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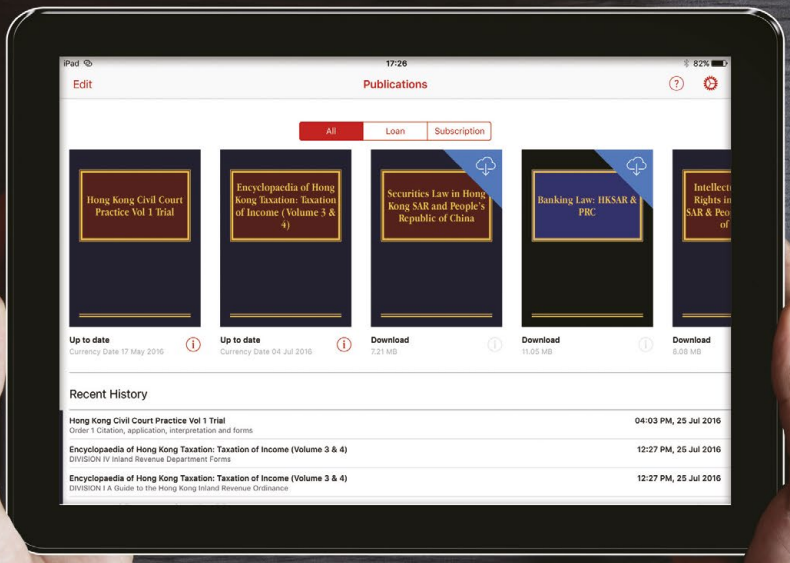

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Feature Article – Promoting efficacy in arbitration practice: Australia's pro-arbitration regime and key developments in the ACICA Arbitration Rules

Authors: Deborah Tomkinson[1] and Cindy Wong[2]

A. Introduction

Arbitration is considered to be a flexible, cost-effective procedure for commercial dispute resolution. Compared with conventional court proceedings, arbitration is a private dispute resolution process, which provides greater autonomy to parties and tribunals to conduct proceedings in a manner suitable to the circumstances of the case. At an international level, arbitration has the advantage of greater certainty (given the limited bases on which an award can commonly be challenged) and enforceability of awards globally under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ('New York Convention'). International arbitration allows parties to have disputes determined in a chosen neutral forum (without any concerns of unfair bias that may exist in a local court system) by a tribunal that they feel confident is independent and impartial. As such, international arbitration continues to be the preferred means of resolving cross-border disputes[3].

The Australian Centre for International Commercial Arbitration ('ACICA') is Australia's international arbitral institution. In the *LexisNexis® Dispute Resolution Law Guide 2014*, we outlined legislative reforms undertaken in Australia and key provisions of the ACICA Arbitration Rules 2011 aimed at reinforcing the benefits of arbitration and ensuring the expediency and neutrality of the process and the enforceability of the outcome. Australia is now recognised as providing a safe and neutral seat for arbitration, supported by a modern, transparent legal framework, an independent judiciary and highly experienced legal practitioners and arbitrators.

In the field of arbitration, procedures are constantly being developed and innovations made to improve arbitral processes. Following an extensive review and consultation process, ACICA introduced an updated edition to its Arbitration Rules ('2016 Rules') and Expedited Arbitration Rules in 2016 to provide additional tools to parties seeking to streamline their procedures. This article briefly outlines the primary reasons Australia represents a safe

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3 See School of International Arbitration, Queen Mary University of London and White & Case, *International Arbitration Survey: Improvements and Innovations in International Arbitration (2015)*, available at www.arbitration.qmul.ac.uk/research/2015

and neutral seat to parties wishing to arbitrate cross-border disputes and details key provisions of the 2016 Rules that may be used to ensure an efficient and suitable arbitration procedure.

B. Australia's Pro-Arbitration Regime

Modern Legislative Framework

Commercial arbitration in Australia is governed by a bifurcated regime. The Federal regime, the International Commercial Arbitration Act 1974 (Cth) ('IAA'), regulates international commercial arbitration. The State regimes, referred to in this article as the Commercial Arbitration Acts ('CAAs')[4], regulate domestic arbitration.

The IAA gives force of law and effect to the 2006 version of the UNCITRAL Model Law on International Commercial Arbitration ('Model Law'), which is designated as the exclusive mandatory procedural law for all international arbitrations seated in Australia, and to Australia's obligations under the New York Convention. The IAA limits the scope of judicial intervention in proceedings, including the bases on which recognition and enforcement of an award may be resisted. Amendments made to the IAA in 2015 operate to further broaden the scope for enforcement of foreign arbitral awards in Australia to those from any State, removing a prior provision which limited enforcement power to awards to which the New York Convention applied[5]. The IAA also establishes a comprehensive confidentiality regime to protect parties' interests. Previously an opt-in provision, the 2015 amendments to the legislation ensure that confidentiality applies unless the parties exclude the provision, in keeping with international expectations. Accordingly, the IAA provides a familiar, clear and effective modern legislative framework for international arbitration in Australia.

The CAAs incorporate much of the Model Law, with necessary modifications adapted to Australia's domestic setting, providing a high level of uniformity at domestic and international levels. The CAAs express, as the overriding objective, the facilitation of a 'fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense'[6]. The functions of the tribunal must be exercised so that (as far as practicable) this objective is achieved[7].

Judicial Respect for Arbitration

International and domestic arbitration in Australia benefits from a highly independent and respected judiciary, supportive of the arbitral process and rigorous in enforcing arbitral awards and agreements. Australian courts are extremely efficient and of the highest integrity.

4 The Model Commercial Arbitration Bill was agreed upon by the Standing Committee of General Attorneys in 2010 as a means of creating a uniform domestic arbitration law throughout Australia. With the exception of the Australian Capital Territory, all Australian States and Territories have adopted and enacted versions of the Model Bill, creating a uniform framework for domestic arbitration in Australia. The CAAs are Commercial Arbitration Act 2010 (New South Wales), Commercial Arbitration (National Uniform Legislation) Act 2011 (Northern Territory), Commercial Arbitration Act 2013 (Queensland), Commercial Arbitration Act 2011 (South Australia), Commercial Arbitration Act 2011 (Tasmania), Commercial Arbitration Act 2011 (Victoria), and Commercial Arbitration Act 2012 (Western Australia).

5 Civil Law and Justice (Omnibus Amendments) Act 2015 (Cth)

6 See section 1C(1) of CAAs NSW, SA, NT, TAS and WA and section 1AC(1) of CAAs VIC and QLD

7 See section 1C(3) of CAAs NSW, SA, NT, TAS and WA and section 1AC(3) of CAAs VIC and QLD

Australia's highest court, the High Court of Australia, has unanimously upheld the finality of international arbitral awards and the voluntary nature of international arbitration agreements, recognising the role of the courts in supporting arbitration[8]. Decisions of the Federal Court of Australia and various State Supreme Courts over the course of recent years demonstrate the judiciary's ongoing commitment to maintaining the right balance between court support and intervention in the arbitral process[9]. A recent comparative analysis of the approaches taken over the course of the last two decades by Australian, Singaporean and Hong Kong courts with regard to the adoption and interpretation the Model Law concluded that judgments of Australian courts exhibit highly sophisticated internationalist decisions. The analysis showed that over the course of the last five years, Australian courts have been particularly strong in their display of internationalism when interpreting the Model Law[10]. The approach of the courts instils great confidence in Australia as a venue for arbitration.

8 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5

9 See for example *Gutnick v Indian Farmers Fertiliser Cooperative Ltd* [2016] VSCA 5, *Ye v Zeng* [2015] FCA 1192 and *Ye v Zeng (No 2)* [2015] FCA 1243, and *Robotunits Pty Ltd v Mennel* [2015] VSC 268

10 Lecture by Dr Dean Lewis (Partner, Pinsent Masons, Hong Kong) on 19 April 2016 at the Australian Disputes Centre. For further reading, see D. Lewis, *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration: Focusing on Australia, Hong Kong and Singapore*, 2016, Wolters Kluwer

Legal Expertise

Australia is home to a highly competent and culturally diverse legal profession. Its tertiary institutions provide a world-class legal education such that the Australian legal profession has a consistently high standard of practitioners with specialist expertise in international business law and cross-border disputes. Australian law firms and members of the Australian Bar have considerable international experience, earning an enviable reputation not only for their specialist legal skills but also their cultural awareness and sensitivity. Australian legal expertise is highly cost-competitive when compared with counterparts in the Asia Pacific region. In addition, the IAA and the 2016 Rules both recognise parties' right to representation of their choice, whether based in Australia or overseas[11].

Some of the world's most highly regarded international arbitrators call Australia home. ACICA maintains extensive panels of over a hundred expert international arbitrators and highly experienced international mediators, based both in Australia and overseas. The Australian Maritime and Transport Commission ('AMTAC'), a commission of ACICA, is an innovative provider of maritime and transport dispute resolution services, catering to the specific needs of the maritime and transport industry in the Asia Pacific region. AMTAC provides a panel of arbitrators with specific expertise in international maritime and transport arbitration.

Infrastructure to Support Arbitration

Arbitrations seated in Australia benefit from strong institutional and administrative support through ACICA and a network of centres including the Australian Disputes Centre in Sydney and the Melbourne Commercial Arbitration and Mediation Centre, which provide

11 See section 29(2) of the IAA and article 8.1 of the ACICA 2016 Rules

world-class hearing and logistical support for arbitration and mediation proceedings.

ACICA has provided support for commercial arbitration and mediation in Australia since its inception in 1985. In 2005, ACICA launched the ACICA Arbitration Rules which have since been updated twice in 2011 and 2016. The ACICA Expedited Arbitration Rules can be used for fast-tracked arbitration, typically for lower value or less complex disputes. The Rules are regularly reviewed to ensure that they continue to reflect international best practice.

C. Developments in the ACICA Arbitration Rules

As a not-for-profit institution, ACICA seeks to promote and facilitate the efficient resolution of commercial disputes throughout Australia and internationally by arbitration and mediation, and to educate users about alternative dispute resolution.

To this aim, ACICA provides a variety of services, including acting as an impartial appointment and administering body for arbitration and mediation, providing rules and model clauses to facilitate best practice in the conduct of arbitration and mediation, maintaining panels of international arbitrators and mediators which may be used as a resource for party appointments, assisting parties in arranging facilities to manage their alternative dispute resolution processes, acting as deposit-holder of tribunal and mediator fees in alternative dispute resolution processes (including cases being administered under other institutional rules), and hosting seminars and conferences to provide thought leadership in international arbitration and mediation. ACICA is also the sole default appointing authority competent to perform the arbitrator appointment functions under the IAA.

The 2016 Rules reflect the institution's objective to ensure that arbitration is expeditious, cost-effective and fair. They draw on the broad international arbitration experience of members of the ACICA Rules Committee based in Europe, the Middle East and Asia, and input from users, in order to provide enhanced processes for efficient dispute resolution. The 2016 Rules contain innovations that facilitate a user-friendly arbitral process and are reflective of current best practice, providing an expedited process for lower value or urgent disputes, joinder and consolidation provisions, a requirement that parties use best endeavours to ensure their legal representatives comply with the *International Bar Association ('IBA') Guidelines on Party Representation in International Arbitration*, and a default rule on the law of the arbitration agreement[12].

As with prior editions, the 2016 Rules address a number of other key issues including confidentiality of process, emergency arbitrator provisions and interim measures.

Expedited Arbitral Procedure

Under article 7 of the 2016 Rules, parties may, prior to the constitution of the Arbitral Tribunal, apply to ACICA in writing for the arbitral proceedings to be conducted in accordance with the ACICA Expedited Rules in circumstances where the parties agree, the amount in dispute is less than A$5 million or in the case of exceptional urgency. ACICA is required to consider the views of both parties in determining whether to grant such an application.

The ACICA Expedited Rules provide for the appointment of a sole arbitrator by ACICA. The Expedited Rules provide that there will be no hearing except in specified circumstances and no disclosure, with the arbitrator given

12 For a detailed outline of all changes made in the 2016 Rules, see Malcolm Holmes, Luke Nottage and Robert Tang, The 2016 Rules of the Australian Centre for International Commercial Arbitration: Towards Further 'Cultural Reform', Sydney Law School Research Paper No. 16/49. Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2786839

the power to order the production of particular documents if considered relevant to the proceedings. In the usual course (and subject to any different agreement between the parties and the arbitrator), the arbitrator is required to make a final award within four months of appointment. If there is a counterclaim or claim for set-off, an award is to be rendered within five months of appointment. The 2016 Rules therefore provide a mechanism for disputes of a lesser value or high level of urgency to be dealt with under this expedited procedure.

Joinder and Consolidation

The 2016 Rules introduce a comprehensive joinder and consolidation regime to deal with some of the practical issues arising from multi-party and multi-contract situations[13]. Article 14 of the 2016 Rules allow parties to apply to ACICA to consolidate two or more arbitrations pending under the 2016 Rules into a single arbitration where all parties to the arbitration have agreed to consolidation, all the claims are made under the same arbitral agreement, or the arbitrations are between the same parties with a common question of law or fact arising, the rights to relief claimed arise out of the same transaction(s) and ACICA finds the arbitration agreements to be compatible. Once ACICA decides that the arbitrations can be consolidated and parties are notified, the parties have 14 days to agree to the identity of the arbitrators after which time any appointments will be made by ACICA.

With respect to joinder, the 2016 Rules confer power on the tribunal to allow a third party to be joined to an arbitration, on application from either a party to the arbitration or the third party, provided that, prima facie, the third party is bound by the same arbitration agreement as between the existing parties to the arbitration. If the request for joinder is received prior to the constitution of the tribunal, ACICA may decide the application. In either case, the decision on joinder is made without prejudice to the tribunal's power to decide any question of jurisdiction arising from the joinder.

Party Representation Provisions

Article 8.2 of the 2016 Rules requires parties to use their best endeavours to ensure that their legal representations comply with the I*BA Guidelines on Party Representation in International Arbitration*. The introduction of this provision is aimed at providing parties with guidance on professional conduct and assisting in reducing delays and costs that may arises as a result of actions taken by parties seeking to obtain an advantage by abusing the process (for example, changing counsel with the aim of causing a conflict with a tribunal member).

Law of the Arbitration Agreement

Pursuant to article 23.5 of the 2016 Rules, the law of the seat is deemed to be the governing law of the arbitration agreement, unless the parties have expressly agreed otherwise and that agreement is not prohibited by an applicable law. Given conflicting court judgments on this issue[14], this provision is aimed at resolving any uncertainty that may arise in circumstances where parties do not specify the law of the arbitration agreement.

Confidentiality of Process

The 2016 Rules provide a comprehensive regime such that in practice the confidentiality of proceedings can be assured by adopting the rules. Parties, the arbitral tribunal and ACICA are required to treat all matters relating to the arbitration (including its existence), the award, materials created for the purpose of the arbitration and documents produced by another party as confidential. Parties calling witnesses are responsible for the maintenance

13 See articles 14 and 15 of the 2016 Rules

14 See *SulAmerica Cia Nacional De Seguros S.A. and others v Enesa Engenharia S.A.* [2012] 1 Lloyd's Rep 671 and *FirstLink Investments Corp Ltd v GT Payment Pte Ltd & ors* [2014] SGHCR 12

of confidentiality by the witness, with regard to evidence or other information obtained by the witness in the arbitration, to the same degree as required by the party[15].

Emergency Arbitrator Provisions

The 2016 Rules also incorporate Emergency Arbitrator Provisions designated to aid an accelerated resolution of commercial disputes. This innovation provides parties the option to seek urgent interim measures of protection from an emergency arbitrator before the tribunal is constituted. Appointments of emergency arbitrators are made within one day (if possible) from the receipt of an application and relevant fees[16]. Decisions on emergency interim measures are also made promptly.

Power of Tribunal to Grant Interim Measures

The 2016 Rules provide the tribunal with the power to order interim measures of protection[17]. These orders may be required to maintain or restore the status quo, prevent harm to either party, preserve assets and evidence, and provide security for costs. The provisions do not prejudice a party's right to apply to court for interim measures.

D. Conclusion

Presenting a compelling option as a safe and neutral forum for international arbitration, Australia offers the advantages of a liberal democracy with a modern legislative system supporting arbitration practice, an independent and supportive judiciary, a sophisticated legal profession and institutions providing the infrastructure to support and facilitate arbitration effectively.

In view of evolving global arbitration practice, ACICA released its 2016 Rules effective 1 January 2016. The 2016 Rules reflect current best practice, drawn from institutional experience and an extensive research and consultative process. The 2016 Rules are complemented by the advanced regime in place supporting arbitration in Australia. The flexible approach of the 2016 Rules and the Australian arbitration framework allows parties to participate actively in the design and achievement of an appropriate commercial dispute resolution outcome.

15 See article 22 of the 2016 Rules
16 See schedule 1 to the 2016 Rules
17 See article 33 of the 2016 Rules

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专题 – 提高仲裁实务的效果：澳大利亚的支持仲裁体系和澳大利亚国际商事仲裁中心仲裁规则的重要发展

作者： Deborah Tomkinson[1]
和 Cindy Wong[2]

A. 引言

仲裁被认为是一种灵活且成本效益高的商业争议解决程序。与常规的法庭程序相比，仲裁是私下的争议解决程序，给予各方和仲裁庭更大自主权以符合案件情况的方式进行解决程序。在国际上，仲裁通常具有确定性更大（鉴于通常可质疑裁决的依据有限）以及裁决根据《承认和执行外国仲裁裁决公约》（纽约，1958 年）（以下简称“纽约公约”）在全球具有可执行性的优势。国际仲裁使各方能够在选定的中立机构将争议交由他们相信是独立和公正的仲裁庭进行裁决（而不必顾虑地方法院体系中可能存在的任何不公正偏向）。因此，国际仲裁一直是解决跨境争议的首选方式[3]。

澳大利亚国际商事仲裁中心（“ACICA”）是澳大利亚的国际仲裁机构。在《2014 年争议解决法律指南》中，我们概述了在澳大利亚进行的立法改革，以及 2011 年 ACICA 仲裁规则中旨在加强仲裁效益、确保程序方便性和中立性及确保结果可执行性的主要规定。在现代、透明法律体制、独立司法和经验及其丰富的执业律师和仲裁员的支持下，澳大利亚目前是公认的安全和中立的仲裁地。

在仲裁领域，程序在不断发展和创新，以改善仲裁流程。经过大量审议和咨询以后，ACICA 出台了其仲裁规则（“《2016 年规则》”）的更新版和《2016 年简易仲裁规则》，为寻求合理化其程序的各方提供了额外的工具。本文简要概述了澳大利亚对希望仲裁跨境争议的各方代表了安全、中立仲裁地的主要原因，并详述了可用于确保高效和合适仲裁程序的《2016 年规则》主要规定。

B. 澳大利亚的支持仲裁体系

现代立法框架

澳大利亚的商事仲裁受分为两部分的体系管辖。联邦体系，《1974 年国际商事仲裁法（C 版）》（“IAA”），管理国际商事仲裁。州体系管理国内仲裁，在本文中称为《商事仲裁法》（“CAA”）[4]。

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3 参见伦敦大学玛丽皇后国际仲裁学院和美国伟凯律师事务所《国际仲裁调查：国际仲裁的改进和创新（2015 年）》，文章地址 www.arbitration.qmul.ac.uk/research/2015

4 澳大利亚一般代理人常务委员会 2010 年同意将《商事仲裁示范法案》作为在全澳大利亚建立统一国内仲裁法的文件。除澳大利亚首都领地外，澳大利亚所有各州和各领地均通过和颁布了各种版本《示范法案》，在澳大利亚建立了统一的国内仲裁框架。《商事仲裁法》为新南威尔士州 2010 年版《商事仲裁法》、北领地 2011 年版《商事仲裁（全国统一立法）法》、昆士兰州 2013 年版《商事仲裁法》、南澳大利亚 2011 年版《商事仲裁法》、塔斯马尼亚州 2011 年版《商事仲裁法》、维多利亚州 2011 年版《商事仲裁法》和西澳大利亚 2012 年版《商事仲裁法》。

《国际商事仲裁法》使 2006 年版联合国贸易法委员会（UNCITRAL）《国际商事仲裁示范法》（“《示范法》”）和澳大利亚在《纽约公约》下的义务生效。《示范法》被指定为在澳大利亚境内所有国际仲裁的唯一强制性程序法。《国际商事仲裁法》限制在仲裁程序中司法干预的范围，包括抗拒承认和执行仲裁裁决的依据。2015 年版《国际商事仲裁法》的修正案进一步将国外仲裁裁决在澳大利亚的执行范围扩大至来自任何一个国家的裁决，删除了以前限制《纽约公约》适用的裁决执行权的规定[5]。并且，《国际商事仲裁法》还建立了全面的保密体系，保护各方的权益。保密条款以前是选择性加入的规定，2015 年立法修正案确保了保密条款如无当事方拒绝则适用。这个修订符合国际的期望。相应地，《国际商事仲裁法》为在澳大利亚进行的国际仲裁提供了一个熟悉、明确和有效的法律框架。

《商事仲裁法》纳入了《示范法》的很多内容，并针对澳大利亚的国内情况作了必要的修订，在国内与国际层面达到了高度的一致性。作为首要目标，《商事仲裁法》表示要促进“通过公正的仲裁庭使商事争议得到公正和最终的解决，且避免不必要的延误或费用”[6]。仲裁庭的职能必须得到执行，以便（在可行的范围内）实现此目标[7]。

对仲裁的司法尊重

在澳大利亚进行的国际和国内仲裁得益于高度独立和受尊重的司法制度，该制度支持仲裁程序并严格执行仲裁裁决和协议。澳大利亚的法院效率极高，并具有最高的诚信。

作为澳大利亚的最高法院，澳大利亚高等法院完全支持国际仲裁裁决的终局性和国际仲裁协议的自愿性质，并承认法院在支持裁决中的作用[8]。在近些年中，澳大利亚联邦法院和各州最高法院的裁决证明了，在仲裁程序中，司法部门始终坚持在支持与干预之间保持适当平衡[9]。近期一项对澳大利亚、新加坡和香港法院过去二十年采用和解释《示范法》所用方法的比较分析得出的结论是，澳大利亚法院的判决显示出非常老练的国际主义裁决。此项分析表明，在过去五年中，澳大利亚法院在解释《示范法》方面尤其强有力地显示了其国际风格[10]。法院的这种风格逐渐使澳大利亚建立起作为仲裁地的强大信心。

法律专业知识

澳大利亚是高素质和文化多样化的法律专业之乡，其高等院校提供世界级的法律教育，使澳大利亚的法律专业具有一贯高标准的执业者，他们具备国际商法和跨境争议的专业知识。澳大利亚的律师事务所和澳大利亚律师协会的成员富有国际经验，不仅为他们的专业法律技能还为他们的文化认知和敏感性获得了令人羡慕的声誉。与亚太地区的对手相比，澳大利亚的法律专业知识非常具有成本竞争力。此外，《国际商事仲裁法》和 2016 年仲裁规则均承认

5 2015 年版《民法和司法（综合修正案）法》（C 版）

6 参见新南威尔士州、南澳大利亚、北领地、塔斯马尼亚州和西澳大利亚《商事仲裁法》第 1C(1) 条和维多利亚州和昆士兰州《商事仲裁法》第 1AC(1) 条。

7 参见新南威尔士州、南澳大利亚、北领地、塔斯马尼亚州和西澳大利亚《商事仲裁法》第 1C(3) 条和维多利亚州和昆士兰州《商事仲裁法》第 1AC(3) 条。

8 《TCL 空调器（中山）有限公司与澳大利亚联邦法院的法官》[2013] HCA 5

9 参见举例：《Gutnick 与印度农民化肥合作社有限公司》[2016] VSCA 5，《Ye 与 Zeng》[2015] FCA 1192 和《Ye 与 Zeng》（第 2 号）[2015] FCA 1243，以及《Robotunits 私人有限公司与 Mennel》[2015] VSC 268

10 Dean Lewis 博士（香港品诚梅森律师事务所合伙人）2016 年 4 月 19 日在澳大利亚争议中心的演讲。如欲进一步阅读，参见 D. Lewis《关于联合国贸易法委员会 < 示范法 > 在国际商事仲裁中的解释和一致性：重点关注澳大利亚、香港和新加坡》，2016 年，威科集团

当事方自行选择代表律师的权利，无论是澳大利亚的或是海外的[11]。

一些世界上最德高望重的国际仲裁员就住在澳大利亚。ACICA 有一百多名专家级的国际仲裁员和经验丰富的国际调解员在其名册上，他们既有在澳大利亚，也有在海外的。澳大利亚海事运输委员会（“AMTAC”）是 ACICA 的一个委员会，专门针对亚太地区海事运输行业的具体需求，提供海事运输争议解决的创新型服务。澳大利亚海事运输委员会提供在国际海事运输仲裁方面具有特定专业知识的仲裁员名单。

支持仲裁的基础设施

在澳大利亚进行的仲裁可通过 ACICA 和中心网络（包括在悉尼的澳大利亚争议中心和墨尔本商事仲裁和调解中心）获得强有力的机构和行政支持，这些设施为仲裁和调解程序提供世界级的审理和后勤支持。

ACICA 从 1985 年即开始为在澳大利亚进行的商事仲裁和调解提供支持。2005 年，ACICA 发布了《ACICA 仲裁规则》，并于 2011 年和 2016 年对其进行了两次更新。《ACICA 简易仲裁规则》可用于加快进程的仲裁，尤其是较低价值或不太复杂的争议。《仲裁规则》会定期审核，以确保能持续体现最佳国际惯例。

C.《ACICA 仲裁规则》的发展

作为一个非营利性机构，ACICA 努力促进通过仲裁和调解高效地解决全澳大利亚以及世界各地的商事争议，并对用户进行关于替代争议解决的教育。

为此，ACICA 提供各种各样的服务，包括充当仲裁和调解的公正任命和执行机构、为在进行仲裁和调解时实施最佳惯例提供规则和示范、保持多个可作为各方任命资源的国际仲裁员和调解员名册、协助各方安排机构管理其替代争议解决程序、在替代争议解决程序中充当仲裁庭和调解员费用的押金持有人（包括按其他机构规则执行的案件）以及召开研讨会和会议以提供关于国际仲裁和调解的先进思想。ACICA 也是唯一一个能够根据《国际商事仲裁法》执行仲裁员任命职能的默认任命机构。

2016 年版《仲裁规则》体现了该机构的目标，即确保仲裁是迅速、成本效益高和公正的。他们吸取在欧洲、中东和亚洲的 ACICA 规则委员会成员的大量国际仲裁经验和用户的反馈，改善程序，提高争议解决的效率。2016 年版《仲裁规则》含有多项创新内容，促成用户友好的仲裁程序并体现现行的最佳实务，为低价值或紧急的争议提供简易的程序。新版规则还包含了联合诉讼和合并规定，关于各方尽最大努力确保其法律代表遵循国际律师协会（“IBA”）的《国际仲裁中当事人代表行为规范指引》的要求；以及关于仲裁协议法律的缺省规则[12]。

与以前的版本一样，2016 年版《仲裁规则》也阐述了多个其他关键问题，包括程序保密、紧急仲裁员的规定和临时措施。

简易仲裁程序

根据 2016 年版《仲裁规则》第 7 条，在仲裁庭形成前，各方可向 ACICA 提出书面申请，请求仲裁程序按照《ACICA 简易仲裁规则》进行，但须符合下述条件：各方同意、争议金额少于 500 万澳元或者案件存在特殊的紧急状况。在决定是否批准此申请时，ACICA 需要考虑双方当事人的意见。

《ACICA 简易仲裁规则》规定由 ACICA 任命唯一的仲裁员。《简易仲裁规则》规定，除非有规定的情况出现，否则仲裁将不开庭审理，也不对外公开，同时仲裁员有权命令当事人提交被认为与仲裁程序有关的任何特定文件。在正常的仲裁程序中（除

11 参见《国际商事仲裁法》第 29(2) 条和 2016 年澳大利亚国际商事仲裁中心仲裁规则第 8.1 条。

12 如欲了解 2016 年版《仲裁规则》所有变更的详情，参见 Malcolm Holmes、Luke Nottage 和 Robert Tang 的《2016 年澳大利亚国际商事仲裁中心规则：向进一步的“文化变革”发展》，悉尼法学院研究论文第 16/49 号。文章地址见社会科学研究网：https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2786839

非各方当事人与仲裁员之间有任何不同协议），仲裁员需要在任命后四个月内做出最终裁决。如有反请求或抵消请求，则裁决应在任命后五个月内做出。因此，2016 年版《仲裁规则》为价值较低或情况较紧急的争议提供了一个依照简易程序处理的机制。

加入和合并

2016 年版《仲裁规则》引入了一个周全的加入和合并制度，以处理因多方和多合同情况造成的一些实践问题[13]。2016 年版《仲裁规则》第 14 条允许各方当事人向 ACICA 申请将两个或更多在 2016 年版《仲裁规则》下未裁决的仲裁合并为一项，但须符合下述条件：仲裁各方当事人同意合并；所有的请求是在相同的仲裁协议下提出；或者，各仲裁是在相同的当事人之间进行，有共同的法律或事实问题，或者请求救济的权利是由相同的交易产生，而且 ACICA 认为各仲裁协议可以并存。一旦 ACICA 决定仲裁可以合并而且通知了各方，各方将有 14 天时间就仲裁员的人选达成合意，逾期则由 ACICA 指定人选。

关于第三方加入仲裁，2016 年版《仲裁规则》授权仲裁庭在仲裁任何一方或第三方申请的情况下允许第三方加入仲裁，但前提条件是，第三方明显受到仲裁现有各方之间的仲裁协议的约束。如果加入申请是在仲裁庭组成之前收到的，则 ACICA 可作出决定。无论是哪种情况，对于第三方加入仲裁的决定无损于仲裁庭裁决因第三方加入而产生的任何管辖权问题的权力。

当事人代理规定

2016 年版《仲裁规则》第 8.2 条要求各方尽其最大努力确保其法律代理人遵循《国际律师协会国际仲裁代理人指引》。加入此规定旨在为各方提供职业行为的指引，并协助减少因滥用程序以谋取优势的行为（例如，变更法律顾问，以造成与仲裁庭成员的冲突）而可能导致的延误和成本。

13 参见 2016 年版《仲裁规则》第 14 和 15 条

仲裁协议法律

根据 2016 年版《仲裁规则》第 23.5 条，除非各方另有明确约定且该约定未被适用法律所禁止，则仲裁所在地的法律被认为是仲裁协议的管辖法律。考虑到对此问题有冲突的法院裁决[14]，此规定旨在解决在各方未规定仲裁协议法律的情况下可能导致的任何不确定性。

程序保密

2016 年版《仲裁规则》提供了一个全面的管理体制，在实践中通过采用这些规则，程序的保密性可得到确保。这些规则要求仲裁各方、仲裁庭和 ACICA 对于与仲裁有关的所有事项（包括仲裁存在的事实）、仲裁裁决、为仲裁编制的材料和另一方出示的文件均予以保密处理。传唤证人的一方当事人负责使证人与当事人一样对证人在仲裁中获得的证据或其他信息予以保密[15]。

紧急仲裁员的规定

2016 年版《仲裁规则》还加入了紧急仲裁员的规定，该规定旨在协助商事争议的加快解决。这一创新使当事人在仲裁庭组成之前有选择权向紧急仲裁员寻求临时保护措施。在收到申请和相关费用后，紧急仲裁员的指定在一天（如有可能）内完成[16]。紧急临时措施的决定也会迅速做出。

仲裁庭批准临时措施的权力

2016 年版《仲裁规则》授予仲裁庭下令采取临时保护措施的权力[17]。作出这些命令是为了维持或回复现状、防止对任何一方的损害、保全资产和证据以及提供费用担保。这些规定并不影响当事人向法院申请临时措施的权利。

14 参见《SulAmerica Cia Nacional De Seguros S.A. 和其他方与 Enesa Engenharia S.A.》[2012] 1 劳氏法律报告 671 和《FirstLink Investments Corp Ltd 与 GT Payment Pte Ltd & ors》[2014] SGHCR 12

15 参见 2016 年版《仲裁规则》第 22 条

16 参见 2016 年版《仲裁规则》附表 1

17 参见 2016 年版《仲裁规则》第 33 条

D. 结论

澳大利亚有着一个自由民主国家的种种优势，包括支持仲裁的现代化立法体制、独立而配合的司法制度以及经验丰富的法律界，具备了有效地支持和促进仲裁的各种基础设施，是一个令人不得不优先选择的安全和中立的国际仲裁地。

鉴于不断演变的全球仲裁实践，ACICA 发布了于 2016 年 1 月 1 日起生效的 2016 年版《仲裁规则》。2016 年版《仲裁规则》体现了现有的最佳实务，这些实务吸取了各个机构的经验，以及经过了大量的研究和咨询。2016 年版《仲裁规则》得到了澳大利亚有利于仲裁的现有先进制度的配合。2016 年版《仲裁规则》和澳大利亚仲裁体制的灵活方法使各方能积极参与设计和实现适当的商事争议解决结果。

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Jurisdictional Q&As
司法管辖区Q&A

OBLIN MELICHAR

1. What is the structure of the court system in respect of civil proceedings?

At the first level, civil proceedings are initiated before either the district courts ('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 have to be made to the regional courts. If a legal question of fundamental importance is concerned, another final appeal can be lodged 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 intellectual property and competition matters, as well as various specific statutes (Public Liability Act, Data Protection Act, Austrian Nuclear Liability Act). Appeals must 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') exist only in Vienna. Apart from that, the above-mentioned ordinary courts act 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') at the trial level. This is the only Cartel Court in Austria. Appeals are decided by the Supreme Court sitting as the Appellate Cartel Court ('Kartellobergericht'). In cartel matters, lay judges sit on the bench with professional judges.

2. What is the role of the judge in civil proceedings?

Compared to common law countries, the role of judges in Austria is rather inquisitorial. To establish the relevant facts, judges can order witnesses to appear at a hearing (unless this is opposed by both parties), or appoint experts at their own discretion.

In some proceedings, the tribunal will consist of a panel involving 'expert' lay judges, especially in anti-trust cases, and 'informed' lay judges in labour and social cases.

3. Are court hearings open to the public? Are court documents accessible to the public?

In most cases, court hearings are open to the public. However, a party may ask the court to exclude the public from the hearing, provided

that it can show a justifiable interest for the exclusion of the public.

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

4. Do all lawyers have the right to appear in court and conduct proceedings on behalf of their client? If not, how is the legal profession structured?

Attorneys-at-law are authorised to represent parties in all court and out-of-court proceedings (be it in public or private matters). No official appointment is required; however, professional practice is conditional upon the requirements set out below.

After finishing law school, at least five years of practice in professional legal work (of which at least nine months must be spent at court and three years at law offices as candidate) are required, as well as completion of mandatory courses prescribed by the Bar Association and a successful bar exam.

5. What are the limitation periods for commencing civil claims?

Limitation periods are determined by substantive law.

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

The statute of limitations must be argued explicitly by one of the parties; however, it cannot be taken into consideration by the initiative of the court ('ex officio').

6. Are there any pre-action procedures with which the parties must comply before commencing proceedings?

No, there are none. However, as a matter of general practice, a claimant will give notice to their opponent before commencing proceedings.

7. What is the typical civil procedure and timetable for the steps necessary to bring the matter to trial?

The proceedings are initiated by submitting a lawsuit ('Klage') with the court. The lawsuit is considered officially submitted upon receipt. If the potential defendant does not respond within four weeks, an enforceable title is afforded to the claimant, who may proceed to the enforcement stage. If the defendant replies, of course, a regular litigation follows. Most often, the first hearing takes place within 6–10 weeks from receipt of the statement of defence. At such first hearings, the parties are invited to discuss settlement options. If the parties do not settle, the proceedings continue. Additional briefs are exchanged. Further hearings follow, the duration of which depends on the number of witnesses/experts to be heard. The time between the submission of a lawsuit and final judgement usually ranges between 10 and 16 months.

8. Are parties required to disclose relevant documents to other parties and the court?

If a party is able to show that the opposing party is in possession of a specific document, the court may issue a submission order if: (a) the party in possession has expressly referred to the document in question as evidence for its own allegations; or (b) the party in possession is under a legal obligation to hand it over to the other party; or (c) 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.

9. Are there rules regarding privileged documents or any other rules which allow parties to not disclose certain documents?

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).

Attorneys have the right of refusal to give oral evidence if information was made available to them in their professional capacity.

10. Do parties exchange written evidence prior to trial or is evidence given orally? Do opponents have the right to cross-examine a witness?

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.

Yes. After the initial examination of the witness by the judge, the witness may be subject to direct-examination, followed by opponent's cross-examination.

OBLIN MELICHAR

Dr. Klaus Oblin

Partner, Oblin Melichar

Klaus Oblin is Vice Chairman of Euro-American Lawyers Group (EALG), having received both continental and common law legal education (PhD, University of Vienna and LL.M., University of San Diego). He has joined the pool of several prominent arbitral institutions and is a respected member of the Austrian Federal Bar Association.

Having acted as chairman, co-arbitrator and counsel in numerous high-profile international disputes in front of domestic and foreign courts as well as arbitral institutions, Klaus has developed exceptional expertise on a wide range of contentious matters, focusing on construction, corporate, energy and natural resources, insurance, distribution, sales and transport.

He has given lectures on International Supply Agreements and has co-authored several international legal guides on commercial litigation and arbitration.

11. What are the rules that govern the appointment of experts? Is there a code of conduct for experts?

Any qualified person may be publicly appointed as an expert. In practice, courts choose an expert who is accredited with the Austrian Federal Ministry of Justice. The litigants may propose a specific expert but the judge is not bound by this. Once appointed, the expert is obliged to follow the court's instructions. Experts may be disqualified on the same grounds as judges.

There is no special code of conduct for experts, but all experts must take an oath.

The register of all accredited experts is available on the Austrian Justice Department's website at www.sdgliste.justiz.gv.at.

12. What interim remedies are available before trial?

Discovery proceedings do not exist in the Austrian civil procedure.

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

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

13. What does an applicant need to establish in order to succeed in such interim applications?

See question 12.

14. What remedies are available at trial?

The Austrian Civil Procedure Code ('ACCP') provides for several remedies that are available during the proceedings. These are available against all court rulings that were made during the course of proceedings and do not constitute a final judgment or any other form of decision on the merits. Many such remedies need to be submitted within 14 days from issuance, some immediately during the hearing.

For remedies available against court judgments and other decisions on the merits, see question 17.

15. What are the principal methods of enforcement of judgment?

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 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.

16. Are successful parties generally awarded their costs? How are costs calculated?

In its final judgment, the court will order who will have to bear the procedural costs (including court fees, legal fees and certain other costs of the parties, such as costs for the safeguarding of evidence, travel expenses etc). The court's decision on costs is subject to redress, along with or without an appeal on the court's decision on the merits.

In principle, the prevailing party is entitled to reimbursement by the losing party of all costs of the proceedings. If either party prevails with and loses parts of its claims, either party shall bear its own costs, or costs will be divided on a pro-rata basis. The calculation of reimbursable legal fees is subject to the calculation method under the Austrian Act on Attorneys' Tariffs, irrespective of the agreement between the prevailing party and its attorney. Thus, the reimbursable amount may be lower than the actual payable legal fee, as any claim for reimbursement is limited to necessary costs.

Foreign claimants, on the defendant's request, in principle have to provide security to cover the defendant's costs. However, this does not apply, for example, to citizens of a member state of the European Union and/or the Lugano Convention.

17. What are the avenues of appeal for a final judgment? On what grounds can a party appeal?

There are several types of legal remedies against final court judgments.

First appeals against judgments are available against judgments issued by the court of first instance and may be raised on the grounds of procedural errors or errors of law.

Second appeals can be made 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 (see question 1).

Actions to re-open proceedings can be based on the following grounds:

(a) the judgment is based on a document that was initially or subsequently forged;

(b) the judgment is based on false testimony (of a witness, an expert or a party under oath);

(c) the judgment is obtained by the representative of either party, or by the other party, by way of criminal acts (e.g. deceit, embezzlement, fraud, forgery of a document or of specially protected documents, or of signs of official attestations, indirect false certification or authentication or the suppression of documents);

(d) the judgment is based on a criminal verdict that was subsequently overruled by another legally binding judgment;

(e) the judgment was issued without due regard to a preliminary ruling with prejudicial significance.

18. Are contingency or conditional fee arrangements permitted between lawyers and clients?

Yes; however, they are permissible only if they are not calculated as a percentage of the amount awarded by the court ('pactum de quota litis').

19. Is third-party funding permitted? Are funders allowed to share in the proceeds awarded?

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

20. May parties obtain insurance to cover their legal costs?

Yes. Most insurances cover necessary payments, i.e. attorneys' fees, court fees, witness- and expert-related costs, and the reimbursement obligation in case of not prevailing.

21. May litigants bring class actions? If so, what rules apply to class actions?

Although the ACCP does not contain any provision on class actions, the Austrian Supreme Court held that a 'class action with a specific Austrian character' is legally permissible. The ACCP allows a consolidation of claims of the same plaintiff against the same defendant. A joinder may be filed if: (a) the court has jurisdiction for all claims; (b) the same type of procedure applies; and (c) the subject matter is of the same nature regarding facts and law. Another possibility is to organise mass claims and assign them to an institution which then proceeds as a single claimant.

22. What are the procedures for the recognition and enforcement of foreign judgments?

See question 15.

23. What are the main forms of alternative dispute resolution?

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 (such as those for lawyers, public notaries, doctors, civil engineers) provide for dispute resolution mechanisms concerning disputes between their members or between members and clients.

24. Which are the main alternative dispute resolution organisations 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').

Certain professional bodies and chambers provide for their own rules or administer alternative dispute resolution proceedings, or both.

25. Are litigants required to attempt alternative dispute resolution in the course of litigation?

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

26. Are there any proposals for reform to the laws and regulations governing dispute resolution currently being considered?

The VIAC aims at modernising and streamlining its rules, which was first enacted in 1975. In its quest to do so, the rules were reviewed as recently as 2013, simplifying and adding several provisions.

The main changes to the rules can be summarised as follows:

Joinder of Third Parties

The arbitral tribunal has the authority to order the joinder of third parties upon the request of either party or of the third party itself. The tribunal has wide discretion provided that all parties (including the joining one) have been heard. A cross-claim against the party to be joined is permissible, which also results in that

party's right to participate in the formation of the arbitral tribunal.

Consolidation of Proceedings

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

Confirmation of Arbitrators

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

Multi-party Proceedings

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

Remission

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

Expedited Proceedings

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

27. Are there any features regarding dispute resolution in your jurisdiction or in Asia that you wish to highlight?

No.

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1. 在民事诉讼方面，法院系统的结构是怎样的?

从第一个层面来说，民事诉讼是在地区法院（“Bezirksgerichte”）或区域法院（“Landesgerichte”）提起。

地区法院管辖涉及租赁和家庭法的大多数争议（诉讼标的管辖权）和争议金额不超过 15,000 欧元的事务（金额管辖权）。关于事实问题和法律问题的上诉须向区域法院提起。若涉及某项非常重要的法律问题，二审终审上诉可向最高法院（“Oberster Gerichtshof”）提起；具体如下。

区域法院对争议金额超过 15,000 欧元的事务具有金额管辖权，对知识产权和竞争案件以及涉及各种具体法案（《公共责任法》、《数据保护法》、《奥地利核责任法》）的案件具有诉讼标的管辖权。上诉必须直接向高级区域法院提起（“Oberlandesgerichte”）。三审终审上诉向最高法院提起。

一般情况下，只有当诉讼标的涉及到解决一个具有普遍意义的法律问题（也就是说，出于法律一致性、可预测性或发展性考量，澄清该问题是重要的），或者在最高法院先前未有相关判决的情况下，才能向最高法院提起上诉。

就商事案件而言，只有维也纳设有特别商事法院（“Handelsgericht und Bezirksgericht für Handelssachen”）。此外，上述普通法院均可充当商事法院。商事案件主要包括以商人或公司为被告，涉及商业交易、不公平竞争等方面的案件。其他特别法院是指劳工法院（“Arbeits-und Sozialgericht”），劳工法院管辖雇主与雇员之间因（先前）雇佣问题导致的所有民事法律纠纷以及社会保障和养老金案件。对于商事（在商事法院专家组裁决的情况下）和劳工案件，由非职业法官和职业法官共同作出判决。在审判阶段，维也纳上诉法院作为卡特尔法院（“Kartellgericht”）作出判决。这是奥地利唯一的卡特尔法院。上诉案件由最高法院作为上诉卡特尔法院（“Kartellobergericht”）开庭作出判决。同样，对于卡特尔案件，由非职业法官与职业法官共同作出判决。

2. 法官在民事诉讼中的角色是什么?

与普通法国家相比较而言，奥地利法官需进行大量的审问调查。为确定相关事实，法官可以命令证人出席庭审（双方当事人反对的情况除外），或自行决定任命专家。

在一些诉讼中，审判庭由一个专家组组成，这个专家组包括“专家”非职业法官（尤其是在反垄断案件中）和“熟知”劳工和社会案件的非职业法官。

3. 庭审是否向公众开放？公众是否能够查阅法庭文件?

在大多数案件中，庭审是向公众开放的。但是，一方当事人可请求法院禁止公众旁听，但前提是该方当事人能够给出拒绝公众旁听的正当理由。

原则上，仅允许涉案当事人查阅文件。如果第三方能够给出充足的正当理由（在可能出现的诉讼结果中的合法权益），可查阅文件和 / 或甚至参加诉讼。

4. 所有律师均有权代表其委托人出庭并参加诉讼吗？如果不是，律师职业的结构是怎样的?

律师有权在所有庭内和庭外诉讼中（无论是在公共事务还是私人事务方面）代表当事人。无需进行正式任命；但是律师执业须满足以下条件要求。

从法学院毕业之后，需要有至少五年的专业法律工作实践经验（其中至少九个月是在法院工作，三年是作为见习律师在律师事务所工作），并完成律师协会规定的必修课程和通过律师资格考试。

5. 提起民事请求的时效期为多久？

时效期根据实体法确定。

一旦诉讼要求超过法定时效，就不能再执行。法定时效一般从可首次行使权利之时起算。奥地利法律分别规定有长时效期和短时效期。如果特殊条款未另作规定，则长时效期适用。短时效期为三年，并适用于诸如应收款项或损害索赔一类诉讼。

法定时效必须由一方当事人明确提出；但是，法院不能主动考虑法定时效（“依据职权”）。

6. 有哪些诉前程序是当事人在提起诉讼之前必须遵守的？

没有，没有任何相关规定。但是，依据惯例，原告会在开始诉讼之前通知对方当事人。

7. 案件进入审理之前要经过哪些典型的民事程序？有什么样的时间表？

将诉讼案件（“Klage”）提交至法院即启动诉讼程序。法院收到之后，视为正式提交诉讼。如果潜在被告在四周内未作出回应，原告将获得一项可执行权利，可进入执行阶段。如果被告作出答复，自然就继而进行常规诉讼。通常情况下，初审在收到答辩陈述书后 6 – 10 周内进行。初审时，会请双方当事人讨论和解事项。如果双方当事人不和解，则继续进行诉讼，并交换补充陈情文件。审理随后继续进行，审理持续时间取决于被传唤的证人 / 专家的数量。从提交诉讼案件到最终判决的时间通常是 10 到 16 个月。

8. 当事人是否必须向其他当事人和法院披露相关文件？

如果一方当事人能够证明对方当事人掌握某份特定文件，在以下任一情形下，法院可发出提交令：(a) 掌握文件的当事人已明确将该文件列为支持其所提主张的证据；或者 (b) 掌握文件的当事人有法律义务将文件交予另一方当事人；或者 (c) 该文件是以双方当事人的法律利益为出发点编制的，能够证明双方当事人之间的法律关系，或者包含双方当事人在法律行为谈判期间作出的书面陈述。

不存在诉前披露规定。

9. 是否有关于特权文件的规则或允许当事人不披露特定文件的任何其他规则？

在下列情况下，当事人无需提交关于家庭生活的文件：如果提交文件会使另一方违反名誉义务，或如果披露文件会玷污该方或任何其他人的名誉或涉及刑事检控风险，或如果披露文件会违反该方尚未被解除的任何国家批准的保密义务或会侵犯商业秘密（或因类似于上述各项的任何其他原因）。

如果律师通过其职业身份获得任何信息，律师有权拒绝提供口头证据。

10. 当事人在审理之前是否交换书面证据？或是提供口头证据？对方当事人是否有权盘问证人？

证据是在诉讼过程中而不是诉讼之前录取。双方当事人须提供支持其各自主张的证据，或者如果双方当事人负有举证责任，应分别提供证据。

是的。法官完成对证人进行初始询问之后，证人可能需接受直接询问，然后对方当事人对证人进行盘问。

11. 关于专家任命的规则是怎样的？是否有专家行为准则？

任何合格人员都可以被公开任命为专家。实际上，法院会选择经奥地利联邦司法部认证的专家。诉讼当事人可提名某位专家，但法官不受此约束。一经任命，专家有义

务遵循法院指示。专家可因与法官被取消资格的同样理由而被取消资格。

没有专门的专家行为准则，但所有专家必须进行宣誓。

奥地利司法部的网站 www.sdgliste.justiz.gv.at/ 提供了包含所有认证专家的登记名册。

12. 案件审理前可获得哪些临时救济?

奥地利民事诉讼程序中不存在证据开示程序。

但是，双方当事人可在提交起诉书之前和之后向法院寻求帮助，以保护证据。如果不确定证据将来是否可以获得，或者如果有必要审查某物件的当前状态，必要的法律利害关系则被视为已确定。

可通过各种措施给予禁制令形式的临时救济，如下令冻结银行账户或者没收土地等资产。此外，也可命令第三方暂不支付应收款项。

13. 申请人需要确立些什么才能成功申请此类临时救济?

参见问题 12。

14. 案件审理时可获得哪些救济?

《奥地利民事诉讼法则》（“ACCP”）规定了案件审理期间可获得的几种救济。这些救济是针对诉讼期间法院所作所有裁决提供的救济，不构成依事实作出的最终判决或任何形式的裁决。在审理期间，大多此类救济须颁布之后 14 天以内提交，一些救济须在颁布之后立即提交。

关于针对依事实作出的法院判决和其他裁决可以提供的救济，参见以下问题 17。

15. 执行判决的主要方式有哪些?

如果被告不服法院判定的诉讼要求，原告可请求强制执行。

判决一旦成为终局和有约束力的判决（例如，当事方在有关期限内没有提起任何上诉），即可执行。

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Klaus Oblin 博士

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Klaus Oblin 是欧美律师联盟（Euro-American Lawyers Group，EALG）的副主席，具有大陆法系和普通法系专业的学历文凭（维也纳大学博士学位和圣地亚哥大学法学硕士学位）。他已名列多个著名仲裁机构的候选仲裁员库，现为奥地利联邦律师协会（Austrian Federal Bar Association）的成员而且很受尊重。

Klaus 曾就多个备受瞩目的国际争议案件在国内外法院和仲裁机构中担任仲裁庭主席、共同仲裁员以及顾问，对各种争议事项拥有卓越的专业能力，特别是有关建设、企业、能源和自然资源、保险、物流、销售和交通运输方面的。

Klaus 曾举行多场有关国际供应协议的演讲，并作为共同作者发表了多篇有关商事诉讼与仲裁的国际法律指南。

《欧洲（“布鲁塞尔”）公约》和《卢加诺公约》是与外国判决的承认与执行最相关的多边协定。此外，还有一些双边的协定。

国内法院裁决的执行须获得法院准许执行的命令，法院在一般要求（诉讼可接纳性、成为一方当事人或提起诉讼的能力）得以满足时可作出该命令。

外国判决的执行需要一份正式可执行性声明，如果有关权利根据签发国的规定是可以执行的，而且国家协定或条例规定保证互惠，则可提供该可执行性声明。地区法院有权单方面作出决定。但该决定是可被上诉的。

就欧盟的判决而言，判决的承认是根据上述《公约》自动进行的。

16. 胜诉方是不是一般会被判获得诉讼费用赔偿？诉讼费用如何计算？

法院将在最终判决中裁定由哪一方承担诉讼费用（包括诉讼费、律师费和当事人的其他特定费用，例如，保护证据所需的费用、差旅费等等）。不论对法院依事实作出的裁决是否有上诉，法院的费用裁定均可进行调整。

原则上，胜诉方有权获得败诉方对其一切诉讼费用的赔偿。如果任何一方为部分胜诉或败诉，该方则应自担相关费用，或者费用将按照比例分摊。可赔偿的律师费应按照《奥地利律师税法》规定的计算方法计算，不考虑胜诉方与其代理律师之间签署的协议。由于任何赔偿要求均以必要的费用为限，因此，可赔偿金额可能低于实际应支付的律师费。

原则上，如果被告要求，外国原告必须提供支付被告费用的担保。但是，这并不适用于某些国家的公民，例如欧盟和 / 或《卢加诺公约》成员国的公民。

17. 对最终判决有哪些上诉途径？当事人能够以什么理由提起上诉？

有几种针对最终法院判决的法律救济。

针对一审法院作出的判决，可以程序错误或法律错误为由提出第一次上诉。

如果诉讼标的涉及到解决一个具有普遍意义的法律问题（也就是说，出于法律一致性、可预测性或发展性考量，澄清该问题是重要的），或者在最高法院先前未有相关判决的情况下，可提出第二次上诉（参见以上问题 1）。

可以根据以下原由重新提出诉讼：

(a) 该判决所依据的文件最初则为伪造或之后被伪造；

(b) 该判决所依据的证词（经过宣誓的证人、专家或一方当事人的证词）是伪证；

(c) 该判决是任何一方当事人或对方当事人代表通过犯罪行为（例如，欺骗、盗用、欺诈、伪造文件或受特别保护文件或官方证明、对文件进行虚假认证或核实或隐瞒）获得的；

(d) 该判决是依据被另一个具有法律约束力的判决所否决的刑事裁决作出的；

(e) 该判决是在未审慎考虑到具有偏见的初步裁决的情况下作出的。

18. 是否允许律师和委托人之间存在胜诉酬金或按条件收费的安排？

可以，但是，只有不是按照法院判决金额的百分比计费的（“pactum de quota litis”）才可采用。

19. 是否允许第三方资助？资助人是否可分享胜诉收益？

允许第三方资助并且一般在争议金额较高时可采用，但涉及费用协议时，则更具灵活性。请注意，将部分判给金额分配给律师的费用协议是禁止的。

20. 当事人是否可为其诉讼费用投保？

可以。大多数保险可保付必要款项，即律师费、诉讼费、证人和专家相关费用以及如果败诉则须承担的赔偿义务。

21. 诉讼人是否可提起集体诉讼？如果可以，哪些规则适用于集体诉讼？

尽管《奥地利民事诉讼法则》（“ACCP”）不涉及集体诉讼，但是奥地利最高法院认为，“具有奥地利特性的集体诉讼”是法律上允许的。《奥地利民事诉讼法则》允许整合同一原告对同一被告的若干诉讼要求。在下列情况下，可以提出联合诉讼：（a）法院对所有诉讼要求具有司法管辖权；（b）相同类型的程序适用；以及（c）就法律和事实而言，诉讼标的具有相同性质。另一种可能则是组织大量诉求并将其转让给一个机构，由该机构作为单独原告起诉。

22. 外国判决通过哪些程序予以承认和执行？

参见问题 15。

23. 替代争议解决的主要形式是什么？

依法规定的主要法外解决方法为仲裁、调解（主要用于家庭法事宜）和解决住房或电信问题的调解委员会。

此外，各专业团体（例如律师、公证人、医生、土木工程师的团体）为其成员之间的或成员与客户之间的争议提供争议解决机制。

24. 在您所在的司法管辖区有哪些主要的替代争议解决机构？

奥地利联邦商会维也纳国际仲裁中心（“VIAC”）是奥地利与争议解决关联性最强的（国际商事）仲裁机构。仲裁程序实施构架为《维也纳国际仲裁中心仲裁与调解规则》（“维也纳规则”）。

特定专业团体和协会有其自身的规则，或者执行替代争议解决程序，或同时执行两种程序。

25. 在诉讼过程中诉讼人是否必须尝试替代争议解决办法？

《奥地利民事诉讼法则》（“ACCP”）没有规定强制性和解，也没有规定要进行有约束力的调解或仲裁。但很普遍的是，法官在审判初期通常鼓励各当事人探究和解办法或先向调解员求助。

26. 当前是否有改革争议解决法律法规的建议在审议中？

维也纳国际仲裁中心要对其最初于 1975 年颁布的规则进行现代化与简易化。为此目的，仲裁中心于 2013 年对规则进行了审查，简化并新增了几条规定。

规则的主要变更可总结如下：

第三方当事人的加入

仲裁法庭有权按照任何一方当事人或第三方当事人自己的要求命令第三方当事人加入仲裁。仲裁法庭有很大的自主裁量权，但前提是所有当事人（包括加入的当事人）参与审理。可对共同起诉当事人提出反申索，这也使得该方有权参与仲裁法庭。

程序的合并

可合并两个或以上的程序。合并程序的决定由维也纳国际仲裁中心的执行委员会（在听取当事人和仲裁庭成员的意见之后）作出。

仲裁员确认

所有仲裁员必须经维也纳国际仲裁中心秘书长确认。

多方当事人程序

如果一方当事人（团体）未能就有待确认为仲裁员的被提名人候选人达成共识，不会自动使另一方当事人的提名无效。

移交

新规则也就法院将诉讼移交仲裁庭的问题作出规定，此举已走在奥地利仲裁法律将出现的一项变革之前，即规定废止程序将直接提交给最高法院。

简易程序

经修改的规则也包含具体的快捷审理条例。各当事方必须就此类条例明确达成一致（选

择适用）。最终裁决必须在六个月之内作出（除非延期）。

27. 关于您所在司法管辖区或者亚洲地区的争议解决，是否有任何特殊情况需加以强调?

没有。

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MEDINA GARRIGÓ ABOGADOS

1. What is the structure of the court system in respect of civil proceedings?

The Dominican Republic is a civil law jurisdiction belonging to the family of Roman-Germanic Law. In respect to its territory, the judicial system is divided into 11 judicial departments and 35 judicial districts. In each judicial district, there is a court of first instance that is commonly divided into chambers according to the nature of the case; civil and commercial chambers are competent to hear civil proceedings. Each judicial district is headed by a Court of Appeal. Cases can subsequently be appealed before the Supreme Court of Justice.

2. What is the role of the judge in civil proceedings?

Judges preside over the proceedings, maintain order during hearings and rule on the parties' claims and defences. They are the decision-makers as the Dominican justice system does not provide for jury trials. Accordingly, their main role is to interpret the law and assess the evidence presented in order to issue a decision. Their role is neutral concerning the rules of evidence that govern the parties, who have to prove their cases during the proceedings and comply with terms and forms concerning motions and memorials.

3. Are court hearings open to the public? Are court documents accessible to the public?

Public hearings are held in the majority of civil proceedings, pursuant to article 87 of the Civil Procedure Code of the Dominican Republic. Only some matters such as cases involving minors or divorces are not open to the public. In certain cases, judges can restrict access to hearing after giving a reasoned decision on the matter.

Court documents are accessible by the public throughout the process. However, once all the hearings have concluded and the case is ready to be decided by judges, the files will no longer be accessible by the public.

4. Do all lawyers have the right to appear in court and conduct proceedings on behalf of their client? If not, how is the legal profession structured?

Certain legal requirements have to be met in order to practise law in the Dominican Republic and have the right to appear in court and conduct proceedings on behalf of clients. After receiving a law degree from a local university, lawyers must have their official authorisation to exercise the profession 'exequatur'. This authorisation is granted by a decree from the President authorising lawyers to practise in the country. In addition, lawyers must participate in an induction ceremony held by the Supreme Court of Justice. It is also mandatory to be part of the Dominican Bar Association ('Colegio Dominicano de Abogados').

5. What are the limitation periods for commencing civil claims?

The general limitation period for the majority of civil claims in the Dominican Republic is 20 years, according to article 2262 of the Civil Procedure Code. Other matters are subject to shorter periods as expressly stated in the law. Some of these matters include tort actions arising out of negligence (one year) and actions for liability for the failure to fulfil contractual obligations (two years).

6. Are there any pre-action procedures with which the parties must comply before commencing proceedings?

The general rule is that claimants do not have to comply with pre-action procedures before commencing proceedings. Some exceptions are established in the law. In this regard, it is worth noting that article 1146 of the Civil Procedure Code of the Dominican Republic indicates that damages are due only where a debtor has been given notice of default in contractual liability.

7. What is the typical civil procedure and timetable for the steps necessary to bring the matter to trial?

The initial complaint is initiated by a notice by means of a bailiff's act (acto de alguacil) to the defendant. This act must comply with several formalities set out under article 61 of the Civil Procedure Code. In this regard, the plaintiff must indicate the purpose of the lawsuit as well as a summary of the main arguments with a clear identification of the parties.

After this initial written statement, the plaintiff must seek for the appointment of the court and the first hearing. The defendant must notify the plaintiff as to the name and address of the attorney that will undertake its legal representation during trial, through the act of a bailiff.

Several hearings can be held, typically three or more. Usually, the parties request mutual disclosure of documents, and judges almost always grant consecutive 15-day terms for each of the parties to file the documents that such party wishes to disclose. During hearings, the evidence is disclosed and arguments are made; in some cases, the defendant can present counterclaims.

After the final hearing, the court might take three to ten months to issue a decision. In this regard, civil proceedings do not have a time limit, and the duration will depend on the workload of the court. Procedures in the cities usually take longer than in smaller towns.

8. Are parties required to disclose relevant documents to other parties and the court?

The obligatory disclosure of documents in civil procedures in the Dominican Republic occurs only in certain limited circumstances. Parties usually voluntarily produce the documents supporting their arguments through the process, and mandatory disclosure (or discovery) as found in other jurisdictions such as the United States does not exist in the Dominican Republic.

Articles 55 to 59 of the Civil Procedure Code provide for a process to compel the production of documents when a party wishes to have access to a certain document that it deems necessary for the case. The interested party must file the request before the judge that hears the case. Judges can order the delivery of the document and, in some cases, order a penalty (an "astreinte") if the person does not comply with the order within a certain time frame.

9. Are there rules regarding privileged documents or any other rules which allow parties to not disclose certain documents?

There are no express rules regarding privileged documents or any other rules which allow parties to not disclose certain documents. However, pursuant to paragraph 8 of article 69 of the Dominican Constitution, any evidence obtained contrary to the law is null and void. Accordingly, all evidence that is used during the trial must have been obtained according to the law.

In addition, during the trial, the judge may dismiss documents that have not been communicated in good time in accordance with article 52 of Law 834 of 15 July 1978.

Attorneys' and other professionals' communications are protected by a general confidentiality duty.

10. Do parties exchange written evidence prior to trial or is evidence given orally? Do opponents have the right to cross-examine a witness?

Written evidence is commonly used in Dominican civil procedures. Although parties may use the testimony of a witness as evidence, this is the exception. The documents can be exchanged before or after the first hearing. During civil and criminal trials, a witness may be interrogated. The first party to interrogate the witness is the one that has proposed it; in civil procedures, interrogation of a witness is through the judge, and the opponents have the right to cross-examine the witness.

11. What are the rules that govern the appointment of experts? Is there a code of conduct for experts?

Requests for an expert's intervention must be made to the judge before filing a formal application for appointment, and their intervention is regulated under the Civil Procedure Code. In this regard, an expert may participate in a

MEDINA GARRIGÓ ABOGADOS

Fabiola Medina Garnes

Founding Partner, Medina Garrigó Abogados

Fabiola Medina Garnes is the founding partner of Medina Garrigó Abogados (MGA). She has ample experience in public administration and private practice. She served as Head Assistant to the Chief Legal Advisor of the President of the Dominican Republic in 1982–85 and was an Associate and Partner of renowned law firms in the country, concentrating her practice on Litigation, Arbitration, Administrative Law, Telecommunications Law and Tax Law. In 1992, she began a corporate career with Verizon Dominicana (now CLARO) as the Vice-President Legal-Regulatory as well as Secretary of the Board of Directors (1996–2005).

She was the Dominican member of the ICC International Court of Arbitration in 2005–12 and is recognised for her top leadership in the field of arbitration in the Dominican Republic. Ms. Medina presided over the Center of Alternative Resolution of Controversies of the Chamber of Commerce of Santo Domingo (CRC) and is its Second Vice-President of the Board of Directors. She is a co-author of the Arbitration Regulations and the Complementary Rules of the CRC and had a notable participation in drafting Commercial Arbitration Law No. 489-08 and the amendment of the Arbitration Chapter in Law No. 50-87 on the Chambers of Commerce.

In addition, Ms. Medina has served as President of the Disciplinary Board of the Dominican Bar Association, the Dominican Corporate Lawyers Association (ADAE), the Institutionalism and Justice Foundation (FINJUS) and the Board of Trustees of the University Instituto Tecnológico de Santo Domingo (INTEC). She has been a professor for the most prominent universities in the Dominican Republic.

trial by means of a testimony, but they usually provide written reports.

Currently, there is not a code of conduct for experts with regards to their intervention in civil or commercial proceedings. However, depending on their area of expertise, they are subject to compliance with the ethical guidelines as set by their respective professions.

12. What interim remedies are available before trial?

Interim remedies before trial are mostly employed to impede the dissipation of affected assets in the case of an eventual claim. In this regard, pursuant to article 48 of the Civil Procedure Code, as amended by Law No. 845 of 1978, an unsecured creditor can request the judge for an order attaching personal property owned by its debtor. This is an ex parte proceeding and if the order is granted, the claimant must give notice of the order to the debtor by means of a bailiff's act. After the assets have been attached, the claimant has 30 days to institute its action on the merits.

13. What does an applicant need to establish in order to succeed in such interim applications?

Pursuant to the aforementioned article 48 of the Civil Procedure Code, the claimant must prove to the judge the urgency of the measure or the danger of the dissipation of assets. Proof of the existence of the debt is also necessary, but generally judges are lenient in granting this authorisation without questioning the prima facie validity of the claim.

14. What remedies are available at trial?

Conservative measures such as the one indicated in question 12 can be requested during the procedure. The measures are subject to the same rules and procedures as if they were requested before the procedure was initiated.

Concerning the merits, parties are at liberty to request the remedies they consider appropriate, e.g. resolution of the contract, compliance with obligations not fulfilled, damages, and interest. Counter-claims are also allowed.

15. What are the principal methods of enforcement of judgment?

To enforce a judgment, the successful party must notify the other party of the judgment and wait for the appeal period to pass, which is one month in civil and commercial matters (article 443 of the Civil Procedural Code) in the case of a judgment at first instance. If it is a judgement of the Court of Appeal, the period of appeal before the Supreme Court of Justice is 30 days (article 7 of Law 3726 of 23 September 1953). Once the appeal period has passed, the judgement acquires an irrevocable authority.

Our Civil Procedure Code provides for several enforcement methods: liens, embargoes, seizure of assets, foreclosure, among others.

16. Are successful parties generally awarded their costs? How are costs calculated?

Yes, generally.

Costs are calculated in accordance with Law No. 302 of 1964. It states the amounts payable at the different stages of the procedure, but the rates indicated in the mentioned regulations are substantially below the market rates and accordingly they are not commonly used in practice. Judges can enforce parties' dispositions if the costs are agreed upon.

17. What are the avenues of appeal for a final judgment? On what grounds can a party appeal?

Paragraph 9 of article 69 of the Civil Procedure Code provides that 'any sentence can be appealed in accordance with the law. The superior tribunal cannot aggravate the sanction imposed when only the prejudiced person appeals the

sentence'. In the majority of cases, the party who loses the case appeals the decision before the Court of Appeal, since matters shall be reviewed by two instances. However, there are some exceptions in specific laws which indicate that some decisions are not subject to appeal.

The process, conducted generally before a Court of Appeal, varies depending on the matter. The appeal should be made based on the grounds of errors or mistakes of facts or law.

Judgements in the last or unique instance can be appealed before the Supreme Court of Justice. In regards to appeals before the Supreme Court of Justice, it only considers if the law has been correctly applied to the facts that have been previously presented in the lower courts.

18. Are contingency or conditional fee arrangements permitted between lawyers and clients?

Contingency and conditional fee arrangements between lawyers and clients are permitted.

19. Is third-party funding permitted? Are funders allowed to share in the proceeds awarded?

Third-party funding is not expressly allowed in the Dominican Republic.

20. May parties obtain insurance to cover their legal costs?

There are specific insurance policies for civil and tort liabilities in the Dominican Republic. These types of insurance will cover the damages a person may cause and the legal costs of the claims for those damages. These types of insurance policies are usually issued prior to the disputes and are regulated in accordance with Law No. 146-02 on Insurance and Bonds of 11 September 2002.

21. May litigants bring class actions? If so, what rules apply to class actions?

Class actions are not expressly established under local laws and regulations. Nevertheless, courts can decide on lawsuits filed by multiple plaintiffs against the same defendants for the same event. Consequently, these types of proceedings are not subject to special rules.

Some regulations such as the General Law for Protection of Consumers' Rights (No. 358-05) provide the right for associations to file a claim on consumer protection. Article 94 of the said regulation provides that the association must be organised and in existence as a non-government organisation (NGO) and that in order to seek damages, the association must have express authorisation from consumers.

22. What are the procedures for the recognition and enforcement of foreign judgments?

Pursuant to the newly enacted Law No. 544-14 of Private International Law Act of the Dominican Republic, foreign awards may be enforced through an authorisation or exequatur rendered by the Civil and Commercial Chamber of the Court of First Instance of the National District, with the exception of judgments on the following matters: administrative law, arbitration and bankruptcy.

It is important to mention that the exequatur to enforce the foreign judgment does not seek to modify or substitute the merits of the decision. During the exequatur proceedings, the court will not be able to hear arguments on the merits and is limited to verifying if the judgment was issued in accordance with the laws and does not create a conflict with public policy.

Also, the Dominican Republic is a contracting state to the Panama and New York Conventions on the Recognition and Enforcement of Foreign Arbitral Awards. In accordance with the New York Convention and the Dominican Law on Commercial Arbitration, foreign arbitration awards may be enforced through exequatur rendered by the Civil and Commercial

Chamber of the Court of First Instance of the National District.

23. What are the main forms of alternative dispute resolution?

The most commonly used form of alternative dispute resolution is arbitration. Law No. 489- 08 on Commercial Arbitration of the Dominican Republic is the general legal framework applied to all arbitrations conducted within the territory of the Dominican Republic.

According to its article 23, the parties have the freedom to agree on the procedure to be followed by an arbitral tribunal, and in the case of institutional arbitration where the regulations of the institution provide for a mandatory procedure, the mandatory procedure will be applied. In the absence of such an agreement, the arbitral tribunal may conduct the arbitration as it considers appropriate pursuant to the provisions of the Law.

24. Which are the main alternative dispute resolution organisations in your jurisdiction?

The most renowned arbitral institution in the Dominican Republic is the Alternative Dispute Resolution Center of the Chamber of Commerce (CRC), created by Law No. 50-87 of the Chambers of Commerce.

The CRC has an official list of arbitrators, with prestigious professionals in different areas. In the absence of an agreement between the parties regarding the number of arbitrators, the managing board shall appoint one arbitrator, except where the circumstances require an arbitral tribunal of three or more members.

The parties are free to agree on the language(s) and the place of the arbitration. In the absence of an agreement, the managing board shall decide on this depending on the circumstances of the case.

25. Are litigants required to attempt alternative dispute resolution in the course of litigation?

For civil and commercial disputes, the courts do not require or suggest the use of alternative dispute resolution during the course of litigation. However, in accordance with article 516 of the Dominican Labour Code, the parties in a labour dispute must attempt a preliminary procedure of conciliation before the same court.

Also, conciliation and mediation proceedings are available for certain civil disputes, such as in Law No. 173 concerning the distribution or representation of foreign companies. Pursuant to articles 37 and 38 of the Criminal Procedure Code, conciliation can be attempted in private actions and also in public actions where the public interest is not compromised. In disputes on alimony or child support, the Prosecutor will conduct conciliation proceedings before the trial.

Furthermore, article 198 of Law No. 146-02 on insurance and liabilities establishes preliminary conciliation with the regulator in case of a dispute.

26. Are there any proposals for reform to the laws and regulations governing dispute resolution currently being considered?

During recent years, different drafts of a bill containing a new Civil Procedure Code have been discussed at Congress. The different drafts represent major changes to civil procedures. However, the bill has not yet been enacted.

27. Are there any features regarding dispute resolution in your jurisdiction or in Asia that you wish to highlight?

Major changes in the civil and commercial procedures have taken place over the past few decades. As these changes were inevitable, new laws have been enacted to guarantee a fair and

expedited procedure. Important structural changes in the composition of the Supreme Court of Justice and lower courts have been implemented as a consequence of the constitutional and legal reforms. One example is the new Law on Restructuring and Liquidation of Companies and Business Persons (Law No. 141-15) that will take effect on 7 February 2017. The law provides for, among others, the creation of new courts that will be exclusively competent in regards to the liquidation process. Although many challenges still lie ahead, the Dominican Republic is making progress on the subject.

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MEDINA GARRIGÓ ABOGADOS

1. 在民事诉讼方面，法院系统的结构是怎样的?

多米尼加共和国是罗马 - 日耳曼法系的民事法律管辖地。就其领土而言，司法制度分为 11 个司法部门和 35 个司法地管辖区。各个司法管辖区设有一审法院，该一审法院通常按照案件的性质又分为各个法庭；民事和商事法庭主管审理民事诉讼。各司法管辖区均由上诉法院负责管理。案件随后可向最高法院上诉。

2. 法官在民事诉讼中的角色是什么?

法官主持审理诉讼、维持审理期间的秩序以及就各当事方的诉求和抗辩进行裁决。由于多米尼加司法系统并未规定陪审团审案，因此法官便充当裁决人的角色。因此，法官的主要角色就是解释法律，并评估所呈递的证据，以便最终做出裁决。对于管辖各当事方的证据规则，法官均需保持中立，当事方则须在诉讼期间证明其各自案件并遵守有关动议和记录的条款和形式。

3. 庭审是否向公众开放？公众是否能够查阅法庭文件?

根据多米尼加共和国《民事诉讼法》第 87 条规定，大多数民事诉讼均进行公开审理。只有某些事项不采用公开审理，如涉及未成年人或离婚的案件。在特定案件中，法官可在对事项作出合理决定之后限制参与庭审的人员。

在整个过程中，公众可查阅法院文件。但是，一旦所有的审理完毕，且法官准备对案件作出裁决时，则公众不可再查阅文件。

4. 所有律师均有权代表其委托人出庭并进行诉讼吗？如果不是，律师职业的结构是怎样的?

在多米尼加共和国从事法律事务，需满足某些法定要求。律师有权代表其委托人出庭并进行诉讼。在获得地方大学的法律学位之后，律师必须获得行使其专业的官方授权，即‘许可证书’。该授权由总统颁布授权律师在本国执业的法令授予。此外，律师必须参与最高法院举行的入职仪式。律师也必须成为多米尼加律师公会的成员（‘多米尼加律师公会’）。

5. 提起民事请求的时效期是多久?

根据《民事诉讼法》第 2262 条规定，多米尼加共和国大多数民事索赔案的一般时效期为 20 年。其他案件则遵循法律明确规定的较短时效。该等案件包括因疏忽引起的侵权诉讼（一年）和未能履行合同义务的责任诉讼（两年）。

6. 有哪些诉前程序是当事人在提起诉讼之前必须遵守的?

一般而言，在提起诉讼之前原告无需遵守诉前程序。但法律规定了一些例外情况。在这方面值得一提的是，多米尼加共和国《民事诉讼法》第 1146 条规定，只有在债务人被告知违反合同责任的情况下，才须支付损害赔偿金。

7. 案件进入审理之前要经过哪些典型的民事诉讼程序？有什么样的时间表?

诉讼通过法警向被告发送通知的行为（acto de alguacil）提起。该行为须符合《民事诉讼法》第 61 条规定的多项手续。在这方面，

原告必须表明诉讼的目的，简要说明主要论据，并清楚指明当事方的身份。

在进行上述初步书面声明之后，原告必须寻求法院及第一次审理的指定。被告必须通过法警向原告告知将在审理期间担任其代理律师的律师姓名和地址。

案件可进行多次聆讯，通常为三次或更多次。当事方一般要求相互披露文件，而法官则几乎不例外地给予各当事方连续 15 天的时间提交该当事方希望披露的文件。在聆讯期间，须披露相关证据并提出论据；在某些案件中，被告可以提出反诉。

在最后一次聆讯之后，法院可能需要三到十个月的时间做出裁决。在这方面，民事诉讼没有时间限制，而其持续时间将取决于法院的工作量。在各个城市提起的诉讼持续的时间通常比在小城镇上提起诉讼所花费的时间长。

8. 当事人是否必须向其他当事人和法院披露相关文件?

在多米尼加共和国的民事诉讼中，只有在特定有限的情况下会要求强制披露文件。当事方通常自愿通过诉讼程序披露支持其论点的文件，在多米尼加共和国不存在诸如美国这些司法管辖区内可见的强制披露（或证据开示）的情况。

《民事诉讼法》第 55 条至第 59 条规定，当一方当事人希望查阅其认为对案件所必要的特定文件时，可以采取一个强制提供文件的程序。相关方必须向审理案件的法官提交申请。法官可以下令提交文件，在某些案件中，如果某人在规定的时间内未遵守该命令，则法官还可命令进行处罚（“astreinte”）。

9. 是否有关于特权文件的规则或允许当事人不披露某些文件的任何其他规则?

不存在有关特权文件的规则或者任何其他允许当事人不披露特定文件的明文规则。但是，依据《多米尼加宪法》第 69 条第 8 款规定，违法获得的任何证据均无效。因此，在审理期间使用的所有证据必须是依法获取的。

另外，在审理期间，对于未按照 1978 年 7 月 15 日第 834 号法律第 52 条规定依时传送的文件，法官可不予考虑。

代理律师和其他专业人员的往来信函均受一般保密义务的保护。

10. 当事人在审理之前是否交换书面证据? 或是提供口述证据? 对方是否有权盘问证人?

在多米尼加民事诉讼中，通常使用书面证据。虽然当事人可能使用证人的证词作为证据，但这种情况属于例外。在第一次聆讯之前或之后可以交换文件。在民事和刑事审判期间，可以审问证人。提出要审问的一方先审问证人；在民事诉讼中，审问证人通常通过法官实施，且对方当事方有权盘问证人。

11. 关于专家任命的规则是怎样的? 是否有专家行为准则?

在提交正式任命专家的申请之前必须向法官提交专家介入的申请，而专家的介入须遵守《民事诉讼法》规定。在这方面，专家可通过提交证词参与案件审理，但是他们通常会提交书面报告。

目前，在民事或商事诉讼中，对于专家介入，不存在专家行为准则。但是，依据专家所在专业领域，专家须遵守其各自专业领域规定的道德准则。

12. 案件审理前可获得哪些临时救济?

在案件审理之前的临时救济主要用于防止有关资产流失，以备将要提起的诉讼请求。在这点上，依据《民事诉讼法》第 48 条规定（经 1978 年第 845 号法律修订），无担保债权人可以请求法官下达扣押其债务人个人财产的命令。这种情况适用于单方面诉讼，而如果法官下达了命令，请求人必须通过法警向债务人告知该命令。在资产被扣押之后，请求人有 30 天的时间根据案情提起诉讼。

13. 申请人需要确立些什么才能成功申请此类临时救济?

依据前述《民事诉讼法》第 48 条规定，原告必须向法官证明采取措施的紧迫性或存在资产流失的危险性。还必须提供存在债务的证明，但是法官在给予批准时一般不会很严格，不会质讯请求的表面有效性。

14. 案件审理期间可获得哪些救济?

在诉讼期间可以要求获得如问题 12 中所示的保全措施。该等措施须遵循诉前申请措施适用的同等规则和程序。

在考虑案情的基础上，当事人可自由要求获得其认为适当的救济，例如，解除合同、遵守未履行的义务、损害赔偿和利息。允许提出反诉。

15. 执行判决的主要方式有哪些?

胜诉方执行判决，必须将判决通知另一方；若为一审判决，则等待上诉期结束。在民事和商业案件中，上诉期为一个月（《民事诉讼法》第 443 条）。如果是上诉法院作出的判决，则向最高法院提起上诉的时限为 30 天（1953 年 9 月 23 日第 3726 号法律第 7 条）。一旦上诉期结束，则判决将具有不可撤销的效力。

我们的民事诉讼法规定多种执行方法：其中有留置权、禁令、查封资产、止赎权等。

16. 胜诉方是不是一般会被判获得诉讼费用赔偿? 诉讼费用如何计算?

是的，一般而言。

MEDINA GARRIGÓ ABOGADOS

Fabiola Medina Garnes
创始合伙人，Medina Garrigó Abogados

Fabiola Medina Garnes 是 Medina Garrigó Abogados（MGA）的创始合伙人。她在公共行政管理和私人执业方面具有丰富的经验。她在 1982-85 年期间担任多米尼加共和国总统的首席法律顾问的主管助理，曾是国内多家著名律师事务所的职员兼合伙人，专注于诉讼、仲裁、行政法、电信法和税法方面的业务。1992 年，她在 Verizon Dominicana（现为 CLARO）开启了公司职业生涯，在公司担任负责法规的副总裁兼董事会秘书（1996-2005）。

在 2005-2012 年期间，Fabiola Medina Garnes 是国际商会国际仲裁院的多米尼加成员，被认为是多米尼加共和国仲裁领域的最出色领导。Medina 女士负责圣多明哥省商会（CRC）的替代争议解决中心，现为董事会的第二副总裁。她是仲裁法规和 CRC 补充规则的合著者，并曾引人注目地参与了起草第 489-08 号商业仲裁法以及商会第 50-87 号法律中仲裁章节的修订。

另外，Medina 女士曾担任多米尼加律师公会纪律审裁委员会、多米尼加公司律师公会（ADAE）、制度主义和司法基金会（FINJUS）、圣多明哥科技学院受托管理委员会的主席。她一直是多米尼加共和国最著名大学的教授。

费用按照 1964 年第 302 号法律计算。其中规定了在诉讼不同阶段应付的款项，但是上述法律规定的价格大大低于市场价格，因此在实践中该等价格并不常用。如果商定了费用，法官可以执行各当事人的处理意见。

17. 对最终判决有哪些上诉途径？当事人能够以什么理由上诉？

《民事诉讼法》第 69 条第 9 款规定："可依法上诉任何判决。当仅有败诉的一方对判决提起上诉时，高等法庭不能加重已经做出的处罚"。在大多数案件中，是案件败诉方针对裁决向上诉法院提起上诉，因为案件应经过二审复核。但是，在具体法律中存在一些例外情况，其中规定某些裁决不得上诉。

一般向上诉法院提起上诉的程序因案件的不同而不同。上诉的提起应当以事实或法律错误为理由。

对终审或单一审理作出的判决可向最高法院提起上诉。对于向其提起的上诉，最高法院提起只考虑法律是否恰当适用于之前向下级法院呈递的事实情况。

18. 是否允许律师和委托人之间存在胜诉酬金或按条件收费的安排？

律师和委托人之间的胜诉酬金或按条件收费安排是允许的。

19. 是否允许第三方资助？资助人是否可分享胜诉收益？

在多米尼加共和国，第三方资助不是明文许可的。

20. 诉讼当事人是否可为其诉讼费用投保？

在多米尼加共和国，存在针对民事和侵权责任的具体保险单。该等类型的保险将赔偿投保人可能招致的损害赔偿以及诉求该等损害赔偿的诉讼费。该等保险单通常在争议之前出具，并受 2002 年 9 月 11 日关于保险和债券的第 146-02 号法律的规管。

21. 诉讼人是否可提起集体诉讼？如果可以，哪些规则适用于集体诉讼？

当地法律和法规没有对集体诉讼作出明文规定。不过，法院可裁决多方原告针对同一原告以同一事件为由提起的诉讼。因此，该等类型的诉讼不受特殊规则的规管。

某些法规，如《消费者权利保护普通法》（第 358-05 号），规定团体有权提起有关消费者保护的请求。上述法规第 94 条规定团体必须是有组织的，作为非政府组织（NGO）的形式存在；还规定，为了寻求损害赔偿，团体必须获得消费者的明确授权。

22. 外国判决通过哪些程序予以承认和执行？

依据新颁布的多米尼加共和国国际私法第 544-14 号法律规定，外国裁决可通过国内一审法院的民事和商事法庭授权或许可证书予以执行，但不包括有关以下事项的判决：行政法、仲裁和破产。

必须说明，执行外国判决的许可证书并不会修改裁决或替代裁决的法律理据。在许可诉讼期间，法院不能够审理有关是非曲直的论证，而仅限于验证判决是否是依法作出的而且并未与公共政策产生冲突。

另外，多米尼加共和国是《有关承认和执行外国仲裁裁决的巴拿马和纽约公约》的缔约国家。按照《纽约公约》和《多米尼加商业仲裁法》规定，外国仲裁裁决可通过国家一审法院的民事和商事法庭签发的许可证书予以执行。

23. 替代争议解决的主要形式是什么？

最常使用的替代争议解决的形式为仲裁。《关于多米尼加共和国商业仲裁的第 489-08 号法律》是适用于在多米尼加共和国国内进行的所有仲裁的一般法律框架。

按照其中第 23 条规定，当事方可自由商定仲裁庭须遵守的程序，但若为机构仲裁，且机构的法规规定了强制性程序，则该强制性程序将适用。在未达成此类约定的情况下，仲裁庭可按照其认为适当的方式依据法律规定进行仲裁。

24. 在您所在的司法管辖区有哪些主要的替代争议解决机构?

多米尼加共和国最著名的仲裁机构是按照商会第 50-87 号法律创立的商会替代争议解决中心（CRC）。

CRC 拥有一份正式的仲裁员名单，该等仲裁员均是在不同领域有名望的专业人员。在各当事人未就仲裁员人数达成一致的情况下，管理委员会应任命一名仲裁员，除非当时的情形要求有一个由三名或以上仲裁员组成的仲裁庭。

当事人可自由商定仲裁语言和仲裁地点。在未就此达成一致的情况下，管理委员会应依据案件的情况作出决定。

25. 在诉讼过程中诉讼人是否必须尝试替代争议解决办法?

对于民事和商事争议，法院不会要求也不会建议在诉讼过程中使用替代争议解决。但是，按照《多米尼加劳动法》第 516 条规定，劳动争议中的当事人必须在同一法院尝试采用初步调停程序。

同样，某些民事争议也可以采用调停和调解程序，例如在有关外国公司分配和代表的第 173 号法律中的规定。依据《刑事诉讼法》第 37 条和第 38 条规定，在私人诉讼以及公诉（如果不会损害公众利益）中也可尝试调停。在有关赡养费或儿童抚养费的争议中，公诉人将在审理之前进行调停程序。

此外，有关保险和责任的第 146-02 号法律第 198 条规定，若发生争议可由监管人进行初步调停。

26. 当前是否有改革争议解决法律法规的建议在审议中？？

近几年来，国会已经在讨论关于新的《民事诉讼法》法案的各种草案。各种草案均表示对民事诉讼作出重要变更。但是，法案尚未通过。

27. 关于您所在司法管辖区或者亚洲地区的争议解决，是否有任何特殊情况需加以强调?

在过去几十年来，民事和商事诉讼程序发生了重要变更。由于该等变更是不可避免的，因此颁布了新的法律以保障有一个公平且快速的诉讼程序。由于宪法和法律改革，最高法院和下级法院的构成也发生了重要的结构性变更。举例来说，新的《公司和商人重组和清算法》（第 141-15 号法律）将于 2017 年 2 月 7 日开始生效。该法律规定，除其他事项以外，将设立新的法院，专门管辖清算程序。虽然未来仍面临诸多挑战，但是多米尼加共和国在这一方面正在不断进步。

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1. What is the structure of the court system in respect of civil proceedings?

The court system in respect of civil proceedings is broadly divided into three tiers. The District Courts are the first tier followed by the High Court and finally the Supreme Court of India. It may be noted that depending on the type of civil proceedings being filed, there are divisions within the District Courts which need to be kept in mind. Certain actions below a specific pecuniary value (this pecuniary value may differ from state to state) are filed before the District Judge (Junior Division), and parties have the right to appeal to the District Judge (Senior Division) from these subordinate courts. If the actions are of a higher pecuniary value, then the court of first instance is the District Judge (Senior Division). A number of larger cities also have City Civil Courts which act as courts of first instance for the designated geographic region. These courts are established by a statute.

Above the District Courts are the High Courts. The High Courts generally exercise appellate jurisdiction over the District Courts. However, certain High Courts, such as the High Courts of Delhi, Calcutta, Mumbai and Madras, also exercise original jurisdiction over civil disputes. The pecuniary jurisdiction of the Delhi High Court was amended in 2015. As a result of this amendment, the Delhi High Court now exercises jurisdiction over matters which are valued in excess of Rupees Two Crore. The High Court of Calcutta shares concurrent jurisdiction with the local City Civil Courts in matters valued between Rupees Ten Lakh and Rupees One Crore. For matters valued in excess of Rupees One Crore, the High Court of Calcutta exercises exclusive jurisdiction. The High Court of Bombay exercises exclusive original jurisdiction in matters which are valued in excess of Rupees One Crore, and the High Court of Madras exercises exclusive original jurisdiction with respect to matters which are valued in excess of Rupees Twenty Five Lakh.

Apart from exercising such appellate and in some instances original jurisdiction, the High Courts also exercise writ jurisdiction under articles 226 and 227 of the Constitution of India, which empowers them to issue orders and directions to any state body or authority in case any action of such body is ultra vires the provisions of the Constitution. Under article 227, the High Court has the right to supervise all courts and tribunals under its jurisdiction.

The Supreme Court of India is the final court of appeal. Appeals from judgments and orders passed by the various High Courts and tribunals are adjudicated upon by the Supreme Court. Article 136 of the Constitution provides the Supreme Court with the power to grant Special Leave to Appeal from any judgment or order of a High Court or tribunal. The Supreme Court also has the power under article 32 of the Constitution to pass necessary orders for protection and enforcement of fundamental rights which are guaranteed by the Constitution.

In addition to the three tiers of courts mentioned above, there are also a number of tribunals in India which hear civil actions on a particular area of law. For instance, the National Green Tribunal is responsible for hearing and adjudicating cases related to environment preservation and protection. The Parliament through legislation has also set up consumer redressal tribunals at the district, state and

national levels. There are specialised tribunals in the fields of electricity, debt recovery for financial institutions, telecommunications, competition and tax as well.

In 2016, the National Company Law Tribunal ('NCLT') and the National Company Law Appellate Tribunal ('NCLAT') under the Companies Act, 2013, have also been set up. As a result of the formation of these tribunals, all disputes which were pending before the Company Law Board and the National Company Law Board have been transferred to the NCLT and NCLAT, respectively. Over a period of time, NCLT and NCLAT will also preside over winding-up petitions and schemes of arrangement which currently fall within the jurisdiction of High Courts.

2. What is the role of the judge in civil proceedings?

India is a common law country and follows an adversarial system. The role of the judge in civil proceedings is adjudicatory in nature. Unlike a civil law system, a judge in India is responsible for hearing and adjudicating on all cases. Effectively, every decision of the judge can set a judicial precedent. There is no jury system in India. Hence, the judge is the sole authority responsible for determining the eventual outcome of each case based on evidence led by the parties and arguments addressed by their respective advocates.

3. Are court hearings open to the public? Are court documents accessible to the public?

Yes, court hearings are generally open to the public. In certain exceptional cases, a judge can order for a hearing in private. Court documents are accessible to the public on the payment of a nominal fee and usually with a statement which explains the reason providing 'good cause'. Copies can also be obtained under the Right to Information Act, 2005.

4. Do all lawyers have the right to appear in court and conduct proceedings on behalf of their client? If not, how is the legal profession structured?

Only advocates who are registered with a bar council have the right to appear and conduct proceedings in courts. After completing a degree in Bachelor of Laws, anyone who wishes to appear in courts in India has to register with the bar council of the state where they will primarily practice. The Bar Council of India has also introduced, in 2010, an All India Bar Exam for all lawyers who have successfully completed a Bachelor of Laws degree. Upon passing the All India Bar Exam, candidates receive a Certificate of Practice. This Certificate of Practice, coupled with the registration with a state bar council, gives a lawyer the right to appear in court and conduct proceedings on behalf of their client. Prior to appearing in court and conducting such proceedings, a lawyer is required to obtain an authorisation from the client, popularly known as vakalatnama, appointing the lawyer as the client's advocate and permitting the lawyer to appear and conduct proceedings on the client's behalf. A lawyer registered with a state bar council can appear before court in other states as well.

In India, if a lawyer is employed as a company's in-house counsel, the Advocates Act, 1961, places a specific bar on such lawyers from practising in courts. Further, such lawyers are also expected to suspend or surrender their registration, if they have registered with any state bar council, during the period of their employment.

5. What are the limitation periods for commencing civil claims?

The Limitation Act, 1963 ('Limitation Act') is the statute which prescribes the limitation periods for various civil claims. While the general period of limitation for adjudication of a civil claim is three years from the date on which the cause of action arises, there are exceptional

cases where the period of limitation is either more or less than three years. If, due to any genuine reason, a party is unable to institute proceedings within the period of limitation as prescribed by the Limitation Act, such party can seek condonation of such delay by the court by filing an application under section 5 of the Limitation Act.

6. Are there any pre-action procedures with which the parties must comply before commencing proceedings?

Generally, there are no pre-action procedures mandated under law. A party has the right to approach a court as and when a cause of action arises. Procedural requirements include the payment of appropriate court fees and compliance with filing procedures before the appropriate forum or tribunal based on the rules stipulated by such forum or tribunal.

In certain cases, such as eviction, parties follow the practice of putting the tenant on notice, and if the property is not vacated even after delivery of such notice, then a suit for eviction is filed. Another instance of a pre-action procedure is prescribed under the Companies Act, 1956, where before filing a winding-up petition against a company, a creditor is required to issue a statutory notice, giving the company 21 days from the date of receipt of notice to pay the debt. Similar statutory provisions putting the opposite side on notice also exist in the context of initiating an action to appeal from an arbitral award under the recently amended Arbitration and Conciliation Act, 1996.

Further, where a suit is to be instituted against the government or against a public officer for any act purporting to be done by such public officer in his/her official capacity, then as per section 80 of the Code of Civil Procedure, 1908 ('CPC'), a notice has to be served on such government or public officer two months prior to the institution of proceedings.

7. What is the typical civil procedure and timetable for the steps necessary to bring the matter to trial?

As per the CPC, a trial commences after the pleadings of both parties are complete and after the plaintiff has presented evidence in court. For the suit to reach the trial stage, the defendant must file a written statement in response to the plaint. After the written statement is filed, the judge frames issues. After the issues to be determined in the suit are framed, the next step is for the plaintiff to lead evidence in support of the plaint. Once the plaintiff files the affidavit in support of its evidence, the trial is deemed to have commenced.

There is no specific time prescribed within which the trial must commence. However, for the filing of a written statement, the defendant has 30 days from the date of service of notice. This time can further be extended by another 60 days if sufficient reasons are provided by the defendant. Due to judicial precedent set by the Supreme Court of India, the courts have discretion even beyond this initial 90 day period, to allow the defendant to file a written statement. Also, if the parties file any interim applications prior to the evidence stage, then rulings on such interim applications also take time, thus delaying the commencement of the trial.

The CPC has undergone certain amendments after notification of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2016 ('Commercial Courts Act'). The Commercial Courts Act provides a specific timeline for e ach stage in a suit. However, it remains to be seen whether such timelines will be strictly enforced or the courts will exercise their discretionary powers and consider such timelines as indicatory rather than compulsory.

8. Are parties required to disclose relevant documents to other parties and the court?

Yes, the CPC specifically requires that any documents on which the parties rely must be filed in court. As a matter of practice, a copy of such documents is also provided to the opposing party. Further, under Order XI of the CPC a party has the right to make an application for discovery or inspection of relevant documents, which it has reason to believe are in the possession of the opposing party and have not been disclosed to the court. The court itself has the suo-moto power to call for production of any document which it considers relevant to the proceedings but has not been produced by a party.

9. Are there rules regarding privileged documents or any other rules which allow parties to not disclose certain documents?

As per section 126 of the Indian Evidence Act, 1872 ('Evidence Act'), a barrister, attorney, pleader or vakil cannot, without their client's express consent, disclose any communication made to them in the course of and for the purpose of their employment as such barrister, attorney, pleader or vakil. Further, they are also barred from stating the contents or condition of any document with which they can become acquainted for the purpose of their professional employment or disclose any advice rendered to a client. The Bar Council of India Rules also protects this professional privilege.

Apart from protection of attorney-client privilege, there are no rules regarding privileged documents. However, a party has the option of disclosing a privileged document only to the judge with a request that the same may be kept confidential. If a party is called upon to produce a privileged document in court which is confidential in nature or contains sensitive information regarding the party's business and chooses not to do so, then the court may draw an adverse inference, i.e. an inference that the said document contains information which is adverse/against the interest of the said party. To seek production of a document from the opposing party, a party must establish as to how such information is relevant to the case.

The Evidence Act prevents a public official from disclosing communication which may be against public interest during the course of a trial.

10. Do parties exchange written evidence prior to trial or is evidence given orally? Do opponents have the right to cross-examine a witness?

Evidence is primarily led through an affidavit filed by witnesses of each party to the suit. Such an affidavit is filed in lieu of an examination-in-chief of the witness. A copy of the affidavit has to be served on the opposing party prior to or at the time of filing with the court. Based on this affidavit, the opposing party has the right to cross-examine the witness. Further to such cross–examination, parties may also re-examine their own witness. The scope of re-examination is very limited.

11. What are the rules that govern the appointment of experts? Is there a code of conduct for experts?

Parties to a suit can appoint experts to tender evidence on their behalf in court. There are no specific rules regarding the conduct of such experts. If considered necessary, the court can also suo moto seek the opinion of an expert with respect to any evidence or fact which may be presented before it. Sections 45–49 of the Evidence Act deal with the appointment and opinion of experts. Parties also have the right to seek an appointment of a court commissioner. This is usually done where there is a requirement of surveying a property and reporting its status to the court. These experts are not witnesses of facts but of their specialised area of expertise.

12. What interim remedies are available before trial?

Prior to the commencement of a trial, if the property in dispute in the suit is in danger of being wasted, damaged or alienated by any party to the suit, then the court can pass appropriate orders to restrain such act or to secure the property in question. If the property is perishable in nature, then the court can order sale of such property and deposit of the money in court. The court can also pass an order for injunction if the defendant is likely to remove or dispose of its property with the intention of defrauding its creditors, to secure the amount in dispute. The court also has the power to restrain a defendant from dispossessing the plaintiff in relation to any property or causing injury to the plaintiff. These provisions are specifically provided for under Order XXXIX of the CPC.

Courts can also appoint commissioners to survey and report the status of the property as part of the interim relief proceedings.

13. What does an applicant need to establish in order to succeed in such interim applications?

In order to obtain interim relief, the applicant needs to establish that there is prima facie evidence that the subject matter of the suit is in danger of being wasted, damaged or alienated. It is also necessary to demonstrate that the balance of convenience is in favour of the party approaching the court for interim relief and that no harm or damage will be caused to the opposing side if the said relief is granted.

In cases involving possession of property, it is necessary to prove that prima facie, the plaintiff has title to the property and the defendant is actively interfering with the plaintiff's possession of the property. It is also necessary to prove that the main relief in the suit will become infructuous if the interim relief is not granted, and that the interim order will not cause any irreparable harm or loss to the party against whom it is passed whereas if such order is not passed, then the applicant will suffer irreparable loss or harm.

14. What remedies are available at trial?

The power to grant final relief is wide in an Indian trial. While courts do award damages, positive damages are normally not allowed. Costs are normally not awarded and if awarded are limited by court rules to a very minor amount.

The remedy available at trial depends on the nature of the suit. Parties can seek specific performance of agreements, recovery of money, declaration of title to a property, possession of property, injunctions, probate of wills and succession certificates.

15. What are the principal methods of enforcement of judgment?

If the judgment debtor fails to comply with the judgment, then the decree holder has the right to commence execution proceedings to enforce the judgment. In execution proceedings, the decree holder has the option of seeking liquidation of properties belonging to the judgment debtor in order to recover monies due. If the judgement debtor fails to comply with any order passed in such execution proceedings, the court has the power to order his/her arrest. Non-compliance of court orders can lead to the initiation of contempt proceedings.

16. Are successful parties generally awarded their costs? How are costs calculated?

Courts usually do not award costs to parties. In rare instances, a minimal cost is imposed on the losing party. However, two recent pieces of legislation, the Arbitration and Conciliation (Amendment) Act, 2015 and the Commercial Courts Act, have specific provisions which empower the arbitral tribunal and courts,

respectively, to impose costs on the losing party. For calculation of such costs, the legal fees of lawyers, administrative fees for arbitration, court fees for a suit etc., are to be taken into account.

17. What are the avenues of appeal for a final judgment? On what grounds can a party appeal?

A judgment debtor has the right to appeal from the final judgment. The grounds for such an appeal can vary from failure of the court to apply the law correctly to incorrect interpretation of facts and evidence.

Parties in a civil suit can also appeal from the decision of the first appellate court. Compared to a first appeal, the grounds for a second appeal are much narrower. For a second appeal, i.e. an appeal from the final judgment of the first appellate court, it is necessary to establish that there is a substantial question of law to be determined. Only if this is established will the appeal be maintainable. It may be noted that parties do not have the right to appeal from a decree which is passed with the consent of the parties.

18. Are contingency or conditional fee arrangements permitted between lawyers and clients?

There is a specific bar on contingency or conditional fee arrangements between lawyers and clients. The Bar Council of India Rules specifically prohibits the same.

19. Is third-party funding permitted? Are funders allowed to share in the proceeds awarded?

This is prohibited in India.

20. May parties obtain insurance to cover their legal costs?

Yes, parties are free to obtain insurance to cover their legal costs, although this is not a common practice in India and such insurance is not readily available.

21. May litigants bring class actions? If so, what rules apply to class actions?

There is no provision for class action suits in the CPC. However, the CPC does provide for a representative suit which can be initiated by a number of persons who have a similar interest.

The Companies Act, 2013, does provide for class action suits. Section 245 of the Companies Act, 2013, provides for members or depositors in a company to be able to file a class action suit against the company if the affairs of the company are being run in a manner prejudicial to the interests of the company or of such members or depositors. Class actions in the form of public interest litigations (PILs) can be filed before the High Courts and the Supreme Court of India under the provisions of the Constitution of India. These actions are normally brought from a public law perspective and seek to protect the fundamental rights of people as guaranteed by the Constitution of India.

22. What are the procedures for the recognition and enforcement of foreign judgments?

The CPC provides for the recognition and enforcement of foreign judgments. Section 13 specifically provides for circumstances under which a foreign judgment will and will not be conclusive. A foreign judgment can be challenged when the judgment has not been pronounced by a court of competent jurisdiction, the judgment is not on merits, the judgment is based on an incorrect view of international law or failure to recognise Indian law (where applicable), the judgment is obtained ex-parte or by fraud or the judgment sustains a claim founded on a breach of any law in force in India.

Section 14 provides for a presumption that upon production of a certified copy of the foreign judgment, the court will presume that

the judgment was passed by a court of competent jurisdiction unless proved otherwise. Further, the limitation period for seeking enforcement of a foreign judgment is three years from the date of the judgment.

The enforcement of a foreign judgment has to be sought through the District Court where the judgment is sought to be enforced. Such enforcement is in the form of an execution proceeding under Section 44-A of the CPC. Judgments from only such countries which have been notified as reciprocating territories can be enforced in India. There is no provision under Indian law for enforcing decrees from non-reciprocating countries.

23. What are the main forms of alternative dispute resolution?

The main forms of alternative dispute resolution are arbitration and mediation. Certain statutes also make reference to conciliation, through amendments. Certain statutes require parties to mediate before approaching a forum for resolution. A number of High Courts in India have court-annexed arbitration centres and separate court-annexed mediation centres. Lok Adalats are also a form of alternate dispute resolution which are conducted by the High Courts, usually twice a year.

24. Which are the main alternative dispute resolution organisations in your jurisdiction?

Arbitration in India is mostly ad-hoc in nature, with parties appointing their own tribunals and choosing to conduct proceedings at a place of their choice. However, in recent years, a few arbitration institutions have opened and gained in popularity. These include arbitration centres which are administered by the High Court of Delhi, the High Court of Karnataka and the High Court of Madras. There are domestic arbitration institutions which include the recently launched Mumbai Centre for International Arbitration and the Nani Palkhivala Centre in Chennai, among others.

Mediation is still at a nascent stage when compared to arbitration. Few parties voluntarily opt for mediation as a mode of dispute resolution. Most parties are referred to mediation by courts during a trial when the possibility of a settlement emerges. Similar to arbitration institutions, a number of High Courts, including the High Court of Karnataka, the High Court of Delhi and the Madras High Court administer a court-annexed mediation centre.

25. Are litigants required to attempt alternative dispute resolution in the course of litigation?

Litigants have the option of attempting alternative dispute resolution prior to proceeding to trial. There is no compulsion in this regard. The CPC was specifically amended to provide that the dispute between the parties may be referred to mediation if the judge is of the opinion that the matter may be referred to mediation.

26. Are there any proposals for reform to the laws and regulations governing dispute resolution currently being considered?

There have been significant reforms recently governing dispute resolution. The Arbitration and Conciliation (Amendment) Act, 2015, was passed bringing into force significant and long overdue amendments to the Arbitration and Conciliation Act, 1996. These amendments introduce clarity to issues of interim relief, possible fast-track arbitration, timelines for conducting arbitration, limiting the process of appeal and finally a regime on costs.

Similarly, the Commercial Courts Act provides specifically for benches which will hear commercial matters which are above a certain pecuniary value. Various provisions of the CPC have also been amended in light of the Commercial Courts Act. While these Commercial

Courts have begun operation in certain states, they are yet to begin operation in others.

Finally, the National Company Law Tribunal has been constituted through its principal bench and regional benches. These tribunals currently hear matters such as oppression and mismanagement. Eventually, these tribunals will also hear winding-up petitions and schemes of arrangements between companies, which are currently within the jurisdiction of the High Courts. The Companies Act, 2013, also has a provision for mediation by a panel of mediators to resolve the dispute while the dispute is pending before the tribunal.

27. Are there any features regarding dispute resolution in your jurisdiction or in Asia that you wish to highlight?

In the interest of liberalisation, the current government in India is considering permitting the entry of foreign law firms into India. This matter is also under review by the Supreme Court of India, in an appeal filed from a judgment of the Madras High Court. The Bar Council of India recently published certain guidelines to regulate and govern the entry of foreign law firms into India. However, these guidelines have since been recalled. It appears to be only a matter of time before foreign law firms are allowed to enter the Indian market. In all likelihood, initially the role of foreign lawyers will be restricted to advisory work and in arbitrations as they cannot practice before courts in India under the current legal regime.

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1. 在民事诉讼方面，法院系统的结构是怎样的?

在民事诉讼方面，印度的法院系统被分为 3 级。第 1 级为地方法院，第 2 级为高等法院，第 3 级是印度最高法院。须注意的是，根据提起的民事诉讼的不同类型，要知道地方法院有不同的分类。某些低于特定金额的诉讼（不同州对该金额的规定也不同）要向低级法院的地区法官提起，但当事人有权向高级法院的地区法官上诉。若诉讼相关的金额较高，一审法院就是高级法院的地区法官。许多大城市也拥有城市民事法院，作为指定地理区域的一审法院。这些法院是按照法规组建的。

地方法院之上为高等法院。通常而言，高等法院针对地方法院行使上诉管辖权。但是，某些高等法院，例如德里高等法院、孟买高等法院和马德拉斯高等法院，还对民事争议行使初审管辖权。印度在 2015 年对德里高等法院的金钱管辖权作出了修改。修改后，德里高等法院有权管辖价值超过 2000 万卢比的事件。对于价值在 100 万卢比到 1000 万卢比之间的事件，加尔各答高等法院与地方城市民事法院享有共同管辖权。加尔各答高等法院对于价值超过 1000 万卢比的事件拥有专属管辖权。孟买高等法院对于价值超过 1000 万卢比的事件拥有专属初审管辖权，而马德拉斯高等法院对于价值超过 250 万卢比的事件拥有专属初审管辖权。

除了行使上诉管辖权以及在某些情况下行使初审管辖权外，高等法院还行使印度宪法第 226 条和第 227 条项下的令状管辖权。按照此等规定，若任何国家机构的行为违反了宪法规定，高等法院有权向此等机构签发命令和指示。按照第 227 条的规定，高等法院有权对其管辖的所有法院和法庭进行监督。

印度最高法院是印度的终审法院。最高法院将裁定针对各个高等法院和法庭作出的裁决和命令的上诉。按照宪法第 136 条的规定，最高法院有权就高等法院或法庭的裁决或命令给予特殊上诉许可。按照宪法第 32 条的规定，最高法院还有权下达必要的命令，以便保护和行使宪法赋予的基本权利。

除上述提到的三级法院外，印度还存在其他若干法院，有权对特定法律领域的民事诉讼进行审理。例如，国家绿色法院负责审理与环境保护有关的案件。议会还通过立法设立了地区、州和国家级别的消费者赔偿法庭。印度还设立了电力、金融机构债务追收、通讯、竞争以及税务方面的特殊法庭。

在 2016 年，印度还按照 2013 年《公司法》设立了国家公司法法庭（“NCLT”）以及国家公司法上诉法庭（“NCLAT”）。设立这些上诉法庭后，公司法委员会以及国际公司法委员会审理但未决的所有争议已分别移交给国家公司法法庭和国家公司法上诉法庭进行审理。在一段时间后，国家公司法法庭和国家公司法上诉法庭还将负责目前由高等法院管辖的清盘呈请和债务偿还安排。

2. 法官在民事诉讼中的角色是什么?

印度是普通法国家，采用抗辩制度。法官在民事诉讼中起到裁决的作用。与大陆法系不同，印度的法官负责审理和裁定所有的案件。事实上，法官的每一个决定都能够设定一个司法判例。印度没有陪审制度。因此，法官是唯一的权力人，将负责根据

当事方提出的证据以及当事方各自的辩护律师进行的诉答对每项案件作出最终判决。

3. 庭审是否向公众开放？公众是否能够查阅法庭文件？

是的，庭审一般都向公众开放。在特殊情况下，法官可要求进行秘密庭审。公众在支付象征性费用并且（通常而言）提供一份声明，解释正当理由后，可查阅法庭档案。还可按照 2005 年《知情权法案》取得法庭档案的副本。

4. 所有律师均有权代表其委托人出庭并参加诉讼吗？如果不是，律师职业的结构是怎样的？

只有在印度律师公会注册的辩护律师有权出庭并参加诉讼。任何人在取得法学学士学位后，若想在印度出庭进行诉讼，必须在其主要执业所在州的律师公会进行注册。2010 年，印度律师公会还设立了全印度律师资格考试，面向已获得法学学士学位的所有律师。通过全印度律师资格考试后，考生将获得执业证书。取得执业证书并在相关州的律师公会进行注册后，律师将有权代表其委托人出庭并参加诉讼。在出庭参加诉讼之前，律师必须获得委托人的授权。此等授权通常被称为授权委托书（vakalatnama），将该律师指定为委托人的辩护律师，并授权律师代表其委托人出庭并参加诉讼。在某一州的律师公会注册了的律师也可在其他州出庭。

在印度，若律师被雇佣为某家公司的内部法律顾问，那么按照 1961 年《辩护律师法》的规定，该律师将被禁止出庭参加诉讼。此外，在作为公司内部法律顾问期间，若该等律师已在任何州的律师协会进行了注册，该等律师必须中止或撤销其注册。

5. 提起民事请求的时效期为多久？

1963 年《时效法》（“时效法”）规定了各类民事请求的时效期。民事请求的裁决时效一般为三年，从诉讼理由产生之日起计算。但在例外情况下，时效期可能短于或长于三年。若一方由于任何正当理由无法在时效法规定的时效期内提出诉讼，该方可按照时效法第 5 条的规定向法院申请延期。

6. 有哪些诉前程序是当事人在开始诉讼之前必须遵守的？

通常而言，法律没有规定任何诉前程序。起诉理由产生后，一方有权随时诉诸法院。程序规定包括：支付适当的诉讼费，以及按照法庭或法院的规则遵守向该等法庭或法院提出诉讼程序的程序规定。

在某些情况下（例如驱逐租客），当事人向承租人发出警告；如果发出警告后承租人仍未腾出房屋，当事人将提起驱逐诉讼。1956 年《公司法》还规定了诉前程序的另一种情况：在提起针对某公司的清盘申请前，债权人必须向该公司发送法定通知，该公司须在收到通知之日起 21 天内支付债务。按照最近修订之 1996 年《仲裁与调解法案》的规定，在针对仲裁裁决提起上诉情况下，还存在类似的向对方提出通知的法律规定。

此外，若由于某公务人员以公职身份采取的任何行为而向政府或该公务人员提出诉讼，那么，按照 1908 年《民事诉讼法典》（“CPC”）第 80 条的规定，必须在提起诉讼前两个月向政府或该公务人员发出通知。

7. 案件进入审理之前要经过哪些典型的民事程序？有什么样的时间表？

按照民事诉讼法典的规定，双方当事人完成诉答且原告向法院提供证据后，将进行审理。为了进行诉讼的审理，被告必须提供针对原告的书面抗辩声明。被告提供书面声明后，法官将构建诉讼议题。构建完有待在诉讼中解决的议题后，原告应提供支持性证据。原告提交支持自身证据的宣誓书后，审判将视为已开始。

未规定必须在规定时间进行案件审理。但是，被告必须在收到通知后 30 天内提交书面声明。若被告提供了充分理由，则可将期限延伸至 60 天。由于印度最高法院设定的司法判例，法院在最初 90 天期限过后仍

拥有自由裁量权，以便被告能够提交书面声明。此外，若当事人在质证阶段前提交了任何临时申请，由于处理临时申请需耗费时间，因此也会推迟审理开始的时间。

在颁布 2016 年《高等法院之商业法院、商业法庭和商业上诉庭条例》（“商业法院条例”）后，印度已对《民事诉讼法典》进行了若干修订。商业法院条例规定了诉讼各阶段的时限。但是，法院是否能够严格遵守这些时限规定，或是将行使自由裁量权将此等时限视作象征性规定而非强制性规定，还有待观察。

8. 当事人是否必须向其他当事人和法院披露相关文件?

是的，《民事诉讼法典》特别规定了当事人必须将其依赖的任何文件提供给法院。依照惯例，还应向对方当事人提供此等文件的副本。此外，按照《民事诉讼法典》法令 11 的规定，若当事人有理由相信对方当事人未向法院披露其拥有的任何文件，则该当事人有权申请要求对方当事人开示相关文件或申请勘验该等文件。法院有权要求当事人提供法院认为与诉讼有关但该当事人未提供的任何文件。

9. 是否有关于特权文件的规则或允许当事人不披露特定文件的任何其他规则?

按照 1872 年《印度证据法》第 126 条的规定，未经委托人明确同意，出庭律师、代理律师、辩护律师或律师不得披露委托人在聘用他们期间进行的或者为了聘用他们的目的而对他们进行的任何通信。此外，出庭律师、代理律师、辩护律师或律师还不得披露为了进行他们受聘工作而取得的任何文件的内容或条件，或者披露向委托人提供的任何建议。《印度律师公会规则》也保护此项专业特权。

除了对律师与委托人之间的特权进行保护外，没有任何其他关于特权文件的规则。但是，当事人有权向法官披露特权文件，但要求法官必须对该等文件进行保密。若当事人被要求向法庭提供带有保密性质或者含有与该当事人的业务有关的敏感信息的特权文件，并且该当事人拒绝了此要求，法院可进行反向推断，即推断该等文件含有对该当事人不利或影响该当事人利益的信息。为了让对方当事人提供文件，一方必须证明此等信息有多大程度与案件有关。

《证据法》禁止公务人员在庭审阶段披露不利于公共利益的信息。

10. 当事人在审理之前是否交换书面证据? 或是否提供口述证据? 对方是否有权盘问证人?

提供证据的主要途径是诉讼各方证人提交的宣誓书。这些宣誓书代替对证人的讯问。向法院提供宣誓书之时或之前，必须向对方当事人提供宣誓书的副本。根据该宣誓书，对方当事人有权盘问证人。除了盘问之外，当事人还可重新审查各自证人。重新审查的范围十分有限。

11. 关于专家任命的规则是怎样的? 是否有专家行为准则?

诉讼当事人可指定专家代表自己在法院提供证据。没有关于专家行为的具体规则。如法院认为有必要，法院可寻求专家就法院面对的任何证据或事实提供意见。《证据法》第 45 至 49 条有关于专家的任命和专家的规定。当事人还有权寻求任命法院专员。若法院要求调查当事人的财产并向法院报告财产状况，通常当事人可寻求法院专员的任命。这些专家并非事实证人，而是其专业领域的证人。

12. 案件审理前可获得哪些临时救济?

案件审理前，若争议中的财产可能被诉讼的任何当事人浪费、损害或转让，法院可下达恰当的命令，防止出现上述情况，保全争议中的财产。若财产具有易坏性质，法院可要求出售此等财产并将所得交存法院。如果被告为了欺骗债权人而可能转移或处理掉自身的财产，法院可下达禁令，以保护争议中的资金。法院还有权禁止被告抢占原告的任何财产或对原告造成损害。此等规定被明确记录在《民事诉讼法典》法令 39 之中。

法院可任命法院专员，对财产进行调查并向法院报告财产状况（作为临时救济程序的一部分）。

13. 申请人需要确立些什么才能成功申请此类临时救济?

为了取得临时救济，申请人需要确定有初步证据表明诉讼标的存在被浪费、损害或转让的风险。申请人还需要证明便利的平衡有利于向法院申请临时救济的一方，并且法院授予临时救济不会对对方当事人造成任何损害。

若涉及财产的占有，申请人需要证明，从表面看来，原告拥有财产所有权，并且被告干扰着原告对于财产的占有。此外，还需证明，若法院不授予临时救济，诉讼中的主要救济将变得徒劳，并且，临时救济不会对对方当事人造成任何不可挽回的损害或损失，而若不授予临时救济，申请人可能蒙受不可挽回的损失或损害。

14. 案件审理时可获得哪些救济?

在印度进行的审理中，授予最终救济的权力非常宽泛。虽然法院可以判定损害赔偿，但一般不会允许积极损害赔偿。法院一般不会对诉讼费用作出判决，即使作出，也会被法院规则限制在一个非常低的金额之内。

审理中是否提供救济将取决于诉讼的性质。当事人可寻求强制履行协议、索款、宣布对财产的所有权、占有财产、申请禁令、检验遗嘱和继承证书。

15. 执行判决的主要方式有哪些?

若判定债务人未能遵守判决，判决持有人有权提起诉讼，强制执行判决。提出诉讼时，为了追回应得款项，判决持有人可寻求将判定债务人的财产进行清算。若判定债务人未能遵守诉讼中下达的任何命令，法院有权下令逮捕判定债务人。违反法院的命令可能导致被提起藐视法院的诉讼。

16. 胜诉方是不是一般会被判获得诉讼费用赔偿? 诉讼费用如何计算?

法院通常不对诉讼费用作出判决。在极少情况下，败诉一方可能承担少量诉讼费。但是，最近的两项立法，即 2015 年《仲裁与调解（修订）条例》以及《商业法院法案》作出了特殊规定，授权仲裁法院和法庭裁定败诉一方承担费用。在计算此等费用时，将考虑律师费用、仲裁管理费以及诉讼费等。

17. 对最终判决有哪些上诉途径? 当事人能够以什么理由提起上诉?

判定债务人有权对终审判决进行上诉。上诉的理由有多种，包括法院未能正确适用法律、对事实和证据的解释不正确等等。

民事诉讼当事人还可对第一上诉法院的判决进行上诉。与首次上诉相比，第二次上诉的理由少很多。就第二次上诉而言，即针对第一上诉法院的终审判决进行的上诉，必须证明存在一个待确定的重要法律问题。只有在证明这一点之后，才能继续进行上诉。须注意的是，当事人无权针对征得其同意后下达的任何判决进行上诉。

18. 是否允许律师和委托人之间存在胜诉酬金或按条件收费的安排?

印度禁止律师与委托人之间订立有关胜诉酬金或按条件收费的协定。《印度律师公会规则》也明确禁止上述安排。

19. 是否允许第三方资助? 资助人是否可分享胜诉收益?

印度禁止第三方资助。

20. 当事人是否可为其诉讼费用投保?

是的，当事人可自由为其诉讼费用投保，但这一做法在印度并不常见并且此等保险很难获得。

21. 诉讼人是否可提起集体诉讼？如果可以，哪些规则适用于集体诉讼？

《民事诉讼法典》没有关于集体诉讼的规定。但是，《民事诉讼法典》规定了拥有相同利益的人群可提起代表诉讼。

2013 年《公司法》作出了有关集体诉讼的规定。按照 2013 年《公司法》第 245 条的规定，若公司事务的运行方式会损害公司或其成员或存款人的利益，公司的成员或存款人有权针对公司提出集体诉讼。公益诉讼形式的集体诉讼可按照印度宪法的规定向高等法院及印度最高法院提起。此类诉讼通常从公法的角度提起，旨在保护受到印度宪法保护之人的基本权利。

22. 外国判决通过哪些程序予以承认和执行？

《民事诉讼法典》规定了外国判决的承认和执行。第 13 条明确规定了外国判决在何种情况下能够或不能够作为终局判决。若外国判决并非由具有管辖权的法院下达、判决未依照实情、判决基于不正确的国际法律观点、判决未承认印度法律（若适用）、判决是单方面的或带有欺诈性质，或者判决支持的诉求违反印度现行法律，则该等外国判决将受到质疑。

第 14 条规定了一项假设，即获得外国判决的经验证的副本后，除非有其他证明，法院将假定该判决是由具有管辖权的法院下达的。此外，寻求执行外国判决的时限为判决下达之日起三年。

外国判决的执行应通过执行地的地方法院进行。外国判决的执行将采用《民事诉讼法典》第 44-A 条规定的执行程序的方式。仅拥有相互执行地区身份的国家下达的判决可在印度执行。印度法律没有关于执行非相互执行国家颁布的判令的规定。

23. 替代争议解决的主要形式是什么？

在印度，替代争议解决的主要形式有仲裁和调解。某些法令也通过修订提及了调解。某些法令要求当事人在诉诸法院寻求争议解决之前进行调解。印度的若干高等法院拥有法院附设仲裁中心以及单独的法院附设调解中心。Lok Adalats 也是替代争议解决的一种方式，通常由高等法院一年进行两次。

24. 在您所在的司法管辖区有哪些主要的替代争议解决机构？

在印度，仲裁带有临时性质，由当事人自己指定仲裁庭并选择仲裁地点。但是，近年来，某些仲裁机构开始出现并受到欢迎。其中包括受德里高等法院、卡纳塔克邦高等法院以及马德拉斯高等法院管辖的仲裁中心。还包括一些国内的仲裁机构，包括最近设立的孟买国际仲裁中心以及位于金奈的 Nani Palkhivala 中心。

与仲裁相比，调解仍处于萌芽阶段。很少有当事人自愿选择调解作为争议解决的方式。法院审理诉讼期间若出现和解的可能性，会让当事人进行调解。与仲裁机构相类似，许多高等法院（包括卡纳塔克邦高等法院、德里高等法院和马德拉斯高等法院）管辖着法院附设调解中心。

25. 在诉讼过程中诉讼人是否必须尝试替代争议解决办法？

诉讼人可在审判前尝试进行替代争议解决。印度没有这方面的强制性规定。印度对《民事诉讼法典》进行了特别修订。按照修订后的规定，若法官认为可通过调解解决争议，则可通过调解的方式解决当事人之间的争议。

26. 当前是否有改革争议解决法律法规的建议在审议中？

印度最近进行了有关争议解决的重要改革，通过了 2015 年《仲裁与调解（修订）条例》，完成了对于 1996 年《仲裁与调解条例》的重要且长期未实施的修订。此等修订澄清临时救济、可能的简易仲裁、仲裁时间、上诉程序限制以及费用制度方面的规定。

相类似地，《商业法院法》特别规定了审理金额高于特定金钱价值的商业案件的机构。

《民事诉讼法典》的多条规定已因为《商业法院法》而进行了修订。商业法院已开始在某些州运行，但其他州仍未设立此等商业法院。

最后，国家公司法法庭已通过其主要机构和地区机构完成了组建。这些法院目前审理例如压迫和管理不当方面的案件。目前由高等法院管辖的清算呈请以及公司间的协议安排最终由这些法院审理。2013 年《公司法》还规定由调解小组进行调解解决由该法庭审理但未决的争议。

27. 关于您所在司法管辖区或者亚洲地区的争议解决，是否有任何特殊情况需加以强调?

从自由化角度考虑，印度当前政府正考虑允许外国律师事务所进入印度。印度最高法院在审理针对马德拉斯高等法院下达的判决提起的上诉时对此事项进行了审查。印度律师公会不久前发布了一些条令，以便管理和管辖有关外国律师事务所进入印度的事项。但是，这些条令后来被撤销了。似乎外国律师事务所被允许进入印度只是早晚的事情。由于外国律师无法按照当前的法律制度在印度法院从事法律工作，最初这些外国律师很可能仅限于从事顾问工作。

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1. What is the structure of the court system in respect of civil proceedings?

The court structure in Kenya follows a hierarchical system: the Superior Courts and the Subordinate Courts. The Superior Courts consist of: (a) the Supreme Court established under article 163 of the Constitution of Kenya ('Constitution') with exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of the President and determine any appeals from the Court of Appeal in any case involving the interpretation of the Constitution and any other court or tribunal prescribed by national legislation; (b) the Court of Appeal established under article 164 of the Constitution with jurisdiction to hear appeals from the High Court and other courts and tribunals; and (c) the High Court established under article 165 of the Constitution with unlimited original jurisdiction in civil matters, jurisdiction to determine whether a right or fundamental freedom has been denied, violated, infringed or threatened and determine appeals from lower courts and tribunals and courts with the status of the High Court which are the Environment and Land Court and the Employment and Labour Relations Courts.

There are then the Subordinate Courts which are established under article 169 of the Constitution. These are: (a) the Magistrate's Courts; (b) the Kadhi's Courts; and (c) the Courts Martial and any other courts or local tribunals as may be established by an Act of Parliament.

2. What is the role of the judge in civil proceedings?

Kenya inherited the common law adversarial justice system from its British coloniser. The judge in a civil case assesses the evidence presented before him/her, interprets the law and provides an independent and impartial assessment of the facts and how the law applies to those facts. The judge, as the decision-maker on issues of fact, decides the credibility of the evidence before him/her and the witnesses brought forth. The judge applies the law to the facts to determine whether the claim has been established on a balance of probabilities. In 2016, the High Court commenced the Court Mandated Mediation pilot programme for matters filed in the commercial division and the family division of the High Court where a judge in such a civil case can mandate the parties to go for mediation and attempt to solve the dispute.

3. Are court hearings open to the public? Are court documents accessible to the public?

Article 50(1) of the Constitution provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. The court has the discretion to direct in appropriate cases that matters be heard on camera. Among Kenya's national values and principles of governance under Article 10 of the Constitution is transparency. To adhere to this principle, court proceedings are generally open to the public.

However, court documents such as pleadings are generally not accessible to the public. Subsequent rulings and judgments are accessible at www.kenyalaw.org.

4. Do all lawyers have the right to appear in court and conduct proceedings on behalf of their client? If not, how is the legal profession structured?

Kenya has a fused legal practice in that all lawyers admitted to the Roll of Advocates can conduct both courtroom advocacy practice (traditionally barristers) and law firm/transactional practice (traditionally solicitors).

A lawyer is one who has completed the requisite Bachelor of Laws degree and graduated. Upon graduation, lawyers are required to attend the Kenya School of Law and thereafter to complete a mandatory pupillage programme. The Advocates Act defines an advocate as '*any person whose name is duly entered upon the Roll of Advocates or upon the Roll of Advocates having the rank of Senior Counsel.*' A lawyer is qualified to act as an advocate when: (a) they have been admitted as an advocate; (b) their name is for the time being on the Roll; (c) they have in force a practising certificate; and (d) they have in force an annual licence. In essence then one must be qualified and have a practising certificate in order to conduct proceedings on behalf of their client.

5. What are the limitation periods for commencing civil claims?

There are statutory time limits for one to bring civil claims. The Limitation of Actions Act seeks to ensure that certain causes of action are not brought before the court upon expiry of a certain period of time. For land cases, claims must be filed within 12 years, contractual matters within six years, tortuous matters within three years and defamation cases within one year. A claim against the government is governed by the Government Proceedings Act and must be filed within 12 months with a mandatory requirement of a 30-day notice issued to the Attorney General giving the proposed cause of action. No proceedings founded on contract shall be brought against the government or a local authority after the end of three years from the date on which the cause of action accrued.

Time starts to run on the day the cause of action arose. Section 27 of the Limitation of Actions Act provides for an extension of time. However, in order to extend time for filing a suit, the action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed must be in respect of personal injuries to the plaintiff as a result of the tort.

6. Are there any pre-action procedures with which the parties must comply before commencing proceedings?

There are generally no pre-action procedures with which parties must comply. The failure to serve a demand notice may go to costs but will not disentitle the plaintiff or petitioner from prosecuting the proceedings. However, as stated in question 5, proceedings against the government must be preceded by a notice to the Attorney General setting out the acts on which the contemplated cause of action is premised; in addition, in certain personal injury claims, notice must be served on the insurer if it is intended to hold the insurer liable for the payment of any damages awarded. Claims in defamation must also be preceded by a demand setting out the circumstances which are alleged to give rise to the cause of action and identifying how it is alleged that the words uttered or written have caused injury to the plaintiff's reputation.

7. What is the typical civil procedure and timetable for the steps necessary to bring the matter to trial?

(a) Once pleadings are closed under Order 2 Rule 13 of the Civil Procedure Rules, the parties are supposed to complete, file and

serve within 10 days a Pre-trial Questionnaire which is a checklist document.

(b) Within 30 days after close of the pleadings, the court convenes a Case Conference. Parties are expected to make sure that they have filed in the Pre-trial Questionnaire before the court convenes a Case Conference.

(c) Within 60 days of a Case Conference in fast-track cases and 90 days in multi-track cases, the court convenes a Settlement Conference. This is meant to explore avenues for settlement of either the issues or the suit.

(d) Seven days before the settlement conference, parties prepare and exchange a Settlement Conference Brief which contains a summary of the facts including issues and admissions, a summary of the law to be relied on, a final list of witnesses and statements and expert reports and relevant portions of the documents to be relied on.

(e) If there is no settlement within the 30 days before the scheduled hearing of the claim, a Trial Conference is convened by the court to plan trial time, explore expeditious ways of introducing evidence, amend pleadings, deal with admissions, allow adduction of affidavit evidence, make orders for commissions, expert evidence, alternative dispute resolution ('ADR') etc. At the end of the Trial Conference, the parties sign a Trial Conference Memorandum, and the court proceeds to make orders necessary for the conduct of the suit. The parties are bound by the memorandum signed herein unless the court decides otherwise.

(f) In the meantime and at least 10 days before the trial, parties are expected to have completed, filed and exchanged a Trial Conference Questionnaire Form.

8. Are parties required to disclose relevant documents to other parties and the court?

Parties are required to file all documents that they wish to rely on at the onset of a civil claim or defence. However, any party may apply to court for orders to compel the other party to answer interrogatories, admit documents and facts, make discovery, production or inspection, impound or return documents which are in the control or possession of that other party. Discovery is a relatively straight-forward process and is governed pursuant to section 22(a) of the Civil Procedure Act which provides for the power of the court to order discovery and the like. The same is buttressed by Order 11 Rule 3(2)(d) of the Civil Procedure Rules.

9. Are there rules regarding privileged documents or any other rules which allow parties to not disclose certain documents?

Section 134 of the Evidence Act protects privileged information from disclosure. The Evidence Act also extends the same protection of privilege to communications during marriage, official records, communication with advocates, privileged documents, privileged source of information on commission of offences, confidential information and banking records.

As a rule of thumb, one is not bound to make discovery of a privileged document, which may include documents on a without prejudice basis or parliamentary proceedings; incriminating documents and communication between spouses. The power to order discovery is subject to limitation: for instance, discovery shall not be granted if it is not necessary, if it is disposing fairly of the suit or if the discovery shall not result in saving costs.

10. Do parties exchange written evidence prior to trial or is evidence given orally? Do opponents have the right to cross-examine a witness?

Order 3 Rule 2 of the Civil Procedure Rules requires certain documents in a suit to be accompanied by a list of witnesses to be called at trial, their witness statements, affidavits and a list of all supporting documents that will be relied on. Prior to the commencement of the hearing, parties are required to comply with Order 11 of the Civil Procedure Rules which deals with pre-trial directions and conferences for all suits except small claims. Order 11 provides timetables for identifying contested and uncontested issues; exploring methods to resolve the contested issues; a schedule of events; creating a timetable for the proceedings; considering consolidation of the suit, among others.

Order 11 applies to all claims other than small claims as defined under Order 3(1). The court ensures that written documents are exchanged prior to court hearings. This helps deal with preliminary issues well in advance so that the trial once commenced proceeds without unnecessary interruptions.

Opponents are generally granted the right to cross-examine witnesses. The main aims are to: elicit further facts which are favourable to the cross-examining party; test and if possible cast doubt on the evidence given by the witness in chief; and impeach the credibility of the witness.

11. What are the rules that govern the appointment of experts? Is there a code of conduct for experts?

Section 48 of the Evidence Act provides for expert witnesses. Expert witnesses are called upon when the court has to form an opinion on a point of foreign law, or of science or art, or as to the identity or genuineness of handwriting or fingerprints or other impressions. The only rule that governs the appointment of such persons is that the individual has to be specially skilled in such foreign law, science or art, or questions as to identity, or genuineness of handwriting or fingerprints or other impressions before they can be appointed. The code of conduct for such experts is that applicable to any witness in court.

12. What interim remedies are available before trial?

Interim orders, also referred to as interlocutory orders, are those passed by a court during the pendency of a suit, often between the pleading stage and the trial stage. It is imperative to note that the same does not determine finally the substantive rights and liabilities of the parties in respect of the subject matter or the rights in the suit. They seek temporary protections, adjustments or remedies and the following are available: arrest before judgment, orders for a commission, attachment before judgment, temporary injunctions, appointment of receivers, and security for costs.

13. What does an applicant need to establish in order to succeed in such interim applications?

In the celebrated case of *Giella v Cassman Brown* (1973) EALR, the court laid out what an applicant needs to establish to the court to be granted interim injunctive orders. The applicant must establish that: (a) it has a prima facie case with a probability of success; and (b) it will suffer irreparable loss or harm if the same is not granted. Where in doubt, the application should be determined on a balance of convenience.

14. What remedies are available at trial?

A plaintiff may combine a request for equitable relief and monetary damages in its plaint. Some of the more common types of equitable relief include: specific performance, rescission,

restitution, declaratory relief, quiet title and injunctions. Monetary reliefs include general and special damages as well as punitive damages.

15. What are the principal methods of enforcement of judgment?

There are several modes of execution which depend largely on the nature of the case. The principal modes of enforcement of judgment in Kenya include: delivery of the property specified in the decree; attachment and sale; sale without attachment of the property; attachment of salary; by arrest and detention in a civil prison of the judgement debtor; by garnishee proceedings which involve an attachment of monies which may be held by a third party such as a bank to the credit of the debtor; and any such manner as the nature of the relief requires at the court's discretion.

16. Are successful parties generally awarded their costs? How are costs calculated?

Generally speaking, costs follow the event. The right to costs arises only after the court has made an order to that effect, but there are instances where costs may arise without an order. If a plaintiff wholly discontinues the action by notice in writing without a court's leave, within seven days, the plaintiff may tax its costs in court. Where the plaintiff withdraws a particular claim in the action without leave and if the plaintiff does that immediately, the defendants will have to tax its costs. If the plaintiff accepts money paid into court before the trial has begun, then the plaintiff must tax its costs within seven days.

If judgment is entered in default of appearance and defence, one goes for a certificate of costs to enable execution. These are costs that have been certified by the Registrar and a certificate issued in respect of uncontested cases.

17. What are the avenues of appeal for a final judgment? On what grounds can a party appeal?

An appeal is a judicial examination by a higher court of the decision of a lower court. The avenues of appeal generally follow the hierarchy of courts described in question 1, depending on the nature of the claim and where it was first instituted. An appeal is available if the appellant can demonstrate that the trial court erred in law or in fact. Sometimes, leave of the court may be required before filing the prerequisite documents which are in a prescribed form. Where the appeal is against a money decree, the appellant may be required to deposit the decretal amount or furnish such security as may be required by the court.

Section 79B of the Civil Procedure Rules empowers the court to summarily reject an appeal. The court has the opportunity in the first instance to peruse the record of appeal and if it finds there is no sufficient ground for interfering with the decree, the court may reject the appeal. If the court does not reject the appeal, then it proceeds to hearing.

18. Are contingency or conditional fee arrangements permitted between lawyers and clients?

Section 46(c) of the Advocates Act makes any contingency fee arrangements between an advocate and a client void. Section 46 invalidates such arrangements, and this amounts to professional misconduct which may subject an advocate to the penalties described under section 60(4) of the Advocates Act. Under section 60(4), an advocate who is guilty of professional misconduct may be:

(a) admonished;

(b) suspended from practice for a period not exceeding five years;

(c) struck off the Roll of Advocates;

(d) liable to pay a fine not exceeding Kshs. 100,000;

(e) ordered to pay to the aggrieved person compensation or reimbursement not exceeding KShs. 5 million;

(f) subject to a combination of the above as the disciplinary committee deems fit.

19. Is third-party funding permitted? Are funders allowed to share in the proceeds awarded?

There is no outright provision for or prohibition on third-party funding so long as the advocate's fee is not based on a success fee model. Section 46 of the Advocates Act provides for invalid agreements, which include any agreement by which an advocate retained or employed stipulates for payment only in the event of success of a suit or that he/she be remunerated at different rates depending on the success or failure of the case. These are generally referred to as champertous agreements and are not only illegal but also professionally unethical. However, if a plaintiff and a funder have their own agreement as to the sharing of proceeds, it could be a contract inter partes which is not prohibited so long as the advocate's remuneration is not part of it.

20. May parties obtain insurance to cover their legal costs?

Yes, parties are free to take out any insurance policy that may limit or fund their legal costs.

21. May litigants bring class actions? If so, what rules apply to class actions?

Litigants may bring class actions in Kenya pursuant to article 22(2) of the Constitution which provides that a person may bring a class action as a member of, or in the interest of, a group or class of persons. Further, Order 1 Rule 8 of the Civil Procedure Rules specifically provides that one or more persons may sue or defend on behalf of numerous persons who have the same interests in a suit.

22. What are the procedures for the recognition and enforcement of foreign judgments?

The primary law on the enforcement of foreign judgments is the Foreign Judgments (Reciprocal Enforcement) Act. Under the preamble of the Act, enforcement of foreign judgments is subject to the principle of reciprocity, and reciprocal treatment is granted only to judgments emanating from courts of countries that accord reciprocal treatment to Kenyan judgments. The designated countries under the Foreign Judgments (Reciprocal Enforcement) Act are Tanzania, Uganda, Zambia, the United Kingdom and the Republic of Rwanda. In the absence of reciprocal enforcement arrangements, a foreign judgment is enforceable in Kenya as a claim in common law. Under section 4(4) of the Limitation of Actions Act, an action for the enforcement of a foreign judgment must be brought in Kenya within 12 years of the date of that judgment.

23. What are the main forms of alternative dispute resolution?

The main ADR methods available in Kenya are negotiation, conciliation, mediation and arbitration.

24. Which are the main alternative dispute resolution organisations in your jurisdiction?

The Kenyan Chartered Institute of Arbitrators¬, the Dispute Resolution Centre and the Mediation Training Institute are currently the main bodies that offer ADR in Kenya. Kenya has also recently established the Nairobi Centre for International Arbitration to promote and facilitate international commercial arbitration and to set Nairobi as a regional hub for investment/commercial arbitration.

25. Are litigants required to attempt alternative dispute resolution in the course of litigation?

ADR and traditional dispute resolution mechanisms are recognised in Kenyan law. Article 159 of the Constitution enjoins courts and tribunals in the exercise of judicial authority to promote alternative forms of dispute resolution including conciliation, mediation, arbitration and traditional dispute resolution mechanisms. Further, pursuant to Order 46 Rule 20 of the Civil Procedure Rules, litigants and the courts are encouraged to pursue ADR.

26. Are there any proposals for reform to the laws and regulations governing dispute resolution currently being considered?

As mentioned earlier, with a robust Constitution, the current wave is to make access to justice as envisaged by article 48 of the current Constitution of Kenya 2010 a reality. To achieve this, board viable options are needed. One such option, and a proposal for reform, is the adoption and actualisation of the use of ADR throughout Kenya. The Court Annexed Mediation is also in its pilot phase in the commercial division and the family division and, if successful, could be extended to qualifying claims in all divisions of the High Court.

27. Are there any features regarding dispute resolution in your jurisdiction or in Asia that you wish to highlight?

The Constitution of Kenya has placed a strong emphasis on the use of ADR mechanisms to address inter-community and inter-governmental conflicts. The effect of this is that it rubber stamps the use of traditional dispute resolution mechanisms in the management of conflicts affecting the concerned communities. The Constitution also creates constitutional bodies such as the National Land Commission which aims to address historical injustices emanating from land disputes while also using traditional dispute resolution mechanisms to address land conflicts.

To avoid a backlog of cases in mainstream courts, Kenya prides itself in having various tribunals that deal with specialised areas and are adjudicated by specialised staff, e.g. a first-of-its-kind HIV and AIDS Tribunal (whose mandate is to address the plights of persons living and affected with HIV and AIDS), the Sports Tribunal, Retirement Benefit Tribunal, Water Tribunal and Capital Markets Tribunal.

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1. 在民事诉讼方面，法院系统的结构是怎样的?

肯尼亚的法院结构采用分级体系，包括：高级法院和初级法院。高级法院包括：(a) 按照《肯尼亚宪法》("宪法") 第 163 条组建的最高法院：最高法院拥有专属初审管辖权审理和裁决与总统选举有关的争议，以及裁决上诉法院提起之涉及宪法解释的上诉和国家法律规定之任何其他法院或法庭提起的上诉；(b) 按照宪法第 164 条组建的上诉法院：上诉法院有权审理高等法院及其他法院和法庭提起的上诉；以及 (c) 按照宪法第 165 条组建的高等法院：高等法院拥有无限制的民事案件初审管辖权，有权判定某项权利或基本自由是否被剥夺、违反、侵犯或遭受威胁，并且有权裁决初级法院和法庭以及拥有高等法院之地位的法院（即环境与土地法院和雇佣与劳动关系法院）提起的上诉。

然后就是按照宪法第 169 条组建的下级法院，即：(a) 地方法院；(b) Kadhi 法院；以及 (c) 军事法庭和按照国会立法组建的任何其他法庭或地方法庭。

2. 法官在民事诉讼中的角色是什么?

肯尼亚继承了英国殖民时期的普通法抗辩司法体系。在民事案件中，法官将评估呈递的证据，对法律进行解释，并对事实以及法律对该等事实的适用进行独立且公正的评估。作为事实争议的裁定人，法官将确定呈递的证据以及出庭的证人的可信度。法官对事实适用法律，根据概率的大小确定诉讼请求是否可以成立。2016 年，高等法院对提交高等法院的商业法院和家庭法院审理的事项启动了法院强制调解试行方案，根据此方案，处理此类民事案件的法官可强制要求当事人进行调解并尝试解决争议。

3. 庭审是否向公众开放？公众是否能够查阅法庭文件?

宪法第 50 (1) 条规定，任何人都有权通过法院或者（若恰当）其他独立且公正的法庭或机构进行公正公开的审理解决可通过法律的实施解决的任何争议。法院有权在恰当的情况下决定在电视上直播案件的审理。透明原则是宪法第 10 条规定的肯尼亚的民族价值和治理原则。为了遵守该原则，法院审判一般都向公众公开。但是，法庭文件（例如起诉状）一般不提供给公众。后续的裁定和裁决将公布在 www.kenyalaw.org。

4. 所有律师均有权代表其委托人出庭并参加诉讼吗？如果不是，律师职业的结构是怎样的?

肯尼亚拥有融合的法律实务体系，所有登记在辩护律师名册中的律师可进行法庭辩护（传统称为出庭律师）以及办理律师事务所 / 事务性业务（传统称为事务律师）。

律师必须拥有必要的法学学士学位且已毕业。毕业后，律师必须就读肯尼亚法学院 (Kenya School of Law) 并完成规定的见习课程。《辩护律师法》将辩护律师定义为"被正式登记在辩护律师名册或者拥有高级法律顾问地位的辩护律师名册中的任何人士。"满足下列条件后，律师可成为辩护律师：(a) 被承认为辩护律师；(b) 被登记在辩护律师名册中；(c) 拥有有效的执业证书；并且 (d) 拥有有效的年度执照。总之，要代表委托人进行诉讼，律师必须拥有相关资格以及执业证书。

5. 提起民事请求的时效期为多久?

提出民事请求是有法定时限的。《诉讼时效法》力图保证某些诉讼因由在一定时限之

后就不得再诉诸法院。土地案件的请求必须在 12 年之内提出，合同案件是 6 年，侵权案件是 3 年，而诽谤案件是 1 年。向政府提出的请求受《政府诉讼法》管辖，必须在 12 个月内提出，并且必须提前 30 天向检察长发送通知，说明起诉理由。针对政府或地方当局的与合同有关之诉讼必须在起诉理由产生后 3 年内提起。

时限从起诉理由产生当日开始计算。《诉讼时效法》第 27 条作出了关于延期的规定。但是，为了延长起诉时限，诉因必须是侵权并且与疏忽、滋扰或失职有关，而且请求的损害赔偿必须与原告因侵权行为蒙受的人身伤害有关。

6. 有哪些诉前程序是当事人在提起诉讼之前必须遵守的?

总体上不存在当事人必须遵守的诉前程序。未提供权利主张的通知可能会有代价，但不会剥夺原告或申请人提起诉讼的权利。但是，如上文第 5 个问题所述，若向政府提起诉讼，必须事先向检察长发送通知，说明在提起诉讼所依据的行为；此外，在某些人身伤害索赔中，若打算要求承保人支付法院判定的损害赔偿，必须向承保人发送通知。在进行诽谤索赔之前，必须提出权利主张，说明导致诉讼原由的情况，并确定对原告的声誉造成损害的言语或文字。

7. 案件进入审理之前要经过哪些典型的民事程序? 有什么样的时间表?

(a) 按照《民事诉讼规则》法令 2 规则 13 的规定结束诉答后，当事人应在 10 天内填写完毕并提交预审问卷作为清单文件。

(b) 法院将在诉答完成后 30 天内召开案件讨论会。当事人应确保在法院召开案件讨论会之前提交了预审问卷。

(c) 法院将在召开案件讨论会后 60 天（若为快速程序）或 90 天（若为多轨程序）内召开和解会议。法院将在和解会议上努力让当事人进行争论点或诉讼的和解。

(d) 当事人应在和解会议召开前 7 天内编制并交换和解会议简要，其内容包含事实概要（包括争论点和承认点）、适用法律的概要、证人的最终清单、陈述、专家报告以及诉讼所依赖之文件的相关部分。

(e) 若当事人未能在计划审理日期前 30 天内达成和解，法院将召开审理会议，拟定审理时间，寻找提供证据的快速方式，修改起诉状，处理当事人同意的问题，允许引用誓证，下达关于委任、专家证据和替代争议解决机制（ADR）等方面的命令。审理会议结束后，当事人将签署审理会议备忘录，而法院将下达进行诉讼所需的命令。除非法院另有决定，签署的备忘录将对当事人构成约束力。

(f) 当事人应在审理期间以及审理前至少 10 天内完成、提交并交换审理会议问卷。

8. 当事人是否必须向其他当事人和法院披露相关文件?

在开始进行民事权利请求或抗辩时，当事人必须提交其希望依赖的所有文件。但是，任何一方可向法院申请强制另一方回答问题，承认文件和事实，就对方控制或拥有的文件作出开示、提交、勘验、扣留或归还要求。证据开示是一个相对简单的流程，由《民事诉讼法》第 22（a）条管辖，该条款规定了法院要求当事人开示证据或采取类似行动的权力。《民事诉讼规则》法令 11 规则 3（2）（d）也有同样规定。

9. 是否有关于特权文件的规则或允许当事人不披露特定文件的任何其他规则?

《证据法》第 134 条保护特权信息免于被披露。《证据法》还将同样的特权保护延伸至夫妻通信、官方记录、与辩护律师的通信、特权文件、有特权的犯罪信息来源、保密信息以及银行记录。

作为一条经验法则，当事人无需开示特权文件，包括基于无损权利承诺的文件或议会程序的文件、夫妻间可导致入罪的文件和通信。法院要求当事人开示证据的权力是受到限制的：例如，若没有必要、法院正公正地处置诉讼或者证据的开示不会节省费用，则法院不应命令当事人开示证据。

10. 当事人在审理之前是否交换书面证据？或是提供口述证据？对方是否有权盘问证人？

《民事诉讼规则》法令 3 规则 2 规定，在诉讼中提供某些文件时，必须随附出庭证人名单、证词、宣誓书以及将要依赖的所有支持文件的清单。在开庭审理前，当事人应遵守《民事诉讼规则》法令 11 的规定，该条规定与所有诉讼的审前指示以及会议有关（小额诉讼除外）。除其他规定外，法令 11 规定了以下各事项的时间表：确定争议问题及无争议文件，寻求解决争议问题的方法，诉讼事项的安排，为诉讼程序设定时间表，并考虑诉讼的合并。

法令 11 的规定适用于除法令 3（1）定义之小额请求外的所有其他请求。法院应确保当事人在庭审前交换了书面文件。这一做法能够帮助法院事先处理先决问题，以便法院能够顺畅地进行审理。

通常而言，异议人有权盘问证人。其主要目的是：获取有利于盘问证人一方的进一步事实；检查第一证人提供的证据并且（若可能）对该证据提出疑问；以及对证人的可信度提出质疑。

11. 关于专家任命的规则是怎样的？是否有专家行为准则？

《证据法》第 48 条制定了有关专家证人的规定。若法院必须形成有关于外国法律、科学或艺术，或者笔迹、指纹或其他痕迹的特征或真实性的观点，则法院将传唤专家证人。有关专家证人任命的唯一规定是：在被任命为专家证人前，该人员必须是上述外国法律、科学或艺术以及笔迹、指纹或其他痕迹的特征或真实性方面问题的专业人员。专家证人的行为准则与适用于法院所有证人的行为准则相同。

12. 案件审理前可获得哪些临时救济？

临时救济，也被称为中间命令，是法院在诉讼期间（通常在诉答阶段与审理阶段之间）给予的救济。须注意的是，临时救济并不会对当事人有关标的的实质权利和责任或者诉讼中的权利做出最终决定。这些救济旨在提供暂时性保护、调整或救济，并以以下方式提供：判前批捕、查证委托命令、判前财产扣押、临时禁令、任命接管人以及诉讼保证金。

13. 申请人需要确立些什么才能成功申请此类临时救济？

在著名的 Giella 诉 Cassman Brown（1973）EALR 一案中，法院规定了申请人向法院申请临时救济时需要确立的事情。申请人必须证实：（a）申请人的主张表面证据确凿，有胜诉可能性；以及（b）若法院不给予临时救济，申请人可能遭受无法弥补的损失或伤害。法院应在权衡便利性的基础上考虑是否同意申请人的申请。

14. 案件审理时可获得哪些救济？

原告可在诉状中同时提出衡平救济请求以及金钱损害赔偿要求。一些较为常见的衡平救济类型包括：强制履行、废除、赔偿、宣告性救济、产权归属判定以及禁令。金钱救济包括一般损害赔偿、特别损害赔偿以及惩罚性赔偿。

15. 执行判决的首要方式有哪些？

存在若干种执行方法，主要取决于案件的性质。在肯尼亚，执行判决的首要方法包括：交付判决中规定的财产；扣押和出售；财产的非扣押性出售；扣押工资；逮捕判决债务人并将其扣押在民事监狱；第三方扣押程序，该程序扣押由第三方（例如银行）持有的债务人款项；以及法院确定的带有救济性质的任何其他方法。

16. 胜诉方是不是一般会被判获得诉讼费用赔偿？诉讼费用如何计算？

一般而言，诉讼费用将视诉讼结果而定。诉讼费用的补偿权由法院下达的命令确定，但也存在法院未下达命令而出现需要承担诉讼费用的情况。若原告未经法院许可在七天内以书面通知的方式完全中止了诉讼，原告将承担其诉讼费用。若原告未经法院许可立即撤销了诉讼中的某项请求，被告

须承担其诉讼费用。若原告在审判前接受了已向法院支付的费用，原告必须在七天内支付诉讼费用。

若法院在当事人未出庭应诉的情况下作出判决，应取得诉讼费用证书以便执行诉讼费用的支付。这些诉讼费用是指经注册官就无争议案件发出的证书证实的诉讼费用。

17. 对最终判决有哪些上诉途径？当事人能够以什么理由提起上诉？

上诉是指上级法院对下级法院的判决进行的司法审查。一般而言，上诉途径遵循上文问题 1 规定的法院等级制度，根据请求的性质以及首次提起请求所在法院的等级而定。若上诉人能够证明审理法院在法律或事实方面存在错误，则可进行上诉。有时，在提交带有规定格式的必要文件前需获得法院许可。若上诉人对金钱方面的判决提出上诉，上诉人需要按照法院的要求交存判决规定的金钱或提供保证金。

根据《民事诉讼规则》第 79B 条的规定，法院有权立即拒绝上诉。法院可首先详细阅读上诉记录，若发现没有充分的理由干涉判决，法院可拒绝上诉人的上诉。若法院未拒绝上诉，法院将进行审理。

18. 是否允许律师和委托人之间存在胜诉酬金或按条件收费的安排？

《辩护律师法》第 46（c）条规定辩护律师与委托人之间的胜诉酬金安排无效。第 46 条规定了这种收费安排是无效的，因为这相当于专业行为失当，可能使辩护律师受到《辩护律师法》第 60（4）条规定的处罚。按照第 60（4）条的规定，有专业行为失当的辩护律师可能：

(a) 被警告；

(b) 被中止执业资格最多 5 年；

(c) 被从执业律师名册中除名；

(d) 必须支付不超过 100,000 肯尼亚先令的罚款；

(e) 必须向受到侵害的人员支付不超过 500 万肯尼亚先令的赔偿或补偿；

(f) 遭受纪律委员会认为恰当的以上多种处罚。

19. 是否允许第三方资助？资助人是否可分享胜诉收益？

不存在任何直接允许或禁止第三方资助的规定，只要辩护律师的费用并非采用胜诉酬金模式就可以。《辩护律师法》第 46 条作出了有关无效协议的规定；无效协议包括规定仅在胜诉时支付律师费和 / 或根据诉讼胜败情况支付不同费用的辩护律师聘用协议。这些协议通常被称为帮诉协议，不仅是非法的，而且也是不符合职业道德的。但是，如果原告与资助人对于收益分享另有协定，只要并非将辩护律师的报酬包含在内，则该协议可作为当事人之间不受禁止的合约。

20. 诉讼当事人是否可为其诉讼费用投保？

可以，当事人可办理任何保险以限制或资助其诉讼费用。

21. 诉讼人是否可提起集体诉讼？如果可以，哪些规则适用于集体诉讼？

诉讼人可按照宪法第 22（2）条（该条款规定一个人可以一群人或一类人的成员的身份，或者为了一群人或一类人的利益提起集体诉讼）的规定在肯尼亚提起集体诉讼。此外，《民事诉讼规则》法令 1 规则 8 特别规定了一人或多人可代表在诉讼中存在相同利益的多名人员进行诉讼或抗辩。

22. 外国判决通过哪些程序予以承认和执行？

《外国判决（相互执行）法》是外国判决执行相关的主要法律。按照该法序言的规定，应按照对等原则执行外国判决，对等待遇仅适用于对肯尼亚的法院判决给予对等待遇的国家的法院下达的判决。《外国判决（相互执行）法案》中指定的国家包括：坦桑尼亚、乌干达、赞比亚、英国和卢旺达。若没有相互执行的安排，外国判决可作为普通法下的请求在肯尼亚执行。按照《诉讼时效法案》第 4（4）条的规定，外国判

决的执行诉讼必须在判决日期后 12 年内在肯尼亚提出。

23. 替代争议解决的主要形式是什么?

在肯尼亚，替代争议解决的主要形式包括：协商、调解、调停和仲裁。

24. 在您所在的司法管辖区有哪些主要的替代争议解决机构?

肯尼亚特许仲裁员协会（Kenyan Chartered Institute of Arbitrators）、争议解决中心（Dispute Resolution Centre）以及调解培训协会（Mediation Training Institute）是肯尼亚提供替代争议解决服务的主要机构。肯尼亚近期还成立了内罗毕国际仲裁中心（Nairobi Centre for International Arbitration），以便促进国际商业仲裁的解决，并将内罗毕定为投资 / 商业仲裁的区域中心。

25. 在诉讼过程中诉讼人是否必须尝试替代争议解决办法?

肯尼亚法律认可替代争议解决以及传统的争议解决机制。宪法第 159 条要求法院和法庭在行使司法权时促进争议解决替代方式的使用，包括调解、调停、仲裁以及传统争议解决机制。此外，《民事诉讼规则》法令 46 规则 20 还鼓励诉讼人和法院采用替代争议解决。

26. 当前是否有改革争议解决法律法规的建议在审议中?

如上文所述，由于肯尼亚宪法的健全，目前需要做的就是将现行的 2010 年肯尼亚宪法第 48 条规定的人人享有司法服务的愿景变为现实。为实现这一目的，需要更多可行方法。一个可行的方法，也是一项修订建议，就是在肯尼亚全面使用替代争议解决办法。商事法院和家庭法院的附设调解机构也正处于试验阶段，如果试验成功，会延伸适用于在高等法院所有下属法院提起的合资格请求。

27. 关于您所在司法管辖区或者亚洲地区的争议解决，是否有任何特殊情况需加以强调?

肯尼亚宪法非常强调利用替代争议解决机制解决社群间和政府间的冲突。其结果就是允许对影响相关社群的冲突管理适用传统的争议解决机制。宪法还组建了诸如国家土地委员会（National Land Commission）这样的宪制机构，旨在利用传统争议解决机制解决土地纠纷的同时也解决土地纠纷产生的历史不公情况。

为了避免案件积压在主要法院，肯尼亚拥有许多特别法庭由专业人员解决特别领域的问题，例如首创的 HIV 和 AIDS 法庭（旨在解决 HIV 和 AIDS 患者的困境）、运动法庭、退休金法庭、水资源法庭以及资本市场法庭。

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CECIL ABRAHAM & PARTNERS
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1. What is the structure of the court system in respect of civil proceedings?

At first instance, civil proceedings are initiated before the Magistrates' Courts, the Sessions Courts or the High Courts.

Magistrates' Court

With the exception of subject matters within the exclusive competence of the High Court for first-instance determination, the Magistrates' Court has jurisdiction to decide all matters where the amount or value of the subject matter in dispute does not exceed RM100,000.

Sessions Court

The pecuniary jurisdiction of the Sessions Court is unlimited in actions relating to motor vehicle accidents, landlord and tenant disputes and distress actions, and up to RM1,000,000[1] for all other civil disputes[2].

High Court

In respect of civil proceedings, the High Court has unlimited monetary and subject matter jurisdiction. It has five divisions:

(a) Criminal Division;

(b) Civil Division;

(c) Commercial Division;

(d) Family Division; and

(e) Appellate and Special Powers Division.

1 Not including interest claimed: *Foo Sey Koh & Ors v Chua Seng Seng & Ors* [1986] 1 MLJ 501

2 Section 65 of the Subordinate Courts Act 1948

2. What is the role of the judge in civil proceedings?

As with most common law jurisdictions, the role of the judge in Malaysia is that of an adversarial judge, but also possesses an overriding power to exercise control over the conduct of civil proceedings.[3]

The judge also conducts case management. The second and third case management after the filing of a writ or originating summons, and the second and third case management of any interlocutory application filed, is before a judge in chambers[4].

The judge also facilitates alternative dispute resolution by directing parties to opt for mediation during the course of litigation[5].

3. Are court hearings open to the public? Are court documents accessible to the public?

Save for matters heard in chambers, court hearings and trials are open to the public, unless it is expedient to keep the hearings private in the interests of justice, public safety, public security or propriety[6].

Court documents are generally accessible to the public. They can be accessed online or through a physical search through the files in court.

3 Order 15, Rule 17 of the Rules of Court 2012 ('ROC 2012')

4 Chief Judge of Malaya Practice Direction No. 2 of 2014: 'Pre-Trial Case Management'

5 Practice Direction No. 4 of 2016: 'Practice Direction on Mediation'

6 Section 15 of the Courts of Judicature Act 1964 ('CJA 1964')

4. Do all lawyers have the right to appear in court and conduct proceedings on behalf of their client? If not, how is the legal profession structured?

An advocate and solicitor of the High Court of Malaya within the meaning of section 11 of the Legal Profession Act 1967 ('LPA 1967'), holding a valid practising certificate under section 29 of the LPA 1967, has the right to appear in court and conduct proceedings on behalf of their client. The right of audience is limited only to the civil courts of West Malaysia. Advocates and solicitors born in West Malaysia do not have rights of audience in the High Court of Sabah and Sarawak (which is reserved for advocates and solicitors born in Sabah or Sarawak and called to the High Court of Sabah and Sarawak).

An advocate and solicitor of the High Court of Sabah and Sarawak may also appear in civil courts of West Malaysia upon completion of a further three months of pupillage in a law firm in West Malaysia.

As for foreign lawyers, rights of audience can be obtained by two routes:

(a) ad hoc admission to practise as an advocate and solicitor of the High Court in respect of the particular case applied for, which requires the foreign lawyer to demonstrate that:

  (i) for the purpose of the particular case, he/she has, in the opinion of the court, special qualifications or experience of a nature not available among advocates and solicitors in Malaysia; and

  (ii) he/she has been instructed by an advocate and solicitor in Malaysia;

(b) direct entry as a foreign lawyer through a Qualified Foreign Law Firm, International Partnership, or Registration as a Foreign Lawyer for employment in a Malaysian law firm[7].

7 Part IVA of the LPA 1976

5. What are the limitation periods for commencing civil claims?

The Limitation Act 1953 ('LA 1953') stipulates the limitation periods applicable to causes of action arising in Peninsular Malaysia:

(a) for contractual and tort disputes, the limitation period is six years from the date the cause of action accrued:

  (i) for contracts, the commencement of the limitation period is triggered at the date of the breach of contract;

  (ii) for tortious claims, the date on which the wrongful act caused loss or damage[8];

(b) claims for fraudulent breach of trust have no limitation period[9]. For all other breaches of trust, the limitation period is six years from the date when the breach of trust occurred[10];

(c) actions brought to recover land is 12 years from the date the right of action accrued. This is typically the last agreed date of completion of the sale of the land[11];

(d) claims brought for the enforcement of a judgment is 12 years from the date the judgment was made enforceable[12].

For Sabah and Sarawak, limitation periods are governed by their own respective limitation ordinances, which stipulate different limitation periods compared to the LA 1953. For example, the limitation period for a cause of action in libel and slander is six years in Peninsular Malaysia, but only one year in Sabah and Sarawak. There are also significant differences in contractual claims: for a claim for money pursuant to a loan which is payable on demand, the limitation period is three years from the date of

8 Section 6 of the LA 1953
9 Section 22(1) of the LA 1953
10 Section 22(2) of the LA 1953
11 Section 9 of the LA 1953
12 Section 6(3) of the LA 1953

CECIL ABRAHAM & PARTNERS
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Sunil Abraham

Partner, Cecil Abraham & Partners

Sunil Abraham was called to the Bar in 2004 and is a partner at Cecil Abraham & Partners, specialising in Corporate and Commercial, Banking and Securities, Media, Telecommunications, Public & Administrative, Environmental Law as well as Arbitration. He has significant advocacy experience before the High Court, Court of Appeal and Federal Court and before arbitral tribunals.

Some of Sunil's noteworthy cases before the Federal Court include:

- *AV Asia Sdn Bhd v Measat Broadcast Network Systems Sdn Bhd [2014] 3 MLJ 61*, pertaining to the applicable principles relating to the granting of interim relief in arbitration disputes.
- *Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors [2012] 2 MLJ 713* pertaining to the powers of liquidators.
- *Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir (Attorney General, intervener) [2010] 2 MLJ 285 and His Royal Highness Sultan Ismail Petra Ibni Almarhum Sultan Yahya Petra v His Royal Highness Tengku Mahkota Tengku Muhammad Faris Petra & Anor and another suit [2011] 1 MLJ 1* in respect of the exercise of royal prerogative powers/

He has successfully represented Raub Australian Gold Mining Sdn Bhd and Lynas Malaysia Sdn Bhd in high profile environmental law disputes instituted by local residents and has had the distinction of representing the Minister of Home Affairs and Minister of Tourism in several defamation claims. He is presently acting for Maxis Communications Berhad, Astro All Asia Networks Ltd and South Asia Entertainment Holdings Ltd in a major cross-border dispute in India.

He has appeared as co-counsel for the Government of Malaysia in an investment treaty arbitration claim instituted by Malaysian Historical Salvors and is presently co-counsel for several investors in a few pending investment treaty disputes.

the loan, whereas a claim for breach of a written contract is six years from the date of breach.

Note that limitation periods for making a claim can be limited by contractual agreement[13].

13 *The Pacific Bank Bhd v Kerajaan Negeri Sarawak* [2015] 3 CLJ 717

6. Are there any pre-action procedures with which the parties must comply before commencing proceedings?

While there are no general pre-action procedures to be complied with, certain pre-action procedures can be imposed by a court order, the non-compliance of which may attract the imposition of sanctions, ranging from a fine

to a committal for contempt of court. One such example is an order for discovery made against a non-party prior to commencement of proceedings[14].

However, as a matter of practice, a plaintiff will usually give notice to the prospective defendant before commencing civil proceedings.

7. What is the typical civil procedure and timetable for the steps necessary to bring the matter to trial?

In early 2009, policy changes were made to implement a fast-track system for new commercial and civil disputes. Disputes are to be disposed of within a strict timeline of nine months from the date of the filing of the claim. The court timetable to bring a writ action to trial is six months from the date of the filing of the writ[15].

Upon filing of the writ, all parties (if the defendant has been duly served the writ and has entered his/her appearance) will be informed of the date and time appointed for the holding of the pre-trial case management[16]. Failure to attend any pre-trial case management may attract procedural sanctions[17].

The first pre-trial case management is to be held within 30 days from the date of the filing of the writ:

(a) parties are required to inform the registrar of the status of the service of the writ, and the defendant's entry of appearance, and of any interlocutory applications to be filed;

(b) if no interlocutory applications are filed, pleadings are to be exhausted within 30 days from the first case management date.

The second pre-trial case management date is to be held within 42 days from the date of the first case management date and 14 days from the date of close of pleadings:

(a) parties are required to file in the following documents:

  (i) bundle of pleadings;

  (ii) common bundle of documents that will be relied on or referred to in the course of the trial by any party, including documents referred to in witness statements. The contents of this bundle are to be divided into three parts: Part A (agreed documents), Part B (documents where the authenticity is not disputed but the contents are disputed), and Part C (documents where the authenticity and contents are disputed);

  (iii) case summaries of the respective parties;

  (iv) statement of agreed facts;

  (v) statement of issues to be tried;

  (vi) list of witnesses;

  (vii) witness statements;

(b) parties may, at this stage, apply for discovery of documents or interrogatories.

The third pre-trial case management date is to be held within 30 days from the date of the second pre-trial case management date, for parties to fix a trial date.

Interlocutory applications may be made at pre-trial case management[18]. Practice direction has stipulated that an interlocutory application must be filed within seven days from the date of the first case management date, and must be disposed of within 42 days of the date of the filing of the interlocutory application. Notwithstanding the above, parties are still required to comply with court directions on trial preparation given on the second case management date.

14 Order 24, Rule 7A(1) ROC 2012

15 Chief Judge of Malaya Practice Direction No. 2 of 2014: 'Pre-Trial Case Management'

16 Order 34, Rule 3 of the ROC 2012

17 Order 34, Rule 6 of the ROC 2012

18 Order 34, Rule 8 of the ROC 2012

Judges are empowered to make 'unless orders', which have the effect of stipulating a procedural sanction against a party for failing to comply with case management directions. Failure to comply may lead to the dismissal of a plaintiff's action or the striking out of a defendant's defence or counterclaim[19].

Throughout the course of the pre-trial case management stage, parties and their solicitors are required to provide to the court all information and documents required for the court's proper handling of the action[20]. However, communication of facts disclosed or of any matter considered in the course of pre-trial case management will not be made to the court that conducts the trial of the action or proceedings[21].

8. Are parties required to disclose relevant documents to other parties and the court?

Common pre-trial court directions at the case management stage would include a direction for parties to file a common bundle of documents which the parties would rely on in support of their case or in opposition to the counterparty's case.

However, parties are required to disclose relevant documents which are subject to a court order for discovery. A court can order discovery of documents that the party relies on or will rely on, and documents that could adversely affect or support any of the parties' case[22]. Where this is the case, failure to comply with the discovery order empowers the court to dismiss the claimant's action, strike out a defence or even enter judgment in default[23].

19 Order 34, Rules 1(3) and 2(3) of the ROC 2012; *Nur Ibrahim Masilamani & Anor v Joseph Lopez* [2014] 9 MLJ 722

20 Order 34, Rule 8(1) of the ROC 2012

21 Order 34, Rule 11 of the ROC 2012

22 Order 24, Rule 3(1) of the ROC 2012

23 Order 24, Rule 16 of the ROC 2012

9. Are there rules regarding privileged documents or any other rules which allow parties to not disclose certain documents?

The Evidence Act 1950 ('EA 1950') recognises certain classes of documents as privileged from production in court, the major ones of which are:

(a) communications between an advocate and solicitor (and his/her interpreters and clerks or servants) and a client[24]; and

(b) 'without prejudice' communications, including admissions[25], and documents relied on in the course of settlement negotiations[26].

10. Do parties exchange written evidence prior to trial or is evidence given orally? Do opponents have the right to cross-examine a witness?

The court is empowered to make orders and directions to secure the just, expeditious and economical disposal of an action or proceeding[27]. In practice, courts typically direct the parties to exchange written witness statements prior to trial[28]. At trial, these would be adopted as the examination-in-chief, subject to any additions which the party may wish to make to the witness statement during trial.

During trial, opponents have the right to cross-examine witnesses of fact, including those who give evidence by way of written

24 Sections 126 and 127 of the EA 1950; *Dato' Anthony See Teow Guan v See Teow Chuan & Anor* [2009] 3 MLJ 14

25 Section 23 of the EA 1950, provided that there is an agreement that such admission should not be given as evidence in court

26 *Malayan Banking Bhd v Foo See Moi* [1981] 2 MLJ 17

27 Order 34, Rule 2(2) of the ROC 2012

28 Chief Judge of Malaya Practice Direction No. 2 of 2014: 'Pre-Trial Case Management'

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Daniel Chua

Associate, Cecil Abraham & Partners

Daniel was called to the Bar in 2015 and is developing a practice covering all areas of the firm's work, including Commercial and Corporate Litigation, Commercial Arbitration and Public International Law. Some of the more notable cases he has been involved in include:

- *Raub Australian Gold Mining Sdn Bhd v Malaysiakini Dotcom Sdn Bhd* – This appeal by Raub Australian Gold Mining Sdn Bhd before the Court of Appeal relates to the application of the law of qualified privilege and reportage (led by Tan Sri Dato' Cecil Abraham and Sunil Abraham)
- *Arch Reinsurance Ltd v Akay Holdings Sdn Bhd* – This appeal before the Federal Court relates to the law pertaining to stay pending reference to arbitration under the Arbitration Act 2005 (led by Tan Sri' Dato' Cecil Abraham and Sunil Abraham)
- *State Government of Selangor v Triumph City Development Berhad* – opposing an ongoing application to set-aside the arbitration award in the sum of RM179 Million handed down in favour of Triumph City Development for breach of a joint venture agreement for the sale and development of land (led by Sunil Abraham)

Daniel is also involved in a number of investment treaty cases under the auspices of ICSID and UNCITRAL. Daniel read law at the University of London and completed his Certificate of Legal Practice in Malaysia. Daniel thereafter completed his LLM in International Arbitration Law and International Commercial Litigation at University College London. He was called to the Malaysian Bar in 2015.

evidence. Where written evidence is tendered by way of affidavit evidence, an opponent must seek leave from the court to cross-examine the deponent[29].

11. What are the rules that govern the appointment of experts? Is there a code of conduct for experts?

The Rules of Court 2012 ('ROC 2012') provides for the appointment of court experts and the parties' own experts.

A court expert can be appointed by the court either on its own motion or upon an application by either party to the proceedings:

29 *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 432

(a) of its own motion, the court can appoint its own expert where there is a deadlock in expert evidence between both parties' respective expert witness[30];

(b) if either party to the proceedings requests for a court-appointed expert, this must be consented to by the other party.

Parties to the litigation may appoint their own expert witnesses in support of their case, but the court can make an order limiting the number of expert witnesses appointed by the parties at the pre-trial stage or during trial[31].

As a matter of practice, parties calling expert witnesses are required to disclose the identity of the expert witness and serve the expert witness report before trial. While the timing of disclosure is determined by the court in case management directions, it should be no later than 30 days before the trial[32].

While there is no written code of conduct for expert witnesses, expert witnesses are required to be independent, and to assist the court in providing evidence for matters in which a judge has no expertise. While this duty is obvious for court experts[33], the emphasis is often on party-appointed experts. The duty of the expert is to assist the court and not to advance the interests of any particular party, including the party instructing the expert. This duty to the court supersedes the expert witness's contractual obligations to the party appointing the expert[34].

In terms of procedural conduct, parties have a right to provide expert reports in response to expert reports tendered by the opposing party, and a right to cross-examine expert witnesses at trial.

12. What interim remedies are available before trial?

Asset freezing injunctions, known as Mareva injunctions, are available to preserve assets pending a judgment[35].

Anti-suit injunctions are available to restrain a party from commencing proceedings in a foreign jurisdiction, where the effect of such proceedings would be to create multiplicity of proceedings[36].

Anton Piller orders provide the judgment creditor the right to search and seize evidence without the need to provide prior notice[37].

Quia Timet injunctions restrain a party from instituting court proceedings[38].

Erinford injunctions maintain the status quo of proceedings pending appeal against the decision of the judge at first instance[39].

Fortuna injunctions are available to restrain a party from presenting a winding-up petition[40].

30 *Ernest Cheong Yong Yin v KM Engineering & Development Sdn Bhd* [1996] 4 MLJ 438

31 Order 40A, Rule 1 of the ROC 2012

32 Chief Judge of Malaya Practice Direction No. 2 of 2014: 'Pre-Trial Case Management'

33 *Lian Chen Fah @ Lian Chen Lee & 3 Ors v Gimo Holdings Sdn Bhd* [2008] 1 MLJ 135

34 *National Justice Cia Naviera SA v Prudential Assurance Co. Ltd, The Ikarian Reefer* [1993] 2 Lloyd's Rep 68

35 *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509

36 *BSNC Leasing Sdn Bhd v Sabah Shipyard Sdn Bhd & Ors* [2000] 2 MLJ 70

37 *Anton Piller KG v Manufacturing Processes Ltd and Others* [1976] 1 All ER 779

38 *PPES Resorts Sdn Bhd v Keruntum Sdn Bhd* [1990] 1 MLJ 436

39 *Erinford Properties Ltd v Cheshire County Council* (1974) 2 All ER 448

40 *Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation* [1978] VR 83

13. What does an applicant need to establish in order to succeed in such interim applications?

Generally, for interim injunctions of a prohibitory nature, applicants are required to establish the following:

(a) the application was made promptly;

(b) the applicant has provided a full and frank disclosure of all facts relevant to the application;

(c) there exists serious question(s) to be tried;

(d) damages would not be an adequate remedy in lieu of an interim injunction; and

(e) the balance of convenience lies towards the granting of the injunction[41].

For Mareva Injunctions, in addition to the requirements for granting an interim injunction, the plaintiff or applicant has to fulfil the following additional requirements[42]:

(a) the plaintiff has a good arguable case on the merits against the defendant;

(b) the defendant has assets within the jurisdiction of the court; and

(c) there is a real risk that the defendant would dissipate its assets in order to frustrate the enforcement of a prospective judgment.

For Fortuna injunctions, an applicant is required to demonstrate to the satisfaction of the court that: (a) the intended winding-up petition has no prospect of success (both as a matter of law and as a matter of fact); and (b) the presentation of such a petition might produce irreparable damage to the company. A Fortuna injunction may also be granted where a petitioner proposing to present a winding-up petition for a disputed debt has chosen to assert a disputed claim by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure[43].

41 *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504

42 *Pacific Centre Sdn Bhd v United Engineers (Malaysia) Bhd* [1984] 2 MLJ 143

14. What remedies are available at trial?

The availability of post-trial remedies (pecuniary and non-pecuniary) depends on the facts and circumstances of each particular case.

Pecuniary remedies take the form of damages. The purpose of an award of damages is compensatory, not punitive[44]. However, aggravated damages is available for cases where the defendant's behaviour is of such an intolerable nature that it warrants a reprimand by the court[45].

Types of damages which may be awarded are general damages (for pecuniary loss and non-pecuniary loss), specific damages, nominal damages, exemplary damages, and aggravated damages. Other types of damages include liquidated damages[46] and deposits.

Other remedial orders which may be made post-trial include prohibitory or mandatory orders, declarations, specific performance, rescission of contracts, and cancellation or rectification of an instrument. Norwich Pharmacal injunctions can be granted to compel a respondent to disclose particular documents or information to the applicant.

15. What are the principal methods of enforcement of judgment?

The principal methods to enforce a judgment are as follows:

Judgment Debtor Summons[47]

A judgment debtor summons can be issued to examine an individual's means and ability to

43 *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2011] 1 CLJ 947

44 *Dennis v Sennyah* (1963) 1 MLJ 95

45 *Dato' Abdullah Hishan bin Haji Mohd Hashim v Sharma Kumari Shukla (No 3)* [1999] 6 MLJ 589

46 Order 31, Rule 1 of the ROC 2012

47 Order 45, Rule 5 of the ROC 2012

satisfy the judgment debt. The court may make an order directing the judgment debtor to pay a stated monthly sum. A warrant of arrest may be issued against a judgment debtor who fails to appear before the court despite being served a summons to appear.

Writs of Execution

A writ of execution can take the forms as prescribed under Order 46, Rule 1 of the ROC 2012. These include the following:

(a) writ of seizure and sale for payment of money[48]: a writ of seizure and sale is issued to enforce a judgment for payment of money when there are special circumstances or when the judgment debtor is unable to pay the terms of the judgment;

(b) writ of possession for immovable property[49]: a writ of possession empowers the sheriff to enter into the judgment debtor's land and take possession of it, whereupon the judgment creditor may proceed to auction the immovable property[50];

(c) writ of delivery for movable property[51]: a writ of delivery is issued to recover movable property or its assessed value from the judgment debtor.

Writs of Distress[52]

A writ of distress is available to seize the property occupied by a tenant when rent becomes due and when the distress is levied. The warrant of distress issued need not be served on the tenant and is instead addressed to the bailiff for execution, in order to maintain an element of surprise for the purpose of fruitful execution.

Garnishee Proceedings[53]

A garnishee order can be granted by the court where a garnishee within the jurisdiction of the Malaysian courts owes money to a judgment debtor. The judgment creditor may apply to the court for a garnishee order, compelling the garnishee to pay the sums owing to the judgment debtor directly to the judgment creditor[54].

Charging Orders

A charging order imposes a charge on the securities of a judgment debtor in favour of a judgment creditor[55].

Appointment of Receivers

Where the court is satisfied that other means of execution cannot be used, the court has the discretion to appoint receivers to receive monies from the judgment debtor's source(s) of income, such as shares, debentures, debenture stocks or government stock.

Committal Proceedings for Contempt[56]

For judgments requiring a person to perform an action within a specified time or to refrain from doing so, applicants may apply for a committal order to be issued by the court, which may require the party in contempt to pay a fine and/or be committed to prison.

Committal proceedings can also be instituted against a party in breach of a consent order, but such a breach must be proven beyond reasonable doubt[57].

Winding-up Proceedings[58]

A winding-up petition may be lodged to wind up a company on the grounds that it is unable

48 Order 45, Rule 1(1)(a) of the ROC 2012

49 Sections 7 and 8 of the Specific Relief Act 1950 (Act 137); Order 45, Rule 3 of the ROC 2102

50 Sections 256–269 of the National Land Code 1965; Order 83 of the ROC 2012

51 Order 45, Rule 4 of the ROC 2012

52 Distress Act 1951 (Act 255)

53 Order 45, Rule 1(1)(b) of the ROC 2012

54 Order 49, Rule 1 of the ROC 2012

55 Order 50 of the ROC 2012

56 Order 52 of the ROC 2012

57 *Muhammad Said Amin v Haszeri Hussin* [2014] 3 CLJ 536

58 Section 218 of the Companies Act 1965 (Act 125); Companies (Winding Up) Rules 1972

to pay any undisputed debt, including a judgment debt, of RM500.

Bankruptcy Proceedings[59]

A bankruptcy petition may be lodged against an individual to be adjudicated as a bankrupt. This is if the judgment debtor is unable to pay a judgment debt exceeding RM30,000.

16. Are successful parties generally awarded their costs? How are costs calculated?

Parties can recover costs only through a court order[60], and the court's power to award costs is discretionary[61], the exercise of which is based on established judicial principles. However, courts will usually order that 'costs follow the event', meaning that the unsuccessful party pays its own costs and the costs of the successful party.

Courts calculate the costs payable by taking into account all the relevant circumstances of the case, including:

(a) the complexity of the matter and the difficulty of the questions involved;

(b) the skill, specialised knowledge, responsibility, time and labour expended by the solicitor and/or counsel;

(c) the number and importance of documents prepared or perused;

(d) the place and circumstances in which the business involved is transacted;

(e) the importance of the matter to the litigant; and

(f) the value of the subject matter in dispute.

Interest is also awarded on costs, which is calculated on a simple interest basis. This is presently awarded at 5% per annum to be calculated from the date of judgment until the date of full and final satisfaction of the judgment[62].

17. What are the avenues of appeal for a final judgment? On what grounds can a party appeal?

Appeals to the Court of Appeal

Appeals against the final judgment of the High Court can be made to the Court of Appeal[63].

Appeals to the Court of Appeal are as of right where[64]:

(a) the value of the claim is RM250,000 or higher;

(b) the subject matter relates to costs where, as a matter of law, no discretion is involved; or

(c) summary judgment has been given in court in interpleader proceedings.

If the subject matter of the appeal does not relate to the above, appeals to the Court of Appeal are contingent upon the Court of Appeal granting leave to appeal.

An appeal from the High Court to the Court of Appeal must be made within one month from the date of the final judgment sought to be appealed against. Upon expiry of the time limit, an extension of time must be sought by the prospective appellant[65].

Appeals to the Federal Court

Appeals against the final judgment of the Court of Appeal can be made to the Federal Court, contingent upon the Federal Court granting leave to appeal.

The grounds for leave to appeal are that the appeal must involve a question of general

59 Bankruptcy Act 1967 (Act 360); Bankruptcy Rules 1969

60 Order 49, Rule 3(1) of the ROC 2012

61 Order 59, Rule 2(2) of the ROC 2012

62 Chief Judge of Malaya Practice Direction No. 1 of 2012: 'Determination of Interest Rate under the Rules of Court 2012'

63 Section 67(1) of the CJA 1964

64 Section 68 of the CJA 1964

65 Rule 12 of the Rules of the Court of Appeal 1994

principle decided for the first time or a question of public importance[66].

An application for leave to appeal to the Federal Court must be made within one month from the date of final judgment of the Court of Appeal[67]. Once leave to appeal is granted by the Federal Court, the Federal Court may fix the time within which the notice of appeal is to be filed[68].

18. Are contingency or conditional fee arrangements permitted between lawyers and clients?

Contingency and conditional fee arrangements between advocates and solicitors and clients are prohibited[69].

19. Is third-party funding permitted? Are funders allowed to share in the proceeds awarded?

Third-party funding is vulnerable to accusations of maintenance and champerty in Malaysia, particularly if the plaintiff is not the original title holder to the litigation. However, third-party contracts for a share of the proceeds of a suit amounting to champerty are prohibited[70].

20. May parties obtain insurance to cover their legal costs?

Various insurance companies offer public liability insurance and product liability insurance. The terms and conditions of the coverage of litigation costs, as well as costs ceilings, differ among insurance companies.

21. May litigants bring class actions? If so, what rules apply to class actions?

A class action does not exist as a right of action in Malaysia. However, the Rules of Court 2012 provide for representative proceedings[71]. Where numerous persons have the same interest in the proceedings, the proceedings may be begun and continued by or against any one or more of them as representing all or as representing all except one or more of them.

Substantively, a plaintiff to a representative action is required to demonstrate that the plaintiff and those represented by the plaintiff are members of a class having a common interest and a common grievance and that the relief sought is in its nature beneficial to all[72].

The procedural rules require a party seeking to bring a representative action to make a proper endorsement on the writ. Note that representative actions are based on members of the class 'opting in' to the action. Therefore, throughout the course of the proceedings, there may be a need to add, drop or substitute parties, which would require representative parties to invoke the provisions of the Rules of Court 2012 in respect of joinders, misjoinders and non-joinder of parties.

22. What are the procedures for the recognition and enforcement of foreign judgments?

The procedures for the recognition and enforcement of foreign judgments differ depending on whether the jurisdiction from which the foreign judgment originates is listed in the First Schedule to the Reciprocal Enforcement of Judgments Act 1958 ('REJA 1958')[73].

66 Section 96(a) of the CJA 1964; *Terengganu Forest Products Sdn Bhd v COSCO Container Lines Co Ltd & Anor & Other Applications* [2011] 1 CLJ 51

67 Section 97(1) of the CJA 1964

68 Rule 108 of the Rules of the Federal Court 1995

69 Section 112 of the LPA 1976

70 *Rhina Bhar v Koid Hong Keat* [1992] 2 MLJ 455

71 Order 15, Rule 12 of the ROC 2012

72 *Palmco Holding Bhd v Sakapp Commodities (M) Sdn Bhd & Ors* [1988] 2 MLJ 624

73 Section 3 of the REJA 1958

First Schedule Jurisdictions

The following prerequisites must first be satisfied[74]:

(a) the foreign judgment sought to be recognised and enforced in Malaysia must be a final and conclusive judgment from a superior court for a definite sum;

(b) the foreign judgment must originate from a jurisdiction listed in the First Schedule to the REJA 1958;

(c) the foreign court must have had jurisdiction to make the foreign judgment;

(d) the judgment debtor must have received notice of proceedings to appear in the proceedings to defend the action;

(e) the foreign judgment was not obtained by fraud;

(f) the rights under the foreign judgment are vested in the party seeking to enforce the foreign judgment;

(g) the enforcement of the foreign judgment would not be contrary to public policy in Malaysia.

The application to register a foreign judgment under Order 67 of the ROC 2012 must be made within six years from the date of the foreign judgment. The judgment creditor is required to apply to have the foreign judgment registered in the High Court by way of an originating summons, supported by an affidavit[75].

Non-First Schedule Jurisdictions

For foreign judgments not originating from a jurisdiction listed in the First Schedule to the REJA 1958, the only method of enforcement at common law is to secure a Malaysian judgment[76]. This requires an action to be brought under the common law rules to sue upon the judgment and obtain a Malaysian order in the terms of the foreign judgment. This can be obtained expeditiously by way of summary judgment.

74 Sections 2–4 of the REJA 1958

75 Order 67, Rules 2 and 3 of the ROC 2012

76 *Loo Chooi Ting v United Overseas Bank Ltd* [2015] 8 CLJ 287

23. What are the main forms of alternative dispute resolution?

The main forms of alternative dispute resolution in Malaysia are arbitration, mediation and adjudication.

Arbitration is governed by the Arbitration Act 2005[77].

Any mediation not conducted by a judicial officer in respect of proceedings instituted in court is governed by the Mediation Act 2012[78].

Adjudication of payment disputes under written construction contracts for development projects carried out in Malaysia is governed by the Construction Industry Payment and Adjudication Act 2012[79].

24. Which are the main alternative dispute resolution organisations in your jurisdiction?

The Kuala Lumpur Regional Centre for Arbitration ('KLRCA') is the primary venue for Malaysian arbitral proceedings, and maintains its own rules for conventional arbitration, fast-track arbitration and Islamic arbitration[80]. Other major arbitral bodies include the Malaysian branch of the Chartered Institute of Arbitrators[81], and the Malaysian Institute of Arbitrators[82].

77 Arbitration Act 2005 (Revised 2011) (Act 646)

78 Section 2 of the Mediation Act 2012 (Act 749)

79 Construction Industry Payment and Adjudication Act 2012 (Act 746)

80 'Dispute Resolution', accessible at http://klrca.org/dispute-resolution/

81 'CIArb Malaysia Branch', accessible at http://www.ciarb.org.my/

82 'The Malaysian Institute of Arbitrators', accessible at http://www.miarb.com/

Various major mediation organisations provide mediation services, such as the Malaysian Mediation Centre under the auspices of the Malaysian Bar Council[83], and the KLRCA[84]. The Kuala Lumpur Court Mediation Centre ('KLCMC') provides free court-annexed mediation for civil disputes filed in the Kuala Lumpur Civil Courts[85].

25. Are litigants required to attempt alternative dispute resolution in the course of litigation?

While there are no pre-action protocols requiring litigants to opt for mandatory alternative dispute resolution mechanisms, the court-annexed mediation programme housed in the KLCMC has given rise to an increase of court-ordered mediation. This has been further reinforced by way of a practice direction, which encourages judges and their deputy and assistant registrars to direct the parties to mediate their disputes at any stage[86].

The High Court or Sessions Court in Kuala Lumpur may, on its own motion or upon the request of any of the parties to the litigation, make an order of referral to the KLCMC for disputes which are the subject matter of court proceedings instituted in the High Court or Sessions Court in Kuala Lumpur. The order of referral may be made at any stage of the proceedings, but would typically be made during pre-trial case management[87].

26. Are there any proposals for reform to the laws and regulations governing dispute resolution currently being considered?

No.

27. Are there any features regarding dispute resolution in your jurisdiction or in Asia that you wish to highlight?

On 24 October 2013, the KLRCA launched its revised and translated edition of the KLRCA i-Arbitration Rules, which adopts the UNCITRAL Arbitration Rules 2010 for arbitration of disputes arising from commercial transactions premised on Islamic principles. The i-Arbitration Rules incorporate an expert reference procedure in relation to a Shariah Advisory Council or Shariah expert (both to be determined according to the characteristics of the agreement or transaction in dispute, and consent of the parties), whenever the arbitral tribunal is required to form an opinion on a point relating to Shariah principles[88].

83 'Malaysian Mediation Centre (MMC)', accessible at www.malaysianbar.org.my/malaysian_mediation_centre_mmc.html

84 'KLRCA Mediation Rules (Revised 2013)', accessible at http://klrca.org/rules/mediation/

85 'Kuala Lumpur Court Mediation Centre Court – Annexed Mediation', accessible at www.aseanlawassociation.org/11GAdocs/workshop5-malaysia.pdf

86 Practice Direction No. 4 of 2016: 'Practice Direction on Mediation'

87 'Kuala Lumpur Court Mediation Centre Court – Annexed Mediation', accessible at http://www.aseanlawassociation.org/11GA-docs/workshop5-malaysia.pdf

88 KLRCA i-Arbitration Rules (Revised 2013), accessible at http://klrca.org/rules/i-arbitration/

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1. 在民事诉讼方面，法院体系的结构是怎样的?

民事诉讼的初审可向地方法院、开庭法院或高等法院提起。

地方法院

除高等法院具有专属管辖权做出初审判决的争议事项外，地方法院有权判决一切金额或价值不超过 100,000 林吉特的争议事项。

开庭法院

对于机动车事故、业主与租户争议和扣押诉讼等相关的诉讼，开庭法院的管辖权不受争议金额限制，对于所有其他民事争议，则以争议金额不超过 1,000,000[1] 林吉特[2]的为限。

高等法院

在民事诉讼方面，高等法院具有不受限制的金钱管辖权和事项管辖权。高等法院分为五个法庭：

(a) 刑事庭
(b) 民事庭
(c) 商业庭
(d) 家庭争议庭
(e) 上诉和特别权力庭

2. 法官在民事诉讼中的角色是什么?

与大多数普通法司法管辖地一样，马来西亚法官主要扮演对抗制诉讼法官的角色，但同时又拥有控制民事诉讼过程的凌驾性权力[3]。

法官同时还负责组织案件管理会议。发出令状或原讼传票后的第二次和第三次案件管理会议以及任何非正审申请的第二次和第三次案件管理会议均由内庭法官负责组织[4]。

此外，在诉讼过程中，法官有权提出替代争议解决方式，比如征询当事人是否愿意调解[5]。

3. 庭审是否向公众开放？ 公众是否能够查阅法庭文件?

除内庭审理和出于公正、公共安全或公共礼仪考虑而不适合公开的庭审外，法院可以公开审理案件[6]。

法庭文件一般向公众开放，公众可以通过在线查询或亲自到法院查阅法庭文件。

4. 所有律师均有权代表其委托人出庭并参加诉讼吗？ 如果不是，律师职业的结构是怎样的?

《1967 年法律专业法》第 11 条中定义的马来西亚高等法院律师（辩护律师和事务律师）在持有《1967 年法律专业法》第 29 条所述的有效执业证书时，有权代表其委托人出庭并参与诉讼，但他们只在马来西亚半岛的民事法庭上才有出庭发言权。在马

1 不包括主张的利息：*Foo SeyKoh&Ors v Chua Seng Seng&Ors [1986] 1 MLJ 501*
2 1948年《下级法院条例》第65条
3 《2012年法院规则》第17条第15号令
4 2014年马来西亚第2号诉讼指引首席法官:“审前案件管理”
5 2016年第4号诉讼指引:“关于调解的诉讼指引”
6 1964年《司法法院法》第15条

来西亚半岛出生的律师在沙巴和沙捞越州高等法院没有出庭发言权（只有在沙巴和沙捞越州出生的律师才有权出庭发言和被传唤到庭）。

沙巴和沙捞越州高等法院律师在马来西亚半岛任何一家律师事务所完成三个月见习后可以在马来西亚半岛民事法庭上出庭。

对于外国律师，他们可以通过以下两种途径获得出庭发言权：

(a) 如果外国律师可以证明有关案件符合以下要求，可被临时许可在高等法院出庭：
   (i) 法院认为该外国律师对于该案件具备马来西亚律师不具备的特殊资格或经验；并且
   (ii) 该外国律师已受马来西亚律师委托出庭；
(b) 通过合格外国律师事务所、国际合伙律师事务所或注册为外国律师并受雇于马来西亚律师事务所而作为外国律师直接出庭[7]。

5. 提起民事请求的时效期为多久？

1953 年《诉讼时效法案》对在马来西亚半岛发生的诉讼作出了以下的诉讼时效规定：

(a) 对于合同和侵权争议，时效期为六年，自诉讼理由发生之日起算：
   (i) 若为合同争议，时效期自违约之日起算；
   (ii) 若为侵权争议，自侵权行为造成损失或损害之日起算[8]；
(b) 对于欺诈性违反信托的请求，没有时效限制[9]；对于其他违反信托的请求，时效期为六年，自违反信托之日起算[10]；
(c) 对于收回土地诉讼，时效期为 12 年，自起诉权发生之日起算，一般为约定的完成土地出售的最后日期[11]；
(d) 对于执行判决的请求，时效期为 12 年，自判决可执行之日起算[12]。

在沙巴和沙捞越州，诉讼时效按各自的时效条例执行，与 1953 年《诉讼时效法案》的规定有所不同。例如，在马来西亚半岛，诽谤和恶意中伤的诉讼时效为六年，但在沙巴和沙捞越州仅为一年。除此之外，在合同请求的时效限制上也存在明显不同：若为即时应付贷款相关的金钱请求，时效期为三年，自贷款日期之日起算；若为违反书面合同相关的请求，时效期为六年，自违约之日起算。

注意：合约协议也可对请求时效作出限制规定[13]。

6. 有哪些诉前程序是当事人在开始诉讼之前必须遵守的？

虽然没有需要遵守的一般诉前程序，但法院可下令要求当事人遵守一定的诉前程序，并且若当事人不服从法院命令，法院有权施以处罚，包括罚款和按藐视法庭罪处罚。例如，法院可能在诉讼前向非当事人发出证据开示命令[14]。

但依据惯例，原告一般会在开始民事诉讼之前通知潜在被告。

7. 案件进入审理之前要经过哪些典型的民事程序？有什么样的时间表？

2009 年初政策发生变化后，马来西亚开始对新的商业争议和民事争议执行“快速通道”制度，争议将严格按规定在 9 个月（自提出请求之日起算）内解决。根据法院时间表，诉讼进入审理的时间为六个月，自发出令状之日起算[15]。

发出令状后，所有当事人（若被告已收到令状并露面）将获悉举行审前案件管理会

7 《1976年法律专业法》第IVA部分
8 1953年《诉讼时效法案》第6条
9 1953年《诉讼时效法案》第22(1)条
10 1953年《诉讼时效法案》第22(2)条
11 1953年《诉讼时效法案》第9条
12 1953年《诉讼时效法案》第6(3)条
13 The Pacific Bank Bhd诉KerajaanNegeri Sarawak案, [2015] 3 CLJ 717
14 《2012年法院规则》第7A(1)条第24号令
15 2014年马来西亚第2号诉讼指引首席法官：“审前案例管理”

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Sunil Abraham

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Sunil Abraham 于 2004 年取得律师资格，是 Cecil Abraham & Partners 律师事务所合伙人，专长于公司法、商法、银行法、证券法、媒体法、通信法、公法、行政法、环境法以及仲裁法。Sunil Abraham 在高等法院、上诉法院、联邦法院和仲裁法庭有丰富的出庭经验。

Sunil 在联邦法院处理过的值得注意的案件包括：

- AV Asia SdnBhd 诉 Measat Broadcast Network Systems SdnBhd 案，[2014] 3 MLJ 61。该案件涉及在仲裁纠纷情况下授予临时救济的相关原则。
- OoiWoon Chee & Anor 诉 Dato' See TeowChuan&Ors 案，[2012] 2 MLJ 713。该案件涉及清算人的权力。
- Dato' Seri IrHj Mohammad Nizar bin Jamaluddin 诉 Dato' Seri Dr Zambry bin Abdul Kadir 案（总检察长，调停者），[2010] 2 MLJ 285。Sultan Ismail Petra IbniAlmarhum Sultan Yahya Petra 诉 Tengku Mahkota Tengku Muhammad Faris Petra & Anor 案。[2011] 1 MLJ 1 诉讼案。此等案件涉及皇家特权的行使。

在由当地居民提起的引人注目的环境法纠纷案件中，Sunil 代表 Raub Australian Gold Mining SdnBhd 公司和 Lynas Malaysia SdnBhd 公司获得了胜诉。此外，在几个诽谤索赔案件中，Sunil 也因作为内政部部长和旅游部部长的代表律师而获得一定名声。目前，在印度的一项重大跨国纠纷案件中，Sunil 是 Maxis Communications Berhad 公司、Astro All Asia Networks Ltd 公司和 South Asia Entertainment Holdings Ltd 公司的代理律师。

在由 Malaysian Historical Salvors 公司提起的投资协议仲裁索赔案件中，Sunil 担任马来西亚政府的协理律师。目前，在几个未决的投资协议纠纷案件中，Sunil 也是几个投资人的协理律师。

议的日期和具体时间[16]。若有当事人未出席审前案件管理会议，法院可施加程序性处罚[17]。

第一次审前案件管理会议将在发出令状后的 30 日内举行：

(a) 各当事人需向司法常务官告知是否已收到令状、被告是否露面、是否要提出非正审申请；

(b) 若不提出非正审申请，当事人需在第一次案件管理会议结束后的 30 日内完成诉答。

第二次审前案件管理会议将在第一次案件管理会议结束后的 42 日、诉答完成后的 14 日内举行：

16 《2012年法院规则》第3条第34号令
17 《2012年法院规则》第6条第34号令

(a) 当事人需提交以下文件：

(i) 诉答宗卷；

(ii) 审理过程中任何当事人将依赖或提到的常用文件宗卷，包括证人证词中提到的文件。这类文件分为 A 部分（无争议文件）、B 部分（真实性无争议但内容有争议的文件）、C 部分（真实性和内容均存在争议的文件）三部分；

(iii) 各当事人的案件概述；

(iv) 无争议事实陈述；

(v) 待审理问题陈述；

(vi) 证人名单；

(vii) 证人证词；

(b) 在这一阶段，当事人可申请开示文件或书面质询。

第三次审前案件管理会议将在第二次案件管理会议结束后的 30 日内举行，当事人将在会上确定具体的审理日期。

非正审申请可在此次审前案件管理会议上提出[18]。根据诉讼指引规定，非正审申请只能在第一次案件管理会议后的 7 日内提出，在申请提出后的 42 日内进行处理。尽管存在该规定，但各当事人仍需遵守法院在第二次案件管理会议上就审前准备作出的指示。

法官有权作出“除非命令”，这种命令的效果相当于对不服从案件管理指示的当事人作出程序性惩罚。若不服从法院指示，法官可驳回原告起诉或撤销被告的辩护或反诉[19]。

在审前案件管理阶段，各当事人及其律师应向法院提供所有必需的信息和文件，以便法院正确处理诉讼[20]，但各当事人不会与负责审理诉讼的法院交流已披露的事实或审前案件管理阶段考虑到的任何事项[21]。

8. 当事人是否必须向其他当事人和法院披露相关文件？

在审前案件管理阶段，法院通常作出的指示包括要求当事人提交用于支持自己观点或反驳对方观点的常用文件宗卷。

此外，各当事人还需披露法院证据开示命令中提到的相关文件。法院有权命令当事人开示目前及将来会依赖的文件以及可能不利于或支持其中任一当事人观点的文件[22]。有这种情况时，若当事人不服从开示命令，法院有权驳回原告起诉或撤销辩护，甚至作出缺席判决[23]。

9. 是否有关于特权文件的规则或允许当事人不披露某些文件的任何其他规则？

1950 年《证据法》已将某些类别的文件列为可以不在法庭上出示的特权文件，其中主要的类别是：

(a) 律师（包括其翻译、助理和职员）与委托人之间的通信文件[24]；和

(b) “无损权益的”通信文件，包括供认[25]和在和解协商过程中依赖的文件[26]。

10. 当事人在审理之前是否交换书面证据？或是否提供口述证据？ 对方是否有权盘问证人？

法院有权作出命令和指示以便公正、快速、经济有效地审理诉讼[27]。事实上，法院一般

18 《2012年法院规则》第8条第34号令

19 《2012年法院规则》第1(3)条和第2(3)条第34号令；*Nur Ibrahim Masilamani& Anor* 诉*Joseph Lopez*案，[2014] 9 MLJ 722

20 《2012年法院规则》第8(1)条第34号令。

21 《2012年法院规则》第11条第34号令

22 24号令，《2012年法院规则》第3(1)条。

23 《2012年法院规则》第16条第24号令

24 1950年《证据法》第126条和第127条；*Dato' Anthony See Teow Guan*诉*See TeowChuan& Anor*案，[2009] 3 MLJ 14

25 1950年《证据法》第23条，前提是提前有约定不会在庭上将这类供认作为证据出示。

26 Malayan Banking Bhd诉Foo See Moi案，[1981] 2 MLJ 17

27 《2012年法院规则》第2(2)条第34号令

会在审理案件前要求当事人交换书面的证人证词[28]。在审理过程中，这些证词会作为主询问而被采纳，但当事人在庭上还可以对证人进行补充询问。

庭审过程中，对方当事人有权对事实证人进行盘问，包括对提供书面证据的证人进行盘问。对于以誓证方式提出的书面证据，对方当事人若希望对宣誓证人进行盘问，则必须事先获得法院准许[29]。

11. 关于专家任命的规则是怎样的？ 是否有专家行为准则?

《2012 年法院规则》对法庭专家和当事人专家的任命作了规定。

法庭专家可由法院自行任命，也可以在当事人提出申请后任命：

(a) 法院自行任命：法院可在当事人专家证人提供的证据陷入僵局时任命法庭专家[30]；

(b) 当事人申请法院任命专家：必须征求对方当事人的同意。

诉讼双方当事人可指定自己的专家证人，但法院有权限制当事人在审前阶段或庭审过程中指定的专家证人数量[31]。

根据惯例，请求传唤专家证人的当事人需在庭审前披露专家证人的身份并提交专家证人报告。虽然具体披露时间由法院在案件管理会议上确定，但无论如何应当在庭审前 30 日内披露[32]。

目前没有成文的专家证人行为准则。专家证人应当独立判断，针对法官知识范围以外的问题协助提供证据。虽然这一职责明显为法庭专家的职责[33]，但通常由当事人指定的专家执行。专家的职责是协助法院审案，而不是维护任何一方当事人（包括指定专家的当事人）的利益。专家证人对法院的职责超越对其指定人的合同义务[34]。

审理诉讼时，当事人有权提供专家报告以回应对方当事人提交的专家报告，同时有权在庭审时对专家证人进行盘问。

12. 案件审理前可获得哪些临时救济?

资产冻结令：也称“玛瑞瓦禁令”，主要用于在判决前保全资产[35]。

禁诉令：用于阻止其他当事人在外国司法管辖区提起诉讼，避免发生诉讼竞合[36]。

安东 · 皮勒禁令：赋予判定债权人在无需事先通知的情况下搜查和扣押证据的权利[37]。

恐惧禁令：阻止某一当事人向法院提起诉讼[38]。

暂缓执行判决：在对初审判决上诉前保持诉讼现状[39]。

Fortuna 禁令：阻止某一当事人提出结业请求[40]。

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28 2014年马来西亚第2号诉讼指引首席法官:“审前案例管理”

29 Tay Bok Choon 诉 TahansanSdnBhd案, [1987] 1 MLJ 432

30 Ernest Cheong Yong Yin 诉 KM Engineering & Development SdnBhd案, [1996] 4 MLJ 438

31 《2012年法院规则》第1条第40A号令

32 2014年马来西亚第2号诉讼指引首席法官:“审前案例管理”

33 Lian Chen Fah @ Lian Chen Lee & 3 Ors诉 Gimo Holdings SdnBhd案, [2008] 1 MLJ 135

34 National Justice Cia Naviera SA诉Prudential Assurance Co. Ltd, The Ikarian Reefer [1993] 2 Lloyd's Rep 68

35 MarevaCompaniaNaviera SA诉International Bulkcarriers SA案, [1975] 2 Lloyd's Rep 509

36 *BSNC Leasing SdnBhd*诉*Sabah Shipyard SdnBhd&Ors*案, [2000] 2 MLJ 70

37 *Anton Piller KG*诉*Manufacturing Processes Ltd*等案, [1976] 1 All ER 779

38 *PPES Resorts SdnBhd*诉*KeruntumSdnBhd*案, [1990] 1 MLJ 436

39 *Erinford Properties Ltd*诉*Cheshire County Council*案, (1974) 2 All ER 448

40 *Fortuna Holdings Pty Ltd*诉*The Deputy Commissioner of Taxation*案, [1978] VR 83

CECIL ABRAHAM & PARTNERS
ADVOCATES & SOLICITORS

Daniel Chua

律师，Cecil Abraham & Partners

Daniel 于 2015 年取得律师资格。目前，Daniel 正在将其执业领域拓展至律师事务所工作的各个方面，包括处理涉及商业诉讼、企业诉讼、商业仲裁和国际公法的案件。他参与的关注度较高的案件包括：

- Raub Australian Gold Mining SdnBhd 诉 Malaysiakini Dotcom SdnBhd 案。该案件为 Raub Australian Gold Mining SdnBhd 向上诉法院提起的上诉案件，涉及有限特权和新闻报道相关法律的应用（首席律师为 Tan Sri Dato' Cecil Abraham 和 Sunil Abraham）。
- Arch Reinsurance Ltd 诉 Akay Holdings SdnBhd 案。该案件为向联邦法院提起的诉讼案件，涉及根据《2005 年仲裁法》暂时搁置诉诸仲裁的法律（首席律师为 Tan Sri' Dato' Cecil Abraham 和 Sunil Abraham）。
- State Government of Selangor 诉 Triumph City Development Berhad 案。该案件涉及反对不断搁置宣判的仲裁裁决，其中裁决金额为 1.79 亿林吉特，受益人为 Triumph City Development 公司，理由为违反了关于土地出售和开发的合资协议（首席律师为 Sunil Abraham）。

Daniel 还参与了许多由国际投资争端解决中心和联合国国际贸易法委员会主持的投资协议纠纷案件。Daniel 曾在伦敦大学研读法律，并在马来西亚获取律师执业证书。之后，Daniel 在伦敦大学学院获得了国际仲裁法和国际商业诉讼专业方面的法学硕士学位。2015 年，Daniel 取得马来西亚律师资格。

13. 申请人需要确立些什么才能成功申请此类临时救济？

一般而言，为获得禁令性临时救济，申请人需满足以下条件：

(a) 已及时提出申请；

(b) 申请人已完整、坦诚地披露申请相关的所有事实；

(c) 存在有待审理的严重问题；

(d) 损害赔偿不是能够可以代替临时禁令的充分救济；

(e) 便利平衡倾向于颁发禁令[41]。

若申请玛瑞瓦禁令，除满足颁发临时禁令的要求外，原告或申请人还需满足以下要求[42]：

(a) 原告针对被告有表面论据良好的案情；

(b) 被告在法院管辖地内拥有资产；

(c) 被告极有可能使资产流失，以阻碍未来判决的执行。

若申请 Fortuna 禁令，申请人需阐述以下两点并令法院满意：(a) 结业请求几乎无成功希望（不论是从法律还是事实角度看）；以及 (b) 提出结业请求可能对公司造成不可修复的损害。若针对有争议债务提出结业的

41 *American Cyanamid Co*诉*Ethicon Ltd* 案，[1975] 1 All ER 504

42 *Pacific Centre SdnBhd*诉*United Engineers (Malaysia) Bhd*案，[1984] 2 MLJ 143

申请人选择提出有争议的请求而不是采用其他适当的替代方式可能对公司造成不可修复的损害，法院也可能会颁发 Fortuna 禁令[43]。

14. 案件审理时可获得哪些救济?

是否可获得审后救济（金钱和非金钱救济）取决于案件的具体事实和情况。

金钱救济以损害赔偿为形式。作出损害赔偿判决的目的是为了补偿，而不是惩罚[44]。但当被告行为具有难以容忍的性质，应当受到法院谴责时，可加重赔偿[45]。

损害赔偿有多种形式，包括一般损害赔偿（针对金钱损失和非金钱损失）、特别损害赔偿、象征性损害赔偿、惩罚性损害赔偿和加重性损害赔偿。其他损害赔偿类型包括违约赔偿[46]和保证金。

审后可申请的其他救济命令包括：禁止或强制性命令、声明、强制履行、解除合同、取消或修正文书。为强制性要求被申请人向申请人披露特定文件或信息，可申请第三方披露令（Norwich Pharmacal Order）。

15. 执行判决的主要方式有哪些?

执行判决的方法主要有以下：

判定债务人传票[47]

法院可发出判定债务人传票，查看判定债务人履行判定债务的方式和能力，同时还可下令要求判定债务人支付规定的每月额度。若判定债务人收到出庭传票但未出庭，法院还可对判定债务人发出逮捕令。

执行令

执行令可采取《2012 年法院规则》第 1 条第 46 号令中规定的形式，包括：

(a) 查封与变卖令[48]：查封与变卖令主要用于在特殊情况下或判定债务人无偿债能力时强制执行付款判决；

(b) 不动产管有令[49]：管有令使法警有权进入判定债务人的土地并接管土地，随后判定债权人可拍卖该不动产[50]；

(c) 动产交付令[51]：通过签发交付令，可收回判定债务人的动产或动产估值。

扣押财产令[52]

通过签发扣押财产令，可在租户拖欠租金和扣押财物后扣押租户占用的财产。扣押令不必送达租户，而是送交执行官，以做到出其不意顺利执行扣押。

扣押第三债务人保管的财产[53]

当马来西亚法院管辖地内有第三债务人对判定债务人欠有债务，法院可签发债权扣押令。判定债务人可向法院申请债权扣押令，强制要求第三债务人直接向判定债权人支付欠付判定债务人的款项[54]。

押记令

通过签发押记令，可强制对判定债务人的证券进行押记并以判定债权人作为受益人[55]。

指定接管人

当法院认为不能采用其他执行方式时，法院可指定接管人接管从判定债务人经济来

43 *Pacific & Orient Insurance Co Bhd*诉*MuniammahMuniandy*案，[2011] 1 CLJ 947

44 *Dennis*诉*Sennyah*案，(1963) 1 MLJ 95

45 *Dato' Abdullah Hishan bin Haji MohdHashim*诉*Sharma Kumari Shukla (No 3)* [1999] 6 MLJ 589

46 《2012年法院规则》第1条第31号令

47 《2012年法院规则》第5条第45号令

48 《2012年法院规则》第1(1)(a)条第45号令

49 1950年《特定救济法》（第137号法）第7条和第8条；《2012年法院规则》第3条第45号令

50 Sections 256–269 of the National Land Code 1965; Order 83 of the ROC 2012

51 《2012年法院规则》第4条第45号令

52 1951年《动产扣押法令》（第255号法）

53 《2012年法院规则》第1(1)(b)条第45号令

54 《2012年法院规则》第1条第49号令

55 《2012年法院规则》第50号令

源所得的一切财物，包括股份、债券、信用债券、政府债券等。

因藐视法庭罪拘押[56]

对于要求一方在规定时间内做出某行为或禁止做出某行为的判决，申请人可申请法院签发拘押令，要求对藐视法庭的一方处以罚款和 / 或监禁处罚。

当一方违反同意令时，也可以申请拘押令，但必须证明该违反行为不存在任何合理疑点[57]。

结业程序[58]

当一个公司无能力偿还 500 林吉特以上的无争议债务（包括判定债务）时，可针对该公司提出结业申请。

破产程序[59]

当一个个人被判定破产，例如判定债务人无能力偿还 30,000 林吉特以上的判定债务，可针对该个人提出破产申请。

16. 胜诉方是不是一般会被判获得诉讼费用赔偿？ 诉讼费用如何计算？

当事人只能通过法院判令收回诉讼费[60]。法院对诉讼费用的判决具有自由裁量权[61]。行使该自由裁量权时，法院遵守已确立的司法原则。但是，法院通常会命令遵守“费用跟随结果规则”，即由败诉方支付自己的以及胜诉方的诉讼费用。

在计算应支付的诉讼费用时，法院会考虑与案件相关的所有情况，包括：

(a) 诉讼事项的复杂程度以及涉案问题的难度；

(b) 律师和 / 或法律顾问运用的技能和专业知识、承担的责任以及花费的时间和劳力；

(c) 准备或详阅的文件数量和重要性；

(d) 处理涉案事宜的地点和环境；

(e) 诉讼事项对诉讼人的重要程度；以及

(f) 诉讼标的的价值。

在判决诉讼费用时还包括利息，其计算方法是单利法。目前按年利率 5% 计判，从判决之日开始算起，至最终履行完判决书全部内容之日结束[62]。

17. 对最终判决有哪些上诉途径？ 当事人能够以什么理由上诉？

向上诉法院上诉

针对高等法院终审判决的上诉可向上诉法院提起[63]。

有权向上诉法院上诉的条件包括[64]：

(a) 索赔金额为 250,000 林吉特或更高；

(b) 诉讼标的涉及诉讼费用，但从法律角度而言不涉及任何自由裁量权；或

(c) 法院已经在互争权利诉讼程序中给出了即决判决。

如果上诉标的与上述条件无关，向上诉法院提出上诉要取得上诉法院的上诉许可。

针对高等法院终审判决向上诉法院提出上诉，必须在该终审判决作出之日后的一个月之内进行。在该时间期限届满之时，准上诉人必须寻求延长时间[65]。

向联邦法院上诉

针对上诉法院终审判决的上诉可以向联邦法院提起，视联邦法院是否给予上诉许可而定。

56 《2012年法院规则》第52号令

57 *Muhammad Said Amin*诉*HaszeriHussin*案，*[2014] 3 CLJ 536*

58 1965年《公司法》（第125号法）第218条；1972年《公司（清算）条例》

59 1967年《破产法》（第360号法）；1969年《破产条例》

60 《2012年法院规则》第3(1)条第49号令。

61 《2012年法院规则》第2(2)条第59号令。

62 2012年马来西亚首席大法官第1号诉讼指引：“根据《2012年法院规则》判决利率”。

63 《1964年司法法院法令》第67(1)条。

64 《1964年司法法院法令》第68条。

65 《1994年上诉法院规则》第12条。

上诉许可依据为：诉讼必须涉及首次裁决的一般原则问题或具有公共重要性的问题[66]。

向联邦法院申请上诉许可必须在一个月之内完成，时间从上诉法院做出终审判决之日算起[67]。一旦联邦法院授予上诉许可之后，联邦法院即可确定提交上诉通知书的时间期限[68]。

18. 是否允许律师和委托人之间存在胜诉酬金或按条件收费的安排?

辩护人、律师和委托人之间的胜诉酬金和按条件收费安排是被禁止的[69]。

19. 是否允许第三方资助? 资助人是否可分享胜诉收益?

在马来西亚，第三方资助很容易遭受助讼与帮诉指控，当原告并非原始权利持有人时尤其如此。无论如何，如果签订合同与第三方分享诉讼赔偿金额会构成帮诉，则这种第三方合同是被禁止的[70]。

20. 当事人是否可为其诉讼费用投保?

许多保险公司都会提供公众责任保险和产品责任保险。但是，保险公司之间有关诉讼费保险范围以及诉讼费上限的条款和条款各不相同。

21. 诉讼人是否可提起集体诉讼? 如果可以，哪些规则适用于集体诉讼?

在马来西亚，不存在集体诉讼的权利。但是，《2012 年法院规则》对代表人诉讼做出了规定[71]。当众多人在诉讼程序中享有共同利益时，可由其中一人或多人作为所有人或者该一人或多人之外的其他人的代表提起或被提起并继续执行诉讼程序。

从实质上讲，代表人诉讼的原告需要证明：原告和原告代表的众多人是在诉讼程序中拥有共同利益和共同申诉理由的集体成员；寻求的救济在本质上对原告和原告代表的众多人均有利[72]。

程序规则要求寻求提出代表人诉讼的当事人在令状上进行适当背书。需要注意的是，代表人诉讼取决于集体成员“选择”参与该诉讼。因此，在整个诉讼程序过程中，可能需要增加、减少或替换当事人，这就要求当事人代表援引《2012 年法院规则》中关于当事人共同诉讼、不合法的共同诉讼和非共同诉讼的规定。

22. 外国判决通过哪些程序予以承认和执行?

用以承认和执行外国判决的程序不尽相同，取决于产生外国判决的管辖区是否属于《1958 年相互执行判决法》附表一中所列的区域[73]。

列于附表一中的管辖区

必须首先满足的先决条件如下[74]：

(a) 请求在马来西亚认可和执行的外国判决必须是高级法院针对一定金额做出的最后和终局性判决；

(b) 外国判决必须源自《1958 年相互执行判决法》附表一中列举的管辖区；

(c) 外国法院必须拥有做出该外国判决的司法管辖权；

(d) 判定债务人必须已经收到了诉讼程序通知书，从而能够参与诉讼程序并在诉讼中进行辩护；

66 《1964年司法法院法令》第96(a)条; Terengganu Forest Products SdnBhd诉COSCO Container Lines Co Ltd & Anor & Other Applications案, [2011] 1 CLJ 51。
67 《1964年司法法院法令》第97(1)条。
68 《1995年联邦法院规则》第108条。
69 《1976年法律专业法令》第112条。
70 RhinaBhar诉Koid Hong Keat案, [1992] 2 MLJ 455。
71 《2012年法院规则》第12条第15号令。
72 Palmco Holding Bhd诉Sakapp Commodities (M) SdnBhd&Ors案, [1988] 2 MLJ 624。
73 《1958年相互执行判决法》第3条。
74 《1958年相互执行判决法》第2条至第4条。

(e) 外国判决并非通过欺诈方式获得；

(f) 试图执行外国判决的当事人拥有该外国判决中规定的权利；

(g) 执行外国判决不会违反马来西亚公共政策。

如果想要申请根据《2012 年法院规则》第 67 号令登记外国判决，则必须在六年之内完成，时间从外国判决做出之日算起。判定债权人需要申请由高等法院登记外国判决，条件是要获得高等法院下达的原诉传票并呈上宣誓书[75]。

未列于附表一中的管辖区

对于并非源自《1958 年相互执行判决法》附表一中列举的管辖区的外国判决而言，要按照普通法执行的唯一方法是获得马来西亚判决[76]。这需要根据普通法规则就该判决提起诉讼，并且获得与该外国判决条款一样的马来西亚判决令。要想快速获得马来西亚判决，可以采取即决判决的形式。

23. 替代争议解决的主要形式是什么？

在马来西亚，替代争议解决的主要形式有仲裁、调解和裁决。

仲裁受《2005 年仲裁法》管辖[77]。

并非在法院诉讼程序中由司法人员进行的任何调解，受《2012 年调解法》管辖[78]。

裁决因马来西亚开发项目书面施工合同而引起的付款争议时，接受《2012 年建筑业付款及裁决法令》管辖[79]。

24. 在您所在的司法管辖区有哪些主要的替代争议解决机构？

在马来西亚进行仲裁程序的主要场地是吉隆坡区域仲裁中心（KLRCA）。该中心拥有其自己的常规仲裁规则、简易仲裁规则和伊斯兰仲裁规则[80]。其他主要仲裁机构包括特许仲裁员协会马来西亚分会[81]和马来西亚仲裁员协会[82]。

有多个主要调解组织提供调解服务，此类组织包括由马来西亚律师公会赞助的马来西亚调解中心[83]和吉隆坡区域仲裁中心[84]。吉隆坡法庭调解中心（KLCMC）可以免费提供法院附设的调解服务，调解向吉隆坡民事法院提起的民事争议[85]。

25. 在诉讼过程中诉讼人是否必须尝试替代争议解决办法？

虽然没有诉前规则要求诉讼人选择强制性替代争议解决机制，但是吉隆坡法庭调解中心的法院附设调解计划已经导致法院下令的调解出现增加。这一情况在采用诉讼指引后愈加明显，因为诉讼指引鼓励法官及其副司法常务官和助理司法常务官在任一阶段指导当事人调解其争议[86]。

吉隆坡高等法院或开庭法院可根据其自身的动议或诉讼的任一当事人提出的要求，向吉隆坡法庭调解中心下达转介命令，向该中心转介属于向吉隆坡高等法院或开庭

75 67号令，《2012年法院规则》第2条和第3条。

76 Loo Chooi Ting诉United Overseas Bank Ltd案，[2015] 8 CLJ 287。

77 《2005年仲裁法》（2011年修订版）（第646号法）。

78 《2012年调解法》（第749号法）第2条。

79 《2012年建筑业付款及裁决法令》（第746号法）。

80 “争议解决”相关内容，请登录http://klrca.org/dispute-resolution/。

81 “特许仲裁员协会马来西亚分会”相关内容，请登录http://www.ciarb.org.my/。

82 “马来西亚仲裁员协会”相关内容，请登录http://www.miarb.com/。

83 “马来西亚调解中心（MMC）”相关内容，请登录www.malaysianbar.org.my/malaysian_mediation_centre_mmc.html。

84 “《吉隆坡区域仲裁中心调解规则》（2013年修订版）”相关内容，请登录http://klrca.org/rules/mediation/。

85 “吉隆坡法庭调解中心法院附设调解”相关内容，请登录www.aseanlawassociation.org/11GAdocs/workshop5-malaysia.pdf。

86 2016年第4号诉讼指引：“关于调解的诉讼指引”。

法院提起之诉讼程序标的的争议。转介命令可以在诉讼程序的任何阶段下达，但是通常在审前案件管理期间下达[87]。

26. 当前是否有改革争议解决法律法规的建议在审议中?

没有。

27. 关于您所在司法管辖区或者亚洲地区的争议解决，是否有任何特殊情况需加以强调?

2013 年 10 月 24 日，吉隆坡区域仲裁中心推出了《吉隆坡区域仲裁中心伊斯兰仲裁规则》修订和翻译版本。该版本采用了《2010 年联合国国际贸易法委员会仲裁规则》，适用于仲裁因基于伊斯兰原则的商业交易而引起的争议。每当仲裁庭需要就涉及伊斯兰原则的问题形成一种观点时，该伊斯兰仲裁规则就可以提供涉及伊斯兰教义咨询委员会或伊斯兰教义专家（这两者的确定取决于存在争议的协议或交易的特点以及当事人的准许）的专家参考程序[88]。

87 “吉隆坡法庭调解中心法院附设调解”相关内容，请登录http://www.aseanlawassociation.org/11GAdocs/workshop5-malaysia.pdf。

88 《吉隆坡区域仲裁中心伊斯兰仲裁规则》（2013年修订版）相关内容，请登录http://klrca.org/rules/i-arbitration/。

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1. What is the structure of the court system in respect of civil proceedings?

New Zealand's highest court is the Supreme Court. The Supreme Court was established by the Supreme Court Act 2003 and replaced the Privy Council (based in the United Kingdom) as the court of final appeal in New Zealand. Appeals to the Supreme Court may only be brought with leave, which can be granted where the subject matter is of general or public importance, a substantial miscarriage of justice has occurred or may occur, or the matter is of general commercial significance. Supreme Court appeals are heard by a bench of five judges.

The Court of Appeal is the second highest court in New Zealand and has jurisdiction to hear appeals from decisions of the High Court and, in some special circumstances, appeals from decisions of District Courts. Most appeals are heard by a bench comprising of three judges.

The High Court functions as both a court of first instance and an appellate court. The High Court's first instance jurisdiction includes claims in excess of NZ$200,000 and certain complex claims, such as proceedings under the Companies Act 1993, bankruptcies, disposition of real property (land), administration of trusts and estates, and admiralty. The High Court also has jurisdiction to hear appeals from some lower courts and tribunals, such as the District Court, Family Court and Environment Court.

The District Court has jurisdiction to hear claims between NZ$15,000 and NZ$200,000. Disputed claims under NZ$15,000 are determined by the Disputes Tribunal.

In addition, there are a number of specialist courts and tribunals. For example, the Employment Relations Authority and Employment Court, Waitangi Tribunal, Maori Land Court, Tenancy Tribunal and Weathertight Homes Tribunal.

2. What is the role of the judge in civil proceedings?

The role of the judge in civil proceedings in New Zealand is to determine disputes between parties. The process is adversarial, rather than inquisitorial or investigative. Each party has the opportunity to present their case to the judge who fairly and impartially decides the outcome by applying the facts of the case to the relevant law.

As New Zealand has a common law system, the relevant law includes not only the law embodied in statutes and regulations, but also case law principles (judicial precedents). A judge in a lower court is required to take notice of and follow any relevant judicial precedent set by a higher court. On appeal, a judge may overturn a decision of a lower court.

Judges have the power and jurisdiction to ensure that proceedings before them are conducted in accordance with the law. Judges of the High Court have an inherent jurisdiction to make any order that is necessary to ensure the court's effective operation, such as orders to prevent the abuse of the court's processes.

Another aspect of a judge's role is to assist in the development of the law by case law principles. Where a novel situation arises and there is no applicable judicial precedent, the judge's decision may extend the existing law by adding a new judicial precedent to the body of case law.

3. Are court hearings open to the public? Are court documents accessible to the public?

Most civil trials are open to the public unless there are reasons for confidentiality – for example, if the subject matter is of a sensitive nature, it is in the public interest, or where there are good reasons to protect the identity of a party or witness.

While most trials are open to the public, not every appearance in court by counsel before a judge is a trial. Many appearances are of an administrative or procedural nature and are not open to the public.

Judgments are accessible by the public, except in exceptional circumstances. In some judgments, the identities of parties and confidential information may be prohibited from publication, but the legal reasoning and outcome of the case will be made available to the public. Judgments of the High Court, Court of Appeal and Supreme Court are routinely made available by the Ministry of Justice via websites. The availability of judgments to the public is a principal tenet of a common law system.

Other court documents are not made generally available to the public, although an application can be made for access.

4. Do all lawyers have the right to appear in court and conduct proceedings on behalf of their client? If not, how is the legal profession structured?

Yes. A lawyer is a person who holds a current practising certificate as a 'barrister sole' or as a 'barrister and solicitor' (section 6, Lawyers and Conveyancers Act 2006). Either can appear in court and conduct proceedings. Generally, a barrister sole must receive client instructions via an instructing solicitor.

5. What are the limitation periods for commencing civil claims?

The Limitation Act 2010 proscribes the limitation periods for most civil claims, where the cause of action has arisen on or since 1 January 2011. Certain statutes under which proceedings may be brought have their own specific limitation periods. Common types of claim and their applicable limitation periods are shown on the facing page.

6. Are there any pre-action procedures with which the parties must comply before commencing proceedings?

No. However it is common to correspond with the opposing party before commencing proceedings to explore whether a resolution can be reached without resort to court proceedings.

7. What is the typical civil procedure and timetable for the steps necessary to bring the matter to trial?

The steps in a defended civil proceeding are standard for most proceedings and are as set out in the table below. The time between or for each step will differ depending on the particular case, although some guidance may be obtained from the standard timetable directions included in the table overleaf.

8. Are parties required to disclose relevant documents to other parties and the court?

Yes, both the District Court and the High Court have a process for initial disclosure upon filing of a proceeding. In the District Court, a plaintiff must provide a list of documents relied on, and a defendant may request copies of those documents (which the plaintiff must provide). In the High Court, an initial disclosure bundle must be provided to the other parties at the time the proceeding is commenced.

Type of claim	Limitation period
Money claim, includes any claim for monetary compensation, including under contract, tort, equity and most statutes providing for monetary relief	6 years from the date of the act or omission on which the cause of action is based
Claims seeking non-monetary or declaratory relief under various contract statutes (Contractual Mistakes Act 1977, Contractual Remedies Act 1979, etc)	6 years from the date of the act or omission on which the claim is based
Action for an account	6 years from the date the matter arose in respect of which the account is sought
Claim for conversion	6 years from the date of the original or first conversion
Action for current, future or equitable interests in land	12 years (unless claimant is the Crown or claiming through the Crown)
Enforcement of a judgment or arbitral award	6 years from the date on which the decision became enforceable (by action or otherwise) in the country in which it was obtained
To have a will declared invalid	6 years from the date of the grant of probate or administration
Action for a beneficiary's interest in a trust	6 years from the date on which the interest in the trust falls into possession or when the beneficiary first becomes entitled to trust income or property
Claims for a share or interest in a personal estate	6 years from the date on which the right to receive the share or interest accrues
Claims relating to building work	10 years from the date of the act or omission on which the proceedings are based (longstop limitation period)
Defamation actions	3 years from the date of the act or omission on which the claim is based
Claims under the Fair Trading Act 1993	3 years from the date on which the loss or damage, or the likelihood of loss or damage, was discovered or ought reasonably to have been discovered

Step in proceeding	Time
Claim commenced by plaintiff by filing a statement of claim in court and serving on the defendant	Varies, depending on plaintiff
Defendant files and serves a statement of defence	25 working days from service
Parties are required to attend a first case management conference before a judge. Orders may be made for discovery, interlocutory applications	25 working days after statement of defence filed and not fewer than 50 working days after the proceeding was filed
Parties provide discovery. This involves the listing, exchange and inspection of discoverable documents	Often 20–30 working days after first case management conference
Interlocutory applications. A party may apply for pre-trial orders, such as further discovery, particulars of pleadings, interrogatories and other preliminary orders. Applications may be opposed or consented to	Often 20 working days after discovery completed
Parties may be required to attend a second and subsequent case management conference before a judicial officer	
Resolution of interlocutory applications. If an interlocutory application is opposed, a hearing must be convened before a judge to determine the issue	Varies, depending on nature of application, court schedule and judge's determination
Staged exchange of written statements of evidence and documents for trial	Varies, often plaintiff's evidence first, defendant's evidence 10–20 working days following
Final hearing/trial	Varies depending on court

In addition to initial disclosure, in most civil proceedings, parties are or can be ordered to give 'discovery' of documents. An order for 'standard discovery' requires parties to discover all documents that either support or are adverse to their own or any other parties' case. An order for 'tailored discovery' must be made where the interests of justice require it and allows parties to discover a more limited range of documents, depending on the circumstances of the case.

A party to a proceeding has an obligation to comply with a discovery order, and a failure to do so may be a contempt of court. In addition, under the District Court Rules and the High

Court Rules, a solicitor has a personal obligation to the court to ensure compliance with discovery orders. A solicitor must take reasonable care to ensure a party for which it acts understands its obligations under a discovery order and fulfils those obligations.

Documents obtained during the discovery process may be used only for the purposes of the proceeding and, unless the document has been read in open court, may not be provided to any other person.

9. Are there rules regarding privileged documents or any other rules which allow parties to not disclose certain documents?

Part 2 subpart 8 of the Evidence Act 2006 sets out the statutory framework for claiming privilege.

Various categories of privilege exist, the most common of which is 'legal professional privilege', which protects confidential communications between legal advisers and clients where legal advice has been obtained or given. 'Litigation privilege' is also common and may be claimed over documents prepared for the dominant purpose of preparing for or defending a proceeding, including communications among the party, its legal advisers and non-parties.

Other categories of privilege include confidential communications made in connection with an attempt to settle or mediate a dispute between parties, communications with ministers of religion, and trust accounting records kept by a solicitor/law firm.

Non-disclosure or limited/restricted disclosure of documents may also be ordered where they contain confidential information (e.g. commercially sensitive information such as trade secrets, personally sensitive information such as medical records, or State secrets where the public interest is not served by disclosing the information).

10. Do parties exchange written evidence prior to trial or is evidence given orally? Do opponents have the right to cross-examine a witness?

In preparation for trial, parties exchange unsworn, written briefs of evidence. Supplementary briefs may also be provided. The written briefs are then given orally and under oath at the hearing. A witness at the trial must read a brief of evidence before it becomes part of the court record and part of the evidence-in-chief.

In a judge-alone trial, affidavit evidence may be admitted where there is agreement between the parties or if the court orders.

11. What are the rules that govern the appointment of experts? Is there a code of conduct for experts?

Parties are entitled to engage expert witnesses to provide expert evidence with leave of the court. Alternatively, the court may appoint an expert witness to enquire into and report on any question of fact or opinion. A court-appointed expert may be appointed with the consent or agreement of the parties. If the parties are unable to agree on an expert, the court may make an appointment from nominations given by the parties.

All expert witnesses are required to comply with the Code of Conduct (Schedule 4 to the High Court Rules). This includes experts appearing in a court or tribunal other than the High Court. The Code of Conduct imposes on expert witnesses an overriding duty to act impartially on matters within the expert's area of expertise and for the assistance of the court. An expert witness must not act as an advocate or give evidence on questions of law. They must state whether their evidence is subject to any limitations or qualifications.

12. What interim remedies are available before trial?

Judges of the High Court have wide powers to make interim orders and grant pre-trial relief. Some interim orders provide temporary relief pending a final determination, whereas other orders are directed to maintaining the status quo or preserving evidence.

As to relief, interim injunctive relief can take many different forms, including orders to restrain trade, halt the liquidation of a company, stop the exercise of a mortgagee's powers, restrain publication, halt a nuisance or trespass, or stay an arbitration process. Other types of interim relief include orders requiring the preservation of property or funds, the sale of perishable property and retention of proceeds, the transfer of property and the payment of income.

Freezing orders, previously referred to as Mareva injunctions, prevent a respondent party from dissipating or removing assets outside the court's jurisdiction, where there is an intention to defeat an applicant's interest in the assets. A freezing order prevents a party from dealing with, diminishing or disposing of assets pending trial, so that judgment may be executed or enforced in respect of the asset.

Search orders, previously known as Anton Pillar orders, are invasive orders which allow a party to enter onto the opposing party's property to search for and remove evidence and preserve it for trial. A search order may be granted where there is a risk that evidence might be removed, destroyed or concealed before trial.

13. What does an applicant need to establish in order to succeed in such interim applications?

The requirements for the granting of interim relief vary depending on the type of relief.

To obtain interim injunctive relief, the applicant must satisfy the court that there is a serious question to be tried, the balance of convenience falls in favour of the interim injunction, and an award of damages would adequately compensate the respondent for losses that may be suffered as a result of the injunction. The applicant must also provide an undertaking that it will meet any court order for damages sustained by the respondent through the injunction.

To obtain a freezing order, the applicant must show that it has a good arguable case, the assets are within the jurisdiction of the court, and there is a real risk the assets will be dissipated before determination of the matter. The applicant must provide an undertaking as to damages and has a duty to the court to disclose fully and frankly all material facts. If an order is granted, the applicant must prosecute the claim as quickly and as reasonably as possible.

The requirements for the grant of a search order are stringent given its invasive nature. The applicant must show that it has a strong prima facie case, the potential or actual loss or damage will be serious if the order is not made, the respondent is in possession of relevant evidentiary material, and there is a real possibility the respondent will destroy or conceal the evidentiary material so that it is not available for use at trial. The scope of a search order must be proportional and not unnecessarily wide. The applicant must give undertakings to the court as to damages, to provide copies of documents seized to the respondent party, to inform the respondent party of its rights, and not to use seized material for collateral purposes.

14. What remedies are available at trial?

In civil proceedings, the relief granted is usually for the purpose of compensating a wronged party, rather than being of a punitive nature. Remedies available at trial include orders requiring the payment of money

(e.g. compensatory damages), specific performance, permanent injunctions, or declarations.

Exemplary damages are available only in exceptional circumstances where the defendant has acted in flagrant disregard of the plaintiff's rights. Awards to date have been nominal in nature.

15. What are the principal methods of enforcement of judgment?

Where a successful party (the judgment creditor) obtains judgment for the payment of money against the unsuccessful party (judgment debtor), but the judgment is unsatisfied, the judgment creditor has a range of enforcement options. The court can make an order allowing a judgment creditor to register a charge against property owned by the judgment debtor, allowing the court to take possession of and/or sell the property registered to the judgment debtor, or requiring an employer to make deductions from the judgment debtor's salary or wages and pay them to the judgment creditor.

Where the judgment debtor is a company, an unsatisfied judgment may be the basis for an application putting the company into liquidation. Where the judgment debtor is an individual, an unsatisfied judgment may form the basis for an application for bankruptcy.

Where an unsatisfied judgment is not for the payment of money, the court has the power to issue an arrest order, which provides for the arrest and detention of the defaulting party by an enforcing officer, so that the defaulting party may be brought before the court.

16. Are successful parties generally awarded their costs? How are costs calculated?

Yes, an award for legal costs is generally made in favour of a successful party for steps taken in a legal proceeding. Because costs are intended to be certain and identifiable by parties at any stage of a proceeding, they are almost always calculated by reference to a scale of costs that specifies the level of recovery for each step in a proceeding. The complexity of a proceeding and the reasonableness of time taken for a step are also factored into the calculation of costs.

Indemnity costs may be ordered if they have been provided for in a contract or agreement between the parties. Increased or indemnity costs may also be awarded if a party has acted unreasonably, unnecessarily or improperly in the conduct of a proceeding.

17. What are the avenues of appeal for a final judgment? On what grounds can a party appeal?

In most cases, where a judicial decision has the effect of finally determining a proceeding, there is a right of appeal to the next highest court. In some exceptional circumstances, a second right of appeal may be granted, but leave is required before a second appeal can be brought.

A party can appeal a decision on the grounds that there has been an error of fact or law. Where a decision involves the exercise of judicial discretion, an appeal may be brought on the grounds that the court below acted on a wrong principle, took into account some irrelevant matter or failed to take into account some relevant matter, or made a decision that was plainly wrong.

18. Are contingency or conditional fee arrangements permitted between lawyers and clients?

Prior to the Lawyers and Conveyancers Act 2006, neither contingency nor conditional fee arrangements were lawful. Since its enactment, conditional fee agreements in civil proceedings between lawyers and clients have been permitted but are subject to strict criteria.

Under a conditional fee agreement, the lawyer's remuneration is dependent on a successful outcome being obtained. Under a conditional fee agreement, the lawyer's remuneration must be

the lawyer's normal fee or the lawyer's normal fee plus a premium. The premium is payable only if a lawyer obtains a successful outcome. The premium can compensate the lawyer for the risk of not being paid or not being paid on account, but it cannot be calculated as a proportion of any amount received.

19. Is third-party funding permitted? Are funders allowed to share in the proceeds awarded?

Third-party funding, also referred to as litigation funding, is permitted in New Zealand. Third-party funding is the payment of the plaintiff's (usual) litigation costs. This includes legal fees, expert costs and other disbursements, security for costs and adverse cost orders.

Litigation funding agreements are only those agreements which provide funding from a party unrelated to the claim and their remuneration is tied to the success of the proceeding and/or they exercise control over the proceeding. It excludes relatives or associated bodies who may fund litigation, solicitors' conditional fee arrangements, and litigation funded by insurance.

In a recent decision, the Supreme Court held that New Zealand courts have no general rule regulating the bargains between litigation funders and parties; however, the court will step in to prevent an abusive process which arises as a result of litigation funding. An abuse may arise where the process has been used improperly, deceptively or viciously, or where the true effect of a ligation funding agreement is to assign a legal claim to the funder.

Where there is a litigation funding arrangement in place, once proceedings are issued, the identity and location of any litigation funders must be disclosed, and the litigation agreements themselves may be required to be disclosed where it is relevant to an application for third-party costs, abuse of process, or security for costs.

20. May parties obtain insurance to cover their legal costs?

Yes, a party may obtain insurance to cover legal costs. However, an insurer cannot indemnify a party against penalties ordered following prosecution under certain statutes.

21. May litigants bring class actions? If so, what rules apply to class actions?

There is no specific legislative provision that permits class action suits.

When one or more persons have the same interest in the subject matter of the proceeding, they may sue on behalf of, or for the benefit of, all of those persons through a representative action. The 'same interest' extends to a significant common interest in the resolution of any question of law or fact arising from the proceedings. This has provided an avenue for commercial class action law suits to come before the courts and allowed for the promotion of access to justice, elimination of duplication and a sharing of costs. The court's position has been to provide a liberal and flexible approach without restriction from precedent and allow for the 'exigencies of modern life'.

22. What are the procedures for the recognition and enforcement of foreign judgments?

Foreign judgments may be enforced in New Zealand by registration under the Trans-Tasman Proceedings Act 2010, the Reciprocal Enforcement of Judgments Act 1934, the Judicature Act 1908, or an action may be brought at common law.

The Trans-Tasman Proceedings Act 2010 allows for registerable Australian judgments (i.e. certain, final and conclusive judgments given by an Australian court or certain Australian tribunals) to be registered in a New Zealand court and enforced as if given by a New Zealand court.

The Reciprocal Enforcement of Judgments Act 1934 provides for the enforcement of judgments given in the United Kingdom or certain other countries. Other countries include Australia, Belgium, Botswana, Cameroon, Fiji, France, Hong Kong, India, Kiribati, Lesotho, Malaysia, Nigeria, Norfolk Island, Pakistan, Papua New Guinea, Sabah, Sarawak, Singapore, Sri Lanka, Swaziland, Tonga, Tuvalu, and Western Samoa.

If judgment for a sum of money has been obtained from a Commonwealth country, it is enforceable under the Judicature Act 1908.

To enforce judgments from other countries, an action may be brought at common law. For a judgment to be enforceable in New Zealand under the common law, a foreign court's jurisdiction over a person or an entity against whom the judgment is awarded must be recognised by New Zealand law, the judgment must be final and conclusive and for a definite sum of money.

23. What are the main forms of alternative dispute resolution?

Mediation is the most common form of alternative dispute resolution in New Zealand.

First instance courts sometimes provide for the convening of settlement negotiation meetings with the assistance of a judge. Such meetings are known as judicial settlement conferences. This is an alternative to mediation. A judge who participates in a judicial settlement conference is precluded from later determining the substance of the proceeding.

A common alternative to litigation through the courts is private arbitration, which is governed by the Arbitration Act 1996. Parties must agree to submit to arbitration, and commercial contracts often specify arbitration as the applicable dispute resolution forum.

24. Which are the main alternative dispute resolution organisations in your jurisdiction?

The main private alternative dispute resolution organisations in New Zealand include the Arbitrators' and Mediators' Institute of New Zealand (AMINZ), the Resolution Institute (Lawyers Engaged in Alternative Dispute Resolution (LEADR) and Institute of Arbitrators and Mediators Australia combined), and FairWay.

25. Are litigants required to attempt alternative dispute resolution in the course of litigation?

In some forums, parties may be directed by a judge to participate in alternative dispute resolution processes before the matter can proceed. Examples are employment disputes and certain proceedings before the District Court.

Even though a majority of cases in New Zealand are resolved by settlement, there is no general requirement to attempt alternative dispute resolution, although it is encouraged. A lawyer's professional duties include keeping clients advised of alternatives to litigation.

26. Are there any proposals for reform to the laws and regulations governing dispute resolution currently being considered?

The Judicature Modernisation Bill is currently before Parliament and, at the time of writing, was progressing towards its third and final reading. The Bill is expected to be passed within the next 3 – 4 months. It is an omnibus bill containing 15 individual pieces of legislation. It is expected that the majority of amendments will come into force in March 2017. The reforms are designed to modernise the legislation and arrangements relating to New Zealand's court system and provide a more efficient system of dispute resolution.

The changes are designed to 'increase transparency, certainty and clarity'.

If enacted, the Judicature Modernisation Bill is likely to have a wide effect on dispute resolution in New Zealand. As presently drafted, it sets out new arrangements relating to the senior courts, including the establishment of a commercial panel in the High Court and the ability to form other specialist panels. At present, there is no specialisation within the High Court. In addition, the District Courts will become one District Court that will have jurisdiction to hear claims up to NZ$350,000. Several technological advancements are also to be introduced including the use of electronic documents in courts and tribunals.

A draft Class Actions Bill (and associated rules) was drafted in 2009, but has not progressed further through the legislative process.

27. Are there any features regarding dispute resolution in your jurisdiction or in Asia that you wish to highlight?

New Zealand has a stable democracy and a judiciary that upholds the rule of law. According to Transparency International, it is the fourth least corrupt country in the world. As a result, parties undertaking dispute resolution in New Zealand can have a high degree of confidence that their matter will be determined on its merits, uninfluenced by corruption or other external factors.

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1. 在民事诉讼方面，法院系统的结构是怎样的?

在新西兰，第一高等法院是最高法院。最高法院依据《2003 年最高法院法》成立，取代了枢密院（设在英国）成为新西兰终审法院。向最高法院提起上诉必须经过许可。在下列情况下会授予该许可：诉讼标的具有普遍或公共重要性，发生了或可能会发生重大误判，或者诉讼标的具有一般商业重要性。向最高法院提起的上诉须由五名法官组成的法庭进行审理。

上诉法院是新西兰第二高等法院，有权审理就高等法院裁决而提出的上诉；在某些特殊情况下，还有权审理就地区法院裁决而提出的上诉。大多数上诉案件由三名法官组成的法庭进行审理。

高等法院可以同时作为一审法院和上诉法院。高等法院的一审司法管辖权包括金额超过 200,000 新西兰元的请求案件和某些复杂的请求案件，如根据《1993 年公司法》提起的法律诉讼、破产、不动产（土地）的处置、信托和遗产的管理以及海事诉讼。除此之外，高等法院还有权审理就某些下级法院和法庭（例如地方法院、家事法庭和环境法庭）判决而提出的上诉。

地方法院有权审理金额介于 15,000 新西兰元至 200,000 新西兰元的请求案件。金额为 15,000 新西兰元以下有争议的请求由争议法庭判决。

此外，还设有许多专门法院和法庭。例如，雇佣关系管理局和雇佣法庭、怀唐伊调解庭、毛利土地法院、租赁法庭和漏雨房屋法庭。

2. 法官在民事诉讼中的角色是什么?

在新西兰的民事诉讼中，法官的角色是裁决当事方之间的争议。这是一种抗辨程序，而非审问或者调查程序。每个当事人均有机会向法官陈述其案情，而法官应将案件事实与适用法律相结合，公平公正的作出判决。

由于新西兰采用的是普通法系，所以此处的适用法律不仅包括法令和法规中所体现的法律，还包括判例法原则（司法先例）。下级法院的法官需考虑和遵从上级法院作出的任何相关司法先例。在处理上诉案件时，法官可推翻下级法院的判决。

法官具有权力和司法管辖权来确保诉讼案件是依法审理的。高等法院法官享有固有管辖权下达任何必要命令以确保法院有效工作，例如有权下达相关命令避免滥用法院诉讼程序。

法官的另一个作用是根据判例法原则协助制定法律。出现无司法先例可适用的新情况时，法官的裁决则可为案例法律新增司法先例，从而延伸了现有法律。

3. 庭审是否向公众公开？ 公众是否能够查阅法庭文件?

绝大多数的民事审判案件均可向公众公开，存在保密原因的除外 – 例如，如果案件的标的事项比较敏感、事关公共利益或者存在需要保护当事方或证人身份的正当理由。

虽说大多数庭审是向公众公开的，但并非每次律师出庭都是庭审。很多时出庭是属于手续或程序性质的，不向公众公开。

除特殊情况之外，公众可以查阅判决文件。在某些判决文件中，可能不会公布当事人

的身份和保密信息，但是会向公众公开法律推理和案件判决结果。按照惯例，高等法院、上诉法院和最高法院的判决文件由司法部在网站上公布。向公众公开判决文件是普通法系的一项首要原则。

其它法庭档案通常不会向公众公开，但公众可以提出查阅申请。

4. 是否所有律师均有权出庭并代表其委托人进行诉讼？ 如果不是，律师职业的结构是怎样的？

是的，律师有权出庭并代表委托人进行诉讼。律师就是持有‘仅出庭律师’或者‘出庭律师兼事务律师’有效执业证书的人（《2006 年律师和物业过户师法案》第 6 条）。两种律师均可出庭并进行诉讼。通常情况下，仅出庭律师必须经由事务律师获得委托人指示。

5. 提起民事请求的时效期是多久？

《2010 年时效法令》中就诉讼事由产生于 2011 年 1 月 1 日当日或之后的大多数民事请求规定了诉讼时效期。某些可作为诉讼依据的法规另有规定自己的时效期限。常见的请求类型及其适用的时效期限见对页。

6. 有哪些诉前程序是当事人在提起诉讼之前必须遵守的？

没有。但是，在提起诉讼之前通常会与对方当事人联系，确定是否能在诉诸法院之前达成和解。

7. 案件进入审判要经过哪些典型的民事诉讼程序？ 有什么样的时间表？

大多数诉讼案件都有标准的民事诉讼辩护程序，可参见第 116 页中的列表。但是依据具体情况，每个程序的时间会因案件不同而有所差异，可将第 116 页中的列表作为某种指南。

8. 当事人是否必须向其他当事人和法院披露相关文件？

是的，地方法院和高等法院均设有在提交诉讼之后进行首次披露的程序。地方法院规定，原告必须提供其所依据的文件清单，而被告可要求获得该等文件的复件（原告则必须提供）。高等法院规定，在提起诉讼之时必须向其他当事人提供首次披露文件。

除了首次披露之外，在绝大多数民事诉讼案件中，法院会命令或可命令各当事人提供‘证据开示’文件。‘标准证据开示’命令要求所有当事人开示支持或不利于己方或其他任何当事人案件的所有文件。在司法公正需要的情况下，必须下达‘特定证据开示’命令，允许各当事人能够根据案件的情况开示范围更受限制的文件。

诉讼案件当事人有义务遵守证据开示命令，违反此命令规定即视为藐视法庭。除此之外，根据地方法院规则和高等法院规则规定，事务律师对法院负有确保遵守证据开示命令规定的个人义务。事务律师必须采取合理措施确保其当事人清楚并遵守证据开示命令下的各项义务。

在证据开示程序中获得的所有文件仅可用于诉讼目的。并且，除非文件已在公开法庭上宣读，否则不得提供给任何其他人。

9. 是否有关于特权文件的规则，或允许当事人不披露某些文件的任何其他规则？

《2006 年证据法》第 2 部分第 8 小节列明了主张特权的法定框架。

在诉讼方面存在各种特权，其中最为常见的是‘法律职业特权’。这种特权可以使法律顾问和委托人之间为取得或给予法律意见而产生的通信得到保密。‘诉讼特权’也是一种常见特权，当事人可以为主要用于准备诉讼或抗辩的所有文件主张‘诉讼特权’；此类文件包括当事人、其法律顾问和非当事人之间的通信。

其他类型的特权包括通信保密特权，涉及当事人之间为就争议达成和解或调解而产生的通信函件、与宗教神职人员之间的通信文件以及由事务律师 / 律师事务所保存的信托会计记录文件。

请求类型	时效期
金钱请求（包括根据合同、侵权、衡平法和多数金钱救济法规提出的任何金钱赔偿请求）	自诉讼事由所依据的作为或不作为之日起 6 年期限
根据各类合同法规（《1977 年合同错误法令》、《1979 年合同救济法令》等）之规定寻求非金钱或确认性救济的请求	自请求所依据的作为或不作为之日起 6 年期限
债务诉讼	自债务有关事件发生之日起 6 年期限
针对侵占的请求	自原始或第一次侵占之日起 6 年期限
关于土地现有、未来或公平权益的诉讼	12 年（除非请求人为国家或通过国家提出请求）
判决或仲裁裁决的强制执行	自裁决可于作出裁决所在国家强制执行（通过诉讼或其他方式）之日起 6 年期限
宣布遗嘱无效	自授予遗嘱认证或作出遗产管理之日起 6 年期限
信托受益人权益诉讼	自开始拥有信托权益之日或在受益人首次有权享有信托收入或财产之日起 6 年期限
动产股份或权益请求	自有权获得股份或权益之日起 6 年期限
建筑工程方面的请求	自诉讼所依据的作为或不作为之日起 10 年期限（最终截止时效期）
诽谤诉讼	自请求所依据的作为或不作为之日起 3 年期限
根据《1993 年公平交易法》提出的各类请求	自发现或理应发现损失或损害，或损失或损害的可能性，之日起 3 年期限

如果文件中包含保密信息（例如商业敏感信息（如商业机密）、个人敏感信息（如医疗记录）或者披露后会影响公共利益的国家机密），则也可下令不予披露或限制披露。

10. 当事人在审理之前是否交换书面证据？或是提供口述证据？对方是否有权盘问证人？

在准备审理过程中，当事人可交换未经宣誓、书面形式的证据摘要。当事人还可提供补充摘要。然后在庭审时经宣誓后口头提供书面摘要。出席审讯的证人必须在证据被纳入法庭笔录、主证据之前宣读证据摘要。

在法官单独审理时，如果各当事人达成约定或如果法院作出命令，则誓章证据可被接纳。

诉讼程序	时间
原告向法院提交请求书并送达给被告，请求即开始	取决于原告
被告提交并送达答辩状	自送达之日起 25 个工作日
当事人须参与法官召开的首次案件管理会议。法官可下达有关证据开示、非正审申请的命令	在答辩状提交之后 25 个工作日以及在提起诉讼之后不少于 50 个工作日
当事人开示证据。包括列举、交换和查验可开示的文件	通常是首次案件管理会议后的 20-30 个工作日
非正审申请。当事人可申请审前命令，例如进一步证据开示、诉状明细、书面质询等其他初步命令。申请可得到同意或被反对。	通常在完成证据开示之后的 20 个工作日
各当事人可能被要求参与司法人员召开的第二次及后续案件管理会议	
非正审申请的解决。如果非正审申请被反对，则必须由法官召开聆讯会作出裁决	取决于申请的性质、法庭日程安排和法官的裁决
安排交换供审理的书面证词和文件	通常首先为原告证词，10-20 个工作日之后被告证词
最终听审 / 审理	取决于法院

11. 关于专家任命的规则是怎样的？ 是否有专家行为准则?

各当事人有权在法院许可的情况下请专家证人出庭提供专家证据。或者，法院可任命专家证人就任何事实或观点问题进行调查并提交报告。法院指定的专家需经当事人同意。如果各当事人无法就任命某一专家事宜达成一致意见，法院则可从当事人提供的提名人名单中指定专家。

所有专家证人均需遵守《行为准则》规定（《高等法院规则》附件 4）。其中包括在高等法院之外的其他法院或法庭出庭的所有专家。根据《行为准则》规定，专家证人的首要责任就是在其专业领域内必须公平对待各项案件事宜，协助法院审理案件。专家证人不得为当事人进行辩护或者就法律问题提供证据。专家必须声明其证据是否存在任何局限性或限制条件。

12. 案件审理前可获得哪些临时救济?

高等法院的法官权力较大，可以下达临时命令、批准审前救济。某些临时命令可以提供最终裁决之前的临时救济，而其他命令可以维持现状或保全证据。

在救济方面，临时禁令救济可以有多种不同形式，包括限制贸易命令、暂停公司清算命令、停止行使抵押权人权力命令、限制出版命令、停止损害或侵害命令、中止仲裁程序命令。其他类型的临时救济包括要求保全财产或资金的命令、出售易坏财

产和保留所得收益的命令、转让财产的命令及支付收入的命令。

冻结命令（以前称作资产冻结令）可以防止应诉方意图使申请人对资产的权益无效而向法院管辖区域之外分散或转移资产。冻结命令可以防止当事人在审判之前处理、减少或处置资产，以便对资产执行或强制执行法院判决。

搜查命令（以前称作安东皮勒禁令）是一种侵入性命令，可以允许当事人进入对方当事人财产搜查、移交并且保全供审理的证据。法院可在相关证据在案件审理之前存在被转移、销毁或隐藏风险时下达搜查命令。

13. 申请人需要确立些什么才能成功申请此类临时救济?

授予临时救济的要求条件根据救济的类型而有所不同。

为了获得临时禁令救济，申请人必须使法院相信：存在有待审理的严重问题，从便利性衡量倾向作出临时禁令，并且损害赔偿的裁决将足以赔偿应诉人可能因该禁令而遭受的损失。此外，申请人必须承诺遵守法院就被告因禁令蒙受的损失而作出的任何损害赔偿命令。

为获得冻结令，申请人必须证明申请人有一个论据合理的案件，资产属于法院管辖范围，而且存在着资产会在案件裁决之前流失的实际风险。申请人必须就损害赔偿金做出承诺，并且有义务向法院充分、坦白披露所有重要事实。一旦作出了冻结令，申请人必须在合理范围内尽快提出诉讼请求。

由于搜查命令具有侵入性质，作出搜查命令的要求条件非常严格。申请人必须证明：案件表明证据确凿，若法院不下达命令，潜在或实际损失、损害将十分严重，应诉人持有相关的证明材料，而且存在着应诉人将为阻止该证明材料被用于审理案件而将之销毁或者隐藏的真实可能性。搜查命令的适用范围必须合符比例，而不得过大。申请人必须向法院承诺支付损害赔偿金、向应诉人提供所没收文件的副本，告知应诉人享有的各项权利，并且不得将所没收材料用于附属目的。

14. 案件审理期间可获得哪些救济?

在民事诉讼案件中，法院授予的救济通常是为了向受害方给予补偿，而不具有惩罚性质。在审理时可获得救济包括要求支付款项的命令（如补偿性赔偿）、强制履约命令、永久禁令或声明。

只有在被告公然不顾原告权利而行事的特殊情况下可获得惩戒性赔偿。到目前为止的赔偿裁定额都是名义性质的。

15. 执行判决的主要方式有哪些?

如果胜诉方（判定债权人）针对败诉方（判定债务人）取得付款判决，但判决未被执行，判定债权人有权强制执行判决。法院可下令允许判定债权人针对判定债务人持有财产登记抵押权，允许法院持有和 / 或出售已登记给判定债务人的财产，或者要求雇主从判定债务人的薪酬或工资中扣减款项支付给判定债权人。

判定债务人为一家公司时，不执行法院判决可成为申请对该公司进行清算的理由。若判定债务人为个人，不执行法院判决可构成申请该个人破产的理由。

如果未执行的判决与付款无关，则法院有权发出逮捕令，允许强制执行官员逮捕、拘留违约方并带其出庭。

16. 胜诉方是不是一般会被判获得诉讼费用赔偿? 诉讼费用如何计算?

是的，法庭通常就胜诉方在法律诉讼中采取的各个步骤判给诉讼费赔偿。由于在诉讼的任何阶段，诉讼费用途是确定的，且各当事人均可确认，所以，诉讼费的计算几乎始终会参考一个费用尺度，这个尺度标定了就诉讼程序的每个步骤可追偿的费用水平。在计算诉讼费用时，还会考虑诉讼的复杂性和采取每个步骤所花费时间的合理性。

如果当事人之间的合同或协议有费用赔偿规定，法院可作出费用赔偿命令。如果某一当事方在进行诉讼期间无理地、不必要地或不恰当地行事，还可被判赔增加的赔偿费用。

17. 对最终判决有哪些上诉途径？当事人能够以什么理由上诉？

在大多数案件中，如果一项司法裁决对一件诉讼案件具有最终裁决的效力，则当事人有权向上一级法院提起上诉。在某些特殊情况下，当事人可获得第二次上诉权，但是，当事人在提起第二次上诉之前，必须获得法院许可。

当事人可以以裁决存在事实或法律错误为理由提起上诉。如果裁决涉及行使司法自由裁量权，提起上诉的理由可以是下级法院适用了错误原则、考虑了无关事项（或者未能考虑某些相关事项）或者做出了明显错误的裁决。

18. 是否允许律师和委托人之间存在胜诉酬金或按条件收费的安排？

在《2006 年律师和物业过户师法案》颁布之前，风险代理费和按条件收费协议均属不合法。在该法案颁布之后，法律允许民事诉讼程序中的律师与当事人之间按条件收费协议，但是必须符合严格的标准规定。

在按条件收费协议下，律师的报酬取决于案件胜诉。在按条件收费协议下，律师的报酬必须是律师的一般应得费用，或者是律师的一般应得费用加上奖金。奖金只有在律师获得胜诉的情况下方可支付。奖金可补偿律师承担的未获得付款或被拖欠付款的风险，但是该奖金不可按照胜诉所获得的任何款项的比例进行计算。

19. 是否允许第三方资助？资助人是否可分享胜诉收益？

在新西兰，法院允许第三方资助（也称作诉讼资助）。第三方资助就是支付原告的（通常）诉讼费用。其中包括律师费、专家费、其他开支、诉讼费和诉讼费赔偿令保证金。诉讼资助协议仅指规定由与请求无关的一方提供资金且该方的报酬与诉讼的胜负挂钩和 / 或由该方对诉讼行使控制权的协议。其中不包括可能资助诉讼的亲属或关联人、事务律师的按条件收费安排以及由保险资助的诉讼。

在最近的一项裁决中，最高法院认为新西兰法院不存在监管诉讼资助者与当事人之间交易的通用规则；但是，如果因诉讼资助而发生滥用诉讼程序的情况，法院会介入予以制止。如果不恰当地、欺骗性地或恶意地利用诉讼程序，或者如果诉讼资助协议的真正作用是为了向资助者转让法定请求权，则可能会发生滥用情况。

如果作出了诉讼资助安排，一旦提起诉讼，必须披露任何诉讼资助者的身份和所在地，并且如果事关第三方费用申请、诉讼程序滥用或诉讼费担保，则可能需要披露诉讼协议本身。

20. 当事人是否可为其诉讼费用投保？

是的，当事人可以为诉讼费用投保。但是，对于当事人被根据某些法例起诉后被判付的罚款，承保人是不能赔偿的。

21. 诉讼人是否可提起集体诉讼？ 如果可以，哪些规则适用于集体诉讼？

没有具体的立法规定表示允许提起集体诉讼。

当一人或多人对诉讼标的事项有相同的利害关系时，可通过代表人诉讼代表他们全体员或为了他们全体的利益提起诉讼。‘相同的利害关系’包括对诉讼中任何法律或事实问题的决定的重大共同利害关系。这提供了向法院提起商业集体诉讼的途径，并且有助于司法便民、消除重复诉讼及共担费用。法院的立场一向是要灵活司法，无拘于先例，适应‘现代生活之需”。

22. 外国判决通过哪些程序予以承认和执行？

外国判决可根据《2010 年跨塔斯曼诉讼法》、《1934 年判决互惠执行法》、《1908 年司法法》

进行登记后在新西兰予以强制执行，或可按照普通法提起诉讼。

《2010 年跨塔斯曼诉讼法》允许可登记的澳大利亚判决（即澳大利亚法院或某些澳大利亚法庭作出的确定的、终审的和终局性的判决）在新西兰法院登记并强制执行，如同在新西兰法院作出的一样。

《1934 年判决互惠执行法》规定了英国或某些其他国家法院判决的执行。其他国家包括澳大利亚、比利时、博茨瓦纳、喀麦隆、斐济、法国、香港、印度、基里巴斯、莱索托、马来西亚、尼日利亚、诺福克岛、巴基斯坦、巴布亚新几内亚、沙巴、沙捞越、新加坡、斯里兰卡、斯威士兰、汤加、图瓦卢和西萨摩亚。

如果是英联邦国家法院作出的有关一笔款项的判决，则该判决可根据《1908 年司法法》予以执行。

要执行其他国家的法院判决，可根据普通法提起诉讼。对于可根据普通法在新西兰执行的法院判决，外国法院对判决所针对的人或实体的司法管辖权必须得到新西兰法律的承认，判决必须是终审和终局的，而且是有明确金额的判决。

23. 替代争议解决的主要形式是什么?

在新西兰，调解是最为常见的替代争议解决形式。

一审法院有时会规定在法官的协助下召开和解谈判会议。该等会议亦称为司法和解会议。这是调解的替代方法。法官参与司法和解会议之后就不得参与以后诉讼的裁决。

替代法院诉讼的一个常见办法是私人仲裁。私人仲裁由《1996 年仲裁法》管辖。各当事方必须同意提请仲裁，并且商业合同通常明确规定仲裁为适用的争议解决途径。

24. 在您所在的司法管辖区有哪些主要的替代争议解决机构?

在新西兰，主要的私人替代争议解决机构包括新西兰仲裁员和调解员研究所（AMINZ）、争议解决研究所（由替代争议解决律师协会（LEADR）和澳大利亚仲裁员和调解员研究院合并而成）以及 FairWay。

25. 在诉讼过程中诉讼人是否必须尝试替代争议解决办法?

在某些法庭上，法官可以指示当事人在诉讼进行之前参与替代争议解决程序。例如，向地区法院提起的劳动争议和某些诉讼案件。

新西兰的大多数案件是通过庭外和解解决的，但是不存在一般性的规定有要求尝试替代争议解决程序，不过这种尝试是受到鼓励的。律师的职业责任包括告知委托人替代诉讼的办法。

26. 当前是否有改革争议解决法律法规的建议在审议中?

议会目前正在审议《司法现代化法案》，撰写本文之时，该法案正在进行三读和终读阶段。预计《法案》会在未来 3-4 个月内通过，该《法案》是一项包含 15 件立法的综合法案。预计大部分修订会在 2017 年 3 月生效。这些改革是为了使新西兰法院系统的有关法律和安排更具现代化，并为争议解决提供更加有效的解决机制。这些改革旨在‘增加透明度、明确度和清晰度’。

如果《司法现代化法案》获得颁布，可能会对新西兰境内的争议解决产生广泛影响。根据目前草案的内容，法案对高等级的法院有新的安排，包括在高等法院内设立商业法庭并且还能够设立其他专门法庭。目前，高等法院内没有专门法庭。此外，地方法院将成为单一的地方法院，有权审理金额高达 350,000 新西兰元的请求。同时还将出台几项技术方面的改进，包括在法院和法庭使用电子文档。

《集体诉讼法案》的草案（和相关规则）于 2009 年起草，但在立法程序中没有进展。

27. 关于您所在司法管辖区或者亚洲地区的争议解决，是否有任何特殊情况需加以强调?

新西兰是一个稳定的民主国家，有着维护法治的司法制度。按照透明国际组织的排名新西兰是世界第四最清廉的国家 。因此，在新西兰进行争议解决的当事人可以有高度的信心他们的案件会根据是非曲直得以裁决，不会受到腐败或其他外部因素影响。

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1. What is the structure of the court system in respect of civil proceedings?

The Judicial Authority Law (enacted by Royal Decree 90/99) ('JAL') provides for different levels of courts: Supreme Court, appellate courts, courts of first instance and courts of summary jurisdiction.

Courts are competent to hear all civil and commercial matters, labour, tax and rent cases, in addition to arbitration applications filed before them other than in respect to immovable property situated outside Oman. The Administrative Law (enacted by Royal Decree 91/99) established an administrative court as an independent judicial body set up with exclusive powers to review decisions issued by government bodies. Court proceedings are conducted in accordance with the Civil and Commercial Procedural Law (enacted by Royal Decree 29/2002).

2. What is the role of the judge in civil proceedings?

Judges are competent to decide on all issues of facts and law relevant to the matter brought before them in accordance with Omani law.

They are required to ensure that all procedural formalities have been complied with regarding the proceedings filed before them and that the parties, if represented, have executed valid powers of attorney in favour of their attorneys authorising them to act on their behalf. At the first hearing of the case, the judge is required to ask the parties whether there is any possibility of a settlement. During the proceedings, the judge will allow the parties to make oral submissions and to provide oral evidence in accordance with the Law of Evidence in Civil and Commercial Transactions (enacted by Royal Decree 68/2008) ('Evidence Law'). Only the judge may cross-examine witnesses.

Depending on the nature of a dispute and the complexity of the technical issues raised by the parties, the judge may appoint a court-registered expert (see question 11). While judges are at liberty to take an inquisitorial approach to cases, they seldom do so and leave it to the parties to present and establish their cases on the basis of documentary evidence.

Following a review of the parties' pleadings and consideration of any oral evidence, judges are required to pronounce judgment and then issue the same in a written form.

All judges are required to take an oath provided for by JAL upon their appointment. They may not engage in commercial activity or any work inconsistent with the independence and dignity of the court. They must at all times comply with the requirements of JAL, including preservation of confidentiality of their deliberations, prohibitions on expressing political opinions, engaging in any political activity, considering cases in which they may have a conflict of interest and disclosure of confidential information.

3. Are court hearings open to the public? Are court documents accessible to the public?

Under Oman's Civil and Commercial Procedure Law (enacted by Royal Decree 29/2002) ('Procedure Law'), all civil court proceedings

at primary and appellate levels are open to the public unless otherwise ordered by the presiding judge. The Supreme Court, however, conducts its deliberations in camera. Judgments of all courts are pronounced in open court.

Court documents are not accessible to the public

4. Do all lawyers have the right to appear in court and conduct proceedings on behalf of their client? If not, how is the legal profession structured?

Lawyers licensed by the Ministry of Justice's advocacy committee in accordance with article 66 of the Advocacy Law of Oman (enacted by Royal Decree 78/2008) have the right to appear before the courts. Only Omani national lawyers may appear before the primary courts while licensed non-Omani lawyers may appear only before the appellate courts and the Supreme Court of Oman.

5. What are the limitation periods for commencing civil claims?

Article 92 of Oman's Commercial Code (enacted by Royal Decree 55/90) provides for a limitation period of 10 years, commencing from the date an obligation arose or was breached giving rise to a cause of action, within which a party may file its dispute before the Omani courts unless a shorter period is specified by another law. For example, the limitation period for a carriage of goods claim is one year, a bill of lading claim two years, agency disputes three years from the expiry of the agency agreement, claims against the government five years, and claims by the government seven years.

The liability of contractors is 10 years from the date of completion and hand-over to the client under articles 21 and 22 of the Engineering Consultancy Offices Law (enacted by Royal Decree 27/2016) ('ECL').

Under article 634 of the Civil Transaction Law (enacted by Royal Decree 29/2013) ('CTL'), a contractor and an engineer may be jointly liable for any: (a) total or partial damage to a building or other fixed facilities constructed by them; (b) defects which threaten the stability or safety of the building; and (c) defects which endanger the safety and endurance of the building for a period of ten years. It remains to be seen how the CTL limitation period will be applied in light of the ECL.

Article 185 of the CTL introduces an overarching limitation period of 15 years within which an action for compensation recoverable for a harmful act may be initiated. This 15-year limitation period is subject to any shorter limitation periods stipulated by law.

6. Are there any pre-action procedures with which the parties must comply before commencing proceedings?

In general, no. However, pre-action procedures must be complied with in certain circumstances such as where a promissory note has been dishonoured.

7. What is the typical civil procedure and timetable for the steps necessary to bring the matter to trial?

Claims are filed with the relevant primary court which then serves on the defendant a summons accompanied by the statement of claim and the supporting documents. The defendant is required to submit a response within a specified time period upon which the court secretariat may schedule a hearing date. Upon expiry of the period provided for submission of the defence, the court will schedule a hearing date for the parties to appear in person or represented by lawyers in possession of a power of attorney executed before a notary public in Oman or, where one of the parties is resident overseas, executed, notarised and consularised in the jurisdiction where the party is domiciled. If a party has not instructed lawyers to present the case or otherwise requires time to instruct lawyers, the court may grant an adjournment of up to two weeks.

Upon receipt of the statement of defence and any rejoinder from the plaintiff, the court will determine whether it can proceed to adjudicate the case or whether an expert should be appointed. After consideration of the pleadings, any expert's report and comments of the counter-party, the court pronounces judgment.

Judgments for sums in excess of OMR 1000, other than those handed down by summary courts, may be appealed before the appellate courts and the Supreme Court of Oman. An appeal must be filed within 30 days of the issue of the judgment or, in the case of the Supreme Court, within 40 days of the date of the appeal court judgment. A primary court judgment may not be enforced until the time for lodging an appeal before the appeal court has expired, or, if an appeal is lodged, until a determination is reached. However, in the case of appeals to the Supreme Court, enforcement proceedings may proceed notwithstanding the appeal unless otherwise stayed by the court. The judgment of the Supreme Court is binding on the parties subject to articles 142 and 143 of the Procedure Law.

The conduct of proceedings up to the Supreme Court may take between 18 months and six years, depending on the complexity of the case

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Mansoor is a listed Court of Appeal arbitrator in Oman, enjoys rights of audience before the Supreme Court of Oman and acts as an expert witness on Omani laws in disputes before courts in international jurisdictions. He is a door tenant of leading Chambers of Stephen Tromans QC and Neil Block QC at Thirty Nine Essex Street, London, a member of Lincolns' Inn and the International Bar Association.

Mansoor's expertise has won him Chambers Global's accolade of 'star performer' in Oman for the past five years and top ranking across the main global legal directories.

and procedures for service of proceedings on a party domiciled or resident outside Oman.

8. Are parties required to disclose relevant documents to other parties and the court?

Parties are required to provide copies of all documents on which they seek to place reliance in the proceedings to the counter-party(ies). Under the Evidence Law, parties to proceedings may seek a court order compelling the opposing party to submit documents and records relevant to the case in their possession. This process is not dissimilar to the process of discovery found in other common law jurisdictions and takes place in the circumstances set out in articles 20–21 of the Evidence law, namely:

(a) where the law expressly entitles a litigant to request the submission of the relevant documents; or

(b) if the document is common between the parties (a document will be considered to be common if it affects the interest of both parties or if it confirms their mutual liabilities and rights); or

(c) if the opponent has relied on the document at any stage of the proceedings.

The application for the disclosure must provide, to the satisfaction of the court, a detailed description of the document, the purpose for which the document is required, supporting evidence that it is in the possession of the opposing party and the reasons why the document is required.

9. Are there rules regarding privileged documents or any other rules which allow parties to not disclose certain documents?

The concept of privilege is not recognised in Omani law. There are no rules in the Evidence Law which allow a party to withhold or not disclose certain documents.

10. Do parties exchange written evidence prior to trial or is evidence given orally? Do opponents have the right to cross-examine a witness?

Written evidence is exchanged prior to any hearing of the case. All statements of claim, defence and counter-claim and reply must be accompanied by supporting documentation on which the litigant parties seek to rely.

Parties and the court may call witnesses to provide oral evidence subject to the rules and limitations laid down by the Evidence Law.

Article 43 of the Evidence Law provides that witness testimony may be heard: (a) where there is a material or moral obstacle to obtaining written evidence; (b) if the creditor loses written documents for reasons beyond its control; and (c) when the court is satisfied that evidence may be established through the testimony of witnesses. Article 43 of the Evidence Law can be relied on by a party to prove the existence of a contract by calling as a witness a person who was present at the conclusion of a contract. Litigant parties are not permitted to cross-examine witnesses. This is a prerogative of the judge alone. While judges are at liberty to take an inquisitorial approach to cases, they seldom do so and leave it to the parties to present and establish their cases on the basis of documentary evidence.

11. What are the rules that govern the appointment of experts? Is there a code of conduct for experts?

Depending on the nature of a dispute and the complexity of the technical issues raised by the parties, the court may appoint an expert, of its own accord or at the request of a litigant. Oman's Ministry of Justice maintains a register of experts chosen from a range of professions such as accounting and engineering (the 'Register'). The court will accept an agreement between the litigants on the appointment of an identified expert or otherwise will select

one from the Register. The expert will be issued with a mandate letter setting out the brief and the terms on which it is to be carried out. Litigants will be given an opportunity to comment on and challenge the expert's findings and recommendations.

An expert is not obliged to commence work until his/her fee is deposited with the court secretariat. An may be relieved from appointment at his/her request within five days from receipt of the mandate letter or at the request of a litigant party for any of the reasons set forth in the Evidence Law.

There is currently no code of conduct governing experts. However, at the time of entry on the Register, experts are required to take an oath before the court of appeal undertaking to act professionally, diligently and honestly in the discharge of their duties.

12. What interim remedies are available before trial?

An application may be made to the court for a provisional attachment order under the Procedure Law in circumstances where:

(a) a creditor is a bearer of a bill of exchange or promissory note and the debtor is a merchant who has undertaken to perform the obligation set out in the instrument; and

(b) a creditor may lose a right to which the creditor is entitled to if the order is not granted.

The application for a provisional attachment order must provide details of the outstanding debt and particulars of the properties to be attached.

The presiding judge may grant the interim relief with or without an order for security. The order must specify the amount of the debt or an estimate thereof. The court will notify any third party in possession of movable property subject to the order or the relevant authority in the case of immovable property of the attachment order. The court may order the sale of the goods subject to the attachment if they are perishable or liable to lose value.

The debtor must be notified within 10 days of the attachment order and the applicant is required to file the substantive claim within the same period. If the debtor has not been notified or the substantive proceedings have not been filed, then the order shall lapse.

13. What does an applicant need to establish in order to succeed in such interim applications?

The creditor will need to demonstrate, to the satisfaction of the court, that if a provisional attachment order is not granted, the defendant is likely to dispose of or remove its assets from the court's jurisdiction or otherwise dispose of it so as to deprive the creditor of the opportunity to enforce and/or recover its rights from the debtor once a final judgment is obtained.

14. What remedies are available at trial?

Most remedies are discretionary. The most commonly available remedy is an award of monetary damages for loss or injury. The remedy of specific performance introduced by the CTL provides contracting parties with a remedy other than a claim for monetary damages in circumstances where damages do not adequately compensate for the loss or damage arising from the non-performance of the party in breach. As the CTL provisions are relatively new and untested, it remains to be seen how they will be interpreted and applied by the Omani courts.

As a general rule, the courts uphold contractual terms which are not contrary to the law. However, in the event of a fundamental breach of contract, after considering the merits of the case, the court may order termination of the agreement notwithstanding the presence of provisions in the contract stipulating or excluding an alternative remedy. Articles 167–173 of the CTL now set forth the circumstances

(e.g. force majeure or the occurrence of an exceptional event rendering the performance of an obligation unduly onerous for a party) in which a contract may be terminated and the mechanism for such termination.

As in the case of the remedy of specific performance, these CTL provisions remain to be considered by the Omani courts, and no precedent is as yet available.

15. What are the principal methods of enforcement of judgment?

Enforcement of judgments or arbitration awards conducted before the Omani courts, or of a private arbitration award obtained in Oman and from a contracting state under international conventions, is undertaken by the commercial division of the primary court. An application for enforcement is submitted identifying the judgment debtor's assets.

Pending the enforcement of a judgment or an arbitration award, an application may be made for the attachment of the judgment debtor's assets. Upon seven days' notice to the judgment debtor, the judgment debtor's assets may be seized and sold at auction by the court within three months of the confiscation application unless otherwise agreed or ordered.

A judgment may be enforced against funds held by a third party or against land, the sale of which shall take place at the courts after appropriate notices have been published in the daily newspapers.

Notwithstanding provisions in the CTL for declaring a debtor bankrupt, historically, the courts have been reluctant to make bankruptcy orders unless and until satisfied that all efforts have been expended to obtain and enforce a judgment.

16. Are successful parties generally awarded their costs? How are costs calculated?

Historically, the Omani courts awarded legal costs only in circumstances where the contract between the parties provided for recovery of the same. The courts currently award legal costs irrespective of whether this is provided for by contract. Quantum of costs awarded, rather than the actual costs claimed by the litigants, is assessed by the court. In general, the courts award nominal legal costs in relation to lawyers' fees. Expert fees are determined by the court and payable by the party requesting the appointment of an expert or the party against whom the final judgment has been passed.

17. What are the avenues of appeal for a final judgment? On what grounds can a party appeal?

Appeals may be raised in the appellate courts against judgments of the primary courts, and appellate court decisions may be appealed before the Supreme Court of Oman. A Supreme Court judgment may not be appealed unless it is determined that a member of the Supreme Court bench had sat as a judge in a lower court when the same case was adjudicated.

18. Are contingency or conditional fee arrangements permitted between lawyers and clients?

Contingency or conditional fee arrangements are not permitted in accordance with article 48 of the Advocacy Law.

19. Is third-party funding permitted? Are funders allowed to share in the proceeds awarded?

There are no restrictions on a party entering into third-party funding arrangements. Consequently, a funder would be permitted to share in the proceeds awarded.

20. May parties obtain insurance to cover their legal costs?

There are no legal restrictions preventing a party from obtaining insurance to cover its legal costs.

21. May litigants bring class actions? If so, what rules apply to class actions?

Class actions are permitted, but there are no specific rules governing the commencement of such actions.

22. What are the procedures for the recognition and enforcement of foreign judgments?

Applications for enforcement of judgments and orders passed by foreign courts are dealt with by Oman's primary courts in accordance with articles 352–355 of the Procedure Law. An order for enforcement of a foreign judgment or order may be passed by the primary court provided the court is satisfied that:

(a) the judicial authority which passed the foreign judgment or order had jurisdiction, in accordance with the rules governing international judicial jurisdictions, as provided for by the law of the country where the judgment or order was passed, and that the judgment or order was to be treated as final in accordance with such law and was not passed on the basis of deceit and fraud;

(b) the parties to the suit in respect of which the foreign judgment was passed were summoned to appear and were represented in a proper and rightful manner;

(c) the judgment or order does not contain any request which is in violation of any of Oman's laws;

(d) the judgment or order was neither in conflict with an earlier judgment or order passed by an Omani court, nor does it contain anything contrary to public order or morals; and

(e) the country where the judgment was passed enforces on a reciprocal basis judgments passed by the courts of Oman.

23. What are the main forms of alternative dispute resolution?

Mediation may be applied for in accordance with Royal Decree 98/2005.

24. Which are the main alternative dispute resolution organisations in your jurisdiction?

There is no specific organisation set up for alternative dispute resolution. However, the Ministry of Justice has established a special committee empowered to conduct reconciliation proceedings upon application by the parties in dispute under Royal Decree 98/2005. There is no obligation under Omani law requiring disputing parties to negotiate or seek mediation in a disputed matter before commencing litigation.

25. Are litigants required to attempt alternative dispute resolution in the course of litigation?

No. The primary court may, at the first hearing of a disputed matter, enquire of the parties as to whether reconciliation is feasible. If not, the judge will proceed with the adjudication of the case. Parties in dispute may refer their dispute for resolution through a reconciliation committee under the purview of the Ministry of Justice in accordance with Royal Decree 98/2005.

26. Are there any proposals for reform to the laws and regulations governing dispute resolution currently being considered?

No.

27. Are there any features regarding dispute resolution in your jurisdiction or in Asia that you wish to highlight?

No.

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1. 在民事诉讼方面，法院系统的结构是怎样的？

《司法机构法》（第 90/99 号皇家法令颁布）（'JAL'）规定了各级法院：最高法院、上诉法院、一审法院和即时裁决法院。

除仲裁申请外（不包括有关阿曼境外不动产的仲裁申请），法院还有权审理所有民商事、劳务、税务和租务案件。《行政法》（第 91/99 号皇家法令颁布）设立了行政法院，该行政法院作为独立的司法机构，具有复核政府机构决议的专属权。法院审理程序依据《民商事程序法》（第 29/2002 号皇家法令颁布）执行。

2. 法官在民事诉讼中的角色是什么？

法官有权根据阿曼法律对提请法院裁决的事项所涉及的所有事实和法律问题作出裁决。

法官必须确保在处理提请其解决的诉讼时，遵守所有相关程序手续，如当事人由他人代理，应确保当事人已签署有效委托书，授权其代理人代其行事。案件第一审期间，法官必须询问当事人是否有可能和解。诉讼期间，法院会允许当事人根据《民商事证据法》（第 68/2008 号皇家法令颁布）（'《证据法》'）提供口供和口头证据。只有法官可盘问证人。

法官可根据当事人提出的争议的性质以及技术问题的复杂性，指定一名在法院登记的专家（见问题 11）。虽然法官可对案件采用审问模式，但他们很少这样做，而是由当事人自己依据证明文件说明和证明其案情。

在复核当事人的诉答和审议任何口头证据之后，法官必须宣判并下达判决书。

所有法官在接受任命时均须按照 JAL 的规定宣誓。法官不得从事任何有违法院独立性和尊严的商业活动或任何工作。法官必须始终遵守 JAL 的要求，包括保护其审议内容的机密性，禁止发表政治言论、从事政治活动、审理与其有利益冲突的案件以及泄露保密信息。

3. 庭审是否向公众开放？公众是否能够查阅法庭文件？

根据阿曼《民商事程序法》（第 29/2002 号皇家法令颁布）（'《程序法》'），所有初级和上诉阶段的民事法院诉讼均向公众公开，除非审判长另有其他命令。但是，最高法院执行不公开审讯。所有法院的判决均在公开法庭宣布。

法院文件不对公众公开。

4. 所有律师均有权代表其委托人出庭并参加诉讼吗？如果不是，律师职业的结构是怎样的？

司法部辩护委员会依据《阿曼辩护法》（第 78/2008 号皇家法令颁布）第 66 条许可的律师有权出庭。只有阿曼本国律师可在初级法院出庭，而非阿曼本国的执业律师只能在阿曼上诉法院和最高法院出庭。

5. 提起民事请求的时效期为多久？

阿曼《商法典》（第 55/90 号皇家法令颁布）第 92 条规定为 10 年期限，自产生或违反义务而引起诉因之日起计。在该期限内，当事人可将争议提交阿曼法院，除非其他法律规定了较短期限。例如，货物运输请求的时效期为一年，提单请求的时效期为两年，代理争议的时效期为自代理协议到期

之日起三年，针对政府的请求的时效期为五年，政府提起的请求的时效期为七年。

根据《工程咨询机构法》（第 27/2016 号皇家法令颁布）（'ECL'）第 21 条和第 22 条的规定，承包商的责任期为 10 年，自完工并移交给委托人之日起计。

根据《民事交易法》（第 29/2013 号皇家法令颁布）（'CTL'）第 634 条的规定，承包商和工程师可共同承担以下责任：(a) 其建造的建筑物或其他固定设施的全部或部分损坏；(b) 威胁建筑物稳定性或安全性的缺陷；以及 (c) 危及建筑物安全性和耐久性的缺陷，责任期为十年。 涉及到 ECL 时，CTL 时效期的适用性则视情况而定。

CTL 第 185 条引入了 15 年的普遍时效期，在该期间，可针对危害行为提起赔偿诉讼。该 15 年的时效期应服从法律规定的任何较短时效期。

6. 有哪些诉前程序是当事人在提起诉讼之前必须遵守的?

一般情况下没有。但是，在某些情况下，例如期票被拒付，必须遵守诉前程序。

7. 案件进入审理之前要经过哪些典型的民事程序? 有什么样的时间表?

向相关初级法院提出请求后，该初级法院向被告送达传票以及请求书和证明文件。被告必须在规定期限内递交回复书，之后，法院秘书处可安排听审日期。提交答辩文件的规定期限到期后，法院会安排听审日期，当事人可亲身出庭或由持有委托书的律师代为出庭，该委托书必须是在阿曼公证人面前签署的，或者，如果一方当事人居住在国外，则该委托书必须由该当事人所在管辖区进行签署、公证、领事认证。如果一方当事人未聘请律师提交案件或需要时间聘请律师，法院可允许休庭最多两星期。

收到答辩陈述书和原告的任何反驳书后，法院会决定是否可继续审判案件，或者是否需要指定专家。法院在审议诉求、专家报告和对方当事人的论述后即作出宣判。

对于金额超过 1000 阿曼里亚尔的判决（不包括即决法院作出的判决），可向阿曼上诉法院和最高法院提起上诉。该上诉必须在作出判决后 30 日内提出，或者如果是向最高法院上诉，在上诉法院作出判决之日起 40 日内提出。初级法院的判决必须在向上诉法院提起上诉的期限到期后才可执行，或者，如果已提起上诉，则在裁决作出之后才可执行。但是，如果是向最高法院提起上诉，则判决即使被上诉都可进行执行程序，除非被法院阻止。最高法院的判决对当事人具有约束力，但受《程序法》第 142 条和第 143 条的规限。

诉讼至最高法院的程序，可需要 18 个月至六年时间，取决于案件的复杂性以及向住所在阿曼境外的当事人送达诉讼文书所需的程序。

8. 当事人是否必须向其他当事人和法院披露相关文件?

当事人必须将其诉讼所依赖的全部文件副本提供给对方当事人。根据《证据法》，诉讼当事人可寻求法院命令，强制对方当事人提交其持有的与案件相关的文件和记录。该程序与其他普通法管辖区的证据开示程序没什么不同，并且在发生《证据法》第 20 至 21 条所述的情况时会出现该程序，即：

(a) 法律明确规定诉讼当事人有权要求提交相关文件；或

(b) 文件是当事人之间的共同文件（如果文件影响到双方当事人的利益或确认了双方当事人共同的责任和权利，则被视为共同文件）；或

(c) 对方当事人在诉讼的任何阶段曾依赖过该文件。

申请披露时，必须按照法院的要求提供该文件的详细说明、需要该文件的目的、对方当事人持有该文件的佐证以及需要该文件的原因。

9. 是否有涉及特权文件的规则或允许当事人不披露特定文件的任何其他规则?

阿曼法律不认可特权这一概念。《证据法》中没有任何其他允许当事人隐瞒或不披露相关文件的规则。

10. 当事人在审理之前是否交换书面证据?或是否提供口述证据?对方是否有权盘问证人?

书面证据在案件的任何庭审之前交换。所有的请求书、答辩书、反请求书和回复书必须附有诉讼当事人依赖的证明文件。

当事人和法院可根据《证据法》规定的规则和限制传唤证人提供口头证据。

《证据法》第 43 条规定，在以下情况下，可听取证人证言：(a) 获取书面证据存在物质或道德障碍；(b) 债权人因其控制之外的原因丢失书面文件；以及 (c) 法院认为证人证言能够作为证据。根据《证据法》第 43 条，一方当事人可传唤签订合同时在场的一名人员作为证人，以此证明存在合同。诉讼当事人不得盘问证人。这是法官独有的特权。虽然法官可对案件采用审问模式，但他们很少这样做，而是由当事人自己依据证明文件说明和证明其案情。

11. 有关专家任命的规定是怎样的?是否有专家行为准则?

法院可根据当事人提出的争议的性质和技术问题的复杂性，主动地或应诉讼当事人的请求，指定一名专家。阿曼司法部备有一份专家登记簿，其中记录了从会计和工程设计等各职业选出的专家（'登记簿'）。法院认可诉讼当事人之间关于指定某一专

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Mansoor 是全球顶级全方位服务律师事务所 Al Busaidy, Mansoor Jamal & Co 的创始人和管理合伙人。作为一名有英国执业资格的律师，他在争议解决、阿曼法律和其他 GCC 以及伊斯兰管辖区法律的专家咨询方面具有丰富经验。Mansoor 是一个有经验的律师团队领导人，参与过国内外重大的公法私法争议仲裁和复杂的商业诉讼，涉足行业领域极其广泛，包括银行、水电、工程建设、保险、就业和油气。他曾在国际商会国际仲裁院和伦敦国际仲裁院（LCIA）成功地依照 ICSID 和 UNCITRAL 规则为仲裁申请人提起请求和为被申请人进行辩护。

Mansoor 是阿曼记录在册的上诉法院仲裁员，享有在阿曼法院出庭辩护的权利，并且可在国际司法区法院的争议中担任阿曼法律界的专家证人。他是位于伦敦 Essex 街 39 号的 Stephen Tromans QC 大律师事务所和 Neil Block QC 大律师事务所的常驻律师以及林肯律师学院和国际律师公会的成员。

凭借其专业知识，Mansoor 在过去五年中曾获得钱伯斯全球授予的阿曼"最佳表现奖"，并且在主要的全球律师名录中名列前茅。

家的协议，若无协议则从登记簿中另选一名。专家会收到一份委任书，其中说明其职责范围和执行职责的条款。诉讼当事人有机会对专家的调查结果和建议提出意见和质疑。

专家在专家收费存入法院秘书处之后才有义务开始工作。如有《证据法》所述的任何原因，专家可在收到委任书后或收到诉讼当事人请求后五日内申请免除对其任命。

目前没有专家行为准则。但是，在被录入登记簿时，专家必须在上诉法院宣誓，保证专业、勤勉、诚实地履行其职责。

12. 案件审理前可获得哪些临时救济?

在以下情况下，可根据《程序法》向法院申请临时扣押令：

(a) 债权人是任何汇票或期票的持有人，债务人是保证履行票据所述义务的商人；以及

(b) 如不给予扣押令，债权人可能会丧失其享有的权利。

申请临时扣押令时，必须提供未偿还债务以及拟扣押财产的详细信息。

审判长可批准给予临时救济，同时可附带或不附带提交担保令。扣押令必须具体说明债务金额或预估金额。法院会将扣押令通知持有该命令所涉及的动产的任何第三方，如果该扣押令涉及的是不动产，则通知相关主管机构。如果所扣押的货物易腐坏或丧失价值，法院可命令出售该货物。

关于扣押令的通知必须在 10 日内发给债务人，并且申请人也须在相同期限内提交实体请求。如未通知债务人或未提起实体程序，则命令失效。

13. 申请人需要确立些什么才能成功申请此类临时救济?

债权人须按照法院要求证明，如不给予临时扣押令，被告可能会处置其资产或将其资产转移到法院管辖区之外或以其他方式进行处置，从而使债权人丧失在终审判决作出后行使其权利或从债务人处追回其权利的机会。

14. 案件审理时可获得哪些救济?

大部分救济是酌情给予的。最常见的救济为判定损失或伤害的损害赔偿金。CTL 引入的强制履行救济为合同当事方提供了一种损害赔偿请求之外的救济，适用于损害赔偿金无法充分补偿违约方违约所造成的损失或损害的情形。由于 CTL 的规定相对较新并且从未经过检验，阿曼法院如何解释和运用这些规定仍不得而知。

在一般情况下，法院会维护那些不违背法律规定的合同条款。但是，如发生根本性违约行为，法院可在考虑案件真实情况后，命令解除协议，即使合同中有规定或排除某种替代救济的条款。现行 CTL 第 167 条至第 173 条规定了可解除合同的情形（例如，不可抗力或发生特殊事件，导致一方义务过分繁重而难以履行）以及解除机制。

至于强制履行救济，这些 CTL 条款还有待阿曼法院考虑，目前尚无先例。

15. 执行判决的主要方式有哪些?

阿曼法院作出的判决或仲裁裁决，或在阿曼境内和国际公约缔约国获得的民间仲裁裁决，由初级法院商事法庭负责执行。提交执行申请时，需指明判定债务人的资产。

执行判决或仲裁裁决之前，可申请扣押判定债务人的资产。除非另有其他约定或命令，法院在提前七日向判定债务人发出通知后，即可扣押判定债务人的资产，并在收到没收申请后三个月内拍卖其资产。

可针对第三方持有的资金或针对土地执行判决，土地的出售应在日报上发布恰当通知之后在法院进行。

尽管 CTL 中有关于宣布债务人破产的条款，但法院以往一直不愿意发布破产命令，除非法院认为有关当事人已尽全力获得和执行判决。

16. 胜诉方是不是一般会被判获得诉讼费用赔偿？诉讼费用如何计算？

在过去，阿曼法院只有在双方当事人之间的合同有赔偿诉讼费用规定的情况下才会判定诉讼费用。现在法院在判定诉讼费用时不会考虑合同是否有此规定。法院会评估所判定费用的总额，而非诉讼当事人请求的实际费用。一般情况下，法院会就律师费判定名义诉讼费。专家费用由法院决定，然后由要求聘任专家的一方当事人或终审判决被执行方支付。

17. 对最终判决有哪些上诉途径？当事人能够以什么理由提起上诉？

对于初级法院的判决，可向上诉法院提起上诉，对于上诉法院的裁决，可向阿曼最高法院提起上诉。最高法院的判决是不可上诉的，除非下级法院对同一案件宣判时有最高法院法官团的一位成员担任下级法院法官。

18. 是否允许律师和委托人之间存在胜诉酬金或按条件收费的安排？

根据《辩护法》第 48 条规定，禁止胜诉酬金或按条件收费的安排。

19. 是否允许第三方资助？资助人是否可分享胜诉收益？

目前无任何规定限制当事人订立第三方资助协议。因此，资助人可分享胜诉收益。

20. 诉讼当事人是否可为其诉讼费用投保？

目前无任何法律规定限制当事人为其诉讼费用投保。

21. 诉讼人是否可提起集体诉讼？如果可以，哪些规则适用于集体诉讼？

允许提起集体诉讼，但是目前没有关于提起此类诉讼的具体管辖规则。

22. 外国判决通过哪些程序予以承认和执行？

目前由阿曼初级法院根据《程序法》第 352 条至第 355 条的规定受理关于执行外国法院判决和命令的申请。初级法院如认为符合以下情况，则可发出执行外国判决或命令的命令：

(a) 根据国际司法管辖权规则，作出该外国判决或命令的司法机构具有其本国法律所规定的管辖权，并且按照该法律的规定，该判决或命令为终局性的，且不存在欺骗和欺诈；

(b) 该外国判决的诉讼当事人有被传唤出庭，并且获得了恰当和合法的法律代理服务；

(c) 该判决或命令不含任何违背阿曼法律的请求；

(d) 该判决或命令既不违反阿曼法院之前通过的判决或命令，也不含任何有违公共秩序或道德的内容；以及

(e) 作出该判决的国家根据互惠原则执行阿曼法院作出的判决。

23. 替代争议解决的主要形式是什么？

可根据第 98/2005 号皇家法令申请调解。

24. 在您所在司法管辖区有哪些主要的替代争议解决机构？

目前未设立专门的替代争议解决机构。但是，司法部成立了一个专门委员会，该委员会有权在争议当事人提出申请时根据第 98/2005 号皇家法令执行和解程序。阿曼法律不强制要求争议当事人在提起诉讼之前协商或调解争议事项。

25. 在诉讼过程中诉讼人是否必须尝试替代争议解决办法？

不需要。初级法院可在首次听审争议事项时询问当事人和解是否可行。如果不可行，法官会继续审理案件。争议当事人可将其争议提交给司法部下辖的和解委员会，由

该委员会根据第 98/2005 号皇家法令予以解决。

26. 当前是否有改革争议解决法律法规的建议在审议中?

没有。

27. 关于您所在司法管辖区或者亚洲地区的争议解决，是否有任何特殊情况需加以强调?

没有。

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1. What is the structure of the court system in respect of civil proceedings?

In all provinces of Pakistan, except the province of Sindh, all civil claims are filed before the Civil Judge in the District Courts in the first instance. The first right of appeal against a judgment of the Civil Judge lies to the District Judge. The second right of appeal is before a single judge of the High Courts and thereafter a third appeal may lie to the Supreme Court under article 185 of the Constitution of the Islamic Republic of Pakistan 1973 ('Constitution').

In the province of Sindh, the High Court has original civil jurisdiction in respect of claims greater than PKR 15 million. In such cases, the first right of appeal is before a Division Bench of the High Court, and the second appeal will lie before the Supreme Court under article 185 of the Constitution.

2. What is the role of the judge in civil proceedings?

Proceedings in Pakistani courts are adversarial in nature. Judges therefore primarily hear lawyers' arguments and pass orders thereon. Once pleadings are exchanged, judges are required to frame issues of the case and record the evidence of the parties under the provisions of the Code of Civil Procedure 1908 ('CPC'). Judgments are to be pronounced by a judge within 30 days of hearing final submissions from the lawyers under the CPC. However, in view of the severe backlog of cases and increased workload, judges are often unable to render judgments within this time frame.

3. Are court hearings open to the public? Are court documents accessible to the public?

Court hearings are open to the public. However, only the concerned litigants and their counsels are entitled to obtain documents pertaining to a case.

4. Do all lawyers have the right to appear in court and conduct proceedings on behalf of their client? If not, how is the legal profession structured?

The Legal Practitioners and Bar Councils Act 1973 ('1973 Act') regulates the structure of the legal profession in Pakistan. Under section 22 of the 1973 Act, an advocate of the Supreme Court has the right to practise in any court throughout Pakistan, an advocate of the High Court has the right to practise throughout Pakistan in any court except the Supreme Court, whereas any other advocate has the right to practise in any court in the province in which he/she is enrolled other than the High Court or the Supreme Court. The 1973 Act also separately lists the qualifications which are required to be satisfied to become an advocate of the Supreme Court, High Court or any other.

5. What are the limitation periods for commencing civil claims?

The Limitation Act 1908 ('1908 Act') specifies the limitation periods for different types of civil claims. The limitation period for civil claims typically ranges between one and three years. For instance, Schedule 1 to the 1908 Act states, inter alia, that the limitation period for claims for libel and slander or against carriers for loss

or delay in the delivery of goods is one year. Claims for specific performance or recession of a contract, compensation for the breach of contract and the payment of money in relation to the sale of goods all have a limitation period of three years.

6. Are there any pre-action procedures with which the parties must comply before commencing proceedings?

There are no general mandatory pre-action requirements before commencing civil proceedings, except in cases filed against the government. Section 80 of the CPC provides that a suit may be instituted against a public officer in his/her official capacity upon the expiry of two months after a notice in writing.

In addition, a pre-action procedure may be stated in a special law concerning a certain subject matter. For instance, the Defamation Ordinance 2002 states that prior to instituting any suit for defamation, a person is required to give a notice to the defendant within two months of the publication of the defamatory statement stating the intention to initiate legal action.

7. What is the typical civil procedure and timetable for the steps necessary to bring the matter to trial?

The procedure for bringing a matter to trial is a two-stage process. A case is initiated by filing a plaint, which states all the material facts relevant to the dispute. The defendant then has an opportunity to respond by filing a written statement under Order VIII, Rule 1 of the CPC, ordinarily within 30 days, wherein the defendant may refute or admit the contents of the plaint. Subsequently, the judge frames issues on the basis of the contested pleadings filed by the parties. Order XVI, Rule 1 of the CPC provides that once issues are framed, the parties are required to present within seven days a list of witnesses whom they propose to call. Evidence is then recorded by the parties on the basis of the issues framed by the judge.

Although the time frame specified in the CPC for bringing a case to the stage of a trial is fairly stringent, in practice, the stipulated periods are often not met. This is for a variety of reasons. In some cases, interim applications and their hearings take a substantial amount of time to conclude and, therefore, cause a delay in the evidentiary hearings. In others, simply because of the backlog of work in some of the courts, the trial stage arrives after an extended period of time.

8. Are parties required to disclose relevant documents to other parties and the court?

Parties are required to disclose relevant documents to other parties and the court in their pleadings. Under Order VII, Rule 14 of the CPC, where a plaintiff sues on the basis of a document in its possession, the plaintiff is required to produce it in court when the plaint is presented. Other documents on which the plaintiff relies as evidence in support of its claim are to be listed and attached to the plaint. In addition, any party may file an application under Order XI, Rule 12 of the CPC to direct the opposing party to make discovery of the documents in its possession relating to any matter in question in the suit.

9. Are there rules regarding privileged documents or any other rules which allow parties to not disclose certain documents?

There are no provisions in the CPC regarding privileged documents. However, in the event that a party requires disclosure of a certain document in the possession of the opponent and files an application to seek discovery of documents under Order XI, Rule 9 of the CPC, the judge may decide to reject the application if the disclosure of such document is not necessary at that stage in the suit. Generally, the judicial

trend in relation the provisions pertaining to discovery of documents at the preliminary stage of a case is that such applications are allowed if the documents are material or relevant to the issues in the case to enable the parties to raise all matters in dispute and effectively plead their case.

10. Do parties exchange written evidence prior to trial or is evidence given orally? Do opponents have the right to cross-examine a witness?

Under Order XIII, Rule 1 of the CPC, the parties are required to produce all the documentary evidence on which they intend to rely on the first date of hearing and before the trial commences. Subsequently, Order XVIII, Rule 4 of the CPC states that evidence of the witnesses shall be taken orally in open court. However, in practice, judges often direct the parties to file an affidavit-in-evidence of the witnesses, instead of having the witnesses give oral evidence. Opponents have the right to cross-examine the witnesses after the affidavit-in-evidence is filed and a copy is provided to the opponent.

11. What are the rules that govern the appointment of experts? Is there a code of conduct for experts?

Section 59 of the Qanun-e-Shahadat Order 1984 ('Order') states that when the court has to form an opinion on a point of foreign law, or of science or art, or as to the identity of handwriting or finger impressions, an expert may be appointed to render his/her opinion in relation thereto. Please note that an expert opinion is admissible only if it can furnish the court with information which is likely to be outside the knowledge and experience of a judge.

12. What interim remedies are available before trial?

The CPC lists certain remedies which are available to parties before trial. For instance, Order XXXVIII, Rule 5 of the CPC states that in certain circumstances, a court may order the defendant to furnish security of an amount or produce property which will satisfy the decretal amount, at the disposal of the court at any stage of a case. Additionally, the CPC entitles a party to obtain an interim injunction before trial. Order XXXIX, Rules 1 and 2 of the CPC lists the conditions that are required to be satisfied in this regard in relation to disputes pertaining to property and breach of contract.

13. What does an applicant need to establish in order to succeed in such interim applications?

For an order of attachment under Order XXXVIII, Rule 5 of the CPC to be granted, the court must be satisfied that: (a) the defendant is about to dispose of or remove the whole or part of its property; and (b) the defendant's intention is to obstruct or delay the execution of any decree that may be passed against the defendant.

Order XXXIX, Rule 1 of the CPC addresses an interim injunction in cases which concern property, whereas Order XXXIX, Rule 2 of the CPC regulates the grant of interim injunctions in cases concerning breach of contract. In relation to both rules, in order to grant an interim injunction, the court must be satisfied that: (a) the plaintiff has a prima facie case; (b) the balance of convenience favours the plaintiff; and (c) irreparable loss will result unless the application is granted.

Since these are equitable remedies, in addition to the above, the courts in Pakistan also consider whether the applicant has acted with equity and whether the grant of an interim application will alter the status quo between the parties.

14. What remedies are available at trial?

A wide variety of remedies are available for litigants at trial. For simple cases of recovery of money or damages on account of breach of contract, courts often grant compensation and damages. In this regard, the Contract Act 1877 provides that a party who suffers from a breach

of contract is entitled to receive compensation for any loss caused to that party which naturally arose in the usual course from such breach.

The Specific Relief Act 1877 ('1877 Act') regulates the grant of certain specific remedies by the courts. Under the provisions of the 1877 Act, parties are entitled to seek, inter alia, recovery of possession of property, specific performance of a contract, recession of a contract, a declaration in relation to a party's legal right or title, prohibitory injunctions to prevent a breach of an obligation, and mandatory injunctions to compel a party to perform certain acts.

15. What are the principal methods of enforcement of judgment?

The principal methods of enforcement of judgment are specified in the CPC. Order XXI, Rule 1 of the CPC states that in cases where money is payable under a decree, it shall be paid into court or to the decree holder directly through a money order. Under Order XXI, Rule 30 of the CPC, a money decree may also be executed by the detention in prison of the judgment debtor or by the attachment and sale of judgment debtor's property.

In so far as cases relating to property are concerned, Order XXI, Rule 31 provides that movable property may be executed by the seizure and delivery thereof to the party to whom it has been adjudged, whereas Order XXI, Rule 35 provides that possession shall be delivered to the party to whom it has been adjudged in a decree pertaining to immovable property.

16. Are successful parties generally awarded their costs? How are costs calculated?

Section 35 of the CPC provides that the court has full power and discretion in relation to the imposition and extent of awarding costs. Despite such power, judges have traditionally been reluctant to impose costs on litigants unless the case or application is completely frivolous. Even when costs are imposed, they are insignificant and do not have any bearing as to the actual expense suffered by the successful party. Generally, parties are usually directed to bear their own costs by the court.

17. What are the avenues of appeal for a final judgment? On what grounds can a party appeal?

The CPC provides the rights of appeal available to a litigant. Section 96 of the CPC states that an appeal shall lie from every decree passed by any court exercising original jurisdiction. Section 100 of the CPC provides that a second appeal will lie to the High Court from an appellate decree if: (a) the decision is contrary to law; (b) the decision fails to determine some material issue of law; and (c) a substantial procedural error has been committed which affects the merits of the decision.

Parties have a direct right to appeal to the Supreme Court against certain decisions in civil cases of the High Court under article 185 of the Constitution where: (a) the value of the subject matter of the dispute in the first instance was not less than PKR 50,000, and the judgment appealed from has set aside or varied the decision of the court immediately below it; or (b) the judgment pertains to a property in the said amount and has set aside or varied the decision of the court immediately below it; or (c) the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution. In the event that the case does not meet any of these conditions, an appellant is required to first obtain leave to appeal from the Supreme Court under article 185(3) of the Constitution.

18. Are contingency or conditional fee arrangements permitted between lawyers and clients?

Contingency fee arrangements are not permitted between lawyers and clients in Pakistan.

19. Is third-party funding permitted? Are funders allowed to share in the proceeds awarded?

There is no concept of third-party funding in Pakistan.

20. May parties obtain insurance to cover their legal costs?

There is no statutory provision which restricts parties from covering legal costs by obtaining insurance.

21. May litigants bring class actions? If so, what rules apply to class actions?

Litigants are permitted to bring class actions in Pakistan. This is reinforced by observations by the Supreme Court which state that it is consistent with the Constitution to permit a class of persons to initiate litigation for the enforcement of their fundamental rights.

22. What are the procedures for the recognition and enforcement of foreign judgments?

Section 44A of the CPC provides that where a decree has been passed by a superior court in the United Kingdom or in any other reciprocating territory, the decree may be executed in Pakistan by filing a certified copy of the decree in the District Court. The said section further states that once a certified copy of the decree has been filed, the decree may be executed as if it had been passed by the District Court itself.

23. What are the main forms of alternative dispute resolution?

Arbitration and mediation are the main forms of alternative dispute resolution in Pakistan.

In this regard, section 89-A of the CPC provides that the court may, with the consent of the parties, where it considers necessary, adopt an alternate method of dispute resolution including mediation and conciliation. In Pakistan, the mediator encourages and facilitates the resolution of the dispute through an informal and non-adversarial process in which parties are at liberty to decide how to settle their dispute. If the matter is pending adjudication before a court, parties can request the court to refer their case to a mediator.

Parties are also at liberty to resolve their disputes via arbitration, with or without the intervention of courts, under the provisions of the Arbitration Act 1940 ('1940 Act'). In order to prevent delay and procedural formalities, the provisions of the CPC or the Order do not apply to arbitrations conducted under the 1940 Act. Arbitrations in Pakistan are usually conducted by senior lawyers or retired judges of the superior courts, and once a decision is rendered by the arbitrator, the parties are required to file an application in court to make the award a rule of court.

24. Which are the main alternative dispute resolution organisations in your jurisdiction?

The main dispute resolution organisation in Pakistan is the National Centre for Dispute Resolution ('NCDR'). The NCDR, formerly known as Karachi Centre for Dispute Resolution, was established in February 2007 with the approval of the High Court of Sindh and the financial assistance of International Finance Corporation. The mediation at the NCDR is conducted by accredited mediators.

25. Are litigants required to attempt alternative dispute resolution in the course of litigation?

Please note that litigants are not required to attempt alternative dispute resolution in the course of litigation.

26. Are there any proposals for reform to the laws and regulations governing dispute resolution currently being considered?

In December 2015, the Senate of the Government of Pakistan produced a comprehensive report on the provision of inexpensive and speedy justice in the country. This report highlighted that the fundamental problem in the Pakistani justice system is expensive and delayed justice. The report recommends, inter alia, specific timelines for procedural steps in civil proceedings, penal consequences in the event of default in compliance, the appointment of a judicial ombudsman to hear complaints of litigants, and increasing the number of judges in various courts. The report is presently under consideration.

27. Are there any features regarding dispute resolution in your jurisdiction or in Asia that you wish to highlight?

Undoubtedly, delays of the judicial process are the most challenging feature of dispute resolution in Pakistan. However, cognizant of this, Pakistan's judiciary is actively working on a comprehensive reform agenda which includes modern case management techniques, an increase in the number of judges and improved training of judicial officers.

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1. 在民事诉讼方面，法院系统的结构是怎样的?

在巴基斯坦，除信德省之外，其他各省的所有民事诉讼都由地区法院民事法官进行一审。不满民事法官判决时，可向地区法官提出第一次上诉。根据 1973 年《巴基斯坦伊斯兰共和国宪法》（'《宪法》'）第 185 条的规定，可向高等法院的一名法官提出第二次上诉，之后还可向最高法院提出第三次上诉。

在信德省，高等法院对金额超过 1,500 万巴基斯坦卢比的请求具有初审民事管辖权。根据《宪法》第 185 条的规定，在此类案件中，第一次上诉应向高等法院分庭提出，第二次上诉应向最高法院提出。

2. 法官在民事诉讼中的角色是什么?

在巴基斯坦法院进行的诉讼为对抗性诉讼。因此法官主要听取律师的论据并作出裁决。双方诉答之后，法官必须根据 1908 年《民事诉讼法典》（'CPC'）的规定找到案件争议点并记录当事人的证据。法官在听审双方律师最后提交的材料后 30 日内根据 CPC 宣判。但是，如果案件严重积压且工作量加大，法官往往无法在该时间范围内作出判决。

3. 庭审是否向公众开放? 公众是否能够查阅法庭文件?

庭审过程对外开放。但是仅相关诉讼当事人及其法律顾问有权获得案件相关文件。

4. 所有律师均有权代表其委托人出庭并参加诉讼吗? 如果不是，律师职业的结构是怎样的?

1973 年《执业律师和出庭律师法案》（'《1973 年法案》'）规定了巴基斯坦的法律职业结构。根据《1973 年法案》第 22 条之规定，最高法院律师有权在巴基斯坦所有法院执业，高等法院律师有权在除最高法院之外的所有巴基斯坦法院执业，而其他律师有权在其注册所在省份的任何法院执业，不包括高等法院和最高法院。《1973 年法案》还单独列出了成为最高法院、高等法院或任何其他法院的律师分别所需满足的资格条件。

5. 提起民事请求的时效期为多久?

1908 年《时效法案》（'《1908 年法案》'）规定了不同类型的民事诉讼请求的时效期。民事诉讼请求的时效期通常为一到三年。例如，《1908 年法案》附件 1 规定，因诽谤中伤而提出请求或因货物丢失或运输延误而对运输者提出请求的时效期为一年。因合同的具体履行或撤销、违约赔偿以及所销售货物的货款支付而提出请求的时效期均为三年。

6. 有哪些诉前程序是当事人在开始诉讼之前必须遵守的?

目前没有规定提起民事诉讼前的通用强制性诉前要求，但起诉政府的案件除外。CPC 第 80 条规定，自发出书面通知起满两个月后，可在公职人员职务范围内起诉该公职人员。

此外，与特定事项相关的专门法律可能会规定诉前程序。例如，2002 年《诽谤条例》规定，在起诉任何诽谤行为之前，必须在作出诽谤性言论后两个月内向被告发出通知，说明其拟提起法律诉讼。

7. 案件进入审理之前要经过哪些典型的民事程序? 有什么样的时间表?

起诉程序分两个阶段。首先提交起诉状立案，起诉状内陈述争议相关的全部重大事

实。然后被告有一次应诉机会，被告应诉时必须根据 CPC 条例八规则 1 的规定在 30 日内提交一份书面陈述书，以反驳或承认起诉状的内容。之后，法官根据当事人提交的有争议诉答找到争议点。CPC 条例十六规则 1 规定，锁定争议点后，当事人必须在七日内提交一份其拟用以作证的证人名单。然后双方根据法官确定的争议点记录证据。

虽然 CPC 规定的起诉时间范围较为严格，但在实践中，通常无法执行规定期限。这是由多种原因导致的。在一些案件中，临时申请及其审理需花费大量时间才能定论，因此造成证据性审理延误。在另一些案件中，仅仅是因为部分法院工作量积压，因此通常会在延迟一段时间后才开始审理。

8. 当事人是否必须向其他当事人和法院披露相关文件?

当事人必须在其诉状中向其他当事人和法院披露相关文件。根据 CPC 条例七规则 14 的规定，在原告基于自身掌握的文件进行起诉的情况下，原告必须在呈递起诉状时，同时在法庭上出示该文件。原告用于证明其主张的其他文件列附在起诉状中。此外，任一当事人均可根据 CPC 条例十一规则 12 要求对方当事人开示其持有的与诉讼事由相关的文件。

9. 是否有关于特权文件的规则或允许当事人不披露特定文件的任何其他规则?

CPC 中没有关于特权文件的规定。但是，一方当事人要求披露对方当事人持有的特定文件，并根据 CPC 条例十一规则 9 的规定提出文件披露申请时，法官如认为此等文件披露对当前诉讼阶段不必要，则可拒绝该申请。一般而言，关于案件初期阶段文件开示的规定的司法趋势是，如果文件对案件争议点具有重大意义或具有相关性，能够使当事人提出所有争议问题并有效进行案件诉答，则可批准此类申请。

10. 当事人在审理之前是否交换书面证据? 或是否提供口述证据? 对方是否有权盘问证人?

根据 CPC 条例十三规则 1 的规定，当事人必须在听审首日以及审理开始之前出示其拟依靠的所有文件证据。之后，按照 CPC 条例十八规则 4 的规定，必须在公开法庭口头听取证人证据。但是，实际上法官往往会要求当事人提交证人誓证，而不是要求证人提供口述证据。在提交誓证以及向对方当事人提供副本后，对方当事人有权对证人进行盘问。

11. 关于专家任命的规则是怎样的? 是否有专家行为准则?

1984 年《证据法》('法令') 第 59 条规定，法院需要外国法律、科学或艺术，或笔迹、指纹识别方面的意见时，可指定专家提供相关意见。但是请注意，只有当专家意见能够向法院提供法官知识和经验范围之外的信息时，才会被采纳。

12. 案件审理前可获得哪些临时救济?

CPC 列出了审理之前当事人可获得的一些救济。例如，CPC 条例三十八规则 5 规定，特定情况下，法院可在案件任何阶段命令被告提供达到法令要求金额的担保金或财产，供法院自由处置。此外，CPC 规定当事人有权在审理之前获取临时禁令。CPC 条例三十九规则 1 和规则 2 列出了获取财产和违约相关争议方面的临时禁令所需满足的条件。

13. 申请人需要确立些什么才能成功申请此类临时救济?

若要申请获得 CPC 条例三十八规则 5 项下的扣押令，必须向法院证明：(a) 被告即将处置或转移其全部或部分财产；以及 (b) 被告打算阻碍或延误执行可能会通过的对被告不利的任何法令。

CPC 条例三十九规则 1 处理财产相关的临时禁令，而 CPC 条例三十九规则 2 处理违约相关的临时禁令的授予事宜。根据这两条规则，若要获得临时禁令，必须向法院证明：(a) 原告具有表面上确凿的证据；(b) 便利性衡量有利于原告；以及 (c) 如不批准申请则会导致不可挽回的损失。

由于这些是衡平法上的救济，除上述内容外，巴基斯坦法院还考虑申请人是否采取了衡平法上的行动以及临时申请的批准是否会改变当事人之间的现状。

14. 案件审理时可获得哪些救济?

审理期间诉讼当事人可获得各种救济。对于追讨钱款或违约损害赔偿金等简单案件，法院通常会批准赔偿和支付损害赔偿金。在这方面，1877 年《合同法》规定因一方违约而受到损害的另一方有权就其在该违约的常规过程中自然产生的任何损失获得赔偿。

1877 年《特殊救济法》（'《1877 年法》'）规定法院可给予特定救济。根据《1877 年法》条款的规定，当事人有权要求收回财产占有权、具体履行合同、撤销合同、寻求作出关于一方当事人法律权利或所有权的声明、防止违反义务的阻止性禁令以及迫使一方当事人作出某种行为的强制性禁令。

15. 执行判决的主要方式有哪些?

CPC 具体规定了执行判决的主要方法。CPC 条例二十一规则 1 规定，如果按照某一法令的规定应当付款，则应支付给法院或通过汇票直接支付给法令持有人。根据 CPC 条例二十一规则 30 规定，付款令执行形式可包括监禁判定债务人或扣押和出售判定债务人的财产。

就财产相关案件而言，条例二十一规则 31 规定，对于动产，可执行没收并将该动产交付给判定应得该动产的当事人，而条例二十一规则 35 规定，如果法令有关不动产，应将财产交付给法令判定应得该财产的一方当事人。

16. 胜诉方是不是一般会被判获得诉讼费用赔偿? 诉讼费用如何计算?

CPC 第 35 条规定，法院可全权自主决定诉讼费用的判定和范围。尽管有此权力，但传统上法官一直不愿意对诉讼当事人征收费用，除非案件或申请毫无意义。即使征收费用，金额也微不足道，并且对胜诉方实际付出的费用无任何影响。一般情况下，法院通常要求当事人自行承担各自的诉讼费用。

17. 对最终判决有哪些上诉途径? 当事人能够以什么理由提起上诉?

CPC 规定了诉讼当事人可享有的上诉权。CPC 第 96 条规定，上诉应针对行使原始管辖权的法院所通过各项判令。CPC 第 100 条规定，在以下情况下，对上诉令的第二次上诉应向高等提起：(a) 判决违反法律；(b) 判决未能确定部分重大法律问题；以及 (c) 存在重大程序错误，影响判决的法律依据。

根据《宪法》第 185 条的规定，在以下情况下，当事人有权针对高等法院民事案件中的相关判决直接向最高法院起诉：(a) 一审争议标的的价值不低于 50,000 巴基斯坦卢比，并且所起诉的判决搁置或变更了其下级法院的裁决；或 (b) 判决涉及到达到所述金额的财产，并且搁置或变更了其下级法院的裁决；或 (c) 高等法院证实，案件涉及到有关《宪法》解释的重大法律问题。如果案件不符合上述任一条件，上诉人需首先根据《宪法》第 185(3) 条之规定获得最高法院的上诉许可。

18. 是否允许律师和委托人之间存在胜诉酬金或按条件收费的安排?

巴基斯坦不允许代理律师与委托人之间采用胜诉酬金模式。

19. 是否允许第三方资助? 资助人是否可分享胜诉收益?

巴基斯坦没有第三方资助这一概念。

20. 诉讼当事人是否可为其诉讼费用投保?

目前没有任何法律条款限制诉讼当事人为其诉讼费用投保。

21. 诉讼人是否可提起集体诉讼? 如果可以，哪些规则适用于集体诉讼?

巴基斯坦允许诉讼当事人提起集体诉讼。最高法院的意见重申了这一点，认为允许某一类人提起诉讼以强制执行其基本权利

是符合《宪法》规定的。

22. 外国判决通过哪些程序予以承认和执行?

CPC 第 44A 条规定，英国或任何其他交互执行地区的高级法院作出的判令要在巴基斯坦执行，应向巴基斯坦地区法院提交一份经证实的判令副本。该条款进一步规定，提交经证实的判令副本后，地区法院可将该判令视同自己作出的法令予以执行。

23. 替代争议解决的主要形式是什么?

在巴基斯坦，主要的替代性争议解决形式包括仲裁和调解。

在这方面，CPC 第 89-A 条规定，法院认为必要时，经当事人同意，法院可采用替代性争议解决方法，包括调解和调停。在巴基斯坦，调解人鼓励并促进通过非正式非对抗程序解决争议，解决方式由当事人自由决定。如果相关事项正待法院判决，当事人可申请法院将其案件移交给调解人。

当事人还可根据 1940 年《仲裁法》（'《1940 年法》'）之规定，自主通过仲裁形式解决其争议，法院可进行或不进行干预。为防止程序延误，CPC 或法令条款不适用于《1940 年法》项下进行的仲裁。巴基斯坦的仲裁通常由高级律师或高级法院退休法官执行，仲裁员作出裁决后，当事人必须向法院提交申请，以使该裁决成为法院的裁决。

24. 在您所在的司法管辖区有哪些主要的替代争议解决机构?

巴基斯坦的主要争议解决机构是国家争议解决中心（'NCDR'）。NCDR，原名为卡拉奇争议解决中心，2007 年 2 月经信德省批准成立，由国际金融公司提供财援助。NCDR 的调解由正式认可的调解员执行。

25. 在诉讼过程中诉讼人是否必须尝试替代争议解决办法?

请注意，诉讼人在诉讼过程中不需要尝试替代性争议解决办法。

26. 当前是否有改革争议解决法律法规的建议在审议中?

2015 年 12 月，巴基斯坦政府参议院提出一份关于在本国提供低收费高效率司法服务的全面报告。该报告强调，巴基斯坦司法制度的基本问题在于司法服务费用昂贵且效率低下。报告作出的建议包括规定民事诉讼程序的具体步骤时间期限、不合规情况下的惩罚性后果、负责听取诉讼当事人投诉的司法特派员的任命以及各法院法官人数的增加。该报告目前仍在审议中。

27. 关于您所在司法管辖区或者亚洲地区的争议解决，是否有任何特殊情况需加以强调?

毫无疑问，司法程序的托延是巴基斯坦争议解决问题的最具挑战性特征。但是，意识到这一点后，巴基斯坦司法部门正积极制定全面改革议程表，其中包括现代案件处理技术、增加法官人数以及强化司法人员培训。

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1. What is the structure of the court system in respect of civil proceedings?

In Switzerland, civil litigation is usually preceded by a mandatory conciliation phase that generally takes place before the local conciliation authority of the commune in which the defendant resides. In some instances defined by statute, trial parties may approach the court directly (see question 6).

In principle, Switzerland has a three-tiered court system in private law matters: a district court acting as a court of first instance, a court of appeal or high court in the second instance and the Federal Supreme Court as the highest body of appeal. Further, there are specialised first instance courts such as labour courts or courts dealing with rental matters. Four cantons (Zurich, St. Gallen, Aargau and Berne) have set up commercial courts. Judgments by these commercial courts, which constitute sections of the local high courts, can be appealed only to the Federal Supreme Court.

2. What is the role of the judge in civil proceedings?

The judge in Swiss civil proceedings has a case management role. The judge thus directs the proceedings and issues the required procedural rulings. As a rule, it is the parties' (and their lawyers') obligation to present the facts to the judge. In all proceedings, the judge has the duty to enquire of his/her own accord, if a party's submission is unclear, contradictory, ambiguous or manifestly incomplete. The degree to which this needs to be done depends on the area of law and whether an attorney represents the party or not. The duty to inquire is substantially lower when parties have chosen professional representation.

However, in some areas of law, the judge has the duty to establish the facts of his/her own accord (i.e. in family law cases with regard to child matters).

In Switzerland, the judges apply the law ex officio. The court deals with claims by either not entering into the matter and not considering the merits or by making a decision on the merits itself and adjudicating the matter.

3. Are court hearings open to the public? Are court documents accessible to the public?

The majority of civil law proceedings and the delivery of judgments are open to the public, unless public interests or the legitimate interests of the parties involved are overriding and require the proceedings to be held in camera. Conciliation hearings as well as judicial settlement hearings are not open to the public.

Copies of judgments by the courts, usually in an anonymised version, may be requested by the public and are often published online, e.g. judgments of the Federal Supreme Court (www.bger.ch/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht.htm). However, all submissions by the parties, including the exhibits, are not open to the public. Compared to proceedings in common law jurisdictions, a higher degree of confidentiality is maintained.

The courts' deliberations are usually confidential. The parties are not privy to the discussion of the judges.

4. Do all lawyers have the right to appear in court and conduct proceedings on behalf of their client? If not, how is the legal profession structured?

Only attorneys registered with one of the cantonal attorney registers have the right to appear in Swiss courts. Once registered, they may conduct proceedings on behalf of their clients. In order to register, the candidate attorney must pass a cantonal bar exam. Attorneys registered with an EU/EFTA attorney register also have the right to appear in a Swiss court on a temporary basis. European legal professionals registered with a cantonal register may appear in court on a permanent basis, provided they make use of their original European professional title. They can even register with a cantonal attorney register after either passing an exam or having worked actually and regularly as an attorney in Switzerland for three years.

5. What are the limitation periods for commencing civil claims?

Limitation periods are governed by substantive civil law. The general statutory limitation period for contractual claims is 10 years if the law does not provide otherwise (e.g. five years for periodic payments). Tort claims and claims for unjust enrichment become time-barred after one year. However, if a tort claim is derived from an offence for which criminal law envisages a longer limitation period, that longer period also applies to the tort claim. Usually, the courts observe limitation periods only if pleaded by the parties.

6. Are there any pre-action procedures with which the parties must comply before commencing proceedings?

If a conciliation hearing is required by law, the parties have to attend this hearing first. In certain instances, the Civil Procedure Code does away with the requirement of a prior conciliation hearing, i.e. in summary proceedings, some actions in connection with debt enforcement, and if a single cantonal instance is competent to hear a matter, such as a commercial court. If the value of the dispute is CHF 100,000 or more, the parties can mutually agree to waive the preceding conciliation hearing. Furthermore, the claimant may waive conciliation and commence direct proceedings in court if the defendant's registered office or domicile is abroad or if the defendant's residence is unknown.

If a conciliation hearing is necessary, a party domiciled outside the canton or abroad is exempt from appearing in person and may send a representative.

7. What is the typical civil procedure and timetable for the steps necessary to bring the matter to trial?

Conciliation hearings, if required by law, should take place within two months of receipt of the claimant's application by the conciliation authority. If no agreement is reached during the conciliation hearing, the conciliation authority grants authorisation, usually to the claimant, to approach the first instance court. The claimant is then entitled to file the action and bring the matter to trial within three months. The claimant is of course free to submit the statement of claim earlier to speed up proceedings. After three months, the authorisation lapses. Nonetheless, this does not mean that the matter may not be brought to court eventually (no res iudicata effect). However, a claimant is required to recommence conciliation proceedings.

If no conciliation hearing is required by law, the matter is brought directly to trial by lodging a submission to the court of first instance, e.g. the district court or the commercial court.

8. Are parties required to disclose relevant documents to other parties and the court?

This obligation is narrow under Swiss civil procedure law and is not comparable to the

disclosure required in proceedings in common law jurisdictions. In principle, trial parties and third parties have a statutory duty to co-operate with the court in the taking of evidence. The production of evidence is either ordered by the court or the parties can produce documents in their possession with their legal brief. A request to the court by a party to order the other party to disclose evidence such as documents will be granted only if the evidence sought is required to prove facts that are legally relevant and the claim has been substantially motivated by the requesting party and the evidence requested (e.g. a specific document) is sufficiently identified. As a rule, each party is well advised to rely on the evidence in their hands rather than hoping to find evidence in the hands of the counterparty.

9. Are there rules regarding privileged documents or any other rules which allow parties to not disclose certain documents?

A party may refuse to co-operate where the taking of evidence would expose a close associate, such as a direct relative or a spouse, to criminal prosecution or civil liability. Furthermore, co-operation may be refused if the disclosure would constitute a breach of professional confidentiality (e.g. attorney-client privilege). Under Swiss law there is no attorney-client privilege for in-house counsels, although patent attorneys working as in-house counsels do enjoy the attorney-client privilege.

10. Do parties exchange written evidence prior to trial or is evidence given orally? Do opponents have the right to cross-examine a witness?

As a rule, no evidence is exchanged prior to the trial, neither in written form nor orally. However, Swiss law knows the instrument of precautionary taking of evidence by the court before a matter is actually pending. This is possible if either the law grants the right to do so or the applicant shows credibly that the evidence is at risk or that it has a legitimate interest. If successfully pleaded, a party can obtain certain critical evidence that it can use to determine whether it wants to risk proceedings.

There is no comparable right to cross-examine a witness as in common law jurisdictions. Nevertheless, each party is allowed to put additional questions to a witness through the judge after the judge's initial interrogation. The court's examination of a witness is usually thorough.

11. What are the rules that govern the appointment of experts? Is there a code of conduct for experts?

There are no specific rules governing the appointment of experts by the parties. The findings of party-appointed experts are considered by the court as party allegations and the court is free to assess their evidentiary value. If the court believes that expert knowledge is required, it can obtain an opinion from one or more experts, either of its own accord or if requested by a party. Court-appointed experts are considered experts with an added evidentiary weight as they are subject to similarly strict objectivity requirements and recusal grounds as judges and judicial officers.

The expert must tell the truth. There are criminal consequences for perjury by an expert witness and with regard to breach of official secrecy. The expert must submit his/her opinion within the set deadline. The court instructs the expert and submits the relevant questions to the expert. The court gives the parties the opportunity to respond to the proposed questions put to the expert and may invite them to suggest amendments or additional questions. The expert submits his/her opinion in writing or presents it orally. If necessary, an expert can also be summoned to the hearing. The parties have the opportunity to ask for explanations and to put additional questions to the expert.

12. What interim remedies are available before trial?

Interim remedies available before trial are general interim measures, attachment orders under the Debt Enforcement and Bankruptcy Act ('DEBA') and protective letters.

For non-monetary claims, the types of general interim measures available to parties are not limited by law. Rather, the parties are free to request and the court is at liberty to order whatever measure is required. This can be in the form of a mandatory or prohibitory interim injunction, such as an order to a bank to freeze certain assets or a cease and desist order. Further options include orders to take on record entries in a public register, orders to perform or rectify something or orders forbidding the disposing of an object.

If the opposing party provides appropriate security, the court can refrain from ordering an interim measure. If the principal action is not yet pending when an interim measure is requested, the court sets a deadline within which the applicant must file their principal action (no conciliation hearing required), failing which the interim measure lapses automatically. The court can issue the interim measure subject to the payment of security by the applicant if it is anticipated that the measures could cause loss or damage to the opposing party.

In cases of special urgency, and in particular where there is a risk that the enforcement of the measure will be frustrated by the other party if it became aware of the application, the court can order the interim measure immediately in ex parte proceedings with a first hearing after the measure has been put in place.

Safeguarding claims for monetary claims must take the form of an attachment order under the DEBA. A disposal or transfer of the assets of the debtor is prohibited by such an order until the creditor's claim has been determined in debt collection proceedings. The applicant may be held to post security for potential damages from an unwarranted attachment. If the creditor has not already commenced debt enforcement proceedings or filed a court action, the creditor must do so within 10 days of service of the attachment order. If the debtor files an objection, the creditor must either apply for the objection to be set aside or file a court action to have the creditor's claim confirmed within 10 days of service of the objection.

A protective letter can be filed by any person who has reason to believe that an ex parte application for an interim measure, an attachment order under the DEBA or any other measure against that person may become pending. This person can set out their position in such a letter. The party applying for the ex parte interim measure is only served with this letter if it actually initiates the relevant proceedings. Such a letter becomes ineffective six months after it has been filed. The aim of such a letter is to prevent the court from adopting an ex parte interim measure solely on the arguments of the applicant.

13. What does an applicant need to establish in order to succeed in such interim applications?

With regard to interim measures, the applicant must credibly show that a right to which the applicant is entitled has been violated or that a violation is immediately anticipated and, additionally, that the violation threatens to cause not easily reparable harm to the applicant. When applying for ex parte interim measures, the applicant must furthermore establish that there is special urgency by showing why it is necessary to adopt an interim measure without hearing the other party.

For an attachment order to be successful under the DEBA, a creditor has to show that it has a mature claim against the debtor and that there exists one of the statutory grounds for attaching assets. Further, the creditor needs to plausibly demonstrate the existence of assets and their

location. The DEBA provides for the following six grounds for the attaching of assets:

(a) if the debtor has no fixed domicile;

(b) if the debtor is concealing assets, absconding or making preparations to abscond so as to evade the fulfilment of the debtor's obligations;

(c) if the debtor is travelling through Switzerland or conducts business on trade fairs, for claims which must be fulfilled at once;

(d) if the debtor does not live in Switzerland and no other ground for attachment is fulfilled, provided that the claim has sufficient connection with Switzerland or is based on a recognition of debt;

(e) if the creditor holds a provisional or definitive certificate of shortfall against the debtor; or

(f) if the creditor holds a definitive title to set aside the objection in enforcement proceedings.

14. What remedies are available at trial?

General interim remedies and attachment orders may also be requested during the trial phase. The same rules apply as for remedies before the trial phase (see questions 12).

15. What are the principal methods of enforcement of judgment?

The method of enforcement of domestic judgments depends on whether a monetary or non-monetary judgment is at stake (for the enforcement of foreign judgments, see question 22). In instances of monetary judgments, the issuing of a payment order by the local debt collection office has to be requested. Such a payment order can be objected to by the debtor. A creditor can request the setting aside of this objection in court by reference to the enforceable judgment (or award) obtained.

The enforcement court also decides on the enforcement of non-monetary judgments. The enforceability is examined ex officio, and the opposing party can file its comments. The question of whether a judgment is enforceable is decided either as a preliminary question in the pending proceedings (incidentally) or separately (exequatur).

16. Are successful parties generally awarded their costs? How are costs calculated?

As a rule, costs are borne by the unsuccessful party. If no party succeeds fully with its claims, the costs are apportioned in accordance with the outcome of the case. Usually, the court decides on the costs in its final decision.

The claimant is obliged to make a reasonable deposit in the amount of the likely court fees at the beginning of the proceedings. In the final judgment, the court's fees are set off against the advances paid by the parties. Any balance is collected from the person liable to pay, i.e. the unsuccessful party. The unsuccessful party has to reimburse the other party for its advances and must pay the party costs awarded. Note in conclusion that the risk of insolvency of a counterparty is borne largely by the other party.

Unless a treaty (such as the Hague Convention of 1954 on Civil Procedure) provides otherwise, a defendant can also apply for the court to order that the claimant provide security for its party costs if the other party: has no residence or registered office in Switzerland; appears to be insolvent; owes costs from prior proceedings; or if for other reasons there seems to be a considerable risk that the awarded party costs will not be paid.

The cantons set the tariffs for the costs (both court fees and party costs). These are usually based on the amount in dispute and may be altered based on the complexity of a case. The Federal Supreme Court has its own tariffs, also based on the amount in dispute. Similarly, for DEBA proceedings, a federal ordinance governs the fees applicable.

17. What are the avenues of appeal for a final judgment? On what grounds can a party appeal?

A final first instance judgment may either be appealed (Berufung) or be subject to an objection (Beschwerde) and brought before the second instance cantonal court. An appeal is admissible if the value of the claim is at least CHF 10,000. It is not admissible against decisions of the enforcement court and with regard to some matters under the DEBA (such as attachment orders). An incorrect application of the law or an incorrect establishment of the facts may constitute grounds for review. If a judgment is not eligible for appeal, an objection is admissible. The grounds for an objection are narrower and limited to an incorrect application of the law and a manifestly incorrect establishment of the facts.

Second instance judgments as well as judgments by single cantonal instances (such as commercial courts) can be brought before the Federal Supreme Court if the amount in dispute is higher than CHF 30,000 (with some exceptions such as rental disputes). The grounds for an appeal for civil matters to the Federal Supreme Court are narrow. Usually, only breaches of federal law and/or a manifestly incorrect establishment of the facts may be pleaded.

18. Are contingency or conditional fee arrangements permitted between lawyers and clients?

Contingency fee arrangements are not permitted under Swiss law. However, conditional fee arrangements are permitted under specific circumstances, one of which being that the lawyer's base fee covers his/her actual costs and also allows a modest earning.

19. Is third-party funding permitted? Are funders allowed to share in the proceeds awarded?

Third-party funding is becoming more popular and is permitted as long as the lawyer acts independently from the third-party funder. Furthermore, the lawyer is not allowed to participate in the funding. Nevertheless, funders are allowed to share in the proceeds awarded.

20. May parties obtain insurance to cover their legal costs?

Insurance for litigation costs is available and is increasingly popular.

21. May litigants bring class actions? If so, what rules apply to class actions?

Typical class actions are not available in Switzerland. However, associations and other organisations of national or regional importance that are authorised by their articles of association to protect the interests of a certain group of individuals are allowed to bring an action in their own name for a violation of the personality of the members of such group. Organisations, such as environmental protection organisations, are, in limited cases, also allowed to bring an action in their own name based on special laws.

The Swiss Parliament has referred a motion to the Federal Government to revise the current system of collective redress and to introduce class actions. In July 2013, the Federal Council issued a report on possible improvements. Whether the motion will be transposed into law remains to be seen (see also question 26).

Currently, in instances of class action-type scenarios, it is sometimes possible to launch a test case during which some core elements of fact and/or the law can be decided. Other cases with a similar fact pattern are then stayed by the court based on an application by the respective claimant for a suspension. Once the test case is decided, the identical elements in

the subsequent cases do not need to be litigated from scratch.

Mandatory joinders are given if two or more persons are in a legal relationship that calls for one single decision with effect for all of them. In this case, they must jointly appear as claimants or be sued as joint defendants. Voluntary joinders are possible if two or more persons whose rights and duties result from similar circumstances or legal grounds and if the same type of procedure is applicable.

22. What are the procedures for the recognition and enforcement of foreign judgments?

The Civil Procedure Code governs the recognition and enforcement of judgments, as long as the Swiss Federal Act on Private International Law ('PILA') or an international treaty (such as the Lugano Convention) does not take precedence. The PILA is only applicable if there is no international treaty. The recognition procedure itself is summary in nature and governed by the rules of the Civil Procedure Code.

There are two different ways of enforcing a foreign judgment. Regular enforcement proceedings for judgements by a Lugano Convention signatory state are governed by the Lugano Convention itself. Other state judgements are enforced pursuant to the rules of the PILA. Monetary judgments can be enforced by means of ordinary debt collection proceedings (see question 15). Debt collection proceedings can either be commenced straight away or one can also initiate regular enforcement proceedings first and start ordinary debt collection proceedings after receiving an enforceable judgment. Against a judgment granting enforceability, an objection can be filed (see question 17).

Under Swiss law foreign ex parte decisions cannot be enforced for lack of adherence to the right to be heard, nor can declaratory judgments since there are no actual enforcement steps that can be ordered.

23. What are the main forms of alternative dispute resolution?

Alternative dispute resolution, other than arbitration in international commercial disputes, is currently of only limited significance in Switzerland.

This is likely due to the active approach taken by Swiss judges to find a suitable settlement solution during the course of the court proceedings. Following the exchange of the statement of claim and the statement of defence, the court frequently makes a preliminary assessment of the matter and approaches the parties in an instruction hearing during which it provides a first-hand view of the procedural strengths and weaknesses of the parties' stances. It then sets out a well-reasoned proposal what a settlement could look like and encourages the parties to conclude a settlement agreement during the instruction hearing. Frequently, parties agree to conclude a judicial settlement under such circumstances. Such instruction hearings may be ordered at any time during the proceedings. Parties can also ask the court to stay proceedings in order for them to negotiate a settlement agreement inter partes.

The Civil Procedure Code contains some provisions on mediation. If all the parties so request, the pre-trial conciliation proceedings can be replaced by mediation. The court can also recommend mediation to the parties during the proceedings or the parties may make a joint request for mediation. The parties themselves are responsible for organising and conducting mediation and also bear the costs for mediation. The parties can request that an agreement reached through mediation be approved by the court. Such an approved agreement has the same effect as a state court decision. A court cannot approve a mediation agreement if the parties agree on mediation without pending proceedings in the matter.

As mentioned in questions 1 and 6, a conciliation hearing before a local conciliation authority is usually required before trial. A

substantial number of small cases is settled at this stage.

24. Which are the main alternative dispute resolution organisations in your jurisdiction?

The following are the main alternative dispute resolution organisations in Switzerland:

(a) Swiss Chambers' Arbitration Institution: they have adopted the Swiss Rules of Commercial Mediation (www.swissarbitration.org/files/50/Mediation%20Rules/English%20mediation_20-06-2016_web-version_englisch.pdf);

(b) WIPO Arbitration and Mediation Center (www.wipo.int/amc/en);

(c) Swiss Chamber of Commercial Mediation (SCCM; www.skwm.ch);

(d) Swiss Association of Mediators (SDM-FSM; www.swiss-mediators.org).

25. Are litigants required to attempt alternative dispute resolution in the course of litigation?

Litigants are not required to attempt alternative dispute resolution in the course of litigation. The court can only recommend mediation to the parties during the proceedings.

26. Are there any proposals for reform to the laws and regulations governing dispute resolution currently being considered?

Some of the limitation periods are being considered as to whether to be amended (see question 5).

The Lugano Convention is the equivalent to the Brussels I Regulation (Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Regulation). As Switzerland is not a member of the European Union, only the Lugano Convention, and not the Brussels I Regulation, is applicable. The European Union has enacted the revised Brussels Ia Regulation (Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters). Despite the amendments, there are currently no initiatives to adapt the Lugano Convention to the revised Brussels Ia Regulation.

As noted in question 21, the Federal Government has been asked by the Parliament to revise the rules on collective redress. The Federal Government has not yet suggested amendments, but has stated that there will be proposals in the first half of 2017. Presently, it is open what solutions the Federal Government will propose.

The Federal Government is currently also reviewing the Swiss Federal Act on International Private Law with regard to the framework for international arbitration with the aim of maintaining the attractiveness of Switzerland as a place for international arbitration.

The Swiss Federal Act on Private International Law is also being reviewed with regard to the provisions on inheritance law. The reason is the European Union Regulation on Inheritance Matters (Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession). The goal is to ensure the compatibility of Swiss and foreign competences and also to allow a better coordination with foreign proceedings.

27. Are there any features regarding dispute resolution in your jurisdiction or in Asia that you wish to highlight?

Switzerland is known for its neutrality, consistent and high-quality jurisprudence and large pool of multi-lingual legal practitioners. These are some of the reasons why Switzerland is a destination of choice for arbitration. In addition, the Swiss state court system is highly

efficient and effective when compared to other countries. Court-initiated settlements are widespread. The commercial courts are especially known for conducting proceedings efficiently and with a high settlement rate and are open to foreign litigants (see also question 23). Recent figures show that about two-thirds of the cases pending at the Commercial Court of the Canton of Zurich are settled with the assistance of the court within a period of six months following the submission of the statement of claim.

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1. 在民事诉讼方面，法院系统的结构是怎样的？

在瑞士，民事诉讼案件在受理之前，一般先由被告所在地调解机构进行强制性调解。在法规规定的某些情况下，诉讼当事人可以直接诉诸法院（见“问题 6”）。

原则上，在审理私法案件时，瑞士执行三级法院审理体系：地方法院（即一审法院）、上诉法院或高等法院（即二审法庭）、联邦最高法院（即最高上诉法院）。此外，瑞士设有专门的一审法院，如劳工法院、租赁法院等；在四个州（苏黎世州、圣加仑州、阿尔高州和伯尔尼州）还设有商事法院。商事法院做出的判决构成当地高等法院判决的组成部分，仅可向联邦最高法院上诉。

2. 法官在民事诉讼中的角色是什么？

在瑞士民事诉讼案件中，法官起着案件管理作用。因此，法官统管诉讼程序，并作出必要的程序性裁决。通常情况下，由当事人（及其律师）向法官陈述案件事实。在整个诉讼过程中，如果一方当事人提交的证词不清晰、自相矛盾、模棱两可或明显地不完整，法官可以自行问询。法官是否问询取决于事关哪个法律领域以及当事人是否有律师代理。在当事人已选择由职业律师代理时，法官的问询职责就大大减少。

然而，在某些法律领域里，法官有职责自行酌情确定法律事实（如：涉及儿童问题的家庭法案件）。

在瑞士，法官依据其职权适用法律。法院处理诉讼请求时，可以不进入案件、不考虑事实曲直，也可以就事实本身做出裁决并对案件进行裁定。

3. 庭审是否向公众公开？公众是否能够查阅法庭文件？

大多数民事诉讼程序以及判决书是对公众公开的，除非公众利益或相关当事人的正当利益高于一切并要求摄像记录诉讼过程。调解听证会以及司法和解听证会不对公众公开。

法院判决书的副本通常是不署名的，公众可以请求查阅并在网上发布。比如，联邦最高法院的判决书发布网站是 www.bger.ch/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht.htm。但是，当事人提交的所有材料，包括证明附件，是不对公众公开的。与普通法体系相比，保密程度更高。

法院的审议意见一般是保密的。当事人对法官的商议没有知情权。

4. 所有律师均有权代表其委托人出庭并进行诉讼吗？如果不是，律师职业的结构是怎样的？

在瑞士，只有在州律师登记处注册的律师才有权在瑞士法庭出庭。律师经注册后就可以代表当事人参加案件诉讼。要注册的候选律师必须通过州律师资格考试。在 EU/EFTA 律师登记处注册的律师也有权临时在瑞士法庭出庭。在瑞士州律师登记处注册的欧洲律师可利用其原有的欧洲职业资格证享有在瑞士法庭出庭的永久资格。在瑞士通过法律资格考试或者在瑞士执业满三年的欧洲执业律师也可在瑞士州律师登记处申请注册。

5. 提起民事请求的时效期是多久?

时效期限由民事实体法管辖。合同诉讼案件的法定时效期限是十年，除非法律另有规定（如分期付款的时效期限为五年）。侵权请求案件或不当得利索赔案件一年后即过时效期。但是，如果侵权请求起源于一件刑事罪行，而且刑法对该罪行有较长的时效规定，则该较长时效期限也适用于该侵权请求。通常情况下，法院仅执行当事人请求的时效期限。

6. 有哪些诉前程序是当事人在开始诉讼之前必须遵守的?

如果法律规定必须进行调解聆讯，则当事人须首先参加该聆讯。在某些情况下，瑞士《民事诉讼法》不要求进行审前调解聆讯，这些情况包括：简易诉讼程序、涉及债务执行的某些诉讼、州级单一的一审法院（如商事法院）已经完全有审理能力。如果争议价值等于或大于 100,000 瑞士法郎，当事人可以协商放弃调解聆讯。此外，如果被告注册地或办公处所在国外或者被告的居住地不详，原告可以放弃调解而直接向法院提起诉讼。

如果有必要进行调解聆讯，居住地在其他州或国外的一方当事人可以不亲自出庭，也可派代表出庭。

7. 案件进入审理要经过哪些典型的民事诉讼程序? 有什么样的时间表?

如果依法必须进行调解聆讯，则调解聆讯应在调解机构收到请求人申请后两个月之内开始。调解聆讯未达成一致意见的，调解机构可以授权请求人向一审法院提出诉讼。请求人随之有权在三个月内向法院提起诉讼。当然，请求人可以提前提交请求书以加快诉讼过程。三个月过后，调解机构的授权失效；但是，这并不意味着该案件不能被诉诸法律（无既判力作用）。然而，请求人必须重新开始调解程序。

如果依法不必进行调解聆讯，可以向一审法院（如地方法院或商事法院）提交起诉书，将案件交由法院直接审理。

8. 当事人是否必须向其他当事人和法院披露相关文件?

根据瑞士民事诉讼法，该义务的范围是有限的，无法与普通法司法管辖地区的披露规定相比。原则上，当事人和第三方有法定义务配合法院采集证据。法院可要求当事人提供证据，也可以由当事人在其诉讼案件摘要中提供他们掌握的文件。对于一方当事人向法院提出的要求另一方公开文件等证据的请求，只有在所要求得到的证据是证明相关法律事实所需要的，而且请求方有充分的动机提出诉讼，所请求的证据（如特别文件）是充分确认的，法院才可予以准许。一般而言，建议各方当事人依赖自己掌握的证据而不要寄希望于从对方手中寻找证据。

9. 是否有关于特权文件的规则或允许当事人不披露某些文件的任何其他规则?

如果采集的证据可能使直系亲属或配偶等亲密人士承担刑事或民事责任，当事人可以拒绝配合。此外，如果披露的信息违反职业保密原则（如律师 - 当事人特权）等，当事人也可以拒绝配合。根据瑞士法律的规定，内部律师并不享有律师 - 当事人特权，但是身为内部律师的专利律师除外。

10. 当事人在审理之前是否交换书面证据? 或是提供口述证据? 对方是否有权盘问证人?

通常情况下，在庭审前不交换证据，无论是书面的或是口头的。不过，瑞士法律允许法院在实际审理案件之前采取预防性的证据采集。如果法律允许或者申请人可信地表明该证据处于风险之中或者该证据具有合法的利害关系，法院才可采取预防性的证据采集。如果申请成功，当事人就可获得某些关键证据，用这些证据来确定提起诉讼是否有风险。

瑞士没有类似普通法司法管辖区中盘问证人的权利。但是，允许当事人在法官首次问询证人后通过法官向证人提出补充问题。法院对证人的问询通常是非常彻底的。

11. 关于专家任命的规则是怎样的？是否有专家行为准则？

瑞士没有关于当事人任命专家的特别规则。当事人任命的专家的调查结果被法院视同当事人的主张，法院有权评估其证据价值。如果法院认为需征求专家的意见，法院会自行征求或在一方当事人请求时征求一位或多位专家的意见。法院任命的专家有更大的作证分量，因为他们和法官及司法人员一样都要经过同样严格的客观性要求和资格审查。

专家必须说真话。专家证人作伪证的和违反公事保密法的，须承担刑事后果。专家必须在规定的期限内提交意见。法院会指导专家并向专家提交相关问题。法院给当事人机会回答拟对专家提出的问题，并可邀请当事人对这些问题进行修改或提出补充问题。专家可以书面提交或口头表述其意见。在必要时，法院也可以传唤专家出庭。当事人有机会要求专家给出解释和向专家提出其它问题。

12. 案件审理前可获得哪些临时救济？

庭审前可得到的临时救济有一般性临时措施、《债务执行与破产法》规定的扣押令以及保护函等。

对于非金钱请求中当事人可得到的一般性临时措施类型，法律没有限制。相反，当事人可自由请求而法院也有权责令选用哪种措施。这些措施可以是强制性的或禁制性的临时禁令，例如，要求银行冻结某些资产的命令，或制止令等。类似的命令还有在公共登记册上记录的命令，执行或改正某事项的命令，或者禁止处置某物件的命令等。

如果对方当事人支付适当的保证金，法院可以不发出临时措施命令。如果在请求临时措施时主诉尚未提起，则法院应设定申请人必须提起主诉的期限（没有调解聆讯要求），如果申请人未在期限前提起主诉，则临时措施自动失效。如果临时措施预期会给对方当事人造成损失或损害，法院可以在申请人支付保证金之后才发出临时措施命令。

在特别紧急的情况下，尤其是另一方当事人一旦得知临时措施的申请就会阻挠措施的执行的情况下，法院可以在单方面诉讼程序中命令立即执行临时措施，措施落实后即开始第一次庭审。

在金钱请求中提起的保障请求必须采用《债务执行与破产法》规定的扣押令。这种扣押令禁止在债务追偿诉讼裁定债权人主张之前对债务人的资产进行处置或转移。申请人可能必须要为无端扣押造成的潜在损失提供担保。如果债权人尚未开始债务执行程序或者尚未提起法律诉讼，则必须在扣押令送达后十天内开始债务执行程序或提起诉讼。如果债务人提出异议，则债权人必须在异议送达后十天内申请驳回异议或者提起诉讼使其主张获得确认。

如果任何人有理由相信有人会针对他单方面申请临时措施、《债务执行与破产法》扣押令或者其它措施，此人可提交保护函。此人可在此信函中陈述其立场。申请单方面临时措施的一方只有在实际提起相关诉讼时才会被送达该保护函。保护函在提交六个月后失效。保护函的目的是防止法院仅依据单方面临时措施申请方的一面之词就采取临时措施。

13. 申请人需要确立些什么才能成功申请此类临时救济？

关于临时措施，申请方必须可信地证明其享有的权利已被侵犯或者预料即将被侵犯，并且该侵权行为有可能对申请方造成无法弥补的伤害。在申请单方面临时措施时，申请方必须说明为何有必要在未听取对方陈述就采取临时措施，从而进一步确立情况的特别紧迫性。

要成功获得《债务执行与破产法》扣押令，债权人必须证明其对债务人拥有到期债权，且存在扣押财产的法定依据。此外，债权人需可信地证明资产的存在及其位置。《债务执行与破产法》对资产扣押规定了以下六条理由：

(a) 债务人无固定居所；

(b) 债务人藏匿财产、为逃避履行债务人义务而潜逃或准备潜逃；

(c) 债务人正在瑞士旅行或参加交易会（仅适用于必须一次性履行的债务）；

(d) 债务人不住在瑞士，也没有其他扣押财产的理由，但债务请求与瑞士有足够的关联性，或是以债务的承认为依据的；

(e) 债权人持有针对债务人的临时的或正式的差额证明；或者

(f) 债权人持有的明确权利可在强制执行诉讼中驳回异议。

14. 案件审理期间可获得哪些救济?

当事人也可在审理阶段申请一般性临时措施和扣押令。审前救济所适用的规则也同样适用（见“问题 12”）。

15. 执行判决的主要方式有哪些?

执行国内判决的方法取决于事关金钱性判决还是非金钱性判决（关于外国判决的执行，见“问题 22”）。事关金钱判决的，必须申请当地收债机构签发的付款单。债务人可对该付款单提出异议。债权人可以依据强制执行判决书（或裁定书）请求法院驳回异议。

执行法院也可以决定对非金钱判决的执行。法院依据职权查验判决的可执行性，对方当事人可提出意见。判决是否有可执行的问题可在有待提起的诉讼中作为一个（附带的）先决问题裁定或另行单独裁定（执行性审查）。

16. 胜诉方是不是一般会被判获得诉讼费用赔偿? 诉讼费用如何计算?

通常情况下，诉讼费用由败诉方承担。如果双方均未完全胜诉，则诉讼费用按照诉讼结果分摊。一般而言，法院会在其最终判决中裁定诉讼费用问题。

在诉讼程序开始时，请求人有义务缴纳一笔金额为预估法院费用的合理押金。在最终判决书中，法院费用按当事人缴纳的预付款抵扣。不足金额由应付方即败诉方缴纳。败诉方须偿还另一方的预付款，并支付判付的当事人费用。最后请注意，对方破产的风险主要由另一方承担。

除非另有条约规定（如《1954 年关于民事诉讼的海牙公约》），被告可申请法院下令，如果另一方出现以下情况，要求原告为当事人费用提供保证金：在瑞士没有居住地或注册办公地；似乎无偿债能力；仍欠有以前诉讼案件遗留的诉讼费用；或有其他迹象表明另一方很有可能不支付判付的当事人费用。

瑞士各州都为法院费用和当事人费用设定了收费标准。收费标准一般都是根据涉案金额确定的，并根据案件的复杂度调整。联邦最高法院有自己的收费标准，该标准也是根据涉案金额确定的。同样地，DEBA 诉讼程序的相关费用也是根据联邦条例确定。

17. 对最终判决有哪些上诉途径? 当事人能够以什么理由上诉?

对一审终审判决不服，可以向州二审法院提起上诉（Berufung）或提出异议（Beschwerde）。诉求价值至少为 10,000 瑞士法郎的上诉，法院才会受理。针对执行法院裁决以及涉及《债务执行与破产法》案件（如扣押令）的上诉，法院不予受理。适用法律不当或事实证据不足的，可构成法院复核的理由。如果判决不符合上诉条件，允许提出异议。提出异议的理由范围比较窄，仅限于适用法律不当或事实证据明显不足的案件。

对于二审判决和单一州级法院（如商事法院）的判决，如果诉求价值大于 30,000 瑞士法郎（有个别例外，例如租赁纠纷），可向联邦最高法院提起上诉。就民事诉讼案向联邦最高法院提起上诉的理由范围是很窄的。一般而言，只有违反联邦法律和 / 或证据明显不足能够成为上述理由。

18. 是否允许律师和委托人之间存在胜诉酬金或按条件收费的安排?

瑞士法律不允许胜诉酬金协议。但是，在特定情况下允许按条件收费协议，其中一种情况就是律师基本收费可抵偿其实际费用并有小额收益。

19. 是否允许第三方资助? 资助人是否可分享胜诉收益?

第三方资助越来越普遍，只要律师独立于第三方资助人行事就是允许的。此外，律师不得参与资助。不过，允许资助人分享胜诉收益。

20. 当事人是否可为其诉讼费用投保?

有诉讼费用保险，且越来越普遍。

21. 诉讼人是否可提起集体诉讼? 如果可以，哪些规则适用于集体诉讼?

瑞士没有典型的集体诉讼。然而，国家或地区性协会和其他组织如果获得自己章程授权保护某个群体的权益，是可以以自己的名义就侵害其群体成员人格尊严的事件提起集体诉讼的。诸如环保组织此类组织机构在有限的情况下也允许根据特别的法律以自己的名义提起集体诉讼。

瑞士议会已经向联邦政府提交了一项动议，拟修订当前集体求偿制度并引入集体诉讼制度。2013 年 7 月，瑞士联邦委员会发布了一份关于可能改进措施的报告。该动议能否转为立法，还要拭目以待（另见“问题 26”）。

目前，在类似集体诉讼的情形中，有时可启动一个试验案件，通过该案件裁定某些事实和 / 或法律的核心要素。然后，在具有类似事实的其他案件中，法院可在有关请求人提出暂停诉讼申请后暂时中止诉讼程序。一旦试验案件被作出裁决，不必从头开始争诉其他案件中的相同要素了。

如果两个或多个人之间的法律关系要求有一个对他们全体都有效力的裁决，则可允许强制性合并诉讼。在这种情况下，他们必须以请求人身份共同出庭或者作为共同被告。如果两个或多个人的权利和责任是由类似的情况或法律依据产生的，而且他们的诉讼适用相同的程序，则允许他们自愿合并诉讼。

22. 外国判决通过哪些程序予以承认和执行?

如果《瑞士联邦国际私法法规》或者国际条约（如《卢加诺公约》）不具有优先管辖权，法院判决的承认和执行程序由《民事诉讼法》管辖。《瑞士联邦国际私法法规》在没有国际条约时才适用。承认程序本身具有简易程序性质，由《民事诉讼法》的规则管辖。

外国判决有两种不同的执行方法。《卢加诺公约》条约国执行判决的常规程序由《卢加诺公约》管辖。其他国家的判决依据《瑞士联邦国际私法法规》执行。金钱判决可依据普通的收债程序执行（见“问题 15”）。可直接开始收债程序，也可以先提起常规的强制执行诉讼，在收到强制执行判决后再开始常规的收债程序。如果一份判决具有可执行性，那么也允许提出异议（见“问题 17”）。

根据瑞士法律的规定，外国的单方面裁决不能执行，因为它侵犯了听审权；宣告式判决也不能执行，因为没有实际的执行步骤是法院可以下令采取的。

23. 替代争议解决的主要形式是什么?

在瑞士，除了国际商事争议仲裁之外的替代争议解决方式目前意义不大。

这可能是因为瑞士法官在庭审过程积极寻求适当的和解办法。在交换起诉书和答辩书之后，法庭一般会对案件做初步评估，然后让当事人参加一次指导性聆讯，对各当事人立场在程序方面的优势和劣势提供初步看法。之后，法庭会提出一份列明理由的建议书，说明和解会怎样，并鼓励双方在指导性聆讯期间达成和解协议。在这种情况下，当事人常常会要求司法解决。法院在诉讼过程中任何时候都可以下令进

行这种指导性聆讯。当事人也可以要求法庭暂停诉讼程序，以便当事方通过协商达成和解协议。

瑞士《民事诉讼法》中有一些关于调解的条款。如果各方当事人均要求调解，可以用调解程序取代审前调解程序。在诉讼期间，法庭也可以向双方当事人推荐调解，或者双方当事人共同请求调解。当事人自己负责组织和实施调解，并承担调解费用。当事人可以向法庭申请批准经调解达成的协议。经批准的协议和国家法院的裁决具有同等法律效力。如果当事人在没有等待裁决的诉讼情况下同意调解，法院不能批准调解协议。

正如“问题 1 和 6”中所述，在法院审理前一般需要在当地调解机构进行调解聆讯。相当多小案件就是在这个阶段解决的。

24. 在您所在的司法管辖区有哪些主要的替代争议解决机构?

瑞士主要的替代争议解决机构如下：

(a) 瑞士商会仲裁院：该院已通过《瑞士商事调解条例》(www.swissarbitration.org/files/50/Mediation%20Rules/English%20mediation_20-06-2016_webversion_englisch.pdf)；

(b) 世界知识产权组织（WIPO）仲裁与调解中心（www.wipo.int/amc/en）；

(c) 瑞士工商会商事调解院（SCCM; www.skwm.ch）；

(d) 瑞士调解员协会（SDM-FSM; www.swiss-mediators.org)。

25. 在诉讼过程中诉讼人是否必须尝试替代争议解决办法?

在诉讼期间，当事人不需要尝试替代争议解决办法。法院只可在诉讼期间向当事人推荐采用调解办法。

26. 当前是否有改革争议解决法律法规的建议在审议中?

瑞士正在考虑是否要修改某些时效期限（见“问题 5”）。

《卢加诺公约》等同于《布鲁塞尔条例 I》(即欧盟关于民事和商事管辖权以及判决的承认与执行的 (EC) 第 44/2001 号条例（布鲁塞尔条例))。由于瑞士不是欧盟成员国，所以，只有《卢加诺公约》适用，而《布鲁塞尔条例 I》不适用。欧盟已经颁布修改后的《布鲁塞尔条例 Ia》(即欧盟关于民事和商事管辖权以及判决的承认与执行的第 1215/2012 号条例)。尽管有了修改后的条例，但是，瑞士目前尚没有让《卢加诺公约》适应修改后《布鲁塞尔条例 Ia》的任何举动。

如“问题 21”所述，瑞士议会已经要求联邦政府对集体求偿规则进行修改，而联邦政府尚未提出任何修改意见，但已声明要在 2017 年上半年提出建议。目前，尚不知联邦政府将会提出什么解决方案。

瑞士联邦政府目前正在对《瑞士联邦国际私法法规》的国际仲裁框架进行审查，目的是要维护瑞士作为国际仲裁地的吸引力。

《瑞士联邦国际私法》中关于继承法的条款也正在受到审查，原因是《欧盟继承条例》(即：欧盟关于继承事务的管辖权、准据法、判决的承认与执行、作准证书的接受与执行，以及关于创制欧洲继承证书的第 650/2012 号条例)。其目的是确保瑞士法规和外国管辖权的兼容性，并更好地配合外国诉讼程序。

27. 关于您所在司法管辖区或者亚洲地区的争议解决，是否有任何特殊情况需加以强调?

瑞士以具有中立立场、稳定而高质量的法律体系和大量多语种法律从业者而著称。这也是瑞士之所以成为仲裁首选地的原因所在。此外，与其他国家相比，瑞士的法院体系是非常高效率的。由法院促成的和解是很普遍的。特别是瑞士的商事法院更以高效的诉讼审理和较高的和解率而著称，而且商事法院对外国的诉讼当事人是开放的（另见“问题 23”）。最近的数据表明，在苏黎世州商事法院待决的诉讼案件中，有大约三分之二是在收到起诉书后六个月内在法院协助下和解的。

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In 2015, Lee and Li enters its 50th year as the largest law firm in Taiwan owing to the solid foundation laid at the beginning. The firm is known for expertise in all legal fields and offers a full range of services.

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1. What is the structure of the court system in respect of civil proceedings?

The 'three-level and three-instance' system is adopted for civil proceedings in Taiwan. 'Three-level' refers to the three levels of court: the District Court, High Court and Supreme Court. 'Three-instance' means a case is initially heard by the District Court (first instance), and may be appealed to the High Court (second instance), and further to the Supreme Court (third instance) if applicable. While factual and legal issues of a case are heard in the first and the second instances, only an erroneous application or violation of laws and regulations is reviewed in the third instance. No appeal may be taken in the third instance unless the judgment is in contravention of laws and regulations; an appeal to the Supreme Court is also subject to a threshold of value of the subject matter.

2. What is the role of the judge in civil proceedings?

The role of the judge in civil proceedings in Taiwan has some features of an inquisitorial system. Under some circumstances, the judge actively leads the proceedings. For example, according to the law, if the judge cannot come to a judgment on the basis of the evidence provided by the parties, the judge can decide to investigate other evidence to discover the truth[1]; the judge should direct the parties to present their arguments appropriately and completely on the facts and the law regarding the matters at issue[2]. The judge should ask or lead the parties to make representations, provide evidence or make other statements on the facts or the law[3]. The above embodies the features of an inquisitorial system.

3. Are court hearings open to the public? Are court documents accessible to the public?

Court hearings are open to the public[4], but they are closed to the public in certain instances, e.g. cases regarding applications for a protective order[5], cases concerning trade secrets[6], juveniles[7], sexual assaults[8], families[9] and mediation[10].

Court documents (including parties' submissions, evidence investigated by the court, hearing minutes and expert opinions) are not accessible to the public. Only the parties, advocates, interveners and other persons relevant to

1 Section 288(1) of the Code of Civil Procedure

2 Section 199(1) of the Code of Civil Procedure

3 Section 199(2) of the Code of Civil Procedure

4 Section 86 of the Court Organic Act

5 Section 12(3) of the Domestic Violence Prevention Act

6 Section 14(2) of the Trade Secrets Act

7 Section 34 of the Juvenile Proceeding Act

8 Section 18 of the Sexual Assault Prevention Act

9 Section 9 of the Family Act

10 Section 410(2) of the Code of Civil Procedure

the case and permitted by the court can access court documents[11].

4. Do all lawyers have the right to appear in court and conduct proceedings on behalf of their client? If not, how is the legal profession structured?

There is no barrister-solicitor system in Taiwan. An attorney who is legally licensed by the government and whose licence is not revoked or by any order suspended is eligible to appear in court and conduct proceedings on behalf of the client, regardless of the type of the case or the specialty involved[12].

A lawyer must join a local bar association to practise in a specific region[13]. Currently, there are 16 regional bar associations in Taiwan. In other words, although a lawyer may be eligible to defend a client, if he/she would like to appear in court in a certain region, he/she must join the respective regional bar association.

5. What are the limitation periods for commencing civil claims?

Unless shorter periods are provided by the law, the limitation period for commencing civil claims is 15 years starting from the moment the claim can be exercised[14].

Some examples of a shorter limitation period are as follows:

(a) if the claim is for the payment of interest, dividends, rental, maintenance, pensions, or other periodical prestations whose interval is equal to or less than one year, the limitation period for the claim for each payment or each prestation is five years[15];

(b) if the claim is for:

(i) transport charges;

(ii) remuneration for medical practitioners, pharmacists, nurses, attorneys, certified public accountants, public notaries or technical experts; or

(iii) the price of goods or products supplied by merchants or manufacturers,

the limitation period is two years[16];

(c) the limitation period for a claim for compensation for torts is two years starting from when the claimant becomes aware of the damage and the person who should be liable for the damage; however, the limitation period can in no way exceed 10 years after the occurrence of the tort[17].

6. Are there any pre-action procedures with which the parties must comply before commencing proceedings?

There are usually no requisite pre-action procedures before civil proceedings are commenced, except for certain matters where compulsory mediation before the commencement of litigation proceedings is required by law. Such matters include disputes arising from adjacency of real estate, determination of boundaries or demarcation of real estate, co-ownership of real estate, rentals of real estate, superficies, traffic accidents, medical treatments, employment contracts, partnerships, proprietary rights between spouses or certain relatives, and proprietary rights where the value of the subject matter is less than NTD 500,000[18]. Mediation may also be initiated upon a party's motion

11 Section 242(1), (2) and (6) of the Code of Civil Procedure and section 2 of the Rules of Reviewing Court Documents
12 Sections 3, 4 and 5 of the Lawyer's Act
13 Section 11(1) of the Lawyer's Act
14 Sections 125 and 128 of the Civil Code
15 Section 126 of the Civil Code
16 Section 127 of the Civil Code
17 Section 197(1) of the Civil Code
18 Section 403(1) of the Code of Civil Procedure

before or during the litigation proceedings[19]. The court usually recommends mediation before any litigation[20].

19 Sections 404(1), 405(1), 420-1(1), 463 and 481 of the Code of Civil Procedure, and section 9 of the Key Points for the Court to Promote Mediation

20 Section 8 of the Key Points for the Court to Promote Mediation

7. What is the typical civil procedure and timetable for the steps necessary to bring the matter to trial?

To bring a matter to trial, besides filing a pleading specifying the counterparty and the subject matter, the plaintiff has to advance the court fee; otherwise, the court may dismiss the claim. When the dispute concerns proprietary rights, the court fee is calculated on the basis of the value of the subject matter. When the dispute is

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Qualification

Taiwan Bar Admission (1992)

Taiwan Patent Agent (1993)

New York Bar Admission, U.S.A. (1998)

Education

LL. M., Columbia Law School, U.S.A. (1998)

LL. M., Soochow University Graduate School of Law, Taiwan (1997)

LL. B., National Taiwan University, Taiwan (1992)

Membership To Professional Associations

Chairman of Arbitrator Training Committee, Chinese Arbitration Association Vice-Chairman of the Mediation Center, Chinese Arbitration Association

Associate mediator of Singapore Mediation Centre

Standing Supervisor of Taipei Bar Association

Vice-Chairman of International Affairs Committee, Taiwan Bar Association

not relevant to proprietary rights, the court fee is NTD 3,000 for the first instance[21].

Certain cases are subject to compulsory mediation before the commencement of litigation proceeding, as explained in question 6.

Usually, it takes six and eight months respectively to complete the litigation proceedings for the first and second instances, and another 6–12 months for the third instance proceedings.

8. Are parties required to disclose relevant documents to other parties and the court?

The court may order the parties to specify and submit the evidence for issues identified by the court[22]. Where a document specified as evidence is in the opposing party's possession, a party may move the court to order the opposing party to provide such document[23]. Parties are required by law to provide the following documents: documents created for the interests of the other party, commercial accounting materials, and documents created regarding matters relating to the action[24].

9. Are there rules regarding privileged documents or any other rules which allow parties to not disclose certain documents?

In civil proceedings, the parties are obligated to adduce documents created regarding matters relating to the action. However, if the documents involve the privacy or trade secrets of either party or a third party, and if disclosed, the relevant party may suffer from material impairment, the party in possession of the documents may refuse to provide them[25]. Even when such documents are provided, the court may, on motion or sua sponte, render a ruling to deny the inspection, copying or photographing of such documents by those who have the right to access the court documents[26].

10. Do parties exchange written evidence prior to trial or is evidence given orally? Do opponents have the right to cross-examine a witness?

A copy of any submissions sent to the court by a party is required to be provided to the opposing party[27]. The parties may therefore exchange written evidence via the submissions prior to or during the trial. Some evidence may be given orally, such as the testimony of a witness or an expert.

Under the Code of Civil Procedure, parties may request the court to make inquiries that in their opinion are necessary, or make such inquiries themselves with the permission of the court[28]. In practice, some judges examine the witness themselves, and others let the parties examine the witness directly, depending on the judge's discretion and style.

11. What are the rules that govern the appointment of experts? Is there a code of conduct for experts?

Under the Code of Civil Procedure, experts are appointed by the court. Before the appointment, the court may seek the parties' opinion on the candidates. If the parties have agreed on an expert, the court should appoint

21 Section 77-14(1) of the Code of Civil Procedure
22 Section 268 of the Code of Civil Procedure
23 Sections 342(1) and 343 of the Code of Civil Procedure
24 Section 344(1) of the Code of Civil Procedure
25 Section 344(2) of the Code of Civil Procedure
26 Section 242(3) of the Code of Civil Procedure
27 Sections 267 and 268 of the Code of Civil Procedure
28 Section 320(1) of the Code of Civil Procedure

such expert, except where the court considers that the appointment of such expert is grossly inappropriate[29]. After an expert is appointed, the court may sua sponte replace the expert if necessary[30]. The parties may appoint an expert; however, the opinion made by such expert has no legal effect under Taiwanese law.

Before giving expert testimony, an expert should make a written oath indicating that he/she will give just and truthful testimony and is willing to be charged with perjury for intentionally giving any false statement[31]. Instead of oral testimony, an expert may present written testimony subject to the court's order[32].

12. What interim remedies are available before trial?

A provisional attachment, a provisional injunction and an injunction for maintaining a temporary status quo are some of the interim remedies available before trial. A provisional attachment is an interim remedy for monetary claims or claims that can be changed to monetary claims[33]. A provisional injunction is an interim remedy for non-monetary claims[34]. An injunction for maintaining a temporary status quo is an interim remedy used to prevent material harm or imminent danger or other similar events[35].

No provisional attachment or provisional injunction is to be granted by the court unless it would be impossible or extremely difficult to satisfy the claim by compulsory execution in the future[36]. Further, where necessary, for the purposes of preventing material harm or imminent danger or other similar circumstances, an application may be made for an injunction to maintain a temporary status quo with regard to the legal status in dispute[37].

Other than the aforesaid interim remedies, there is an interim measure for evidence preservation. Where the evidence may become lost, destroyed or difficult to be adduced in court, or with the consent of the opposing party, a party may move the court to preserve evidence. Furthermore, in order to secure the legal rights and interests, a party may move for expert testimony, inspection or preservation of documentary evidence to ascertain the current status of a matter or an object[38]. The motion for evidence preservation may be made before or after filing a lawsuit[39].

13. What does an applicant need to establish in order to succeed in such interim applications?

To successfully obtain a provisional attachment, a provisional injunction or an injunction for maintaining a temporary status quo, the applicant must satisfy the respective requirements thereof: the type of claim and the urgency and necessity for securing such claim. Please see question 12.

14. What remedies are available at trial?

Remedies available at trial include monetary relief, declaratory relief, revocation relief and

29 Section 326(1) and (2) of the Code of Civil Procedure
30 Section 326(3) of the Code of Civil Procedure
31 Section 334 of the Code of Civil Procedure
32 Section 335(1) of the Code of Civil Procedure
33 Section 522(1) of the Code of Civil Procedure
34 Section 532(1) of the Code of Civil Procedure
35 Section 538(1) of the Code of Civil Procedure
36 Sections 523(1) and 532 (2) of the Code of Civil Procedure
37 Section 538(1) of the Code of Civil Procedure
38 Section 368(1) of the Code of Civil Procedure
39 Section 369(1) of the Code of Civil Procedure

specific performance. Specific performance is very rare and is not available to all types of claims.

15. What are the principal methods of enforcement of judgment?

To enforce monetary claims where there is more than one creditor, all the creditors can participate in the distribution of the debtor's property[40]. To enforce against movable property, the method may be attachment, auction or sale[41]. To enforce against real estate, the method may be attachment, auction or compulsory administration[42]. To enforce a claim for delivery of movable property, the court may deliver such property to the creditor[43]. To enforce a claim for delivery of real estate, the court may remove the possession thereupon by the debtor and deliver the real estate to the creditor[44].

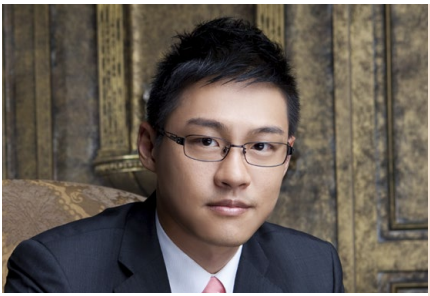
40 Section 31 of the Compulsory Enforcement Act

41 Section 45 of the Compulsory Enforcement Act

42 Section 75(1) of the Compulsory Enforcement Act

43 Section 123(1) of the Compulsory Enforcement Act

44 Section 124(1) of the Compulsory Enforcement Act



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16. Are successful parties generally awarded their costs? How are costs calculated?

Court fees should be eventually borne by the losing party[45]. As to the attorneys' fees, for litigation proceedings at the third instance, attorneys' fees are deemed as part of the court fees, and the recoverable amount is determined by the court[46]. For actions relevant to proprietary rights, the recoverable amount determined by the court should not exceed 3% of the value of the subject matter or NTD 500,000, whichever is lower; for actions not relevant to proprietary rights, the recoverable amount may not exceed NTD 150,000. However, for litigation proceedings at the first and second instances, attorneys' fees are not considered as part of the court fees and are not recoverable, unless otherwise agreed by the parties.

17. What are the avenues of appeal for a final judgment? On what grounds can a party appeal?

A District Court judgment may be appealed to the High Court, and a High Court judgment may be appealed to the Supreme Court. An appeal to the Supreme Court must be based on an erroneous application or violation of laws and regulations by the High Court. For a final and binding judgment, a rehearing action may be initiated subject to certain circumstances, e.g. where the application of law is manifestly erroneous; the rationale manifestly contradicts the judgment; the court which entered the judgment is not legally organised; a disqualified judge has participated in the judgment; one party was not legally represented in the action; a piece of crucial evidence was fabricated or altered; one party discovers evidence which has not been considered or which becomes available after the final and binding judgment is rendered[47].

18. Are contingency or conditional fee arrangements permitted between lawyers and clients?

Contingency or conditional fee arrangements are not permitted for certain types of cases, such as family, juvenile and criminal cases[48]. Other than the above, such arrangements are permissible.

19. Is third-party funding permitted? Are funders allowed to share in the proceeds awarded?

Section 157 of the Criminal Code reads: "A person who for the purpose of profits, instigates, or invites and guarantee for wining for a lawsuit for the others shall be sentenced to imprisonment for less than one year, short-term imprisonment, or a fine of no more than fifty thousand yuan." In addition to this section, there are no specific laws or regulations forbidding third-party funding or the sharing of proceeds in Taiwan. As long as the third-party funding does not constitute the scenario under Section 157, it should be permissible. However, if a party's attorney is such a third party who provides funds and shares in the proceeds awarded, the portion shared may be deemed as a contingency or conditional fee, and will have to be subject to relevant restrictions. (See question 18.)

20. May parties obtain insurance to cover their legal costs?

Parties may procure insurance to cover their legal costs if such insurance is available to them.

45 Section 78 of the Code of Civil Procedure

46 Section 466-3(1) of the Code of Civil Procedure

47 Section 496(1) of the Code of Civil Procedure

48 Section 35(2) of the Lawyer's Rules of Ethic

21. May litigants bring class actions? If so, what rules apply to class actions?

Litigants may bring class actions under the laws of Taiwan, especially for consumer disputes and environmental disputes.

Regarding consumer disputes, where numerous consumers are injured as a result of the same incident, a consumer advocacy group may sue in its own name if 20 injured consumers or more have assigned their claims to the group[49].

Regarding environmental disputes, take the Air Pollution Control Act ('APCA') as an example: where a public or private entity violates the APCA or the relevant regulations and the competent authority is negligent in administration, the aggrieved persons or public interest groups may file a lawsuit against the competent authority to seek a ruling from the administrative court to order the competent authority to carry out its duties[50]. Other similar laws and regulations concerning environmental class actions include section 72(1) of the Water Pollution Control Act, section 72(1) of the Waste Disposal Act and section 59(1) of the Marine Pollution Control Act.

22. What are the procedures for the recognition and enforcement of foreign judgments?

A final and irrevocable foreign court judgment or decree can be recognised and enforced by a court judgment in Taiwan. Pursuant to Section 402 of the Code of Civil Procedure, a final and binding judgment rendered by a foreign court shall be recognised, except in the following circumstances:

(a) where the foreign court lacks jurisdiction pursuant to Taiwanese law;

(b) where a default judgment is rendered against the losing defendant, except where the notice or summons of the initiation of action had been legally served in a reasonable time in the foreign country or had been served through judicial assistance provided under Taiwanese law;

(c) where the content of the judgment or its litigation procedure is contrary to the public order or good morals of Taiwan; or

(d) where there exists no mutual recognition between the foreign country and Taiwan (i.e. where judgments given by the courts in Taiwan are not reciprocally recognised by the courts of the foreign country concerned).

Courts in Taiwan generally apply the principle of international comity in discerning whether reciprocal recognition exists. The existence of diplomatic ties is not an absolute factor when determining reciprocal recognition.

Recognition and enforcement of foreign judgments in Taiwan is subject to the court trial process, which includes courts of three levels: the District Court, High Court and Supreme Court.

23. What are the main forms of alternative dispute resolution?

The primary forms of alternative dispute resolution in Taiwan are arbitration and mediation.

24. Which are the main alternative dispute resolution organisations in your jurisdiction?

Arbitration associations are the main alternative dispute resolution organisations in Taiwan. Currently, there are four arbitration associations in Taiwan: the Chinese Arbitration Association, Taipei ('CAA'), the Taiwan Construction Arbitration Association, the Chinese Construction Industry Arbitration Association, and the Chinese Real Estate Arbitration Association. Among them, the CAA is the one with

49 Section 50(1) of the Consumer Protection Act

50 Section 81(1) of the Air Pollution Control Act

the longest history and capable of handling international arbitration.

Mediation may be conducted under the direction of the court by one to three court-appointed mediators[51], or may be conducted by the local mediation committee established in accordance with the Mediation Act for City, County and Township[52] or by the private sector such as the Mediation Centre of the CAA. For disputes regarding the performance of government procurement contracts, parties may apply for mediation with the Complaint Review Board for Government Procurement in the city/county government or the Public Construction Commission[53].

25. Are litigants required to attempt alternative dispute resolution in the course of litigation?

As explained in question 6, certain types of disputes are subject to compulsory mediation before litigation. Such disputes include those arising from adjacency of real estate, determination of boundaries or demarcation of real estate, co-ownership of real estate, rentals of real estate, superficies, traffic accidents, medical treatments, employment contracts, partnerships, proprietary rights between spouses or certain relatives, and proprietary rights where the value of the subject matter is less than NTD 500,000[54].

26. Are there any proposals for reform to the laws and regulations governing dispute resolution currently being considered?

There has been continuing discussion on the reform of the Arbitration Act and accordingly proposals are floated from time to time. There is also discussion on whether mediation for disputes under the Government Procurement Act may be conducted by the private sector.

27. Are there any features regarding dispute resolution in your jurisdiction or in Asia that you wish to highlight?

Sections 13–15 of the Cross-Strait Bilateral Investment Protection and Promotion Agreement between China and Taiwan ('Cross-Strait BIA') concern dispute resolution. According to the Cross-Strait BIA, where an investor of a party (i.e. Taiwan or China) enters into a commercial contract with a natural person, juridical person or any other organisation of the other party, the contract may include an arbitration clause. Where no arbitration clause is included, the parties to the contract may consult with each other to submit the dispute to arbitration should a dispute occur[55]. The working group of the Cross-Strait Economic Cooperation Committee may assist to resolve investment disputes[56].

Investors from Taiwan and China may utilise the dispute resolution mechanisms under the Cross-Strait BIA to resolve investment disputes.

51 Section 406-1(2) of the Code of Civil Procedure

52 Section 1 of the Mediation Act for City, County and Township

53 Section 85-1(1) of the Government Procurement Act

54 Section 403(1) of the Code of Civil Procedure

55 Section 14(2) and (3) of the Cross-Strait BIA

56 Section 15(2) of the Cross-Strait BIA

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1. 在民事诉讼方面，法院系统的结构是怎样的?

台湾民事诉讼采取“三级三审”制。“三级”指三个法院等级：地方法院、高等法院和最高法院。“三审”指一个案件首先经地方法院审判（第一审），对地方法院之判决结果不服时，可上诉至高等法院（第二审），再有不服时，可上诉至最高法院（第三审）。案件的事实及法律争议由第一审和第二审法院作实质审判，只有原判决出现法律法规适用不当或违反法律法规时，才能上诉至第三审；原判决无前述情事时，不得上诉至第三审；只有诉讼标的价值达到一定数额时，才能向最高法院提起上诉。

2. 法官在民事诉讼中的角色是什么?

台湾民事诉讼中，法官的角色具有职权进行主义的若干特点。某些情况下，法官会积极主导诉讼程序。比如，法律规定，如果法官无法基于诉讼双方提交的证据作出判决时，为找出事实真相，可依职权调查证据[1]；法官应指导诉讼双方就争论问题之事实和法律为适当且完全之辩论[2]。法官应要求或引导诉讼双方进行事实上或法律上之陈述、提交证据或作出其它陈述[3]。以上这些体现了职权进行主义的特点。

1 《民事诉讼法》第 288 条第 1 项
2 《民事诉讼法》第 199 条第 1 项
3 《民事诉讼法》第 199 条第 2 项

3. 庭审是否向公众开放？公众是否能够查阅法庭文件?

庭审原则上是对公众开放的[4]，但某些情况除外，比如有关申请保护令的案件[5]、涉及商业秘密[6]、青少年[7]、性侵犯[8]、家事事件[9]和调解[10]的案件。

法庭文件（包括双方提交的文件、法院调查之证据、庭审记录和专家意见书）不对公众公开。只有当事人、诉讼代理人、参加人和其他经法庭许可的案件有关人员才能查看法庭文件[11]。

4. 所有律师均有权代表其委托人出庭并参加诉讼吗？如果不是，律师职业的结构是怎样的?

台湾并没有诉务律师和事务律师之分。不论案件是什么类型或涉及哪个专业，持有政府颁发的合法资格证且其资格未被撤销或被命令暂停执业的律师均可以代表委托人出庭进行诉讼[12]。

律师为在特定地区执业，必须加入该地区的地方律师公会[13]。目前，台湾有 16 家地区性律师公会。换言之，尽管律师可以代表委托人进行辩诉，但想要在某个地区出庭，必须加入相应地区的律师公会。

4 《法院组织法》第 86 条
5 《家庭暴力防治法》第 12 条第 3 项
6 《营业秘密法》第 14 条第 2 项
7 《少年事件处理法》第 34 条
8 《性侵害犯罪防治法》第 18 条
9 《家事事件》第 9 条
10 《民事诉讼法》第 410 条第 2 项
11 《民事诉讼法》第 242 条第 1、2、6 项以及《民事阅卷规则》第 2 条
12 《律师法》第 3、4 和 5 条
13 《律师法》第 11 条第 1 项

5. 提起民事请求的时效期为多久?

除非法律规定了更短的期限，提起民事诉讼请求的时效期为自请求权可行使之时起15年[14]。

下列是时效期限较短的一些示例：

(a) 如果请求的是付息、分红、租金、赡养费、退职金或其他一年或不及一年的定期给付债权，其各期给付请求权的时效期限为五年[15]；

(b) 如果请求的是：

(i) 运送费；

(ii) 执业医师、药剂师、护士、律师、注册会计师、公证人或技师的报酬；或

(iii) 商家或制造商供应的商品或产品的代价；

其时效期限为两年[16]；

(c) 侵权诉讼的时效期限为自请求权人发现损害并知晓赔偿义务人时起两年。但是，任何情况下诉讼时效期限都不超过发生侵权之后10年[17]。

6. 有哪些诉前程序是当事人在提起诉讼之前必须遵守的?

通常情况下，不存在民事诉讼开始之前必须遵守的诉前程序，但对于某些诉讼事项，法律要求在诉讼程序开始之前进行强制调解。上述事项包括不动产相邻关系、不动产界线或界标的确定、不动产共同所有权、不动产的租金、地上权、交通事故、医疗、雇佣合同、合伙关系、夫妻或特定亲属间的财产权以及标的价值低于50万新台币的其他财产权引起的争议[18]。起诉前或诉讼程序进行中，得因当事人一方之声请而进行调解[19]。法院通常建议在提起诉讼之前先进行调解[20]。

7. 案件进入审理之前要经过哪些典型的民事程序? 有什么样的时间表?

提起诉讼时，除了提交诉状说明诉讼对方和标的之外，原告需要预付裁判费，否则，法院可驳回其诉。争议涉及财产权时，将按照诉讼标的的价值计算裁判费；争议未涉及财产权时，第一审裁判费为3千新台币[21]。

某些案件需要在开始诉讼程序之前进行强制调解，具体见问题6。

通常情况下，第一审和第二审的诉讼程序分别需费时六个月和八个月，而第三审则费时六至十二个月。

8. 当事人是否必须向其他当事人和法院披露相关文件?

法院可命令双方就特定事项表明并提交证据[22]。如果对方当事人持有被视为证据的文件，另一方可要求法院命令对方当事人提供所述文件[23]。法律要求双方提供以下文件：为另一方利益而作之文件、商业会计资料以及与本次诉讼有关事项所作之文件[24]。

9. 是否有关于特权文件的规则或允许当事人不披露特定文件的任何其他规则?

民事诉讼中，双方有义务提出与本次诉讼有关事项所作之文件。但是，如果该等文件涉及一方或第三方的个人隐私或商业秘密，披露之后会给有关当事人造成重大损

14 《民法》第125和128条
15 《民法》第126条
16 《民法》第127条
17 《民法》第197条第1项
18 《民事诉讼法》第403条第1项
19 《民事诉讼法》第404条第1项、405条第1项、420-1条第1项、463和481条及《法院加强办理民事调解事件实施要点》第9条
20 《法院加强办理民事调解事件实施要点》第8条
21 《民事诉讼法》第77-14条第1项
22 《民事诉讼法》第268条
23 《民事诉讼法》第342条第1项和343条
24 《民事诉讼法》第344条第1项

害，持有所述文件的当事人可拒绝提供该等文件[25]。即使该等文件经提供后，法院可依声请或依职权裁定禁止原有权查看法庭文件的人员阅览、复制或摄影该等文件[26]。

10. 当事人在审理之前是否交换书面证据？或是否提供口述证据？对方是否有权盘问证人？

一方向法院提交任何文件时，需要将该文件的副本一份提供给对方当事人[27]。因此，在庭审之前或审理过程中，双方可通过提交文件交换书面证据。有些证据可以口头提供，比如证人或专家证词。

根据《民事诉讼法》，双方可请求法院对证人为必要之发问，或征得法院许可后自行发问[28]。实际上，有些法官自行讯问证人，有些则让诉讼双方诘问证人，这取决于法官之自由裁量和行事方式。

25 《民事诉讼法》第 344 条第 2 项
26 《民事诉讼法》第 242 条第 3 项
27 《民事诉讼法》第 267 和 268 条

28 《民事诉讼法》第 320 条第 1 项

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台湾律师公会国际事务委员会副主任委员。

11. 关于专家任命的规则是怎样的？是否有专家行为准则？

根据《民事诉讼法》，鉴定人由法院选任。选任鉴定人之前，法院可就其人选征询双方意见。如果双方已经合意指定某位鉴定人，则法院须选任该名鉴定人，除非法院认为该人选显不适当[29]。鉴定人选任之后，如有必要，法院可依职权撤换之[30]。双方可合意选任鉴定人；但是，根据台湾法律，该等鉴定人发表的意见不具有法律效力。

在鉴定前，鉴定人应具结，表明其作出的鉴定是公正、真实的，如果有意作出任何虚假陈述，愿意因伪证罪接受法律的制裁[31]。除了口头说明，鉴定人可按照法院命令作出鉴定书[32]。

12. 案件审理前可获得哪些临时救济？

假扣押、假处分和定暂时状态之处分是审前可获得的临时救济。假扣押是针对金钱请求或可以转变成金钱请求的请求采取的临时救济[33]，假处分是针对非金钱请求采取的临时救济[34]，而定暂时状态之处分则是用来防止造成重大损害或避免急迫之危险或其它类似事件的临时救济[35]。

除非今后无法或很难透过强制执行来履行所述请求，法院一般不会准予假扣押或假处分[36]。此外，在必要的时候，为了防止造成重大损害或避免急迫之危险或其它类似情况，可以就争执之法律关系声请定暂时状态之处分[37]。

除了以上所述的临时救济，还可声请证据保全。如果证据可能会灭失、遭到破坏或难以作为呈堂证供，或征得对方当事人的同意，一方可声请法院保全证据。此外，为了保护合法权利和利益，一方可声请鉴定，勘验或保全书面证据，以证实事或物的现状[38]。证据保全之声请可在提起诉讼之前或之后提出[39]。

13. 申请人需要确立些什么才能成功申请此类救济？

要成功声请假扣押、假处分或定暂时状态之处分，申请人必须分别满足各种临时救济所对应的请求种类，和所述请求的迫切性和必要性。（见问题 12）

14. 案件审理时可获得哪些救济？

案件审理时可获得的救济包括金钱赔偿、确认宣告、撤销救济和行为不行为义务履行。行为不行为义务履行很少见，且并不是所有的请求类型都可以采用。

15. 执行判决的主要方式有哪些？

如果金钱请求权的债权人不止一人，执行时所有债权人可参与债务人财产的分配[40]。要执行动产，可以选择查封、拍卖或变卖等方式[41]。执行不动产时，可以选择查封、拍卖或强制管理等方式[42]。执行动产交付请求权时，法院可将所述财产交付给债权人[43]。执行不动产交付请求权时，法院可解除债务人的占有并将不动产交予给债权人占有[44]。

16. 胜诉方是不是一般会被判获得诉讼费用赔偿？诉讼费用如何计算？

诉讼费用最终都由败诉方承担[45]。至于律师费，对于第三审诉讼程序，律师费被视为

29 《民事诉讼法》第 326 第 1、2 项
30 《民事诉讼法》第 326 条第 3 项
31 《民事诉讼法》第 334 条
32 《民事诉讼法》第 335 条第 1 项
33 《民事诉讼法》第 522 条第 1 项
34 《民事诉讼法》第 532 条第 1 项
35 《民事诉讼法》第 538 条第 1 项
36 《民事诉讼法》第 523 条第 1 项和 532 条第 2 项
37 《民事诉讼法》第 538 条第 1 项
38 《民事诉讼法》第 368 条第 1 项
39 《民事诉讼法》第 369 条第 1 项
40 《强制执行法》第 31 条
41 《强制执行法》第 45 条
42 《强制执行法》第 75 条第 1 项
43 《强制执行法》第 123 条第 1 项
44 《强制执行法》第 124 条第 1 项
45 《民事诉讼法》第 78 条

诉讼费用的一部分，胜诉方可获补偿之律师费金额由法院裁定[46]。对于与财产权相关的诉讼，法院裁定的金额不得超过诉讼标的价值的 3% 或 50 万新台币，以低者为准。对于与财产权无关的诉讼，则不得超过 15 万新台币。但是，对于第一审和第二审诉讼程序，律师费不被视为诉讼费用的一部分，除双方另有约定外，胜诉无法获得律师费补偿。

17. 对最终判决有哪些上诉途径？当事人能够以什么理由提起上诉？

地方法院判决之后，可向高等法院提起上诉；高等法院判决之后，可向最高法院提起上诉。只有高等法院之判决属法律法规适用不当或违反法律法规时，才能向最高法院提起上诉。对于终局确定的判决，特定情况下可以提出再审，比如，法律适用显有错误；判决理由与判决结果显有矛盾；判决法院之组织不合法；应回避之法官参与了判决；诉讼过程中，一方当事人未经合法代理；一份关键证据属于伪造或被篡改；一方当事人找到在判决时未经斟酌的证据或作出终局确定判决后才发现证据[47]。

18. 是否允许律师和委托人之间存在胜诉酬金或按条件收费的安排？

某些类型的案件不允许胜诉酬金或按条件收费安排，比如家事事件、青少年和刑事案件[48]。在以上所述案件之外，这种安排是允许的。

19. 是否允许第三方资助？资助人是否可分享胜诉收益？

《刑法》第 157 条规定："意图渔利、挑唆或包揽他人诉讼者，处一年以下有期徒刑、拘役或五万元以下罚金。"除了这项规定，台湾不存在严禁第三方资助或共享收益的特殊法律或法规。只要第三方资助不构成第 157 条项下的情况，都是允许的。但是，如果一方的律师即是提供资金和共享收益的第三方，则共享的部分可能会被视为胜诉酬金或按条件收费，而受到有关限制。（见问题 18）

20. 诉讼当事人是否可为其诉讼费用投保？

如果有这方面的保险，诉讼当事人可以为其诉讼费用投保。

21. 诉讼人是否可提起集体诉讼？如果可以，哪些规则适用于集体诉讼？

根据台湾法律，当事人可以提出集体诉讼，尤其是涉及到消费争议和环境争议时。

消费者争议方面，如果许多消费者因同一事件受害，消费者保护团体可以在受让 20 人以上消费者损害赔偿请求权后以自己名义起诉[49]。

环境争议方面，以《空气污染防制法》为例：如果公营或私营实体违反了《空气污染防制法》或有关法令而主管部门管理失职时，受害人或公益团体可起诉主管部门，要求行政法院判令主管部门履行其职责[50]。关于环境争议集体诉讼的其它类似法律法规包括《水污染防治法》第 72 条第 1 项、《废弃物清理法》第 72 条第 1 项和《海洋污染防治法》第 59 条第 1 项。

22. 外国判决通过哪些程序予以承认和执行？

外国法院作出终局且不可撤销的判决或判令可以通过台湾的法院判决承认和执行。根据《民事诉讼法》第 402 条，外国法院作出的终局确定判决应被承认，但有下列情况者除外：

(a) 根据台湾法律，所述外国法院不具有管辖权；

(b) 败诉的被告未应诉而被作出缺席判决，但如果开始诉讼的通知或命令已于合理时间在该国依法送达，或依台湾法律协助送达，则不在此限；

46 《民事诉讼法》第 466-3 条第 1 项
47 《民事诉讼法》第 496 条第 1 项
48 《律师伦理规范》第 35 条第 2 项
49 《消费者保护法》第 50 条第 1 项
50 《空气污染防制法》第 81 条第 1 项

(c) 判决内容或诉讼程序有悖于台湾的公共秩序或善良风俗；或

(d) 该外国和台湾之间无相互承认（即，台湾法院作出的判决不被该外国承认）。

在判断两国是否相互承认时，台湾法院一般遵循国际礼让原则。外交关系的建立不是判断相互承认的绝对因素。

在台湾，承认和执行外国判决需要经过法院审判程序，这包括三级法院：地方法院、高等法院和最高法院。

23. 替代争议解决的主要形式是什么？

台湾替代争议解决机制的主要形式包括仲裁和调解。

24. 在您所在的司法管辖区有哪些主要的替代争议解决机构？

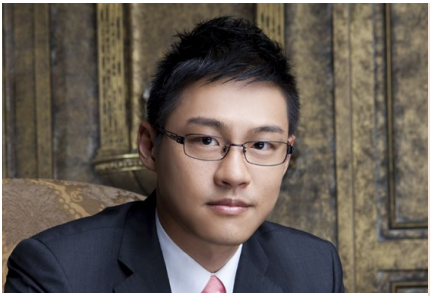
台湾的主要替代争议解决机构是仲裁协会。目前，台湾有四家仲裁协会：中华民国仲裁协会（“CAA”）、台湾营建仲裁协会、中华工程仲裁协会和中华不动产仲裁协会。其中，中华民国仲裁协会历史最为悠久，且能够处理国际仲裁案件。

调解可由法院指定的一至三名调解员按照法院的指示进行[51]，或由根据《乡镇市调解条例》组建的地方调解委员会[52]或由中华民国仲裁协会的调解中心等民间机构进行。如果争议涉及政府采购合同的履行，双方可向市政府 / 县政府的采购申诉审议委员会或公共工程委员会申请调解[53]。

25. 在诉讼过程中诉讼人是否必须尝试替代争议解决办法？

如问题 6 所述，某些类型的争议在提起诉讼之前需要进行强制调解。这类争议包括不

51 《民事诉讼法》第 406-1 条第 2 项
52 《乡镇市调解条例》第 1 条
53 《政府采购法》第 85-1 条第 1 项



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动产相邻关系、不动产界线或界标的确定、不动产共同所有权、不动产的租金、地上权、交通事故、医疗、雇佣合同、合伙关系、夫妻或特定类亲属间的财产权以及标的价值低于 50 万新台币的其他财产权引起的争议 [54]。

26. 当前是否有改革争议解决法律法规的建议在审议中?

关于《仲裁法》修正的讨论在持续进行中，因此会不时发布修正建议。同时，目前正在讨论《政府采购法》相关争议之调解是否能够由民间机构来执行。

27. 关于您所在司法管辖区或者亚洲地区的争议解决，是否有任何特殊情况需加以强调?

《海峡两岸投资保护和促进协议》第 13-15 条提到了争议解决。根据《海峡两岸投资保护和促进协议》，如果一方（即台湾或中国大陆）的投资者和另一方的自然人、法人或任何其它组织签订了贸易合同，所述合同可包含仲裁条款。如无仲裁条款，发生争议时，合同双方可于争议发生后协商提交仲裁 [55]。两岸经济合作委员会的工作小组可协助解决投资争议 [56]。

台湾和中国大陆的投资者可以利用《海峡两岸投资保护和促进协议》规定的争议解决机制来解决投资争议。

54 《民事诉讼法》第 403 条第 1 项
55 《海峡两岸投资保护和促进协议》第 14 条第 2、3 项
56 《海峡两岸投资保护和促进协议》第 15 条第 2 项

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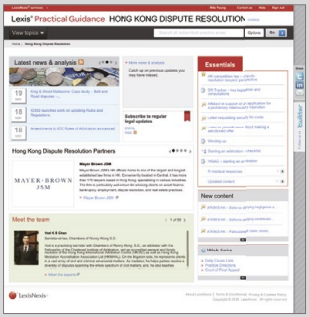

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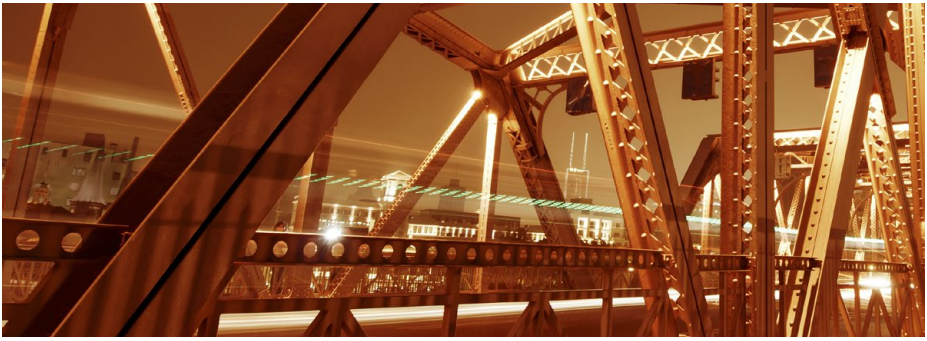

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