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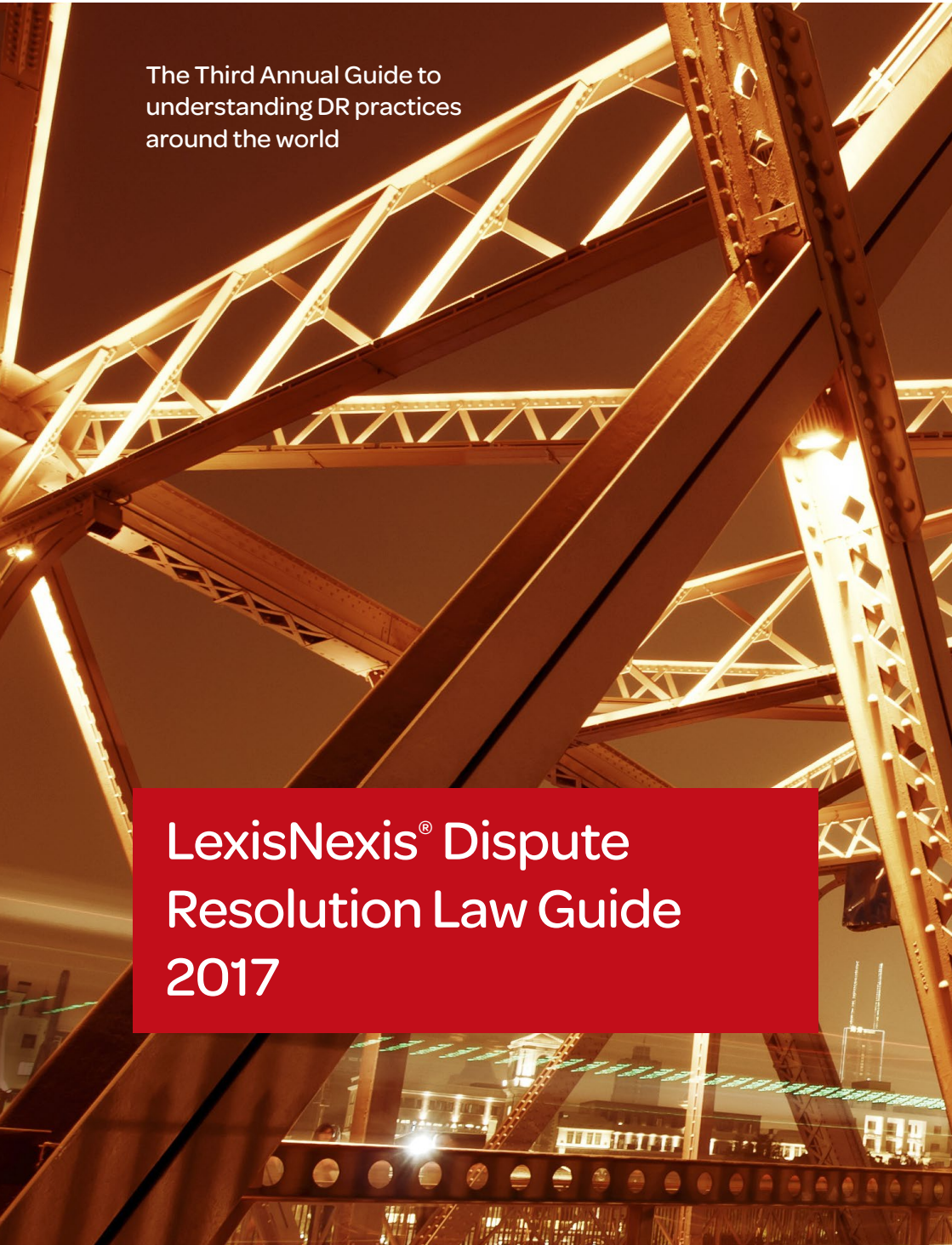

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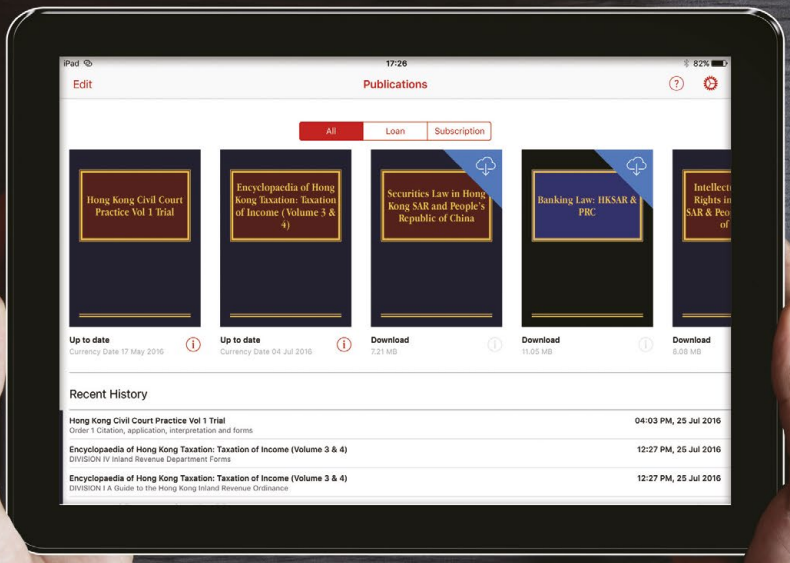

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Feature Article – Promoting efficacy in arbitration practice: Australia's pro-arbitration regime and key developments in the ACICA Arbitration Rules

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.

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

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.

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Jurisdictional Q&As

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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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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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. 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. 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
ADVOCATES & SOLICITORS

Sunil Abraham

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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

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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. 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. 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 founder and managing partner of Al Busaidy, Mansoor Jamal & Co, a globally-ranked, top-tier, full-service law firm in Oman. A UK-qualified barrister, he has extensive experience of dispute resolution and expert advisory on the laws of Oman and other GCC and Islamic jurisdictions. Mansoor is experienced leading and directing teams of advocates in high-value domestic and international arbitration of public and private law disputes and complex commercial litigation claims across a wide span of industry sectors including banking, power and water, construction, insurance, employment and oil and gas. He has successfully prosecuted and defended claims under ICSID and UNCITRAL rules before the ICC International Court of Arbitration and the London Court of International Arbitration (LCIA).

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. 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. 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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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.

Lee and Li's professionalism and achievements have long been recognized and relied on by its clients in Taiwan and abroad, many of whom have been with it for decades. Recognition has come from abroad as well. Lee and Li are often named as one of the best law firms in evaluations of international law firms/intellectual property right firms. For instance, Lee and Li was selected as the best pro bono law firm in Asia and the best law firm in Taiwan many years consecutively by the International Financial Law Review (the IFLR); Lee and Li was also named the National Deal Firm of the Year for Taiwan and awarded the Super Deal of the Year by Asian Legal Business. For many years, the renowned Global Competition Review has included Lee and Li on its list of the top 100 competition law firms in the world; Lee and Li has the distinction of being the only law firm in Taiwan on this list. Lee and Li's performance is not only recognized by its clients but also by international professional institutes.

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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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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

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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].

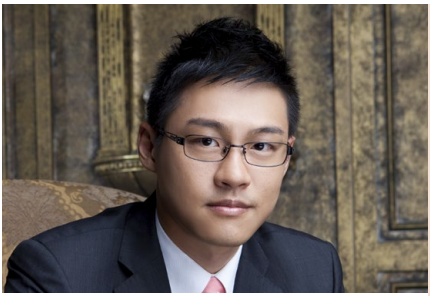
40 Section 31 of the Compulsory Enforcement Act

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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Jeffrey Li is an associate in Lee and Li's litigation Department. His practice focuses on domestic and international commercial arbitration, investment arbitration, administrative and civil litigation, environmental law and constitutional law. Jeffrey was a member of the attorneys group for petition of the Judicial Yuan Constitutional Interpretation No. 737. He represented many clients in administrative lawsuits in Taiwan. Jeffrey is also an adjunct lecturer at Soochow University Law School. He has published a book "Sojourn in Harvard Law School" in 2014 in Taiwan and in 2015 in China.

Qualification

Taiwan Bar Admission (2010)

Education

LL. M., Harvard Law School, U.S.A. (2013)

LL. M., National Taiwan University, Taiwan (2010)

LL. B., Soochow University, Taiwan (2006)

Membership To Professional Associations

Administrative Appeal Review Committee and Law Committee Member, the Hakka Affairs Council of Executive Yuan

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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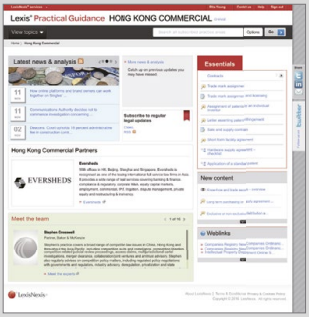

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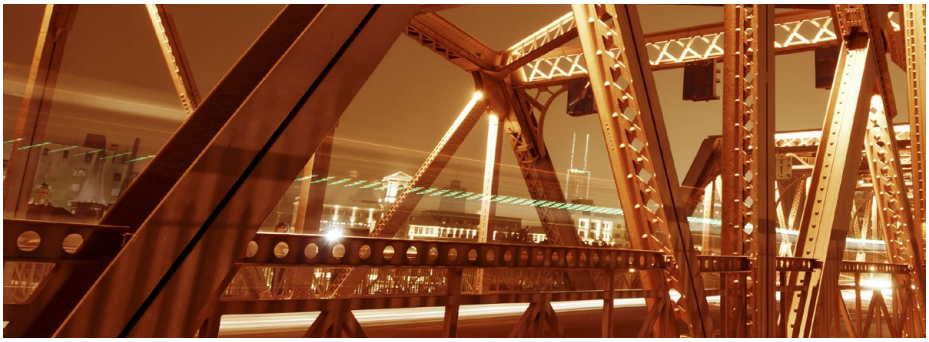

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