds the legal interest of the intervener to be non-existent.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

If a single court is hearing several litigations between the same parties, or if a party appears as the opposing party against several plaintiffs or defendants, the court may rule to join all of these civil actions for common hearing where this would expedite the hearing of arguments or reduce costs. The court may render a single judgment adjudicating joined actions.

5.3 Do you have split trials/bifurcation of proceedings?

The court may order that two or more claims covered by a single action be heard separately, and may render separate rulings on those claims at the end of each hearing.

Furthermore, if only some of those claims are ready for final adjudication on foot of an admission plea or waiver or argument, or if only a part of one of the claims is ready for final adjudication, the court is entitled to conclude a trial hearing and render a judgment in respect of claims that are ready for adjudication, or in respect of a part of the claim (partial judgment). The court may also render a partial judgment if a counterclaim has been submitted and either the claim or counterclaim is deemed ready for adjudication.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

To ensure an equal case load between judges in the court, cases are classified on receipt based on their urgency, type of proceeding, i.e. area of law, and are then allocated to judges randomly, according to the time when they were received by the court, all in accordance with the yearly allocation of work at the court.

6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

The court manages the civil proceedings in the sense that it schedules hearings, sets time limits for acting on directions/orders, gives parties the floor at the hearing, etc., but it passes judgment only within the limits of the claims brought by the parties. However, the court has the power, in certain instances, to ascertain facts and derive evidence not presented by the parties if the hearing and presentation of evidence suggests the parties are setting claims they are not allowed to (claims that contravene statutory regulations, public order and the code of conduct).

6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

The court may, in the course of proceedings, impose a fine of up to RSD 150,000 (approx. EUR 1,270) on a private individual, and a

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fine of up to RSD 1,000,000 (approx. EUR 8,450) on a legal entity for insulting the court, opposing party or other party to the proceedings. The court can also take other measures, but it does not specify which ones.

6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

The court may, during the course of a preliminary examination of a matter, dismiss the action if it finds that: 1) the court lacks jurisdiction to adjudicate in the matter; 2) the action was filed outside the statutory time limits; 3) another litigation proceeding between the same parties and with the same subject-matter is pending; 4) the matter has already been adjudicated by way of a final and binding decision; 5) a court settlement was reached on a particular matter; 6) a plaintiff holds no legal interest in filing an action; or 7) an action is incomprehensible or incomplete and as such cannot be proceeded with, if it was submitted by an attorney at law.

The court can also dismiss an action in some other cases, e.g. where an action was filed by a plaintiff residing abroad who failed to nominate a process agent.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

The Civil Procedure Act does not recognise summary judgment as such. However, there are certain institutes similar to it. For example, where a defendant fails to file a statement of defence or fails to appear at the first hearing, as described under question 4.4 above, the court can enter a default judgment in favour of the plaintiff.

In addition, if the statement of claim refers to a due monetary receivable, the existence of which is being proven by an authentic document (e.g. invoice) enclosed with the action, and if such receivable does not exceed the dinar countervalue of EUR 2,000, the judge can issue a payment order *in lieu* of a ruling.

6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

The court may discontinue proceedings in certain situations, e.g. if a party dies or no longer has capacity to be sued, or if a party who is a legal entity ceases to exist, due to legal consequences arising from insolvency proceedings or liquidation, etc. Actions taken by a party during the discontinuance shall have legal effect only on the continuation of the proceedings. The time limits suspended due to discontinuation of the proceedings shall duly resume as of the day when the court serves notice of the continuation of the proceedings on the interested party.

The court may stay proceedings if so expressly provided by the law, and specify the period of the stay. A stay of proceedings does not affect the time limits for procedural steps.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

Serbian law does not provide for the institute of disclosure. However, litigating parties in Serbia are required to list all the evidence supporting their claims in the action by the end of preliminary hearing. Motions to introduce new evidence at a later stage must demonstrate that they could not have done so earlier for reasons beyond their control.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

Beside client-attorney privilege, there are other types of privileges, which can be grouped into professional privilege, family privilege and self-incrimination privilege.

7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

The court may order a third party to submit or present a document only when it is so obliged pursuant to the law, or if the document concerned is deemed to be, in respect of its content, common to both the party adducing the document and a third party. If a document is held by a public authority, enterprise, or other organisation vested with public powers, and a party is unable to afford the document to be conveyed or presented, the court shall obtain the document, on application by the party, or *ex officio*.

7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

As mentioned, the institute of disclosure does not exist as such, but see question 6.2 above for the role of the court in respect of evidence.

7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

Since disclosure is not specifically regulated in Serbian law, there are no specific restrictions either.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

Each party is required to furnish evidence in support of its claims, but the court decides which evidence shall be used to establish the relevant facts. The party who claims to have a certain right shall bear the burden of proof pertaining to the fact essential for the existence/exercise of that particular right. However, a party contesting the existence of a particular right shall bear the burden of proof pertaining to the fact that prevented the existence or exercise of that right. Facts that are common knowledge do not need to be proven.

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8.2 What types of evidence are admissible, and which ones are not? What about expert evidence in particular?

Under Serbian law, admissible evidence includes documents, testimony given by parties and third parties (witnesses), affidavits, expert opinions and judicial inspection.

The court may order that evidence be presented by an expert witness if the establishment or explanation of a certain fact requires expert knowledge that the court lacks. The expert submits his findings and opinion in writing to the court, including his reasoning, prior to the trial hearing. If a party has objections to the expert opinion, it will submit them to the court in writing. A party has the right to engage another expert witness to challenge the opinion of the first one and such expert can be present at a hearing, ask questions and provide explanations, at which hearing the court will try to reconcile the conflicting expert opinions. Failing that, the court will appoint a new expert witness.

8.3 Are there any particular rules regarding the calling of witnesses of fact, and the making of witness statements or depositions?

As a rule, witnesses give testimony in person at a hearing. Exceptionally, a court may allow a duly witnessed written statement (affidavit) to be presented instead.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Are there any particular rules regarding concurrent expert evidence? Does the expert owe his/her duties to the client or to the court?

In addition to that outlined under question 8.2 above, an expert witness assists the court, hence he owes his allegiance to the court. He must be objective and impartial. A party may suggest an expert witness from the list of court-vetted expert witnesses. If the other party to a dispute does not agree with the proposed expert witness, the court will choose one.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

Beside the judgment in which the court decides on the merits of the entire statement of claim, there are several types of judgments:

1) Partial judgment – e.g. if there are several claims and only some of them are ready for adjudication.
2) Interim judgment – if the defendant has challenged both the grounds of a claim and the amount, i.e. value of the claim, and where only the conditions have been met to render a final decision in respect of the grounds, the court may adjudicate only on the grounds and on the value of the claim after the interim judgment becomes final.
3) Judgment based on a defendant's recognition of the statement of claim.
4) Judgment based on a plaintiff's waiver of the statement of claim.
5) Default judgment – there are two types of default judgment as described under question 4.4 above.
6) Additional judgment – in case the court failed to decide on all the claims or on all parts of the claim.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

The courts regularly rule on damages, interests and costs of litigation. The court decides to accept the party's claim for damages and interest if the party sought it, if it is in line with relevant substantive law and if it is supported by sufficient evidence. As regards the costs, they are a part of every judgment and are borne by the losing party in a dispute.

9.3 How can a domestic/foreign judgment be recognised and enforced?

A foreign judgment needs to be recognised by the Serbian courts before it can be enforced. Recognition requires that the judgment be final and binding, and that a reciprocal arrangement of recognition exists with the issuing state. These judgments are recognised before high courts or commercial courts, depending on their subject-matter.

Judgments are enforceable once final and binding, and on foot of a motion for enforcement filed by the plaintiff (now enforcement creditor) where a defendant fails to act on a judgment.

9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

A party appeals a first-instance judgment within 15 days of the day when it was served with the same. Appeals can be filed on the following grounds: substantial violation of rules of civil procedure; erroneous or incomplete findings of fact; and erroneous application of substantive law.

Extraordinary legal remedies can be filed against appeal judgments. These are:

1) Revision (which is not allowed in relation to monetary claims with a value less than EUR 40,000 in disputes between private individuals, and EUR 100,000 in disputes between companies, but is always allowed in cases provided for by a specific law when an appeal court has changed the judgment and adjudicated the parties' claims, and when the appeal court has upheld the appeal, annulled the judgment and adjudicated the parties' claims).
2) Application for review of the final judgment. This request is filed by the public prosecutor.
3) Application for retrial (e.g. where a party was not afforded the opportunity to argue its case before the court due to unlawful conduct, and in particular due to the court's failure to effect service, where a ruling was founded on the false testimony of a witness or expert witness, where a party has learned of new facts or has been given or has gained a possibility to have recourse to new evidence, etc.).

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

The court advises the parties as per their liability to reach a settlement before the court and shall act to facilitate a settlement. A settlement is deemed concluded if one the parties sign the minutes of the settlement upon reading it. A certified copy of the minutes of the settlement is issued to the parties and has the effect of a judgment.

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II. ALTERNATIVE DISPUTE RESOLUTION

1 General

1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

The most commonly used alternative dispute resolution method in Serbia is arbitration and, somewhat more shyly, mediation. A dispute can be solved before arbitration solely based on the agreement of the parties, be it a separate arbitration agreement or an arbitration clause within some other agreement. Arbitration is organised by the permanent arbitral body, but the parties can agree on *ad hoc* arbitration as well. If a party files an action to the court despite the existence of an arbitration clause or agreement in relation to the relevant matter, the court shall dismiss such action.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

- Arbitration Act.
- Mediation in Dispute Resolution Act.
- Amicable Resolution of Labour Disputes Act.

1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Parties may agree to resolve their pecuniary dispute via arbitration in respect of rights that they freely dispose of, save for disputes for which exclusive jurisdiction of the court is stipulated.

Mediation also cannot be used to resolve matters that come under the exclusive jurisdiction of the court or, for example, to resolve disputes regarding the determination and collection of public revenues.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, force parties to arbitrate when they have so agreed, or order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

The courts can assist arbitral tribunals in cases stipulated in the Arbitration Act, such as in the following cases:

- Issuing of preliminary injunctions prior to or during arbitral proceedings.
- Composition of the tribunal in case the appointment authority fails to do so, or in case of *ad hoc* arbitrations.
- Deciding on the challenge of arbitrators in an *ad hoc* arbitration.
- Rendering of the final decision on jurisdiction if the arbitral tribunal is deciding on that issue as a preliminary issue.
- Helping with presenting evidence, if sought by the arbitration tribunal.
- Depositing the arbitral award upon the parties' request.
- Review of the arbitral award in case a party files an action for its annulment.
- Recognition and enforcement of a foreign arbitral award.

As regards mediation, the court shall inform the parties about the possibility to resolve their dispute via mediation. If parties agree to try to solve the disputable matter via mediation, the court will stay the civil proceedings. The court shall continue the proceedings in 30 days as of its receipt of information that an attempt to resolve the dispute via mediation has failed.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

Local arbitral awards are final and binding and foreign arbitral awards become final and binding after their recognition by local courts. However, even though they cannot be appealed, parties may file an action for their annulment to the competent court. The subject-matter of an annulment application can only be the local arbitral award, i.e. the arbitral award rendered by an arbitral tribunal seated in the Republic of Serbia.

As mediation is voluntary, there are no sanctions for refusing to mediate. Agreement between the parties reached via mediation has the legal force of an out-of-court settlement, hence the provisions of contract law apply in this case. However, such a mediated agreement between the parties can have the force of an enforceable document if it contains a debtor statement, whereby he accepts that the creditor may initiate enforcement proceedings based on such mediation agreement, and if the signatures of the mediator and the parties have been witnessed by the court or notary public.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

- Foreign Trade Court of Arbitration at the Chamber of Commerce and Industry of Serbia.
- Committee for the resolution of disputes relating to the registration of national internet domain names.
- The Centre for Mediation.
- The Agency for Amicable Settlement of Labour Disputes.

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Chapter 32

Singapore

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

The legal system of Singapore is based on the common law system. Civil procedure in Singapore is governed by the Rules of Court, which are made in accordance with the provisions of the Supreme Court of Judicature Act.

1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

There are essentially two tiers for the civil courts in Singapore, namely the State Courts which hear claims of up to $250,000, and the Supreme Court which comprises the High Court and the Court of Appeal (the highest court in Singapore). The High Court hears claims of more than $250,000.

Within the structure of the State Courts, the Magistrates' Court hears claims of up to $60,000 and the District Court hears claims of more than $60,000 up to $250,000.

Specialised courts include the Family Court, Coroner's Court, the Small Claims Tribunals and the Employment Claims Tribunals.

There is also the Singapore International Commercial Court ("SICC") which is a division of the Singapore High Court, established to deal with transnational commercial disputes.

An appeal may be made from decisions of District Judges or Magistrates in the State Courts to a Judge in the High Court. In the Supreme Court, a party may appeal from decisions of a Registrar to a Judge in chambers, and from a Judge to the Court of Appeal.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

From the date of filing and service of a writ of summons by the plaintiff, the defendant has eight days to enter an appearance. Where the statement of claim was not endorsed on the writ, it must be served by the plaintiff within 14 days from the date the defendant enters an appearance. The defendant has 14 days to serve a defence (and counterclaim) from the later of the time limit for entering appearance or service of statement of claim. Any reply and defence to counterclaim, if any, must be served by the plaintiff within 14 days after service of the defence and counterclaim. Pleadings will be considered closed 14 days after the service of the reply (or, if there is no reply, after service of the defence to counterclaim). Thereafter, discovery is generally expected to take around one to two months, depending on the complexity of the matter. Affidavits of Evidence-in-Chief will be prepared and filed. Parties will thereafter proceed to trial. Trial dates will depend on the Court's calendar at that time.

The plaintiff can apply for summary judgment against the defendant after a defence is filed, and within 28 days after the close of pleadings unless the plaintiff obtains an extension from the Court. The hearing of a summary judgment application can usually be concluded within a day.

A simplified court process applies in respect of claims in the Magistrates' Courts. It is not possible to apply for summary judgment in such claims, and where it is not possible for parties to settle their disputes without a trial, time limits are provided for simplified trials.

1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

The Singapore Courts will enforce exclusive jurisdiction clauses. In doing so, the Singapore Courts take a wide reading to exclusive jurisdiction clauses and will give a commercially sensible meaning to such clauses. Where a party sues in breach of an exclusive jurisdiction clause, the Court will stay the proceedings unless "strong cause" for refusing a stay is shown. In determining whether there is "strong cause", the Court will consider various factors such as whether the party genuinely desires trial in the foreign country or is only seeking procedural advantages. The merits of the defence are irrelevant to the Court's consideration in deciding an exclusive jurisdiction clause application.

1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

As a general guide, the successful party is generally entitled to costs. The quantum of party-and-party costs largely depend on the complexity of the matter at hand, although costs for certain applications are fixed. Costs awards by the High Court and Court of Appeal are guided by the costs guidelines in Appendix G of the Supreme Court Practice Directions. The Court, however, retains an

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overriding discretion to depart from these guidelines on a case-by-case basis. Party-and-party costs are separate from solicitor-and-client costs.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

Contingency fees are expressly prohibited under the Legal Profession Act.

The Council of the Law Society has taken the position that for contentious matters, conditional fee arrangements are similarly prohibited where they amount to the solicitors having an interest in the subject matter of the litigation.

1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

Third-party funding is now permitted for international arbitrations and court or mediation proceedings arising out of international arbitrations.

The Singapore High Court has also recognised third-party funding where a liquidator assigns the causes of action of a company undergoing liquidation to a third-party litigation funder.

1.8 Can a party obtain security for/a guarantee over its legal costs?

A defendant could take out an application to the court to obtain security for costs. The Courts retain the discretion, having regard to all the circumstances of the case, such as whether a genuine claim will be stifled, as to whether to order security for costs. A usual ground for ordering security is that the plaintiff is ordinarily resident out of jurisdiction.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

There are no particular formalities with which parties must comply before commencing proceedings. However, as a matter of practice, it is usual for claimants to send out a letter of demand before initiating formal proceedings.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Generally, actions in contract and tort cannot be commenced more than six years after the cause of action accrues. Actions to recover land and rent have a limitation period of 12 years. Actions for negligence and breach of duty, where the damages claimed consists of personal injuries, have a limitation period of three years from the date the cause of action accrues, or from the date the plaintiff has the knowledge required for bringing an action in respect of the relevant injury, whichever is later. The overriding time limit for negligence, breach of duty or nuisance is 15 years from the relevant act or omission.

Time limits are treated as a procedural law issue. However, in cases where the Singapore Court has to adjudicate on a foreign law issue, it will be treated as a substantive law issue and that foreign law's limitation period will apply.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

Civil proceedings are commenced by the issuance and service of a writ or originating summons. The writ must be endorsed with, amongst others, either an endorsement of claim or with a statement of claim. Originating summons are to be issued in the proper forms. Both writs and originating summonses (other than an *ex parte* originating summons) must be served personally on each defendant, unless such service is not required under any particular rule or statutory enactment or an alternative method of service is authorised. A party can also make an application to the Court for substituted service (by post, fax, WhatsApp or such other method as the Court deems appropriate) where personal service is impracticable.

Service out of jurisdiction may be effected by a number of ways such as service by a method specifically authorised by the law of the foreign jurisdiction for service of foreign process, or service through a Singapore consular authority, provided that such methods do not contravene the law of the foreign jurisdiction. If the foreign jurisdiction is one with which Singapore has a Civil Procedure Convention, service may also be effected through the judicial authorities of the foreign jurisdiction.

3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

Pre-action remedies available to a party are Mareva injunctions (freezing orders), anti-suit injunctions, and Anton Piller orders (search orders). These applications are made either as a summons to the substantive action (to be filed in due course) or an originating summons (if the remedy sought is a stand-alone remedy, for example, if it is sought in aid of foreign proceedings).

A party may also be able to take out pre-action discovery against another party. Pre-action discovery may also be applied for by way of an originating summons. A party seeking pre-action discovery must have *locus standi* to commence subsequent proceedings in court, and would have to establish that the party, against whom pre-action discovery is sought, appears to be likely to be a party in such proceedings and likely to have or to have had in possession, custody or power of any relevant documents.

3.3 What are the main elements of the claimant's pleadings?

A plaintiff is only required to set out the material facts relied upon by the plaintiff for its claim but not the evidence by which such facts are to be proved. The statement of claim must state specifically the relief or remedy which the plaintiff claims but costs need not be specifically claimed.

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3.4 Can the pleadings be amended? If so, are there any restrictions?

Pleadings can be amended at any point in time in the action. Pleadings may be amended without leave of court once pleadings are deemed to be closed, and the plaintiff must serve the amended pleading on the opposite party. Where an amended statement of claim is served on a defendant after the defendant has already served a defence on the plaintiff, the defendant may make consequential amendments to its defence.

If pleadings are deemed to have closed, pleadings may be amended with leave of court, on such terms as to costs or otherwise as may be just and in such a manner as the Court may direct.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

A plaintiff may withdraw any particular claim without leave of court not later than 14 days after service of the defence on it. A defendant may withdraw its defence or any part of it at any time without leave of court. A defendant may also withdraw any particular claim made by it in its counterclaim not later than 14 days after service of the defence to counterclaim on it. Parties will require leave of court to withdraw a claim in all other cases.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

A defendant needs to set out the material facts upon which it relies for its defence in the statement of defence. The defendant must also plead specifically any matter which it alleges, e.g. if such matter makes any claim of the opposite not maintainable or which if not specifically pleaded might take the opposite party by surprise. A defendant can file a defence and counterclaim(s).

4.2 What is the time limit within which the statement of defence has to be served?

The defendant has 14 days after the time limit for appearing or the time the statement of claim is served on it, whichever is later, to serve a defence (and counterclaim).

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

A defendant may commence third-party proceedings where it claims against a third party, amongst others, any contribution or indemnity or any relief or remedy relating to or connected with the original subject-matter of the action and for substantially the same as some relief or remedy claimed by the plaintiff.

4.4 What happens if the defendant does not defend the claim?

If a defendant does not defend a claim, the plaintiff will be entitled to apply for default judgment against the defendant.

4.5 Can the defendant dispute the court's jurisdiction?

Yes, a defendant may dispute the Singapore Court's jurisdiction over a matter. Such a defendant must, however, first enter an appearance in the matter before the Singapore Court, and such entry of appearance by a defendant is not a waiver of his right to contest the court's jurisdiction. The defendant is required to make such application to contest the Singapore Court's jurisdiction within the time limit for serving a defence.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

In addition to the circumstances set out at question 4.3 above, a defendant may issue a third-party notice where the defendant requires that any question or issue relating to or connected with the original subject-matter of the action be determined not only as between the plaintiff and the defendant, but also as between either or both of them and a third party.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Matters may be consolidated if: (i) some common question of law or fact arises in them; (ii) the rights to relief claimed therein are in respect of or arise out of the same transaction or a series of transactions; or (iii) for some other reason it is desirable to consolidate the action.

5.3 Do you have split trials/bifurcation of proceedings?

Yes, parties may apply prior to the trial for a bifurcation of the hearing on liability and damages.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

Cases in the civil courts are allocated to registrars and judges based on their availability and special area of knowledge and experience.

6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Yes, case management is carried out through regular pre-trial conferences before assistant registrars. The assistant registrars will review the progress of the matter and have the power to make orders or give directions as they think fit for the just, expeditious and economical disposal of the matter. Parties can make a variety of interim applications such as applications for security for costs, specific discovery, mandatory injunctions etc. and these applications

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are usually heard by the assistant registrars at first instance. Costs could be awarded on fixed costs or costs in the cause basis, depending on the background of the proceedings. The trial judge will preside over the final pre-trial conference before the trial, and will issue directions in furtherance of the expedient conduct of the trial.

6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

The Court can make an "Unless Order" which could lead to the striking out of a claim or defence unless certain directed steps are taken. A party deliberately disobeying orders of court could also be held liable for contempt of court, and such a party may be sanctioned with an order for a fine to be paid and/or an order of committal.

6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

The Court may at any stage of the proceedings order pleadings to be struck out on the ground that: (i) it discloses no reasonable cause of action; (ii) it is scandalous, frivolous or vexatious, it may prejudice, embarrass or delay the fair trial of the action; or (iii) it is otherwise an abuse of process of the Court. In addition, the Court has the power to strike out cases where it considers that parties have been in breach of an "Unless Order".

6.5 Can the civil courts in your jurisdiction enter summary judgment?

The Courts have the power to enter summary judgment. A plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, apply to the Court for summary judgment against the defendant.

6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Generally, a party may not discontinue an action or counterclaim without the leave of court except in certain specified circumstances. For example, the plaintiff in an action begun by writ may, without leave of court, discontinue the action at any time not later than 14 days after service of the defence on the plaintiff. The Court has the power to stay the proceedings in certain circumstances, such as in aid of arbitration or for the non-payment of costs. Further, proceedings are deemed to be discontinued if no step in an action has been taken for more than a year.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

The disclosure of documents is governed by the rules of discovery set out in Order 24 of the Rules of Court. Generally, relevant documents in the power, custody or possession of the parties will have to be disclosed. The documents which a party may be ordered to discover are: (a) the documents on which the party relies or will rely; and (b) the documents which could: (i) adversely affect his own case; (ii) adversely affect another party's case; or (iii) support another party's case.

Privileged documents need not be disclosed. Pre-action disclosure is possible but only in limited circumstances as briefly described under question 3.2 above. Discoverable electronically stored documents are generally supplied in their native format. There are guidelines on what key words and search terms should be used for e-discovery.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

Confidential communications and documents between a lawyer and his client for the purpose of obtaining or providing legal advice are privileged and not subject to discovery. Communications and documents between a lawyer and his client (or any other third party), prepared in circumstances where there is a reasonable prospect of litigation or in the anticipation of litigation, are privileged as well.

7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

The Court can order disclosure against a third party. It must be shown that the documents sought are relevant to an issue arising or likely to arise out of a claim made or likely to be made in the proceedings, or the identity of the likely parties to the proceedings, or both as the case may be. It must also be shown that the party against whom the order is sought is likely to have or have had the documents in his possession, custody or power. The overriding provision is that it must be necessary to order discovery.

7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

The Court's role is limited to deciding parties' applications for discovery orders, such as orders for specific discovery. It is, however, for parties themselves to ensure that discovery is complete and that the rules have been adhered to. Failure to disclose documents ordered by the Court may lead to an adverse inference being drawn against the non-disclosing party.

7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

Documents obtained by disclosure are generally subject to an implied undertaking not to use the documents for a collateral purpose.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

The law of evidence in Singapore is codified in the Evidence Act. In civil cases, a party asserting a fact bears the burden of proving that fact on a balance of probabilities.

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8.2 What types of evidence are admissible, and which ones are not? What about expert evidence in particular?

Generally, evidence which is relevant and not excluded by the rules of evidence may be given in respect of the existence or non-existence of every fact in any suit or proceeding. Expert evidence is admissible, so long as it complies with the requirements of the Rules of Court.

8.3 Are there any particular rules regarding the calling of witnesses of fact, and the making of witness statements or depositions?

Evidence by a witness of fact must be given by way of a sworn/affirmed affidavit unless the Court otherwise directs. Save in excepted cases, such as when used in interlocutory proceedings, an affidavit must contain evidence of the deponent as to facts from his own knowledge.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Are there any particular rules regarding concurrent expert evidence? Does the expert owe his/her duties to the client or to the court?

The specific rules on the giving of expert evidence are contained in Order 40A of the Rules of Court. An expert's report must give details of his qualifications, details of the material he relied on and contain a statement setting out the issues which he has been asked to consider and the basis upon which the evidence was given, among other things. The Court may order that some or all of the expert witnesses testify as a panel, but only if the parties consent to the production and examination of expert witnesses as a panel and to a waiver of the right to submit no case to answer. The expert's duty is owed to the Court.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

The Courts are empowered to issue monetary judgments, mandatory or prohibiting orders, stay of proceedings or grant all reliefs and remedies at law and in equity within the limit of their jurisdiction. The High Court has jurisdiction over both criminal cases and civil claims exceeding S$250,000 in the first instance. The District Courts have jurisdiction over claims to recover monies for debt, demand or damages above S$60,000 to up to S$250,000 and the Magistrates' Courts for up to S$60,000.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

The courts are generally empowered to award damages, interests and costs.

9.3 How can a domestic/foreign judgment be recognised and enforced?

A domestic judgment can be enforced by way of several methods, including writs of seizure and sale and garnishee proceedings. The Singapore Court can recognise and enforce foreign judgments falling within the Reciprocal Enforcement of Commonwealth Judgments Act or within the Reciprocal Enforcement of Foreign Judgments Act. An action for debt can be brought under common law in the Singapore Courts to enforce foreign judgments that do not fall within both Acts.

9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

A party dissatisfied with the judgment of an assistant registrar may appeal to a judge in the High Court as of right. A party dissatisfied with the judgment of a judge in the High Court may appeal to the Court of Appeal, but only if the matter is appealable under the Fifth Schedule of the Supreme Court of Judicature Act. Orders which may not be appealed against are set out in the Fourth Schedule of the Supreme Court of Judicature Act. Orders made by the District Court or Magistrate's Court which may not be appealed against are set out in the Third Schedule of the Supreme Court of Judicature Act.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

Singapore has a statutory mechanism under Order 22A of the Rules of Court pursuant to which parties may make offers to settle. Order 22A encourages parties to settle claims by providing for costs consequences in a situation where a party does not accept a settlement offer, and its counterparty obtains a judgment more favourable than its terms of offer to settle.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

The most frequently used methods of alternative dispute resolution are arbitration and mediation.

Arbitration is a process by which parties agree to resolve the dispute by bringing the matter to a neutral third party, i.e. the arbitrator for decision. Parties can decide on the process of appointing the arbitrator. The arbitrator will make a decision and it will be binding on the parties.

Mediation is a process by which a neutral third party will hear the dispute and attempt to guide parties towards a mutually acceptable settlement. The mediator does not make a decision, and it is up to parties to agree on a solution.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

The laws or rules governing arbitration is for parties to select at the time of making the arbitration agreement. Under Singapore law, domestic arbitration proceedings are governed by the Arbitration

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Act, and international arbitration proceedings by the International Arbitration Act. For mediation in Singapore, the Mediation Act 2017 and the Mediation Rules apply where parties agree that Singapore law applies and when the mediation is not conducted under any written law or by a court.

1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Disputes are non-arbitrable if it would be contrary to public policy for such disputes to be determined by arbitration. Such disputes would include matters which touch on public or third-party interests, such as family, intellectual property matters or claims arising upon insolvency or the liquidation of an insolvent company.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, force parties to arbitrate when they have so agreed, or order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

The Singapore Courts are pro-arbitration and will generally seek to give effect to arbitration agreements. The Singapore Courts also have the power to stay Singapore Court proceedings in favour of arbitration and may also make interim or supplementary orders for the purpose of preserving the rights of the parties in aid of arbitration. However, the Singapore Courts will not force parties to arbitrate where there are no such agreements existing. The Singapore Courts will also encourage parties to consider mediation during the case management process.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

Arbitration awards are final and binding. A party can apply to the Court to set aside an arbitral award, but this can only be done in limited circumstances, including amongst other things, where the arbitral tribunal had no jurisdiction to decide the dispute or there is a breach of the rules of natural justice. Settlement agreements reached at mediation do not need to be sanctioned by the Court, but parties have the option of recording the settlement as a consent order or as an order of court under the Mediation Act 2017.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

The main arbitration institution in Singapore is the Singapore International Arbitration Centre ("SIAC"). Other more specialised institutes include the Singapore Chamber of Maritime Arbitration ("SCMA"), and the Court of Arbitration of the International Chamber of Commerce.

Mediation institutions in Singapore include the Singapore International Mediation Centre ("SIMC") and the Singapore Mediation Centre ("SMC").

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Kaili specialises in commercial litigation and arbitration with a focus on international trade, shipping and oil & gas. She has been involved in multi-jurisdictional cases involving cargo claims, charterparty disputes, bill of lading disputes, and offshore construction disputes, amongst others.

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OON & BAZUL

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Slovakia

Alexander Kadela

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

The legal system of Slovakia is civil law, originating in Roman law.

Civil procedure law is governed in particular by the following Acts:

- Act No. 160/2015 Coll., Rules of Civil Contentious Procedure ("RCCP").
- Act No. 161/2015 Coll., Rules of Civil Non-contentious Procedure ("RCNP").
- Act No. 233/1995 Coll. on court bailiffs and execution (Rules of Distraint Procedure).

Civil procedure is divided into two basic categories:

(i) contentious proceedings regulated by RCCP; and

(ii) non-contentious proceedings regulated by RCNP (e.g. probate proceedings, child custody proceedings or proceedings on the matters of the register of companies).

1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

General courts in Slovakia are: district courts that are the courts of first instance; regional courts that are the courts of appeals against decisions of the courts of first instance; and the Supreme Court of the Slovak Republic which is an appellate review court. Appellate review (unlike appeal) is an extraordinary remedial measure admissible only against decisions in force of the courts of appeals, aiming to rectify the most serious errors.

The Constitutional Court of the Slovak Republic stands outside the general courts system and decides on constitutional matters.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

The first stage of civil contentious proceedings is the petition filing in court. If the process conditions are met, the court serves the action on the defendant for the defendant's statement of defence to the action. The plaintiff may then respond to the defendant's statement of defence (the so-called "replica"). The defendant may then respond to the plaintiff's response (the so-called "duplica").

After that, the court may schedule a pre-trial conference in order to reach settlement between the parties and inform the parties about the preliminary legal opinion of the court on the matter. The court determines the uncontested facts of the case and evidence to be taken.

To decide on the merits, oral and public hearing that has several stages is scheduled. In the beginning, the parties have the opportunity to summarise their previous statements and present their proposals. In the next stage, evidence is taken as determined by the parties. In the last stage, the parties have the opportunity to give their opinions on individual pieces of evidence again, on the legal aspect of the matter, and summarise their proposals again (closing speech). The court then declares the evidence-taking stage closed – after which the parties cannot present new evidence – and the court decides on the merits. The court may adjourn the hearing in order to deliver a decision.

The party that has lost the case may lodge an appeal against the decision of the court of first instance.

Where law permits, an application for appellate review of the decision of the court of appeals may be filed as an extraordinary remedial measure.

The same applies in general to non-contentious proceedings with certain exceptions. In some cases, the court may commence proceedings also without a motion – e.g. probate proceedings, proceedings on the matters of the register of companies, etc. The entire concept of non-contentious proceedings concentrates on the establishment of the factual situation, which means that the court is not bound by the evidence proposals of the parties and may act *ex officio* and take evidence at its own discretion where necessary.

In Slovak civil procedure, expedited procedures are: proceedings on a motion for charging order; European Payment Order; and motion for charging order submitted electronically, in which the court may decide only on the basis of facts presented by the plaintiff if perceived as indubitable by the court. An issued charging order enters to force and is capable of being executed if the defendant does not lodge a statement of opposition against the order.

The timeframe always depends on the complexity of proceedings. According to the statistics of the Ministry of Justice of the Slovak Republic, the average duration of civil proceedings in 2017 was 20.8 months in civil matters and 21.6 months in business matters.

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1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

Slovak law does not have an institute under which parties to proceedings could establish the jurisdiction of a particular general court, save for arbitration proceedings.

1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

In disputes, where the value can be expressed in money, the costs of proceedings are calculated as a percentage of the dispute value (e.g. 6% of the claimed amount). In other cases (e.g. proceedings on rights relating to personality), the court costs are set out in the price list.

In general, each party to the dispute bears the costs incurred by that party – the costs of the proceedings. Costs of proceedings are the provable, justified and purposefully paid expenses incurred in proceedings in relation to the exercise or defence of rights in court.

In contentious procedure, the winning party is awarded the costs of proceedings proportionally to that party's success, i.e., if the party was only partially successful, the court costs may be awarded to both parties *pro rata* or the court may exceptionally decide that neither party is awarded the costs of proceedings where there is good reason for that.

The court of first instance decides on the amount of the costs of contentious proceedings when the final decision enters into force.

The opposite is true in non-contentious procedure – courts usually do not award the costs of proceedings save for the exceptions set out in law.

The court decides on the (eventual) amount of the costs of non-contentious proceedings to be awarded in the final decision.

Slovak law does not have any special rules on costs budgeting in place.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

A party to proceedings may agree with their attorney on various ways of remuneration for the legal services provided – hourly rate, lump sum, tariff rate or even share remuneration – and those may be also combined. The highest admissible share remuneration is 20% of the dispute value.

1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

The provisions of substantive law enable the creditors to assign a claim to a third party; however, certain exceptions apply – the following claims must not be assigned: (i) a claim that ceases to exist at the creditor's death at the latest; (ii) a claim for which the content would change with the creditor change; (iii) a claim that cannot be affected by the execution of judgment; and (iv) a claim for which the assignment would contradict the law or agreement with the debtor.

It is therefore possible to change the claimant in the course of the proceedings – if such an assignment is proved to the court, and if the person replacing the previous claimant in the proceedings agrees to that, the court will approve the claimant change.

It is also possible to use the so-called silent cession where the assigned claim is recovered, on the application of the assignee, by the assignor in the assignor's own name and on the assignor's own account. If it is so, it is for the assignor to have standing to sue, although the assignor is no longer the actual claim owner.

Although Slovak civil procedural law does not recognise a third-party funding procedure, according to the substantive principle of autonomous will, a party to proceedings may agree with a third party on dispute funding at its own discretion.

1.8 Can a party obtain security for/a guarantee over its legal costs?

In general, the court cannot impose on a party to provide security/a guarantee for the costs of proceedings of the adverse party. If a party to proceedings proposes that the court take evidence that entails costs, the court may order that party to pay an advance payment as a deposit into the court to be used to cover those costs. The winning party is usually entitled to reimbursement of such costs.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

Slovak law does not set out any procedural formality with which the plaintiff must comply prior to filing a petition.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Limitation periods and the moment from which they start to run are stipulated by law. In general, the limitation period in civil law is three years and starts to run from the moment when the right could have been exercised for the first time.

Civil substantive law also has special limitation periods (e.g. the right to compensation for damages passes two years after the date on which the aggrieved party learned about the damages and who is liable for them; however, this will be no later than three years, and the right corresponding to easement passes if it has not been exercised for 10 years, etc.).

The general limitation period in commercial relationships is four years unless otherwise provided by law.

Limitation periods are treated as a substantive law issue.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

In contentious proceedings, the proceeding commences when a petition or motion for an interim injunction or freezing order is filed in court. A similar regulation applies also to non-contentious proceedings – save for proceedings the court may also commence without a motion.

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The court then serves the action on the adverse party for the adverse party's statement of defence to the action (or the resolution on the commencement of proceedings to all the parties to the proceedings) electronically or by mail. A document is deemed served on the addressee's confirmation of delivery.

If the addressee fails to confirm delivery (in the case of certified mail, such as the case of a petition being served on the defendant for the statement of defence) or collect the mail, the document is deemed delivered under RCCP after a certain period of time, which also applies if the addressee does not learn about the mail – the so-called deemed service applies.

If legal documents are to be served in the EU Member States, the EU regulations apply. If documents are to be served outside the EU, the relevant authority of the country is served a request for service under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

If the country is not a signatory to any multilateral international treaty, the courts proceed according to a bilateral or convention arrangement, and where existing arrangements such as a bilateral or convention arrangement do not exist, diplomatic channels are used under Act No. 97/1963 Coll. on international private and procedural law.

3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

Yes, there are two pre-action interim remedies available – interim injunction and freezing order.

A motion for interim injunction should include, in addition to the mandatory information, a description of decisive facts giving grounds for the necessity of interim injunctions or concern that execution would be frustrated, a description of facts reliably confirming the grounds for and duration of the entitlement for which protection is sought, and it must be clear from the motion which interim injunction is sought by the claimant.

By freezing order, the court may order pledge of assets, rights or other property of the debtor to secure a monetary claim of the creditor if there is concern that execution may be frustrated.

3.3 What are the main elements of the claimant's pleadings?

Firstly, the plaintiff must provide a complete and true description of facts from which the plaintiff derives the violation of or threat to the plaintiff's right in the petition, and provide supporting evidence for those facts. Secondly, the plaintiff must draft the wording of the proposed decision sought by the plaintiff ("*petit*" in Slovak).

Further mandatory information to be provided in a petition includes: name of the court; name of the submitter; the subject-matter of the petition; what is sought by the petition; and a signature.

3.4 Can the pleadings be amended? If so, are there any restrictions?

The plaintiff may amend the petition subject to approval of the court, except for a petition amendment made before the court serves the petition on the defendant for the defendant's statement of defence.

The plaintiff may seek the following by a petition amendment: extend the exercised right; exercise another right; and add or significantly change the decisive facts provided in the petition.

The court shall not admit a petition amendment if the results of the previous proceedings cannot serve as a basis for proceedings on the amended petition. The court shall not admit a petition amendment if another court is the court of competent jurisdiction in the proceedings on the amended petition.

The petition cannot be amended in appellate and appellate review proceedings.

A similar regulation applies to non-contentious proceedings, apart from the fact that approval of the court is always necessary to change a motion for commencement of proceedings.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

The plaintiff may partially or entirely withdraw the petition in proceedings of first instance or appellate proceedings. If the petition is withdrawn partially, the court will discontinue the proceedings related to the withdrawn part and continue the proceedings on the remaining part of the petition. If the petition is withdrawn entirely, the court will discontinue the proceedings.

The court will not discontinue the proceedings in certain cases where the defendant disagrees to the petition, withdrawing for good reason.

The petition cannot be withdrawn in appellate review proceedings as it was already adjudicated in appellate proceedings; however, an application for appellate review may be withdrawn by the applicant and the appellate review court will discontinue the proceedings.

The petition withdrawal may have an impact on the costs of proceedings – if the party causes procedural discontinuation, the court will award the adverse party the costs of the proceedings.

A similar regulation applies to non-contentious proceedings, aside from the fact that the court will not discontinue the proceedings if the proceedings could have also started without a motion, and it is necessary to continue with them.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

In contentious proceedings, the means of procedural defence of the defendant are: statement of facts; refusal of the adverse party's statement of facts; proposal to take evidence; objection against the adverse party's proposal to take evidence; and substantive objection.

A statement of facts not explicitly refused by the adverse party is deemed uncontested facts of the case.

The defendant may exercise the right to bring action against the plaintiff, i.e. a mutual petition. A mutual petition also means a submission of the defendant by which the defendant brings a counterclaim or set-off against the plaintiff, but only if the defendant claims more than the plaintiff; otherwise, such a submission will be perceived by the court only as the defendant's means of procedural defence.

4.2 What is the time limit within which the statement of defence has to be served?

The time limit within which the defendant's statement of defence has to be served is not stipulated by law. The time limit within

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which the defendant's statement of defence has to be served is provided by the court in the request for the statement of defence, served on the defendant together with the petition. The time limit provided by the court is usually 15 days. The court may extend this time limit on the application of the defendant.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

RCCP regulates the possibility of intervention of an intervenor. Intervention is excluded in non-contentious proceedings (Art. 11 of RCNP). An intervenor is a person who participates in the proceedings alongside the plaintiff or defendant and has a legal interest – arising out of substantive law – in the result of the proceedings. However, when an intervenor joins the proceedings, the legal liability of the defendant does not pass onto the intervenor and the intervenor also does not share legal liability with the defendant.

The intervenor's legal interest consists in the following: the losing party in the proceedings may usually initiate a so-called regress claim against the intervenor, arising out of substantive law (which happens most frequently in liability insurance cases).

4.4 What happens if the defendant does not defend the claim?

The court may decide on a petition (only on a petition for fulfilment of obligation) by a default judgment, provided that the court:

(i) has summoned the defendant to provide a written statement of defence to the petition within a determined time limit, and the defendant has failed to fulfil that obligation without good reason;

(ii) has notified the defendant, in the summons under section **(i)** above, of the consequences of defaulting on the said obligation, including the possibility of a default judgment; and

(iii) has served the summons under section **(i)** above on the defendant by certified mail.

The court may decide on a petition (only on a petition for fulfilment of obligation) in a hearing by a default judgment on the application of the plaintiff, provided that:

(i) the defendant has failed to appear at the hearing despite being summoned duly and sufficiently in advance, and the defendant had been notified in the summons of the consequences of failing to appear, including the possibility of a default judgment; and

(ii) the defendant has failed to excuse his/her absence in advance, providing good reason.

In relation to petitions other than petitions for fulfilment of obligation, procedural passivity of the defendant in a litigation may have the following consequences: if the defendant does not refuse the statement of facts of the plaintiff provided in the petition, the court may take the plaintiff's statement of facts provided in the petition for the basis – the court will perceive such a statement of facts as uncontested facts – and the defendant may lose the case.

4.5 Can the defendant dispute the court's jurisdiction?

The defendant may in general challenge the court's jurisdiction; the court, however, verifies its jurisdiction also without the defendant's challenge – *ex officio*.

An arbitration contract may exclude jurisdiction of a general court. If such a contract exists, the court does not verify its jurisdiction *ex officio*, therefore the defendant who challenges the general court's jurisdiction needs to file a challenge in the court. Such a challenge may be filed by the defendant upon the first procedural action relating to the defendant at the latest. The court will disregard a challenge filed afterwards.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

RCCP enables a third party to join the proceedings. Following a motion of the plaintiff, the court may admit that a third party joins any claim the plaintiff or defendant has against the opposite party. If a third party is to join a claim of the plaintiff, consent of that party is necessary.

RCCP further enables a third party to join the proceedings as intervenor (see question 4.3).

RCCP also allows for a change of the parties (see question 1.7).

RCNP does not allow for a joinder, intervention or change of the parties.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Two sets of proceedings may be consolidated under RCCP. The court consolidates proceedings that are factually related or related to the same parties. However, the court may consolidate only the proceedings that have commenced before the same court. If the proceedings were given to several judges of the same court, the judge that commenced the proceedings earlier should decide on the consolidation.

A party to proceedings may file a motion for consolidation; however, the court will decide on the consolidation also without such a motion of a party to proceedings.

RCNP explicitly excludes consolidation of two sets of proceedings.

5.3 Do you have split trials/bifurcation of proceedings?

The defendant may exercise their right *vis-à-vis* the petitioner by a mutual petition. RCCP allows for splitting of a mutual petition of the defendant where the conditions of consolidation of the matters have not been met.

The court may also split a matter where the reasons of consolidation made by the court cease to exist (see question 5.2).

RCNP explicitly excludes bifurcation of proceedings.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

The jurisdiction of courts in contentious proceedings is regulated by RCCP. In general, district courts are the courts of first instance

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unless otherwise provided in RCCP – e.g. under Art. 31 of RCCP, specific regional courts are the courts of competent jurisdiction for matters arising out of abstract control ("*control for unacceptable contractual conditions or unfair practices in consumer contracts and documents*") in consumer matters.

Local jurisdiction of a court depends on the place of primary residence of the defendant if the defendant is a natural person, and on the place of registered office of the defendant if the defendant is a legal person – this is the general local jurisdiction of a court.

RCCP further regulates:

(i) the so-called facultative local jurisdiction of courts where the plaintiff may file a petition in a general court of the defendant or a court provided in Art. 19 of RCCP (e.g. the court in the district of which the defendant is employed); and

(ii) the so-called exclusive local jurisdiction of courts where the plaintiff must file a petition in the designated court only (e.g. the court in the district of which the disputed property is located).

Under RCNP, the court of competent jurisdiction is the court provided in RCNP for each type of proceedings, and where such a court jurisdiction is not provided, the general court of the applicant is the court of competent jurisdiction.

When an action is filed, it is allocated to a judge of the court of competent jurisdiction at random by electronic means.

6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Petitions and motions filed in the court of competent jurisdiction are allocated to judges of the court according to the work schedule. The chair of the court prepares the work schedule that consists in the appointment of a senate, sole judges, court officials and notaries tasked with the management of individual kinds of matters delivered to the court.

A party to proceedings may raise an objection of bias against the judge assigned the matter or an objection of bias if, with regard to the judge's relation to the litigation, parties, their representatives or participants in the proceedings, justified doubts about the judge's impartiality may be raised. A superior court will decide on whether a judge should be excluded.

Raising an objection of bias against the judge is, in principle, not related to a payment obligation of a party to the proceedings. However, if the court dismisses a vexatious objection or objection of bias without grounds, the court may order a party to pay a civil penalty of up to EUR 500.

6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

The court may impose a civil penalty of up to EUR 500 on a person that thwarts the progress of proceedings, for instance, by:

- failing to fulfil an obligation imposed by the court;
- neglecting to obey a subpoena although they have been served with it duly and sufficiently in advance, and failing to excuse their absence sufficiently in advance, providing good reason;
- disturbing the order or dignity of the proceedings; or
- filing a grossly offensive submission.

Further reasons for a fine are set out in RCCP.

In the event of repeated violations, the court may impose a civil penalty of up to EUR 2,000.

If a person disturbs the order or dignity of the proceedings, the court may expel the person from the courtroom.

6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

If the submission is on the merits or a motion for interim injunction or freezing order that is not clear or the purpose of which is unclear, or is incomplete or illegible, the court will prompt the submitter to amend or correct the submission. If the submitter does not amend or correct the submission within the time limit determined by the court, the court will dismiss the submission. That does not apply where it is possible to continue with the proceedings in disregard of the deficiency.

The court discontinues the proceedings when the petition is withdrawn. The court may also discontinue the proceedings due to a lack of jurisdiction over the subject matter (e.g. because a court of arbitration is the court of competent jurisdiction; see question 4.5), due to pending lawsuit – *lis pendens*, or a matter already judged – *res judicata*. The court may discontinue the proceedings also in the appellate and appellate review procedure stage.

RCNP regulates the discontinuation procedure for individual types of non-contentious proceedings.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

A summary judgment belongs in common law and is not known in Slovak law.

6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

The court will discontinue the proceedings where:

- the decision depends on a matter that the court is not authorised to adjudicate within the present proceedings;
- before adjudicating the matter, the court has reached a conclusion that the conditions of compliance with the legislation and regulations have been met – if so, the court will file a motion for the commencement of proceedings in the Constitutional Court of the Slovak Republic; or
- the court has filed a motion for commencement of pre-trial proceedings in the Court of Justice of the European Union.

The court will also stay the proceedings for a minimum of three months if the parties unanimously file for a stay of proceedings.

The court may also stay the proceedings if there are judicial or administrative proceedings pending in a matter that may be significant for the court's decision, or if the court has instigated such proceedings.

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7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

"Disclosure", as it is known in common law, is not known in Slovak law; it is therefore impossible to answer this question.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

A natural person must not refuse to be examined as a witness. However, RCCP stipulates that a witness shall maintain confidentiality about information protected under special regulations and other statutory obligations of non-disclosure. A witness shall notify the court of the ban on testifying immediately after the witness has learned about the obligation to testify. The witness shall prove the grounds for the ban and the court shall then decide on whether the ban on testifying is justified.

A witness bound by the obligation of non-disclosure may be examined only if the relevant authority has released the witness from that obligation on the initiative of the court or the entity in the interest of which the witness has the obligation of non-disclosure. The same applies, under RCCP, also where evidence is taken differently than by examination of a witness.

7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

"Disclosure", as it is known in common law, is not known in Slovak law; it is therefore impossible to answer this question.

7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

"Disclosure", as it is known in common law, is not known in Slovak law; it is therefore impossible to answer this question.

7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

"Disclosure", as it is known in common law, is not known in Slovak law; it is therefore impossible to answer this question.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

In civil litigation, an application for evidence taking should be filed by the parties that bear the burden of proof in relation to the facts they state within the dispute. The court is bound by such an application – the court does not take evidence without an application of the parties.

Only contested facts between the parties or justifiably dubitable facts need to be supported by evidence.

The court assesses evidence at its own discretion. No piece of evidence prevails over another piece of evidence.

In non-contentious proceedings (RCNP), the court shall ascertain the factual situation in disregard of the activity of the parties, and take evidence, for the said purpose, even if the parties have not proposed it.

8.2 What types of evidence are admissible, and which ones are not? What about expert evidence in particular?

Anything that may contribute to the proper clarification of the matter and that has been obtained in a lawful way by means of evidence is admissible as evidence. Means of evidence are, in particular, but not only: examination of a party; examination of a witness; a deed; professional opinion; and an expert evidence and inspection.

An unlawful piece of evidence is evidence obtained unlawfully (a video record without consent of the recorded person) or evidence taken unlawfully (examination of a person bound by the non-disclosure obligation).

Evidence taken unlawfully is in principle inadmissible. Inadmissibility of evidence obtained unlawfully is not automatic – the court decides on admissibility of evidence.

The court may only instruct an expert witness provided that the decision-making depends on the assessment of facts for which scientific knowledge is needed, and due to the complexity of the matter, a professional opinion is not enough.

A registered expert institution may be appointed to deliver expert evidence for extraordinarily complicated issues.

8.3 Are there any particular rules regarding the calling of witnesses of fact, and the making of witness statements or depositions?

If a party proposes examination of a witness, the party shall ensure that the witness attends the hearing. Only if that is not possible, the court shall summon the witness on the party's request. The witness shall appear before the court and give a deposition.

In principle, examination of a witness is made at the hearing; the court may on exception accept a written witness statement. The witness may be questioned by the court, parties to the dispute or third parties with consent of the court – e.g. an expert witness.

A witness may refuse to testify only under certain circumstances provided in the law.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Are there any particular rules regarding concurrent expert evidence? Does the expert owe his/her duties to the client or to the court?

In civil proceedings, the court or a party to the dispute may order an expert report. We therefore distinguish an expert report ordered by the court and a private expert report filed by a party.

An expert witness shall carry out his/her activities for the ordering party and for remuneration, reimbursement of the actual expenses and compensation for the lost time. An expert witness is liable for the correctness of the conclusions reached in the expert report *vis-à-vis* the ordering party.

If the court orders expert evidence on the party's request, the court may order that party to pay an advance payment to be used to cover

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the costs of expert evidence. Settlement of such an advance payment is a prerequisite for expert evidence.

In the expert report, the expert witness shall answer the questions of the parties and shall not comment on the legal matters.

An expert report may be delivered in writing or orally within a court record. The formalities of an expert report are regulated by Act No. 382/2004 Coll. on expert witnesses, interpreters and translators as amended.

In the event of concurrent expert evidence that is contradictory, the court may instruct a registered expert institution to give expert evidence.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

In civil litigation, the courts issue judgments or resolutions and in certain cases, payment orders.

A judgment is used to decide on the merits.

Under RCCP, a claim may be decided on by abridged decisions, i.e.:

- default judgment – if the plaintiff or defendant is procedurally passive in proceedings for the fulfilment of obligations and the conditions under RCCP have been met;
- judgment on acknowledgment of claim – if the defendant entirely or partially acknowledges the raised claim; and
- judgment on waiver of claim – if the plaintiff entirely or partially waives his/her raised claim.

The court may issue a payment order if it is possible to make a decision on the basis of facts stated by the plaintiff, perceived by the court as uncontested, in particular if those facts are supported by documentary evidence. If so, the court will decide without a statement of the defendant and without scheduling a hearing.

We also have a partial judgment used by the court to decide on any of several claims raised or on a part of a claim raised, provided that the claim has become uncontested in the course of the proceedings, and an interim judgment is used by the court to decide on the basis or reason of a raised claim.

If the court does not decide on the merits, it issues a resolution.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

A court decides on the award of costs also without an application in its final decision. For more information about the award of costs of litigation, please see the answer to question 1.5.

9.3 How can a domestic/foreign judgment be recognised and enforced?

A judgment of a Slovak court shall be delivered by certified mail. If a judgment cannot be appealed, it will become valid when served. If a judgment can be appealed but no appeal is lodged, it will become valid after the expiration of a 15-day period for appeal.

If a judgment imposes fulfilment of an obligation, it becomes enforceable after the expiration of the period for voluntary fulfilment.

A judgment that is capable of being executed and that has not been voluntarily fulfiled may be enforced in execution proceedings under Act No. 233/1995 Coll. on bailiffs and execution (Rules of Distraint Procedure) as amended.

The process of recognition of foreign judgments depends on whether the judgment was issued in an EU Member State or in another country.

The recognition and execution of foreign judgments issued in an EU Member State have been simplified and accelerated because they are regulated by EU regulations, which are also binding on the Slovak Republic.

Recognition of foreign judgments issued in another country is regulated by international treaties or Slovak Act No. 97/1963 Coll. on international private and procedural law.

Court proceedings that start on the application are held for recognition of a foreign judgment. If a foreign judgment is recognised, it may be enforced in the Slovak Republic.

9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

A judgment of a first instance court can be appealed. A default judgment, judgment on acknowledgment of claim or judgment on waiver of claim cannot be appealed.

Selected resolutions designated in RCCP can be appealed.

Only the losing party may lodge an appeal. An appeal must be filed within 15 days of the service of the judgment in the court that issued the judgment.

An appeal may be lodged only due to reasons specified in RCCP, the most common reasons being not taking evidence as proposed to ascertain decisive circumstances, incorrect factual conclusions of the court of first instance, or incorrect legal assessment of the matter by the court of first instance.

An appeal is decided on by a senate of a regional court consisting of three judges.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

In a civil dispute, the court shall always endeavour to reconcile the parties. Reconciliation is admissible despite the nature of the dispute. Also, in non-contentious proceedings, the court shall endeavour to resolve the matter by reconciliation where possible with regard to the nature of the matter, in particular in divorce and custody proceedings.

The only prerequisite for resolution by reconciliation is compliance with the law, which means that the court shall not approve resolution by reconciliation if that contradicts the mandatory provisions of legal regulations.

Reconciliation can also be the result of mediation regulated by Act No. 420/2004 Coll. on mediation, as amended.

An approved reconciliation served on the parties has the effects of a valid judgment.

Resolution by reconciliation may take the form of a settlement agreement, parties to which have replaced their contested obligations with new obligations. A settlement agreement is a substantive law agreement; therefore by itself it does not result in dispute termination. An obligation of the plaintiff to withdraw the petition and invoke dispute settlement is usually part of such an agreement.

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II. ALTERNATIVE DISPUTE RESOLUTION

1 General

1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

The alternative methods of dispute resolution in the Slovak Republic are mediation, arbitration proceedings and consumer arbitration proceedings.

Mediation may come before judicial proceedings or may be initiated also in the course of court proceedings. Successful mediation results in an agreement that is binding on the parties. To make that agreement capable of being executed, it must be drawn up as a notarial record or reconciliation approved by a civil court or an arbitration court.

Arbitration proceedings are held before an arbitration court by one or more arbitrators appointed by the parties. Jurisdiction of an arbitration court is established by agreement of the parties in the form of an arbitration contract regulated by law. Only disputes designated by law may be decided on in arbitration proceedings.

Arbitration proceedings are faster and less formal than judicial proceedings. Arbitration proceedings result in an award that has the same force, when served on the parties to the proceedings, as a decision in force issued in judicial proceedings.

Under certain conditions stipulated by law, the award may be contested by action for reversal of the award brought in a civil court.

In addition to traditional arbitration proceedings, we also have consumer arbitration proceedings.

Consumer disputes are decided on in consumer arbitration proceedings on the basis of consumer arbitration agreements.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Mediation is governed by Act No. 420/2004 Coll. on mediation, as amended.

The arbitration procedure is governed by Act No. 244/2002 Coll. on arbitration procedure.

Consumer arbitration proceedings are governed by Act No. 335/2014 Coll. on consumer arbitration procedure, as amended.

1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Mediation applies only to disputes that arise out of civil, family, commercial and employment relationships. Other types of relationships must not be the subject of mediation.

The following disputes shall not be decided on in arbitration proceedings or consumer arbitration proceedings:

- disputes on the establishment or termination of title to real property or other rights *in rem* to real property;
- disputes on personal status;
- disputes related to execution of judgment; and
- disputes arising in the course of bankruptcy or restructuring proceedings.

Consumer disputes shall not be decided on in traditional arbitration proceedings since those disputes may be decided on, except for civil litigation, in consumer arbitration proceedings only.

In consumer arbitration proceedings, only consumer disputes in which a settlement agreement can be reached may be decided on, including disputes on the determination of existence of a right or legal relationship; only the consumer has an immediate legal interest in such determination under Act No. 335/2014 Coll.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, force parties to arbitrate when they have so agreed, or order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

General courts must always endeavour to resolve a dispute of parties by reconciliation.

The court may recommend the parties to resolve a dispute by mediation; however, the court is not obliged under RCCP to impose an obligation of mediation on the parties. Mediation is therefore strictly voluntary under RCCP.

In certain non-contentious proceedings under RCNP, e.g. dissolution of marriage or matters related to minors, mediation is the preferred way of resolution and the court may prompt the parties to mediate, or, if a judgment related to minors is to be executed, the court may oblige the parties to mediate.

In arbitration proceedings, the civil court is not allowed to oblige the parties to resolve their dispute before an arbitration court. However, if the parties have concluded an arbitration contract and the plaintiff files a petition in the civil court, that court will discontinue the contentious proceedings on the defendant's objection raised at the first action. The civil court may act only when the parties declare that they do not insist on the arbitration contract.

Such a plaintiff is indirectly forced to bring the dispute before an arbitration court because the civil court cannot act in the matter if the defendant objects to the civil court's jurisdiction over the matter. An exception applies to consumer arbitration contracts where the consumer may file, despite the existence of an arbitration contract, a petition in the civil court, in which case the defendant cannot object to the civil court's jurisdiction over the matter. If so, the dispute will be adjudicated by a civil court despite the existence of an arbitration contract.

Parties may conclude an arbitration contract or consumer arbitration contract also pending lawsuit in a civil court, and the concluding of such contract has the effects of a petition withdrawal. The parties can then bring their dispute before an arbitration court.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

RCCP does not stipulate an obligation of mediation. Even if parties agree on mediation, failure to observe this by a party cannot be

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sanctioned by a civil court in any way. If a party files a petition in a civil court despite a mediation agreement, judicial proceedings will be held in disregard of the mediation agreement's existence.

Exceptions concerning mandatory participation in mediation are provided in RCNP; see the answer to section II, question 1.4 above.

On the other hand, an agreement reached in mediation is binding on the parties. For more details see the answer to section II, question 1.1 above.

Dispute resolution in arbitration proceedings is binding if an arbitration contract has been concluded. For more details, see the answer in section II, question 1.4 above.

Parties may agree in an arbitration contract that the award be examined by another arbitrator or arbitrators on the application of a party.

An award that cannot be examined or an award examined by another arbitrator has the same effects when served on the parties as a judgment in force of a civil court. If an award imposes fulfilment of an obligation, after the expiry of the voluntary fulfilment period, the award becomes enforceable and can be executed.

A motion for dismissal of an award may be filed in a civil court under the terms and conditions provided in the law. These are the cases concerning a deficiency of an arbitration contract, lack of jurisdiction of an arbitration court or procedural errors in arbitration proceedings.

When an award is dismissed by a civil court – depending on the circumstances of the case – the dispute continues to be tried in a civil court or is repeatedly handled in arbitration proceedings.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

The major alternative dispute resolution institutions are:

- the Arbitration Court of the Slovak Chamber of Commerce;
- the Permanent Arbitration Court of the Slovak Banking Association; and
- the Arbitration Court in Bratislava at the Association for Arbitration Proceedings.

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An exceptional litigation lawyer who:

- personally represents some of the most challenging litigation cases accepted by RELEVANS Law Firm in the proceedings before the courts; and
- defines the strategy and course of action in many legal proceedings represented by RELEVANS Law Firm.

Main areas of activity: claims for damages; commercial law; competition law; personality protection; constitutional law; banking and financial laws.

Alexander's significant clients include:

- Representation of Mr. Grund and Mr. Hruby in the *Carlton* case (several legal proceedings; the cumulative value of the three main disputes was over EUR 200 million).
- Representation of the state companies Železničná spoločnosť Cargo Slovakia and Železničná spoločnosť Slovensko, which were charged with paying damages of more than EUR 82 million.
- Representation of MEDICAL CARE HOLDING LIMITED in a dispute over damages of EUR 50 million due to profit payment restrictions to shareholders of a private health insurance company.
- Representation of an applicant in proceedings for damages of more than EUR 50 million, who acquired claims through assignment from Slovnaft shareholders. The shareholders claimed to have been damaged by the actions of Mol Hungarian Oil And Gas Public Limited Company when announcing the mandatory takeover bid of Slovnaft.
- Representation of a developer in several litigation proceedings against the City of Bratislava concerning the demolition of the *Park kultury a oddychu* (Park of Culture and Rest) buildings, damages of more than EUR 28 million and unjust enrichment, as well as out-of-court settlements with the City.
- Representation of a bank in proceedings before the Constitutional Court of the Slovak Republic regarding the lodging of creditors' (in particular banks') claims to the restructuring.
- Representation of a complainant in proceedings before the European Court of Human Rights for violation of the right to a fair trial.

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- personally represents some of the most challenging litigation cases accepted by RELEVANS Law Firm in the proceedings before the courts; and
- defines (together with Alexander Kadela) the methodological procedures and standards of the Litigation Division at RELEVANS Law Firm.

Main areas of activity: personality protection; claims for damages; competition law; labour law; commercial law; constitutional law; and administrative law.

Tomáš' significant clients include:

- Representation of Mr. Grund and Mr. Hruby in the *Carlton* case (several legal proceedings; the cumulative value of the three main disputes was over EUR 200 million).
- Representation of the applicant ČEZ Slovensko in proceedings for damages in total of more than EUR 19 million caused by the breach of an obligation to take electric energy.
- Representation of the applicant Železničná spoločnosť Cargo Slovakia in proceedings for the review of the lawfulness of the procedure and decision of the Antimonopoly Office of the Slovak Republic, imposing a fine of more than EUR 10 million.
- Representation of the defendant Rozhlas a televízia Slovenska (Radio and Television of Slovakia) in several proceedings for damages, personality protection, protection of reputation and compensation for non-pecuniary damage.
- Representation of a complainant in proceedings before the European Court of Human Rights for violation of the right to a fair trial.

RELEVANS Law Firm is one of the largest and award-winning law firms in Slovakia. Thanks to our outstanding and experienced legal professionals, we have become one of the leading law firms in litigation, real estate law, as well as in M&A, corporate law and banking.

Since the formation of our law firm, the litigation agenda has been and continues to be one of the key and most important areas of our activity. We have a specialised team of procedural lawyers representing domestic and foreign clients before general courts, the Constitutional Court of the Slovak Republic, the European Court of Human Rights, as well as in arbitration proceedings.

We represents our clients in all areas of our activities, being most experienced primarily in the field of claims for damages, legal issues related to personality rights, protection of competition, constitutional law, intellectual property rights, telecommunication law, banking and financial law and administrative law. We provide comprehensive legal cover for the most challenging cases.

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Sweden

Fredrik Norburg

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

Sweden is, together with the Nordic countries, considered to be a distinctive group within the Roman-Germanic law family. Swedish law is predominantly based on statutes, but Swedish case law is also an important part of the legal sources. Civil litigation in Sweden includes features and principles found in both common and civil law jurisdictions.

The rules that govern civil procedure are found in the Swedish Code of Judicial Procedure (Sw. *Rättegångsbalken SFS 1942:740*).

1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

The court system in Sweden is structured with three kinds of courts, as follows:

- The General Courts, which comprise District Courts, Courts of Appeal and the Supreme Court.
- The General Administrative Courts, which comprise Administrative Courts, Administrative Courts of Appeal and the Supreme Administrative Court.
- There are also specialised courts which determine disputes within specific areas; for example, the Labour Court, the Environmental Court and the Patent and Market Court.

More information on the Swedish court system can be retrieved at: http://www.domstol.se/Funktioner/English/The-Swedish-courts/.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

The main stages in civil proceedings in the first instance are, in general: (i) a preparatory phase of exchanging written statements; (ii) a preliminary hearing sought to make clear any uncertainties in the parties' respective positions and where the court offers assistance in settlement negotiations; (iii) further exchange of written statements; and (iv) the final hearing of the case. After the final hearing, the court renders its judgment.

There is no general underlying timeframe for each of the stages. In less complex cases, the proceedings in a district court take approximately one year. In complex cases, it is not uncommon for proceedings to last two to three years. Proceedings in the courts of appeal and the Supreme Court are usually faster than district court proceedings.

There are no rules on expedited trial procedures. However, there are provisions in the Swedish Code of Judicial Procedure aimed at simplifying the procedure. Such rules are, for example, applicable in cases regarding minor claims (approximately below EUR 2,000); for example, in these claims only one judge hears the case, instead of the three which is common in larger disputes.

1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

Exclusive jurisdiction clauses are generally allowed unless peremptory regulations on jurisdiction in the Swedish Code of Judicial Procedure apply, for example, in claims regarding real estate.

1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

Except for application fees (approximately EUR 280), there are no costs payable to the court for the court proceedings.

The main rule is that the losing party shall reimburse the opposing party for its reasonable litigation costs, including counsel fees and other costs incurred in the case and its preparations. There are exceptions to this rule, for example, where the winning party has intentionally or negligently caused unnecessary litigation. Limitations also apply in cases regarding minor claims.

There are no rules on costs budgeting in Swedish law.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

There are no particular rules concerning litigation funding in Sweden, except as set out below.

Under Swedish law, contingency fees are not prohibited *per se*. However, members of the Swedish Bar Association are generally not allowed to accept contingency fee arrangements where the lawyer has a stake in the claim. A conditional fee arrangement is

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generally allowed unless this results in the lawyer having a stake in the claim, or where the lawyer's own interest in the case becomes disproportionate.

1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

There are no general constraints to assigning a claim. The assignor needs to notify the debtor about the assignment. It is permissible for a third party to finance proceedings.

1.8 Can a party obtain security for/a guarantee over its legal costs?

In proceedings between Swedish parties, security for legal costs cannot be obtained.

Where a plaintiff is a non-Swedish national, however, the respondent can request that the plaintiff provide such security under the Swedish Act on Foreign Plaintiff's Obligation to Provide Security for Litigation Costs (Sw. *Lag om skyldighet för utländska kärande att ställa säkerhet för rättegångskostnader SFS 1980:307*). Nonetheless, this Act includes several exceptions, and nationals from a large number of countries are exempt from the obligation to provide security. This includes countries within the EU and EEA and countries which are parties to the Hague Conventions of 1905 or 1954.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

There is no particular formality to be applied before initiating proceedings. However, according to the Code of Conduct of the Swedish Bar Association, which governs the conduct of lawyers admitted to the Swedish Bar Association, the main rule is that legal action must not be taken unless the opposing party has been given reasonable time to consider the claim.

It should also be noted that, in case a claim is filed, which is partly or fully undisputed, the plaintiff can be held liable for the litigation costs due to the initiation of unnecessary proceedings.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Time limits are treated as a substantive law issue. The general rule is a 10-year limitation period calculated from the date of origin of the claim. There are several exceptions to this rule where specific claims are subject to shorter limitation periods; for example, claims from a business proprietor to a consumer and certain claims in connection to the lease of real estate. The limitation period can be interrupted through, for example, a reminder, an acknowledgment or an initiation of legal proceedings; a new limitation period will then start to run as a result.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

Civil proceedings are initiated by a plaintiff applying for a summons. If all legal requirements are fulfilled, the court will issue a summons against the defendant and serve the application together with an order to respond to the application.

Service is regulated by the Swedish Service Act (Sw. *Delgivningslagen SFS 2010:1932*). The foremost common method of service is by mail with a return receipt. Service can also be made by a process server or by public notice or, where the recipient is a legal person, by mail to the legal person's registered address, together with a control mail being sent the next day. It is also possible to serve documents electronically. Confirmation of service by mail may be done by telephone. The deemed date of service is the date stated on the return receipt. In case no date has been stated on the receipt, the date of service is the date the court received the receipt or the date the court receives an oral confirmation of the service by mail.

When the recipient is not domiciled in Sweden, various international regulations and conventions apply, e.g. Regulation (EC) No. 1393/2007, the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and the 1974 Nordic Convention. As a general rule, service will be made according to the applicable law in the recipient's country, unless such is contrary to the Swedish general principles of law.

3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

The Swedish Code of Judicial Procedure provides for pre-action interim remedies, the most common being provisional attachment, either in the form of a collateral of the opponent's property or by provisional attachment of specific property. Unless a delay places the applicant's claim at risk, the opposing party shall be given an opportunity to respond to the application. Where the applicant's claim is at risk, the court may immediately impose a security measure to remain effective until otherwise ordered. As a main rule, the applicant should deposit security for the loss that the opposing party may suffer with the court.

To obtain a provisional attachment, a person must show probable cause to believe that he has a claim which is, or can be, subject to judicial proceedings, and that it is reasonable to suspect that the opposing party will evade payment by absconding, removing property, or similar.

Apart from provisional attachment, the court may also order other measures deemed necessary to secure the applicant's rights: for example, through a prohibition order; through the appointment of a receiver; or any other measure deemed suitable to secure the applicant's rights.

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3.3 What are the main elements of the claimant's pleadings?

The main elements of the claimant's pleadings are a presentation of a distinct request for relief, a detailed account of the circumstances invoked as a basis for the claim, and a specification of the evidence invoked. Written evidence should be enclosed with the application. Circumstances rendering the court competent to hear the case should also be presented, including sufficient details of the opponent, such as name and address, to effect service.

3.4 Can the pleadings be amended? If so, are there any restrictions?

As a starting point, the request for relief and the cause of action may not be amended. However, several exceptions apply. The claimant may, for example, claim interest or other auxiliary obligations dependent upon the principal obligation, present a new claim based essentially on the same ground as the instituted action, and demand a performance other than the instituted action by reason of a circumstance that occurred during the proceedings or only became known to the claimant then. The claimant may also request a declaratory award regarding the existence or non-existence of a disputed legal relationship. Facts and evidence to support the action filed may be added during the proceedings unless the court has set a cut-off date and the court does not permit the additional facts or evidence. In case late filings delay the proceedings, this may be taken into account by the court when determining liability for the litigation costs.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

Pleadings can be withdrawn at any stage of the proceedings. If, however, a claim is withdrawn after the defendant has responded, the claim shall be adjudicated if the defendant so requests. If a party's action is written off following its withdrawal of the action, such party is generally compelled to reimburse the opposing party for its litigation costs.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

The main elements of a statement of defence are: (i) any objections regarding procedural impediments that the defendant desires to make; (ii) to what extent the plaintiff's claim is admitted or contested; (iii) if the plaintiff's claim is contested, the basis therefor, including the defendant's position as to the circumstances being the basis of the plaintiff's claim and also the defendant's statement of the circumstances made in defence; and (iv) a specification of the evidence invoked by the defendant.

The defendant can bring a counterclaim(s) towards the plaintiff in the form of an application for summons. In practice, this can be made in the same submission as the statement of defence. Provided that the counterclaim concerns the same, or any related issue to the plaintiff's claim, it can be joined in one proceeding with the plaintiff's claim. The defendant would be required to pay an application fee relating to the counterclaim. The defendant may also bring a defence of set-off.

4.2 What is the time limit within which the statement of defence has to be served?

It is in the court's discretion to set the time limit within which the statement of defence shall be submitted to the court. The usual time limit is two to three weeks after the date of service of the summons application, but the court may grant a time extension if this is requested by the defendant. The court then sends the statement of defence to the plaintiff.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

Joint adjudication is possible in Sweden. A party may institute proceedings against a third party and claim for rescission or for damages, or similar, and have such claim joined with the main claim.

4.4 What happens if the defendant does not defend the claim?

If the defendant fails to obey a court order to submit a statement of defence, the court may render a default judgment against the defendant unless the plaintiff has opposed this.

A party against whom a judgment by default has been entered may apply for the reopening of the case at the court in which the action was instituted, within one month from the date on which the judgment was rendered.

4.5 Can the defendant dispute the court's jurisdiction?

The defendant can dispute the court's jurisdiction but must do so in his first submission to the court. For several types of claims which should normally be initiated at a certain court, the court will nevertheless be deemed competent to entertain proceedings unless the defendant makes an objection.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

Third parties can be added to ongoing proceedings where: (i) an action concerns the same matter at issue; (ii) a third party, by reason of the potential outcome of a pending case, wishes to present a claim for rescission or for damages or similar against one or both of the parties; or (iii) where a joinder of the claims will aid the adjudication of the claims.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

The Swedish Code of Judicial Procedure allows for consolidation. Generally, the claims need to be based on substantially the same matter at issue.

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5.3 Do you have split trials/bifurcation of proceedings?

There are several situations in which the court may bifurcate proceedings. When several actions that could be separated are joined in one proceeding, the court may give a separate judgment of any of the actions. When one of such claims is conceded, a separate judgment may be given regarding that part. Also, if the adjudication of one claim or issue depends on the adjudication of another claim or issue in the same proceeding, a separate judgment may be given for such part of the case. In such cases, the court may order a stay of proceedings on the remaining issues. It is in the court's discretion to determine whether bifurcation is appropriate.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

In general, the competent court for civil cases is the district court for the place where the defendant resides. Exceptions apply, for example, for consumer claims and disputes regarding real estate.

Each court has an internal allocation system which allots the cases to the internal divisions randomly. It is, however, not uncommon that cases regarding a specific subject matter are allocated to designated divisions within the court.

6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

The court manages the proceedings from the application for summons to the final judgment. The court decides on the time frame for the proceedings, usually after communication with the parties, including the time limits for the parties' submissions. Before the preliminary hearing, the case is managed at the discretion of the court. At the preliminary hearing, the court, together with the parties, usually decides on a time schedule for the parties' written submissions. The court may draft a written summary of the parties' positions and may order the parties to submit material for this summary.

The court may direct a party to finally determine its position and to state the evidence invoked in support thereof. The court may decide on a cut-off date before a final hearing.

A party which fails to comply with a court order, or if his carelessness or oversight has caused costs for the opposing party, may be ordered to reimburse the opposing party for incurred costs, regardless of how litigation costs otherwise are to be borne.

6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

There are various situations in which the court can impose sanctions on a party. The court can, for example, dismiss a party's claim entirely where a party fails to obey a directive to cure a defect of the claim, order a person to produce a document under penalty of fine, or let the parties' non-compliance have evidentiary or cost allocation consequences.

6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

In exceptional cases, the court may immediately enter judgment if it is obvious that the plaintiff's claim is unfounded.

The court may disregard new circumstances or new evidence after a cut-off date, unless the party proves that he has had a valid excuse for not alleging the circumstance of evidence earlier.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

There are no rules in the Swedish Code of Judicial Procedure according to which a party can request a summary judgment.

However, there are situations where judgments can be rendered without a main hearing being held in a case, for example: where the parties consent to not having a main hearing and a main hearing is not deemed necessary; where the judgment is in the form of a default judgment; where a judgment is based on a party's consent to, or concession of, a claim; or where the judgment confirms a settlement. In exceptional cases, a court can also immediately enter judgment if it is obvious that a plaintiff's claim is unfounded.

6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

The court may order a stay of proceedings on the remaining issues of a case until a separate judgment rendered has entered into final force. The court may also order a stay of the proceedings where an issue in other pending proceedings is deemed to be decisive for the case at hand, or where there is any other considerable impediment to trial. The court may also decide to postpone the proceedings, e.g. if the parties request this with reference to ongoing settlement negotiations.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

The court may, upon the request of a party, order anybody holding a written document that can be assumed to be of importance as evidence in a case to produce it. An application for production of documents must concern specific documents or categories of documents which can be identified by a specific evidentiary theme.

Pre-action disclosure is permissible but only in certain situations where there is a risk that evidence may be lost or difficult to obtain.

There are no specific rules or acceptable practices on e-disclosure. The general provisions on production of documents will apply also to electronically stored information.

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7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

There is no obligation for a party to produce written communications between him and someone closely related to him, including spouses, close relatives and similar persons. Officials may not be ordered to produce written documents if it can be assumed that the contents are such that he may not be heard as witness thereto. This applies to, for example, doctors, psychiatrists and lawyers. Also, the rules on the privilege of a witness to refuse to testify correspond to the holder of a written document's right to privilege. As regards lawyers, it should be noted that the provisions on privilege do not cover in-house lawyers.

7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

The rules on disclosure in the Swedish Code of Judicial Procedure also apply to third parties. A third party who has produced a written document is entitled to compensation for its costs and inconvenience from the party requesting production.

7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

The court decides on whether a request for document production shall be granted or not and ultimately orders a party, or third party, to produce such document.

7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

There are no restrictions on the use of documents obtained by disclosure; see question 8.2.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

The main rules on evidence in Sweden are: (i) the principle of free evidence, meaning that there are basically no provisions on what is permitted as evidence as long as it is relevant to the facts to be proven in the case; and (ii) the principle of free evaluation of evidence, meaning that the court evaluates all evidence at its discretion. In principle, it is for the party making a claim to present evidence in support of the claim. Collection and presentation of evidence is the responsibility of the parties and all evidence shall be brought forward and displayed at the main hearing.

Proof is not required as to legal rules unless where foreign law is to be applied. Neither is proof required for such circumstances that are universally known.

8.2 What types of evidence are admissible, and which ones are not? What about expert evidence in particular?

Generally, all evidence is admissible and it is up to the court to evaluate everything that has occurred and determine what has been proven in the case. As regards written witness statements, see below.

If a court finds that a circumstance that a party offers to prove is without importance in a case, or that an item of evidence offered is unnecessary, the court may reject that evidence. The court may also reject an item of evidence if it can be presented in another way with considerably less trouble or costs.

Expert evidence is accepted.

8.3 Are there any particular rules regarding the calling of witnesses of fact, and the making of witness statements or depositions?

Chapter 36 of the Swedish Code of Judicial Procedure includes provisions on witnesses.

The parties must list each witness they invoke and what the testimonies should prove. The court then summons the witness to appear before the court.

A witness shall give his testimony orally. Written statements of witnesses may, as a main rule, not be invoked. Written reports by expert witnesses may, however, be submitted.

Pre-trial depositions are not allowed. However, in exceptional circumstances a witness may be called to testify separately, e.g. due to illness. The court may allow a witness to testify by video link, for example, from a foreign jurisdiction, provided that the measure is allowed according to the foreign jurisdiction in question. Testimonies of all witnesses are recorded by video, and in appellate proceedings the recordings are normally viewed instead of new live testimonies.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Are there any particular rules regarding concurrent expert evidence? Does the expert owe his/her duties to the client or to the court?

The Swedish Code of Judicial Procedure contains no rules on the preparation of witnesses, and witness preparation is common in commercial disputes.

The principal rule is that, when there are two or more witnesses in a case, each shall be heard separately. Furthermore, the witness should not be present in the court room prior to the hearing. However, where the witnesses' respective testimony is ambiguous or a conflicting/special reason exists, witnesses may be examined confronting each other.

An expert witness is usually called by a party but can also be appointed by the court.

An expert who has submitted a written opinion shall also be examined orally if requested by a party or if the court otherwise finds it necessary. An expert witness is also required to take an oath before giving testimony.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

The court can deliver a judgment on the merits of the case, a default judgment or a consent judgment confirming a settlement. During the preparatory stage of the proceedings, the court can issue

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decisions or orders concerning procedural or interim measures. Final decisions can be in the form of a writing-off or dismissal of the case.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

The district courts are empowered to make rulings on everything that is being adjudicated, including damages, interest and costs of the litigation. Punitive damages are not available under Swedish law.

9.3 How can a domestic/foreign judgment be recognised and enforced?

A domestic judgment can be enforced at the Swedish Enforcement Authority (Sw. *Kronofogden*).

A foreign judgment's enforceability is dependent on whether or not it is covered by an international convention ratified by Sweden, or where EU regulations regarding the enforceability apply; for example, the Brussels I Regulations from 2000 and 2012, the Brussels Convention and the Lugano Convention. According to most conventions and regulations, a district court must make a declaration of enforceability before enforcement proceedings are initiated at the Swedish Enforcement Authority.

9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

Leave to appeal is generally required for the court of appeal to review a district court's judgment. Leave to appeal may be granted if: (i) it is of importance for the guidance of the application of law that a superior court considers the appeal; (ii) reason exists for an amendment of the conclusion that the district court has rendered; or (iii) there are otherwise extraordinary reasons to entertain the appeal. A party desiring to appeal a district court judgment in a civil case shall do so in writing, and deliver such appeal to the district court within three weeks from the pronouncement of the judgment.

Leave to appeal is required for the Supreme Court to review a court of appeal judgment and may be granted only if: (i) it is of importance for the guidance of the application of law that the Supreme Court considers the appeal; or (ii) there are extraordinary reasons for such a determination, such as the occurrence of substantive defects, grave procedural errors or where the result in the court of appeal is due to gross oversight or to gross mistake. An appeal from a court of appeal judgment shall be delivered within four weeks from the pronouncement of the judgment.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

In civil cases, one of the objectives of the preparations of the case is to elucidate whether there are possibilities for an out-of-court settlement. In practice, this is usually considered at the preparatory hearing of the case where the judge may assist in discussions on settlement. The court can also direct the parties to appear at a mediation session before a mediator appointed by the court.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

The primary method of alternative dispute resolution in Sweden is arbitration, including *ad hoc* arbitration under the Swedish Arbitration Act (Sw. *Lagen om skiljeförfarande SFS 1999:116*) and institutional arbitration under the Stockholm Chamber of Commerce ("SCC") Arbitration Rules and other rules.

Mediation exists in Sweden and can be pursued via the national courts or at the SCC, but it is relatively uncommon.

For specific disputes, additional alternative methods are available; for example, regional rent tribunals which mediate in disputes relating to domestic and business premises.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Ad hoc arbitration is governed by the Swedish Arbitration Act. Institutional arbitration in Sweden is often based on the SCC Arbitration Rules or the SCC Expedited Arbitration Rules. SCC launched revised rules on 1 January 2017; see www.sccinstitute.com.

Mediation at the national courts is governed by the Swedish Mediation Act (Sw. *Lagen om medling i visa privaträttsliga tvister SFS 2011:860*). Mediation at the SCC is governed by the SCC Mediation Rules which can also be retrieved at the SCC's webpage.

1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Disputes concerning matters in respect of which the parties may not reach a settlement by agreement are not considered arbitrable; for example, disputes concerning family law matters, taxation and certain disputes relating to competition law. Also, arbitration clauses in agreements between business enterprises and consumers are not valid if the arbitration agreement was concluded before the dispute arose.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, force parties to arbitrate when they have so agreed, or order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

The local courts can assist parties to arbitration proceedings in certain matters such as provisional measures of protection, the appointment of an arbitrator *in lieu* of a defaulting party, ordering document production and hearing witnesses under oath.

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A court cannot force parties to arbitrate, nor order parties to mediate. However, the existence of an arbitration agreement is a bar to court proceedings.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

An arbitration award is final and binding unless otherwise agreed. An arbitration award can only be set aside or declared invalid on narrow procedural grounds.

Settlement agreements reached at mediation do not need to be sanctioned by the court, but can be issued in the form of a consent judgment.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

The major institution is the Arbitration Institute of the SCC, which is one of the leading arbitration institutions in the world.

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Norburg & Scherp is a specialist firm for arbitration and litigation based in Stockholm, Sweden. It represents Swedish and international clients as counsel in commercial disputes in Swedish and international arbitration, and before Swedish courts of all instances, including the Supreme Court.

Norburg & Scherp's arbitration experience includes assignments as counsel and arbitrators in Swedish and international arbitration under a variety of institutional rules and *ad hoc*.

Norburg & Scherp has extensive experience of disputes in numerous industries and fields, including M&A, joint ventures, construction, foreign investments, mining, energy, manufacturing, renting, IT & telecoms, intellectual property and licensing.

Norburg & Scherp also frequently acts as counsel in administrative litigation, including public procurement appeals, secrecy issues and telecom disputes.

The firm and its partners are listed as leading by, among others, *Chambers & Partners*, *The Legal 500*, *Who's Who Legal* and Legal Media Group's *Expert Guides*.

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Switzerland

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

Switzerland is a civil law jurisdiction. Accordingly, the primary sources of legal authority are written codes and statutes, whereas case law is of less importance than in common law jurisdictions.

Civil procedure in Switzerland is primarily governed by the Swiss Code of Civil Procedure ("SCCP"). The SCCP comprehensively governs civil procedure in Switzerland and domestic arbitration proceedings. Further important sources of civil procedure are the Swiss Federal Act on Private International Law ("PILA") and the Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 30 October 2007 ("Lugano Convention"), dealing with the question of jurisdiction in cross-border matters. The PILA, moreover, regulates international arbitration with a seat in Switzerland.

1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

Generally speaking, the Swiss court system consists of three layers of instances: at the cantonal (state) level, the courts of first instance and the upper courts (second instance); and above them, the Swiss Federal Supreme Court as the third and last instance. In exceptional cases, however, a single instance (e.g., the upper court or a specialist court) decides a dispute on the cantonal level (with the possibility to appeal to the Federal Supreme Court). The structure of the (first and second instance) civil court system varies from canton to canton.

In general, the regular cantonal courts have jurisdiction in all areas of the law, including federal law. Cantons are, however, free to have specialist courts, such as a court for labour law matters, a court for landlords and tenants, and specialised commercial courts. While most cantons have specialist courts for labour and tenant law matters, only Zurich, Bern, St. Gallen and Aargau have a commercial court.

In addition, the Federal Patent Court decides all civil law disputes concerning patents on a first instance level. Its jurisdiction and organisation is governed by the Patent Court Act ("PatCA"), whereas the proceedings before the Federal Patent Court are generally governed by the SCCP.

The Federal Supreme Court, as Switzerland's highest court, safeguards the application of federal and constitutional law. Proceedings before the Swiss Federal Supreme Court are governed by the Swiss Federal Tribunal Act.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

The SCCP provides for three types of proceedings: (i) ordinary proceedings; (ii) simplified proceedings; and (iii) summary proceedings. Each of the three types of proceedings can generally be divided into the following stages, before a court of first instance:

- the assertion stage, where the parties must plead their arguments and offer evidence available to them;
- the evidentiary stage, where the court takes the evidence offered by the parties;
- the closing stage, where the parties may comment on the result of the evidentiary phase and on the merits of the case; and
- the issuance of the judgment.

Simplified proceedings apply to small cases (where the value in dispute **does not exceed** CHF 30,000), as well as to cases before special courts for labour law, landlord and tenant matters and consumer disputes, and are, compared to ordinary proceedings, less formal, favour oral submissions, and give a more active role to courts. Summary proceedings, which apply to urgent requests and requests for provisional measures, to so-called '**clear cases**', to specific proceedings under the Federal Debt Collection and Bankruptcy Act ("DEBA"), and to numerous other matters explicitly listed in the SCCP, go even further in terms of simplification and expediency. A specificity of summary proceedings is that the evidence available is limited to documents. Other means of evidence are only admissible if the taking of such evidence does not substantially delay the proceedings, or is required by the purpose of the proceedings, or if the court has to establish the facts *ex officio*.

The average length of proceedings before first instance courts is between one and two years in commercial cases, and approximately up to one year in smaller and simpler cases, as well as cases before specialist courts for labour law and for landlord and tenant matters. In complex cases, the duration of the proceedings may be longer.

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1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

Domestic and foreign parties may agree on the court that shall have jurisdiction *ratione loci* over an existing or future pecuniary dispute ("*vermögensrechtliche Streitigkeit*") arising from a particular legal relationship. Unless the parties' agreement provides otherwise, the agreed court's jurisdiction is exclusive. Generally, the agreement must be in writing or in any other form allowing it to be evidenced by text. The parties' freedom to agree on the competent court *ratione loci* is excluded or limited in a few instances only.

The designated Swiss court must honour an exclusive jurisdiction clause, unless none of the parties is domiciled in a Member State of the Lugano Convention, and the law applicable to the merits of the case is not Swiss law.

1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

Court fees and attorneys' fees are regulated by the cantons individually. In Switzerland, litigation costs are generally reasonable. In pecuniary disputes, the court and attorneys' fees mainly depend on the amount in dispute. Other factors, such as the type and course of the proceedings and the complexity of the case, are also taken into consideration. Currently, Swiss courts may – and usually do – order a claimant to make an advance payment up to the amount of the expected court costs. This might change, however, since in the presently ongoing revision of the SCCP, the amount of the advance payment should be reduced to a maximum of half of the expected court costs.

In general, all expenses arising from the litigation are to be borne by the losing party. If no party fully prevails, the court will divide the costs proportionally between the parties.

There are no rules on costs budgeting.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

Agreements on contingency fees are not permissible for proceedings before Swiss courts. On the other hand, as long as the hourly fee covers the attorney's costs, additional incentive payments can be agreed.

As regards security for costs, in certain cases and upon the respondent's request, Swiss courts may order the claimant to provide security for the respondent's attorneys' fees. This may be the case if the claimant has no residence in Switzerland, appears to be insolvent, or owes costs from previous proceedings. To the extent, however, that the Hague Convention of 1954 on Civil Procedure, or of 1980 on International Access to Justice, or other treaties apply, which forbid security for costs for the sole reason of a claimant's foreign domicile, Swiss courts cannot order a claimant to provide security for costs on that ground.

1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

In general, the assignment of a claim is permitted and valid, unless one of the following exceptions apply:

- In few instances, the law forbids the assignment (mainly with regard to employment contracts, claims of the borrower or tenant regarding the usage of the leased item, or claims connected to a person's status as heir).
- The parties agreed that a claim shall not be assigned.
- Moreover, an assignment is prohibited if a claim is so closely connected to the person of the assignor that an assignment would significantly alter the existence, the content or the purpose of the claim.

The Swiss Federal Supreme Court, in principle, allows litigation funding through a third party. It is important to note, however, that litigation funding must not unduly interfere in the client-attorney relationship. The attorney's independence needs to be ensured at all times.

1.8 Can a party obtain security for/a guarantee over its legal costs?

For the preconditions to obtain security for/a guarantee over legal costs, see question 1.6.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

The SCCP generally requires a claimant to initiate conciliation proceedings before filing a claim with the first instance court. However, there are several exceptions to this rule, for example, in summary proceedings, or if a dispute falls within the jurisdiction of a commercial court. Furthermore, instead of conducting conciliation proceedings, the parties may agree to mediate.

If no amicable settlement is reached, the conciliation authority grants a temporary authorisation to proceed with the claim ("*Klagebewilligung*"). Generally speaking, a claimant must file the claim with the competent court within three months from the date of notification of this authorisation. Once the authorisation expires, the claimant must commence new conciliation proceedings if they wish to pursue the claim.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Swiss law treats limitation periods as a substantive law issue. The general limitation period for contract claims is 10 years from the date of maturity. However, for certain types of contractual claims, the limitation period is five years (e.g., claims for periodic payments or claims of employees) or less (e.g., two years for warranty claims under a contract for the sale of goods).

Tort claims currently become time-barred one year after the aggrieved party obtained knowledge of the damage and of the tortfeasor. However, pursuant to a currently ongoing revision of the Swiss Code of Obligations, this limitation period should be extended to three years. In any event, such claims are time-barred 10 years after the occurrence of the damaging event. In connection with the said revision of the Swiss Code of Obligations, this limitation period should be extended to 20 years in case of the death of a human being or the causation of bodily injury. The same limitation period applies to claims based on unjust enrichment.

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3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

Proceedings are commenced by the claimant submitting the statement of claim with the court. In Switzerland, the courts take care of the service of submissions of the opposing party, summons, rulings and other decisions. Service of summons, rulings and other decisions are effected by (registered) mail or other means against confirmation of receipt. Other documents may be served by regular mail. With the consent of the person concerned, service may also be effected electronically.

Service is accomplished when the document has been received by the addressee or an authorised person. Service is generally also deemed to have been effected on the seventh day after the failed attempt to serve a registered letter, or on the day of refusal to accept service in case of personal service.

Swiss courts can instruct foreign parties to provide a domicile for service in Switzerland. If service must be effected outside Switzerland, the channels of judicial assistance as per the Hague Conventions of 1954 and 1965 or other treaties must be used.

3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

In order to secure monetary claims, a creditor can seek to attach the debtor's assets in accordance with the DEBA. The creditor must show to the court that, *prima facie*:

- the creditor has a claim;
- a statutory ground for attachment exists (e.g., foreign domicile of the debtor, provided that the claim has a sufficient connection with Switzerland or is based on a recognition of debt; the debtor is attempting to conceal assets); and
- the debtor has assets which are situated in Switzerland.

A court may also grant interim measures for all other claims, if the applicant shows that in the absence of the requested interim measure it would suffer irreparable harm. Moreover, the applicant must show that it is likely to prevail on the merits of the underlying cause of action. In cases of exceptional urgency, interim measures may be granted *ex parte*.

3.3 What are the main elements of the claimant's pleadings?

The statement of claim to be filed by the claimant must be dated and signed and, in essence, contain the following:

- the prayers for relief;
- a statement of the value in dispute; and
- a detailed account of all factual allegations and of the evidence offered for each allegation.

The statement of claim usually contains legal arguments as well.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Reductions of the prayers for relief (with prejudice) are permissible at any time. Other amendments of the prayers for relief (including additional claims) are only allowed if: (i) they are submitted with the party's second round of pleadings; (ii) they are subject to the same type of procedure and venue; and (iii) the new claim is closely connected to the original action, or the opposing party agrees with the amendment. After the second round of pleadings, no amendments are admissible, unless they are based on new facts and evidence and the prerequisites mentioned before (ii)–(iii) are met.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

Pleadings submitted before the proper court can only be withdrawn without having a *res judicata* effect if the claim has not yet been notified to the defendant, or if the defendant agreed to the withdrawal.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

The main elements of a statement of defence are essentially the same as mentioned above under question 3.3. Moreover, the statement of defence must state which of the claimant's factual allegations are accepted and which are disputed.

The respondent may file a counterclaim in the statement of defence if the court is competent to deal with the counterclaim (either because of a jurisdiction clause or statutory ground, or because there is a factual connection between the claim and the counterclaim), and if the counterclaim is subject to the same type of procedure as the main claim. In the presently ongoing revision of the SCCP, it is intended that a factual connection between the claim and the counterclaim should always be required. For Euro-international disputes, the Lugano Convention requires that the counterclaim is based on the same contract or facts.

Set-off defences are available in Switzerland. A set-off defence should be raised with the respondent's second pleading at the latest.

4.2 What is the time limit within which the statement of defence has to be served?

The court sets a time limit for filing the statement of defence. In deciding on the time limit, the court considers the volume of the statement of claim and the complexity of the case. The average time range for the filing of the statement of defence is 20 to 60 days.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

A party may notify a third party of the dispute ("*Streitverkündung*") if, in the event of losing the case, the party might take recourse against or be subject to recourse by the third party. The notified

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third party may decide: (i) not to react to the notification; (ii) to intervene in favour of the notifying party; or (iii) with consent of the notifying party, to proceed with the litigation in the place of the latter. As a general rule, if the notifying party loses the case, the decision will also have an effect on the notified party. The notified party's liability will be the subject of a subsequent litigation. In ordinary proceedings, it is also possible for the notifying party to integrate the litigation between it and the notified party into the main proceedings, by filing a claim against the notified party in the same proceedings ("*Streitverkündungsklage*").

4.4 What happens if the defendant does not defend the claim?

If the statement of defence is not filed in time, the court will set a short grace period. If the respondent again fails to submit the statement of defence, the court will decide the case if it is in a position to do so. Otherwise, the court shall summon the parties to the main hearing. If the defendant fails to attend the hearing, the court shall decide on the basis of the submissions on file and, as a general rule, may rely on the claimant's representations.

4.5 Can the defendant dispute the court's jurisdiction?

The court's jurisdiction can be disputed. It is important to note that as soon as the defendant submits arguments on the merits without disputing the court's jurisdiction in the first place, the defendant enters an appearance and submits to the court's jurisdiction.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

A joinder is available if two or more persons are in a legal relationship that calls for one single decision with effect for all of them (mandatory joinder), or if the rights and duties of two or more persons result from similar circumstances or legal grounds (voluntary joinder).

For the notification of third parties, see question 4.3.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Swiss courts have discretion to consolidate two sets of proceedings if the facts are closely connected, and if the consolidation simplifies the proceedings.

5.3 Do you have split trials/bifurcation of proceedings?

In order to simplify the proceedings, Swiss courts have discretion to limit the proceedings to individual issues or prayers for relief, or order the separation of jointly-filed actions.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

Courts allocate the cases among the judges in accordance with their internal policies. Cases should be distributed "blindly" or "mechanically" between the different judges of the court in order to ensure independence. Some courts take a flexible approach and distribute the cases randomly, but in consideration of the strengths and specialised areas of the judges.

6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

The courts have the power to directly and efficiently manage the proceedings pending before them. Swiss courts namely have the power to consolidate separately filed claims, to separate jointly-filed actions, or to bifurcate proceedings. If factually connected claims are pending before different courts, the subsequently seized court may transfer the case to the court seized first, given the latter court's agreement. Moreover, at any time during the proceedings, the courts have the power to facilitate an attempt at amicable settlement.

During the proceedings, the parties can file procedural motions or apply for interim measures (e.g., preservation of evidence, request for a stay). The prerequisites for interim measures to be granted during proceedings are the same as set out under question 3.2. Usually, the costs for such applications are allocated at the end of the proceedings in accordance with the general principle that costs should follow the event.

6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

During hearings, if any person disrupts the hearing, the court may order the person to pay a reprimand or a disciplinary fine. The court may also exclude the person from the hearing.

Other than that, as far as the parties are concerned, disobeying the procedural duty to cooperate does not result in sanctions or constraints. However, the party risks procedural disadvantages, such as the drawing of adverse inferences or a default judgment. If a third party refuses to cooperate without justification, the court may order disciplinary fines or adopt other measures. Furthermore, disciplinary fines and criminal sanctions may be imposed for wilfully lying during the examination of the parties or for not telling the truth while testifying.

6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

A court may order a party to rectify formal defects of its written submission; e.g., if the submission is incomprehensible or incoherent. If the defect is not rectified, the submission will not be taken into consideration. Courts may also not take into consideration any querulous or abusive submissions. Generally, late submissions will also be disregarded.

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6.5 Can the civil courts in your jurisdiction enter summary judgment?

Parties cannot move for a summary judgment and the courts do not have the possibility to issue a summary judgment as known in the U.S., for example. However, after reviewing the parties' submissions and documentary evidence, a court can issue its judgment on the merits of the case without hearing witnesses or taking other evidence, if it can anticipate the assessment of evidence (i.e., in cases where no material issues of fact remain to be proven or where the evidence offered is irrelevant).

6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Once a court has decided that all procedural requirements are met, it may not discontinue the proceedings without rendering a decision on the merits.

However, Swiss courts may stay the proceedings – upon request or *sua sponte* – if appropriate. This may be the case if the decision depends on the outcome of other proceedings or if the parties are engaged in settlement negotiations.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

The SCCP does not provide for a pre-trial discovery phase. That being said, in specific and narrowly described circumstances, the taking of evidence as a form of precautionary measure pre-action is possible. Moreover, during proceedings, the parties may request the production of a specific document which is in the possession of the opposing party or a third party.

The SCCP does not contain any special rules concerning the disclosure of electronic documents. Neither do acceptable practices for conducting e-disclosure, such as predictive coding, exist. As is the case with traditional documents, disclosure may be refused if the electronic document in question falls under a privilege, and parties may ask for protective measures to be issued by the courts where business and trade secrets are involved.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

Parties and third parties have a duty to cooperate in the taking of evidence. In particular, they have the duty to produce documents in their possession.

Swiss law, however, provides for certain privilege rights in order to protect family members of a party and certain professionals (e.g., attorneys, physicians) from a request for disclosure or from giving testimony. Currently, in-house lawyers may not invoke the legal profession privilege. However, this may change, since in the presently ongoing revision of the SCCP, it has been proposed to extend the legal profession privilege to in-house lawyers.

Generally speaking, privilege may only be invoked by the person bound by the privileged secret (e.g., the attorney). However, documents which are in the possession of the client because they have been sent to them by the attorney are also privileged.

7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

Third parties have a duty to cooperate in the taking of evidence, unless they can invoke a legal privilege. This includes, in particular, the duty to truthfully testify as a witness, to produce physical records where required, or to allow an examination of their person or property by an expert.

7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

Only courts can order a witness to appear, or a party or a third party to produce documents. Thus, unlike during disclosure in, for example, U.S. proceedings, the court is always involved.

7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

Swiss courts must take the appropriate measures to protect legitimate interests of any party or third parties, e.g., business secrets. For instance, the court may restrict access to certain documents.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

As a general rule, the burden of proving the existence of an alleged fact rests on the party that derives rights from that fact. The Swiss courts are free in assessing the evidence.

8.2 What types of evidence are admissible, and which ones are not? What about expert evidence in particular?

The SCCP provides for the following types of evidence:

- witness testimony;
- documents;
- expert opinions;
- written statements ("*schriftliche Auskunft*");
- inspections; and
- party assertions and testimony ("*Partei- und Beweisaussage*").

8.3 Are there any particular rules regarding the calling of witnesses of fact, and the making of witness statements or depositions?

Parties must name the witnesses on which they rely in their submissions. The court will then order the witnesses to appear and testify orally. Witnesses will be questioned by the court, but the parties have the right to ask additional questions. Witness statements or depositions are generally not admissible evidence. Furthermore, only a person who is not a party can be a witness, and it is not admissible to prepare a witness before the hearing.

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8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Are there any particular rules regarding concurrent expert evidence? Does the expert owe his/her duties to the client or to the court?

Upon request or *ex officio* and after hearing the parties, a Swiss court may obtain an opinion from an expert witness. The court will instruct the expert and submit the relevant questions to him/her. The parties will have the opportunity to comment on the questions to be put to the expert. Thereafter, the court will provide the expert with the necessary files and set a deadline for the submission of the opinion. After the expert has rendered their opinion, the parties may ask for explanations or submit additional questions. The expert has a contractual relationship with the court and owes his/her duties to the court.

Upon request or *ex officio*, expert witnesses may be confronted with each other or with the parties.

Parties are free to submit reports prepared by their own experts. However, such reports are not given more evidentiary weight than party pleadings.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

Courts can render interim decisions, final decisions or partial decisions. Interim decisions are typically rendered to decide upon the competence of a court or questions of prescription. Interim decisions allow for substantial saving of time and costs, as they are used where a higher court could potentially issue a contrary decision that would put an immediate end to the proceedings.

The final decision is the actual decision on the merits. Their content depends largely on the claims submitted by the parties, i.e., whether the parties asked for a judgment for damages, for a specific performance, or for a declaratory judgment. Partial decisions are a specific kind of final decision, namely decisions with regard to only part of a claim.

Moreover, courts can issue procedural orders to manage the proceedings.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Swiss courts cannot award punitive damages. Damages are strictly compensatory and courts may thus only grant damages in the amount of the incurred loss.

Unless the parties have stipulated otherwise, a statutory interest rate of five per cent *per annum* applies to monetary claims. A court will only award interests in the presence of a respective prayer for relief.

As regards costs, see question 1.5.

9.3 How can a domestic/foreign judgment be recognised and enforced?

The recognition and enforcement of foreign judgments depends on the country where the judgment was rendered and on whether or not that country has signed a treaty with Switzerland. For example, a judgment rendered in a Member State of the Lugano Convention will be recognised and enforced in Switzerland without review of the substance of the judgment, save for certain narrowly defined exceptions. In absence of an international instrument, the recognition and enforcement is governed by the PILA. Under the PILA, final decisions rendered by a competent court will generally be recognised and enforced, unless they violate fundamental principles of Swiss law.

The rules governing the enforcement of any judgment, domestic or foreign, also depend on the nature of the judgment. The rules for the enforcement of monetary judgments are set out in the DEBA. According to the DEBA, monetary judgments are enforced in an expedited procedure. The enforcement of non-monetary judgments is subject to the provisions of the SCCP.

9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

Generally speaking, a decision of a first instance court may be appealed to the upper cantonal court within 30 days of service of the decision. The threshold amount in dispute for an appeal in pecuniary matters is CHF 10,000. With some exceptions, an appeal has suspensive effect. The grounds for appeal are the incorrect application of the law or the incorrect establishment of the facts of the case.

A decision of an upper cantonal court may be appealed to the Swiss Federal Supreme Court if the amount in dispute is at least CHF 30,000, or if the matter involves a question of law of fundamental significance. As a general rule, the appeal must be filed within 30 days after notification. The Swiss Federal Supreme Court only re-examines questions of law. An appeal based on erroneous fact finding may only be made where the lower court's findings are obviously wrong or in violation of Swiss law.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

Subject to certain exceptions (see above under question 2.1), under the SCCP, a claimant is generally required to initiate conciliation proceedings before filing a claim with the first instance court. Instead of conducting conciliation proceedings, the parties may agree to mediate. If no amicable settlement is reached, the conciliation authority grants a temporary authorisation to proceed with the claim ("*Klagebewilligung*"; see also question 2.1 above).

Courts may also hold instruction hearings at any time during the proceedings. Such hearings are mainly held to prepare for the main hearing or to facilitate a settlement.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

Arbitration has a long-standing tradition in Switzerland. Swiss courts are known to respect and enforce arbitration agreements and

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awards. Arbitration is the only alternative to court litigation where it is possible to achieve a final, binding and enforceable resolution of a dispute. Switzerland is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("New York Convention").

Mediation has traditionally been used as a means of (non-binding) dispute resolution in family law matters. Recently, mediation has become more popular for the amicable resolution of commercial disputes. Generally speaking, in mediation proceedings an impartial third party seeks to help resolve a dispute by facilitating settlement negotiations. The mediator has no authority to impose a binding solution on the parties. Swiss courts cannot order parties to resort to mediation, but they can encourage them to do so.

Expert determination (frequently used in relation to price adjustment disputes in M&A transactions) and proceedings before an Ombudsman (for example, in banking matters) are further means of alternative dispute resolution available in Switzerland.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

As far as arbitration is concerned, a distinction has to be made between domestic and international arbitration. International arbitration, i.e., an arbitration where at least one of the parties has its residency outside Switzerland when concluding the arbitration agreement, is governed by the 12th Chapter of the PILA. Rules governing domestic arbitration are set out in the SCCP.

As regards mediation, the SCCP only governs the relationship between mediation and state court litigation, but does not regulate the process itself. The parties are thus free to structure the mediation as they see fit.

1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

As a general rule, any pecuniary dispute may be submitted to international arbitration. Domestic arbitration and mediation is available for all claims that parties may freely dispose of. Claims that first and foremost affect a party's personal rights cannot be arbitrated. This includes marriage, paternity, child adoption, divorce or separation.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, force parties to arbitrate when they have so agreed, or order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

Swiss courts may assist with the constitution of an arbitral tribunal, e.g., appointment, removal or replacement of arbitrators. The state judges' assistance can also be requested if a party does not voluntarily comply with provisional measures ordered by the arbitral tribunal. Moreover, Swiss courts will assist in the taking of evidence or provide any further assistance.

If a respondent invokes an arbitration agreement, a Swiss court must decline to hear the case, unless the agreement to arbitrate is null and void, ineffective or incapable of being performed, or if the tribunal cannot be constituted due to reasons attributable to the respondent.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

Arbitration awards are binding and enforceable in Switzerland. International and domestic arbitral awards can only be appealed before the Swiss Federal Supreme Court. However, in domestic arbitration, the parties are free to agree to the jurisdiction of the high court of the canton at the seat of the arbitration instead. The grounds for attacking an arbitral award are limited to *ordre public* (international awards), arbitrariness (domestic awards) and certain essential procedural rights (domestic and international awards).

Settlements reached through mediation are generally treated as extra-judicial settlement agreements and have the binding force of an ordinary contract. To the extent mediation was conducted in the context of judicial proceedings, the settlement agreement may be ratified by the Conciliation Judge or the court. In this case, the settlement agreement has the effect of a final and binding decision.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

The most widely known Swiss provider of arbitration and mediation is the Swiss Chamber's Arbitration Institution (www.swissarbitration.org). This institution has adopted unified rules of arbitration and mediation and provides respective services.

Most Swiss arbitration practitioners are members of the Swiss Arbitration Association ("ASA"; www.arbitration-ch.org), which is a non-profit association committed to promoting arbitration.

Besides the Swiss Chamber's Arbitration Institution, other private institutions offer mediation services, e.g., the Swiss Chamber of Commercial Mediation, the Swiss Mediation Association and also the Swiss Bar Association.

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- 2016, 2013 and 2012 *Chambers* Award.
- 2016, 2015 and 2014 *The Legal 500* ("most recommended law firm in Switzerland").
- 2015 and 2014 *IFLR* Award.
- 2015, 2014, 2013, 2011, and 2010 *The Lawyer* European Award.
- 2015 *Citywealth* Magic Circle Award ("Law firm of the Year – EMEA").
- 2014 *Citywealth* International Financial Centre Awards.

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Turkey

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

The Turkish legal system is established on a civil law basis which is governed by the Code of Civil Procedure ("CCP").

There are various procedural rules governing the civil procedure under specific codes such as the Turkish Commercial Code, Code of Labour Courts, Maritime Labour Law, etc.

1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

The Civil Court system in Turkey consists of three degrees: the first-degree courts; the Regional Court of Appeals; and the High Court of Appeal.

The first-degree courts are categorised into the Civil Court of Peace and the Civil Court of First Instance. The Civil Courts of First Instance are categorised into the Civil Courts of First Instance, which hear non-commercial disputes, and the Commercial Courts of First Instance, which hear commercial disputes.

There are specialist courts in the Turkish court system, such as the admiralty court, the enforcement court, the land registration court, etc.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

There are four main stages in civil proceedings: 1) exchange of submissions; 2) preliminary proceedings; 3) examination phase; and 4) oral hearings.

Turkish procedure consists of two main types of procedures to be followed during the proceedings; i.e., written procedure and simple procedure. The simple procedure is an expedited and simplified procedure in which the parties can only submit points of claim and points of reply. The written procedure includes two exchanges of submission: points of claim; points of reply; and second replies of the parties.

1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

The Turkish jurisdiction system allows merchants and public authorities to agree on a written and clearly expressed exclusive jurisdiction clause if there is not any mandatory jurisdiction of a specific court.

1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

Civil proceedings costs are as follows: application fees; official attorney fee; and litigation expenses. As a general rule, litigation expenses shall be paid before filing an application. At the end of the proceedings, litigation costs and the official attorney fee determined by the court shall be borne by the losing party. The Code of Fees and Charges and secondary tariffs determine most of the litigation costs.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

The parties who cannot afford litigation expenses are able to demand legal aid from the court. The Turkish Law System permits the attorneys and their clients to make fee arrangements which cannot be lower than the minimum amount ruled in the Official Tariff. The legal fee can also be settled regarding the value of the claim amount, which cannot exceed 25% of the claim value by the attorneys and their clients.

1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

The parties are able to assign a claim or cause of action to the third parties unless there is not any injunction granted by the court that restricts the assignment. In addition to this, certain requirements regarding the form of assignment shall be met; i.e., an assignment must be in writing and the amount assigned shall be stated in the deed of assignments.

It is permissible for a non-party to finance litigation proceedings through the liberty of contract.

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1.8 Can a party obtain security for/a guarantee over its legal costs?

Should there be no contractual, legal or *de facto* reciprocity with the country of the plaintiff and Turkey, foreign plaintiffs shall provide a security for the litigation costs and possible damages of the defendants. Furthermore, a defendant is able to ask the court for an order that forces the plaintiff to provide security if a Turkish citizen does not have a habitual residence in Turkey or the plaintiff has financial difficulties.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

In principle, there is not any particular formality which should be compiled by the plaintiff before filing an application. Following the settlement of an application fee and legal expenses, the plaintiff is able to file an application. However, due to recent amendments in the Labour Law, before initiating a file at the labour court, the plaintiff is obliged to apply to the mediator.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

The principal time-bar is a 10-year period commencing from the due date of the obligation regarding the Turkish Code of Obligations. Beside that general rule, time-bars vary depending on the types of the claims, such as five years for claims arising out of the agency and brokerage agreements; one year for carriage contracts; and two years for tort claims (within the limit of 10 years as of the act).

Unless the expiration of the time-bar is raised by the defendant, the court could not consider the issuing of the time-bar *ex officio*.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

Points of claim shall be submitted to the court in order to commence the proceedings. Thereafter, the points of claim shall be served on the defendant by post. Once these have been served, the same date is deemed as the date of service.

If the defendant is living abroad, the service will be made according to the international agreements executed between the other states and Turkey. Should there be any agreement, domestic provisions are applied.

3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

A party is allowed to apply for an interim remedy. In general, in order to request from the court an interim injunction, the applicant shall prove that the acquirement of a right will be considerably difficult or impossible because of delay, or delay is likely to cause serious damage.

An application becomes acceptable by the court if the party provides security (15% of the claim amount in general) for the possible losses of the counterparty.

3.3 What are the main elements of the claimant's pleadings?

The main elements of the claimant's pleadings are as follows: the name of the court; the names and addresses of the parties; the ID number of the plaintiff; the names and addresses of the parties' attorneys; the subject of the litigation; the factual grounds of the plaintiff's allegation; evidence; legal reasons; claims; and the signature of the plaintiff or the attorney.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Parties are able to amend their submissions until the completion of the exchange stage of the submissions. Once the subject stage is completed, it is only possible to amend the pleadings with the consent of the opponents. This being said, should the parties decide to amend their pleadings, both of them are entitled to do so only once by an oral or written statement of amendment without the consent of the defendant.

In addition to that, if the claim amount cannot be calculated and determined prior to filing an application, the plaintiff can file the claim with a limited amount by reserving further rights/claims.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

Pleadings can be withdrawn until the decision is granted with the explicit consent of the counterparty. If the pleadings are withdrawn by reserving the client's further rights, the plaintiff will file a claim with the same subject-matter in the future. In addition to that, the parties are able to waive their claims either partially or totally notwithstanding the defendant's consent.

If neither party attends a hearing, or if a party does not attend the hearing and the other party declares not to follow the proceedings, the proceedings will be stopped. Thereafter, the case will be deemed not to have been filed unless it is re-filed within three months.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

The main elements of the points of reply are the same as with the points of claim. After the point of reply has been submitted, the first objections cannot be alleged even if the subject period for submitting points of reply is not expired.

The defendant may file a counter claim under three conditions: a) the main claim is pending; b) there is a link between the main and counter claim; or c) there is a set-off relation between the claims of the parties.

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4.2 What is the time limit within which the statement of defence has to be served?

The points of reply shall be submitted to the court within two weeks as of the service of the points of claim. Upon the defendant's request, the court may grant a time extension for submitting the reply. This time extension is to be granted for up to two weeks for the simple procedure, but up to one month for the written procedure.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

Either party is able to request form the court to invite a third party to join ongoing proceedings as an intervener during the proceedings.

4.4 What happens if the defendant does not defend the claim?

Should the points of reply not be submitted within the time limit or should the defendant decide not to follow the proceedings, it will be deemed that any and all claims are denied.

4.5 Can the defendant dispute the court's jurisdiction?

The defendant is able to raise an objection regarding the court's jurisdiction if the same is mentioned in the points of reply as a preliminary objection. Having said that, if there is an exclusive jurisdiction clause in the law for the subject-matter, the court shall examine its jurisdiction *ex officio*. In such case, the defendant is also able to raise the objection on the court's jurisdiction in any stage of the proceedings.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

In case of a subsequent recourse action to be commenced by or against a third party, a party may request the court to notify the proceedings to the third party. If there is no such notification, the subject third party might request the court's permission to join the proceedings as an intervenor. An intervenor can choose his side between the parties and the intervenor is bound by the claims or defences and evidence submitted by that party. The court shall render its judgment for the main parties of the case. Having said that, following the main case, should there be a recourse action between the intervenor and the related party, the intervenor cannot raise objections against the main decision.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Two or more claims can be consolidated under the below conditions:

- if those claims are related;
- if the cause of action is the same;
- if the linked claims are filed before civil courts of the same level; and
- if the linked claims require the same specialisation.

The decision of the consolidation will be rendered by the court upon the request of the parties or *ex officio* during all stages of the proceedings. The decision of consolidation can be given by the court at the hearing of the latter filed case and the consolidated case shall be heard before the court where the first case was filed. A link will be deemed to be accepted by the court should both claims be on the same ground, or should a decision to be rendered in one claim affect the other.

5.3 Do you have split trials/bifurcation of proceedings?

Severing the claims might be decided by the court either upon the request of the parties or *ex officio* during all stages of the proceedings.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

The cases are allocated according to subject-matter, type of lawsuit and territorial jurisdiction.

The general rule of the allocation is that a points of claim shall be filed at the court at the defendant's location or place of residence. Civil Courts of First Instance have jurisdiction for all civil disputes except the cases which fall under the jurisdiction of Civil Courts of Peace and the cases which are allocated to specialised courts by law.

6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

The court has authority to take any and all actions in order to finalise the cases. All parties of the case, public authorities and any other third parties shall have to comply with the court decisions, i.e. to provide the court with their responses and all related information as requested by a court writ.

The parties are able to request from the court interim applications to conduct expert examinations, to hear witnesses, to dispatch writs to public authorities or third parties for collecting evidence, and to apply for temporary legal protections. The expenses of such requests shall either be paid by the related party, or the court may decide to use the funds paid in advance for the expenses.

6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

When a party disobeys the orders of a court, the judge may impose sanctions on that party, i.e. to expel the party from the courtroom, to impose fines and to order disciplinary detention.

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6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

The Turkish courts are not qualified to strike out a part of a statement. Having said that, they can dismiss the case at any stage based on a decision of lack of jurisdiction or a pending claim. Besides this, a court can partially accept or dismiss a claim at the end of the proceedings on the merits. In addition to that, the court may also dismiss the claims/defences on procedural grounds.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

The civil court can enter summary judgment if the judgment is about a protection measure or a precaution. Besides this, the court can form a decision on the merits of the case with a summary judgment if the case is subject to simple procedure.

6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

The court shall stay the proceedings if there is a preliminary issue or a prejudicial question. In this case, the proceedings will continue after the preliminary issues are solved.

The court will discontinue the proceedings in the case that: the plaintiff waives the claim; the defendant accepts the claim; on the amicable settlement of the claim; if the subject matter of the case no longer exists; or if any party attending the hearing or a party attending the hearing and the other party states not to pursue the proceedings.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

The Turkish jurisdiction does not have any regulations that allow full disclosure but it is possible to request the court to collect evidence from the opponent or any third party. Mostly the institutions or parties who are asked to submit certain evidence are obligated to disclose that evidence, instead of some exceptions.

Considering the electronic documents/information, the same shall have to be either printed or recorded in a USB flash drive or CD, which is to be submitted to the court.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

When a court requests certain evidence, the requested party is obligated to submit it. Having said that, should the requested party not wish to submit the subject evidence, an acceptable reason must be stated. Alternatively, sometimes evidence is only submitted to the court confidentially, but not to the parties. In addition to that, in terms of attorneys, an attorney is not allowed to disclose the information provided by the client unless the client consents.

7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

Any type of evidence can be requested by the court from the third parties. The third parties are obliged to disclose the requested evidence. Having said that, should the party fail to disclose the evidence, the reason of the subject failure shall have to be provided to the court. If the reason is not found to be sufficient, the court is able to order the third party to be heard as a witness.

7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

Since the courts are responsible for clarifying the dispute between the parties, they are authorised to order the parties or the third parties to disclose evidence in order to finalise the matter. Therefore, the courts are the only authority to ask the parties to explain their claims/defences and to order the disclosure of the evidence by the parties or third parties.

7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

There is no restriction on the use of disclosed documents, except for on the occasion that the parties ask for confidentiality from the court.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

Under normal circumstances, the burden of proof lies with the party claiming certain facts to be true so that the same party is obliged to submit that evidence. The evidence that the parties will submit shall be listed and submitted to the court at the period of exchange of submissions. In addition to that, a two-week period is granted in the preliminary examination hearing in order for the parties to submit the evidence listed in their submissions or to provide the court with information for the collection of the evidence which is not in their hands. If the same is not submitted in time, the court is able to decide that the relevant party is deemed to waive its right to rely on the same.

8.2 What types of evidence are admissible, and which ones are not? What about expert evidence in particular?

As a general rule, unless the evidence is obtained unlawfully, all types of evidence or information related to the subject matter are admissible. The evidence, such as witness testimony, expert opinions, court surveys, professional opinions, and other evidence such as email exchanges are not binding, and are left to the discretion of the court. Having said that, the courts are bound by the final judgments of other courts as long as the judgments are valid.

In addition to that, either *ex officio* or upon the request of the party, the court is able to decide to conduct an expert examination considering the cases where special and technical knowledge is required.

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8.3 Are there any particular rules regarding the calling of witnesses of fact, and the making of witness statements or depositions?

The list of witnesses, as well as their addresses, shall have to be submitted with the question to be asked at the period that the court allows. A witness makes statements under oath.

In addition to that, in some cases the witnesses can refuse to testify. Under normal circumstances, the court which handles the main file takes the statements of the witnesses, but if a witness is residing in another city, the main court issues an order to the court in that city to ask that court to take the statement of the witness.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Are there any particular rules regarding concurrent expert evidence? Does the expert owe his/her duties to the client or to the court?

The courts can appoint experts if special and technical knowledge is required to solve the dispute, and ask the experts to prepare and submit their report. The experts can be appointed either on the parties' request or by the court *ex officio*. In both cases, the appointment is made by the court and the expert is chosen from the expert list published by the Judicial Commission in the relevant judicial locality.

The court-appointed experts prepare their report on facts determined by the courts and shall not be appointed to give opinions to the parties on legal matters. In addition, the parties can obtain private expert reports.

The parties can submit their statements and objections regarding the expert examination report within two weeks of the notification of the report. If the court finds the report insufficient, the court could: ask for explanations; ask new questions; or order an additional expert examination.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

There are two types of rulings in Turkish civil procedure: interim decisions; and final decisions. In the Turkish judicial system, there are three main types of final judgments to be granted:

a) An action for performance. In this judgment, the court orders the defendant to give or do something or cease from doing something.

b) An declaratory action. The court is required to determine the existence or non-existence of a right or legal relationship or whether a document is false or not.

c) An constitutive judgment. In this judgment, the court shall create a new legal status or change the content of an existing legal status or remove it.

In addition to that, a preliminary injunction may be granted on the subject matter in cases where there is a concern that an inconvenience or serious damage would occur as a result of a delay, or a change in the current situation, which would cause a difficulty or impossibility related to the exercise of a right. In accordance with article 391 of the CCP, the court may decide on any kind of injunction that would prevent or remove the damage, such as protection of property or the right that is the subject matter of the injunction, safekeeping, or taking or not taking an action.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Courts can make rulings for the payment of pecuniary damages, both for non-economic damages and economic damages. In general, Turkish civil procedure law does not provide for punitive damages.

The court is bound by the request of the parties so that the court cannot decide beyond what the parties request. The interest rate is not allowed to be ordered by the court *ex officio*. In other words, the court is able to rule the collection of the interest and determine the interest rate in case the related party claims and requests the same.

9.3 How can a domestic/foreign judgment be recognised and enforced?

Should a domestic court decision be rendered in favour of a party, that party shall apply the bailiff office in order to enforce the decision.

Recognition and enforcement of foreign judgments is subject to the decision of the competent Turkish court. The competent court shall render enforcement and recognition of the foreign judgment subject to the following conditions:

a) The subject foreign judgment shall be binding and final according to the law of the country where the decision was rendered.

b) The subject matter of the judgment shall be out of the scope of the Turkish courts' exclusive jurisdiction.

c) The decision shall not contradict the Turkish public order.

As a general rule, the courts examine whether the above requirements are met *ex officio*.

9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

Under the three-tier appeal system, the regional courts of appeal act as appeal courts against the decisions given by the Courts of First Instance. The High Court of Appeal remains the final decision-making authority for appeals that have been made against regional court of appeal decisions.

As a general rule, all final judgments could be appealed. Having said that, judgments regarding a claim amount of under TRY 3,560 are non-appealable before the regional courts of appeals. In addition to that, regional courts of appeal are the final judicial authority for judgments regarding cases for which the claim amount does not exceed TRY 47,530 (including this amount).

The appeal period is two weeks for the regional courts of appeal and one month for the High Court of Appeal. Having said that, the period of appeal may vary in certain codes.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

During the preliminary investigation hearing, the court encourages the parties to settle or mediate according to the rules of the CCP. If

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the parties choose not to exercise these options, the court will then continue with the proceedings. Parties may partially or entirely settle the dispute before the commencement of the trial or during the litigation, until the final judgment is rendered.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

The main alternative dispute resolution ("ADR") method used in Turkey is arbitration. Mediation is also one of the ADR methods used in Turkey. Compared to arbitration, the use of mediation is quite limited, but the government encourages its use in order to decrease the files applied before the courts. In addition to that, Turkey has adopted a mandatory mediation mechanism for certain employment disputes from 1 January 2018. According to recently adopted rules, the parties shall have to apply mediation before filing a claim arising from an employment dispute before the courts.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

In terms of arbitration, the main legislation regulating international arbitration is the International Arbitration Code numbered 4686.

The mediation method was implemented in the Turkish Jurisdiction with the enactment of the Law on Mediation in Legal Disputes ("LMLD") "No. 6325" on 22 June 2012. In addition to that, the Regulation on Law of Mediation in Legal Disputes was published on 26 January 2013 as the secondary legislation.

1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Commercial matters may be referred to arbitration. Having said that, disputes related to criminal law, family law, administrative law and issues related to employees' payments arising from labour contracts, as well as disputes arising from or related to the rights *in rem* over immovable properties located in Turkey, shall not be subject to the arbitration award.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, force parties to arbitrate when they have so agreed, or order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

The parties have the right to apply to the arbitral tribunal with a request for interim relief or recording of evidence relating to the matter in dispute before or during the arbitral proceedings. Having said that, interim measures granted by the arbitrators are enforceable by neither courts nor other authorities. In addition to that, such measures do not have any effect on third parties. Having said that, the court may decide on the enforceability of the measure granted by the arbitrator or tribunal upon the request of the parties if there is a valid arbitration agreement.

If the arbitrator or arbitral tribunal or another person to be appointed by the party cannot act on time or effectively, one of the parties may apply to the court for interim relief or recording of evidence. The interim relief awarded by the court may be changed or removed by the arbitrator or arbitral tribunal. Local courts may provide assistance with the appointment and removal of arbitrators and the extension of the arbitration period.

If there is an arbitration agreement between the parties and if a party files an application before the court, the court can only dismiss the case upon the objections raised by the opponent's party.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

Under Turkish Law, arbitral awards cannot be appealed. Arbitration awards, whether rendered in Turkey or abroad, are binding and enforceable as of the time they are rendered. Arbitration awards could only be set aside before Turkish Courts of First Instance on very limited grounds.

In addition to that, filing an application to set aside an international arbitration award does not affect the enforceability of the award; whereas for domestic awards, filing an application to set aside does not prevent the award from being enforceable.

Although arbitration awards could not be appealed, the judgments setting the award aside can be appealed.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

The main arbitration institutions in Turkey are the Istanbul Arbitration Centre, the Turkish Union of Chambers and Commodity Exchanges Court of Arbitration, the Istanbul Chamber of Commerce Arbitration Institution, and the Mediation Centre. The Istanbul Arbitration Centre ("ISTAC") is the major dispute resolution institution. Being an independent and impartial institution that provides dispute resolution services, ISTAC also offers mediation and arbitration services under the ISTAC Mediation Rules alongside its arbitration services.

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Chapter 37

Uganda

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

The Ugandan legal system is based on the English Common Law system, owing to the fact that Uganda was once a Protectorate of the British Empire. The Civil Procedure Act (CPA) and the Civil Procedure Rules (CPR) govern the civil proceedings.

1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

The court system is established by the Constitution which gives the organisation and hierarchy of courts.

The Supreme Court is the highest and final appellate court in Uganda. It serves as the Court of first instance in Presidential Elections Petitions. The Chief Justice of Uganda heads it.

Below it is the Court of Appeal, which largely sits as an appellate court for all disputes arising from the High Court of Uganda. The Court of Appeal also sits as the Constitutional Court with the mandate to interpret the Constitution of Uganda. The Deputy Chief Justice heads it. Appeals from the Court of Appeal/Constitutional Court lie in the Supreme Court.

The High Court is the Court with unlimited jurisdiction in all matters. It is headed by the Principal Judge and is divided into various divisions (Anti-Corruption, Civil, Commercial, Criminal, Execution, Family, International Crimes, and Land Divisions) and has circuits across the country. It is the first court of record.

Below the High Court are Magistrates' Courts that have limited pecuniary and geographical jurisdiction. They are categorised into Chief Magistrates' Courts, Magistrate Grade 1 and Magistrate Grade 2. Magistrate Grade 2 Courts are being phased out. Appeals from Grade 1 courts and Chief Magistrates' Courts lie in the High Court of Uganda.

There exist specialised courts such as the Tax Appeals Tribunal, the Industrial Court and the Military Court Martial. Other quasi-judicial bodies such as the Uganda Human Rights Commission largely entertain cases involving human rights violations; the Equal Opportunities Commission also exists to address concerns of minority groups.

There exist Local Council Courts that handle disputes informally outside the formal court structures. Local Council Courts range from LC1 (Village level), to LC2 (Parish level), town division and LC3 (Sub County Levels). There are also informal traditional mechanisms of dispute resolution presided over by elders, clan heads, and other traditional cultural leaders.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

The CPR lay out key procedural stages and the requirements for fulfilling them. Where a stage or procedure is not followed as it may invalidate or render the suit a nullity. The stages include:

- Claimant files a claim in court together with a mediation summary.
- Payment of the filing fees to the registry.
- Court allocates the file and then issues summons.
- Court process is served on the defendant.
- Defendant files a written statement of defence and mediation summaries and serves process on the plaintiff.
- Court assisted mediation is conducted for 60 days. Where parties agree, they enter a consent judgment, which determines the suit. Where parties fail to agree, the matter is referred for hearing.
- Scheduling conference; disclosure of documents; exchange of witness statements (where they are written).
- Trial.
- Judgment/ruling.
- Assessment of costs.
- Execution of court orders.

Depending on the nature of the claim, this process may take an average of one to three years. The Judiciary and key stakeholders have been involved in reviewing the CPR with a view of amending it to speed up the trial process. This process is ongoing and will culminate in the amendment of the CPA and the Rules, which might change some of the procedural stages.

1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

The Judiciary largely treats exclusive jurisdiction clauses as a matter of contract and strictly enforces the same. Attempts to digress from them are most often disallowed, unless special circumstances are

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specifically proved. However, such agreements may not necessarily oust courts' jurisdiction from enquiring into the issues involved.

1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

There are different costs associated with civil court proceedings. These include court fees, lawyers' fees, and costs of the proceedings. These costs are initially borne by the party filing the case, but are recoverable upon successful proceedings from the party that has lost, as costs follow the event. Where the proceedings are brought in public interest, interested persons or entities may contribute towards meeting these costs initially, though the court may award some minimal costs to litigants to recover some of the expenses.

Court fees have schedules prepared by the judiciary for various claims. The Advocates (Remuneration and Taxation of Costs) (Amendment) Regulations, 2018 govern the assessment lawyer's fees. Other attendant costs may be assessed on a case-by-case basis and prevailing market rates.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

Yes, there are particular rules on funding litigation, such as the Advocates Act, the Advocates (Remuneration and Taxation of Costs) Rules, and the Advocates Professional Conduct Regulations among others.

Under regulation 26 of the Advocates Professional Conduct Regulations, contingency fees are particularly disallowed. However, under the Advocates Act, an Advocate may enter into an agreement with a client regarding payment of legal fees or remuneration for both contentious and non-contentious matters. For contentious matters, an advocate may be remunerated either by a gross sum or by salary – and such agreement may not affect the amount of any rights or remedies for the recovery of costs payable by the client – or to the client by any third parties unless he or she has otherwise agreed, to require any such costs to be taxed according to the rules for the time being in force.

1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

There are no constraints in assigning claims. Most often, owners of claims assign such rights largely through powers of attorney and others through representative suits. A non-party to the litigation proceedings can fund the proceedings.

1.8 Can a party obtain security for/a guarantee over its legal costs?

There are provisions in the law of security for a guarantee over a party's legal costs. A party may apply to court for security for costs to be deposited in court or such other place as may be appropriate before or during the proceedings. A party may also attach property in partial or full execution prior to or during the course of proceedings, if they have reason to believe that such property may be destroyed or is likely to be removed from the jurisdiction of the court by the adverse party before the proceedings are completed. This may apply whether or not it is a counterclaim.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

In civil matters, it is important that a demand notice is served on to the intended defendant. In such a notice, relevant information regarding the intended suit, or a claim to settle the matter before commencing the suit, may be raised. Failure to do so denies the claimant's lawyer costs. However, in suits where constitutional or other human rights are violated, such a necessity may not impede the award of costs.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

In Uganda, limitations as to when a suit may be brought or not are a matter of law (both substantive and procedural). The Limitation Act largely provides for the timelines within which actions may be brought. Actions founded on contract or on tort, actions to enforce a recognisance, or an award or actions to recover any sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture, may not be brought after the expiry of six years.

Actions for an account shall not be brought where the matter arose more than six years before commencement of the action.

An action may not be brought upon any judgment after the expiry of 12 years from the date of said judgment.

The limitation period runs from the date the cause of action arises.

Certain actions are not timebound by their nature. Factors such as fraud or concealment have a way of prolonging the time for taking action in certain causes.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

A civil suit may be commenced through filing a plaint, notices of motion, chamber summons, originating summons, petitions or applications/letters in court and complaint on oath. The summonses or notices are issued by court and served on the defendant in person or left at their usual or last known/recognised residential or official address. It may be served on an agent, legal representative or advocate. Service may also be done by registered post. Where an adverse party may not be found, copies of the summons may be served by substituted service upon an application being made to court. Courts have also embraced electronic forms of service of court process, though to serve electronically, one must apply to court for an order so to do. All service must be effectively done. Where service is not effective, the defendant can apply to set aside a decision arising from such proceedings.

The date endorsed on the received copy of the summons is the date service is deemed effected. This varies based on the mode of service adopted.

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Service of summons or notices may be effected outside the jurisdiction upon an application being made to a court in that regard. Where an adverse party is a Commonwealth citizen or a British protected person, the court may give directions on how such summons may be served. A letter rogatory by a formal request from a court in Uganda is initiated to a court in another country where the party on whom service is to be made resides. This formal procedure entails the transmission of the document from the court in Uganda through the Ministry of Foreign Affairs in Uganda to the relevant ministry in the destination state. The ministry in the foreign state will then forward the documents to a local court in the area where the defendant is resident. A court process server in that local jurisdiction may then serve the summons to the defendant and a certificate of service would then be transmitted back to Uganda through the same channels.

3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

Pre-action interim remedies are available in the jurisdiction. A party may apply for various interim remedies such as interim orders or temporary injunctions to preserve *status quo*, arrest or attach property before judgment, or apply for security for costs among others. Most of the orders are formally applied for through chamber summons or notice of motion, all supported by affidavits. In Magistrates' Courts, such application may be made orally.

In order to obtain such an order, it has to be proved that it is an urgent matter – danger, waste, damage, or alienation may occur to any party or subject matter to the suit. Where a property is wrongfully sold in execution of a decree; or where the defendant threatens or intends to remove or dispose of the property with a view to defraud his creditors, an interim measure is applicable. Also, where it can be proved a defendant has absconded or left the local limits of the jurisdiction of court, or is about to dispose of or remove property from the local limits of the jurisdiction of court, such orders may be granted. Evidence mostly must be produced by way of an affidavit.

3.3 What are the main elements of the claimant's pleadings?

The pleadings must contain a brief statement of material facts on which the party pleading relies for a claim or defence as the case may be. The particulars include the names, address and legal capacity of the parties, the cause of action, facts giving rise to the dispute, information or evidence the defendant must know and the remedy being sought for in court.

The plaintiff may reply to the defendant's defence where they deem it necessary to rebut any facts alleged. Parties are bound by their pleadings and, as such, the pleadings must be elaborately detailed to capture all relevant facts.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Under the CPR, pleadings may be amended at any stage, most especially before trial starts. Amendment can be with or without leave of court. Where service has been effected, consent of the defendant may be sought, or that of the court where the defendant denies such consent. However, amendments sought lately during the trial or after the trial has commenced may be disallowed by court. Amendments changing causes of action are not permitted unless where the issue arises from the same facts as the original suit.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

A plaintiff may withdraw a suit at any stage before the judgment. Where service of the summons has not taken place, the suit may be withdrawn unilaterally by giving notice to the court. But where service has been effected, the applicant must serve a notice of withdrawal to all the parties involved, most often without permission from the court. Upon withdrawal, the plaintiff is always liable for costs to the defendant, especially where the defendant had taken action to defend the suit. Where the defendant had taken no action, they may not claim any costs.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

A defendant is required to specifically respond to all allegations of fact made by the plaintiff. General denials are not allowed. The defendant must indicate which of the allegations they admit and deny and provide reasons or justification for the said denials, or make their own allegation of facts contradicting that of the plaintiff or claimant.

The defendant may raise a counterclaim or defence of set-off under the Ugandan jurisdiction.

4.2 What is the time limit within which the statement of defence has to be served?

The defendant normally has 15 days from the time of receiving service summons within which to respond to the claims against them. Timelines may vary for pleadings served in a foreign jurisdiction.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

A defendant can sue a third party for indemnity, costs, accounts or such other remedy based on the facts of the case in question.

4.4 What happens if the defendant does not defend the claim?

Depending on the claim, the matter can be heard *ex-parte* and judgment may be entered against the defendant in their absence, and the decree of court accordingly executed.

4.5 Can the defendant dispute the court's jurisdiction?

Jurisdiction is a critical issue with regard to dispute resolution. Where the geographical or pecuniary jurisdiction is in issue, a defendant can dispute that. A defendant can dispute a court's jurisdiction, especially in a contractual arrangement where both agree to submit resolution of their dispute to a different forum, say arbitration.

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5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

A third party can be joined to ongoing proceedings in the Ugandan civil justice system. This normally happens with express permission and discretion of the court. One circumstance is where a party claims to be indemnified by a third party, or the third party is led to the rise of the cause and action and the plaintiff did not know.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Two or more suits may be consolidated and heard and determined jointly. The circumstances under which this may occur include: where the suits arise from the same set of facts; have similar parties; have the same cause(s) of action; where rights of relief arise in respect of the same transaction; or the common question(s) of law or fact arises.

5.3 Do you have split trials/bifurcation of proceedings?

Split trials or bifurcation of proceedings are not expressly provided for in any law or applied in Uganda. What is closely related is that certain disputes may be referred by the court to an official or special referee for inquiry, and to report on any questions arising in a cause or matter. Such report of the referee may be wholly or partly adopted by the High Court and enforced as a court judgment. Trial by referees applies where all parties consent; or the cause or matter requires prolonged examination of documents or any scientific or legal investigation, which cannot be conveniently conducted by court through its ordinary officers, or the dispute consists wholly or partly of accounts.

However, where the court orders trial by referees or makes reference, it may impose terms as to costs, which distinguishes it from split trials/bifurcation of proceedings.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

Case allocation is largely an administrative function of the Registrars or Heads of each of the various divisions of the civil justice system. First, the nature of the case will determine which court a litigant must go to. Civil cases may be filed in family and children's courts, or the land division, commercial division or the civil division of any of the circuits of the High Court. Where a civil claim arises outside Kampala, or as the geographical and pecuniary jurisdiction may determine, they may be filed in the Chief Magistrates' Courts or High Court circuits across the country.

There is a small claims court where advocates are not required to appear, except where one of the parties in the small claims is a legal person. Small claims courts largely handle recovery of liquidated sums of no more than 10 million Ugandan Shillings.

These factors determine the effective case allocation and dispute resolution.

6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Heads of each court have powers to make proactive decisions on cases before them. The Constitution of Uganda implores the Judiciary to hear cases expeditiously, in fairness and without undue regard to technicalities. However, to ensure quick case management, parties are required to attend a court annexed mediation process and scheduling conference, ensuring parties participate fully and conveniently to address the conflict in the shortest time possible, among others.

The Chief Justice is empowered to issue practice directions to streamline case management processes in the country.

Interim applications include: interim injunctions; amendment of pleadings; interlocutory applications or discoveries; contempt of court proceedings; security for costs; and attachment before judgment.

Costs normally are awarded but often abide by the outcome of the main suit.

6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

Most times, parties are compelled to comply with court orders. Contempt of court proceedings may be taken on errant parties. Sometimes, errant parties pay costs or are denied costs in the event that they win the case.

6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

Courts have powers to strike out part of a pleading or dismiss a case entirely where the adverse party points out an illegality, or where the court on its motion takes action upon finding an illegality. Some of the issues include: failure of the pleadings disclosing a cause of action; the case being an abuse of court process or failing to comply with a specific provision of the law; failing to set down a suit for hearing; or failing to prosecute the case within two years.

An application of such a nature is raised in the pre-trial proceedings. Some raise it in their pleadings, as preliminary objections.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

Summary judgments are not provided for in Ugandan laws. What a defendant can do is make an application to dismiss the case for not disclosing a cause of action. The plaintiff may be condemned to costs. This is a pre-trial remedy.

6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

A court can discontinue or stay part or the whole of proceedings against a party or all parties to a suit. This happens where a party serves notice of such discontinuation, or a court on its motion

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considers the circumstances of the case and orders accordingly. This can also occur where the matter has already been handled in another suit.

Where a claimant fails to take steps to prosecute their claim for two years, the court has powers to dismiss the suit.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

In civil proceedings in Uganda, disclosure is a key component of a fair trial. When instituting a civil case in court, "*every pleading shall be accompanied by a brief summary of evidence to be adduced, and a list of documents*..." among others. Parties are required to attach on their respective pleadings documents that they shall rely on during hearing of evidence in court, which are then served on the other party.

Order 12, Rule 1 of the CPR provides for a scheduling conference where parties, *inter alia*, make full disclosure of documentary evidence intended to be relied on during hearing of the case. Parties state agreed facts, agreed documents and list the names of witnesses each party intend to call during the hearing, all of which is intended to avoid a trial by ambush.

Discovery is a category of procedural devices used by a party to a civil action prior to trial, to require the adverse party to disclose the information that is essential for the preparation of the requesting party's case and that the other party alone knows or possesses. It is a device used to narrow the issues in a lawsuit or obtain evidence not readily accessible to the applicant for use at trial, and/or to ascertain the existence of information that may be introduced as evidence at trial, provided it is not protected by privilege. Public policy considers it desirable to give litigants access to all material facts not protected by privilege to facilitate the speedy and fair administration of justice. Discovery is contingent upon a party's reasonable belief that he or she has a good cause of action or defence. A party seeking for a production of documents from the other party must have a suit pending before the court. The documents sought must be documents relevant to the determination of the pending suit before court. The court will deny discovery if the party is using it as a fishing expedition to ascertain information for the purpose of starting an action or developing a defence.

Further, with regard to disclosure, Order 10, Rule 15 of the CPR provides for inspection of documents that cannot be easily and conveniently made available to the opposite party. For example, according to section 6 of the Evidence (Bankers' Books) Act, "*on the application of any party to a legal proceeding, a court may order that the party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of those proceedings*".

Electronic disclosure

There are no specific rules regarding disclosure of electronic documents. The Electronic Transactions Act and Electronic Signatures Act provide some legal framework for electronic records to be disclosed electronically or in other formats that may be produced, as long as their authenticity can be proved.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

The opposite party may object to disclosure, or a party may decline to disclose to the other party a document on the ground that it is a privileged document.

There are various types of privileges, to wit: legal profession privilege includes communication made in confidence between an advocate and client which may not be given except with consent of the client; public interest privilege or immunity, where a party may decline to disclose a document on the ground of public policy, but the court has to weigh on its duty to administer justice *vis à vis* public interest protection.

However, the court may itself inspect the document to decide whether or not the alleged document is a privileged document.

7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

Further, courts in Uganda follow a common law judicial system in which doctrines of equity and common law apply. For disclosure to be ordered with respect to a third party, it is material that that third party participated or there is a connection with the claim in court. In all matters, courts in Uganda have inherent powers to issue any order in the interest of doing justice to the parties in a dispute. These inherent powers are exercised judiciously, and where the court is satisfied that the third party has information or documents that may help the court to effectively administer justice, that third party may be summoned and/or directed by the court upon application by any party to a suit to produce the required information or documents.

7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

The court's primary duty is to administer justice to all parties before the court. For that reason, courts have wide discretion to order for disclosure if satisfied that non-disclosure of the particular document to the opposite party may occasion injustice to that party.

The court takes a central role in weighing the considerations for immunity or privilege against its cardinal duty of administering justice in determining whether to order for disclosure or not. This is done through the judicious exercise of discretionary powers.

7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

As noted in question 7.4 above, the court may direct and/or restrict how disclosure may be done depending on the circumstance of each case. The court may also direct the production of documents to court itself if the circumstance so warrants. The party to which the disclosure order is made may, in its defence, guide the court by stating the reason for objection.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

Under Order 6, Rule 2 of the CPR, parties are required to accompany their pleadings with a brief summary of evidence, list of

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witnesses, and list of documents, among others. Further, during the scheduling conference (pre-trial hearing) as given under Order 12 of the CPR, parties are required to make full disclosure to avoid an ambush during the hearing.

The basic rule of evidence is that "*all facts, except the contents of documents, may be proved by oral evidence*", which must in all cases "*be direct*". This is to say, hearsay evidence is not admissible as evidence in court, but there are exceptions to this general rule.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

Courts admit oral or documentary evidence which suggest any reference to any fact in issue, or to any relevant fact.

With respect to proof of documents in court, the contents of documents may be proved by either primary or secondary evidence. Documents are further classified into public or private documents. Public documents may be proved by production in court of a secondary document that has been certified as the true copy of the original. Courts follow the parole evidence rule, that is, oral evidence is not admissible to prove the contents of the document, except where the intention of the executors of the document is not clear.

Further, the Evidence Act provides for admission of the opinion of experts (expert evidence) on points of foreign law, science, art, identity of handwriting or finger impression, customs, or usage when relevant in support or contradicting facts in issue. The court may also take as evidence the demeanour of the witness in court.

8.3 Are there any particular rules regarding the calling of witnesses of fact, and the making of witness statements or depositions?

The parties to a suit give evidence in support of their respective cases by calling witnesses. The court relies on the list of witnesses availed by the parties and may not admit any witness outside the provided list, except with leave of court. The court has the power to recall any witness and ask or examine that witness. Under the *amicus curie* principle, the court may summon any person experienced in a specific area of law to guide the court.

The general rule is that all evidence in court is taken *viva voce* (orally) before the trial court and tested by cross-examination. However, the court may issue a commission where a witness is unable to attend the court on justifiable grounds. In some proceedings, especially applications, the rules allow evidence to be brought by way of affidavit in support or reply to the application. With leave of court, a deponent of an affidavit may be cross-examined on their depositions.

There is no express legal provision for witness statements in court in the CPR, although the Commercial Division of the High Court introduced and directed the use of the same to hasten trial processes. Now, in practice, courts allow them and are normally exchanged before hearing. But in the proposed amendment to the CPR, it has been included.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Are there any particular rules regarding concurrent expert evidence? Does the expert owe his/her duties to the client or to the court?

Generally, the calling of witnesses including experts is primarily a duty of the respective parties in court to prove their claim. In certain instances, the court may on its motion call an expert in particular fields to provide an opinion, where such opinion is relevant for the court to reach a just decision. The expert witness may give oral evidence or documentary evidence in form of a report upon which he or she may be cross-examined. Where an expert gives a report, disclosure to the other party prior to hearing is mandatory so as to allow the other party to cross-examine him or her on the report.

There is no particular provision of the law requiring concurrent expert evidence.

Just like any other witness in court, the expert is required to give their evidence on oath. This implies that he or she swears to say the truth in court, as the duty they owe to the court.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

There are various types of court decisions in the category of judgments and rulings, giving rise to decrees and orders respectively. Whereas judgments arise from main suits which finally determine the dispute between the contending parties, rulings mainly arise from miscellaneous applications or causes.

Apart from the final judgment given at the end of the case, the court may issue orders from interlocutory matters giving parties interim relief, exercised under the court's inherent powers.

The different types of judgments and/or orders include: the final judgment or ruling, which determines the principle matter in question between parties, and is normally given by the court after hearing both parties on the merit of the case; the default judgment, where the defendant/respondent defaults on filing a defence or response after being served with the court process; the *ex parte* judgment, where the defendant or respondent has not been heard for non-appearance in court; the consent judgment, where parties themselves reach an agreement on the matter in court; the summary judgment under summary procedure; and the judgment on admission and the interlocutory judgment are conclusive as to the subordinate matter they deal with.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Award of damages, interest and costs are remedies given by court through the exercise of the court's discretionary powers. Damages are generally compensatory in nature and are intended to put the aggrieved party to a position before the loss. Courts also award interest where the reliefs given have monetary/pecuniary value. Further, costs are normally awarded to the party that emerges victorious in litigation, but courts have powers to order otherwise.

9.3 How can a domestic/foreign judgment be recognised and enforced?

Domestic judgments are recognised by judicial notice, implying they need no further evidence to prove them provided that they have been properly endorsed, i.e., dated, signed and embossed by court seal. The enforcement of domestic judgment comes after the judgment creditor has extracted the decree or order, and the judgment debtor has not complied by the decree or order of court: the judgment creditor may then apply in the court which issued the decree or order for warrant of execution, either by attachment and

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sale of the property of the judgment debtor, or attachment of the persons (body) and imprisonment in the civil prison of the judgment debtor if the decree or order is for recovery of money. If the decree or order is for other remedies such as eviction, demolition or otherwise, the execution order directed to the court bailiff shall be to execute that order specifically. The court bailiffs, upon executing the court order, are required to file returns in court on whether the execution process has or has not satisfied the decree or order, including execution costs.

There are various laws that govern enforcement of foreign judgments. They include: the Arbitration and Conciliation Act Cap 4, the Foreign Judgments (Reciprocal Enforcement) Act; the Judgment Extension Act Cap 12; and the Reciprocal Enforcement of Judgments Act Cap 21; international treaties such as the 1958 New York Convention and the International Centre for the Settlement of Investment Disputes Convention (ICSID) are applicable.

Arbitral awards, both domestic and foreign arising under the Arbitration and Conciliation Act or the New York Convention or ICSID Convention, are enforceable upon a party applying in writing to enforce the same.

Foreign judgments from countries that accord reciprocal treatment to judgments given in Uganda are enforceable. Uganda also gives cognizance to and enforces judgments from foreign jurisdictions with credible and certain judicial systems. It is generally much easier to enforce judgments arising from a number of Commonwealth jurisdictions, given the judicial system adopted.

9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

The general rule is that appeals are creatures of statute, implying that there is no inherent right of appeal unless provided by law, and where the law does not provide for appeal, parties cannot appeal against a court decision in such matter.

The law provides two ways in which an appeal may originate, that is, without leave of court and with leave (permission) of court. Where leave of court is not required, the aggrieved party may, within 30 days from the date when judgment is delivered, file an appeal in the appellate court. Where leave of court is required, the aggrieved party has to seek that leave from court, whose decision the party intends to appeal, and in the event that court declines to grant leave, then the party may apply to the appellate court for such leave. If a party files an appeal without such leave, the appeal may be struck out for not complying with the law.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

Whereas parties are free at any stage of hearing before judgment to settle their case, Uganda has in place a formal structure that requires parties to appear before a court-appointed mediator to attempt a settlement. It is a legal requirement that before the matter is set down for hearing before court, the court usually appoints a mediator, who in most cases is a member of the bar or bench, to help in mediating between the parties, usually done at court premises. The mediation process is required to take 60 days, and if the parties fail to reach a settlement, the matter is referred back to court for hearing. If parties reach a settlement, the same is reduced in writing, signed by parties and endorsed by the court as a consent judgment.

Further, under Order 12 Rule 1 of the CPR, when scheduling the matter, the court may consider the possibility of mediation, arbitration or any other form of settlement (alternative dispute resolution – ADR).

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

ADR is a structured negotiation process whereby the parties to a dispute negotiate their own settlement with the help of an independent intermediary, who is neutral and trained in the techniques of ADR. The common forms of ADR are negotiation, conciliation, mediation, and arbitration. Tribunals are akin to ordinary courts, hearing parties and giving binding decisions. The Ombudsman in Uganda does not have power to perform ADR.

Negotiation is a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter. Arbitration is the procedure where parties to a dispute refer the issue to the third party for a solution and agree to be bound by the decision, rather than taking the case to the ordinary courts of law. Mediation is a process by which a neutral third person facilitates communication between parties to a dispute and assists them in reaching a mutually agreed resolution to the dispute. Conciliation is a mechanism where a conciliator aims to assist the parties to a dispute to find a solution, but has no power to enforce it.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

The CPR under Order 12, Rule 2 provides for ADR before a member of the bar or bench. The Judicature (Mediation) Rules of 2013 (which provides mediation specifically for civil matters) made mediation mandatory in all civil matters including land, family and other civil claims. The Arbitration and Conciliation Act of Uganda provides for arbitration and conciliation and how they are conducted, as well as for the enforcement of the New York Convention Awards and ICSID Convention Awards.

1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Generally, civil courts in Uganda in all cases encourage the use of ADR or out of court settlement to litigating parties, and parties can at any time before judgment present their consent to be endorsed by the court. However, courts may not endorse consent that affects the third parties, sanctions an illegality or is against public policy.

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1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

Courts in Uganda are positive in assisting parties who opt to arbitrate or settle disputes through alternative mechanisms. They may halt proceedings to enable parties to explore such options. In instances where a matter has an arbitration clause, upon a party raising the same to court, the court, unless the circumstances otherwise require, normally orders a stay of hearing in the civil court and refers the matter for arbitration. In certain circumstances, such suits are dismissed as being incompetent before court.

Courts are not permitted to intervene in matters governed by the Arbitration and Conciliation Act except in ways specified by the Act.

A party to the arbitration agreement may apply to court before or during arbitral proceedings for an interim measure of protection, and the court may grant such measure pending the outcome of the arbitral award.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

Arbitral awards are recognised as binding, and upon application in writing to the court, they are enforceable. A party may make an application to the court to set aside an arbitral award on proof that a party to the arbitration agreement had incapacity, the agreement is not valid under the law, no proper notice of the appointment of an arbitrator or the arbitral proceedings was given or the party was unable to present its case, the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or exceeds the scope of the reference to arbitration, the composition of the tribunal or the procedure was not in accordance with the agreement, or that the award was procured by corruption or fraud or undue means, among others.

A party who submits to an arbitration process, well aware a requirement under the Act or the arbitration agreement has not been complied with, waives their right to object to the noncompliance without undue delay.

Experts may be appointed by the arbitration tribunal to report on specific issues to be determined by the arbitral tribunal, and parties are required to cooperate with such experts unless parties agree otherwise.

There is nothing particular to our jurisdiction.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

Under the Arbitration and Conciliation Act, the law established the Centre for Arbitration and Dispute Resolution (CADRE) as a corporate entity whose major function is to conduct arbitration and conciliation in Uganda.

Civil courts have established mediation registries and have mediators who are required to mediate on every dispute, and it is only upon failure to reach a settlement within 60 days that the matter can be referred to court for hearing.

The several specialised tribunals or other quasi-judicial agencies also promote ADR.

Other informal institutions also contribute to dispute resolution, such as religious institutions, traditional and cultural institutions, and local council courts; all join efforts in offering ADR platforms depending on the nature of the dispute.

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CANDIA ADVOCATES AND LEGAL CONSULTANTS

Candia Advocates and Legal Consultants (CALC) was established in 2010 as a growing and ambitious law firm located in the heart of Kampala City in Uganda, and is committed to providing tailored legal services to its ever-growing clientele.

CALC continues to evolve the positioning of itself as a go-to firm for Litigation and Dispute Resolution in an array of civil and commercial disputes. The firm also offers legal advisory services to SMEs and start-ups in matters of corporate secretarial services, corporate governance and financing services, consumer rights protection, property law, conveyance, and trade and labour-related matters.

With a committed and passionate team of lawyers driven by their core corporate values of integrity, teamwork, responsibility, mutual respect, and professionalism, we deliver our services with efficiency and excellence.

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Chapter 38

United Arab Emirates

Hamdan AlShamsi Lawyers & Legal Consultants

Hamdan AlShamsi

I. LITIGATION

1 Preliminaries

1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

The UAE is a federal constitutional regime consisting of seven emirates. The UAE has a civil law system where there are federal laws and independent state/emirate laws, and the federal law supersedes the state laws. Therefore, all state laws should be within the ambit of the federal laws and should not contradict any federal laws. Each emirate retains its right to promulgate law within what is permissible under the federal law of the UAE.

The UAE has a Federal Civil Procedures Law which governs the judicial and litigation procedures of the UAE. The UAE has courts that have been granted an exception to apply separate laws, namely, the Dubai International Financial Centre Courts (DIFC Courts) and the Abu Dhabi Global Markets Courts (ADGM Courts). The main sources of law for the UAE courts are the constitution, civil laws, *sharia* laws and customs; the DIFC and ADGM Courts rely mainly on their own laws and the laws of England and Wales.

1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

The UAE's Ministry of Justice administers all the courts with the exception of Abu Dhabi, Dubai, the DIFC Courts, ADGM Courts and Ras Al Khaima, which administer their own courts.

Dubai, DIFC, ADGM courts, Abu Dhabi and Ras Al Khaima have retained their own independent courts and judges, which are separate from the Federal Judiciary Authority.

Dubai's courts comprise a Court of First Instance, a Court of Appeal and a Court of Cassation. The DIFC Courts and ADGM Courts are specialist courts for their own area/jurisdiction, consisting of a First Instance and Appeal Court. The other emirates have a Court of First Instance and a Court of Appeal, and they all eventually appeal to the federal UAE Supreme Court. Additionally, each emirate has a separate rental dispute court, or tribunal that hears rental disputes (the DIFC hears its own rental disputes within its jurisdiction).

Other than the DIFC and ADGM, the courts in each emirate have both civil and criminal courts. The civil courts are generally separated into different types for administrative purposes (there may be more types too): civil; commercial; property; personal status; and labour. The criminal courts are separated into misdemeanour courts and felony courts (there may also be several more in each emirate or court). There are sometimes variations within the types of civil courts and sub-sections within the criminal courts. Any rental matters are generally entertained within each emirate's rental dispute tribunal, except for the DIFC. The DIFC have a different organisation of their courts according to the type of dispute at hand.

Moreover, there is a further division of the courts in the UAE (other than the DIFC and ADGM), in respect of the amounts being claimed. In the civil courts, a panel of three judges will hear a dispute for any amount above AED 500,000. A single judge presiding will hear any claim under the amount of AED 500,000. The Court of Cassation or the Supreme Courts will not entertain cases under the amount of AED 500,000. The DIFC have a separate system of separation in respect of value, whilst the rental disputes centres mostly do not prevent an appeal for value, except for in Dubai, where an appeal is not permissible for any value less than AED 100,000.

Most litigation will run through the above stages of the courts, being the Court of First Instance, Court of Appeal, and for UAE courts, the Supreme Court or the Court of Cassation; however, for certain cases, an additional stage is required – for example, in commercial claims in Dubai below a certain amount, prior to the Court of First Instance a dispute file must be opened; and as for labour disputes, a labour complaint must be filed at the labour department. The rent tribunals have a Court of First Instance and a Court of Appeal.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

The main stages of litigation in the UAE legal system are three which begin, in most cases, at the Court of First Instance and end at the Court of Cassation. In certain matters and types of cases, a preliminary step should be followed before proceeding to the Court of First Instance; for example, in labour disputes, a complaint must be filed at the Ministry of Labour (or labour office) which takes up to three weeks to complete. To give another example, in cases in Dubai where an appointment of expert is claimed, they must first be dealt with at the dispute resolution centre, which can take up to five months. After the initial stage is complete (as required by the different laws or rules for different cases), a claim may be filed at the Court of First Instance. In certain cases, the Court of First Instance also has a case management department, which deals with the case before it is actually presented to a judge. It is expected that the Court of First Instance will take one year to issue a judgment.

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Thereafter, if an appeal is filed, the Court of Appeal usually takes from six months up to a year to issue a judgment. Further on, if an appeal is made to the Cassation Court or the Supreme Court, it can typically take anywhere between four months to a year, or more. Subsequently, in the event of any execution of judgment of the counter-party which has liquid assets (bank accounts), a judgment can take up to three months, while in the event of immovable assets or any other assets it can take much more. In total, a claim in the federal courts or in Dubai courts can take anywhere between 15 months to three years for a final judgment, and in very few instances up to five years.

The amount of time that a case may take in the DIFC First Instance Courts varies significantly and depends on the size and complexity of the case. This time can vary between three months to up to two years (or more, if jurisdictional arguments are appealed before entering into liability/claim and quantum trials). Thereafter, in the appeal courts, the case can take anywhere between three months up to nine months.

Rental disputes and cases at the First Instance Tribunal generally take four months, and an appeal thereafter generally takes three months.

1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

The UAE judiciary recognises a party's autonomy in respect of exclusive jurisdiction clauses. In the event that parties agree on a certain clause, the UAE courts will respect such an agreement. The courts will also respect any agreement between the parties to apply a law of their choice or a venue/forum for a dispute, so long as the agreement does not breach any of the 'public order' or *sharia* law principles or any specific procedure that the law requires. There are certain types of cases where the UAE will not accept an exclusive jurisdiction clause, such as disputes in relation to immovable property.

1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

Court fees differ from emirate to emirate and in the DIFC. The standard rules on cost is that the losing party pays the costs.

The court fees are calculated on the basis of every cause of action, and the fees apply to every cause of action separately whether there is one cause of action or several. For every cause of action claimed the maximum court fees are circa AED 40,000 (including other fees) for the Court of First Instance, maximum of circa AED 20,000 for the Appeal Court, and maximum of circa AED 6,000 for the Court of Cassation **or** Supreme Court. A large part of this sum is recoverable or may be claimed from the losing party.

Court fees in the DIFC Courts vary a lot. There are several different fees for each stage of the case, for example: registration fees; fees for any application put in; fees for each day of trial; and several other fees. In a simple, straightforward case (but not for small claims), the fees can reach up to USD 20,000. However, we have not included in this scope small claims courts, which involve a smaller number of fees.

The costs for the ADGM Courts are generally around 2.5% or less of the claim amount. There are additional fees for every additional hearing and enforcement.

The cost advantage to settling before trial is the legal fees for UAE courts (not DIFC). The reason being is that the UAE courts (except for the DIFC) compensate very little of the legal fees.

The losing party bears the entire cost including the cost of the courts, but the lawyers' fees are marginally recoverable from the federal and Dubai courts. On the other hand, in the DIFC sometimes 65% of the lawyer fees are recoverable on a standard basis, and up to 90% on an indemnity basis. There is no budgeting law for cases in the UAE.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

There are no rules pertaining to funding litigation in the UAE, but recently the DIFC has issued a practice direction that recognises funding disputes in the DIFC.

Within the UAE, except for the DIFC, conditional and contingency fee arrangements are not permissible.

The DIFC allows for conditional fee arrangements but not contingency fee arrangements.

There are no rules for security of costs in the federal and Dubai courts. The DIFC provides rules for the security of costs.

1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

There are no constraints to assigning a claim or cause of action, but there are requirements that one must undertake before doing so. This follows the principles of the novation of rights in the UAE civil jurisdiction. The DIFC laws allow for such assignment, and a non-party to a litigation may fund litigation proceedings.

1.8 Can a party obtain security for/a guarantee over its legal costs?

The UAE courts do not provide for such types of orders, but at the DIFC Courts, it is common for applications to be made for security of costs; it is also common that if the merits allow, security would be granted, and a party may then seek security over costs.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

There are specific requirements, such as mediation and complaints, that should be made before initiating certain types of proceedings at the courts. In relation to formalities, there are requirements when initiating proceedings in respect of the documents submitted, including the power of attorney, proof of identity or incorporation and other standard requirements. A notice before taking action should also be sent.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

There are many limitations and time bars that apply to certain types of rights and claims. The days are calculated as calendar days, and if the last day falls on a holiday, it is extended to the next working day. The time limits and bars are a matter of substantive law. The general rules relating to the time bars of bringing a claim is 15 years, but several

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statutes contain other time limits, for example, subject to exceptions, the limitation period for the UAE civil courts is generally:

- Three years for criminal matters.
- Three years for causing harm (tort).
- One year for employment-related disputes.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

Civil proceedings are served through a court bailiff and in accordance with the rules, to a person by hand, or to a relative of first degree, or to his workplace, or to his house. In the event that the service was not possible, and after investigating the address of the person to the best extent possible, the courts may order to serve him by other means, including broadcasting the service in the newspapers as a final step. The DIFC process requires that service is made by personal service in the first instance and thereafter via home address; in the event that the person is not found, a service can be made by substitution, through email, courier, lawyers or a family member.

The date of service is the day on which the person receives the summons or the day it is published in the newspapers (in case he is not found). Service of UAE court summons are made outside the jurisdiction through diplomatic means, unless there is a bilateral treaty to provide otherwise. The preferred method of Foreign Service for foreign court summons is usually via courier or by a court bailiff through diplomatic means.

3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

There are pre-action or pre-suit remedies available in the UAE, both in the UAE courts and the DIFC. One may apply for them by directly lodging an application to the courts. The criteria to obtain such remedies vary according to the remedy; generally, such remedies will require two important elements: (a) fear of irrecoverable loss; and (b) fear of evasion.

3.3 What are the main elements of the claimant's pleadings?

Article 42 of the Civil Procedures Code provides that a case may be raised by application of the claimant with the following: (i) name of the claimant and respondent and their profession, domicile, and name of the representative; (ii) subject of the claim, the claim and substantiations; (iii) date that the claim has been presented to courts; (iv) the court that the claim is before; and (v) signature of the claimant or representative.

3.4 Can the pleadings be amended? If so, are there any restrictions?

A plaintiff may submit an interlocutory application that amends the original application, either by the subject matter or because of circumstances that have occurred after. There are restrictions to changing a pleading or a cause of action, which mainly read that the amendment must be related to the original claim or the completion of the original claim.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

The plaintiff may abandon the dispute at any stage of the proceedings, provided that it notifies the defendant or provides an explicit statement of his intent via a memorandum. The approval of the defendant is required in such case, so long as he has made its pleadings. In addition, any party of interest to the dispute may request the proceedings to be pronounced lapsed in case a period of six months has passed from the last valid procedure taken during the litigation proceedings. If the proceedings are pronounced lapsed by the court on the basis of any of the foregoing cases, any orders or decisions made for proof purposes shall be deemed lapsed and the revocation of all the proceedings of the dispute retroactively. Nonetheless, the right to bring the dispute into action does not lapse as well as the final judgments issued in such disputes or the proceedings prior to such judgments, the admissions of the parties or their oaths. Furthermore, the parties may withhold the investigation procedures and experts' reports unless they are void *per se*. In the case of abandonment of the plaintiff, he shall incur all the fees and costs of the proceedings.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

The defendant may bring a counterclaim; however, the payment must not be set off. Unless such amounts are a result of several business dealings with the defendant, the courts will seek to award the claimant the amount owed at the time of raising the suit. The main elements of a statement of defence are:

1) The names and details of the parties.
2) The statement containing the defence and evidence in respect of procedural issues and substantive issues.
3) The lawyer's power of attorney.

4.2 What is the time limit within which the statement of defence has to be served?

In the UAE courts, a statement of defence may be submitted in any hearing before the case is adjourned for judgment. The judge will usually allow the defendant an adjournment of around three weeks for his defence.

The DIFC provide for time limits set by the judge where a statement of defence may be submitted.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

There are provisions in the Civil Procedures Code allowing the defendant to introduce third-party defendants and parties to the case if the judge sees that there is a valid reason to do so.

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4.4 What happens if the defendant does not defend the claim?

A judgment will be issued and the judge will award the case to the claimant if the claimant has properly substantiated his claim.

4.5 Can the defendant dispute the court's jurisdiction?

The defendant can dispute the court's jurisdiction.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

The procedural law allows third parties to join in ongoing proceedings in the first instance, and the courts have the ultimate authority depending on the circumstances to decide whether a third party can join the proceedings or not.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

The rules allow for the consolidation of two sets of proceedings; however, two fees will be paid in any event. The claim is represented as two separate claims for fee purposes, but entertained by the courts as one proceeding only if the parties are the same. In the event that there are different parties involved, the courts will not consolidate the proceedings. There are very few class actions available to the UAE, such as labour disputes. The DIFC laws, however, allow for consolidation.

5.3 Do you have split trials/bifurcation of proceedings?

In some instances, the UAE courts have bifurcation of proceedings for jurisdictional and substantive matters, but not for matters where a judgment is made for liability and later on the quantum. The DIFC practice splits trials and bifurcates proceedings as it deems necessary, whereby a trial will be had for the liability aspect and thereafter the quantum.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

The case allocation in the UAE civil courts works by allocating cases in accordance with the amount claimed and its type. Cases under the amount of AED 500,000 will be considered minor and cases above the amount of AED 500,000 will be considered major. Cases also vary in types, i.e. civil, commercial, labour and property.

6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

The UAE courts have a case management department for cases. The DIFC also have a case management process.

There are several interim remedies available from the courts including freezing assets, travel bans, obtaining or retaining possession of movable assets, orders to prove certain evidence in a speedy manner (to prevent the risk of changing circumstances) and various other orders requiring certain parties to act.

The cost consequences are considered as part of the court fee for the UAE courts, and the DIFC cost consequences are considerable.

6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

The courts have a variety of sanctions for parties that disobey court orders; however, these vary in respect of the stage at which the disobedience occurs, and the manner in which the party disobeyed the court. In execution orders, if a party disobeys the court, the court may call to order the person to be apprehended and presented before the courts. Alternatively, the court may impose a fine.

6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

The courts in the UAE do not have such power to strike out a statement of a case or to dismiss a case entirely; judges may provide various reasons for doing so. The most common reasons are that it conflicts with the 'public order', or non-compliance with procedural law and jurisdictional issues.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

The UAE civil courts in specific cases can make summary judgments or judgments where it is made *ex-parte*. In the DIFC courts, summary judgments are also recognised and may be awarded.

6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

The courts have the power to discontinue and stay proceedings for various reasons. Some of the most common reasons include: when there is a criminal case that is connected to a civil claim; an absent claimant for a hearing; the courts must stay proceedings because of a trial/court case outside the country; or if the courts view that there are good reasons to stay proceedings.

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7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

There are rules in the evidence laws in the UAE that obligate the counter-party to provide documents in their possession under certain circumstances. Furthermore, the courts may also obligate a third party to provide documents to the courts following certain rules within the evidence laws. Electronic documents obtain their status from the electronic law of the UAE and are governed in a very similar way. The basic rules for electronic disclosure are that a party should cite their source and provide a printed copy of such documents or evidence.

The basic rules for disclosure for a claimant or respondent in respect of his own pleading are whether the party was able to submit such documents beforehand, and as a result caused an adjournment to another hearing. In such cases, the court may (if the counter-party requests) fine the party causing such delay.

It is possible to obtain a pre-order (interim-relief) to investigate certain evidence. However, this requires that a party proves evidence of fear of the party not being able to obtain such evidence afterwards. The courts will generally appoint an expert to go to the place where such evidence may be obtained and to obtain the evidence that is requested. There are no classes of documents that do not require disclosure; any information which a party would like to substantiate to the courts should be submitted. Predictive coding is not used between the experts and there is nothing in the law prohibiting them from using such software to investigate a large amount of e-disclosures.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

Communication between a lawyer and client is confidential. Lawyers must not disclose privileged information without the consent of a client.

7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

The parties may request the courts to seek disclosure from third parties, and/or the courts may also oblige a third party to provide disclosure. The basic rules are that: (i) the law obliges the party to disclose such documents; (ii) if the document was shared between the parties and shared in respect of proving any of their rights or obligations; and (iii) if the counter-party has relied on such document in any stage of his defence.

7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

The courts may, for the interest of justice, order a disclosure in accordance with the rules to ensure that the judge obtains everything which he needs to make a correct judgment.

7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

There are no rules or restrictions as to the use of documents obtained by disclosure.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

The basic rules of evidence are that the claimant must prove his right, and it is for the respondent to prove otherwise. Furthermore, the facts that a party wishes to rely on must be related to the case and be productive and admissible. Therefore, the law states that the judge may not decide on his personal knowledge – the judge must rely on the evidence before him.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

The evidence that is admissible before the UAE courts is documentary evidence, expert evidence, and witness evidence.

8.3 Are there any particular rules regarding the calling of witnesses of fact, and the making of witness statements or depositions?

There are several rules regarding the calling of witnesses of fact. Many rules are limited to what the witness may be called for; e.g., witnesses may not be called for proving their value which exceeds AED 5,000, unless such acts were of a commercial nature or the law states otherwise. In addition, witnesses may not be held witness against facts deduced from written evidence. If the witness intends to witness that a right exists or part of that, it can only be proven by a written document. Witness statements, however, can be made as an exception to the rule if: the written evidence indicates that an act may have been done by the respondent; if there was a moral reason or reasons that written evidence could not obtain; if the claimant has lost his written evidence as a result of a third-party act which he had no control of; and if the courts for good reason allowed the witness statement to be allowed, etc.

Witness statements and depositions are usually made after a party submits to the court the witness statement that they are seeking to prove beforehand. Thereafter, when the witness is brought forward, the courts will request that he takes an oath to say the truth, and after giving his statement he will be required to sign a written record of the hearing and his statement.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Are there any particular rules regarding concurrent expert evidence? Does the expert owe his/her duties to the client or to the court?

There are several rules in relation to experts. Experts provide independent advice to the courts without representing any of the parties in question, and the expert owes his duty to the courts. The parties may provide their independent expert reports; however, the courts generally put more weight on a court-appointed expert. The experts are generally given a set of instructions by the courts, and

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the courts will consider in its interim judgment what the parties seek to prove and what the courts wish to establish. The expert will then be appointed and his fees paid for by the party for which the expert is proving the evidence. The expert will then record the minutes of the liaisons which he had with the parties and conduct himself according to the instructions of the judge. Thereafter, he will provide his draft report for the parties to comment on before submitting his final report to the courts.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

The civil courts may make interim orders, judgments, and final orders. They may also make temporary (interim-relief) judgments.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

The courts have full power to make rulings on damages, interests and costs pursuant to the Civil Procedures Code.

9.3 How can a domestic/foreign judgment be recognised and enforced?

The law in the UAE provides the recognition of foreign judgments. A case must be registered with the courts to recognise a foreign judgment. Once the courts produce a final judgment recognising a foreign judgment, the party may proceed to open an execution file, whereby the execution judge can then order to seize a respondent's assets along with other powers to ensure that payment is made.

9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

Proceedings that were unsuccessful in the Court of First Instance have the right to appeal to the Court of Appeal. A party may appeal any argument to the appeal courts and a party does not require permission to appeal; rather, he must ensure that he appeals according to the procedures and rules set. However, the Cassation and Supreme Courts will only accept appeals in relation to whether the courts have adhered to the law and will avoid determining the substantive matters of the case.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

In certain types of cases, parties must follow a certain procedure which encourages settlement. For example, employment claims must first be presented to the Ministry of Labour who meets with both parties and understands the issue and seeks to resolve the matter amicably. The judge has the power to what he deems fair to adjourn the proceedings and request that the parties attempt to settle the matter.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

Arbitration is the most widely used method for ADR in the UAE. Mediation is not often used and arbitration has become an acceptable alternative in court proceedings in the UAE, especially between commercial companies and business individuals.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

The Civil Procedures Law provides rules that govern arbitration. There are other laws for different types of matters; for example, tribunals have been set up for different types of claims that look into disputes of such nature, e.g. rent tribunals, exclusive agency committees, etc.

1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

The law does not forbid the use of ADR as alternative means. What is important to know is that an ADR will eventually yield a signed enforceable settlement that may be used to enforce rights.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

The local courts may accept cases where a party wishes to appoint arbitrators, and the court will handle the claimant and respondent in the correct manner and appoint arbitrators on their behalf if requested. We have not seen courts engage in other forms of ADR, such as appointing mediators.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

The law in the UAE provides that the courts will respect arbitration judgments that were conducted in accordance with the civil procedural rules of the UAE. For other types of mediation, the UAE courts do not have provisions to deal with such mediation. A

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mediation settlement agreement that does not strictly follow the rules of the arbitration procedures of the UAE may be disregarded; however, a settlement agreement signed between the parties as a result of a mediation will be respected if the rights and obligations of the parties are clearly identified after the mediation, as though it were a settlement signed between two parties.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

The DIFC-LCIA Arbitration Centre, Dubai International Arbitration Centre (DIAC), Abu Dhabi Arbitration Centre (Abu Dhabi Chamber of Commerce), and the Sharjah Arbitration Centre.

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With nearly a decade of successful litigation experience across the United Arab Emirates, Mr. AlShamsi has built one of Dubai's most reputable and respected law practices. He is widely regarded as a top litigator in the Dubai Courts with extensive experience in corporate, banking and finance and insurance law. Mr. AlShamsi advises both local and international companies and governmental entities in cases involving complex litigation. He appears regularly before both the Appeals Court and the Court of Cassation as well as UAE's Federal Supreme Court. Mr. AlShamsi was quoted as being "…very thorough and highly efficient – Hamdan faced each challenge with strategy, professionalism and confidence which ultimately resulted in our successful outcome". It is no surprise that he has been named the most influential young leader in the Middle East, as well as receiving the young achiever award and many more.

HAMDAN ALSHAMSI
LAWYERS & LEGAL CONSULTANTS

Hamdan AlShamsi Lawyers and Legal Consultants was established in 2011, and has since become a name synonymous with success and is well-known in the legal circuit. The law firm specialises in advising on commercial issues, insurance, due diligence, family law, intellectual property law, banking, companies law and other matters locally, and is dedicated to offer unparalleled, high-quality and culturally sensitive legal services while adhering to the highest standards of integrity and excellence.

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USA – Delaware

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

Delaware is governed by a hybrid of constitutional provisions, statutes, and case law. Matters pending before each court are subject to the rules of practice and procedure of that court and other local court rules and directives.

1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

Article IV of the Constitution of Delaware establishes a Supreme Court, Court of Chancery, Superior Court, Family Court, Court of Common Pleas, and Justice of the Peace Courts.

The Supreme Court of Delaware is the highest court and is the only true appellate court. Civil appeals from both the Superior Court and the Court of Chancery are heard directly by the Supreme Court and parties have an absolute right of appeal from final judgments entered in either the Superior Court or the Court of Chancery.

The Delaware Constitution preserves the historic divide between law, in the Superior Court, and equity, in the Court of Chancery. The Superior Court is Delaware's trial court of general jurisdiction. It has statewide original jurisdiction over all civil cases, except equity cases. The Court of Chancery has jurisdiction to hear and determine all matters and causes in equity. The Delaware legislature has vested additional statutory jurisdiction in the Court of Chancery with respect to various corporate matters.

Delaware is also home to the United States District Court for the District of Delaware, which is a federal court as opposed to a Delaware state court.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

Pleading. Generally, a plaintiff commences a civil proceeding by filing a complaint and promptly serving the complaint on all defendants. A defendant has 20 days to file a responsive pleading after the defendant has been served. The defendant also pleads affirmative defences in the answer and certain defences are waived if not made at the time the answer is filed. *In lieu* of filing an answer, the defendant may file a motion to dismiss.

Discovery. Discovery is the opportunity to develop facts. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. Discovery can be in the form of depositions upon oral examination or written questions: written interrogatories; production of documents, electronically stored information, or tangible things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

Trial. There is an absolute right to a trial by jury in an action at law (*i.e.*, in the Superior Court), but not in an action in equity (*i.e.*, in the Court of Chancery). In a jury trial, the judge decides questions of law, and the jury decides questions of fact. In a non-jury trial, the judge decides questions of fact and questions of law.

Final Judgment and Appeal. Generally, parties have an absolute right of appeal from final judgments to the Delaware Supreme Court. An appeal is commenced by a notice of appeal. A notice of appeal must be filed with the Supreme Court within 30 days after entry upon the docket of the judgment, order or decree from which the appeal is taken. Generally, only questions fairly presented to the trial court may be presented for review.

The Court of Chancery has broad power to permit expedited proceedings, but expedition is not granted as a matter of right. Expedition can be sought at any phase of the pre-trial proceedings; however, a motion to expedite must be filed contemporaneously with any motion for a temporary restraining order or preliminary injunction, and at the inception of statutory summary proceedings. With the exception of statutory summary proceedings, which are automatically afforded a level of expedited treatment, the Court of Chancery will grant a motion to expedite only upon a showing of good cause by the party seeking the accelerated schedule.

The Superior Court has established a Complex Commercial Litigation Division designed to expeditiously resolve certain qualifying large commercial disputes where equitable jurisdiction is lacking, in similar fashion, to the Court of Chancery.

1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

Exclusive jurisdiction clauses, also known as forum selection clauses, are presumptively valid in Delaware and will be specifically enforced unless the resisting party clearly shows that

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enforcement would be unreasonable and unjust, or that the forum selection clause is itself invalid for such reasons as fraud and overreaching.

1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

Costs in civil proceedings vary according to the court and nature of the action. Additional fees may also be assessed throughout the litigation. Generally, the initial fee to file a complaint in the Superior Court is $200, and to file in the Complex Commercial Litigation Division is $250. In the Court of Chancery, the initial fee to file a new action is $300 with one or two defendants, $450 with three or more defendants, and $600 for a case asserting class action or derivative claims. A motion or application for an expedited proceeding costs $500.

Authority to tax costs to the prevailing party in civil cases is granted by statute and is governed by court rules. The amount of the fees to be taxed is within the discretion of the trial court.

Delaware follows the general rule that, regardless of the outcome of litigation, each party is responsible for paying his or her own attorneys' fees.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

Under the Delaware Rules of Professional Conduct, the fees charged by an attorney must be reasonable. Written contingency fee arrangements are permissible if they comply with Delaware Lawyers' Rules of Professional Conduct 1.5 and applicable Delaware law (other than divorce-domestic relations matters and representing a defendant in a criminal case).

There are no particular rules about funding litigation, subject to the doctrines of champerty and maintenance.

1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

Delaware common law still recognises the doctrines of champerty and maintenance, which restrict certain assignments. An assignment is champertous if an assignee of a cause of action initiates litigation at his or her own risk and expense in exchange for a share of the proceeds if successful. "Maintenance" is the intermeddling of a disinterested third party to encourage a lawsuit by maintaining or assisting either party to the action, with money or otherwise. Recently, however, the Delaware Superior Court has held that third-party litigation funding does not run afoul of the doctrines of champerty or maintenance.

1.8 Can a party obtain security for/a guarantee over its legal costs?

In every case in which the plaintiff is not at the time of filing the complaint a resident of Delaware, or being so, afterwards moves from Delaware, an order for security for costs may be entered upon motion.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

Generally, there are no specific formalities with which a plaintiff must comply before initiating proceedings by filing a complaint. Potential plaintiffs may be required to comply with requirements to exhaust administrative remedies with state government agencies (*e.g.*, when filing suit against government entities or in employment law cases). Notice may also be required in certain types of cases such as landlord-tenant disputes. Delaware courts may proceed very quickly, in particular the Court of Chancery. In the event of expedited proceedings, plaintiffs should be prepared to present the basics of their case soon after filing the complaint. Plaintiffs should consider the relief sought when choosing which Delaware state court in which to initiate proceedings. At the trial level, only the Court of Chancery can grant injunctive relief.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

The statute of limitations for various claims are summarised in the table below.

Injury to person, libel/slander/defamation	2 years	10 *Del.* C. § 8119
Wrongful death, injury to personal property	2 years	10 *Del.* C. § 8107
Medical malpractice	2–3 years	10 *Del.* C. § 6856
Trespass, contracts, collection of debt, fraud	3 years	10 *Del.* C. § 8106
Judgments	5 years	10 *Del.* C. § 5072

The limitations period is calculated from the time a cause of action accrues. However, such time may be tolled where an appropriate basis exists. For example, the period may be tolled under the "time of discovery rule" where the cause of action was inherently unknowable and the plaintiff was blamelessly ignorant of the cause of action. Time limits are treated as a procedural law issue in Delaware courts. Delaware has a "borrowing statute" (10 *Del.* C. § 8121) which may apply the shorter of competing statutes of limitations.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

Civil cases are commenced by the filing of a complaint (or, where required by statute, a petition or statement of claim), a *praecipe*, a court-specific civil information cover sheet and payment of the filing fee. In the Court of Chancery, the complaint must be verified

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by the plaintiff or plaintiff's authorised agent (Chancery Court Rule 3(aa)). The court will issue a summons to each defendant for service according to the information provided in the praecipe. It is the plaintiff's responsibility to effect proper service on each defendant.

Typically, personal service is made in accordance with 10 *Del*. C. § 3103, which allows the Delaware Courts to define appropriate rules of service.

Delaware statutes control service on corporations. Service of legal process upon any Delaware corporation may be made by delivery to any officer or director of the corporation, or the registered agent of the corporation, in Delaware. 8 *Del*. C. § 321. Service of process on domestic limited liability companies is made in similar fashion. See 6 *Del*. C. § 18–105. Service on corporations may also be made pursuant to 10 *Del*. C. § 3111, which allows for service on foreign corporations by serving any agent of a corporation in Delaware when none of the officers, directors, or managers or a registered agent reside in Delaware.

Service on persons outside the jurisdiction may be made by any of the methods specified in 10 *Del*. C. § 3104(d), including service by the manner of the foreign jurisdiction and mail to the person to be served with a signed receipt.

In Delaware, non-resident directors, trustees, members of the governing body or officers of a Delaware corporation may be served through the registered agent of the Delaware corporation in cases where such person is a necessary or proper party in proceedings by, on behalf of, or against the corporation. 10 *Del*. C. § 3114. Further information regarding service in Delaware can be found in Titles 6, 8, 10 and 12 of the Delaware Code.

3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

Pre-action interim remedies are not available in Delaware. In the Court of Chancery, a plaintiff may move for a temporary restraining order or preliminary injunctive relief following the filing of the complaint. To obtain preliminary injunctive relief, the movant must show a reasonable likelihood of success on the merits, imminent irreparable harm that will result if an injunction is not granted, and that the damage to the plaintiff if the injunction does not issue will exceed damage to the defendant if the injunction does issue (called the "balancing of the equities"). Public interest considerations may also be relevant. A preliminary injunction is unlikely to issue where a plaintiff is unreasonably delayed in filing its complaint or seeking preliminary injunctive relief.

In exceptional circumstances, a temporary restraining order may be obtained on an *ex parte* basis with a subsequent full hearing on a motion for a preliminary injunction soon following. To obtain a temporary restraining order, a movant must demonstrate a colourable claim on the merits, imminent irreparable harm to the movant if a temporary restraining order is not granted, and that the balancing of the equities favours the movant.

3.3 What are the main elements of the claimant's pleadings?

Every pleading must contain a caption setting forth the name of the Court, the title of the action, the case number, if assigned, and a brief descriptive title indicating the nature of the document, (*e.g.*, "Complaint"). A complaint shall contain: (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which the party deems itself entitled. Relief in the alternative or of several different types may be demanded. All averments of a claim shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a single set of circumstances. Each claim founded upon a separate transaction or occurrence shall be stated in a separate count whenever separation facilitates the clear presentation of the matters set forth. Pleadings shall be signed by at least one attorney of record or, if a party is not represented by an attorney, by the party.

Delaware is a notice-pleading state. Thus, a plaintiff need only plead enough facts to plausibly suggest that the plaintiff will ultimately be entitled to the relief sought. Pleading special matters including, but not limited to fraud, mistake, and condition of the mind, require pleading with further particularity. Other special matters may have specific requirements pursuant to the Court's local rules or Delaware statutes.

3.4 Can the pleadings be amended? If so, are there any restrictions?

A party may amend its pleadings once as a matter of course before a responsive pleading is served or, if no responsive pleading is permitted and a trial date has not been set, within 20 days after service. Otherwise, a party may amend its pleadings only by leave of court or written consent of the adverse party. Delaware Courts freely give leave to amend where justice so requires.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

A plaintiff may dismiss an action on its own by filing a notice of dismissal only before an answer is served or motion for summary judgment is filed. Otherwise, an action may be voluntarily dismissed by filing a stipulation of dismissal signed by all the parties who have appeared in the action. Unless otherwise stated in the stipulation or notice of dismissal, dismissals are without prejudice except where a plaintiff has once dismissed in any court of the United States, or of any state, an action based on or including the same claim.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

A defendant generally has two options in responding to a complaint: (1) it may move to dismiss one or more of the claims; or (2) it may answer the complaint. In the answer, the defendant must address each individual allegation separately. In doing so, the defendant may admit or deny the allegation, claim that it lacks sufficient knowledge to answer the allegation, or refuse to respond because the allegation calls for a legal conclusion. Finally, a defendant's answer must assert all relevant affirmative defences, including set-off, or risk waiver of those defences.

A defendant may also assert counterclaims, cross-claims, or a third-party complaint in its answer. These claims can be related to or separate from the claims raised in the plaintiff's complaint.

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4.2 What is the time limit within which the statement of defence has to be served?

The Court of Chancery and Superior Court require that a motion to dismiss or answer be served within 20 days of service of the complaint. In federal court, the time period is 21 days. Reasonable extensions to this time period are not uncommon.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

Yes, defendants may file third-party complaints against third parties that may share liability in the action.

4.4 What happens if the defendant does not defend the claim?

A plaintiff may move for a default judgment against a defendant that fails to respond to a complaint.

4.5 Can the defendant dispute the court's jurisdiction?

A defendant can dispute personal jurisdiction through a motion to dismiss. Failure to timely contest personal jurisdiction will waive the defence. A defendant may also dispute a court's subject matter jurisdiction. This defence cannot be waived, can be raised by a defendant at any time during the litigation, and can be raised by the court *sua sponte*.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

Joinder of third parties may be mandatory or permissive. A mandatory joinder is applicable where: (1) complete relief cannot be accorded among the present parties absent the third party; or (2) the third party claims an interest relating to the subject matter in the litigation and is so situated that disposition of the action in its absence may: (i) impair or impede those interests; or (ii) leaves a party to the action subject to a substantial risk of incurring double, multiple, or inconsistent obligations by reason of the claimed interest. Joinder will be permitted only to the extent that the joined party does not deprive the court of subject matter jurisdiction.

Permissive joinder applies when a third party asserts any right to relief jointly, severally, or alternatively arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to that non-party will arise in the proceeding.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Delaware courts have the discretion to consolidate any or all pre-trial matters at issue in multiple actions. Considerations in ordering consolidation include whether the actions involve a common question of law or fact relating to the same transaction or series of transactions. Consolidation for trial purposes is rarer.

5.3 Do you have split trials/bifurcation of proceedings?

The courts of Delaware may, in the furtherance of convenience or to avoid prejudice, or when separate trials would be expedient and economical, order separate trials on any claim, cross-claim, counterclaim, third-party claim, or any separate issue of the same.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

In most instances, new cases are assigned to the Delaware trial court judges on a rotating basis. Cases that are related, either by party or claim, are typically assigned to the same judge. In the federal district court, parties have the option of having their case assigned to a magistrate judge. In the Court of Chancery, certain cases, like those involving wills and trusts, may first be assigned to a Master.

6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Delaware courts are afforded expansive discretion in managing their litigation dockets. Cases filed in the Delaware Superior Court are typically scheduled for an early status conference where the parties meet the assigned judge to establish a reasonable trial scheduling order. The Delaware Court of Chancery frequently accommodates requests for expedited proceedings in conjunction with applications for preliminary injunctive relief.

6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

Delaware courts possess the inherent power to enforce their orders and deter a wide variety of contumacious conduct by imposing sanctions for civil or criminal contempt. Sanctions are most commonly imposed as a consequence of a litigant's failure to comply with discovery orders. In that situation, potential sanctions include, but are not limited to, the court deeming certain facts established, prohibiting the introduction of certain evidence, striking all or a portion of the pleadings, and even entering judgment by default.

6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

Delaware courts may strike any insufficient defence or any redundant, immaterial, impertinent, or scandalous matter either in response to a motion or at any time on the court's own initiative. Litigants are entitled to move to dismiss a complaint in whole or in part for failing to state a claim upon which relief can be granted either before filing a responsive pleading or after the pleadings are closed, but within such time so as not to delay the trial. To resolve

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a motion to dismiss, Delaware courts are required to accept all well-pleaded factual allegations in the complaint as true, accept even vague allegations in the complaint as well-pleaded if they provide the defendant notice of the claim, and deny the motion to dismiss unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

Delaware courts may enter summary judgment if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Certain judges in the federal district court require the parties to move for permission before filing summary judgment motions.

6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Delaware courts are empowered to stay proceedings in order to promote economies of time and effort for the court, litigants, and counsel. Delaware courts have exercised their authority to issue a stay in a variety of contexts; for instance, courts have stayed discovery pending resolution of a motion to dismiss a complaint, and also entered a stay of all proceedings in deference to parallel litigation pending in another jurisdiction or forum; for example, arbitration or patent proceedings in the Patent and Trademark Office.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

Delaware permits broad discovery of any non-privileged matter that is relevant to the subject matter involved in the pending action, whether it relates to the claim or defence of the party seeking discovery or to the claim or defence of any other party, including the existence, description, nature, custody, condition and location of any documents, electronically stored information, or tangible things and the identity and location of persons having knowledge of any discoverable matter.

Methods of discovery include depositions upon oral examination or written questions, written interrogatories, production of documents, electronically stored information, or tangible things or permission to enter upon land or other property, physical and mental examinations, and requests for admission. While declining to adopt a "one-size-fits-all" approach to the collection and review of electronic documents, the federal district court and the Court of Chancery have separately promulgated a series of written recommendations designed to provide counsel with guidance as to its expectations on the preservation and disclosure of electronic discovery.

Predictive coding has not received broad approval and its acceptance varies from judge to judge.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

Delaware recognises a number of privileges, including the attorney-client privilege, physician-patient privilege, spousal privilege, and priest-penitent privilege. Generally speaking and subject to any applicable exceptions, most notably waiver, a person claiming one of these privileges may refuse to disclose – or prevent any other person from disclosing – the information that is the subject of that privilege. No inferences may be drawn in connection with the assertion of a legal privilege.

7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

Third parties may be subpoenaed to provide the same discovery as a party. A Delaware attorney may issue and sign a subpoena as an officer of the Court. The litigant or attorney responsible for issuing and serving a third-party subpoena is obligated to take reasonable steps to avoid imposing undue burden or expense on the person subject to that subpoena. In the federal system, a Delaware subpoena can be served anywhere in the United States. In the state court system, if the person or entity to be subpoenaed is outside of Delaware, a commission may be necessary to secure a subpoena from the state where the person or entity is located.

7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

Delaware courts wield broad supervisory powers over the civil discovery process and are permitted to exercise those powers in response to a motion or on their own initiative after reasonable notice. Litigants most commonly invoke the court's oversight through motions to compel or to protect against certain discovery. Disputes resolved in this context subject the loser to the risk of paying the winner's reasonable expenses and attorneys' fees. The federal district court, Delaware Superior Court and the Delaware Court of Chancery have appointed special discovery Masters to oversee cases with unusually frequent or contentious discovery disputes and to prepare written recommendations as to how those disputes might be resolved.

7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

As a general rule, proceedings in a Delaware civil action are considered a matter of public record. As a matter of practice, however, parties frequently submit joint applications seeking court permission to maintain the confidentiality of certain categories of information that would otherwise be disclosed in litigation. Delaware courts are most likely to protect and prohibit from public disclosure information such as: trade secrets; sensitive propriety information; financial, business, or personnel records; personal information such as medical records; and personally identifying information such as social security numbers, financial account numbers, and the names of minor children.

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8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

The Delaware Rules of Evidence govern the admissibility of evidence in the Delaware state courts. The Federal Rules of Evidence govern proceedings in the federal district court. The two sets of rules are substantively similar.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

All relevant evidence is admissible, unless otherwise provided by statute or the applicable rules of evidence. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Relevant evidence may nevertheless be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

Generally, if scientific, technical or other specialised knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if: (1) the testimony is based upon sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case.

8.3 Are there any particular rules regarding the calling of witnesses of fact, and the making of witness statements or depositions?

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. If the witness is not testifying as an expert, the witnesses' testimony is limited to opinions or inferences which are: (a) rationally based on the perception of the witness; (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; and (c) not based on scientific, technical or other specialised knowledge.

Generally, witness statements, other than those of an opposing party, are not admissible at trial if the witness does not appear at trial. However, depositions can be introduced at trial under certain circumstances, if otherwise admissible under the applicable rules of evidence. The deposition of a party may be used by an adverse party for any purpose.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Are there any particular rules regarding concurrent expert evidence? Does the expert owe his/her duties to the client or to the court?

Parties must disclose the identity of expert witnesses and their area of testimony before trial. Discussions between counsel and consulting experts are generally protected by the attorney-client privilege. As to testifying experts, the federal district court and the Delaware Superior Court have specific rules that protect most communications between counsel and testifying experts, including draft reports. In the Court of Chancery, such protection can be agreed to by the parties.

There is no express prohibition against concurrent expert evidence, but it has not been commonly accepted. Furthermore, concurrent expert evidence is not particularly well aligned with the general view that an expert's loyalty is to the retaining party.

Experts are typically retained by a party to support its position in a lawsuit and the opposing party examines the credibility of that expert during cross-examination. However, the court does have the power to appoint its own experts.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

Delaware courts may issue final judgments in accordance with a jury verdict or on the court's own factual findings. Delaware courts may also issue summary judgments without trial and declaratory judgments. Delaware courts also have the power to issue interlocutory orders.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Delaware courts follow the American Rule where each party bears its own costs of litigation, including attorneys' fees, absent a rule, statute or contractual obligation to the contrary. Delaware courts and juries have the power to make rulings on damages, including compensatory and punitive damages. A jury's damage award can be amended by the court. The Court of Chancery will not order punitive damages. In tort actions in the Superior Court and Court of Common Pleas, interest is added to any final judgment under certain circumstances.

9.3 How can a domestic/foreign judgment be recognised and enforced?

Domestic judgments are enforced through the Superior Court pursuant to Superior Court Civil Rule 69.

Foreign judgments may be enforced in Delaware pursuant to 10 *Del.* C. § 4781 *et seq*. Foreign judgments must first be domesticated by filing in the Superior Court. Such judgments shall have the same effect and are subject to the same procedures, defences, and proceedings for reopening, vacating or staying, as a judgment of the Superior Court of Delaware and may be enforced or satisfied in like manner. A foreign judgment requires a triple seal or apostille from the issuing foreign court.

9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

Appeals shall be made within 30 days after entry of a judgment, order or decree. Cross appeal may be made within the greater of 15 days after the first notice of appeal or the time otherwise allowed. The Rules of the Supreme Court of the State of Delaware set forth the rules for appealing a civil court order or judgment. The United States Courts of Appeal have their own set of rules.

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10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

The Superior Court requires that the parties in all cases participate in ADR in a form to be agreed on by the parties. The federal district court will assign a magistrate judge to assist in mediation.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

In Delaware, parties may agree upon different methods of alternative dispute resolution including: arbitration, where a neutral arbitrator hears both sides of a controversy and renders a decision based on the facts and law; mediation, where a mediator facilitates the parties in reaching a mutually acceptable resolution of a controversy; and neutral assessment, where a neutral assessor provides the parties with an evaluation of the merits of the controversy.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Delaware has the Delaware Uniform Arbitration Act, which is similar to the Federal Arbitration Act. Delaware also has the Delaware Rapid Arbitration Act, which allows for expedited arbitration. Mediation is available to consenting parties in litigation in the Court of Chancery, as well as to parties with business and technology disputes where no litigation is pending but the amount in controversy exceeds $1,000,000. Such mediations will be conducted by a judicial officer of the Court of Chancery.

1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Delaware courts favour alternative dispute resolution and will typically allow for it upon agreement of the parties. In Superior Court, alternative dispute resolution is compulsory in all civil cases save a few exceptions including class actions, replevin, foreign or domestic attachment, statutory penalty and mortgage foreclosure actions, and *in forma pauperis* actions, as well as a number of enumerated special proceedings.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

Delaware courts are generally only involved in deciding whether or not a dispute is subject to arbitration and the scope of that arbitration. After the decision, Delaware courts do not typically issue interim orders during the actual arbitration. As to mediation, the federal court will appoint a magistrate judge to assist the parties in mediating. The Superior Court requires the parties to engage in alternative dispute resolution for most actions.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

Parties can move to confirm or vacate arbitral awards in the Delaware courts. That right can be limited by agreement. For example, under the Delaware Rapid Arbitration Act, the parties can agree to have no review, review before an Appellate Arbitrator selected by the parties, or review before an Appellate Arbitrator selected by the Court of Chancery. In the absence of such an agreement, a review may be conducted by the Delaware Supreme Court in conformity with the Federal Arbitration Act.

Other than in Superior Court, a party typically cannot be forced to engage in alternative dispute resolution.

Settlement agreements generally do not need to be sanctioned by the court. Exceptions where court approval is required include class actions and derivative actions brought on behalf of a company.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

Most national alternative dispute resolution institutions, such as the American Arbitration Association (AAA) and JAMS, are available in Delaware.

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John practises in courts throughout Delaware, including the Delaware Court of Chancery, the Delaware Superior Court, and the United States District Court for the District of Delaware. He is also experienced in appellate proceedings before the Delaware Supreme Court and the United States Court of Appeals for the Third Circuit.

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Chapter 40

USA – Florida

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

Florida has two parallel court systems: State and Federal courts. Florida State courts are comprised of: (1) 20 judicial circuits, which are commonly known as trial courts; (2) five district appellate courts; and (3) the Florida Supreme Court, which is the highest court in Florida. Florida State courts are governed by the Florida Rules of Civil Procedure, and each circuit has its own Local Rules and Administrative Orders that govern. The Federal system refers to its trial courts as district courts, of which there are three in Florida: the Northern, Middle, and Southern districts. The Federal appeals court for the Florida districts is the Eleventh Circuit Court of Appeals. The highest Federal court, as well as the highest court in the United States, is the Supreme Court of the United States of America. Federal courts also have their own Federal Rules of Civil Procedure, and each U.S. district and circuit has its own local rules.

1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

Florida has two court systems, the State and Federal system.

The State Court system is comprised of county and circuit courts. County courts handle the less serious criminal offenses and civil monetary disputes of US$15,000 or less. Circuit courts handle the more serious criminal offenses, family law, probate, tax, and juvenile matters, as well as civil monetary disputes involving more than US$15,000. Circuit court decisions are appealed to the Florida District Courts of Appeal, with a further appellate level at the Florida Supreme Court.

The Federal Court system, a court of limited jurisdiction, has United States District Courts in the Northern, Middle and Southern districts of Florida, each appealable to the Eleventh Circuit Court of Appeals and the United States Supreme Court. These Courts have subject matter jurisdiction over matters involving federal questions of law or matters involving diverse parties with a dispute in excess of US$75,000.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

Filing a complaint initiates a civil proceeding in the trial court. A defendant then has 20 days to serve a response to the complaint. If the defendant chooses to answer the complaint, rather than file a motion to dismiss, then the plaintiff (the party that filed the complaint) has the opportunity to file a reply to any affirmative defenses asserted by the defendant. In State court, a party can then notice the case for trial. The trial judge will issue an order setting discovery deadlines and typically will order the parties to non-binding mediation.

The discovery process is mainly driven by the parties. Before trial, the parties can also file motions for summary judgment as vehicles to attempt to get a judgment on all, or a portion of, the claims made, either eliminating the need for trial or narrowing the issues that will be heard.

Florida and federal law allows for actions for declaratory judgment to be advanced on the court's trial calendar. A party may also seek injunctive relief to obtain relief prior to trial. Florida law also allows parties to stipulate to an expedited trial. A request can also be made to advance an action on the court's trial calendar if a party is over the age of 65.

1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

Generally, exclusive jurisdiction clauses are enforceable in Florida courts. Parties can agree amongst themselves to consent to one or more options for the venue of choice for any disputes that arise. As with all contracts, in order to be enforceable, all contractual elements must be established. Forum selection clauses are designated as either mandatory or permissive, with the former providing for the sole venue for the matter, and the latter being interpreted as consent to the identified venue, but is not rendered the sole available venue if others are appropriate. In determining whether the contract clause is mandatory or permissive, the court will examine the language to determine whether words of exclusivity are included.

1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

It generally costs approximately US$400 to initiate a civil proceeding in Florida's courts. The plaintiff, the filing party, bears

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that cost. Each party bears their own costs and attorneys' fees, unless otherwise provided by statute or contract.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

Pursuant to the Florida Rules of Professional Conduct, contingency and conditional fee agreements are permitted in certain instances. The rules set forth the manner in which those agreements must be prepared and establish limits on recoverable fees. An attorney is generally not permitted to acquire a financial interest in his/her client's case, but may assist a client with advancement of costs in accordance with the rules regulating lawyer conduct.

1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

Generally, one can freely assign causes of action in Florida. However, there are limitations and prohibitions against assigning certain cause of actions that are considered by courts to be extremely personal to the assignor or that arise from a confidential relationship between the plaintiff and defendant.

1.8 Can a party obtain security for/a guarantee over its legal costs?

This is a matter of contract – parties are free to contract with the other side to incur fees and costs. While typically the contract may not necessarily provide for a guarantee of costs, a judgment resulting from a contract may have security. For example, a promissory note may contain language that provides for an award of fees and costs for the successful enforcement of the note. If that promissory note was secured by a mortgage, the resulting judgment would include fees and costs and the prevailing party would have security in the nature of the mortgage.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

Generally, no. There are exceptions, however, where litigants must comply with pre-suit requirements such as in medical malpractice, construction defect, and civil theft actions, or when filing suit against a government entity. However, parties may be subject to satisfying certain conditions prior to the filing of suit by contract.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Florida statute explicitly provides the statute of limitations for various causes of action, ranging from one (1) year to five (5) years. For instance, while a breach of a written contract claim and a mortgage foreclosure action are subject to a five (5)-year statute of limitation, negligence, fraud, and statutory claims must be brought within four (4) years. With some stated exceptions, medical and professional malpractice claims are subject to a two (2)-year statute of limitation, as are claims for wrongful death, libel and slander. Claims for specific performance have a one (1)-year statute of limitation.

Statutes of limitations are strictly enforced. Generally, the statute of limitations begin to run from the date the cause of action arises. However, there are certain situations where the statute of limitations may not be triggered until such time as the plaintiff discovers or should reasonably discover the injury and related claim.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

A civil proceeding is commenced when the action is filed in court. The clerk will then issue a summons, and the plaintiff is responsible for properly serving the summons on the defendant(s). Florida statutes and the Federal Rules of Civil Procedure provide specifications for service on individuals and entities. Personal service, substitute service, and constructive service are a few available options for service, depending on the type of cause of action being initiated. A defendant may agree to accept service by mail, or have their attorney accept service.

Service of process on persons outside of Florida must be undertaken in the same manner as service within the state. When serving a defendant outside the United States, plaintiffs must comply with the Hague Convention.

3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

No. Florida does not permit for any remedies prior to the filing of an action. Certain temporary remedies may be available during the course of the litigation in order to preserve the *status quo* or to protect the parties, but those remedies generally require notice to the opponent and an opportunity to be heard.

3.3 What are the main elements of the claimant's pleadings?

The parties, jurisdictional and venue allegations, and a short and plain statement of the ultimate facts showing that the pleader is entitled to relief. For certain causes of action, such as fraud, more specificity in the factual details alleged is required. The plaintiff must also make a demand for judgment for the relief sought. If attorneys' fees or a jury trial is sought, a demand for same must be made in the pleadings.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Yes, pleadings can be amended in both Florida State and Federal courts. Florida courts allow a party to amend a pleading once without leave of court as a matter of right prior to the filing of a responsive pleading. Similarly, Florida Federal courts permit one amendment of a pleading without leave of court so long as it is done within the time limits prescribed by the rules of civil procedure.

In both courts, all further amendments must be sought with leave of court or the written consent of the opposing party. While

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amendments are generally liberally granted by the court, parties will likely not be given unlimited attempts to properly plead their claims.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

A plaintiff may file a notice of voluntary dismissal at any time, even through trial, so long as it is dismissed before the fact finder (either the judge in a bench trial or the jury in a jury trial) renders a verdict. A judgment for costs incurred in the action may be entered against the plaintiff.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

If the plaintiff has properly pled a claim, a defendant must file an answer to avoid a default and entry of default judgment. An answer must respond to each of the allegations in the complaint by admission or denial. Generally, any allegation not specifically denied is deemed admitted.

Upon filing an answer, affirmative defenses to the claims shall also be affirmatively pled, including the following defenses: accord and satisfaction; arbitration and award; assumption of risk; contributory negligence; discharge in bankruptcy; duress; estoppel; failure of consideration; fraud; illegality; injury by fellow servant; laches; license; payment; release; *res judicata*; statute of frauds; statute of limitations; waiver; set-off; and any other matter constituting an avoidance or affirmative defense.

When answering a complaint, a defendant can also file claims against the plaintiff, other defendants or third parties in the form of a counterclaim, cross-claim, or third-party complaint. Depending upon the nature of the claims, some counterclaims may be compulsory and will be waived if not pursued in the same case.

4.2 What is the time limit within which the statement of defence has to be served?

Generally, in State court, a defendant has 20 days to respond and 21 days to respond in Federal court.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

Yes. Defendants can file a third-party complaint against a third party for contribution or indemnification.

4.4 What happens if the defendant does not defend the claim?

Where no response is filed by the defendant to a complaint, a plaintiff may seek a default judgment. A default means that the defendant admits the well-pled facts in the complaint. In a case with liquidated damages, the defendant has admitted to both liability and damages, and the plaintiff may seek a default final judgment. In a case with unliquidated damages, the plaintiff must still prove damages and must provide notice to the defaulting defendant of a hearing on same.

4.5 Can the defendant dispute the court's jurisdiction?

Yes, a court must have subject matter and personal jurisdiction to hear the matter. Subject matter jurisdiction (jurisdiction over the claims) cannot be waived, although personal jurisdiction (jurisdiction over the defendant) will be waived if not properly raised and preserved. *In lieu* of an answer, a defendant can file a motion to dismiss the suit for lack of jurisdiction raising these issues at the beginning of the case.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

Yes, an existing party can seek joinder of third parties, or a third party may seek to intervene in the proceeding in order to protect its interest. Interpleader is a mechanism for a third party holding funds, such as an escrow agent, to join in an action for determination of how to distribute the escrowed funds in which the parties are disputing entitlement. Florida requires an interpleading plaintiff to deposit contested funds/property into the court registry during the ongoing litigation between the parties that are claiming they are entitled to the deposited funds/property.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Yes, related matters may be consolidated upon the court's discretion. The court may completely consolidate the cases through trial or, in the alternative, may consolidate the cases for discovery purposes only, keeping the trials of the matters separate. Generally, consolidation occurs in suits arising out of the same underlying facts (for example, a car accident with multiple victims bringing individual suits).

5.3 Do you have split trials/bifurcation of proceedings?

Yes. Florida State and Federal courts have the ability to hear claims separately, either in the interest of convenience or to avoid undue prejudice.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

In Florida State courts, a civil case is assigned randomly to a civil division. The case is then heard before the judge assigned to a particular division, subject to judicial rotations. A party may request a specific judge to hear a case if there is a "related case" already pending in front of a different judge.

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6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Judges have significant discretion to manage a case. Judges can set case management conferences to propose discovery schedules, send parties to mediation, and to specially set a case for trial. If there has been no record activity for 10 months, judges may also set a hearing to dismiss a case for lack of prosecution.

6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

Florida courts have discretion to appropriately sanction a party for failing to comply with court orders. Sanctions can vary from granting fees or costs to an opposing party to the more severe striking of pleadings for intentional and contumacious disregard of the court's orders.

6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

Courts have discretion to strike parts of pleadings or to dismiss cases in their entity. Parts of pleadings that are redundant, immaterial, impertinent or scandalous can be stricken either on the court's own initiative or by motion of a party. Other examples of reasons a court can dismiss a case without a motion from a party are for lack of prosecution or lack of service.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

Yes. Both the State and Federal courts allow for entry of summary judgment if there are no material facts in dispute and a party is entitled to judgment as a matter of law.

State law provides rules that a movant must serve the motion and all supporting evidence at least twenty (20) days prior to the date of the hearing. The adverse party has at least five (5) or two (2) days (depending upon the method of service) prior to the hearing to serve all evidence upon which it relies in opposition to the motion. Failure to comply with these deadlines is grounds to disregard the motion or the evidence relied upon. Each judge has his/her own divisional rules which provide further guidance as to their expectations, which may include page limitations for these types of motions or memoranda of law in support thereof.

Federal law also provides very specific timing guidelines when it comes to summary judgment motions. Generally, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery. The Northern, Central, and Southern districts of the Federal courts in Florida all have their own local rules which provide guidance as to any particular rules required by the specific court.

6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

A mandatory stay is entered when a notice of bankruptcy is filed. Proceedings are typically stayed upon the posting of a bond when appellate relief is sought in the midst of the trial court action or when a party is trying to collect a judgment that is being reviewed on appeal.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

Once a suit is initiated, discovery begins. Discovery, which involves the disclosure of facts, information and evidence, is rather liberal. Generally, so long as the information sought is relevant, or will lead to the discovery of admissible evidence, discovery of the information, facts or documents will be permitted. Disclosure of privileged material is generally not permitted, although there are exceptions. Like any other discovery, e-discovery must be produced so long as the requests are found to be relevant to the allegations made.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

Florida statutes provide specific categories of information that are protected by privilege from disclosure. These categories are: (a) attorney-client communications and work-product; (b) spousal communications; (c) physician-patient communications; (d) psychotherapist-patient communications; (e) clergy-penitent communications; (f) sexual assault victim-counsellor communications; (g) domestic violence advocate-victim communications; (h) trade secrets; (i) accountant-client communications; and (j) professional journalist communications.

7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

Third parties are subject to subpoenas authorized by the court, which may be for the production of documents or may be for testimony, or in some cases, for both. In the State courts, parties must give notice to all parties in advance of serving a subpoena for documents upon a third party to allow for any objections to be filed and heard by the court prior to the service of the intended subpoena. Failure to comply with a properly issued subpoena can ultimately result in a third party being held in contempt by the court.

7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

If a party does not comply with discovery requests, the requesting party can move the court to compel them to comply. The non-complying party risks the court awarding sanctions and attorneys' fees in connection with the requesting party's efforts to obtain the discovery. A party may make objections to and seek a protective order from the requested discovery. A court may preclude discovery if it seeks privileged, confidential, or proprietary information, or if such discovery is burdensome. A court may limit discovery where the request is overbroad, or – in the context of ESI – where the burden and expense of gathering the information far outweighs the potential benefit of it.

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7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

Generally, discovery documents are not restricted in their use. However, upon motion or agreement of the parties, the courts can enter a protective order or confidentiality order to protect the documents from disclosure if deemed appropriate. Most commonly, protective orders are entered in cases concerning the disclosure of trade secrets.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

Florida's Evidence Code is contained within Florida's statutes. The Federal Rules of Evidence govern Federal courts.

8.2 What types of evidence are admissible, and which ones are not? What about expert evidence in particular?

Evidence is admissible in the form of things, documents or testimony. First and foremost, evidence must be relevant to the case to be admissible, which means that evidence is likely to prove or disprove any disputed fact in the case. Generally, to be admissible, documents have to be authenticated, which requires proof that the offered document is, in fact, what it is claimed to be. Pursuant to court rules, there are categories of documents which are self-authenticating and do not require additional proof to establish the document is what it is claimed to be. Certain evidence, which is not considered reliable, is also generally not permitted. There are very specific rules in both the State and Federal courts as to the rules of evidence.

Both court systems also allow for the admission of expert testimony. However, both the State and Federal systems have specific rules regarding the test to determine the admissibility of expert testimony, which examines the proposed expert's qualifications, including his/her skill, knowledge, background, training, and education, and generally whether the knowledge or opinion being offered will help or assist the trier of fact.

8.3 Are there any particular rules regarding the calling of witnesses of fact, and the making of witness statements or depositions?

A witness must be: (a) competent (e.g. not mentally impaired); (b) capable of expressing himself or herself (either directly or through an interpreter); (c) capable of understanding the duty to tell the truth; and (d) have personal knowledge of their testimony.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Are there any particular rules regarding concurrent expert evidence? Does the expert owe his/her duties to the client or to the court?

Expert witnesses are hired by the parties, although there is no privilege between a party and their expert. Counsel for the parties are often involved in helping to prepare their retained expert in advance of deposition or for trial. However, while experts are hired by a particular party, like any other witness, they are required to testify truthfully and honestly. Expert reports are generally prepared in advance of their testimony, wherein they disclose their opinions and the facts relied upon in development of that opinion. If prepared, expert reports are generally exchanged between the parties. The Federal and Florida Rules neither address nor prohibit concurrent expert evidence, but this is not a common practice in Florida.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

Courts can issue orders on a wide variety of topics and at all phases in the proceedings, including but not limited to: discovery; scheduling; protective orders; sanctions; and injunctions. Courts may issue partial and final summary judgments, default judgments, declaratory judgments and final judgments.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

If a jury trial is not sought in the initial pleadings, the court will be the trier of fact and will ultimately adjudicate the matter. In doing so, the court has the responsibility to enter judgment, and determine the award of any damages, which may include interest, attorneys' fees and costs.

9.3 How can a domestic/foreign judgment be recognised and enforced?

A judgment must be "domesticated" in order to be enforced in Florida, in accordance with the "Florida Enforcement of Foreign Judgments Act" (FEFJA). You need a certified copy of the judgment, and must record that judgment in a Florida clerk of court – preferably in the county in which you want to seize assets. You will need to file an affidavit with the clerk of court with information about yourself and the judgment debtor. The clerk notifies the judgment debtor by mail that the judgment as been recorded and gives them 30 days to challenge the validity of the judgment. Upon the expiration of the 30 days, the judgment has the same effect as if it were issued by a Florida court.

9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

Both in Florida State and Federal courts, a Notice of Appeal must be filed within thirty (30) days of entry of the judgment. There are specific rules of appellate procedure in both courts.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

Courts have the ability to order the parties to non-binding mediation with a Florida Supreme Court certified mediator. Courts may also

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direct the party to conduct a summary jury trial, which essentially is a practice run of the trial with the goal of motivating the parties to settle.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

Parties are free to negotiate alternative dispute resolution methods. If the parties have agreed to submit their dispute to arbitration or mediation, the courts will generally enforce such selection. If the parties intended for the arbitration to be binding, such agreement will be enforceable. Arbitration awards are not appealable. However, there are rare circumstances where an arbitration award can be vacated. Even if there is no contract clause requiring mediation, most cases will go through the mediation process by order of the court prior to trial.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

The laws governing different methods of alternative dispute resolution are: (1) the Florida Arbitration Code; (2) the Federal Arbitration Act; and (3) the Florida International Commercial Arbitration Act.

1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Generally, all civil disputes can be resolved by alternative dispute resolution, which is looked upon favorably.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, force parties to arbitrate when they have so agreed, or order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

A party can simply file a motion to compel arbitration and, if there was a previous agreement to arbitrate, a court will typically grant the motion to force the parties to arbitration. A court has the power to order parties to mediation – even multiple times – if necessary.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

If the parties agreed to submit to binding arbitration, the arbitration award is binding and can be transformed into a judgment. Arbitration awards cannot be appealed. There are very rare circumstances where an arbitration award can be vacated, which involve claims of corruption, bias of the arbitration or misconduct in the proceeding. If a party refuses to engage in the process, an award can be entered against the party, ultimately resulting in a post-arbitration judgment consistent with the award.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

The American Arbitration Association (AAA) and JAMS.

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Leora Freire is a shareholder in GrayRobinson's West Palm Beach office and focuses her practice on complex commercial litigation, complex foreclosure matters, product liability and personal injury litigation.

Leora represents both small businesses and Fortune 500 companies. She has prosecuted and defended disputes in State and Federal courts throughout Florida in a wide variety of legal matters, including breach of contract claims, fraud claims, breach of fiduciary duty claims, non-competition claims, complex foreclosure matters, personal injury claims and product liability claims. She also has experience in handling the dissolution of business organizations, including partnership, corporate and limited liability company dissolutions.

Leora is an active member of the National Association of Women Lawyers (NAWL) and has served on various committees. She served as the immediate past-president of the Florida Association for Women Lawyers (FAWL) and is a past-president of its Palm Beach County Chapter. She also serves on the Voluntary Bar Liaison and Professional Ethics committees of The Florida Bar, is a graduate of The Florida Bar Wm. Reece Smith, Jr Leadership Academy and has previously served on a local Florida Bar Grievance Committee. She has served in various capacities of the Palm Beach County Bar Association, including as co-chair for the commercial litigation section of the 2014 and 2015 Bench Bar Conferences. She is also a named fellow of the American Bar Foundation.

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Leslie Arsenault Metz began her practice as a law clerk for the civil and criminal judges of the Fifteenth Judicial Circuit of Florida where she gained valuable experience in litigation and trial processes. Now, Leslie is an associate in GrayRobinson's West Palm Beach office and focuses her practice on complex commercial litigation at the trial and appellate levels. She counsels clients in matters regarding business disputes, shareholder derivative claims, fraud, breach of contract, breach of fiduciary duty, defamation, trade secrets and civil theft.

Leslie is very active in her community. She is appointed to the Board of Governors, Young Lawyers Division of the Florida Bar, serves as an active member of the Palm Beach County Bar Association where she co-chairs several committees, and is past-president of the Palm Beach County Gator Club, a non-profit organization affiliated with the University of Florida.

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

The state of Maryland has both federal and local court systems. The United States District Court for the District of Maryland ("District Court") is the federal court for Maryland, with appeals handed by the U.S. Court of Appeals for the Fourth Circuit. The Maryland District Court (low level civil cases and other small matters) is the trial court level for Maryland, with the Maryland Circuit Courts (serious criminal cases and major civil matters), with the Court of Special Appeals (intermediate appellate court) and Court of Appeals (the highest court in the state) standing as the appellate courts. Each County in Maryland, as well as the City of Baltimore, has its own Circuit Court. Cases in Circuit Court may involve juries or sometimes are handled only by a judge. Both the District Court and Maryland local courts have similar, but not identical, rules of civil procedure known as the Federal Rules of Civil Procedure ("FRCP") and the Maryland Rules ("MD Rules"), respectively.

1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

The federal District Court is a court of limited jurisdiction, and appeals from its final judgments may be taken as a matter of right to the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit"). The Maryland local District Courts are courts of limited jurisdiction (generally dealing with low level civil cases and criminal misdemeanours) and Circuit Courts are courts of general jurisdiction for larger civil matters. Appeals from final judgments of the Circuit Courts may be taken by the Maryland Court of Special Appeals. *See* MD Rule 8-201. Appeals may be made directly to the highest court in Maryland, the Maryland Court of Appeals, if the case presents novel questions of law, a dispute concerning constitutional provisions, or is in the public interest. MD Rule 8-300 *et seq*. The United States Supreme Court has jurisdiction to hear appeals from both the Fourth Circuit and the Maryland Court of Appeals, but such appeals are generally not as of right, and may only be heard if the Supreme Court elects to do so.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

The main stages for civil proceedings in both the federal and local courts are: (1) initial pleadings (complaint, motions to dismiss, answer, counterclaims, etc.); (2) discovery; (3) alternative dispute resolution; (4) summary judgment; (5) pre-trial motions; (6) trial; (7) post-trial motions; and (8) appeal.

1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

Forum selection clauses are presumptively enforceable in Maryland (in both local and federal courts) unless a party contesting the clause proves it is unreasonable. *See, e.g., Atlantic Marine Constr. Co., Inc. v. United States District Court for the Western District of Texas*, 134 S. Ct. 568, 187 L. Ed. 2d 487, 500 (2013) ("When the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause"); *Secure Fin. Serv., Inc. v. Popular Leasing USA, Inc.*, 892 A.2d 571, 576 (Maryland 2006) ("The prevailing view in this country is that forum-selection clauses are presumptively enforceable").

1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

As a general matter, each side will bear its own costs and attorneys' fees. A limited amount of costs may be imposed on the losing party by the court, and other costs and attorneys' fees may be imposed by the court on a party as a sanction for misconduct, or where statutorily sanctioned. *See* FRCP 37, 54, 58; MD Rule 2-433. In Maryland local courts, the prevailing party is entitled to costs. MD Rule 2-603(a).

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

Contingency fees and conditional fees are generally permitted, but the terms of such arrangements are governed by the Maryland Lawyer's Rules of Professional Conduct, which are the ethical rules that govern lawyers. As to funding litigation, please see the answer to question 1.7.

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1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

While Maryland has not issued a definitive ruling on the propriety of assigning claims or causes of action, they have identified numerous ethical issues and limitations in doing so. These limitations include the lack of privilege for communications with non-party financiers, the need for attorneys representing the party to be independent in running the case, and a prohibition on sharing attorneys' fees.

1.8 Can a party obtain security for/a guarantee over its legal costs?

Subject to the restrictions set forth in the Maryland Lawyer's Rules of Professional Conduct and the limitations described in the answer to question 1.7, a party may obtain insurance or other security to pay for its legal costs. However, such an arrangement cannot impact the independence exercised by counsel for the party.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

No. A plaintiff may initiate a civil action by filing a complaint with the court. FRCP 3; MD Rule 2-101 (Circuit Court).

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

The limitation periods for bringing a claim (known as the "statute of limitations") vary depending upon the type of claim. Generally speaking, the statute of limitations begins to run when the claim accrues. Statutes of limitations are generally treated as a procedural issue.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

A plaintiff initiates a civil action by filing a complaint with the court. FRCP 3; MD Rule 2-101. The complaint must then be served on the defendant along with a summons. FRCP 4; MD Rule 2-112. Acceptable methods of service vary depending on the nature of the defendant and the defendant's location. Generally speaking, service is deemed complete when the complaint is received by the defendant through one of the methods permitted by Rule 4 (or MD Rules 2-121 to 2-122 in local court). Service outside the United States can be effectuated by service permitted by international agreement or local (foreign) law. FRCP 4(f). Service through the Hague Convention of Service Abroad of Judicial and Extrajudicial Documents is the preferred method of service for defendants located outside the United States (in those countries that are part of the Hague Convention). If service is outside of the United States in a country that is not part of the Hague Convention, the party may petition the court for issuance of a letter rogatory. Federal courts require a party or non-party filing anything with the court to redact sensitive personally identifiable information. FRCP 5.2.

3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

Although rarely used, it is possible to take pre-action discovery to perpetuate testimony. FRCP 27(a); MD Rule 2-404. A party wishing to do so may file a petition with the court (or a notice, request, and motion in Maryland local courts), and the Court must permit the discovery if it is satisfied that perpetuating the testimony will prevent a failure or delay of justice.

3.3 What are the main elements of the claimant's pleadings?

A pleading that states a claim for relief, such as a complaint or counterclaim, must contain a short and plain statement of the grounds for the court's jurisdiction, the claim showing that the pleader is entitled to relief, and a demand for the relief sought. FRCP 8(a); MD Rule 2-302. Allegations of fraud and mistake must be stated with particularity. FRCP 9(b); *see Goldstein v. Miles*, 859 A.2d 313 (Md. Ct. of Special Appeals 2004). In Maryland local courts, in pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. MD Rule 2-304.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Pleadings may be amended once as of right within a certain time after service, or subsequently only by agreement of the parties or with the court's leave. FRCP 15; MD Rule 2-341. The court should give leave to amend freely when justice so requires.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

A plaintiff may dismiss its claims as a matter of right if the defendant has not served an answer or moved for summary judgment. FRCP 41; MD Rule 2-506. Otherwise dismissal requires the consent of all parties or an order of the court. Unless otherwise stated, a dismissal is without prejudice, but if the plaintiff previously dismissed any federal or state action based on the same claim, the second dismissal functions as an adjudication on the merits.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

In its answer, the defendant must state in short and plain terms its defences to each claim asserted against it and admit or deny the allegations asserted against it in the complaint. FRCP 8(b)-(c); MD Rule 2-323. A defendant may bring counterclaims or assert set-off against the plaintiff. FRCP 13; MD Rule 2-331.

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4.2 What is the time limit within which the statement of defence has to be served?

In federal court, a defendant's answer is ordinarily due within 21 days of being served with the summons and complaint (or pleadings). FRCP 12(a). In Maryland local courts, a defendant's answer is ordinarily due within 30 days after being served. MD Rule 2-321(a). However, a defendant who is served outside of Maryland but within the United States receives 60 days to respond. MD Rule 2-321(b)(1). A defendant who is served outside the United States receives 90 days to respond. MD Rule 2-321(b)(5).

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

A defendant may bring a third party into the action in order to assert an action against the third-party defendant. FRCP 14; MD Rule 2-332(a).

4.4 What happens if the defendant does not defend the claim?

If a defendant fails to defend a claim, the plaintiff may seek, and the court may enter, a default judgment against the defendant. FRCP 55; MD Rule 2-613.

4.5 Can the defendant dispute the court's jurisdiction?

Yes. Challenges to the court's subject matter jurisdiction can be brought at any time. FRCP 12(h)(3); MD Rule 2-322(b). Challenges to personal jurisdiction are generally waived unless made at the time the defendant files its first motion to dismiss or its initial answer to the complaint. FRCP 12(h)(1); MD Rule 2-322(a).

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

Third parties can be joined either as required parties or permitted parties. FRCP 19–20; MD Rules 2-211 and 2-212. Required parties generally must be joined if their absence would prevent the court from according complete relief or the third party claims an interest in the subject of the action. FRCP 19; MD Rule 2-211. Permitted parties generally may be joined if they seek relief with the plaintiff, or if relief is sought against them and the defendant, and a common question of law or fact will arise in the action. FRCP 20; MD Rule 2-212.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Actions before the same court may be consolidated if they involve a common question of law or fact. FRCP 42(a); MD Rule 2-503(a). It is also possible to transfer a case from one federal court to another for the convenience of the parties and witnesses or in the interest of justice. 28 U.S.C. § 1404(a).

5.3 Do you have split trials/bifurcation of proceedings?

Though rare, a court may order separate trials for convenience, to avoid prejudice, or to expedite and economise. FRCP 42(b); MD Rule 2-503(b).

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

In District Court, a case is generally assigned on a random basis to a single judge who presides over the case until its conclusion. USDC Admin Rule 501. In Maryland local courts, a case is generally assigned through the County Administrative Judge. MD Rule 16-302.

6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

The court is empowered to enter a scheduling order and to hold pre-trial conferences in order to manage the case. FRCP 16; MD Rule 2-504.2. Parties may apply for interim relief in the form of temporary restraining orders or preliminary injunctions. FRCP 65; MD Rules 15-504 and 15-505. The moving party must post sufficient security in order to obtain a temporary restraining order or preliminary injunction. FRCP 65(c); MD Rules 15-504 and 15-505.

6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

A court is empowered to sanction a party that disobeys a court order with a variety of sanctions including fines, payment of an opponent's attorneys' fees or costs, preclusion from offering evidence, striking of claims or defences, staying the case, dismissal of the case, or entry of default judgment. FRCP 16, 37(b); MD Rule 2-433.

6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

A defendant may move to dismiss the complaint for lack of jurisdiction or for failure to state a claim, or to strike redundant, immaterial, impertinent or scandalous portions of the complaint at the time its answer is due (before discovery). FRCP 12(b) & (f); MD Rule 2-322(a) & (b). A defendant may also move to dismiss the action after discovery during the summary judgment phase. FRCP 56; MD Rule 2-501. A defendant is also able to move for judgment in his or her favour following the plaintiff's presentation of evidence at trial, following the full trial, and after trial.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

Summary judgment may be entered in whole or part for either the plaintiff or defendant if the moving party demonstrates that there is

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no genuine dispute as to any issue of material fact and it is entitled to judgment as a matter of law. FRCP 56; MD Rule 2-501.

6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

A court is empowered to stay a case for disobedience of a court order until the order is obeyed. FRCP 16, 37(b). A court may also stay enforcement of a judgment pending an appeal. FRCP 62; MD Rule 8-422.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

Generally, a party may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defence. FRCP 26(b)(1); MD Rule 2-402. Ordinarily, a party may not discover documents that are prepared in anticipation of litigation or for trial by or for another party or its representative. FRCP 26(b)(3); MD Rule 2-402(e). Under normal circumstances, a party need not provide discovery of electronically stored information from sources that are not reasonably accessible because of undue burden or cost (taking into account the proportionality of the cost of obtaining the information versus the amount in controversy in the lawsuit). FRCP 26(b)(2); MD Rule 2-402(b).

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

In District Courts, the common law generally governs a claim of privilege. Federal Rule of Evidence ("FRE") 501. Maryland courts follow the Maryland Rules of Evidence at Title 5 of the Maryland Rules. The most commonly asserted privileges in civil proceedings are the Attorney-Client Communication Privilege and Work Product Doctrine.

7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

Third parties may be required to produce documents, provide deposition testimony, or to testify at trial by subpoena. FRCP 45; MD Rule 2-422.1.

7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

The court supervises the timing of discovery through its scheduling order, and rules upon any motions for protective order that seek to limit or preclude discovery and motions to compel discovery, as well as motions for sanctions and for discovery-related violations. FRCP & SCRCP 16(b), 26(c), 37(a); MD Rules 2-504, 2-433.

7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

As a general matter, there are no restrictions on the use of documents obtained in discovery. However, a party may move for a protective order that limits the use of documents obtained during discovery. FRCP 26(c); MD Rule 2-403. The court will typically order that documents containing trade secrets or other confidential research, development or commercial information not be revealed outside of the litigation. FRCP 26(c)(1)(G); MD Rule 2-403(a)(8).

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

In District Court the Federal Rules of Evidence provide the basic rules. Maryland courts follow the Maryland Rules of Evidence at Title 5 of the Maryland Rules.

8.2 What types of evidence are admissible, and which ones are not? What about expert evidence in particular?

Generally speaking, irrelevant evidence, unfairly prejudicial evidence, privileged evidence, evidence not based on personal knowledge, unqualified opinions, and unreliable hearsay are not admissible. FRE 402, 403, 501, 701, 702, and 802; MD Rules 5-402, 5-403, 5-701, 5-702, 5-802. Experts must have sufficient qualifications to provide opinions on the issues for which they have been retained, follow reliable principles and methods, and apply those principles and methods to the facts of the case. FRE 702; MD Rules 5-702, 5-703.

8.3 Are there any particular rules regarding the calling of witnesses of fact, and the making of witness statements or depositions?

Fact witnesses must have personal knowledge of a matter in order to testify concerning that matter. FRE 602; MD Rule 5-602. Deposition testimony of a witness with personal knowledge taken in the action is generally admissible if the witness is an opposing party or is not available to testify at trial. FRE 804(b)(1); MD Rule 5-804(b)(1). Written witness statements of opposing parties are admissible against the party opponent, whether or not they are sworn. FRE 801(d)(2); MD Rule 5-803(a). Other witness statements are inadmissible unless they fall within one of the hearsay exceptions. FRE 803–804; MD Rules 5-803 and 5-804. Fact witnesses may testify regarding their "lay" opinions if the opinion is based upon the witness' perception and not based upon expert knowledge. FRE 701; MD Rule 5-701. In federal court, up to 10 witnesses may be deposed by each side in advance of trial. FRCP 30(a).

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Are there any particular rules regarding concurrent expert evidence? Does the expert owe his/her duties to the client or to the court?

Generally speaking, expert witnesses may testify in the form of an opinion at trial if their knowledge is relevant, their opinions are

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based upon sufficient facts, and their opinions are the result of a reliable methodology. FRE 702; MD Rule 5-702. In federal court, experts are generally required to prepare reports disclosing their opinions and their bases during discovery, and they may be deposed by the party opponent. FRCP 26(a)(2). In Maryland local courts, experts must disclose information upon request during discovery, but a report is not expressly required. MD Rules 5-702 through 5-705. Experts may be deposed in Maryland local courts. MD Rule 2-402(g). There are no particular rules concerning concurrent expert evidence, but the courts will judge whether proffered expert evidence will assist the trier of fact.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

The court may enter judgment for whatever relief is requested and authorised by law. In civil matters, typical judgments are for the payment of damages, permanent injunctions directing the defendant to take, or refrain from taking, certain actions, appointment of a receiver, or a declaration of the parties' respective rights. FRCP 57, 58; MD Rule 2-601 *et seq*.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

A court may order a party to pay attorneys' fees or costs if such fees or costs are recoverable under the party's claim or for violation of a court order, or order the recovery of certain costs to the party. FRCP 16, 37, 54, 58; MD Rule 2-601 *et seq*. The court may also order interest on a money judgment to the extent permitted by the substantive law governing the claim. MD Rule 2-604.

9.3 How can a domestic/foreign judgment be recognised and enforced?

Domestic and foreign judgments may be filed in the office of the clerk of any Maryland Circuit Court and enforced in the same manner as a judgment of the court in which the foreign judgment is filed in accordance with the Maryland Uniform Enforcement of Foreign Judgments Act. MD Code § 11-802.

9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

Appeals from the federal District Court are governed by the Federal Rules of Appellate Procedure. Appeals from the Maryland Circuit Courts will go to the Maryland Court of Special Appeals or, in some circumstances, to the Maryland Court of Appeals, as governed by the Maryland Rules. *See* MD Rules 8-101 *et seq*.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

The court and parties are encouraged to discuss a possible settlement at, and in preparation for, pre-trial conferences. FRCP 16. In Maryland local courts, alternative dispute resolution is governed by MD Rule 17-101 *et seq*.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

As a general matter, parties may agree to use alternative dispute resolution at any point in the litigation process. Available options include court-appointed and privately engaged mediators, privately engaged arbitrators and private judges. Mediators are neutrals who encourage the parties to reach an agreement. Arbitrators and private judges are empowered by agreement of the parties to resolve the dispute, and the parties are bound to follow that resolution by agreement. Maryland local courts also have a collaborative law process, which is an alternative dispute resolution process wherein the parties and lawyers establish formal agreements to resolve the dispute through cooperative negotiations, as opposed to traditional litigation. *See* MD Rule 17-501 *et seq*.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Mediation in Maryland is governed by MD Rule 17-101 *et seq*. Arbitration is governed by the Federal Arbitration Act, 9 U.S.C. § 1–307.

1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Generally speaking, any civil case brought in Maryland may use alternative dispute resolution as a means of facilitating resolution of the case.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, force parties to arbitrate when they have so agreed, or order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

Maryland courts will enforce reasonable arbitration agreements, with both the procedure and substance of the arbitration agreement scrutinised. *See Holloman v. Circuit City Stores, Inc.*, 894 A.2d 547 (Maryland 2006). As for mediation, Maryland courts may provide mediators who can assist the parties in a lawsuit in settling their case before trial. Mediators do not decide the outcome of a case. All agreements reached in mediation are voluntary. Maryland courts also provide resources for informal settlement conferences and community conferencing.

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1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

Maryland courts, both federal and local, encourage parties in civil cases to use mediation and arbitration. Mediation results must be voluntary. Arbitration is generally followed according to the parties' agreement to arbitrate, with the arbitrator's award confirmed by the court under the Federal Arbitration Act (Pub. L. 68–401, 43 Stat. 883) or the Maryland Uniform Arbitration Act (MD Code Ann., Cts. & Jud. Proc. Sections 3-201 through 3-234). While no party will be sanctioned for declining to mediate, the court may force a party to honour a reasonable agreement to arbitrate.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

There are many private mediators and arbitrators throughout Maryland. In addition, the local court system includes trained neutral mediators that can be used by litigants.

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Chapter 42

USA – New York

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

New York's legal system is common law. The Civil Practice Law & Rules governs civil procedure in state courts. Courts and judges have individual rules that must also be consulted.

1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

New York has trial courts, called Supreme Courts, for each county that have state-wide jurisdiction in law and equity, and generally hear cases involving damages over $25,000. There are lower courts that hear civil cases involving damages less than $25,000. The Appellate Division hears appeals from the lower trial courts and a lower appeals court called the Appellate Term. The Court of Appeals is New York's highest court and final court of appeal.

There are special courts for: (i) family matters; (ii) landlord-tenant/housing matters; (iii) estate administration; and (iv) actions against the State of New York. In several counties, the Supreme Court has a specialised Commercial Division.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

Pleadings: Statements of the parties' claims and defences "sufficiently particular to give notice of the transactions [or] occurrences . . . intended to be proved and the material elements of each cause of action or defence". CPLR 3013.

Discovery: Exchange of information by the parties (and third parties) under court supervision, including written questions, witness examinations, and document requests. Discovery may vary in timeframe from months to years depending on the size and complexity of the case.

Motion practice: The parties can apply to the court for rulings regarding pleadings, including dispositive motions; or regarding discovery-related disputes.

Trial: The parties have a waivable right to trial by jury in most cases.

Appeals: The parties can generally appeal trial court judgments as of right to the Appellate Division. Appeals to the Court of Appeals are only on request, except where the Appellate Division is divided or there is an issue concerning the New York or U.S. constitution.

Enforcement of judgments: Judgments are enforceable state-wide and are governed by CPLR Articles 51–54.

New York courts do not impose uniform timeframes on litigation; timeframes vary based on complexity and the court's scheduling determinations.

New York's Commercial Division has an Accelerated Adjudication Procedure that requires all pre-trial procedures to be completed within nine months after a Request for Judicial Intervention, with limits on discovery; certain defences are deemed waived. 22 N.Y.C.R.R. § 202.70(g) (Rule 9).

1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

New York courts will enforce an exclusive jurisdiction clause calling for New York jurisdiction under General Obligations Law § 5-1402 if the contract also has a New York choice of law clause and concerns a transaction worth at least $1 million. New York courts will generally enforce exclusive jurisdiction clauses in contracts freely negotiated by the parties, unless the clause is "unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court". *KMK Safety Consulting, LLC v. Jeffrey M. Brown Assocs., Inc.*, 72 A.D.3d 650, 651 (2d Dep't 2010).

1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

Costs are generally *de minimis* and are awarded to the prevailing party. A prevailing party may not recover its attorney's fees except if contractually agreed or in certain limited circumstances provided by statute or court rule. *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, 3 N.Y.3d 592, 597 (2004). There are no rules on budgeting of costs in New York.

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1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

New York's Rules of Professional Conduct prohibit a lawyer from providing financial assistance to a client, with certain limited exceptions. A lawyer may: (1) advance court costs and expenses in contingency fee matters; (2) pay court costs and expenses when representing an indigent or *pro bono* client; and (3) pay court costs and expenses in contingency fee matters. 22 N.Y.C.R.R. § 1200.0 (Rule 1.8(e)). New York's champerty statute, Judiciary Law §489, prohibits certain types of claim assignments unless consideration of at least $500,000 is paid. *Justinian Capital SPC v. WestLB AG*, 28 N.Y.3d 160 (2016). There are no rules aimed specifically at litigation funding.

Contingent fees are generally permissible, but New York's Rules of Professional Conduct prohibit attorneys from collecting "an excessive or illegal fee or expense". 22 N.Y.C.R.R. § 1200.0 (Rule 1.5(a)). The rules set forth a number of factors to be considered in determining whether a fee is excessive. *Id*.

1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

Claims and causes of action are generally assignable, and non-party litigation funding is permitted. New York's champerty statute prohibits certain assignments where the only purpose is litigation if the assignment has less than a $500,000 purchase price. N.Y. Judiciary Law § 489 (2015); *see generally Justinian Capital*, 28 N.Y.3d 160.

1.8 Can a party obtain security for/a guarantee over its legal costs?

No, it cannot.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

In most cases, no particular formalities are required prior to initiating proceedings. However, there are several exceptions. In tort actions against state and local governments, the plaintiff must serve the government with a notice of claim within 90 days of the date that the claim arises; in wrongful death cases, the notice must be served within 90 days of the appointment of a representative of the decedent's estate. N.Y. Gen. Mun. L. § 50-e. In medical malpractice cases, a plaintiff's attorney must attach a certificate of merit to the complaint declaring that he or she has consulted with a physician and that the attorney has concluded there is a reasonable basis for the action. CPLR 3012-A. A pre-suit notice of claim may be required by contract.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Generally, limitations periods are provided by Article 2 of the CPLR and vary between four months and 20 years. Contract and fraud claims have a six-year limitations period (subject to a discovery toll for fraud claims), in each case measured from the date the action accrued – that is, when the final act giving rise to the cause of action occurred; except that claims on contracts for the sale of goods have a four-year limitations period. CPLR 213(2), 213(4); U.C.C. § 2-725. Product liability, negligence resulting in personal injury, and legal malpractice claims are subject to a three-year limitation. CPLR 214(3), 214(5), 214(6). Medical malpractice claims must be brought within two years and six months of accrual. CPLR 214-A. Wrongful death claims must be brought within two years of the decedent's death. Estates, Powers and Trusts Law § 5-4.1.

While statutes of limitations generally run from the date of accrual of the claim, they may be tolled by certain conditions. The discovery rule permits a plaintiff to sue within two years of the date the claim is discovered or should reasonably have been discovered, or within the statutory period for that claim, whichever is longer. CPLR 203(g). Other conditions that may permit tolling include incapacity to sue and ongoing violations by the defendant.

New York courts consider time limitations to be procedural, not substantive. *Davis v. Scottish Re Grp. Ltd.*, 30 N.Y.3d 247, 255 (2017).

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

Civil proceedings are commenced by filing a summons and complaint or a summons with notice with the court. CPLR 304. The defendant must generally be served within 120 days thereafter, but the court can extend this time. CPLR 306-B. In suits on instruments for payment of money only (e.g., promissory notes), a summary judgment motion may be filed *in lieu* of a complaint. CPLR 3213.

Service may be accomplished by personal service upon an individual. CPLR 308. Alternatively, a plaintiff may serve an individual plaintiff by delivering the summons to an individual of "suitable age and discretion" at the individual's place of business or dwelling, and also mailing the summons to the individual's last known residence or place of business. In such case, service is considered complete 10 days from the filing of an affidavit of service. CPLR 308(2). Where neither of these methods is practicable, service may be accomplished by affixing the summons to the door of the place of business or dwelling as well as mailing it. CPLR 308(4). If none of these means are practicable, the court may direct an alternative means of service. CPLR 308(5).

Similar requirements apply to personal service upon an assistant attorney general of the state; a partner in a partnership; an officer, director, agent or cashier of a corporation; or certain officials within a government entity. CPLR 307, 309-312. In addition, under the Business Corporation Law (BCL), corporations may be served by personal service on the New York Secretary of State. BCL §§ 306, 307.

Service may also be completed by mail alone, but is only effective if the defendant or its agent mails or delivers an acknowledgment of receipt within 30 days. CPLR 312-A.

Personal service outside the state may be accomplished by the same means, so long as it is accomplished by a person authorised to make

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service within the state who is a resident of the state; by any person authorised to make service by the laws of the state or country in which service is made; or by a qualified attorney there. CPLR 313.

Service of foreign proceedings may be effectuated by the means set forth in The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Convention).

3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

There are four pre-action provisional remedies:

Attachment (CPLR 6201): Seizure of the defendant's property during the action, generally where there is a danger that the defendant will dispose of its property to defeat judgment enforcement.

Preliminary injunction (CPLR 6301): An order that maintains the *status quo* during the action, generally where the defendant is engaging in activity that could render judgment ineffectual. A court can issue a temporary restraining order that provides for injunctive relief until the injunction application can be decided. To obtain an injunction, a party must demonstrate irreparable harm absent the injunction, likelihood of success on the merits, and a balancing of the equities in its favour.

Receivership (CPLR 6401(b)): An order that appoints a temporary receiver of property which is the subject of an action, "where there is danger that the property will be removed from the state, or lost, materially injured or destroyed". CPLR 6401(a). The receiver may take possession of the property and sue for, collect and sell debts or claims. CPLR 6401(b).

Notice of pendency (CPLR 6501): A notice filed with the county clerk in a real property action that alerts affected parties that the judgment demanded would affect the title to, or the possession, use or enjoyment of the property.

3.3 What are the main elements of the claimant's pleadings?

The main pleadings are the complaint and the answer, which must have plain and concise statements in consecutively numbered paragraphs and should state each cause of action or defence. CPLR 3014. Complaints and other claims (e.g., counterclaims in an answer) must include a demand for relief. CPLR 3017(a). Claims and defences may be stated alternatively or hypothetically. CPLR 3014. Pleadings may attach documents, which become part of the pleadings. *Id.*

In general, statements in a pleading must be "sufficiently particular to give the court and parties notice of the transactions [or] occurrences . . . intended to be proved and the material elements of each cause of action or defense". CPLR 3013. Certain claims and defences require pleading with additional particularity, including claims for libel or slander, fraud, separation or divorce, or personal injury; actions on a judgment, involving the sale and delivery of goods or performing of labour or services, or based on foreign law; or certain actions for gross negligence or intentional infliction of harm. CPLR 3016.

3.4 Can the pleadings be amended? If so, are there any restrictions?

A pleading can be amended once without leave of court: (i) within 20 days after service; (ii) at any time before the period for responding to it expires; or (iii) within 20 days after service of a pleading responding to it. CPLR 3025(a). A pleading can be amended by leave of court or agreement with the adversary, with leave to be "freely given upon such terms as may be just". CPLR 3025(b). The court may permit pleadings to be amended before or after judgment to conform them to the evidence. CPLR 3025(c).

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

A party may withdraw a claim without court permission: (i) by serving a notice of discontinuance on all parties, if done before a responsive pleading is served or within 20 days after service of the pleading; (ii) by stipulation; or (iii) by filing a notice of discontinuance concerning certain real property. CPLR 3217(a). A claim may be discontinued by order of the court, but once the case has been submitted to the court or jury, stipulation of all parties is required. CPLR 3217(b). Discontinuance is generally without prejudice, but if the claim has previously been discontinued in any prior action the discontinuance may be deemed an adjudication on the merits. CPLR 3217(c).

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

The answer must deny statements in the complaint the defendant knows or believes to be untrue and specify those statements as to which defendant lacks knowledge or information sufficient to form a belief regarding their truth. CPLR 3018(a). All other statements in the complaint are deemed to be admitted unless no responsive pleading is permitted. *Id.* A defendant may assert any affirmative defences. Certain affirmative defences are waived if not raised in the answer. A defendant may assert counterclaims against the plaintiff and cross-claims against other defendants. A defendant may raise the defence of set-off. CPLR 3018(b), 3019.

Prior to serving an answer, a defendant may move to dismiss any cause of action in the complaint on a variety of available grounds, including for failure to state a claim, lack of subject matter jurisdiction, or lack of personal jurisdiction; or because documentary evidence establishes a defence. CPLR 3211(a).

4.2 What is the time limit within which the statement of defence has to be served?

If the summons is served on the defendant by personal service within New York, the defendant must make an appearance by answering the complaint or moving to dismiss it within 20 days. CPLR 320(a). For all other means of service, the time to respond is 30 days. *Id.* The parties may agree to extend these time limits.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

A defendant may file a third-party complaint against a party who may be liable in whole or in part for the plaintiff's damages. CPLR 1007. A defendant may also counterclaim against the plaintiff and cross-claim against another defendant. CPLR 3019.

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4.4 What happens if the defendant does not defend the claim?

Where a defendant fails to "appear, plead or proceed to trial", the plaintiff may seek a default judgment within one year. CPLR 3215(a). If the plaintiff fails to apply for a default judgment within one year, the court will dismiss the complaint as abandoned unless cause is shown why the complaint should not be dismissed. CPLR 3215(c).

4.5 Can the defendant dispute the court's jurisdiction?

A defendant may dispute the court's personal or subject matter jurisdiction. CPLR 3211(a). An objection to the court's subject matter jurisdiction is never waived and can be raised at any time; a challenge to personal jurisdiction is waived if not raised in an answer or pre-answer motion to dismiss. CPLR 3211(e).

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

Parties may join additional parties where a party asserts any right to relief jointly, severally, or arising out of the same transaction or occurrence, if common questions of law are present. CPLR 1002. The court may join individuals or entities who ought to be parties in order for complete relief to be granted, or who might be inequitably affected by a judgment in the action. CPLR 1001(a). When a person who should join as a plaintiff refuses to do so, he may be made a defendant. *Id*. If jurisdiction can be obtained only by consent or appearance, the court may allow the action to proceed when justice requires. CPLR 1001(b).

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

A court may consolidate pending actions when they involve common questions of law or fact. CPLR 602(a). If the related action is pending in the Supreme Court for another county, the court may remove the action to itself and consolidate it or have it tried together with the action pending before it. CPLR 602(b).

5.3 Do you have split trials/bifurcation of proceedings?

A court may order the severance of claims or a separate trial of any claim, or of any separate issue, in furtherance of convenience or to avoid prejudice. CPLR 603. A court may also order the trial of any claim or issue prior to the trial of the others. *Id*.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

Upon the filing of a Request for Judicial Intervention, cases are generally randomly assigned. The assigned judge supervises all proceedings related to that action. 22 N.Y.C.R.R. § 202.3. A party may seek to have its case assigned to the Commercial Division by filing a commercial division addendum or by letter application. 22 N.Y.C.R.R. § 202.70(d)-(e).

6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

A preliminary conference is held within 45 days after the Request for Judicial Intervention is filed. Parties are generally not required to meet and confer prior to a preliminary conference; however, counsel before the Commercial Division must attempt before the conference to reach agreement on certain discovery and dispute resolution issues. 22 N.Y.C.R.R. § 202.70(g).

At the preliminary conference, the court can simplify and limit the factual and legal issues, establish a timetable and method for discovery, add necessary parties, settle the action, remove the action per CPLR 325, and take any other action the court deems relevant. 22 N.Y.C.R.R. § 202.12. The court also assigns the case to one of three tracks: expedited; standard; or complex. 22 N.Y.C.R.R. § 202.19. Discovery must be completed within eight months for expedited cases; 12 months for standard cases; and 15 months for complex cases. *Id*.

6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

A court can hold a party in contempt, which can result in fines or imprisonment. N.Y. Judiciary Law § 753. A court can sanction a party that refuses to comply with a discovery order by resolving issues in favour of the other party, prohibiting the disobedient party from supporting or opposing certain claims or defences, striking parts of pleadings, staying the proceedings until compliance, or dismissing the action. CPLR 3126. Frivolous conduct can result in an order to pay the other party's expenses and attorney's fees. 22 N.Y.C.R.R. § 130-1.1.

6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

New York courts may dismiss or strike a pleading upon a party's motion or on the court's initiative. CPLR 3211; *see* CPLR 3126. Cases may be dismissed for want of prosecution. CPLR 3216. Courts may also strike "scandalous or prejudicial matter unnecessarily inserted in a pleading" upon motion by a party. CPLR 3024.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

A motion for summary judgment may be granted if "upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party". CPLR 3212(b). The motion should be denied if there is a material issue of fact. Summary judgment "searches the record": if the court finds a party other than a moving party is entitled to summary judgment, it may enter summary judgment in that party's favour. *Id*.

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6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

The CPLR authorises the courts to stay proceedings in certain circumstances, including: in conjunction with the removal of a case (CPLR 326); *in lieu* of dismissing an action based on the pendency of another action between the same parties (CPLR 3211(a)(4)); or to enforce a judgment or order pending appeal (CPLR 5519). CPLR 2201 also gives courts discretion to stay a proceeding in "a proper case".

Discovery is generally stayed once a party files a motion to dismiss or a motion for summary judgment, but the court may order otherwise. CPLR 3214. In Commercial Division cases, discovery is only stayed at the court's discretion upon a party's application. 22 N.Y.C.R.R. § 202.70(g), Rule 11(d).

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

There is "full disclosure of all matter material and necessary in the prosecution or defence of an action, regardless of the burden of proof". CPLR 3101(a). Information may be obtained through depositions, interrogatories, discovery and inspection of documents or property, physical and mental examinations, requests for admission, and subpoenas to third parties. CPLR 3102(a), 2301. Privileged materials may not be obtainable. CPLR 3010(b)-(c). The court may issue a protective order limiting the scope of disclosure. CPLR 3103(a).

Parties to cases involving electronic discovery must confer on anticipated electronic discovery issues during the preliminary conference. 22 N.Y.C.R.R. § 202.12(b). If electronic discovery is reasonably likely to happen, the court considers the factors listed in 22 N.Y.C.R.R. § 202.12(c)(3) in determining the method and scope of the discovery.

In the Commercial Division, parties must confer on anticipated electronic discovery issues prior to the preliminary conference. 22 N.Y.C.R.R. § 202.70, Rule 8. Parties acquiring electronically stored information from non-parties must adhere to the Commercial Division's Guidelines for Discovery of Electronically Stored Information. 22 N.Y.C.R.R. § 202.70, App'x A.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

Parties must state the legal ground for withholding each document unless the case is in the Commercial Division. CPLR 3122(b). Parties before the Commercial Division may establish categorical designations for withholding documents. 22 N.Y.C.R.R. § 202.70(g), Rule 11-b(b).

Privileges include those for spouses (CPLR 4502), attorneys and clients and attorney work product (CPLR 4503, 3101(c)), medical practitioners (CPLR 4504), clergy (CPLR 4505), psychologists (CPLR 4507), social workers (CPLR 4508), and rape crisis counsellors (CPLR 4510).

7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

Third parties can be required to testify and produce documents through a subpoena. CPLR 2301. Subpoenas are served in the same manner as a summons, and witnesses must be paid a fee and travel expenses. CPLR 2303(a). A subpoena for the production of documents must be served on all parties simultaneously, and the party receiving the subpoenaed records must deliver a copy of the records to all opposing counsel. CPLR 2305(d).

If electronically stored information is sought from a non-party in the Commercial Division, the party seeking disclosure must follow the Commercial Division's Guidelines for Discovery of Electronically Stored Information. 22 N.Y.C.R.R. § 202.70, Appendix A.

A witness who refuses to comply can be held in contempt of court. CPLR 2308(a). The court may issue a warrant directing a sheriff to bring the witness to court or committing the witness to jail until there is compliance. *Id.*

7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

The courts supervise disclosure. CPLR 3104. A judge may assign a referee to supervise discovery or allow the parties to stipulate to an attorney referee. *Id.* If a person fails to comply with a discovery request, the court may compel disclosure or find a witness in contempt. CPLR 3124, 2308(a). The court rules on motions regarding disclosure under CPLR Article 31.

7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

The courts can issue protective orders limiting the use of information disclosed. CPLR 3103(a). Parties may also agree to limit discovery or the use of discovered information by stipulation. CPLR 2104.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

Evidence must be relevant and admissible. Evidence is relevant if it tends to prove the existence or nonexistence of a fact directly at issue in the case. *People v. Davis*, 43 N.Y.2d 17, 27 (1977). Relevant evidence is generally admissible unless its admission violates an exclusionary rule. *People v. Scarola*, 71 N.Y.2d 769, 777 (1998). A court may exclude relevant evidence if its probative value is outweighed by the prospect of delay, undue prejudice, confusing the issues, or misleading the jury. *See Davis*, 43 N.Y.2d at 27.

8.2 What types of evidence are admissible, and which ones are not? What about expert evidence in particular?

Relevant evidence is admissible if the probative value and need for the evidence outweigh the potential for delay, surprise, or prejudice. *People v. Alvino*, 71 N.Y.2d 233 (1987). Evidence subject to special relevance rules includes subsequent remedial measures to prove negligence, offers of compromise or offers to pay medical expenses

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to prove liability, pleas and plea discussions as statements of guilt, and liability insurance to prove negligent or wrongful actions. Character evidence and prior crimes are also subject to various restrictions. Hearsay is generally not allowed unless it falls under an exception.

New York follows the *Frye* standard in determining whether to admit expert testimony. *Giordano v. Market Am., Inc.*, 15 N.Y.3d 590, 601 (2010). To be admissible, an expert's testimony must be grounded on methods that are generally accepted within the scientific community. The proponent bears the burden of proof. *People v. Middleton*, 54 N.Y.2d 42, 49 (1981); *Parker v. Mobil Corp.*, 739 N.Y.S.2d 432, 437 (2d Dep't 2005).

8.3 Are there any particular rules regarding the calling of witnesses of fact, and the making of witness statements or depositions?

Adults are presumed competent to testify as fact witnesses. *Matter of Brown v. Ristich*, 36 N.Y.2d 183, 188 (1975). Fact witnesses may not be paid more than the statutory fee for testimony, but may be compensated for loss of time if the testimony was procured through a subpoena. *Caldwell v. Cablevision Systems Corp.*, 925 N.Y.S.2d 103, 107 (2d Dep't 2011).

Witness statements and depositions must be signed by the witness before an officer authorised to administer an oath. CPLR 3116(a). Depositions may be used to impeach a witness or *in lieu* of calling a witness if the witness is unavailable. CPLR 3117.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Are there any particular rules regarding concurrent expert evidence? Does the expert owe his/her duties to the client or to the court?

Parties must describe in reasonable detail the subject matter and the substance of the facts and opinions on which an expert is expected to testify, the qualifications of the expert, and a summary of the grounds of the expert's opinion. CPLR 3101(d)(1).

In the Commercial Division, parties intending to introduce expert testimony must confer on a schedule for expert disclosure at least 30 days before the end of fact discovery. 22 N.Y.C.R.R. § 202.70(g), Rule 13(c). Disclosure includes identifying the experts, exchanging reports, and deposing the testifying experts. *Id*.

Unlike fact witnesses, who have a public duty to testify, experts have no public duty and cannot be compelled to testify. *Caldwell v. Cablevision Systems Corp.*, 925 N.Y.S.2d 103 (2d Dep't 2011).

Concurrent expert evidence is not permitted in New York.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

The courts may enter interlocutory or final judgments. CPLR 5011. They may direct a judgment at one or more of a party's causes of action or towards one or more parties. CPLR 5012. These may be issued during the course of the proceedings, and can deal with pleadings, discovery, and other relief. Courts may also issue declaratory judgments, delineating the rights and other legal relations of the parties. CPLR 3001.

A court may also grant equitable relief in the form of temporary, preliminary, or permanent injunctions, as discussed *supra* in response to question 3.2.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Courts may award damages and increase an award if permitted by statute. CPLR 4018. They may also grant additional allowances in certain instances. CPLR 8303. In frivolous cases, the court may award the successful party costs and reasonable attorney's fees. *See* CPLR 8303-A(a).

All monetary awards bear interest from the date of the final judgment. CPLR 5003. A court can award pre-judgment interest depending on the cause of action. CPLR 5001. The interest rate is 9% per annum, unless otherwise provided by statute or agreement. CPLR 5004.

9.3 How can a domestic/foreign judgment be recognised and enforced?

Valid judgments issued by another U.S. state are entitled to full faith and credit and can be enforced in the same manner as a New York judgment. CPLR 5402. Foreign country judgments that are final, conclusive, and enforceable where rendered will also be recognised and enforced, with certain exceptions. CPLR 5302-5304.

A party may apply to a court to confirm an arbitration award. CPLR 7510. Confirmation is a special proceeding that moves directly from pleadings to decision. CPLR 409(b). Foreign arbitration awards are enforceable in New York pursuant to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

Most judgments and orders are appealable as of right. Appeal is initiated by notice of appeal. Appeals are generally made to the Appellate Division, but may be made directly to the Court of Appeals in some circumstances. *See* CPLR 5602.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

As described in the next section, New York has a strong policy favouring alternative dispute resolution. Most New York courts offer free or reduced-fee mediation services, and the Commercial Division operates an alternative dispute resolution programme. Some courts require arbitration if the claims amount to less than $6,000. 22 N.Y.C.R.R. § 28.2.

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II. ALTERNATIVE DISPUTE RESOLUTION

1 General

1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

Arbitration and mediation are the most common methods of alternative dispute resolution.

Arbitration is an informal, private trial-like proceeding in which the parties agree to accept an arbitrator's decision as final.

Mediation is a structured settlement discussion in which a neutral mediator assists the parties in attempting to settle a dispute. New York's Unified Court System offers parties access to free or reduced-fee mediation in family law, general civil and commercial law disputes.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Parties generally agree to arbitration and mediation rules. CPLR Article 75 fills gaps where arbitration agreements are silent. For example, a court can appoint an arbitrator if a selection procedure is not provided for (CPLR 7504). Article 75 also gives the courts power to compel arbitration and enter judgment on arbitral awards.

1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Certain claims that allege a violation of a statute, decisional law, or public policy may not be arbitrable. *See Enlarged City School Dist. Of Middletown New York v. Civil Service Employees Ass'n, Inc.*, 148 A.D.3d 1146, 1148 (2d Dep't 2017).

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, force parties to arbitrate when they have so agreed, or order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

The courts may grant provisional remedies (e.g., attachment or preliminary injunction) in aid of arbitration. CPLR 7502. However, if the arbitration is not commenced within 30 days of granting the provisional relief, the order will expire. *Id.* Parties may also ask a court to compel arbitration or stay an arbitration per CPLR 7503(a)-(b).

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

Mediation is usually non-binding and voluntary. Arbitration is typically binding. An arbitration award may be vacated or modified in very limited circumstances under CPLR 7511.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

The major alternative dispute resolution organisations in New York are the American Arbitration Association, JAMS, CPR, and the ICC.

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The authors would like to thank Joanne Liu for her assistance in the preparation of this chapter. Ms. Liu is an associate in Hughes Hubbard & Reed's litigation department and received her J.D. from Columbia Law School.

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USA – Pennsylvania

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

Pennsylvania is a common law jurisdiction, and case law is developed according to the doctrine of *stare decisis*. The Pennsylvania Rules of Civil Procedure govern civil matters at the trial court level. The Pennsylvania Rules of Appellate Procedure govern appeals.

1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

Courts are organised under a Unified Judicial System. The Supreme Court of Pennsylvania, the highest court, hears certain cases as of right and has discretion to hear other cases. The Supreme Court has original jurisdiction in limited instances. The two state-wide intermediate appellate courts are the Superior Court and the Commonwealth Court. The Superior Court hears appeals from final decisions of the Court of Common Pleas. Direct appeals from certain Commonwealth administrative agencies and cases involving the Commonwealth and the public sector are heard by the Commonwealth Court. The Courts of Common Pleas are the trial courts and are organised into 60 judicial districts. In certain circumstances, the Commonwealth Court has original jurisdiction.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

- Pleadings: a civil action is initiated by filing either (1) a praecipe for a writ of summons, or (2) a complaint. All pleadings after the complaint must be filed within 20 days of service of the previous pleading. If a pleading does not contain a "notice to plead", no response is required. Pennsylvania is a "fact pleading" state. Allegations contained in a complaint or answer must be made specifically.
- Discovery: discovery methods include depositions, written interrogatories, and production of documents.
- Motion Practice: a party may file a motion seeking a rule to show cause or another decision from the court.
- Trial: a civil jury consists of at least six or as many as 12 persons. A party must demand a trial by jury within 20 days after service of the last pleading.
- Judgment: a judgment is the final decision of the court which determines the parties' rights and obligations. Question 9.3 describes how judgments may be enforced.
- Appeal: a party only has a right to appeal where it is given by statute. The scope of appeals is discussed in question 9.4.

Although one of the federal district courts in Pennsylvania has instituted a voluntary expedited civil litigation programme, Pennsylvania state courts have not yet adopted such procedures.

1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

A contract's forum selection clause is enforceable where it is not unreasonable at the time of litigation. *See Cent. Contracting Co. v. C.E. Youngdahl & Co.*, 209 A.2d 810 (Pa. 1965). "[A] forum selection clause in a commercial contract between business entities is presumptively valid and will be deemed unenforceable only when: (1) the clause itself was induced by fraud or overreaching; (2) the forum selected in the clause is so unfair or inconvenient that a party, for all practical purposes, will be deprived of an opportunity to be heard; or (3) the clause is found to violate public policy." *Patriot Com. Leasing Co. v. Kremer Rest. Enters., LLC*, 915 A.2d 647, 651 (Pa. Super. Ct. 2006).

1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

The fee for filing a complaint can run upwards of US$300. Pennsylvania courts follow the American Rule under which each party assumes responsibility for its attorneys' fees and costs unless a statute provides otherwise.

The court may impose costs on a party who seeks a continuance after the preliminary call of the trial list. The opposing party may receive costs incurred that would not have been incurred if the request for a continuance had been made at or prior to the trial call. Pa. R.C.P. 217. The Rules of Appellate Procedure provide for the recovery of costs by a successful party. Pa. R.A.P. 2741–44.

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1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

The Pennsylvania Rules of Professional Conduct permit contingent fees. Pa. R.P.C. 1.5(c). The fee is evaluated based on factors including the time and labour involved, the complexity of the work, and the fee customarily charged. Pa. R.P.C. 1.5(a). Contingent fee arrangements are not permitted in domestic relations matters or criminal cases. Pa. R.P.C. 1.5(d).

1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

The principle of champerty restricts the assignment of claims. "An assignment is champertous when the party involved: (1) has no legitimate interest in the suit, but for the agreement; (2) expends his own money in prosecuting the suit; and (3) is entitled by the bargain to share in the proceeds of the suit." *Frank v. TeWinkle*, 45 A.3d 434, 438–39 (Pa. Super. Ct. 2012); *see also Dougherty v. Carlisle Trans. Prods., Inc.*, 610 F. App'x 91, 94 (3d Cir. 2015) (predicting that Pennsylvania Supreme Court would agree that champerty remains a viable defence); *WFIC, LLC v. Labarre*, 148 A.3d 812, 818 (Pa. Super. Ct. 2016) (invalidating fee agreement based on champerty).

A lawyer shall not provide financial assistance to a client, except that: "(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client." Pa. R.P.C. 1.8(e).

1.8 Can a party obtain security for/a guarantee over its legal costs?

Security for costs may be required in certain situations, including in some shareholder suits – see 15 Pa. Cons. Stat. Ann. § 1782(c) – real property disputes, and actions involving non-resident plaintiffs. A bond is required by a plaintiff instituting an action to seize personal property. Pa. R.C.P. 1075.3(b). A preliminary injunction will only be granted if the plaintiff files a bond. Pa. R.C.P. 1531. The court may order a party seeking an appeal, a stay, or an injunction pending appeal to post a bond as security. Pa. R.A.P. 1731.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

For most claims, no notice is required prior to instituting a civil action. Certain claims, such as employment discrimination, require exhaustion of administrative remedies. Every pleading containing an averment of fact not appearing in the record or containing a denial of fact shall state that the averment or denial is true upon the signer's personal knowledge and shall be verified. Pa. R.C.P. 1024.

In any action based on professional liability, the plaintiff must file a certificate of merit within 60 days of filing the complaint. Pa. R.C.P. 1042.3.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

A four-year statute of limitations applies to contract actions. Personal injury actions must be brought within two years. Most actions involving the possession of real property must be brought within 21 years, but as of June 2019, actions for adverse possession may be instituted after 10 years of possession. A two-year statute of limitations governs actions for waste and trespass. An action based on a construction defect must be filed within 12 years. Other civil actions that are not subject to a specific limitations period must be commenced within six years. *See generally* 42 Pa. Cons. Stat. §§ 5521–38.

The statute of limitations begins to run when the plaintiff is able to maintain the elements of a cause of action. 42 Pa. Cons. Stat. § 5502. The statute of limitations may be tolled for certain claims by the discovery rule, that is, the limitations period begins to run when the plaintiff, by the exercise of reasonable diligence, knew or should have known of the injury and its cause.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

A civil action is commenced by filing either (1) a praecipe for a writ of summons, or (2) a complaint. Pa. R.C.P. 1007. If the plaintiff initiates the action by way of a praecipe for a writ of summons, but does not file a complaint, the prothonotary, upon praecipe by the defendant, will enter a rule upon the plaintiff to file a complaint. If the plaintiff fails to do so within 20 days after service of the rule, upon praecipe by the defendant, the prothonotary will enter a judgment of non-pros. Pa. R.C.P. 1037(a).

Original process must be served within 30 days of the issuance of a writ of summons or the filing of a complaint. Pa. R.C.P. 401. If service is not made, upon praecipe by the plaintiff, the prothonotary will reissue the writ of summons or reinstate the complaint, providing an additional 30 days for service. Pa. R.C.P. 401. In all counties except Philadelphia, original process – except for limited categories of actions set forth in Pa. R.C.P. 400(b) and (c) – must be served by a sheriff. Pa. R.C.P. 400. In Philadelphia County, service of original process may be made by a sheriff or any competent adult. Pa. R.C.P. 400.1. Service of original process is made by handing a copy: (1) to the defendant; (2) to an adult member of the defendant's family at the residence or to another adult person in charge if no adult family member is found; (3) to the clerk or manager of a property in which the defendant resides; or (4) to the person in charge at any office or usual place of business of the defendant. Pa. R.C.P. 402.

Outside Pennsylvania, original process must be served within 90 days of the issuance of the writ or filing of the complaint by a competent adult, by mail, in any manner provided by the law of the jurisdiction in which the service is made, in the manner provided by treaty, or as directed by a foreign authority in response to a letter rogatory or request. Pa. R.C.P. 404.

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3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

A plaintiff may seek a preliminary injunction or a temporary restraining order, which requires that the plaintiff's right to relief be clear, the need for relief be immediate, and the injury be irreparable if the injunction is not granted. *See Credit Alliance Corp. v. Phila. Minit-Man Car Wash Corp.*, 301 A.2d 816, 818 (Pa. 1973).

3.3 What are the main elements of the claimant's pleadings?

The pleading must contain a caption; a notice to defend; numbered paragraphs, each containing one material allegation; a claim for relief; and verification by a party. The claim for relief must be specific. The pleading must be signed by an attorney of record, or the party, if not represented. *See* Pa. R.C.P. 1018–23.1.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Pleadings may be amended at any time by filed consent of the adverse party or by leave of the court. Pa. R.C.P. 1033. A party may file an amended pleading as of course within 20 days after service of preliminary objections. If a party files an amended pleading as of course, the preliminary objections to the original pleading are deemed moot. Pa. R.C.P. 1028(c)(1).

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

Prior to the commencement of trial, a plaintiff may withdraw a pleading voluntarily by filing a praecipe to discontinue. Pa. R.C.P. 229(a). Once the trial has begun, a plaintiff may not voluntarily terminate the action "without leave of court upon good cause shown and cannot do so after the close of all the evidence". Pa. R.C.P. 230. Once withdrawn, a case cannot be reopened unless the action is commenced anew and all filing fees are paid. Pa. R.C.P. 231(a).

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

Preliminary objections are limited to certain grounds, including lack of subject matter or personal jurisdiction, legal insufficiency of a pleading, and failure to exhaust a statutory remedy. Pa. R.C.P. 1028. If the defendant files an answer, he or she must specifically deny the plaintiff's averments; general denials have the effect of an admission. Pa. R.C.P. 1029.

The defendant's responsive pleading may contain "new matter", which may include a number of affirmative defences that must be pleaded. Pa. R.C.P. 1030. The defendant may also bring a counterclaim or a cross-claim. Pa. R.C.P. 1031, 1031.1.

4.2 What is the time limit within which the statement of defence has to be served?

The defendant can file an answer or preliminary objections within 20 days of service of the complaint. Pa. R.C.P. 1026.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

A defendant may join as an additional defendant any person who may be solely liable or liable with the joining party. Pa. R.C.P. 2252(a). The joining party may file a praecipe for a writ or a complaint when joining the new defendant. Pa. R.C.P. 2252(b).

4.4 What happens if the defendant does not defend the claim?

If the defendant fails to file a response to a pleading, the plaintiff can file a request for a default judgment. Pa. R.C.P. 1037(b). If the prothonotary cannot assess damages, a trial will be held on the amount. Pa. R.C.P. 1037(b)(1).

4.5 Can the defendant dispute the court's jurisdiction?

A defendant can challenge the court's subject matter or personal jurisdiction by way of preliminary objections. Pa. R.C.P. 1028. Subject matter jurisdiction can be raised at any time. Pa. R.C.P. 1032. Personal jurisdiction must be raised by preliminary objection or the defence is waived. Pa. R.C.P. 1032(a).

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

Individuals having only a joint interest in the subject matter of a civil action must be joined together as plaintiffs or defendants. Pa. R.C.P. 2227(a). If a person required to join under this rule refuses to do so, that person may "be made a defendant or an involuntary plaintiff when the substantive law permits such involuntary joinder". Pa. R.C.P. 2227(b). The Pennsylvania Rules also call for compulsory joinder of related plaintiffs. For example, if both a husband and wife have causes of action arising from the non-fatal injury sustained by one of them, they must bring their actions together. Pa. R.C.P. 2228(a). Additionally, permissive joinder is allowed where the parties assert a right to relief jointly, severally, separately, or arising out of the same transaction or occurrence. Pa. R.C.P. 2229(a).

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

If two or more actions in the same county involve a common question of law or fact or arise from the same transaction or

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occurrence, the court may order a joint hearing or trial, or may order the actions to be consolidated. Pa. R.C.P. 213. If two or more actions pending in different counties involve common questions of law or fact or arise from the same transaction or occurrence, a party can request the court to order coordination of the actions. Pa. R.C.P. 213.1.

5.3 Do you have split trials/bifurcation of proceedings?

The court has discretion to order trials of separate issues. Pa. R.C.P. 213(b).

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

The Court of Common Pleas of Philadelphia has a trial division, an orphans' court division, and a family court division. 42 Pa. Cons. Stat. Ann. § 951(a). It also has a Commerce Program where certain matters are heard, including corporate governance disputes, business disputes, actions related to trade secrets, non-compete agreements, intellectual property, and business torts. There are no separate courts of equity in Pennsylvania.

6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

The court may order the attorneys for the parties to appear for a pre-trial conference to simplify the issues, enter a scheduling order, obtain admissions of fact, limit the number of expert witnesses, and settle the case. Pa. R.C.P. 212.3.

6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

The court may use its contempt power to sanction parties for engaging in conduct that brings into disrespect the authority of the court or for failing to obey a court order compelling discovery. Pa. R.C.P. 4019. A party subject to sanctions may be required to pay the moving party's expenses and attorneys' fees.

6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

A party can file a preliminary objection based on inclusion of "scandalous or impertinent matter". Pa. R.C.P. 1028(a)(2). A court may dismiss a case entirely by granting a defendant's preliminary objections. Pa. R.C.P. 1028. At least once a year, Pennsylvania courts are required to "initiate proceedings to terminate cases in which there has been no activity of record for two years or more". Pa. R.C.P. 230.2(a). Additionally, trial courts retain the ability to terminate a matter that has been inactive for an unreasonable amount of time. Pa. R.J.A. 1901(a).

6.5 Can the civil courts in your jurisdiction enter summary judgment?

Summary judgment may be granted: (1) where there is no genuine issue of any material fact as to a necessary element of the cause of action or defence; and (2) "if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defence which in a jury trial would require the issues to be submitted to a jury". Pa. R.C.P. 1035.2.

6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

The court may stay execution on a judgment, order a stay of proceedings and compel arbitration, and order a stay pending appeal. A motion for a stay of a judgment pending appeal must establish that the petitioner is likely to prevail on the merits, that the petitioner will suffer irreparable injury, that the issuance of a stay will not substantially harm other interested parties, and that issuance of a stay will not adversely affect the public interest. *Pa. Pub. Util. Comm'n v. Process Gas Consumers Grp.*, 467 A.2d 805, 808–09 (Pa. 1983), *rev'd on other grounds*, 511 A.2d 315 (Pa. 1986).

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

A party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action. Pa. R.C.P. 4003.1(a).

A plaintiff may obtain pre-complaint discovery where the information sought is material and necessary to the filing of the complaint. The discovery sought must not cause unreasonable annoyance, embarrassment, oppression, burden, or expense. Pa. R.C.P. 4003.8.

Pennsylvania Rule of Civil Procedure 4009.1(a) provides that a party may serve a request upon a party to produce electronically stored information. The rule further specifies that "[a] party requesting electronically stored information may specify the format in which it is to be produced". Pa. R.C.P. 4009.1(b). Pennsylvania rules do not currently address specific methods of e-disclosure, such as predictive coding.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

A party may not obtain discovery regarding matters that are privileged. Communications subject to the attorney-client and accountant-client privilege are not discoverable. In Pennsylvania, "the attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications

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made for the purpose of obtaining or providing professional legal advice". *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 59 (Pa. 2011). A party may not obtain attorney work product. Pa. R.C.P. 4003.3.

7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

A subpoena requires a third party to attend and testify at a deposition, and may also require the person to produce documents. Pa. R.C.P. 234.1(a). A party may also obtain documents from a non-party by giving written notice of the intent to serve a subpoena at least 20 days before service. Pa. R.C.P. 4009.21.

7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

A party may seek to compel discovery responses. Pa. R.C.P. 4019. Upon motion, the court may make an order to protect a party, witness, or other person from unreasonable annoyance, embarrassment, oppression, burden, or expense. Pa. R.C.P. 234.4(b), 4012.

7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

The court may prohibit a party from disclosing trade secrets, confidential research, or other commercial information. Pa. R.C.P. 4012.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

The Pennsylvania Rules of Evidence govern the admissibility of evidence.

8.2 What types of evidence are admissible, and which ones are not? What about expert evidence in particular?

Evidence is admissible if it is competent and relevant. Pa. R. Evid. 402. "Evidence is competent if it is material to the issues to be determined at trial, and relevant if it tends to prove or disprove a material fact in issue." *McManamon v. Washko*, 906 A.2d 1259, 1274 (Pa. Super. Ct. 2006). Evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or cumulative evidence. Pa. R. Evid. 403. The standard for qualification of an expert is liberal and considers "whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation". *Miller v. Brass Rail Tavern, Inc.*, 664 A.2d 525, 528 (Pa. 1995). Pennsylvania courts follow the *Frye* test, as set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which admits novel scientific evidence if the underlying methodology has gained general acceptance in the relevant scientific community.

8.3 Are there any particular rules regarding the calling of witnesses of fact, and the making of witness statements or depositions?

A witness can only testify to matters as to which he or she has personal knowledge. Pa. R. Evid. 602. Deposition testimony may be used at trial in certain circumstances, such as for impeachment or if the witness is more than 100 miles from the place of trial or outside the Commonwealth. Pa. R.C.P. 4020.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Are there any particular rules regarding concurrent expert evidence? Does the expert owe his/her duties to the client or to the court?

A party may propound interrogatories asking the other party to identify any expert witness, as well as the subject matter on which the expert is expected to testify. Pa. R.C.P. 4003.5. An expert is permitted to give an opinion on the ultimate issue. Pa. R. Evid. 704. However, experts may not testify on questions of law. *See 41 Valley Assocs. v. Bd. of Supervisors*, 882 A.2d 5, 14 n.12 (Pa. Commw. Ct. 2005). The purpose of expert testimony is to assist the trier of fact in deciding complex factual issues. An expert's testimony at trial "may not be inconsistent with or go beyond the fair scope of his or her testimony in the discovery proceedings". Pa. R.C.P. 4003.5(c). Additionally, concurrent expert evidence – like any other evidence – may be limited if the probative value is outweighed by the danger of wasting time or needlessly presenting cumulative evidence. *See* Pa. R. Evid. 403.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

A final judgment is the final determination of the rights and obligations of the parties in a case. An interlocutory judgment determines a preliminary issue and does not adjudicate the parties' ultimate rights. A preliminary injunction is an interlocutory judgment. The court may enter a final judgment ordering money damages. Under the Declaratory Judgments Act, 42 Pa. Cons. Stat. Ann. § 7532, courts have authority to issue declaratory judgments, which determine the rights of the parties with respect to certain legal issues.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Pennsylvania courts adhere to the "American Rule, which states that litigants are responsible for their own litigation costs and may not recover them from an adverse party unless there is express statutory authorization, a clear agreement of the parties, or some other established exception". *In re Farnese*, 17 A.3d 357, 370 (Pa. 2011). An award of damages is subject to post-judgment interest from the date on which the judgment is finally entered. 42 Pa. Stat. § 8101. The legal rate of interest in Pennsylvania is 6%. 41 Pa. Cons. Stat. § 202. Pre-judgment interest is only awarded where it is necessary to prevent injustice. *See Sack v. Feinman*, 413 A.2d 1059, 1065–66 (Pa. 1980).

9.3 How can a domestic/foreign judgment be recognised and enforced?

Execution of a judgment is commenced by filing a writ of execution with the prothonotary of any county in which the judgment has been entered. Pa. R.C.P. 3103(a). The writ of execution can be enforced

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by a variety of means including sale of real property, garnishment, execution against contents of a safety deposit box, and sale of securities. *See* Pa. R.C.P. 3110–14. In special actions, enforcement of a judgment occurs through an action of ejectment (to obtain possession of real property), an action of replevin (to obtain possession of personal property), or mortgage foreclosures.

The Full Faith and Credit Clause of the United States Constitution requires courts to recognise judgments from other states. Pennsylvania law contains a Uniform Enforcement of Foreign Judgments Act, which governs enforcement of judgments of other states. *See* 42 Pa. Cons. Stat. Ann. § 4306. The Uniform Foreign Money Judgment Recognition Act provides for enforcement of money judgments obtained in another country. *See* 42 Pa. Stat. Ann. § 22001 *et seq.*; *see also Louis Dreyfus Commodities Suisse SA v. Fin. Software Sys., Inc.*, 99 A.3d 79, 84 (Pa. Super. Ct. 2014) (instructing that judgments of other countries must first be recognised under the Recognition Act).

9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

There are two intermediate appellate courts in Pennsylvania: the Commonwealth Court and the Superior Court. The Pennsylvania Rules of Appellate Procedure provide for appeals of right from final orders, from collateral orders, and from certain interlocutory orders. If an order is not appealable of right, a petition for permission to appeal may be filed or a determination of finality may be sought. Pa. R.A.P. 341(c), 1311.

Depending on the case and the order, the Pennsylvania Supreme Court hears appeals from the Court of Common Pleas, the Superior Court, and the Commonwealth Court. Some appeals to the Supreme Court are as of right. *E.g.*, 42 Pa. Cons. Stat. Ann. § 9711(h); Pa. R.A.P. 1101. Most appeals are discretionary and are initiated by a petition for allowance of appeal from a final order of the Commonwealth Court or the Superior Court. Pa. R.A.P. 1112(c). The criteria that the Supreme Court uses to grant allowance of appeal are set forth in Pa. R.A.P. 1114. The Supreme Court has extraordinary jurisdiction and King's Bench powers, which can be sought by application. Pa. R.A.P. 3309. Where post-trial motions are required, the issues must be raised in timely post-trial motions in the trial court before they can be raised on appeal. *L.B. Foster Co. v. Lane Enters.*, 710 A.2d 55 (Pa. 1998).

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

Under 42 Pa. Cons. Stat. Ann. § 7361, judicial districts are authorised to implement compulsory non-binding arbitration for disputes below a certain dollar amount. For example, all civil actions filed in the Philadelphia Court of Common Pleas with an amount in controversy of $50,000 or less are subject to compulsory non-binding arbitration.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

An agreement to arbitrate is presumed to be an agreement for common law arbitration. 42 Pa. Cons. Stat. Ann. § 7302(a). Mediation is another commonly used method of dispute resolution.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Certain claims are subject to statutory arbitration, including collective bargaining agreements and disputes relating to government contracts. 42 Pa. Cons. Stat. Ann. §§ 7302(b)–(c). The Pennsylvania Uniform Arbitration Act sets forth the rules governing witnesses, discovery, awards, and fees. A common law arbitration award "may not be vacated or modified unless it is clearly shown that a party was denied a hearing or that fraud, misconduct, corruption or other irregularity caused the rendition of an unjust, inequitable or unconscionable award". 42 Pa. Cons. Stat. Ann. § 7341. Civil actions where the amount in controversy does not exceed a certain amount are subject to compulsory arbitration. 42 Pa. Cons. Stat. Ann. § 7361.

1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

An agreement to arbitrate a child custody dispute is permissible but may not be enforced where it is not in the best interests of the child. *See Miller v. Miller*, 620 A.2d 1161, 1165 (Pa. Super. Ct. 1993). Arbitration clauses may be found unenforceable under extraordinary circumstances if they violate public policy. *See, e.g., In re Fellman*, 604 A.2d 263, 267 (Pa. Super. Ct. 1992).

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, force parties to arbitrate when they have so agreed, or order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

Where an arbitration clause governs a dispute between parties, a party may file a motion to compel arbitration. Pa. R.C.P. 1329. Courts address disputes over the scope of the arbitration clause, *i.e.* what issues may be arbitrated, unless the parties have agreed to submit such disputes to arbitration. *See, e.g., Kardon v. Portare*, 353 A.2d 368, 370 (Pa. 1976) (finding lower court inappropriately addressed subject matter within scope of arbitration agreement). A court may order litigation to be stayed pending arbitration.

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1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

Appellate review is available of final arbitration orders, but the review is limited, as described in Section II, question 1.2. A court may enforce an arbitration award by ordering specific performance. In court-established custody mediation programmes, sanctions are available against a party who does not comply with the rules. Pa. R.C.P. 1940.8.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

Arbitration agreements often call for disputes to be arbitrated by the American Arbitration Association. JAMS, a well-known provider of arbitration and mediation services, has a location in Philadelphia, Pennsylvania. Pennsylvania's Office of General Counsel offers a mediation programme for disputes involving Commonwealth employees or agencies. The Pennsylvania Council of Mediators provides mediation services in private disputes.

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USA – Virginia

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

The Commonwealth of Virginia has both federal and local court systems. The United States District Court for the Western District of Virginia and the United States District Court for the Eastern District of Virginia ("District Courts") are the federal courts for Virginia. The Virginia General District Court (courts in 32 districts) is the trial court level for the Commonwealth of Virginia, with the Virginia Circuit Courts (120 courts divided among 31 judicial circuits), the Court of Appeals of Virginia (an 11-judge body that hears appeals from decisions of Virginia's Circuit Courts), and the Supreme Court of Virginia (the highest court in the Commonwealth) standing as the appellate courts. Both the District Courts and Virginia local courts have similar, but not identical, rules of civil procedure known as the Federal Rules of Civil Procedure ("FRCP") and the Code of Virginia, Titles 8.01 and 16.1 ("Va. Code"), respectively. Virginia's civil procedure also includes case law, statute books, and Rules of Court, particularly the Rules of the Supreme Court of Virginia, which are applied in the lower courts.

1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

The federal District Court is a court of limited jurisdiction, and appeals from its final judgments may be taken as a matter of right to the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit"). The Virginia General District Courts are courts of limited jurisdiction (generally dealing with cases with a ceiling of $15,000 in private damages) and Circuit Courts are courts of general jurisdiction, and appeals from final judgments of these courts relating to land, condemnation of property, wills, appointments of guardians or conservators, taxes, or interlocutory orders or decrees in any case on an equitable claim may be presented to the Supreme Court of Virginia, which is the highest local court in this jurisdiction. *See* Va. Code §§ 8.01-669 through 675.2. Appeals as of right may be taken by the Court of Appeals of Virginia. *Id.* §§ 8.01-675.3 through 675.4. The United States Supreme Court has jurisdiction to hear appeals from both the Fourth Circuit and the Supreme Court of Virginia, but such appeals are generally not as of right, and may only be heard if the Supreme Court elects to do so. The Eastern District Court in Virginia ("E.D.Va.") is generally considered a specialist court, as it is known as the "rocket docket" for the speed with which cases progress. Cases average 11 months from "file to trial" in E.D.Va., which is much faster than most other courts in the United States.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

The main stages for civil proceedings in both the District Courts and local courts are: (1) initial pleadings (complaint, motions to dismiss, answer, counterclaims, etc.); (2) discovery; (3) alternative dispute resolution; (4) summary judgment; (5) pre-trial motions; (6) trial; (7) post-trial motions; and (8) appeal.

1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

Forum selection clauses are presumptively enforceable in Virginia (in both local and federal courts) unless a party contesting the clause proves it is unreasonable. *See, e.g., Atlantic Marine Constr. Co., Inc. v. United States District Court for the Western District of Texas*, 134 S. Ct. 568, 187 L. Ed. 2d 487, 500 (2013) ("When the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause"); *The Hipage Co., Inc. v. Access2Go, Inc.*, 589 F. Supp. 2d 602, 607-09 (E.D. Va. 2008); *Paul Business Sys., Inc. v. Canon U.S.A., Inc.*, 397 S.E. 2d 804, 807 (Va. 1990) ("[C]ontractual provisions limiting the place or court where potential actions between the parties may be brought are *prima facie* valid and should be enforced, unless the party challenging enforcement establishes that such provisions are unfair or unreasonable, or are affected by fraud or unequal bargaining power").

1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

As a general matter, each side will bear its own costs and attorneys' fees. A limited amount of costs may be imposed on the losing party by the court, and other costs and attorneys' fees may be imposed by the court on a party as a sanction for misconduct. *See* FRCP 37, 54, 58; Va. Code § 8.01-271.1.

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1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

Contingency fees and conditional fees are generally permitted, but the terms of such arrangements are governed by the Virginia Rules of Professional Conduct, which are the ethical rules that govern lawyers. As to funding litigation, please see the answer to question 1.7.

1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

Only those causes of action for damage to real or personal property are assignable in Virginia local courts. *See* Va. Code § 8.01-26. The Virginia Code makes clear that it does not prohibit any injured party or his estate from making a voluntary assignment of the proceeds or anticipated proceeds of any court award or settlement as security for new value given in consideration of a voluntary assignment. As for financing, Virginia has identified numerous ethical issues and limitations in such arrangements. Limitations include the lack of privilege for communications with non-party financiers, the need for attorneys representing the party to be independent in running the case, and a prohibition on sharing attorneys' fees.

1.8 Can a party obtain security for/a guarantee over its legal costs?

Subject to the restrictions set forth in the Virginia Rules of Professional Conduct and the limitations described in the answer to question 1.7, a party may obtain insurance or other security to pay for its legal costs. However, such an arrangement cannot impact the independence exercised by counsel for the party.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

No. A plaintiff may initiate a civil action by filing a complaint with the court. FRCP 3. In Virginia local courts, a party may plead as many matters as necessary when commencing an action. Va. Code § 8.01-272.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

The limitation periods for bringing a claim (known as the "statute of limitations") vary depending upon the type of claim. Generally speaking, the statute of limitations begins to run when the claim accrues. Statutes of limitations are generally treated as a procedural issue.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

A plaintiff initiates a civil action by filing a complaint with the court. FRCP 3. The complaint must then be served on the defendant along with a summons. FRCP 4. Acceptable methods of service vary depending on the nature of the defendant and the defendant's location. Generally speaking, service is effective when the complaint is received by the defendant through one of the methods permitted by Rule 4. Service outside the United States can be effectuated by service permitted by international agreement or local (foreign) law. FRCP 4(f). Service through the Hague Convention of Service Abroad of Judicial and Extrajudicial Documents is the preferred method of service for defendants located outside the United States (in those countries that are part of the Hague Convention). If service is outside of the United States in a country that is not part of the Hague Convention, the party may petition the court for issuance of a letter rogatory. Federal courts require a party or non-party filing anything with the court to redact sensitive personally identifiable information. FRCP 5.2. In Virginia, a party pleads his or her claims and generally must complete service within a year (or show that plaintiff has exercised due diligence in attempting to serve the defendant). Va. Code § 8.01-275.1. Service may be completed by delivering a copy of the pleading to the party in person, by delivering it to the party's "usual place of abode", or by posting a copy at the front door of the "place of abode". Va. Code §§ 8.01-296. If service cannot be affected in these ways, then service by order of publication may be appropriate under certain circumstances.

3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

Although rarely used, it is possible to take pre-action discovery to perpetuate testimony. FRCP 27(a); Rules of Supreme Court of Virginia 4:2(a). A party wishing to do so may file a petition with the court, and the Court must permit the discovery if it is satisfied that perpetuating the testimony will prevent a failure or delay of justice.

3.3 What are the main elements of the claimant's pleadings?

In federal court, a pleading that states a claim for relief, such as a complaint or counterclaim, must contain a short and plain statement of the grounds for the court's jurisdiction, the claim showing that the pleader is entitled to relief, and a demand for the relief sought. FRCP 8(a). Allegations of fraud and mistake must be stated with particularity. FRCP 9(b). In Virginia, a party may plead as many matters as necessary when commencing an action. Va. Code § 8.01-272.

3.4 Can the pleadings be amended? If so, are there any restrictions?

In federal court, pleadings may be amended once as of right within a certain time after service, or subsequently only by agreement of

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the parties or with the court's leave. FRCP 15. In both federal and local courts, the court should give leave to amend freely when justice so requires. FRCP 15; Rules of Supreme Court of Virginia 1:8 and Va. Code § 8.01-6.1; *Ahari v. Morrison*, 654 S.E.2d 891 (Va. Cir. Ct. 2008) (standard for an amendment of pleadings is whether defendant will be prejudiced and will that prejudice affect defendant's ability to have a fair trial).

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

In federal court, a plaintiff may dismiss its claims as a matter of right if the defendant has not served an answer or moved for summary judgment. FRCP 41. Otherwise dismissal requires the consent of all parties or an order of the court. Unless otherwise stated, a dismissal is without prejudice, but if the plaintiff previously dismissed any federal or state action based on the same claim, the second dismissal functions as an adjudication on the merits. In Virginia local courts, a party can only voluntarily dismiss his pleadings before a motion to strike the evidence has been sustained or before the jury retires from the bar or before the action has been submitted to the court for decision. Va. Code § 8.01-380. Voluntary dismissal of this kind is subject to the tolling provisions for the statute of limitations contained in Va. Code § 8.01-229.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

In federal court, the defendant in its answer must state in short and plain terms its defences to each claim asserted against it and admit or deny the allegations asserted against it in the complaint. FRCP 8(b)-(c). A defendant may bring counterclaims or assert set-off against the plaintiff. FRCP 13. In Virginia local courts, a defendant must either respond to the merits of plaintiff's claims or propose reasons why the defendant need not, such as objections to jurisdiction, venue, demurrer, statutes of limitation, and plea in suspension.

4.2 What is the time limit within which the statement of defence has to be served?

In both federal and local courts in Virginia, a defendant's answer is ordinarily due within 21 days of being served with the summons and complaint (or pleadings). FRCP 12(a); Rules of Supreme Court of Virginia 3:8.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

A defendant may bring a third party into the action in order to assert an action against the third party defendant. FRCP 14 & Rules of Supreme Court of Virginia 3:12 and 3:13.

4.4 What happens if the defendant does not defend the claim?

If a defendant fails to defend a claim, the Plaintiff may seek, and the court may enter, a default judgment against the defendant. FRCP 55; Va. Code § 8.01-428.

4.5 Can the defendant dispute the court's jurisdiction?

Yes. Challenges to the court's subject matter jurisdiction can be brought at any time. FRCP 12(h)(3). In Virginia local courts, General District Courts have jurisdiction over matters $4,500 or less in controversy, while Circuit Courts have jurisdiction over matters over $4,500 in dispute. *See* Va. Code §§ 16.1-77 through 16.1-77.2. Challenges to personal jurisdiction are generally waived unless made at the time the defendant files its first motion to dismiss or its initial answer to the complaint. FRCP 12(h)(1); Va. Code § 8.01-277.1.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

Third parties can be joined either as required parties or permitted parties. FRCP 19–20; Rules of Supreme Court of Virginia 3:12 and 3:13. Required parties generally must be joined if their absence would prevent the court from according complete relief or the third party claims an interest in the subject of the action. FRCP 19; Rules of Supreme Court of Virginia 3:12. Permitted parties generally may be joined if they seek relief with the plaintiff, or if relief is sought against them and the defendant, and a common question of law or fact will arise in the action. FRCP 20; Rules of Supreme Court of Virginia 3:13.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Actions before the same court may be consolidated if they involve a common question of law or fact. FRCP 42(a); Va. Code § 8.01-267.1. It is also possible to transfer a case from one federal court to another for the convenience of the parties and witnesses or in the interest of justice. 28 U.S.C. § 1404(a).

5.3 Do you have split trials/bifurcation of proceedings?

Though rare, a court may order separate trials for convenience, to avoid prejudice, or to expedite and economise. FRCP 42(b); Va. Code § 8.01-374.1.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

In District Court, a case is generally assigned on a random basis to a single judge who presides over the case until its conclusion. In Virginia local courts, a case is generally assigned through the chief judge in Circuit Court, Va. Code § 17.1-501, and generally assigned to a civil calendar in other courts.

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6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

The court is empowered to enter a scheduling order and to hold pre-trial conferences in order to manage the case. FRCP 16; Rules of Supreme Court of Virginia 1:18. Parties may apply for interim relief in the form of temporary restraining orders or preliminary injunctions. FRCP 65; Va. Code § 8.01-620. The moving party must post sufficient security in order to obtain a temporary restraining order or preliminary injunction. FRCP 65(c); Va. Code § 8.01-631.

6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

A court is empowered to sanction a party that disobeys a court order with a variety of sanctions including fines, payment of an opponent's attorneys' fees or costs, preclusion from offering evidence, striking of claims or defences, staying the case, dismissal of the case, or entry of default judgment. FRCP 16, 37(b); Va. Code § 8.01-272.1.

6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

A defendant may move to dismiss the complaint for lack of jurisdiction or for failure to state a claim, or to strike redundant, immaterial, impertinent or scandalous portions of the complaint at the time its answer is due (before discovery). FRCP 12(b) & (f); Va. Code § 8.01-273 (demurrer). A defendant may also move to dismiss the action after discovery during the summary judgment phase. FRCP 56; Rules of Supreme Court of Virginia 3:20. A defendant is also able to move for judgment in his or her favour following the plaintiff's presentation of evidence at trial, following the full trial, and after trial.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

Summary judgment may be entered in whole or part for either the plaintiff or defendant if the moving party demonstrates that there is no genuine dispute as to any issue of material fact and it is entitled to judgment as a matter of law. FRCP 56; Rules of Supreme Court of Virginia 3:20.

6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

A court is empowered to stay a case for disobedience of a court order until the order is obeyed. FRCP 16, 37(b); Rules of Supreme Court of Virginia 4:12(b)(2)(C). A court may also stay enforcement of a judgment pending an appeal. FRCP 62; Va. Code § 8.01-676.1.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

Generally, a party may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defence. FRCP 26(b)(1); Rules of Supreme Court of Virginia 4:1(b)(1). Ordinarily, a party may not discover documents that are prepared in anticipation of litigation or for trial by or for another party or its representative. FRCP 26(b)(3); Rules of Supreme Court of Virginia 4:1(b)(3). Under normal circumstances, a party need not provide discovery of electronically stored information from sources that are not reasonably accessible because of undue burden or cost (taking into account the proportionality of the cost of obtaining the information versus the amount in controversy in the lawsuit). FRCP 26(b)(2); Rules of Supreme Court of Virginia 4:1(b)(7).

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

In District Courts, the common law generally governs a claim of privilege. Federal Rule of Evidence ("FRE") 501. Virginia local courts do not have codified rules of evidence, but generally follow the tenets of the Federal Rules of Evidence. The most commonly asserted privileges in civil proceedings are the Attorney-Client Communication Privilege and Work Product Doctrine.

7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

Third parties may be required to produce documents, provide deposition testimony, or to testify at trial by subpoena. FRCP 45; Va. Code § 16.1-89.

7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

The court supervises the timing of discovery through its scheduling order, and rules upon any motions for protective order that seek to limit or preclude discovery and motions to compel discovery. FRCP 16(b), 26(c), 37(a); Rules of Supreme Court of Virginia 1:18, Rules of Supreme Court of Virginia 4:1.

7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

As a general matter, there are no restrictions on the use of documents obtained in discovery. However, a party may move for a protective order that limits the use of documents obtained during discovery. FRCP 26(c); Rules of Supreme Court of Virginia 4:1(c). The court will typically order that documents containing trade secrets or other confidential research, development or commercial information not be revealed outside of the litigation. FRCP & SCRCP 26(c)(1)(G); Rules of Supreme Court of Virginia 4:1(c)(7).

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8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

In District Court the Federal Rules of Evidence provide the basic rules. Virginia local courts do not have codified rules of evidence, but generally follow the tenets of the Federal Rules of Evidence.

8.2 What types of evidence are admissible, and which ones are not? What about expert evidence in particular?

Generally speaking, irrelevant evidence, unfairly prejudicial evidence, privileged evidence, evidence not based on personal knowledge, unqualified opinions, and unreliable hearsay are not admissible. FRE 402, 403, 501, 701, 702, and 802. Experts must have sufficient qualifications to provide opinions on the issues for which they have been retained, follow reliable principles and methods, and apply those principles and methods to the facts of the case. FRE 702.

8.3 Are there any particular rules regarding the calling of witnesses of fact, and the making of witness statements or depositions?

Fact witnesses must have personal knowledge of a matter in order to testify concerning that matter. FRE 602. Deposition testimony of a witness with personal knowledge taken in the action is generally admissible if the witness is an opposing party or is not available to testify at trial. FRE 804(b)(1); FRCP 32(a). Written witness statements of opposing parties are admissible against the party opponent, whether or not they are sworn. FRE 801(d)(2). Other witness statements are inadmissible unless they fall within one of the hearsay exceptions. FRE 803–804. Fact witnesses may testify regarding their "lay" opinions if the opinion is based upon the witness' perception and not based upon expert knowledge. FRE 701. In federal court, up to 10 witnesses may be deposed by each side in advance of trial. FRCP 30(a). In Virginia local courts, the pretrial conference includes a discussion with court concerning an agreement between the parties on limiting the number of expert and/or lay witnesses. Rules of Supreme Court of Virginia 1:19.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Are there any particular rules regarding concurrent expert evidence? Does the expert owe his/her duties to the client or to the court?

Generally speaking, expert witnesses may testify in the form of an opinion at trial if their knowledge is relevant, their opinions are based upon sufficient facts, and their opinions are the result of a reliable methodology. FRE 702; Va. Code § 8.01-401.1. In federal court, experts are generally required to prepare reports disclosing their opinions and their bases during discovery, and they may be deposed by the party opponent. FRCP 26(a)(2). In Virginia local courts, experts must disclose information upon request during discovery, but a report is not expressly required. Rules of Supreme Court of Virginia 4:1(b)(4). There are no particular rules concerning concurrent expert evidence, but the courts will judge whether proffered expert evidence will assist the trier of fact.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

The court may enter judgment for whatever relief is requested and authorised by law. In civil matters, typical judgments are for the payment of damages, permanent injunctions directing the defendant to take, or refrain from taking, certain actions, appointment of a receiver, or a declaration of the parties' respective rights. FRCP 57, 58; Va. Code §§ 8.01-426 through 465.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

A court may order a party to pay attorneys' fees or costs if such fees or costs are recoverable under the party's claim or for violation of a court order, or order the recovery of certain costs to the party. FRCP 16, 37, 54, 58; Va. Code §§ 8.01-426 through 465. The court may also order interest on a money judgment to the extent permitted by the substantive law governing the claim.

9.3 How can a domestic/foreign judgment be recognised and enforced?

Domestic and foreign judgments may be filed in the office of the clerk of any Virginia Circuit Court and enforced in the same manner as a Virginia court judgment in accordance with the Virginia Uniform Enforcement of Foreign Judgments Act. Va. Code § 8.01-465.

9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

Appeals from the District Court are governed by the Federal Rules of Appellate Procedure. Appeals from the Virginia local courts, whether General District Courts or Circuit Courts, are governed generally by the rules set forth at Va. Code §§ 8.01-676 through 688, and specifically by the following: appeals to the Virginia Supreme Court (Va. Code §§ 8.01-669 through 675.2) and appeals to the Court of Appeals (Va. Code §§ 8.01-675.3 through 675.4).

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

The court and parties are encouraged to discuss a possible settlement at, and in preparation for, pre-trial conferences. FRCP 16; Rules of Supreme Court of Virginia 1:19. In Virginia local courts, voluntary mediation is governed by Va. Code §§ 8.01-581.1 through 581.20:1.

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II. ALTERNATIVE DISPUTE RESOLUTION

1 General

1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

As a general matter, parties may agree to use alternative dispute resolution at any point in the litigation process. Available options include court-appointed and privately engaged mediators, privately engaged arbitrators and private judges. Mediators are neutrals who encourage the parties to reach an agreement. Arbitrators and private judges are empowered by agreement of the parties to resolve the dispute, and the parties are bound to follow that resolution by agreement.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Mediation in Virginia is governed by Va. Code §§ 8.01-581.1 through 581.20:1. Arbitration is governed by the Federal Arbitration Act, 9 U.S.C. § 1–307.

1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Generally speaking, any civil case brought in Virginia may use alternative dispute resolution as a means of facilitating resolution of the case.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, force parties to arbitrate when they have so agreed, or order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

Virginia courts will enforce reasonable arbitration agreements, with both the procedure and substance of the arbitration agreement scrutinised. *See* Va. Code §§ 8.01-577 through 581.016. As for mediation, Virginia courts may provide mediators who can assist the parties in a lawsuit in settling their case before trial. Mediators do not decide the outcome of a case. All agreements reached in mediation are voluntary.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

Virginia courts, both federal and local, encourage parties in civil cases to use mediation and arbitration. Mediation results must be voluntary. Arbitration is generally followed according to the parties' agreement to arbitrate, with the arbitrator's award confirmed by the court under Va. Code § 8.01.581.09. While no party will be sanctioned for declining to mediate, the court may force a party to honour a reasonable agreement to arbitrate.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

There are many private mediators and arbitrators throughout Virginia. In addition, the local court system includes trained neutral mediators that can be used by litigants.

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John Eustice's practice focuses on the counselling and representation of businesses and individuals facing complex civil litigation or information technology issues. He has litigated a broad range of civil actions, with a particular emphasis on fiduciary disputes, non-profit corporation counselling and litigation, partnership controversies, whistleblower claims and employment discrimination matters. He has developed expertise in data privacy and data security issues, including issues relating to cloud computing services and cross-border transfers of electronic data. Mr. Eustice advises domestic and foreign clients on data privacy compliance and information technology contracts. He also has extensive experience in complex discovery, including all aspects of electronic and cross-border discovery. He is a contributing member of and panellist for The Sedona Conference®, an e-discovery think tank, in Working Group 1 (Electronic Document Retention and Production), Working Group 2 (Protective Orders, Confidentiality and Public Access) and Working Group 6 (International Electronic Information Management, Discovery and Disclosure).

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Brian Hill focuses on complex commercial cases and has extensive experience litigating cases involving fiduciary and other professional liability, class actions, government contract disputes and false claims and intellectual property rights. He has significant experience in local and federal courts in the District of Columbia and the surrounding area, including the "Rocket Docket" of the United States District Court for the Eastern District of Virginia.

Mr. Hill's fiduciary litigation experience includes multimillion dollar claims involving the fiduciary duties of corporate shareholders, directors, officers, Employee Retirement Income Security Act (ERISA) plan fiduciaries and investment managers and inside and outside counsel. He has represented corporations, insurers, non-profits and beneficiaries in actions alleging breach of fiduciary duties by directors, officers, plan fiduciaries, agents and trustees.

Miller & Chevalier

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Roughly two-thirds of all the firm's engagements are litigation-related. Some distinctive aspects of Miller & Chevalier's complex litigation capabilities include litigating against the federal government – as both plaintiff and defendant, handling parallel civil and criminal proceedings, and litigating matters across international borders.

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

Washington, D.C. has both a federal and local court system. The United States District Court for the District of Columbia ("District Court") is the federal court for the District of Columbia. The Superior Court of the District of Columbia ("Superior Court") is the local court for the District of Columbia. Both the District Court and Superior Court have similar, but not identical, rules of civil procedure known as the Federal Rules of Civil Procedure ("FRCP") and the Superior Court Rules of Civil Procedure ("SCRCP"), respectively.

1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

The federal District Court is a court of limited jurisdiction, and appeals from its final judgments may be taken as a matter of right to the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"). The Superior Court is a court of general jurisdiction, and appeals from its final judgments may be taken as a matter of right to the District of Columbia Court of Appeals ("D.C. Court of Appeals"), which is the highest local court in this jurisdiction. The United States Supreme Court has jurisdiction to hear appeals from both the D.C. Circuit and the D.C. Court of Appeals, but such appeals are generally not as of right, and may only be heard if the Supreme Court elects to do so. The District of Columbia also includes a number of specialist courts, including the United States Court of Federal Claims (which hears certain claims against the U.S. government) and the United States Tax Court (which hears certain claims involving federal income tax).

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

The main stages for civil proceedings in both District Court and Superior Court are: (1) initial pleadings (complaint, motions to dismiss, answer, counterclaims, etc.); (2) discovery; (3) alternative dispute resolution; (4) summary judgment; (5) pre-trial motions; (6) trial; (7) post-trial motions; and (8) appeal.

1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

Forum selection clauses are presumptively enforceable in the District of Columbia (in both local and federal courts) unless a party contesting the clause proves it is unreasonable. *See, e.g., Atlantic Marine Constr. Co., Inc. v. United States District Court for the Western District of Texas*, 134 S. Ct. 568, 187 L. Ed. 2d 487, 500 (2013) ("When the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause"); *Yazdani v. Access ATM*, 941 A.2d 429 (D.C. 2008) (upholding forum selection clause because it was not shown to be unreasonable and because it was reasonably communicated to the challenging party in the relevant agreement); *Walker v. FedEx Office & Print Services, Inc.*, 123 A.3d 160, 163-64 (D.C. 2015).

1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

As a general matter, each side will bear its own costs and attorneys' fees. A limited amount of costs may be imposed on the losing party by the court, and other costs and attorneys' fees may be imposed by the court on a party as a sanction for misconduct. See FRCP & SCRCP 37, 54, 58.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

Contingency fees and conditional fees are generally permitted, but the terms of such arrangements are governed by the District of Columbia Rules of Professional Responsibility, which are the ethical rules that govern lawyers. As to funding litigation, please see the answer to question 1.7.

1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

While the District of Columbia has not issued a definitive ruling on the propriety of assigning claims or causes of action, they have identified numerous ethical issues and limitations in doing so. These limitations include the lack of privilege for communications

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with non-party financiers, the need for attorneys representing the party to be independent in running the case, and a prohibition on sharing attorneys' fees.

1.8 Can a party obtain security for/a guarantee over its legal costs?

Subject to the restrictions set forth in the District of Columbia Rules of Professional Responsibility and the limitations described in the answer to question 1.7, a party may obtain insurance or other security to pay for its legal costs. However, such an arrangement cannot impact the independence exercised by counsel for the party.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

No. A plaintiff may initiate a civil action by filing a complaint with the court. FRCP & SCRCP 3.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

The limitation periods for bringing a claim (known as the "statute of limitations") vary depending upon the type of claim. Generally speaking, the statute of limitations begins to run when the claim accrues. Statutes of limitations are generally treated as a procedural issue.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

A plaintiff initiates a civil action by filing a complaint with the court. FRCP & SCRCP 3. The complaint must then be served on the defendant along with a summons. FRCP & SCRCP 4. Acceptable methods of service vary depending on the nature of the defendant and the defendant's location. Generally speaking, service is effective when the complaint is received by the defendant through one of the methods permitted by Rule 4. Service outside the United States can be effectuated by service permitted by international agreement or local (foreign) law. FRCP & SCRCP 4(f). Service through the Hague Convention of Service Abroad of Judicial and Extrajudicial Documents is the preferred method of service for defendants located outside the United States (in those countries that are part of the Hague Convention). If service is outside of the United States in a country that is not part of the Hague Convention, the party may petition the court for issuance of a letter rogatory. A recent rule in the District of Columbia (that has been used longer in federal courts) requires a party or non-party filing anything with the court to redact sensitive personally identifiable information. FRCP & SCRCP 5.2.

3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

Although rarely used, it is possible to take pre-action discovery to perpetuate testimony. FRCP & SCRCP 27(a). A party wishing to do so may file a petition with the court, and the Court must permit the discovery if it is satisfied that perpetuating the testimony will prevent a failure or delay of justice.

3.3 What are the main elements of the claimant's pleadings?

A pleading that states a claim for relief, such as a complaint or counterclaim, must contain a short and plain statement of the grounds for the court's jurisdiction, the claim showing that the pleader is entitled to relief, and a demand for the relief sought. FRCP & SCRCP 8(a). Allegations of fraud and mistake must be stated with particularity. FRCP & SCRCP 9(b).

3.4 Can the pleadings be amended? If so, are there any restrictions?

Pleadings may be amended once as of right within a certain time after service, or subsequently only by agreement of the parties or with the court's leave. FRCP & SCRCP 15. The court should give leave to amend freely when justice so requires.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

A plaintiff may dismiss its claims as a matter of right if the defendant has not served an answer or moved for summary judgment. FRCP & SCRCP 41. Otherwise dismissal requires the consent of all parties or an order of the court. Unless otherwise stated, a dismissal is without prejudice, but if the plaintiff previously dismissed any federal or state action based on the same claim, the second dismissal functions as an adjudication on the merits.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

In its answer, the defendant must state in short and plain terms its defences to each claim asserted against it and admit or deny the allegations asserted against it in the complaint. FRCP & SCRCP 8(b)-(c). A defendant may bring counterclaims or assert set-off against the plaintiff. FRCP & SCRCP 13.

4.2 What is the time limit within which the statement of defence has to be served?

A defendant's answer is ordinarily due within 21 days of being served with the summons and complaint. FRCP & SCRCP 12(a).

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4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

A defendant may bring a third party into the action in order to assert an action against the third party defendant. FRCP & SCRCP 14.

4.4 What happens if the defendant does not defend the claim?

If a defendant fails to defend a claim, the plaintiff may seek, and the court may enter, a default judgment against the defendant. FRCP & SCRCP 55.

4.5 Can the defendant dispute the court's jurisdiction?

Yes. Challenges to the court's subject matter jurisdiction can be brought at any time. FRCP & SCRCP 12(h)(3). Challenges to personal jurisdiction are generally waived unless made at the time the defendant files its first motion to dismiss or its initial answer to the complaint. FRCP & SCRCP 12(h)(1).

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

Third parties can be joined either as required parties or permitted parties. FRCP & SCRCP 19–20. Required parties generally must be joined if their absence would prevent the court from according complete relief or the third party claims an interest in the subject of the action. FRCP & SCRCP 19. Permitted parties generally may be joined if they seek relief with the plaintiff, or if relief is sought against them and the defendant, and a common question of law or fact will arise in the action. FRCP & SCRCP 20.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Actions before the same court may be consolidated if they involve a common question of law or fact. FRCP & SCRCP 42(a). It is also possible to transfer a case from one federal court to another for the convenience of the parties and witnesses or in the interest of justice. 28 U.S.C. § 1404(a).

5.3 Do you have split trials/bifurcation of proceedings?

Though rare, a court may order separate trials for convenience, to avoid prejudice, or to expedite and economise. FRCP & SCRCP 42(b).

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

In District Court, a case is generally assigned on a random basis to a single judge who presides over the case until its conclusion. USDC Local Civil Rules 40.1–40.3. In Superior Court, a case is generally assigned to a civil calendar. SCRCP 40-I-40-II. The judges on the Superior Court generally change calendars every year or two, but may retain cases from their former calendars in certain circumstances.

6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

The court is empowered to enter a scheduling order and to hold pre-trial conferences in order to manage the case. FRCP & SCRCP 16. The court is also empowered to appoint special masters to assist it in managing the case. FRCP & SCRCP 53. Parties may apply for interim relief in the form of temporary restraining orders or preliminary injunctions. FRCP & SCRCP 65. The moving party must post sufficient security in order to obtain a temporary restraining order or preliminary injunction. FRCP & SCRCP 65(c).

6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

A court is empowered to sanction a party that disobeys a court order with a variety of sanctions including fines, payment of an opponent's attorneys' fees or costs, preclusion from offering evidence, striking of claims or defences, staying the case, dismissal of the case, or entry of default judgment. FRCP & SCRCP 16, 37(b).

6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

A defendant may move to dismiss the complaint for lack of jurisdiction or for failure to state a claim, or to strike redundant, immaterial, impertinent or scandalous portions of the complaint at the time its answer is due (before discovery). FRCP & SCRCP 12(b) & (f). A defendant may also move to dismiss the action after discovery during the summary judgment phase. FRCP & SCRCP 56. A defendant is also able to move for judgment in his or her favour following the plaintiff's presentation of evidence at trial, following the full trial, and after trial.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

Summary judgment may be entered in whole or part for either the plaintiff or defendant if the moving party demonstrates that there is no genuine dispute as to any issue of material fact and it is entitled to judgment as a matter of law. FRCP & SCRCP 56.

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6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

A court is empowered to stay a case for disobedience of a court order until the order is obeyed. FRCP & SCRCP 16, 37(b). A court may also stay enforcement of a judgment pending an appeal. FRCP & SCRCP 62.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

Generally, a party may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defence. FRCP & SCRCP 26(b)(1). Ordinarily, a party may not discover documents that are prepared in anticipation of litigation or for trial by or for another party or its representative. FRCP & SCRCP 26(b)(3). Under normal circumstances, a party need not provide discovery of electronically stored information from sources that are not reasonably accessible because of undue burden or cost (taking into account the proportionality of the cost of obtaining the information versus the amount in controversy in the lawsuit). FRCP & SCRCP 26(b)(2). Absent exceptional circumstances, a party should not be sanctioned for failure to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system. FRCP & SCRCP 37(e).

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

In District Court, the common law generally governs a claim of privilege. Federal Rule of Evidence ("FRE") 501. The Superior Court does not have rules of evidence, but generally follows the Federal Rules of Evidence. The most commonly asserted privileges in civil proceedings are the Attorney-Client Communication Privilege and Work Product Doctrine.

7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

Third parties may be required to produce documents, provide deposition testimony, or to testify at trial by subpoena. FRCP & SCRCP 45.

7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

The court supervises the timing of discovery through its scheduling order, and rules upon any motions for protective orders that seek to limit or preclude discovery and motions to compel discovery. FRCP & SCRCP 16(b), 26(c), 37(a).

7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

As a general matter, there are no restrictions on the use of documents obtained in discovery. However, a party may move for a protective order that limits the use of documents obtained during discovery. FRCP & SCRCP 26(c). The court will typically order that documents containing trade secrets or other confidential research, development or commercial information not be revealed outside of the litigation. FRCP & SCRCP 26(c)(1)(G).

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

In District Court, the Federal Rules of Evidence provide the basic rules. The Superior Court does not have formal rules of evidence, but generally follows the Federal Rules of Evidence.

8.2 What types of evidence are admissible, and which ones are not? What about expert evidence in particular?

Generally speaking, irrelevant evidence, unfairly prejudicial evidence, privileged evidence, evidence not based on personal knowledge, unqualified opinions, and unreliable hearsay are not admissible. FRE 402, 403, 501, 701, 702, and 802. Experts must have sufficient qualifications to provide opinions on the issues for which they have been retained, follow reliable principles and methods, and apply those principles and methods to the facts of the case. FRE 702.

8.3 Are there any particular rules regarding the calling of witnesses of fact, and the making of witness statements or depositions?

Fact witnesses must have personal knowledge of a matter in order to testify concerning that matter. FRE 602. Deposition testimony of a witness with personal knowledge taken in the action is generally admissible if the witness is an opposing party or is not available to testify at trial. FRE 804(b)(1); FRCP & SCRCP 32(a). Written witness statements of opposing parties are admissible against the party opponent, whether or not they are sworn. FRE 801(d)(2). Other witness statements are inadmissible unless they fall within one of the hearsay exceptions. FRE 803–804. Fact witnesses may testify regarding their "lay" opinions if the opinion is based upon the witness' perception and not based upon expert knowledge. FRE 701. Generally speaking, up to 10 witnesses may be deposed by each side in advance of trial. FRCP & SCRCP 30(a).

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Are there any particular rules regarding concurrent expert evidence? Does the expert owe his/her duties to the client or to the court?

Generally speaking, expert witnesses may testify in the form of an opinion at trial if their knowledge is relevant, their opinions are

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based upon sufficient facts, and their opinions are the result of a reliable methodology. FRE 702. Experts are generally required to prepare reports disclosing their opinions and their bases during discovery, and they may be deposed by the party opponent. FRCP & SCRCP 26(a)(2). There are no particular rules concerning concurrent expert evidence, but the courts will judge whether proffered expert evidence will assist the trier of fact. Experts are generally retained by the parties, but the Court may appoint its own expert. FRE 706.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

The court may enter judgment for whatever relief is requested and authorised by law. In civil matters, typical judgments are for the payment of damages, permanent injunctions directing the defendant to take, or refrain from taking, certain actions, appointment of a receiver, or a declaration of the parties' respective rights. FRCP & SCRCP 57, 58.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

A court may order a party to pay attorneys' fees or costs if such fees or costs are recoverable under the party's claim or for violation of a court order, or order the recovery of certain costs to the party. FRCP & SCRCP 16, 37, 54, 58. The court may also order interest on a money judgment to the extent permitted by the substantive law governing the claim.

9.3 How can a domestic/foreign judgment be recognised and enforced?

Domestic and foreign judgments may be filed with the Superior Court and enforced in the same manner as a Superior Court judgment in accordance with the D.C. Uniform Enforcement of Foreign Judgments Act of 1990. SCRCP 62-III.

9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

Appeals from the District Court are governed by the Federal Rules of Appellate Procedure. Appeals from the Superior Court are governed by the Rules of the District of Columbia Court of Appeals.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

The court and parties are encouraged to discuss a possible settlement at, and in preparation for, pre-trial conferences. FRCP & SCRCP 16. In Superior Court, the Scheduling Order typically requires the parties to attend a mediation session at the court's Multi-Door Dispute Resolution Division. SCRCP 16.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

As a general matter, parties may agree to use alternative dispute resolution at any point in the litigation process. Available options include court-appointed and privately engaged mediators, privately engaged arbitrators and private judges. Mediators are neutrals who encourage the parties to reach an agreement. Arbitrators and private judges are empowered by agreement of the parties to resolve the dispute, and the parties are bound to follow that resolution by agreement.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Mediation in the District of Columbia is governed by the Uniform Mediation Act, D.C. Code § 16–4201-16-4213. Arbitration is governed by the Federal Arbitration Act, 9 U.S.C. § 1–307.

1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Generally speaking, any civil case brought in the District of Columbia may use alternative dispute resolution as a means of facilitating resolution of the case.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, force parties to arbitrate when they have so agreed, or order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

District of Columbia courts will enforce reasonable arbitration agreements, with both the procedure and substance of the arbitration agreement scrutinised. In Superior Court the parties may agree to binding or non-binding arbitration. As for mediation, the Superior Court provides trained mediators who can assist the parties in a lawsuit in settling their case before trial. Mediators do not decide the outcome of a case. All agreements reached in mediation are voluntary.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

The Superior Court encourages parties in civil cases to use mediation and arbitration. Mediation results must be voluntary.

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The Superior Court also offers both binding and non-binding arbitration. In binding arbitration, the arbitrator's decision is final and becomes a judgment of the court. This decision carries the same weight as a decision from a judge. In non-binding arbitration, either side of the case can file a request for a "trial *de novo*" or new trial, which is a statement that a person does not want the arbitrator's decision to become a court judgment, and that the case should go to a regular trial process with a judge.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

There are many private mediators and arbitrators in Washington, D.C. JAMS Mediation, Arbitration, and ADR services is one service that employs several former judges as mediators and arbitrators.

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Mr. Hill's fiduciary litigation experience includes multimillion dollar claims involving the fiduciary duties of corporate shareholders, directors, officers, Employee Retirement Income Security Act (ERISA) plan fiduciaries and investment managers and inside and outside counsel. He has represented corporations, insurers, non-profits and beneficiaries in actions alleging breach of fiduciary duties by directors, officers, plan fiduciaries, agents and trustees.

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Zambia

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

Zambia's legal system is based on the English legal system. The legacy of English law has its roots in the British colonial era when Northern Rhodesia, now present day Zambia, was a protected territory of Britain. The basic tenet of the Zambian legal system is the adversarial system of adjudication for both criminal and civil proceedings. The jury system is not provided for under Zambian legislation. The Constitution of Zambia creates the three arms of government, namely, the Executive, Legislature and the Judiciary. Separate pieces of legislation provide for the establishment of the various courts, while the procedure for each court is promulgated by way of statutory instruments usually issued under the hand of the Chief Justice.

The cardinal pieces of legislation, with respect to the constitution and jurisdiction of the courts, are the Local Courts Act, the Small Claims Court Act, the Subordinate Court Act, the High Court Act, the Industrial and Labour Relations Act, the Court of Appeal Act, the Constitutional Court Act, and the Supreme Court of Zambia Act. It is important to note that the Zambian Constitution enjoys supremacy over all legislation and the provision of Article 120 of the Constitution of Zambia provides for the establishment of courts.

It is important to note that, prior to 31st December, 2002, in the event that local procedure in this jurisdiction did not provide for the particular procedure issue, recourse was made to the procedure at that moment being applied in the English High Court of Justice.

However, in 2002, the High Court Practice was limited to English procedure provided in the Rules of the Supreme Court 1965 (The White Book), in particular in the 1999 Edition. Any other civil court practice rules issued after 1999 in England invariably do not apply to Zambia unless they relate to matrimonial causes.

1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

The Zambian civil court system is composed of the Supreme Court which determines all appeals from the Court of Appeal. The Supreme Court is the highest court of the land and the final court of appeal. It is not bound by its judgments. The Supreme Court and the Constitutional Court rank *pari passu* and it is important to state that the Constitutional Court's jurisdiction is limited to cases arising out of the Constitution.

The Constitutional Court has both original and final jurisdiction. The Constitutional Court has original and final jurisdiction to hear a matter relating to the interpretation of the Republican Constitution and matters relating to the violation of the Republican Constitution. Where a question relating to the Constitution arises before any court, the presiding judge may refer the question to the Constitutional Court for determination.

The Court of Appeal has an appellant jurisdiction. Its appellate jurisdiction is to hear appeals from the High Court and quasi-judicial bodies, for example tribunals or arbitrators. An appeal from the Court of Appeal lies to the Supreme Court with leave of the Court of Appeal.

The High Court has both original and appellant jurisdiction. Its original jurisdiction is to the extent that any civil claim exceeding an amount set by the High Court Rules has to be commenced in the High Court. On the other hand, its jurisdiction is appellate to the extent that decisions from the subordinate courts are appealable to the High Court. Currently, it also determines matters relating to the Bill of Rights as enshrined in the Constitution.

The Subordinate Court has original and appellate jurisdiction similar to the High Court; however, its jurisdiction is limited according to the quantum of the claim and the nature of the relief being sought by a party to litigation. The Subordinate Court exercises its appellate jurisdiction when it hears appeals from the Local Court. The appeal for the local courts takes the form of a rehearing on the record and matters are heard afresh (*de novo*). The Subordinate Court has its own rules of court procedure and recourse is had to the County Court Rules ('CCR') in the event of any default on account of a lack of provision to deal with any procedural aspect.

The Local Courts are courts that administer customary law, usually restricted to traditional disputes.

All of the respective courts have rules of Procedure for Civil Matters in terms of Supreme Court Rules, Court of Appeal Rules, High Court Rules, Subordinate Court Rules and Local Court Rules.

Worthy to mention are Small Claims Courts which are presided over by part-time judicial officers called Commissioners, who are in fact practising Advocates. These courts are informal and determine minor disputes by way of a fast track procedure. The decisions are final and not subject to appeal, save for a review by fellow Commissioners. Corporations are not allowed to sue as claimants, but can be sued in the Small Claims Courts. Legal practitioners do not have an audience as in the Local Court and are expressly proscribed from representing parties.

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There are also specialist tribunals and these have the same judicial ranking as the High Court. These include the Lands Tribunal ('LT'), Tax Appeals Tribunal ('TAT') and the Competition and Consumer Protection Tribunal ('CCPT'). The LT deals with all land disputes. The appeals for the Tribunals fall to the Court of Appeal.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

Civil proceedings in Zambia are primarily party driven, save for the Commercial Court, a division of the High Court which is judge driven. Actions are commenced by a party seeking relief from the particular court. Depending on the court, this could be by way of writ of summons, notice of claim, notice of complaint or default writ of summons, originating notice of motion, petition or originating summons. These originating documents set out a claimant's claim in brief and the relief sought. A defendant is expected to prepare a statement of defence in response to the claim. Directions are usually given by the judge setting out the manner in which the pleadings will be settled, how discovery and inspection will proceed, and when and how the trial is to proceed.

As earlier stated, the Commercial Division of the High Court has a peculiar difference with the procedure in other divisions which adopt a party-driven procedure. The Commercial Court on the other hand is judge driven. As such, once a claim is lodged in the High Court, the judge sets up a scheduling conference where the timelines for filing of the pleadings is agreed with the parties. The judge then issues and monitors the agreed schedule by way of order for directions. The judge will then proceed to hold status conferences until the case is set down for hearing. Unlike other civil proceedings in Zambia, the Commercial Court requires written witness statements to be filed into Court and exchanged by parties prior to the trial. The underlying framework is that there should be no trial by ambush as every litigant has a right to have notice of the matters that will arise at trial.

1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

The Zambian courts subscribe to the English law doctrine of freedom of contract. In this respect, where the parties have agreed to grant exclusive jurisdiction to a particular court, the court will readily enforce such an agreement provided the claim is not illegal or contrary to public policy. It is important to note that there are few cases, if any, where the Courts have overridden an exclusive clause in a contract. It is, however, important to note that by virtue of Section 13 of the High Court Act, Chapter 27, Volume 3 of the Laws of Zambia, the Zambian courts are directed to rely on principles of English Common Law and Equity in determining disputes. Thus, when presented with a determination on an exclusive clause, the Zambian court is likely to be persuaded by the English position to the extent consistent with Zambian legislation.

1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

According to Order 40 Rule 1 of the High Court Act, costs which include the expenses incurred by either party in any cause or matter, as well as in the enforcement of the decree or order of the court therein, are recoverable. They are awarded by the court in the exercise of its discretion in accordance with Order 40 Rule 6 of the High Court Act in the case of the High Court. This procedure is the same in all the other Zambian courts.

The taxing master is a judicial officer who determines the quantum of the costs through a process of taxation of party-to-party costs. The taxing master's determination is based on statutory charge out rates provided for in a statutory instrument that governs legal practitioners costs, called the Legal Practitioners' (Costs) Order, 2017, Statutory Instrument No. 6 of 2017.

The general rule is that costs follow the event. In other words, the unsuccessful party bears the costs. The costs can either be party-to-party costs or client-to-solicitor costs; either can be subject to determination by the taxing master in the event of a dispute. However, the courts or judges enjoy a wide discretion in determining the question of costs.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

Please refer to the response to question 1.7, which answers the first part of this question.

On the question of contingency fees, Rule 9(1) of the Legal Practitioners' Rules Statutory Instrument No. 51 of 2002 ('the Rules') prohibits success based or contingency fees. Rule 9 of the Rules provides as follows:

> "*9. (1) subject to sub-rule (2) a practitioner shall not, in respect of any claim arising from death or personal injury, either enter into an arrangement for the introduction of clients with or act in association with any person, not being a practitioner whose business is to make, support or prosecute, whether by action or otherwise, and whether by a practitioner or agent or otherwise, any claim arising from death or personal injury and who in the course of such business solicits or receives contingency fees in respect of such a claim.*
>
> *(2) Sub-rule (1) shall not apply to an arrangement or association with a person who solicits or receives contingency fees only in respect of proceedings in a country outside Zambia, to the extent that a local lawyer in that country would be permitted to receive a contingency fee in respect of such proceedings.*"

1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

The principle in Zambia is that a debt can be assigned as per usual law of contract. However, with respect to a non-party to litigation to finance proceedings, the Zambian courts are likely to examine the doctrine of maintenance and champerty. As stated earlier, the Zambian courts to a very large extent consider English authorities to be highly persuasive. To this extent, the holding of the English Courts on the defence of champerty in the case of ***Camdex v. Bank Zambia (1997) CLC 74***, where the defence of champerty failed with respect to assignment of a debt would be most instructive. Similarly, so would be the English case of ***Donegal International Limited v. Republic of Zambia (2007) EWHC 197***.

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1.8 Can a party obtain security for/a guarantee over its legal costs?

According to Order 40 Rule 7 of the High Court Act, upon an application by a defendant the court or judge may require the plaintiff in any suit to give security for costs to the satisfaction of the court or a judge, and the court or judge may also require the defendant to give security for costs of the proceedings undertaken in his interest. The common instances where a defendant applies for security for costs are where the plaintiff is based outside the jurisdiction and where a plaintiff is of questionable means or has no fixed abode.

Further, Order 10 Rule 8 of the Court of Appeal Act provides that the court at its discretion may at any time order security for costs or further security for costs to be given in an appeal. The security for costs to be given may also include payment for past costs relating to the matters in question in the appeal.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

The Rules in Zambia do not have a process of pre-action steps to be taken, save in the instance where leave is sought prior to using the originating process. In the case of ***Horsham District Council and Another, Ex. Parte (1994) 4 All ER 681***, the courts guided parties seeking to issue Judicial Review proceedings to deliver a letter before action in order to determine that the intended respondent was put on notice. This is predominantly in cases of Judicial Review, where a party seeks to issue court process as a defendant who resides outside the jurisdiction and against companies that are subject to winding-up proceedings. Additionally, a person who is adjudged or certified to be a vexatious litigant equally must seek leave of court before commencing an action.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

The law regarding limitation of actions in Zambia is governed by the provisions of the British statute known as the Limitation Act of 1939, whose application is extended to the Zambian jurisdiction by virtue of the provisions of Section 2 of the British Acts Extension Act Chapter 10, Volume 2 of the Laws of Zambia. Section 2 of the Act provides as follows:

> "*2. The Acts of the Parliament of the United Kingdom set forth in the Schedule shall be deemed to be of full force and effect within Zambia.*"

The Schedule to the British Acts Extension Act lists the British Limitation Act, 1939 as applicable to Zambia for purposes of determining causes with respect to limitation.

However, the British Limitation Act, 1939 is subject to amendments by the Zambian statute called the Law Reform (Limitation of Actions, Etc.), Chapter 72, Volume 6 of the Laws of Zambia. Section 3 of the Law Reform (Limitation of Actions, Etc.) Act provides as follows:

> "*3. (1) In its application to the Republic, the Limitation Act, 1939, of the United Kingdom, is hereby amended as follows:*
>
> *(a) by the insertion of the following proviso at the end of subsection (1) of section 2:*
>
> *Provided that, in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years.*
>
> *(b) by the addition at the end of section 22 of the following subsection:*
>
> *(2) In the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person-*
>
> *(a) the preceding provisions of this section shall have effect as if for the words "six years" there were substituted the words "three years"; and*
>
> *(b) this section shall not apply unless the plaintiff proves that the person under the disability was not, at the time when the right of action accrued to him, in the custody of a parent.*
>
> *(c) by the insertion in subsection (1) of section 31 after the definition of "personal property" of the following definition:*
>
> *"personal injuries" includes any disease and any impairment of a person's physical or mental condition.*"

The statutory amendment to reduce the limitation period from six (6) years to three (3) for actions for damages for negligence, nuisance or breach of duty in Zambia is only in respect of personal injuries. With respect to tortious liability (for conversion and misfeasance in public office) the limitation period is six (6) years.

The same limitation period of six (6) years also applies to contractual liability.

The limitation periods are treated as a substantial right and the same can be pleaded as a defence or an issue raised *in limine* to have the action dismissed summarily.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

As earlier stated in section 1, civil proceedings are commenced by a party instituting an action depending on the cause of action and rules of a particular court. This could be by way of writ of summons, originating summons, originating notice of motion, petition, notice of claim, appeal, notice of complaint or default writ of summons filed into court by the Plaintiff as provided under the respective rules of the particular court.

Service of process as a general rule has to be effected personally. In the event that service cannot be effected personally, an application to the respective court is made for an order to effect service by means of substituted service, e.g. advertisement in a newspaper of wide circulation.

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For parties based out of the Zambian jurisdiction that are sued, the rules provide that leave has to be sought from the court to issue and serve court process out of jurisdiction.

3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

There are no pre-action remedies available in Zambia. Only in post-action interim remedies such as injunctions, and in Judicial Review proceedings, is grant of leave operating as a stay of a decision of an administrative body available. However, there is an exception in arbitration proceedings where a party can move the High Court for interim relief before filing a statement of case.

3.3 What are the main elements of the claimant's pleadings?

The claimant's pleadings include a concise narration of the claim accompanied by a detailed statement in the form of either a statement of claim or an affidavit in support of the notice of complaint. These set out the core facts that constitute the cause of action. The nature of the precise document entirely depends on the rules that prescribe the procedure of that particular court. The pleadings must be concise and evidence is not permitted to be pleaded.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Pleadings can be amended upon application to court. The only restriction is that the amendments should not prejudice or embarrass the other party to the litigation. Amendments can be made at any time. The first amendment does not require leave.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

A plaintiff may withdraw any part of his claim before the date fixed for the hearing by giving written notice of such withdrawal to the registrar and to every defendant as to whom he desires to withdraw. This is provided under Order 17 of the High Court Rules of the High Court Act.

After receipt of the notice of withdrawal, the defendant will only be entitled to costs incurred up to the time of receipt of such notice unless the court or judge otherwise orders.

A plaintiff may also discontinue a matter against a defendant and this is done by giving notice to the Registrar to discontinue the suit. However, upon the lodgement of a Notice of Discontinuance, the plaintiff may be liable to bear the costs of the proceedings.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

A statement of defence consists of a traverse of each of the claims made by the claimant in the statement of claim, as well as a counterclaim, if any. Defendants are at liberty to make counterclaims by filing a defence together with a counter form.

It is important to note that in the Commercial Division of the High Court, a defendant is not allowed to offer statements that fall in the realm of bare denials, as the party setting a defence must specifically traverse the pleadings in the plaintiff's claims. The plaintiff is at liberty to apply to enter a judgment on admission if a defendant lodges a statement of defence falling in the realm of bare denials.

4.2 What is the time limit within which the statement of defence has to be served?

With respect to filing a defence, this is dependent on the distance between the High Court registry and the physical address of the plaintiff. The minimum time limit is 14 days, while the maximum is 42 days. Times within which an appearance must be entered on court writs are governed by the provisions of Practice Direction No. 4 of 1977.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

The most common way in which a defendant can share liability is through joinder of parties. More specifically, a defendant can join a party for purposes of being indemnified or seeking contribution to liability after the successful prosecution of a Plaintiff's claim. These are referred to as Third Party proceedings. This is in line with Order 14 Rule 4 of the High Court Rules of the High Court Act.

An application for contribution is available in tortious liability claims. This would also apply in contribution claims during winding-up proceedings where the defendant or a third party can apply to the court to have the third party joined to the proceedings.

4.4 What happens if the defendant does not defend the claim?

The court will, upon proof of proper service, enter a judgment in default of defence and appearance. This is pursuant to Order 35 Rule 3 of the High Court Rules of the High Court Act. However, this is only with respect to liquidated (quantified) claims, for example a debt collection claim. In the event that the claim is for unliquidated (unquantified) damages, a judgment cannot be entered in default; as such, the matter has to be set down for trial notwithstanding that a defence has not been entered.

The general rule is that judgments in default are usually set aside to allow for a matter to be heard on its merits. Some actions proceed to trial notwithstanding lack of a defence. For example, in ***Muliango and Another v. Masaga and Another***, the learned trial judge found that the defence furnished by the first defendant appeared to be valid and would succeed if sufficiently supported by evidence. In consequence, it was found that this was a case where a full trial was necessary to establish liability and the defendant should have an opportunity to defend.

4.5 Can the defendant dispute the court's jurisdiction?

Where necessary, the defendant has a right to challenge the jurisdiction of the court. As a matter of practice and procedure, such a challenge must be brought as a preliminary issue (*issue in limine*) before submission of the defendants' statement of defence. In this case, it would be prudent to enter what is referred to as a conditional appearance, which is a notice of intention to defend under protest pending an application to set aside the originating process on the

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grounds that the court is wanting in jurisdiction. The court will not proceed to set down the matter for hearing until the issue of jurisdiction is determined.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

The provisions of Order 14 Rule 4 of the High Court Rules of the High Court Act provide for this to the effect that the defendant can apply to the court to have a third party joined to the proceedings. Additional provisions are to be found in Order 16 of the Rules of the Supreme Court (The White Book) 1999 Edition, Volume 1 with respect to joinder of parties and third party proceedings. The circumstances in which third-party notice can be issued by a defendant against a person who is not already a party to an action are: (a) where a defendant who has given notice of its intention to defend claims against a person not already party to the action; or (b) where a defendant claims against such a person any relief or remedy relating to or connected with the original subject matter of the action and which is substantially the same as some relief or remedy claimed by the plaintiff.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Two sets of proceedings can be consolidated provided that separate claims are by and against the same parties, on the same rights, arising from the same facts and that it would be expedient to consolidate them. This is inferred from the provisions of Order 14 Rule 8 and 9 of the High Court Rules of the High Court Act.

5.3 Do you have split trials/bifurcation of proceedings?

The Zambian Civil Rules do not have provision for split trials.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

In the High Court, the judge in charge is given powers to allocate cases, the deputy judge in charge allocates the cases in the Commercial Registry while in the Subordinate Court the Chief Principal Magistrate is the one in charge of allocation of cases. However, these measures are administrative and are revisited from time to time by the Chief Justice. Allocation also depends on the case, e.g. labour matters go to the labour division.

6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

The courts do have such powers and some of the interim applications that parties can make are injunctions. These have the consequences of either compelling a party to do something (e.g. make a security deposit) or restraining a party from doing something (e.g. from disposing of property that is the subject matter of the litigation). The courts also issue the parties with Orders for Direction which they are to comply with, failing which they can be condemned to bear costs. The Commercial Court prescribes for the payment of a hearing fee.

6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

In Zambia, like many other Commonwealth jurisdictions, the court's power to punish persons who defy or disobey court orders is by way of committed proceedings (contempt of court) proceedings. With respect to the failure of a party to abide by case management orders or orders for directions, the court will condemn a party to bear costs for failure, and the Commercial Division will impose a punitive hearing payable before the next hearing date.

6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

Where the action is vexatious, the court may, in accordance with Section 16 of the High Court Act, strike out the claim. A party to an action may also make an application to set aside a matter for irregularity in accordance with Order II Rule 2 of the Rules of the Supreme Court (The White Book) 1999 Edition.

Additionally, Order 18 Rule 2 of the Rules of the Supreme Court (The White Book) 1999 Edition states that:

"*The Court may at any stage of the proceedings order to be struck out or amended any pleading or indorsement of any writ in action, or anything in any pleading or in the indorsement, on the ground that-*

(a) it discloses no reasonable cause of action or defence , as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or it is otherwise abuse of the process of the Court;

and may order the action to be stayed or dismissed or judgement to be entered accordingly as the case may be."

6.5 Can the civil courts in your jurisdiction enter summary judgment?

Order 13 of the High Court Rules of the High Court Act as read with Order 14 of the Rules of the Supreme Court (The White Book) 1999 Edition provide that the court may enter summary judgment upon an application by the plaintiff stating that there is no defence on the merits to the action.

The court may also enter Judgment on Admission where a defence fails to traverse the allegations, as it will be deemed to have admitted the allegations as stated in Order 53 Rule 6(5) of the High Court Rules of the High Court Act; further, Order 27 of the Rules of the Supreme Court 1999 Edition, Volume 1 provide that a party may give notice by his pleading in writing that he admits the truth of the whole or part of the case of any other party.

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6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

The court may discontinue the proceedings at the option of the party who has sued. The action can be recommended but this is subject to payment of costs before a new action can be recommended.

The procedure to stay proceedings is available in the court's inherent jurisdiction. The circumstances in which this is usually granted are where there is an appeal on a ruling by the judge during a trial, and a party appeals to the Court of Appeal before the conclusion of said trial. In an effort not to render the appeal nugatory, in the event that the appeal succeeds, the Court will order a stay of proceedings.

Under the provisions of Section 11 of the Arbitration Act No. 19 of 2000, a party in arbitral proceedings may, before or during arbitral proceedings, make an application to the court for an interim measure.

It is also common to stay proceedings where there is a jurisdictional challenge on a case.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

In the post-commencement of an action there is an elaborate procedure of discovery and inspection. The only class of documents that do not require disclosure are public documents, i.e. documents available in the public domain.

Pre-action disclosure is invoked in exceptional circumstances, and the provisions of Order 24 Rules 1 and 2 (24/7A/7) of the Rules of the Supreme Court (White Book) 1999 Edition, Volume 1 states that an order for the disclosure of documents before an action (or by a non-party) will not be for general discovery of documents under Rule 3. Thus, the order should therefore specify or describe the documents to be disclosed with care and precision.

Lastly, Order 24 Rules 1 and 2 (24/2/3) of the Rules of the Supreme Court (White Book) 1999 Edition, Volume 1 note that the meaning of 'documents' is not restricted to paper writings, but extends to anything upon which evidence or information is recorded in a manner intelligible to the senses or capable of being made intelligible by the use of equipment. Furthermore, 'inspection' extends to examining such recordings or other documents with appropriate equipment. For example, a computer database which forms part of the business records of a company is, in so far as it contains information capable of being retrieved and converted into readable form, a 'document' for the purposes of Order 24 and is therefore susceptible to discovery. In ***OTK Ltd v. Amanita Zambiana Ltd. and Others (2005/HPC/0199) [2011] ZMHC 23***, it was argued that emails are also documents by virtue of the said definition and as such, they needed to be authenticated before their production into evidence, as is the case with a tape recording or transcript made by a device. The test established is that the proponent must present proof that the article is what the proponent claims it to be.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

The general rule is that documents privileged in Zambia are not admissible for the purposes of civil proceedings. This includes documents protected by legal professional privilege. However, according to Order 24 Rule 5 (15) of the Rules of the Supreme Court (White Book) 1999 Edition, Volume 1 information obtained by an Advocate from his client with a view of giving his client legal advice, such information is not privileged unless obtained with a view to contemplated or existing litigation.

7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

There are no rules with respect to disclosure by third parties.

7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

According to Order 24 Rule 7 (1) (24/7) of the Rules of the Supreme Court (White Book) 1999 Edition, Volume 1, the court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any documents specified or described are, or have at any time been, in his possession, custody or power, and if not in his possession, custody or power when he parted with them, what has become of them. In order to bring this order into effect, an application under this rule must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, in his possession, custody or power of the document, or class of document, specified or described in the application and that it relates to one or more of the matters in the cause or matter.

7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

According to the provisions in Order 24 Rule 14A (24/14/A/2) of the Rules of the Supreme Court (White Book) 1999 Edition, Volume 1, the following was elucidated: a party who obtains discovery may use the documents disclosed to him only for the proper purposes of conducting his own case, and there is an implied undertaking by him not to use them for any collateral or ulterior purpose. Any misuse of the documents may be restrained by injunction or punished as contempt (e.g. ***The Distillers Co. (Biochemicals) Ltd v. Times Newspaper Ltd [1975] Q.B. 613 following Alterskye v. Scott [1948] 1 All E.R. 469 at 471***).

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

All evidence should be relevant and admissible to the facts. A witness who has been called to give evidence before the court shall adduce such evidence *viva voce* (word of mouth). However, the court may request that a party adduces his evidence by way of affidavit. Order 53(2) of the High Court Rules of Zambia states that witness statements shall be treated as evidence in chief of the witness and should contain all the facts relevant to the claim,

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defence or counter claim as the case may be, and make reference to the documents relied upon in the bundle of documents.

8.2 What types of evidence are admissible, and which ones are not? What about expert evidence in particular?

The law of evidence in Zambia is based on the Evidence Act and the common law principle of the best evidence rule. The courts admit oral or parole evidence (witness testimony) which is usually complemented by documentary evidence. The rules of who has custody, contemporaneity, authorship and originality of the evidence to be admitted are among the various factors the court will consider before admitting any evidence. As a general rule, hearsay evidence is inadmissible, except under the exceptions under English Law such as *res gestae*, dying declarations, etc.

Other rules of evidence include authentication and notarisation of foreign documents before they are admitted, corroboration and rules on admission of computer-generated evidence.

Expert evidence is admissible in Zambian courts. An expert is one who connotes receipt of formal training and qualification, but this is not always the case. One may be an expert even if they have never been to school and only have informal training; mere experience may also suffice. However, aspects of formal qualifications or many years of service are important and not admissibility of the evidence. An expert cannot testify on everything and thus, his testimony is restricted. His opinion is not admissible upon materials which are not before court or which have merely been reported to him as hearsay. He can give an opinion on facts which are admitted or proved by him or other witnesses in his hearing at the trial.

8.3 Are there any particular rules regarding the calling of witnesses of fact, and the making of witness statements or depositions?

As a general rule, a witness must give evidence only of facts within his knowledge and recollection and not of his opinions. An exception to this general rule is the case of an expert witness such as a doctor who is permitted to give his opinion on the subject in which he is considered by the court to be an expert.

As stated earlier, witness statements are only required in the commercial court of the High Court. In other proceedings, whose proceedings can be disposed of in chambers, evidence is received by mode of affidavit evidence, for example in foreclosure proceedings or Judicial Review proceedings.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Are there any particular rules regarding concurrent expert evidence? Does the expert owe his/her duties to the client or to the court?

The expert witness must either observe the facts on which his opinion is based, or he must make a hypothesis. He owes his duties to the court and not to the client. According to Order 38 Rule 4 (3) of the Rules of the Supreme Court (White Book) 1999 Edition, Volume 1, an expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion. Where an expert witness who prepares a report and cannot assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report. Where a court expert is appointed in a cause or matter, any party may, on giving to the other parties before the trial in reasonable time notice of his intention to do so, call one expert witness to give evidence on the question reported.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

The courts have wide powers to give relief in certain cases. For example, the court can grant the following: an award of damages (typically a sum of money to a person as compensation for loss or injury); prerogative orders under judicial review; specific performance under contract law; orders for interpretation of statute; orders for breach of contract and tortious liability; declaratory orders; declarations ascertaining the rights of litigants and declaratory orders for interpretation of statute.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

The answer to the question on damages is above.

Our courts are granted the jurisdiction to make rulings and orders on damages, interests and costs. If damages have been specifically pleaded and a party is successful, our courts have the power to award damages and interest is charged from the date of the writ at the Bank of Zambia lending rate. As earlier stated, costs follow the event and are usually given to the successful party at the end of the litigation. Section 2 of the Judgements Act of Zambia No. 16 of 1997 states that:

> "*Every judgement, order of decree of the High Court or of a subordinate court whereby any sum of money, or any costs, charges or expenses, is or are to be payable to any person shall carry interest from time to time of entering such judgement, order, or decree until the same shall be satisfied, and such interest may be levied under writ of execution on such judgement, order or decree.*"

9.3 How can a domestic/foreign judgment be recognised and enforced?

Domestic judgments are enforceable in the country pursuant to the provisions of Order XLII of the High Court Rules of the High Court Act, Chapter 27, Volume 3 of the Laws of Zambia. Foreign judgments in this jurisdiction are enforceable pursuant to the provisions of the Foreign Judgments (Reciprocal Enforcement) Act, Chapter 76, Volume 2 of the Laws of Zambia. This Act makes provision for the enforcement in the Republic of Zambia of judgments given in foreign countries which accord reciprocal treatment to judgments given in the Republic of Zambia, to facilitate the enforcement in foreign countries of judgments given in the Republic of Zambia.

9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

A notice of appeal must be made within 14 days from the date of the judgment. According to Section 17 of the High Court Act, civil appeals from the subordinate court shall be heard by one judge unless the Chief Justice directs that it be heard by two, in which case if the two judges differ in opinion, the appeal will be dismissed.

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An appeal is the hearing of the matter on the record. The appellant must therefore file the Record of Appeal within 60 days of the filing of the Notice of Appeal and Memorandum of Appeal. The Record of Appeal should contain all the documents that were relied upon by the parties in the court bellow. The Record of Appeal is filed together with the 'Appellant's Heads of Argument' and these must be served to the respondent. The respondent has the right to respond by filing the 'Respondent's Heads of Arguments'.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

In this jurisdiction the court, in particular the High Court, has incorporated in its procedures rules to encourage parties to settle amicably using the court system. These rules are called Mediation Rules. The Mediation Rules encourage parties to settle court cases on the side lines of court proceedings through the use of court-accredited mediators. A court can also order mediation on its own motion.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

There has been an increase in the use of arbitration, mediation and tribunals by litigants in Zambia. Arbitration is very common in commercial matters. Arbitration proceedings are governed by the Arbitration Act No. 19 of 2000, and by virtue of the provisions of Section 8 of the Act. The Arbitration Act incorporates the UNCITRAL Model Law and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The rule is, if the parties have agreed to have an arbitration clause in the agreement, then the Zambian courts have no jurisdiction to adjudicate on the matter. The court, however, can grant an interim relief to facilitate an arbitral tribunal discharging its functions. Mediation is court-annexed.

Most specialised contracts prefer arbitration because it is quicker and the parties can get an expert in the subject area of the contract to arbitrate. There are two recognised arbitral institutions, namely the Zambia Association of Arbitrators ('ZAA') and the Chartered Institute of Arbitrators Zambia Branch ('CIArbZB').

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

The Arbitration Act governs the process of arbitration while some of the rules are found in the High Court Act, Chapter 27, Volume 3 of the Laws of Zambia.

1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

In Zambia, the settlement of criminal matters is a preserve of the courts and they cannot thus be settled using alternative dispute resolution, as read in Section 6(2)(c) of the Arbitration Act No. 19 of 2000.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, force parties to arbitrate when they have so agreed, or order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

The Arbitration Act has comprehensive provisions in arbitration to provide for interim or provisional protection.

Arbitration in Zambia is dependent on the agreement of the parties.

In the case of mediation, the court can refer the matter to mediation; however, the parties are not forced to reach an agreement. The reference to mediation by a court is an order, and as such, parties cannot refuse to go for mediation. In the event that no agreement is reached by way of mediation, the matter is referred back to the court for trial.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

Arbitration awards in Zambia are conclusive and final, thus a party cannot appeal against an arbitration award. On the other hand, mediation agreements or settlements need to be registered in the courts for them to be recognised as binding.

Arbitration agreements can only be set aside on similar grounds as a contract can be set aside; namely, fraud illegality, misrepresentations, etc.

Rule 21(1) of the Industrial Relations Court (Arbitration and Mediation Procedure) (Amendment) Rules, 2007 states that where the mediation fails, the record of proceedings should be returned to the court. Therefore, refusing to reach agreement through mediation attracts no sanctions.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

In Zambia, the main institute that deals with alternative dispute resolution is the CIArbZB.

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Mr. Linyama is a partner of Eric Silwamba, Jalasi and Linyama Legal Practitioners. He was employed by the firm among the graduating students at the University of Zambia in 2003. He has acquired vast experience in diverse areas of litigation, *inter alia*: Commercial Law, Criminal Law, Administrative Law, Mining Law and General Business Law; Corporate advisory in major areas of Company Law; Secretarial Services for various locally owned and multi-national companies operating in Zambia; Corporate Compliance; and has conducted due diligence in matters related to the business and mining sectors. Equipped with negotiating skills, he was part of the Main and Sub-Committees of the negotiations with the government of the Republic of Zambia and the Chinese investors on the Multi-Facility Economic Zones ('MFEZ') for the Chambishi and Lusaka Areas of the Republic of Zambia, was involved in drafting the Investment Promotion and Protection Agreement for the MFEZ, and was Lead Counsel in the acquisition of Mining Companies, Nominated Law Association of Zambia Member and also a Member of the current Zamseed Administration Committee. He is currently serving as Board Chairman of Zambia Railways Limited.

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Eric Silwamba, Jalasi and Linyama Legal Practitioners

Eric Silwamba, Jalasi And Linyama Legal Practitioners is a Zambian Law Firm. The firm has been in existence for over 30 years as Eric Silwamba and Company. In 2013, it was rebranded to Eric Silwamba, Jalasi And Linyama Legal Practitioners following the admission to partnership of Joseph Jalasi and Lubinda Linyama. It has, over the years, developed to the level of being among the top law firms in Zambia. The firm offers boutique-style legal services to its clients. The firm, unlike its competitors, is able to offer a wide range of services from Criminal to Civil Litigation to Corporate and to Mergers and Acquisitions.

The firm in 2017 was admitted to join the Nextlaw Referral Network, which is operated by Dentons, the world's largest firm by headcount. The Nextlaw Referral Network is a non-exclusive independent network of law firms.

The firm is engaged in high-level dispute resolution which ranges from Tax, Banking and Finance, Corporate, Mining, Energy, Environmental and Criminal litigation.

The firm is regularly published in the *International Comparative Legal Guides* to Mining Law, Corporate Tax, Commercial Real Estate, International Arbitration, Energy and Litigation & Dispute Resolution.

The firm has actively developed its practice with respect to legislative drafting. The firm has hired the services of Mrs. Doris K. Mwiinga, former Clerk of the National Assembly and a Chief Parliament Counsel, to lead the growth of this department.

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