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The Dispute Resolution Review provides an indispensable overview of the civil court systems of 36 jurisdictions. It offers a guide to those who are faced with disputes that frequently cross international boundaries. As is often the way in law, difficult and complex problems can be solved in a number of ways, and this edition demonstrates that there are many different ways to organise and operate a legal system successfully. At the same time, common problems often submit to common solutions, and the curious practitioner is likely to discover that many of the solutions adopted abroad are not so different to those closer to home.

I wrote with hope in last year’s preface that in 2019 we would have increased certainty about the future laws and procedures that will apply to cross-border litigation in the United Kingdom and across the European Union. But despite the huge volume of analysis and commentary across the legal sector, we seem to be no further forward. Instead, the UK Parliament is to vote on the proposed deal by the end of January 2019. Given the interwoven nature of UK and EU law, the next few months will be of huge importance to the legal profession in my home jurisdiction and have a long-lasting impact on how disputes (many of which are between international parties) are resolved in the United Kingdom. This edition includes an updated Brexit chapter that charts the progress (or lack thereof) made over the past year.

This 11th edition follows the pattern of previous editions where leading practitioners in each jurisdiction set out an easily accessible guide to the key aspects of each jurisdiction’s dispute resolution rules and practice, and developments over the past 12 months. The Dispute Resolution Review is also forward-looking, and the contributors offer their views on the likely future developments in each jurisdiction. Collectively, the chapters illustrate the continually evolving legal landscape, responsive to both global and local developments.

Finally, I would like to express my gratitude to all of the contributors from all of the jurisdictions represented in The Dispute Resolution Review. Their biographies start at page 573 and highlight the wealth of experience and learning from which we are fortunate enough to benefit. I would also like to thank the whole team at Law Business Research who have excelled in managing a project of this size and scope, in getting it delivered on time and in adding a professional look and finish to the contributions.

Damian Taylor
Slaughter and May
London
February 2019
Chapter 1

BREXIT

Damian Taylor and Robert Brittain

I INTRODUCTION

On 23 June 2016, the people of the UK were asked whether they believed their country should remain a member of the European Union or leave. On a turnout of 72.2 per cent, a majority (51.9 per cent) voted to leave. The UK government announced it would give effect to the referendum’s result by following the process set out in Article 50 of the Treaty on European Union (TEU). Accordingly, on 29 March 2017, the Prime Minister, acting with the authority of Parliament, gave the European Council formal notice of the UK’s intention to withdraw from the EU. In the period since then, the UK and EU27 have been negotiating an agreement for an orderly departure. In December 2018, a final draft agreement was endorsed by the UK government and the European Council. Ratification of the agreement requires the consent of the UK Parliament and the European Parliament. At the time of writing, it is not clear whether this will happen. Even if the agreement is not concluded, however, the effect of Article 50 is that the UK will leave the EU regardless on the second anniversary of the Prime Minister’s notification: 29 March 2019.2

This special chapter is concerned with the impact of Brexit on the procedural law that underpins dispute resolution in England. Specifically, we consider:

a the determination of governing law;
b the jurisdiction of the courts over disputes;
c the cross-border enforcement of judgments; and
d international arbitration.

Much of that law is, directly or indirectly, European in origin and will, in theory, cease to apply in and to the UK when it leaves the EU. In practice, a combination of unilateral action by the UK and transitional arrangements (agreed or unilateral) should mitigate to a significant extent the legal effects of Brexit in this area. In due course, the UK’s aspiration is to conclude a new relationship agreement with the EU that would largely replicate on a permanent basis the pre-Brexit regime.

1 Damian Taylor is a partner and Robert Brittain is a professional support lawyer at Slaughter and May.
2 That outcome could be avoided in only two ways: the UK and EU27 could agree to extend the two-year period mandated by Article 50; or the UK could abandon Brexit altogether by exercising its unilateral right to revoke the notice of intention to withdraw. The former possibility would not alter the analysis in this chapter of Brexit’s effects albeit it would delay them. The latter possibility is not considered in this chapter, not least because it would produce no change in the legal status quo.
II RELEVANT LEGAL CONSEQUENCES OF BREXIT – A SUMMARY

The foundation of the EU and its unique legal order are the various treaties entered into by the Member States. As a matter of international law, the UK is bound by these treaties for as long as it is a party to them. However, EU law only produces effects in the UK’s domestic legal order because an Act of Parliament – the European Communities Act 1972 – says it does; the 1972 Act is the pipe through which EU law flows into UK law. The UK’s notification under Article 50 TEU has set in train a process by which the UK will cease to be bound by the treaties, cutting off the flow of EU law at its source.

i Legislating for Brexit

Just as the UK’s entry into the EU’s forerunner was given domestic effect by statute, so will the UK’s withdrawal. Two Acts of Parliament will be of central importance and are discussed briefly below (the first is already law; the second has not even been introduced to Parliament yet, and only will be if the withdrawal agreement is ratified).

a The European Union (Withdrawal) Act 2018 received royal assent in June 2018. On the day of the UK’s exit from the EU, it will repeal the 1972 Act, dismantling the mechanism by which EU law takes automatic effect in the UK. At the same time, in order to avoid the legal vacuum that would otherwise result from the wholesale and immediate disapplication of EU law, the 2018 Act will preserve and convert into domestic UK law all EU law as it applies to the UK at the moment before exit. However, not all of this retained EU law will function as it did while the UK was a Member State. This is particularly the case where the law in question imposes reciprocal rights and obligations on Member State courts: if the UK is no longer a Member State, it can no longer require or expect reciprocal treatment. As discussed below, the current EU regime on jurisdiction and judgments is an example of this kind of law. The 2018 Act accordingly provides Ministers with powers to amend retained EU legislation or to revoke it entirely.

b A Withdrawal Agreement Implementation Act will be needed to give effect to in UK law to any withdrawal agreement ratified by the UK and EU legislatures. One of the major functions of the withdrawal agreement would be extend the application of EU law to the UK for the duration of a transitional period, notwithstanding that the UK would have ceased to be a Member State on 29 March 2019. Accordingly, a Withdrawal Agreement Implementation Act would, among other things, suspend the revocation of provisions in the 1972 Act that give domestic effect to EU law.

ii Summary of consequences for civil justice cooperation

What does this mean for the future of EU law in the field of civil justice cooperation? Broadly, and as discussed in more detail in the following sections:

a The current EU rules for the determination of governing law will continue to apply to and in respect of the UK as they do now. Their nature and operation means they can easily be transposed into UK law and still produce the same effects in the UK and in the EU27. There should be no impact on existing English governing law clauses and no reason for commercial parties not to continue to choose English law to govern their contracts.

b The current EU rules for the determination of which country’s courts have jurisdiction over a dispute and the enforcement of resulting judgments are premised on Member
State reciprocity; they cannot unilaterally be domesticated by a non-Member State and continue to produce the same effects. Alternatives are therefore required. The UK is acceding to the Hague Convention on Choice of Court Agreements, which is similar to (though less comprehensive than) the current European regime but does at least cover the 27 remaining Member States (as well as Singapore, Mexico and Montenegro). The UK has also said it wishes to accede in its own right to the Lugano Convention (which extends the basic framework of the EU regime to Iceland, Norway and Switzerland) and to negotiate with the EU27 a new post-exit agreement that replicates to the fullest extent possible the current EU regime.

iii The immediate term: deal or no deal?

If the withdrawal agreement negotiated by the UK and EU is ratified, the UK would still leave the EU on 29 March 2019 but EU law would continue to apply in and to the UK during a transitional period. That period would last until at least 31 December 2020 and, if the parties agree, could be extended for up to another two years after that. Legal proceedings started in the courts of the UK and the EU27 at any time before the end of the transition period would be subject to grandfathering provisions; the EU rules would continue to be applied to questions regarding jurisdiction and to the reciprocal enforcement of judgments across the UK and EU27. However, jurisdiction agreements with a UK element signed before the end of the transition period would not be grandfathered. That means they would not be upheld by EU27 courts in accordance with the current EU rules.

If no withdrawal agreement were to be concluded, the UK would leave the EU on 29 March 2019 and EU law would immediately cease to apply. Any mitigation of the legal consequences of this would take the form of unilateral action by each side. The UK has, for some time, been signalling a programme of proposed steps. Some mimic provisions of the draft withdrawal agreement. For instance, legal proceedings started before exit would continue, after exit, to be treated by UK courts in accordance with EU rules. But, of course, any such unilateral action by the UK could only bind courts and parties in the UK. The EU has shown little or no sign of taking equivalent action, beyond warning court users that the current rules will cease to apply and, if they wish to retain the benefit of EU rules, they need to reduce or eliminate their exposure to UK laws and courts. Whether the EU would maintain that approach in the event a no-deal Brexit comes to pass is an open question.

Doubt in this area increases the importance of the one cross-border instrument in the current regime to which the UK can unilaterally accede: the Hague Convention on Choice of Court Agreements.

iv Post-exit: a new relationship agreement?

It is important not to forget that the UK’s departure in March 2019 is only the start of the Brexit process. As soon as the UK leaves the bloc, whether on the basis of the withdrawal agreement or without a deal, attention will switch to the negotiation of a new relationship agreement. If the withdrawal agreement is ratified, the transition period is intended to afford the parties sufficient time to allow the negotiation of that new relationship. If there is no deal, the resulting legal ‘cliff edge’ would only intensify the pressure to conclude a new permanent relationship agreement.

What would that new relationship look like from a civil justice cooperation perspective? The UK government has said since the summer of 2017 that it wants to replicate the effects of the current regime. The EU has, to date, been more guarded, expressing a hope for cooperation...
only in the fields of family and criminal law. The parties’ joint position was set out in a political declaration on the framework for a future relationship, published in November 2018 alongside the final version of the withdrawal agreement. The political declaration does not mention civil justice cooperation. However, that does not mean that there is no prospect of an agreement. The Lugano Convention is a precedent for EU civil justice cooperation with third countries, one that the UK will seek to join post-exit and use as a basis for further and deeper cooperation with the EU.

III GOVERNING LAW

i The present position
Where the laws of different countries could govern a contract or a dispute relating to a non-contractual obligation, the properly applicable law is determined according to two different EU rules, as explained below.

Contracts
The governing law of a contract is determined according to the provisions of Regulation (EC) No. 593/2008 (commonly known as the Rome I Regulation). As an EU regulation, Rome I has ‘direct effect’, which means that it operates in and binds Member States (including the UK) automatically, without the need for Member States to pass their own implementing legislation.

Where a contract was entered into before 17 December 2009, Rome I’s predecessor, the Rome Convention, applies in the determination of its governing law. The purpose and effect of the Convention are broadly similar to Rome I, but its legal character is different and it does not have direct effect. Instead it was implemented in the UK by means of the Contracts (Applicable Law) Act 1990.

The cornerstone of Rome I (and the Rome Convention) is party autonomy: counterparties are free to choose the law they wish to govern their contractual obligations. This default rule is subject to various overriding exceptions that are intended to protect the weaker party in certain types of contracts (for example, contracts for the carriage of passengers, consumer contracts, employment contracts and insurance contracts), to respect public policy imperatives in the law of the forum and to seek to restrain forum-shopping (such that, where the parties have chosen one country’s law to govern their contract but all the other elements of the situation at the time they made that choice point to a different country, certain mandatory provisions of that country’s law may be applicable).

Where the parties have not made an express choice of law in their contract, Rome I sets out how it should be determined. In addition and subject to the overriding rules described in the paragraph above, various other situations are catered for. For example, in a contract for the sale of goods, the governing law shall be that of the country where the seller has his or her habitual residence. And in a contract for the provision of services, the governing law shall be that of the country in which the service provider has his or her habitual residence.

Importantly (particularly in the context of Brexit), Rome I is of ‘universal application’: a Member State court is bound to apply whichever law Rome I dictates should apply in the particular circumstances; it is irrelevant whether that law is or is not the law of a Member State.
Non-contractual obligations

Regulation (EC) No. 864/2007 (the Rome II Regulation) provides for the determination of the governing law of non-contractual obligations. It has been in force across the EU since 11 January 2009 in respect of events giving rise to damage since that date; like Rome I, it has direct effect in the Member States.

Rome II allows parties to agree expressly on a law to govern their non-contractual obligations. That agreement can be made either before or after the happening of an event that gives rise to damage. In the absence of such agreement, the default rule – where the non-contractual obligation is tortious – is that the applicable law shall be that of the country where the damage occurred.

Like Rome I, a court must apply whichever law the application of Rome II specifies, whether or not that law is the law of a Member State.

ii The legal effect of Brexit

The Rome Regulations (or their substance) will continue to apply in the UK post-Brexit and their application will produce the same results as pre-exit. This will happen whether or not the UK and EU conclude a withdrawal agreement. The reasons for this are as follows.

If the withdrawal agreement is signed, its terms provide for Rome I and Rome II to continue to apply as now in respect of contracts concluded before the end of the transition period.

If there is no withdrawal agreement, or alternatively after the end of the transition period, the regulations are examples of ‘direct EU legislation’ that will be incorporated into UK law on exit day (or after the transition period, as the case may be) by operation of Section 3 of the Withdrawal Act. The regulations will function correctly as domestic law post-exit because membership of the EU is not a precondition to their operation. The UK government has laid before Parliament secondary legislation that would make various generally minor amendments to the text of the Rome regulations to facilitate their practical operation post-exit.

Domestication of the Rome regulations is not without potential complication. Most notably, the question arises of how the English courts will in future construe their provisions. The regulations are native to EU law, the ultimate arbiter of which is the Court of Justice of the European Union (CJEU). Member State courts are obliged to interpret EU law in line with the CJEU’s jurisprudence. Post-exit, however, the UK’s courts will not be ‘bound by any principles laid down, or any decisions made, on or after exit day by the European Court’.3 Those decisions will instead be merely a discretionary consideration. That opens up the possibility of a divergence between EU27 and UK courts in the interpretation of an otherwise shared set of laws.

iii Practical implications

An English choice of law clause in a contract will be as valid post-Brexit as it is today.

Courts of the remaining Member States will continue to apply Rome I, which, as already noted, generally respects the choice of law made by the parties. Even where other

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3 Section 6, European Union (Withdrawal) Act 2018.
rules in Rome I are engaged, they are blind to the country the laws of which their application prescribes. In short, whether or not the UK is inside or outside the EU will make no difference to the operation of Rome I.

Meanwhile, an English court is very likely to continue to uphold an English choice of law clause, because Rome I will become part of the UK’s domestic law post-exit.

Moreover, the reasons for choosing English law will remain powerful. It is a highly sophisticated, commercially aware, flexible system of laws used regularly in international business relations.

IV JURISDICTION

i The current position

The Recast Brussels Regulation and the Lugano Convention

EU law underpins the current position. The principal instrument relating to jurisdiction in civil and commercial matters (as well as the enforcement of resulting judgments) is the Recast Brussels Regulation (Brussels Recast). It applies to proceedings started on or after 10 January 2015 in EU Member States. Where proceedings began before that date (but after 1 March 2002), the original Brussels Regulation (Brussels I) applies. A near-duplicate of Brussels I, the Lugano Convention 2007, applies as between the EU and three of the EFTA states: Norway, Iceland and Switzerland.

The basic rule under these instruments is that a defendant should be sued in the European state in which he or she is domiciled. This basic rule is subject to various exceptions, the most significant of which for present purposes is found only in Brussels Recast: where the parties have reached an agreement to confer jurisdiction on a specific Member State’s courts, only those courts may entertain proceedings; any other Member State court in which proceedings are sought to be brought must decline to hear them.

Where the European regime does not apply (e.g., because the claim in question does not relate to a civil or commercial matter; is, like arbitration, specifically excluded from its scope; or because the defendant is resident in a state not a party to the European regime), the common law rules apply. According to these rules, the jurisdiction of the English court is founded by service of process. If a person can be served (either as of right where a person is within the jurisdiction, or with the permission of the court where the person is outside the jurisdiction), then the court may (not must – in comparison with the European regime) hear a claim against them.

The Hague Convention on Choice of Court Agreements

There is one other relevant instrument that takes effect in the UK as EU law: the Hague Convention on Choice of Court Agreements 2005. Under the terms of the convention, the courts of contracting states are bound to uphold qualifying exclusive jurisdiction agreements that nominate the courts of a contracting state. The judgments in the resulting cases are then reciprocally enforceable in contracting states. The EU acceded to the convention on behalf of the Member States. The other contracting states are Mexico, Singapore and Montenegro. Three other states have signed the convention but not yet ratified it: China, the United States and Ukraine. When or whether these states will ratify and accede to the convention is unclear.
Although the convention is a significant advance for cross-border civil judicial cooperation, there are a number of important points to be borne in mind:

a. Most obviously, the convention applies only to exclusive jurisdiction agreements; these must have been concluded in civil and commercial matters (see point (b)) with a cross-border element. One-sided jurisdiction clauses (where one party is compelled to sue in one country’s courts while the other party has the freedom to sue in any court that will entertain the case) are probably outside the scope of the convention (although the English court has expressed a contrary view (albeit in a non-binding context)).

b. The convention applies only to civil and commercial matters. That restriction also applies to Brussels Recast and the Lugano Convention, but the concept is more narrowly drawn in the convention; competition law claims, tort claims, consumer contracts and some insurance contracts are excluded from its scope.

c. The convention applies only to agreements concluded after its entry into force in the state whose courts are, by the agreement, given exclusive jurisdiction. That is 1 October 2015 for Mexico and the 28 current Member States; 1 October 2016 for Singapore; and 1 August 2018 for Montenegro.

d. Finally, the convention is a relatively new instrument and its provisions are, as yet, untested in the courts of contracting states.

ii Position in the event the withdrawal agreement is ratified

For the duration of the transition period, the regime outlined above will continue to apply to and in the UK. Insofar as the regime binds only Member States, plus the UK, that is straightforward. The potential problem comes for those parts of the regime that involve third countries: the Lugano Convention and the Hague Convention. The UK would be bound to uphold those instruments by virtue of the withdrawal agreement but the non-EU states, not being parties to the withdrawal agreement, could not be obliged to reciprocate and continue to treat the UK as if it were still a Member State.

After the end of the transition period, those parts of the EU law regime relating to jurisdiction would continue to be applied by UK and EU27 courts to proceedings begun before the end of transition. The withdrawal agreement does not provide for jurisdiction agreements concluded before the end of transition to be upheld post-transition in accordance with EU law. They would fall to be treated by the English courts in accordance with the common law rules (which generally seek to uphold a clearly expressed choice of forum by the parties) and in the EU27 in accordance with Brussels Recast. The EU rules do not automatically uphold a jurisdiction clause in favour of a non-Member State.

iii Position in the event there is no deal

The UK will not unilaterally domesticate Brussels Recast

The UK government has confirmed that it would not unilaterally apply the current EU law regime in the event of a no-deal departure from the EU. That is because the EU law system relies on reciprocity between Member States. A unilateral adoption of the rules by a country no longer part of the EU would have led to a lopsided regime: the English courts would have

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4 Commerzbank AG v. Liquimar Tankers Management Inc [2017] EWHC 161 (Comm) per Cranston J at [74].
continued to behave as if the UK was a Member State, accepting jurisdiction or deferring to the jurisdiction of other Member State courts in accordance with the rules. But those other Member State courts would not have treated the UK similarly.

The UK government has laid before Parliament secondary legislation that would, in the absence of a deal, revoke Brussels Recast, Brussels I, the Lugano Convention and other instruments in the EU regime. Transitional provisions would mean UK courts continuing to apply the pre-exit EU rules to questions of jurisdiction and the recognition and enforcement of judgments in any proceedings begun before a UK, EU27 or Lugano court before exit day. Of course, these grandfathering provisions can only have effect in the UK courts; how EU27 courts would deal with pending proceedings is unknown. The EU's only comment on the question, contained in a Brexit preparedness notice published in November 2017, states simply that relevant EU law will cease to apply after exit day.\(^5\)

The UK will accede to the Hague Convention on Choice of Court Agreements

As explained above, the UK is currently bound by the Hague Convention by virtue of its membership of the EU; it will cease to be bound when it leaves the EU. The UK government has said since 2017 that it would take steps to ensure that the UK continues to participate in the convention after Brexit. To that end, the UK deposited its instrument of accession with the relevant authority on 31 December 2018. In accordance with the convention’s terms, it will enter into force for the UK in its own right on 1 April 2019. Assuming the UK leaves the EU on 29 March 2019, there will be a two-day period when the UK is not a party, in any capacity, to the convention. The UK government has sought to deal with this problem with a short piece of secondary legislation. It provides that UK courts should deem the convention to be in force for the UK during the ‘gap’ in coverage. The legislation also seeks to assure continuity of coverage by providing that there be no difference in the treatment of jurisdiction agreements concluded during the two distinct periods of UK adherence to the convention. However, there is no guarantee that the courts of other contracting states will adopt a similar approach.

The UK will seek to accede to the 2007 Lugano Convention

The UK government has said that it will seek to continue to participate in the Lugano Convention, an international agreement between the EU and three of the four EFTA states. That would preserve the essentials of the current regime – in other words, a reciprocal arrangement under which English and other European courts would apply a common set of jurisdictional rules.

The Lugano Convention permits a non-EU, non-EFTA state to accede to the Convention but only where it has the unanimous consent of all the other contracting parties. Obtaining that consent could be easier said than done. Even if no objection was raised by another party, as a pure matter of logistics obtaining consents could take some time.

In addition, from a substantive point of view, the Lugano Convention is a less sophisticated instrument than Brussels Recast. This is because its terms mirror Brussels Recast’s immediate predecessor, Brussels I. Most significantly, that means Lugano does not

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\(^5\) A presentation to the Council’s Article 50 Working Party on 27 November 2018 notes that Member States should assess the impact on pending cases and that the Commission will in any event update its November 2017 preparedness notice.
accord exclusive jurisdiction agreements the primacy they now enjoy under Brussels Recast. Under Brussels I and Lugano, the rule is that the court before which a claim is first brought has the right to rule on its own jurisdiction, even where the parties had agreed that they wanted another court to have jurisdiction. That rule facilitated a litigation tactic whereby one party could frustrate or delay the claims of their counterparty by issuing proceedings pre-emptively in a court in which cases are known to move slowly. That tactic was commonly referred to as the ‘Italian torpedo’. The most reliable way to thwart it was to issue proceedings in the desired court before a would-be opponent had a chance to issue in a slower jurisdiction. One unfortunate side effect of this race between the parties to issue a claim in their preferred court was to limit the scope for alternative dispute resolution and early settlement.

iv Practical implications

Should parties still be agreeing English jurisdiction clauses?

The purpose of a jurisdiction clause is to give parties certainty about which courts can or must hear disputes that arise between them; bound up in this is the need for resulting judgments to be enforceable in places where a party has material assets.

The current European regime provides a predictable and robust framework for the allocation of jurisdiction and the enforcement of judgments, but only within the states that are a party to it. Brexit poses a risk to the UK’s continued participation in the current European regime, but it is important to appreciate that this risk is:

a relevant only to the extent parties have a potential nexus with other EU countries;
b mitigated within the EU (and certain other states) by actions the UK has it within its sole power to take – notably accession to the Hague Convention on Choice of Court Agreements; and
c likely subject to significant transitional arrangements in respect of arrangements entered into before the UK’s formal exit in March 2019 (and perhaps up to the end of any subsequent transitional period).

Accordingly, parties negotiating a jurisdiction clause should begin by considering what it is they want their clause to achieve and where they want it to have effect. Brexit per se should not be a reason to avoid or amend an English jurisdiction clause. The many benefits of bringing proceedings in England – not least an impartial and expert judiciary, a well-established and transparent system of court procedure, and the deep pool of talent in the legal and associated professions – will not be affected by Brexit.

Is there any benefit in adopting a non-exclusive jurisdiction clause?

One option for parties entering into contracts now is to consider giving the English court non-exclusive jurisdiction over disputes. That would allow each party the flexibility to choose at the appropriate time whether to sue in England or to try to sue in the courts of one of the continuing Member States of the EU. The ability to sue in an EU court instead of in England might, in theory, be useful in the event that the UK is not immediately able, post-Brexit, to secure a continuation of the current regime whereby English judgments are easily enforceable across the EU.

However, a non-exclusive jurisdiction agreement carries its own risks, which might negate its perceived benefits. Such a clause should be drafted carefully by reference to the
circumstances of the case and a clear understanding of what each party wishes to achieve. Particular issues relevant in the context of the EU and Brexit, pending certainty on the shape of a post-Brexit arrangement, are as follows:

a First of all, a party can only sue in a Member State court if that court has jurisdiction under the EU rules. In other words, a jurisdiction clause that merely confers non-exclusive jurisdiction on the English courts does not, in and of itself, automatically confer a right to sue in another Member State court.

b Second, it is in the nature of a non-exclusive jurisdiction clause that parties have a choice where to start a claim. The result might be that a party is obliged to defend proceedings in a jurisdiction it might rather have avoided – the EU rules require Member State courts to defer (in the first instance, at least) to the court first seised. With the UK outside the EU, there might be greater potential to enlist the help of the English court in resisting litigation overseas, but that would also involve extra time and cost (with no guarantee of success).

c Third, in the event that a party chose to sue in England (or was unable to sue elsewhere), the fact of the non-exclusive jurisdiction clause might impair its ability easily to enforce the resulting English judgment in the EU27, Singapore, Mexico or Montenegro. These states (and the UK, post-exit) are parties to the Hague Convention by which the reciprocal enforcement of certain court judgments is facilitated; non-exclusive jurisdiction clauses fall outside the convention’s scope.

In short, parties considering adopting a non-exclusive jurisdiction clause should consider carefully in which country the particular circumstances of their contract indicate they might need or be able to sue. Is the apparent flexibility enough to compensate for the risk of jurisdictional disputes and the possibility of not being able to sue in England (or another preferred jurisdiction)?

V ENFORCEMENT

i Current position

EU law underpins the current position. The regime for enforcement is contained in the instruments relating to jurisdiction, which are considered in Section IV.

Under Brussels Recast, the judgments of Member State courts can be exported relatively quickly and easily to other Member States. Assuming certain basic conditions are met, Member State courts will recognise and enforce each other’s judgments as if they had been made domestically.

The process for enforcing a Member State court judgment in another Member State is essentially administrative. A judgment creditor obtains a standard form certificate from the court that gave the judgment and then serves this certificate, along with the judgment itself and translations, on the judgment debtor in another Member State. The judgment creditor can then enforce his or her judgment using all the tools available to a domestic judgment creditor in the Member State of enforcement. The process is slightly more long-winded under the Lugano Convention, but nevertheless represents a considerable saving of time over the cross-border enforcement arrangements, such as they were, that existed before the relevant EU law.
Position in the event the withdrawal agreement is ratified

For the duration of the transition period, the current EU enforcement regime would continue to apply to and in the UK as described above. After the end of the transition period, the regime would continue to have some application: the UK and EU27 Member States would enforce each other’s post-transition judgments in accordance with current EU law, provided that they related to proceedings begun before the end of transition.

Options in the event there is no deal

Preserve the effect of Brussels Recast and/or accede to the Lugano Convention or accede to the Hague Convention

The UK could seek to replicate, to a greater or lesser extent, the existing regime. The points made in respect of these options in Section IV apply equally to enforcement.

Revert to reliance on pre-existing network of bilateral treaties

In the twentieth century, the UK entered into bilateral treaties for the mutual recognition and enforcement of judgments with Austria, Belgium, France, Germany, Italy, the Netherlands and Norway. These treaties (and those with certain other non-European states, mostly Commonwealth territories) are given legal effect in the UK by the Foreign Judgments (Reciprocal Enforcement Act) 1933 (the 1933 Act) and related statutory instruments.

Insofar as it relates to the European countries listed above, the 1933 Act has been superseded for nearly all purposes by the current European regime. It continues to have a residual application in respect of judgments that fall outside the scope of the European regime (for instance, where a judgment is given in a claim that is not a civil or commercial matter).

In the UK, at least, a renewed wholesale reliance on the 1933 Act to enforce judgments from the European countries mentioned above should be feasible. However, ensuring reciprocal treatment of English judgments could be more problematic. The European regime was intended to supersede previous arrangements and it is not clear whether and how other European states would enforce those historic arrangements with the UK.

There are also considerable limitations to the scope and operation of the old bilateral arrangements. As well as applying only to seven of the 31 other EU and EFTA states, the regime only applies to money judgments. It is also less creditor-friendly: before a qualifying judgment can be enforced, it must first be registered in the enforcing state’s courts. Even then, there is considerable scope for a judgment’s registration and enforcement to be set aside, for instance on the ground that the foreign court did not, according to the rules of the enforcing court, have jurisdiction over the judgment debtor.

Practical implications

Will European courts enforce English court judgments? What steps can be taken to reduce uncertainty?

Judgments obtained in the English courts up until 29 March 2019 will be fully enforceable in accordance with the current European regime. If the withdrawal agreement is signed, that deadline will be extended until 31 December 2020 (and perhaps up to two years after that, in accordance with the transition period extension provisions of the agreement). In the event of a no-deal Brexit, or after the end of the transition period if there is a deal, there is considerable incentive for EU Member States to maintain the current regime, or a version of
it, so that their local judgments continue to be easily enforceable in the UK. At the time of writing, accession by the UK to the Lugano Convention (which would require the consent of the EU, as well as Norway, Iceland and Switzerland) would go a long way towards achieving this objective.

Further and in any event, the Hague Convention, which the UK will become a party to independently of the EU on 1 April 2019, will provide another post-Brexit means by which English judgments in disputes arising from qualifying exclusive jurisdiction agreements will continue to be enforceable in Member States.

VI  INTERNATIONAL ARBITRATION

i  The current position

The legal framework governing international arbitrations seated in England is largely British or multilateral in origin; the role of EU law is small.

Jurisdiction

The procedural law that governs English-seated arbitrations is the Arbitration Act 1996 (the AA 1996). Section 30(1) AA 1996 provides that, unless the parties agree otherwise, an arbitral tribunal may rule on its own substantive jurisdiction.

Governing law

There are three distinct areas in which governing law will fall to be determined:

a  The law of the arbitration agreement. In most cases, unless the parties have expressly provided for a particular law to apply to the arbitration agreement, the governing law will be that of the contract containing the arbitration clause. Where the contract is silent on this, the law will be that of the jurisdiction most closely connected to the seat of the place where the arbitration is to be held. (The Rome I Regulation – although it might dictate the same result as the close connection test – does not apply to arbitration.)

b  The law of the arbitral process. This will be the law of the seat, and where the parties have not expressly identified a seat the court will determine it on the basis of the parties’ agreement and all the relevant circumstances.

c  The law of the substance of the dispute. In most cases, this will be the law that the parties have by their contract selected to govern their obligations. Where the parties have adopted institutional rules for their arbitration, these will guide the tribunal in the event that there is no express choice of law. In the absence of a set of institutional rules or other agreement between the parties, Section 46 AA 1996 states that the tribunal shall apply the law determined by the conflicts of laws rules which it considers appropriate. This affords a tribunal a wide discretion, although in most cases where the seat is London it is likely that a tribunal will apply English rules. These are in the Rome I Regulation and can be applied by a tribunal in these circumstances notwithstanding the arbitration exclusion in Rome I.

Enforcement

Cross-border enforcement (including in all the current Member States of the EU) is effected pursuant to a multilateral agreement: the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The UK is a signatory to the New York
Convention in its own right and provisions of the AA 1996 implement the Convention in UK law. Sections 101 and 102 AA 1996 provide that awards made in states that are a party to the New York Convention shall be recognised in the UK as binding on the parties and shall be enforceable by means of the mechanism set out at Section 66 AA 1996.

ii The effect of Brexit

The impact of Brexit on international arbitrations seated in England and London's position as a major international arbitration centre is likely to be minimal. The AA 1996 is a UK statute not dependent on or linked to the UK's EU membership. The New York Convention is a multilateral instrument not linked to the EU; the UK and the other Member States are signatories to the Convention in their own right. The European regime applicable to jurisdiction and enforcement expressly excludes arbitrations from its scope.

Some argue that the legislative uncertainty that could arise in some areas of the dispute resolution framework post-Brexit should make arbitration a more popular choice for commercial parties.

iii Practical implications

A return of the anti-suit injunction in Europe?

An anti-suit injunction is a device by which the English court can restrain a person over whom it has jurisdiction from bringing or continuing proceedings in a foreign court. They were classically used to prevent a party who had agreed to settle a dispute in England from breaking that promise by bringing proceedings in another country.

Anti-suit injunctions to restrain proceedings in another Member State (or signatory to the Lugano Convention) have been prohibited since 2004, when the CJEU ruled that they were inconsistent with the scheme and provisions of the Brussels Convention (the predecessor of today's Recast Brussels Regulation). Under the Convention, the CJEU explained, the courts of Member States owe each other obligations of trust; it is not for the English court to seek to deprive another state's court of its right to decide whether or not to accept jurisdiction over a claim. That is properly a decision for the courts of each state to make in accordance with the requirements of the Convention.

All other things being equal, when the UK ceases to be a member of the EU, decisions of the CJEU will cease to bind its courts. In theory, an English court could, where it had jurisdiction over a respondent, make an order restraining him from pursuing proceedings in a Member State where that would constitute a breach of some prior agreement.

However, in practice, there are several reasons why the English court may remain reluctant to grant this kind of relief:

a The UK has said it wishes to reach an agreement with the EU that substantially replicates the provisions of the European regime. It has also taken steps to accede in its own right to the Hague Convention on Choice of Court Agreements, and has signalled that it wishes to continue to participate in the Lugano Convention. Although it is unlikely that any new agreement with the EU would place the UK under the direct jurisdiction of the CJEU, the exercise of the anti-suit jurisdiction would nevertheless be inconsistent with case law and might conceivably place the UK in direct breach of whatever arrangement it negotiated with the EU.

b The English court's jurisdiction to grant an anti-suit injunction is exercised in personam, that is to say, it is not technically a direct interference with a foreign court's process, but rather a restraint on a person who is already within the English court's jurisdiction.
Where that person is abroad, jurisdiction might be contingent on obtaining permission from the English court to serve that person outside England. It may be difficult to persuade a court to exercise its discretion to permit service out in circumstances where that could be perceived by an EU court as an unwarranted interference with its jurisdiction. In other words, principles of comity might take the place of formerly applicable CJEU jurisprudence.

Should arbitration be the default dispute resolution choice for cross-border contracts and transactions?

The regime governing cross-border enforcement of arbitral awards is not linked to the EU and will be unaffected by Brexit. In some circumstances, arbitration could offer a more certain and more appropriate dispute resolution process.

However, it is important to recognise that an arbitration clause is not a universal panacea. Parties thinking of incorporating an arbitration clause in contracts should still weigh up the relative pros and cons of choosing arbitration, both generally and for the type of disputes that may materialise under the specific contract in question. Relevant considerations might include the limited rights of appeal generally available in arbitrations, and the ability of parties to an arbitration agreement to obtain urgent relief. Parties should also consider carefully the different arbitral institutions and rules that are available to determine that may be appropriate for their circumstances.

Should parties consider including hybrid clauses providing for arbitration as well as litigation in the English courts?

A hybrid jurisdiction clause can provide for the English courts to have jurisdiction over disputes, while also giving one party the right to elect for arbitration. (Giving both parties such a right would be impracticable and would likely lead to further disputes.)

Although superficially attractive for their apparent flexibility, such clauses may in fact do little to mitigate the risks they are designed to guard against. This is because hybrid clauses are a type of one-sided jurisdiction clause: although the English courts have upheld such clauses, courts in certain EU Member States, most notably France, have found them to be unenforceable in some circumstances.

As a result, entering into such a clause creates not only the risk that the enforcement benefit of an arbitral award will be removed, as the clause underpinning the arbitration will itself be unenforceable, but also raises the prospect of additional challenges at the jurisdiction stage by competing tribunals within the EU. In the absence of a clear indication that the courts of all potentially relevant jurisdictions will uphold such a clause, they are unlikely to be suitable.
Chapter 2

BANGLADESH

Fahad Bin Qader

I  INTRODUCTION

As of March 2016, there are over 85,000 pending civil cases in the High Court of Bangladesh according to the Law Minister of Bangladesh, Mr Anisul Haque. One of the steps that the Bangladeshi government is currently taking to manage the overwhelming amount of pending cases is to divert more time and resources to alternative dispute resolution instead of going through the traditional court process, which takes longer.

In Bangladesh there are two main ways to resolve a dispute without seeking the assistance of the court, one being mediation and the other being through arbitration. It must be stated that mediation in Bangladesh is unregularised except for certain laws that provide room for mediation. However, the concept of arbitration was introduced to legal system of Bangladesh from the beginning of the country’s existence.

The first Act that tried to tackle the issue was enacted in 1940 by the name of the Arbitration Act 1940, well before Bangladesh came into existence as an independent country. Hence, the idea of an alternate means of handling court cases is not something new for Bangladesh; however, the implementation, practice and popularity of the Act has taken time. Though the 1940 Act was eventually repealed by the enactment of Arbitration Act 2001. The 2001 Act was heavily influenced by the UNCITRAL Model Law. The 2001 Act was mainly enacted to tackle some of the issues that were observed in its predecessor. The main issue with the 1940 Act was that it was extremely difficult to enforce foreign arbitration awards in Bangladesh. It was a result of the fact that the 1940 Act did not specifically have any provisions that dealt with foreign arbitral awards.

The Arbitration Act 2001 currently is the operative law that dictates the whole aspect of ADAR in Bangladesh, and the courts of Bangladesh are providing a steady flow of case law to sufficiently interpret and enforce the 2001 Act. The 2001 Act, though not perfect, attempts to resolve the issues observed in its predecessor.

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1 Fahad Bin Qader is an associate barrister at Counsels Law Partners.
2 The Independent BD.
3 Came into force on 1 July 1940.
4 Came into force on 24 January 2001.
II ARBITRATION

i Form of arbitration clauses and their application

As per Section 9(1) of the Arbitration Act 2001 ‘An Arbitration agreement may be in the form of an arbitration clause in contract or in the form of a separate agreement,’ so like many other country’s arbitration law, Bangladesh also recognises an arbitration clause in an agreement. The other requirement for an arbitration clause to be valid is that it must be in writing if it is contained in any of the following forms as per Section 9(2) of the Arbitration Act 2001:

- a document signed by the parties;
- an exchange of letters, telex, telegrams, fax, email or other means of telecommunication that provide a record of the agreement; or
- an exchange of statement of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

It seemed that the Arbitration Act 2001 covered all the aspects regarding an arbitration clause, however, a question was raised regarding the legality of a separate arbitration agreement. This was seen as a problem as the Arbitration Act 2001 did not mention anything regarding a separate arbitration clause; however, this issue was resolved by the High Court Division of Bangladesh in the case of Lita Sama Samad Chowdhury v. Mohammad Hossain Bhuiyan. In this case, the High Court stated that ‘An arbitration agreement which forms part of another agreement shall be deemed to constitute a separate agreement which giving decision for the purpose of determining the jurisdiction of the arbitral tribune.’ The High Court went so far as to criticise the decision of the joint district judge by stating ‘The learned Joint District Judge committed illegality by not acting in accordance with law by not staying the proceeding of Money Suit.’ The High Court division directed both the parties to take steps at first to refer the matter for arbitration as per the clause of the agreement to resolve the dispute. Hence, it was made clear that the arbitration clause would be considered as a separate agreement and it can also be used to determine the jurisdiction of the arbitral tribunal. Therefore, the courts of Bangladesh have already accepted the status of an arbitration clause as a valid and very much enforceable term of a contract.

Two important aspects of the Arbitration Act 2001 that are of vital importance where an arbitration clause is present in the agreement are when is the correct time to apply for the matter to be referred for arbitration and the court’s duty regarding the claim that was filed.

ii When to invoke the arbitration clause

As per Section 10 of the Arbitration Act 2001, an arbitration clause may be invoked at any time before filing a written statement (defence statement or response to particulars of claim) and the application to do so must be made to court where the claim is pending. After receiving the application, the court must as per Section 10(2) of the Arbitration Act 2001 ‘if it is satisfied that an arbitration agreement exists, refer the parties to arbitration and stay the proceedings, unless the Court finds that the arbitration agreement is void, inoperative or is incapable of determination by arbitration’. Hence, the correct time to refer a matter to arbitration is after a claim has been filed at court and before the respondent or defendant has filed the defence.
Moreover, another way of invoking the arbitration clause is laid down in Section 27 of the Arbitration Act 2001, which states that the proceeding will be deemed to commence if any dispute arises where the concerned arbitration agreement applies and any party to the agreement has received a notice stating that the party wishes to refer a dispute to arbitration or a party has received from another party to the agreement a notice requiring that party to appoint an arbitral tribunal or to join or concur in, or approve the appointment of, an arbitral tribunal in relation to the dispute.

iii The court’s duty when an arbitration clause has been invoked

The court’s duty when an arbitration clause is invoked was clarified by the High Court Division in the case of International Sea Foods Limited v. BD Corporation where the Court stated ‘A plaint will not be rejected under Order VII, Rule 11 of the Code [the Code of Civil Procedure 1908] because of the presence of an arbitration clause.’ The proper recourse is to stay the proceedings under Section 10(2) of the Act, until the conclusion of arbitration proceedings. By the passing of this judgment the Court made two things abundantly clear. If a claim has been filed with regard to a dispute regarding an agreement where an arbitration clause has been mentioned, the correct time to refer the matter to arbitration is before submitting the defence statement, and the court must stay the proceeding and refer the matter for arbitration.

iv Jurisdiction

As per Section 7 of the Arbitration Act 2001 ‘where any of the parties to the arbitration agreement files a legal proceedings in a Court against the other party, no judicial authority shall hear any legal proceedings except in so far as provided by this Act’. Moreover, as per Section 2(b) of the Arbitration Act 2001 a court means ‘District Judge’s Court and includes Additional Judge’s Court appointed by the Government for the discharging the functions of District Judge’s Courts under this Act through Gazette notification’. Though, originally the jurisdiction was given to the courts of Bangladesh but as per ECOM Agro Corp. Lts. & Anr v. Mosharaf Composite Textile Mills Ltd if the arbitration procedure has already started in a different institute of Bangladesh then the courts of Bangladesh would not have any jurisdiction to accept and try a civil case in the courts of Bangladesh. In this case it was held that ‘The defendant has already commenced a proceeding against the plaintiff before the Tribunal if the MCCI under the arbitration clause of the contract, which is not defined by the plaintiff. If it is so, under Section 7 of the Act, the subordinate Judge would have no jurisdiction to proceed further with the suit.’ Therefore, if the arbitration process was initiated at tribunal, the courts of Bangladesh would not have any jurisdiction to try the case. This aspect of the law is crucial as it sets out a clear guideline as to the jurisdiction of the courts with regards to arbitration procedure and matters that must be left to the arbitration tribunals.

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7  22 BLC (2017)-HCD-145.
8  Act No. V of 1908.
9  23 BLT (2015)-HCD-42.
10 Metropolitan Chamber of Commerce & Industry Bangladesh.
v  **Place of arbitration**

Section 26 of the Arbitration Act 2001 provides the procedure to be followed while selecting a venue for the arbitration hearing to be conducted. Primarily, the selection of the venue for holding the arbitration procedure is up to the joint mutual consent of the parties. However, if it seems that the parties cannot mutually agree upon a venue, the decision will rest upon the arbitral tribunal that will have regard to the circumstances of the case, including the convenience of the parties. The arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property. Hence, the Arbitration Act 2001 does not provide many restrictions as to the actual location of the hearing, rather it has been left to the parties to mutually agree upon the venue.

### III THE ARBITRAL TRIBUNAL

i  **Composition of the arbitral tribunal**

As per Section 11 of the Arbitration Act 2001, it is the right of the parties to an arbitration tribunal proceeding to determine the number of arbitrators and if the parties fail to mutually decide upon the number of arbitrators, there will be three arbitrators. If the number of arbitrators decided by the parties is an even number, another arbitrator must be appointed with the joint consent of the parties.

The procedures to appoint arbitrators have been provided in Section 12 of the Arbitration Act 2001. Primarily, it has been left to the parties to arbitration to agree on a procedure for appointing the arbitrator or arbitrators. The arbitrator can be of any nationality, unless otherwise agreed by the parties. If the arbitration clause requires only one arbitrator to be appointed and a request to appoint the arbitrator by one party to the other was not agreed within one month of receiving such request, the party requiring the arbitrator to be appointed must apply to the district judge of Bangladesh for it to appoint such arbitrator in cases other than international commercial arbitration. In the case of international commercial arbitration, the appointment must be made by a judge of the Supreme Court who was in turn nominated by the Chief Justice.

Where there are three arbitrators to be appointed, each party will appoint one arbitrator and the third arbitrator will be appointed jointly by the other two arbitrators. Moreover, if two arbitrators fail to mutually appoint the third, then again in cases of international commercial arbitration the third arbitrator will be appointed by a judge of the Supreme Court who was in turn nominated by the Chief Justice and in other instances the district judge. The third appointed arbitrator shall be the chair of the said tribunal. The appointment of the arbitrator by the district judge or Supreme Court judge must be made within 60 days of the receipt of the application thereof.

So, it can be said that the composition of the arbitral tribunal is primarily up to the joint decision of the parties, as it was further evident in the case of *Mohammad Enamul Huq v. Govt. Bangladesh &Ors* where the district judge wrongly did not allow the parties to propose names who may be appointed as the arbitrators, and the High Court in response to the decision stated that ‘The learned Joint District Judge in passing the impugned order...’
stepped beyond his jurisdiction inasmuch as according to express provision of Section 12 of the Arbitration Act the District Judge is empowered to direct the parties to make proposal of the name of the Arbitrators.’

ii Arbitration procedure

General responsibilities of the arbitral tribunal are established in Section 23 of the Arbitration Act 2001, which states among other things that it is the duty of the tribunal to deal with any disputes submitted to it fairly and impartially. This Section also provides some general rights to the parties involved in the arbitration procedure such as the parties will be given opportunity to present their case orally or in writing or by both, each party shall be given reasonable opportunity to examine all the documents and other relevant materials filed by other party or any other person concerned before the tribunal, the tribunal shall deal with a dispute submitted to it as quickly as possible and the arbitral tribunal in conducting proceedings shall act fairly and impartially.

The Arbitration Act 2001 further provides that the tribunal is not bound by the Bangladesh Code of Civil Procedure and Evidence Act 1872. Hence, it provides the tribunal with a wide range of discretion while conducting the trial more specifically with regards to evidential matters. With relation to other procedural requirements as per Section 25 of the Arbitration Act 2001, the arbitration procedure will follow the same procedure that was agreed upon by the parties to the arbitration procedure through the arbitration clause in the agreement. If there is no agreement as to the procedural requirements of the arbitration, it will be the duty of the arbitrators to set the procedure for the arbitration proceedings. As per Section 25(3), procedural and evidential matter relates to the time and place of holding the proceeding either in whole or in part, language of the proceeding, written statement of claim, specimen copy of defence, time of submission and range of amendment, publication of document and presentation thereof, the questions asked to the parties and replies thereof, written or oral evidence as to the admissibility, relevance and weight of any materials, power of the arbitral tribunal in examining the issue of fact and issue of law, and submission or presentation of oral or documentary evidence. Therefore, it is quite evident that arbitration as a procedure in Bangladesh is independent from the general ambit of the civil litigation and evidence law.

As per Section 29 of the Arbitration Act 2001 it is up to the tribunal to decide the period the claimant has to state the facts supporting his or her claim, the points at issue and the relief or remedy sought, and the period the respondent has to state his or her defence, unless parties have mutually decided upon a different time frame. The parties also have the right to submit all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit in future. The parties are also at liberty to amend or supplement the claim or defence during the course of the arbitral proceedings unless the tribunal decides the amendments to be inappropriate considering fairness or the delay in making such amendments.

With regard to terminating an arbitral procedure, the tribunal holds various powers, for example, as per Section 35 of the Arbitration Act 2001, the parties are at liberty to agree on the powers of the arbitral tribunal in case of a party’s failure to do what is necessary for the proper and expeditious conduct of the arbitration. However, the tribunal may terminate

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12 Act No. 1 of 1872.
the arbitral proceedings if the claimant fails to communicate his or her statement of claim to the tribunal and if the respondent fails to communicate his or her statement of defence, the tribunal shall continue the proceeding without treating that failure in itself as an admission of the allegations by the claimant. Moreover, the tribunal may also dismiss the proceedings if the tribunal is of the opinion that there has been an inordinate and inexcusable delay on the part of the claimant in pursuing his or her claim and the delay has given rise or is likely to give rise to a substantial risk that it is not possible to have a fair resolution of the issues in that claim, or has caused or is likely to cause serious prejudice to the respondent. Moreover, as per Section 41 of the Arbitration Act 2001 an arbitral proceeding shall be terminated if:

a. a final arbitral award is made;
b. the claimant withdraws his or her claim;
c. the parties agree to terminate the proceedings or the arbitral tribunal; or
d. the tribunal finds that the continuation of the proceedings is unnecessary or impossible.

Whether the hearing is an oral hearing for the presentation of evidence or for oral argument, or whether the proceeding shall be conducted on the basis of documents and other materials will again depend on the decision of the arbitral tribunal as per Section 30 of the Arbitration Act 2001. The tribunal may hold an oral hearing at an appropriate stage of the proceeding either at the request of the parties or at its own motion unless the parties otherwise agreed that there shall be no oral hearing. The tribunal must also give sufficient prior notice before conducting a hearing and of any meeting of the tribunal for the purpose of inspection of different materials that are subject to the arbitration procedure. While making its decision, the arbitral tribunal must indicate to the parties the statements, documents or other information that was taken into consideration while reaching its decision.

Legal or other representation can be appointed by the parties to represent its case to the arbitral tribunal as per Section 31 of the Arbitration Act 2001. Moreover, as per Section 32 of the Arbitration Act 2001, unless otherwise agreed by the parties, the tribunal may appoint different kinds of experts or legal advisers to report to it regarding different matters that might be an issue in the arbitral proceeding. In this instance, the experts will have access to all the relevant documents or information that might be required to determine the issue referred to them. The parties have few rights as to the report produced by the expert and they also have the right to put question to the expert witnesses in order to testify them on the points of issue or issues, to review the documents, goods or other properties that were used by the expert to produce his or her report and the right to have reasonable opportunity to comment on the report, information, opinion or advice submitted in the tribunal by the expert.

With regard to a summons, the arbitral tribunal does not have any direct jurisdiction to compel any witness to come before the tribunal; however, as per Section 33 of the Arbitration Act 2001, the tribunal or a party with the permission of the tribunal may apply to the Court13 to issue a summons to the witnesses. The summons will have the same effect as the summons that was issued by the courts of Bangladesh. Therefore, a person who is compelled to attend the tribunal as per the summons and does not appear will be punished in the same manner as one failing to attend a summons for a hearing that was issued by the district judge.

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13 As per Section 2(b) court means the district judge.
IV  THE ARBITRAL AWARD

i  Making of an arbitral award

According to Section 36 of the Arbitration Act 2001, the arbitral tribunal must decide the dispute in accordance with the rules of law as is designated by the parties as applicable to the substance of the dispute. Generally, in cases of arbitration proceedings the arbitration clause dictates the law of the country that shall be followed in determining the arbitration proceeding. Unless otherwise agreed by the parties, where there is more than one arbitrator the decision of the tribunal shall be made by a majority of all its members.

As per Section 38 of the Arbitration Act 2001, the arbitration award shall be made in writing and shall be signed by the arbitrator. In a proceeding where there is more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient as long as the reason for any omitted signature is stated unless otherwise agreed otherwise by the parties. The arbitral award shall state its date and the place of arbitration and the award shall be deemed to have been made at that place. After the award is made a copy of the award signed by the arbitrator or arbitrators shall be delivered to each party.

ii  Enforcement of an arbitral award

The award obtained by arbitration can be enforced in the same manner as if it was a decree of the court as per Section 44 of the Arbitration Act 2001.

With regard to foreign arbitration awards as per Section 45 of the Arbitration Act 2001, a foreign arbitral award shall on the application being made to it by any party, be enforced by execution by the court under the Code of Civil Procedure, in the same manner as if it were a decree of the court. An application for the execution of a foreign arbitral award should contain the original arbitral award or copy thereof duly authenticated in the manner required by the law of the country in which it was made, the original agreement for the arbitration or a duly certified copy thereof and such evidence as may be necessary to prove that the award is a foreign award. The High Court division has recently made it clear in *Goenka Impex SA v. Tallu Spinning Mills Ltd* (Civil)\(^\text{14}\) that if all the requirements are met a court must accept the foreign award as having the same force as a decree of its own.

iii  Recourse against an arbitral award

A party has the right to apply to the court to set aside an order given by the arbitration tribunal; however, such application as per Section 42 of the Arbitration Act 2001 must be made within 60 days of the receipt of the award in cases where it is not an international commercial arbitration, and in cases of international commercial arbitration the appeal must be made to the High Court Division within 60 days of the receipt of the award.

Section 43 of the 2001 Act provides the situations where the appeal against an arbitration award will be accepted and these are:

- where a party to the arbitration agreement was under some incapacity;
- the arbitration agreement is not valid;
- proper notice was not given of the appointment of an arbitrator or of the arbitral proceedings;
- where a party was otherwise unable, owing to reasonable causes, to present his or her case;

\(^{14}\) 2 ALR (2013)-HCD-427.
the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

the arbitral award contains decision on matters beyond the scope of the submission to arbitration; and

the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties.

Also, the High Court Division has wide discretion that can undermine a decision given by the arbitral tribunal in cases of foreign arbitral awards. The High Court Division can as per Section 43(b) of the Arbitration Act 2001 set aside an arbitral award if it is satisfied that (1) the subject matter of the dispute is not capable of settlement by arbitration under any law of Bangladesh in force, (2) the arbitral award is prima facie opposed to the law for the time being in force in Bangladesh, (3) the arbitral award is in conflict with the public policy of Bangladesh, and (4) the arbitral award was induced or affected by fraud or corruption. This aspect of the Arbitration Act 2001 produces a huge number of controversies mainly owing to the fact that the High Court can easily throw out a foreign arbitral award if it goes against the public policy of Bangladesh. The meaning of ‘public policy’ has not been defined in the Act, hence the power of the High Court in this regard is immense. This is because the legislators intended the courts to have enough power to dismiss an arbitral award if it might cause substantial harm to the economy or to any other sector of the country. This fact was evident in the case of Maisha Corporation (Pvt) Ltd v. BSMMU (Civil),\(^\text{15}\) where the High Court outright stated ‘compensation for any part thereof can be allowed to spend from the Public Fund’. Furthermore, a very vague definition of the term public policy was provided that stated ‘It is against the Public Policy meaning thereby that Public Fund cannot be misused by granting such Award.’ The High Court by delivering this decision has made its stance clear with regards to foreign arbitral awards.

The party appealing against the decision of the arbitral tribunal may be ordered by the Court or the High Court Division as the case may be to deposit the amount awarded by the arbitral tribunal in to it before it entertains the appeal. Therefore, the appeal procedure cannot be used to delay the payment of the arbitral award.

\section*{V CONCLUSION}

Alternative dispute resolution in Bangladesh has two branches and of them only arbitration is regulated. Though the arbitration law of Bangladesh is far from perfect, especially with regard to enforcing foreign arbitral awards, the procedures involved in the process of invoking and later obtaining an arbitral award are sound. Now that the government of Bangladesh is focusing on the concept of alternative dispute resolution, more changes can be expected soon.

\(^{15}\) 18 BLC (2013)-HCD-194.
INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

In Brazil, the inspiration from Europe and the prestige of the nineteenth century's constitutionalist theories have developed into the codification of law, providing for general principles and rules. The Brazilian legal system follows the tradition of civil law, and has also been impacted by a common law influence, with common law mechanisms recently being adopted; where a precedent exists, a higher judicial authority is utilised.

Brazilian law is hierarchically organised. Accordingly, the Federal Constitution is the country's supreme law, determining fundamental principles, rules concerning the organisation of government and the horizontal distribution of power. The Federal Constitution, comprising over 100 articles, provides thorough and specific rules on an array of matters.

Complementary and Ordinary Laws are placed at the second level of the hierarchical scale, and are intended to regulate social relations such as in commercial, tax, civil, administrative, economic and criminal matters. Likewise, provisional measures enacted by the executive branch are placed at the second level. Moreover, equivalent significance is granted to rules proposed by the judicial branch at its highest level – the Federal Supreme Court – when it issues binding legal precedents.

Brazil is a federation formed by the federal government, the states and Federal District (the country's capital), and the municipalities. Each is responsible for legislating on specific matters, resulting in the fact that the hierarchy among the various types of legislation does not derive from the creator of the law, but, rather, from the subject matter of the particular legal text (e.g., only the federal government may legislate on civil and commercial procedure matters). In this regard, it is also interesting to point out two peculiarities of the Brazilian federation: first, municipalities are deemed federated entities; second, the self-determination of the states and their autonomy to enact laws is, in fact, quite limited.

The Brazilian judicial branch is formed by state and federal courts. The ordinary jurisdictions deal with civil, criminal, commercial, administrative and economic law, among other things. However, specialised jurisdictions relate to disputes involving military justice, labour and electoral law.

Administrative disputes that are not resolved definitively in administrative tribunals are settled in ordinary courts, which are not characterised as being a specialised jurisdiction.
The executive branch has administrative tribunals with limited and specific jurisdiction over certain matters. In any case, commencing a proceeding before the administrative branch is not mandatory to access the judicial branch and does not prevent any lawsuit or appeal from appearing before courts.

The judicial branch provides for a hierarchic division, encompassing three levels. The lower court is, as a rule, in charge of the first analysis of the facts and application of the law related to the case, and settles the dispute by rendering a single judge’s decision. The parties may appeal to the appellate courts, which will likely render their decision through a three-judges panel after re-examining the applicable law and the facts of the case. This division is applicable to the ordinary and specialised courts.

Should a party deem that an ordinary appellate court has breached a federal law, it may file a ‘special appeal’ to the Federal Court of Appeals (STJ), a higher court located in the country’s capital Brasilia that has jurisdiction over the entire Brazilian territory and is tasked with ensuring compliance with infra-constitutional laws. However, the jurisdiction of the STJ is limited to issues of law (it may not review the facts of a case that have already been settled and determined by the lower or appellate courts), depending on the particular case.

As for specialised jurisdictions, parties need to appeal from an appellate court to specialised federal courts of appeals (i.e., the Labour Federal Court of Appeals, Military Federal Court of Appeals and Electoral Federal Court of Appeals). In certain cases, appeals will be filed from such specialised courts to the STJ, especially in circumstances of conflict of jurisdiction.

Other than an appeal to the STJ, a party may seek relief from the Federal Supreme Court, if it considers that constitutional law and its principles have been breached.

In specific cases, the first degree of jurisdiction will be exercised by the appellate courts, the STJ and even the Federal Supreme Court depending on the positions held by the parties. In other words, the President of the country, the Vice President, Cabinet members, the Attorney General and members of the Congress, when accused of committing crimes, may only be prosecuted before the Federal Supreme Court. State governors may only be prosecuted before the STJ.

II THE YEAR IN REVIEW

In 2018, the Upper Courts were called to decide on the construction and applicability of several procedural rules, including those introduced by the new Civil Procedure Code, which entered into force in 2016.

In this regard, one of the most relevant decisions rendered by the STJ concerns the statute of limitations applicable to contractual claims. The STJ has specifically affirmed that any claim based on a contract, even those seeking indemnification, could be commenced within 10 years of the event that gave rise to the claim. The statute of limitations applicable to claims based on contractual breach was a source of considerable legal uncertainty, as court decisions (including decisions rendered by the very STJ) have been applying either a three-year or a 10-year statute of limitations. The core of this dilemma lies in the Brazilian

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3 For example, administrative tax tribunals (the Court of Taxes and Fees of the State of São Paulo) and the Administrative Council for Economic Defence antitrust authority.

4 However, if a party opts to skip administrative tribunals, it will lose certain privileges, such as being able to question a tax assessment without providing an asset-based guarantee.
Civil Code, which provides for a general rule of a 10-year statute of limitations and for shorter periods applying to certain claims (such as the three-year statute of limitations applicable for indemnification claims).

The new Civil Procedure Code provides a list encompassing only a dozen or so types of decisions that would entail the right to file an appeal before a final decision is rendered in the proceeding. As a result, all other decisions rendered during such proceeding could only be challenged after a final decision by the lower court judge. This was an attempted effort by the (relatively) new Code to reduce the overall number of appeals possible in a particular case, with a view to expediting the proceedings. Nevertheless, in view of the risk that such limitation imposed, in practice, on a party’s right, certain state appellate courts have accepted the filing of interlocutory appeals even in those circumstances that were not featured in the list provided by the Civil Procedure Code. In light of the differences in the application of the legal provision that limits the cases in which an interlocutory appeal may be filed before the appellate courts, the discussion has finally arrived before the STJ. After a close vote (seven to five), the STJ decided that the list set forth by the Civil Procedure Code may be extended in light of the urgency of the case and in cases where an appeal decided only at the end of the proceeding would prove to be useless.

Another relevant decision rendered by the STJ confirmed the jurisdiction of arbitral tribunals over reorganisation (insolvency) courts to decide matters relating to issues involving shareholders’ issues, including increase of capital of companies under reorganisation. The decision is in tune with prior pro-arbitration decisions rendered by Brazilian courts and corroborates the adhesion, by Brazilian law, to the principle of competence-competence. The support for arbitration is even more remarkable because the decision was rendered within the context of the Oi Group’s reorganisation proceeding, the largest such proceeding in Latin America, and may directly affect not only the company’s restructuring plan (and, thus, tens of thousands of creditors) but other restructuring proceedings as well.

In tune with the major Labour Law reform that occurred in 2017, the Supreme Court recently confirmed the constitutionality of outsourcing of core activities of a company. Although it is too soon to evaluate the full impact of the Labour Law reform, statistics released by Labour Courts indicate a significant decrease in labour claims commenced in 2018 (over 2 million in 2017 and fewer than 1.3 million in 2018) and of the overall pending cases (2.4 million in 2017 and 1.9 million in 2018.)

III圍ROFOURSE

Overview of court procedure

In addition to specific procedural rules, the Federal Constitution and the Civil Procedure Code set forth principles and guarantees concerning procedural aspects, among which are due process of law, reasonable length of the proceeding, independent and impartial judges, and the need for all court decisions to be explained (grounded).

In most cases, court proceedings in Brazil take place before judges, who are expected to ensure their swift development while remaining impartial. Trials by jury are the exception and only happen in specific criminal matters (always in conjunction with the participation
of lower court judges). Likewise, the various steps in a court dispute must take place within the context of the court proceedings themselves, including most of the evidence production stage. 5

The new Civil Procedure Code, which came into force in 2016, has innovated in terms of local law by providing more flexibility to the structure and deadlines involved in a court proceeding. Parties are now allowed to agree on the schedule for certain acts and on what kinds of evidence will be allowed – this is clearly inspired by arbitral proceedings.

Moreover, conciliation and mediation hearings are now a default procedure for most of the cases.

A proceeding usually commences with the filing of a claim before the clerks of the court with jurisdiction over the particular matter. A judge from within the court will be assigned, at random, to hear the case. After a preliminary analysis of the claim, should all the requirements be fulfilled, the judge will order the defendant to be served with process. The defendant is expected to file its defence within 15 business days of the service of process 6 or as of the preliminary hearing, should a settlement not be reached. Once the arguments of each party have been presented, the judge will order the production of evidence in addition to the evidence already supplied by the parties in their pleadings. In most cases, the production of ‘new’ evidence will be circumscribed to court-mandated expert examination of certain matters made by a court-appointed expert 7 and oral deposition of the parties and witnesses in the context of court hearings. 8 Upon completion of the evidence production, the judge is expected to render a ruling on the merits of the case.

Appeals to appellate courts may be filed against final lower court decisions within 15 business days of such decisions having been made public. The Brazilian legal system provides for a wide range of appeals to state appellate courts, the STJ, the Federal Supreme Court as well as to specialised higher courts. The new Civil Procedure Code has reduced various opportunities in which an appeal may be filed.

Finally, in terms of territorial jurisdiction, the general rule is that civil and commercial lawsuits that do not concern real property rights should be brought before the courts of the place where the defendant is domiciled, or in which its headquarters are located. Several exceptions and supplemental jurisdiction rules are provided by the Civil Procedure Code and specific law. Choice-of-forum clauses are valid for lawsuits arising from contracts, and the new Civil Procedure Code provides that Brazilian courts may not have jurisdiction to hear disputes arising out of international contracts containing exclusive choice of foreign courts. However, courts may render a choice-of-forum clause void should they deem that the agreement is unequitable or that it has been reached through abuse of rights.

5 Court proceedings in Brazil do not contemplate out-of-court discovery (including e-discovery), such as in ‘fishing expeditions’. Evidence production is highly regulated and the burden of producing such evidence is clearly allocated depending on the kind of procedure.

6 The deadline for a defendant to present written opposition to a claim will start running from the moment of the filing of the receipt of service of process.

7 Parties are allowed to hire and appoint their own experts to supervise the expert examination, collaborate with the court-appointed expert and present reports that complement or oppose the one presented by the court-appointed expert.

8 Brazilian law and court rules do not allow for deposition of parties or witnesses by lawyers only, as is prevalent in certain common law jurisdictions.
ii Procedures and time frames

Despite Brazil’s Constitution characterising the reasonable length of the proceeding as a constitutional right, proceedings before the courts are not time-efficient. According to data provided by the National Justice Council, on average, it takes a minimum of two years between the filing of the claim and a ruling by a lower court judge, and another four years are required to obtain a decision on the enforcement proceeding if no appeals are filed. This research also indicates that approximately 100 million lawsuits are pending judgment in Brazil.

The new Civil Procedure Code, as well as other laws currently in effect, have, as one of their objectives, making the entire legal dispute experience more efficient in terms of management of court cases. This is evidenced by the reduction of some appeals’ scope, the encouragement towards conciliation and amicable settlements, the outset of fast-track proceedings, and the creation of specialised and small-claims courts.

In synchrony with the spirit of the new procedural law, the rules relating to urgent and interim reliefs have also benefited, in many respects, from a conceptual change provided by the new Civil Procedure Code. Interim reliefs based on the urgency of a situation may be granted under requirements similar to the ones that prevailed under the former code, which were, at a minimum, evidence that the disputed right is probable and that there is risk of damage (or a risk of an inadequate result of the proceeding). The innovation is the possibility of having a provisional measure stabilised without the need of further litigation on the merits. In fact, should the defendant fail to appeal against the decision granting the interim measure sought, said relief will become stable and, until a review of the decision is requested, will continue to produce its effects.

In this regard, another relevant improvement concerns the possibility of granting interim relief based on clear evidence, as an advance of the results of a probable decision on the merits. This kind of interim relief will be granted in cases where:

a. the defence is making use of delaying tactics;
b. the facts are sufficiently evidenced by documents and the legal thesis is supported by mandatory precedents or a repetitive case decision; or
c. the plaintiff provides sufficient evidence on the facts and the defendant fails to reasonably question the requests.

iii Class actions

Influenced by common law, Brazil has embraced class actions since 1985, when the Class Action Act was enacted and the public civil action was conceived. Since then, the number of class actions has significantly increased (although it is not as widespread as it is in the United States) in order to defend different collective rights, such as consumer rights and environmental protection, as well as corruption matters and cultural and historical public heritage. Class actions have been brought against both public and private entities, aiming to sharpen their behaviour and discourage wrongdoings such as environmental pollution, misleading publicity and fraudulent public bids.

9 The review of the decision should be requested within two years from the date when it was officially published.
Regulation of class actions in Brazil differs significantly from common law-based legal systems, such as the United States. In Brazil, outsized compensations and attorney’s fees are rare. Moreover, the Class Action Act restricts those authorised to be plaintiffs in a class action to the following:

\(\begin{align*}
\text{a} & \quad \text{the federal government, states, Federal District and municipalities;} \\
\text{b} & \quad \text{public companies, foundations and agencies, and private companies controlled by the government;} \\
\text{c} & \quad \text{the Public Prosecutor’s Office;} \\
\text{d} & \quad \text{the Public Defender’s Office; and} \\
\text{e} & \quad \text{a civil association of at least one year’s standing, the purpose of which is in connection with the class action’s purpose.}
\end{align*}\)

Finally, there is no class certification procedure and there are no strict opt-in or opt-out provisions.

**iv Representation in proceedings**

As a rule, parties in a lawsuit must be represented by an attorney-at-law, enrolled and in good standing with the local branch of the Brazilian Bar Association (OAB) where the case is ongoing. In-house counsels enrolled with the OAB may represent the companies before courts. Government and public entities that do not have an internal legal department are often represented by government attorneys.

Nevertheless, the law provides for specific cases in which the parties may represent themselves before courts, such as the filing of the writ of habeas corpus, litigation before the labour courts\(^{10}\) or representation before small-claims courts in simple lawsuits, where the amounts involved are lower than 20 times the current federal minimum wage.

Brazilian law provides for strict conditions and limitations regarding the practice of law in Brazil by lawyers enrolled with foreign bar associations. Upon enrolment with the OAB into a specific category, foreigner practitioners may solely perform legal consultancy activities in connection with foreign law. They are not authorised to represent a party before Brazilian courts or otherwise ‘practise Brazilian law’.

With respect to arbitral proceedings, parties are not required to be represented by lawyers enrolled with the OAB. However, the Statute of the Brazilian Bar encompasses, among activities pertaining exclusively to lawyers, consultancy activities, advice and legal direction of matters, a situation that could lead to the expanded interpretation that only lawyers can represent a party in an arbitration proceeding.

The client–attorney relationship is governed mostly by the Brazilian Bar Disciplinary Rules of Professional Conduct, a new version of which entered into force on 1 September 2016. The elements of such relationship are not as developed as in other countries, but attorney–client privilege is generally respected.

\(^{10}\) Despite a legal provision that parties may represent themselves before all levels of labour courts, a binding precedent issued by the Superior Labour Court of Appeals limits such autonomy to the proceedings ongoing before the lower labour courts and regional labour courts of appeals.
v Service out of the jurisdiction

After the filing of a claim, a court order will be rendered, and service of process will be performed, preferably by mail. Under the former Civil Procedure Code, the service of process by mail was an exception and the rule was the personal service of process by a process server, who would have to be an employee of a state court system (there are no private process servers). With the change brought about by the new law, there is an expectation that court costs involved in service of process will be reduced, efficiency of the measure will increase and the parties will not have to wait for a long time for service of process to take place. Accordingly, the judge presiding over a case may order the service of process to be made in any other county or judicial district within the national territory, and the issuance of a prior letter of request is no longer required. This is a very important step towards streamlining the various steps involved in such a process. Service of process by mail is deemed valid if it is carried out by registered letter containing a copy of the claim and indicating the deadline for response (usually 15 business days). For an individual, service of process may be deemed valid when it is received by the doorman or concierge of a building in lieu of the individual who was to be served. As for legal entities, the service of process is valid if it is received by a person with management powers, by the employee in charge of receiving the mail or someone with powers to be served on behalf of the entity.

Nevertheless, other manners of service, especially personal summons by a process server, may be applicable. This mostly occurs when the one to be served is not competent to stand trial or is a public entity, as well as when the plaintiff reasonably requests a different form of service or if service by mail is unsuccessful.

Moreover, should the service by mail and the personal one by process server fail to validly serve a defendant, a public notice will be published on the website of the state appellate court and the judge may also order it to be published in a widely read local newspaper in the location where the lawsuit is under development.

The new Civil Procedure Code also provides for the possibility of a digital service of process; however, owing to the lack of further regulation in this regard, this manner of service is not being used yet.

vi Enforcement of foreign judgments

A foreign court decision will only produce its effects and become enforceable within the Brazilian territory after a ratification proceeding before the STJ. Other than rulings, interlocutory decisions and interim reliefs issued abroad may also be recognised and enforced in Brazil.

In this regard, the jurisdiction of the STJ is limited and its intervention aims, mainly, to assure that the foreign decision:

a is effective and capable of producing effects in the state in which it was rendered;

b has complied with the due process requirements, meaning it was issued by a court with jurisdiction to rule on the matter and preceded by a regular service of process on the parties involved;

11 If, after two failed attempts to serve the defendant, the process server suspects that the defendant is purposely avoiding the service, he or she may summon a family member or a neighbour on a date and time in which he or she will make a new attempt to serve the process. Should the server, in this third attempt, fail to reach the defendant, a letter will be sent by mail and the defendant will be deemed validly served.

12 As it pertains to arbitral awards. See Section VI.ii.
Brazil

c does not conflict with a decision rendered by Brazilian courts; and

d does not violate Brazilian public order rules. Therefore, the STJ will solely analyse formal
requirements, and the merits of the decision shall not be the object of re-examination.

With respect to the service of process concerning proceedings being carried out abroad,
Brazilian case law firmly decided that the service of process issued by a foreign court to a
defendant resident or seated in Brazil will only be deemed valid (for the purposes of Brazilian
law and local enforcement) if it is made through a letter rogatory. However, Brazilian courts
may enforce decisions issued in default procedures as long as a valid service of process has
been performed.

Likewise, the recognition and *exequatur* of decisions rendered in breach of an exclusive
jurisdiction of Brazilian courts will be denied (e.g., lawsuits concerning real property rights
over real estate located within the Brazilian territory, and inheritance proceedings concerning
assets situated in Brazil).

The process of ratification of a foreign decision is an adversarial proceeding in which
the parties are given an opportunity to refute each other’s arguments. Therefore, should the
requirements mentioned above be *prima facie* fulfilled, the justice in charge of reviewing
such request for ratification will order the service of process of those concerned to file their
defence, which is, however, limited to the formal requirements provided for by the law and
referred above.

The recognition of a decision will be made irrespective of reciprocity requirements.
Moreover, it will not depend on the existence of a treaty executed between Brazil and the
country where the decision was issued.

vii Assistance to foreign courts

Assistance to foreign courts may involve:

a the service of process, summons, and in-court and out-of-court notifications;

b evidentiary production and obtaining information;

c acknowledgment and enforcement of decisions;

d granting of a preliminary relief;

e international legal assistance; and

f any other in-court or out-of-court measure not forbidden by Brazilian law and requested
by a foreign party.

International cooperation between Brazil and other countries is governed by general rules
and principles that are mainly provided for by the Civil Procedure Code, and international
(bilateral and multilateral) treaties based on reciprocity, diplomatic consent and comity. Brazil
has not executed the Hague Convention on the Service Abroad of Judicial and Extrajudicial
Documents in Civil or Commercial Matters. However, Brazil is a member of the Vienna

Letters rogatory will be examined by the STJ. The case will be assigned to one of its
justices, who will summon the concerned party or parties to file for defence, except when
such act may have an impact on the effectiveness of the requested measure. The defence may
solely address the arguments related to the authenticity of the documents and the fulfilment
of the formal requirements by the decision.

Particularly when the letter of request disregards national sovereignty, the *exequatur* will
be denied on the grounds of human dignity or rules of public policy as applicable in Brazil.
Moreover, international direct assistance may be granted in connection with measures that do not demand any judgment by Brazilian courts, such as requests for obtaining information about the local legal system or on administrative and court proceedings (ongoing and closed cases).

viii Access to court files
In accordance with the constitutional principle of publicity of judicial acts, court proceedings are, as a rule, accessible to the public in general. Therefore, case files may be freely accessed and free of charge, whether made online or directly at the courthouse.

Nevertheless, proceedings concerning family matters (i.e., marriage, divorce, affiliation and guardianship), confidential arbitration and personal information covered by the constitutional right to intimacy will proceed under seal of confidentiality. Moreover, whenever the public interest involved in a proceeding is at stake, the records will also be under seal.

Access to case files has improved because of technological progress. It has long been possible for parties to a proceeding to access decisions rendered on a case online. However, more recently, Brazilian courts have started embracing the use of electronic process of law in which complete case files are made available online.

Moreover, case law can be easily researched on the websites of state and federal appellate courts and superior courts.

ix Litigation funding
Third-party funding in litigation and arbitration is still at an early stage of development, although its expansion – especially with respect to arbitration – has increased over the past few years.

Brazilian law does not specifically address the issue of litigation funding. Because of this lack of regulation, any related procedural rights and other legal consequences are unclear. In fact, even the lawfulness of such practice is not expressly confirmed.

As mentioned above, third-party funding is a recent issue in Brazil, which currently resonates more significantly in arbitration than in litigation. Court litigation is not particularly costly in Brazil, although it is not time-efficient. There is, therefore, a long-standing practice of judicial credit assignment in Brazil, but not a widespread litigation funding practice.

Nevertheless, given the increase of arbitration proceedings, many international and local funds are offering highly specialised third-party funding products in the Brazilian market. Moreover, considering the absence of specific legislative provisions, practitioners and arbitration chambers are debating the issues in order to set forth guidelines and specific provisions in the arbitration rules in this regard.

IV LEGAL PRACTICE
i Conflicts of interest and Chinese walls
Brazilian law addresses the issue of conflicts of interest with regard to lawyers and judges; however, it does not specifically regulate Chinese walls or provide for other information barrier mechanisms.

With respect to conflicts of interest concerning lawyers, this is mainly addressed by the OAB Statute and the OAB Disciplinary Rules of Professional Conduct, a new version of
which entered into force on 1 September 2016. The OAB’s self-regulation prevents lawyers of a same law firm (or acting in cooperation or in partnership) from representing or counselling clients with antagonistic interests.

The new Civil Procedure Code expanded the circumstances that may lead to a judicial disqualification of judges. Accordingly, the judge must recuse himself or herself whenever, for example, he or she has previously acted in the proceeding as counsel, expert or public prosecutor or judge within another jurisdiction; if he or she is partner or member of the board of a company party to the proceeding; or if his or her spouse or close relative is a party to the proceeding or counsel to a party. In this regard, one of the most relevant innovations is that, by statute, the judges are required to recuse themselves should a party in the proceeding be represented by a law firm in which his or her spouse or relative acts, even in cases in which the party in a particular case is represented by another lawyer of the firm.

The law also provides for situations in which the judge’s impartiality may be impaired and could justify the recusal, such as cases in which the judge has a close personal relationship, either positive or negative, with one of the parties or if he or she received gifts from someone with an interest in the outcome of the proceeding. In such cases, the judge is not obliged to recuse himself or herself and, should the judge deem that his or her decision will not be biased, the motion will be decided by higher courts. The judge may also request his or her replacement owing to causes of personal nature, without being required to disclose the specific reasons for doing so. The new Civil Procedure Code expressly states that a motion for replacement will be deemed unlawful if the party claiming such replacement has acted so to cause a conflict of interest or has agreed with its occurrence.

Money laundering, proceeds of crime and funds related to terrorism

In March 2016, the Counter-terrorism Act (Federal Law No. 13260) entered into force surrounded by security concerns raised in connection with the 2016 Olympic Games held in Rio de Janeiro. The law was widely criticised as it provides for legal concepts that are overly broad and ambiguous, leading to uncertainty and potential disrespect of human rights.

More specifically, Article 6 of said law provides that one who is in any manner linked to resources used in connection with the preparation of terrorist acts will be subject to 15–30 years of incarceration. This can encompass any support towards obtaining or providing financial resources and funds on behalf of individuals or entities who, as a main or secondary activity, commit crimes of terrorism. However, this could also mean that a bank employee through which the funds were transferred, and who had no link to the situation, could also be charged as a co-conspirator or actual perpetrator.

With respect to anti-money laundering measures, Federal Law No. 9613/1998, as amended by Law No. 12683/2012, provides for inspection mechanisms and criminal penalties, including the possibility of three to 10 years of incarceration in case of money laundering.

In 2015, conditions were specified for bringing funds and assets (of lawful origin) held abroad back to Brazil. The deadline for presenting the information and repatriating the money was 31 October 2016, and the tax authorities have collected over 50 billion reais in penalties and taxes. A new version of such law was recently enacted, and funds may be brought to Brazil until February 2017, upon the payment of a tax or penalty of 35 per cent of the amount involved.
iii Data protection

The privacy and protection of private and government data is a fundamental right granted by
the Federal Constitution (Article 5, X and XII). The specific regulations concerning said right
are provided by several laws and decrees.

One of the most relevant and recent laws in this regard is the Internet Act (Federal Law
No. 12965, enacted on 23 April 2014), regulated by Decree No. 8771, dated 11 May 2016,
which preceded the Act on Personal Data Protection, enacted in August 2018 (Law
No. 13.709). The new legislation expressly restricts the communication of third-party data
to marketing companies, and allows the exclusion of personal information from databases, to
which the concerned party should have access. Further, once the Act enters into force (early
2020), companies will have the obligation to provide clear information on the collected,
stored, shared and used data. The creation of a National Agency for the Protection of Personal
Data is still pending further regulation.

Likewise, the breach of confidentiality involving personal data must be allowed
through a court order. In this regard, the same confidentiality protection granted to mail,
and telephone communications is officially extended to emails. Should a post on the internet
be deemed offensive by an individual, its removal can be sought before local courts.

Regarding bank secrecy, in spite of it being a fundamental right, the requirement to
lift such privilege was softened by a Federal Supreme Court decision that concluded that
Complementary Law No. 105/2001 is constitutional. According to such law, tax authorities
may access banking data directly from the banking entities, with no need of a previous court
order.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

The attorney–client relationship is regulated mainly by the OAB Statute and the OAB
Disciplinary Rules of Professional Conduct, which are also applicable to in-house counsel
and foreign lawyers enrolled as ‘consultants on foreign law’.

Accordingly, attorneys-at-law are forbidden to disclose any private and non-public
information to which they have had access through their client, or that has otherwise been
brought to their attention in connection with the attorney–client relationship. The privilege
covers a wide range of information, regardless of the nature involved, including written
and oral communication. Confidentiality regarding the information disclosed within the
attorney–client relationship is a public policy rule, and is applicable regardless of any specific
request made by the client.

Confidentiality may only be withdrawn under extraordinary circumstances that provide
reasonable justification, such as serious threat to life or honour. Moreover, confidentiality
may be lifted should it be relevant to defend the attorney himself or herself.

Attorney–client confidentiality represents not only a duty of the attorney, but
also a right. The lawyer is not required to testify in proceedings (whether it is a judicial,
administrative or arbitral proceeding) with respect to the facts that he or she should keep
under privilege. The privilege also encompasses the attorney’s office, files, electronic data,
mail and any communication (including telecommunications), all of which are deemed as
being inviolable unless the attorney is under criminal investigation or might be acting in
collusion with the client.
Production of documents

The evidence needed to support the court’s finding in connection with a particular case depends on the nature of the dispute, and its production is determined by the judge after hearing the parties in this regard. As the judge is free to examine the evidence, he or she may refuse to order the production of a specific kind of evidence, should he or she deem such evidence irrelevant to the outcome of the dispute.

The production of evidence is conducted and led by the judge. Unlike the witness depositions that are conducted in the United States, no proceedings are conducted by a lawyer. For example, in the case of hearings of witnesses or personal testimony of a party, the questions of counsel involved in the hearing should be addressed to the judge, who will rephrase the question, should it be necessary, and address it to the witness or party.

Brazilian law does not embrace discovery and full disclosure, as such concepts are known in common law jurisdictions. There are, therefore, no ‘fishing expeditions’ that would allow a lawyer to seek evidence that he or she does not know exists as to a particular matter, and parties will often provide documents and produce evidence only in order to support their own case. In fact, the Civil Procedure Code provides that, as a rule, the burden of proof should be supported by the party arguing a fact.

Nevertheless, under certain circumstances, a party may request the judge to order the documents under possession of the other party or of a third party to be provided to the court. The request may only be granted should it:

- specify in detail the document that is required;
- explain the document’s connection with the arguments to be evidenced or disproved; and
- make clear the reasons why the existence of the document and possession by the required party are likely.

Under court order, the other party, or a third party, will be required to provide the evidence, unless:

- it concerns private and family life;
- it might dishonour the other party, or a third party;
- it might lead to self-incrimination;
- it breaches professional confidentiality;
- the law expressly and specifically allows its non-disclosure; or
- there are other situations that are deemed by court as reasonable to prevent its exhibition.

If evidence needs to be produced from outside of the court’s jurisdiction, the judge will issue a national letter of request or an international letter rogatory, as appropriate.

Should a party wish to make use of a document written in a foreign language as evidence, a certified translation of such document, prepared by an official translator in Brazil, must be filed along with it. As for documents produced abroad, an apostille may be required as the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents entered into force in Brazil on 14 August 2016.
VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation
The use of alternative dispute resolution is increasing, and is encouraged by law and even by courts. The Arbitration Act was amended in 2015, which provided further strength to the dispute resolution method that was already widely supported by courts and legal writings. As for mediation and conciliation, their use is particularly encouraged by the new Civil Procedure Code. Moreover, the regulation of out-of-court dispute resolution methods is becoming more consistent owing to the enactment of the Mediation Act in 2015, and the issuance of guidelines and institutional rules by private bodies and mediation chambers.

ii Arbitration
The Brazilian Arbitration Act (Federal Law No. 9307) was enacted on 23 September 1996 and was recently amended by Federal Law No. 13129 on 26 May 2015, consolidating the respective case law and practice. The legal framework is also provided for by the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, which entered into force in Brazil in July 2002, through Decree No. 4311. The Brazilian Civil Procedure Code, especially the new one enacted in 2016, also provides for some rules regarding arbitration, mainly in order to acknowledge its lawfulness and improve the assistance of national courts to arbitral tribunals and the communication between both jurisdictions. The Internal Rules of the STJ and its Resolution No. 9 will apply to awards rendered abroad, as such awards will have to be ‘domesticated’ in Brazil before being locally enforceable. However, Brazil is not a party of the Washington Convention of 1965 on international investment arbitration.

Within an arbitration-friendly environment, and with Brazilian courts being receptive to enforcing arbitration agreements and awards, arbitration has experienced significant development over the past 20 years, and the number of proceedings concerning a Brazilian party has notably increased. The Brazilian Arbitration Act grants full autonomy to the parties when choosing the arbitral institution that will conduct the procedure. Moreover, it does not require any special licence so international and foreign institutions can administer arbitration seated in Brazil. Therefore, the number of arbitration proceedings currently being administered by international institutions such as the International Chamber of Commerce and the London Court of International Arbitration is also remarkable. The main domestic arbitral institutions seated in Brazil are the Centre of Arbitration and Mediation of the Chamber of Commerce Brazil-Canada; the Chamber of Conciliation, Mediation and Arbitration of the Federation of Industries of the State of São Paulo; the American Chamber of Commerce Centre of Arbitration and Mediation; the Chamber of Business Arbitration and the Chamber of Mediation and Arbitration of the Getúlio Vargas Foundation.

Lately, the scope of matters that may be subject to arbitration has been enlarged. In addition, the recent amendment to the Arbitration Act included certain matters that were so far deemed controversial among the subjects that may be referred to arbitration. The possibility of government-controlled entities referring disputes related to disposable rights to arbitration is now specifically authorised, as is the possibility (theretofore non-existent) of establishing arbitration clauses in employment agreements where employees are executive officers or statutory managers of companies (and are therefore assumed to be sophisticated, senior-level employees). Further, currently, certain matters involving consumer relationships may also be subject to arbitration.
The Brazilian Arbitration Act provides that, in order to be binding, the arbitration clause shall be in writing and contained in the contract or in a separate document referring thereto. Nevertheless, there is no provision regarding whether the arbitration agreement must be signed by the parties in order to be effective. On 26 April 2016, the STJ decided that the signature of the parties is not a crucial requirement should the willingness of the parties be expressed by other ways, such as by the context of the negotiations. However, additional requirements to enforce arbitration agreements in contracts of adhesion and standard form contracts are provided by the Arbitration Act. In fact, on 15 September 2016, the STJ, featuring a franchising contract as a contract of adhesion, decided that an arbitration clause inserted in it was void because it was not highlighted and featured no specific signature.

In Brazil, there is no appeal against an arbitral award; however, an arbitration award may be challenged in specific cases. The Arbitration Act sets forth a restricted list of cases that would allow the challenge of an arbitration award, such as when:

- the arbitration agreement is null and void;
- the award is rendered by someone who cannot act as an arbitrator;
- the award fails to comply with the formal requirements;
- the award exceeds the limits set forth by the arbitration agreement;
- the award fails to address all of the issues submitted to the arbitration;
- the award is rendered through unfaithfulness, extortion or corruption;
- the rendering of the award exceeds the time limit set forth by the parties; or
- the award violates the principles of due process, equal treatment of the parties, impartiality of the arbitrator and autonomy of the decision.

As a rule, Brazilian courts tend to accept the enforcement of foreign arbitration awards, which may, however, be denied on the grounds of public policy, especially if there is evidence of a violation of due process (including failure to properly notify a party), the absence of an arbitration agreement or the lack of proper acceptance of arbitration by a party. Likewise, should the dispute concern a matter that may not be subject to arbitration, the award would not be enforced (for example, rights that cannot be disposed of freely by a party). Moreover, based on a restrictive interpretation of Article V.1.e) of the New York Convention, the STJ decided, in December 2015, that an award set aside at the seat cannot be recognised and enforced in Brazil.

### iii Mediation

Over the past few years, mediation has become a possible answer to the ineffectiveness of in-court litigation and to the increasing number of proceedings. Mediation was originally adopted by courts only as an attempt to settle small claims and family disputes. The new Civil Procedure Code, however, has enlarged the use of mediation, causing it to be a standard stage of the proceedings, except when a party expressly informs that it does not intend to be subjected to mediation.

The development of mediation has triggered more robust regulation of such matters. The new Civil Procedure Code dedicated an entire chapter to governing the use of mediation and conciliation in the context of in-court litigation, providing for the establishment of public mediation centres and a register of mediators.

Also enacted in 2015, the Brazilian Mediation Act (Federal Law No. 13140) encompasses rules regarding in-court and out-of-court mediation. One of the most relevant innovations is the express possibility of having a dispute concerning a government entity
submitted to mediation. Therefore, mediation is now a dispute resolution mechanism available in Brazil for individuals, private and government entities alike. Notably, disputes concerning non-disposable rights may be mediated should the parties be allowed to enter into an agreement about such matter, which would need to be ratified by a judicial court.

iv Other forms of alternative dispute resolution

Other than the arbitration and mediation mechanisms that are now widely used, permanent dispute boards constitute a recent but well-established reality in major infrastructure and civil construction projects.

VII OUTLOOK AND CONCLUSIONS

The new Civil Procedure Code came into force in 2016, with the goal of improving the efficiency and expediency of judicial proceedings in Brazil. Likewise, the extensive update of the Labour Law that came into force last year aimed to modernise the labour relationships and to reduce litigation related thereto. By the end of 2017, the statistics provided by the courts seem to evidence the first positive results of such measures; 2018 has already indicated the smallest historical growth rate of ongoing proceedings. However, the success of these legal innovations is still to be confirmed; it is necessary to analyse effects in the medium and long term. In the coming years, the creation of relevant case law is expected in connection with the use of new mechanisms brought by the updating of major legal provisions, especially the new Civil Procedure Code and the reform of Labour Law.

Further, 2017 and 2018 have already confirmed a general support for cutting red tape in litigation and pre-litigation procedures, a trend that should continue in the coming years. A continuous and increasing support to arbitration, especially by the courts, should also be observed within the next few years.

The economic crisis that has affected Brazil in recent years continues to impact, as evidenced by the number of reorganisation proceedings ongoing before Brazilian courts. The courts’ precedents on this matter are providing more certainty to the practice and a new bill to amend the Brazilian Insolvency Act is currently under discussion. Thus, we should expect further developments on this matter within the coming years.

Another aspect that should still be considered by companies and investors doing business in Brazil is the development of compliance requirements and anti-corruption measures. Over the past few years, owing to significant repercussions following Operation Car Wash, the fight against corruption in all industries and all levels of the government has been widely discussed, and this trend is expected to be maintained over the next years.

Finally, in light of the recent presidential election and policy changes, the enactment and amendment of laws, acts and decrees are expected to be seen in the coming years, including the possible reform of the tax and social security systems.
I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

Canada's system of government is divided into three distinct branches: the judiciary, the legislature and the executive. The legislature (Parliament) has the power to make, alter and repeal laws. The executive branch is responsible for administering and enforcing the laws. The judiciary resolves disputes by applying and interpreting the law.

Canada has a bi-jural legal system, meaning that two legal traditions co-exist – civil law in Quebec, and common law in the other nine provinces and all three territories. The main difference between these systems is that in Quebec the private law has been codified and can be found in the Civil Code of Quebec² (the Civil Code). The Civil Code contains a statement of rules that are designed to deal with any dispute that may arise. In Quebec, unlike in the common law provinces and territories, judges first look to the Civil Code, and then refer to previous court decisions to help properly interpret the Civil Code's provisions.

There are different levels and types of courts in Canada – provincial and territorial courts, superior courts, courts of appeal and the federal courts. The federal courts have limited jurisdiction to hear claims in certain federally regulated areas such as immigration and refugee law, navigation and shipping, intellectual property and tax. They can also deal with matters of national defence, security and international relations.

The provincial and territorial courts are comprised of a first-level trial court, which handles civil matters up to a certain threshold, a superior court, which is a court of general or inherent jurisdiction and is referred to as either the Superior Court, the Supreme Court or the Court of Queen's Bench, depending on the province or territory, and an appellate court. These courts are structured in a hierarchy, with the trial courts being subordinate to the appellate courts.

The Supreme Court of Canada is the final court of appeal from all other Canadian courts. It has nine judges and sits in Ottawa, Canada’s capital. Both the Supreme Court of Canada and the Federal Court deal with matters in both civil and common law.

Administrative tribunals run parallel to the provincial or territorial and Federal Court systems. These specialised bodies are created by statute and focus on particular matters of law, including employment insurance, labour relations, human rights and workers’ compensation. These tribunals are not part of the court system; however, it is possible to challenge a tribunal’s decision to the courts through a ‘judicial review’ process.

1 Robert W Staley and Jonathan G Bell are partners, and John Rawlins is an associate at Bennett Jones LLP.
Private arbitration and mediation as forms of dispute resolution are also available and becoming increasingly popular in Canada. There are many organisations that specialise in alternative dispute resolution, and qualified arbitrators and mediators can easily be found throughout the country. Most provinces now require certain alternative dispute resolution procedures (such as mandatory settlement conferences) as a part of the judicial process.

II THE YEAR IN REVIEW

The past year brought exciting new legal developments in Canada. The following provides a brief overview of some of the most significant legal disputes recently adjudicated throughout the country.

i Mikisew Cree First Nation v. Canada (Governor General in Council)

In Mikisew Cree First Nation v. Canada, the Supreme Court held that the federal government does not have a duty to consult First Nations groups when developing legislation, even where the legislation will affect Aboriginal or treaty rights. Imposing such a duty could ‘effectively grind the day-to-day internal operation of government to a halt’ and would contradict the constitutional principles of parliamentary sovereignty, parliamentary privilege and the separation of powers, which mandate that the ‘law-making process is largely beyond the reach of judicial interference’.

ii Reference re Pan-Canadian Securities Regulation

As a result of its provinces having the exclusive constitutional right to legislate with respect to ‘property and civil rights’, Canada remains one of the only developed countries in which securities trading is not regulated nationally. However, in Reference re Pan-Canadian Securities Regulation, the Supreme Court held that a proposed pan-Canadian securities regulatory system was, in fact, constitutional. The proposed scheme did not interfere with provincial supremacy because it is voluntary in nature, and fell within the federal government’s constitutional right to legislate with respect to ‘trade and commerce’.

iii Yip v. HSBC Holdings plc

In Yip v. HSBC Holdings plc, the Ontario Court of Appeal held that Ontario courts do not have jurisdiction simpliciter to hear common-law or statutory claims of secondary market misrepresentation where there is no ‘real and substantial connection’ between the substance of the claim and the province of Ontario. In Yip, where the issuing corporation did not carry on business in Ontario (having an Ontario-based subsidiary was not sufficient) and the securities were listed exclusively on international stock exchanges, no such connection was found to exist, even though the securities were purchased via the internet in Ontario. In Leon v Volkswagen AG, the court adopted this reasoning, finding that if a plaintiff’s residency established jurisdiction simpliciter in such instances, it would ‘totally undermine the norm of international comity’.

3 2018 SCC 40.
4 2018 SCC 48.
5 2018 ONCA 626.
6 2018 ONSC 4265.
iv  Haaretz.com v. Goldhar
In *Haaretz.com v. Goldhar*, the Supreme Court provided guidance with respect to the correct application of the *forum non conveniens* test, which establishes that Canadian courts should refrain from adjudicating a claim where an alternative jurisdiction is ‘clearly more appropriate’. In *Haaretz*, Mr Goldhar brought a claim for libel as the result of an article published by Haaretz, one of Israel’s most prominent newspapers. The Court maintained that the key considerations in the *forum non conveniens* analysis are ‘fairness and efficiency’ and held that, given the location of the relevant witnesses and Mr Goldhar’s significant reputation in Israel, holding the trial in Israel would be both ‘fairer and more efficient’.

v  R v. Comeau
Interprovincial free trade appears to be enshrined in Canada’s constitution – Section 121 of the Constitution Act 1867 explicitly maintains that all products produced or manufactured in any of the provinces ‘shall . . . be admitted free into each of the other provinces’. However, in *R v. Comeau*, the Supreme Court held that Section 121 does not, in fact, mandate free trade; instead, it merely prevents the enactment of laws that have the primary purpose of restricting cross-border trade. In *Comeau*, the court found that Section 134(b) of New Brunswick’s Liquor Control Act had the effect of preventing the cross-border trade of alcohol, but, because it was enacted for the primary purpose of enabling the province to supervise the production, sale and use of alcohol, it was constitutional.

vi  Churchill Falls (Labrador) Corporation Limited v. Hydro-Québec
In *Churchill Falls (Labrador) Corp v. Hydro-Québec*, the Supreme Court of Canada made clear that, where a contract is entered into validly, it will not be set aside or modified simply because its ultimate financial outcomes vastly, and unexpectedly, favour one party over the other. In *Churchill*, Quebec secured the right to purchase energy from Labrador at a continually decreasing fixed price from 1969 until 2041. Unexpected increases in the price of energy have since made the contract extremely profitable for Quebec. The Court held that, by entering the contract, the parties agreed that Quebec would ‘bear any losses or receive any profits flowing from fluctuations in electricity prices’. As a result, Quebec did not act in bad faith by enforcing the contract and reaping the benefits to which it was entitled.

vii  Rosas v. Toca
In *Rosas v. Toca*, the British Columbia Court of Appeal departed distinctly from traditional Canadian contract law principles by holding that fresh consideration is not required to modify the terms of an existing contractual agreement. The Court held that, while Canadian courts have typically accepted that a party’s performance of a pre-existing duty does not constitute fresh consideration, the ‘legitimate expectations’ of parties should be protected if they seek to modify an agreement. As a result, the Court concluded that, absent a finding of duress, unconscionability or other proper policy considerations, contractual modifications should be enforced, regardless of whether fresh consideration is provided.

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7  2018 SCC 28.
8  2018 SCC 15.
9  2018 SCC 46.
10  2018 BCCA 191.
viii Highwood Congregation of Jehovah's Witnesses v. Wall
The Supreme Court, in *Highwood Congregation of Jehovah's Witnesses v. Wall*, clarified the types of administrative decisions that are amenable to judicial review. The court made clear that judicial review is only available to review actions taken that are sufficiently public in nature, and represent an actual exercise of state authority. Decisions made by private bodies, including religious organisations and social clubs, are not the proper subject matter of judicial review, regardless of whether they are of broad public import.

III COURT PROCEDURE
i Overview of court procedure
Each province and territory has enacted a distinct set of procedural rules governing practice within its courts. In addition, Federal Courts have their own rules of procedure. Practice directions are published by adjudicative bodies on an ongoing basis.

The Ontario Rules of Civil Procedure have been revised such that, as of 1 January 2017, matters commenced on or after 1 January 2012 will be automatically dismissed five years after they are commenced if not set down for trial.

Quebec introduced a new Code of Civil Procedure in December 2015. The new Code has a strong focus on the principle of proportionality, requiring parties to ensure that each step in the proceedings is proportionate, in terms of the cost and time involved, to the nature and complexity of the matter.

In Canada, civil actions and proceedings are adversarial in nature. As such, the lawyer takes on the role of the advocate and the judge determines the case based on the evidence presented by the parties.

ii Procedures and time frames
The time within which a party must bring a claim is prescribed by each province. Several of the common law provinces, including Ontario, have adopted a basic limitation period of two years for claims in contract and tort, subject to discoverability. In addition to these prescribed limitation periods, a claim can be barred for delay by equitable doctrines such as laches or acquiescence in the common law provinces and territories.

In the first stage of litigation, the plaintiff initiates proceedings by delivering (i.e., serving and filing) an originating process (i.e., a notice of action, notice of civil claim (British

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13 Rule 48, ON Rules; See also *Daniels v. Grizzell*, 2016 ONSC 7351.
14 Code of Civil Procedure, CQLR c C-25.01.
Canada

Columbia) or statement of claim). The defendant must then respond, within a prescribed period. The prescribed period varies by province, and by the jurisdiction in which the defendant is served. If the defendant fails to deliver a statement of defence within the relevant period, the claimant can obtain default judgment. Canadian pleadings are confined to a concise statement of the material facts of the case. A defendant may also file a counterclaim, cross-claim or third-party claim to join all necessary issues and parties.

Following the close of pleadings, the parties enter the ‘discovery’ stage. In this stage, the parties identify and exchange relevant documents and conduct examinations for discovery.

In all provinces and territories other than Quebec, a party can move for summary judgment at this stage. This allows for a claim to be expeditiously disposed of without a full trial. When faced with a motion for summary judgment, a judge must determine if there is a genuine issue requiring a trial. This determination is made by considering affidavit evidence, examination transcripts and, in some cases, oral testimony. As the Supreme Court of Canada has explained, summary judgment should be used as an approach to achieve a necessary culture shift towards more efficient and affordable access to justice.16

Two types of injunctions are available before trial in Canada: an interim injunction and an interlocutory injunction. An interim injunction can be obtained without prior notice to the other party and may be granted on the same day in urgent cases. This type of injunction is generally only granted for brief periods, lasting until an application for an interlocutory injunction is made. The interlocutory injunction serves to preserve the status quo or enjoin certain conduct until a final determination of the parties’ rights is rendered. Courts also have the power to order the interim preservation of property prior to a trial.

The third and final stage of litigation is the trial. Most Canadian civil matters are tried before a judge alone. Counsel provide the judge with an overview of the case in their opening statements, and the plaintiff then presents its evidence. This may involve calling witnesses to testify or presenting documentary evidence. Opposing counsel then has the opportunity to present its evidence. All witnesses are subject to cross-examination. The trial concludes with closing submissions from counsel.

iii  Class actions

Each Canadian jurisdiction (with the exception of Prince Edward Island and the three territories) has adopted specific class proceedings legislation or amended their rules of court so as to recognise class proceedings and set out the fundamental rules governing collective relief on behalf of a class of litigants.17

The first step in commencing a class action involves filing a statement of claim or complaint, and then having the action ‘certified’ as a class proceeding. At the certification stage, the court applies the certification requirements set out under statute to assess whether the claims are suitable for a class. In making this determination, the court will consider whether:

a there was a common issue among the proposed class;

b the damages could be determined on an aggregate basis; and

c a class action is the preferable procedure.18

17 For an in-depth discussion of class actions in Canada, see Michael A Eizenga et al., Class Actions Law and Practice (Toronto: Butterworths) (loose-leaf).
18 Pro-Sys Consultants Ltd v. Microsoft Corporation, 2013 SCC 57; Sun-Rype Products Ltd v. Archer Daniels Midland Company, 2013 SCC 58.

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The general process for class certification is similar in Quebec, in that a representative must seek ‘authorisation’ of a class action under the Code of Civil Procedure as a first step in the proceeding.\(^{19}\)

In *Airia Brands Inc v. Air Canada*,\(^{20}\) the Ontario Court of Appeal held that Ontario courts can take jurisdiction in class actions over plaintiffs who are not Canadian, do not live or work in Canada, and who have not consented to a Canadian court’s jurisdiction, even at the risk of the judgment being unenforceable outside Canada. The decision clarified that a court can take jurisdiction over a proposed class action involving absent foreign claimants if three conditions are met: (1) a real and substantial connection exists between the subject matter of the dispute and Ontario; (2) there are common issues between the claims of the representative plaintiff or plaintiffs and the absent foreign plaintiffs; and (3) the procedural safeguards of adequacy of representation, adequacy of notice, and the right to opt out are provided, enhancing the real and substantial connection.

Once the action is certified as a class proceeding, the claimant is designated as a ‘representative plaintiff’ and speaks on behalf of members of the class. Persons who fall within this defined class will be bound by the result of the class proceeding, unless they take steps to opt out of the class.\(^{21}\)

Class actions are unique in terms of the high level of judicial supervision and case management provided throughout the proceeding. In addition, throughout the life of a class action, the court has the power to make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination.

In the vast majority of cases, class actions settle before proceeding to trial. A class action that is not resolved by the parties will undergo a trial of the common issues. The same rules of procedure and evidence that apply to regular civil trials apply to class action proceedings. A final judgment on the merits in a class action is binding on all members of the class, other than those who have opted out.

**iv Representation in proceedings**

Every party has the right to be represented by a lawyer. However, individual litigants are not generally obliged to be represented by counsel, unless special circumstances render representation mandatory, such as a litigant who is under disability or who acts in a representative capacity. In most Canadian provinces, corporations must be represented by a lawyer, unless leave of the court is obtained.\(^{22}\)

**v Service out of the jurisdiction**

Canadian courts have limited jurisdiction over parties who are not within the court’s territorial jurisdiction. However, expanded rules of service enable plaintiffs to serve a party outside the jurisdiction without leave of the court in certain circumstances. These circumstances involve some form of connection between the litigation and the jurisdiction where the plaintiff seeks to bring the case – for example, if the contract in dispute was made in that province or

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19 QC Rules, *supra* note 12, Article 574.
20 2017 ONCA 792.
21 British Columbia, Newfoundland and New Brunswick have adopted a hybrid opt-in/out model that depends on the residence of the class member.
otherwise governed by the law of that province, or if a tort was committed or damages sustained within that province. In cases where these special circumstances do not exist, the court may grant leave to serve a party outside of the jurisdiction.

Normally, an originating process can be served outside Canada in the same manner as it can be served within the jurisdiction, pursuant to the rules of service in the jurisdiction where service is made, or pursuant to the Hague Convention on the Service Abroad of Extrajudicial Documents in Civil or Commercial Matters of 1965. With respect to natural persons, personal service is generally required. The rules of service will vary in cases where the party is not a natural person.

vi Enforcement of foreign judgments
Canadian courts have adopted a generous and liberal approach to the recognition and enforcement of foreign judgments. Enforcement of foreign judgments is a matter of provincial law. Judgments from the United Kingdom, for example, are recognised in certain provinces through a bilateral convention between Canada and the United Kingdom. If no such statutory recognition of judgments exists, the common law may serve as an alternative method for enforcing a foreign judgment.

If it is to be enforced in Canada, a foreign judgment must be final and dispositive. The judgment must have originated from a court that had jurisdiction under the principles of private international law as applied by Canadian courts and be for a definite and ascertainable sum of money. If not a monetary judgment, its terms must be sufficiently clear and limited in scope. If a foreign judgment meets all of these criteria, it may nevertheless be denied enforcement if it:

a is based on a foreign penal, revenue or public law;

b was obtained by fraud;

c is contrary to natural justice; or

d violates public policy.

Articles 3155 and following of the Civil Code govern the substantive rules applicable to the recognition and enforcement of foreign judgments by Quebec courts. The procedural rules are governed by Articles 507 and 508 of the Code of Civil Procedure.

In Canada, the enforcement of a judgment by one province in another province is considered to be the enforcement of a foreign judgment, although, in practice, Canadian courts will generally scrutinise judgments issued in another province or territory with less rigour than they will scrutinise judgments coming from another country.

vii Assistance to foreign courts
When a litigant seeks to obtain evidence from a non-party Canadian resident for use in a proceeding outside Canada, they must do so by way of letters rogatory. In determining whether to give effect to such a request, a Canadian court will consider whether:

a the evidence sought is relevant;

b the evidence sought is necessary for trial and will be adduced at trial, if admissible;

c is contrary to natural justice; or

d violates public policy.

23 Chevron Corp v. Yaiguaje, 2015 SCC 42 at para. 27.
26 CQLR c C-25.01.
c the evidence is not otherwise obtainable;
d the order sought is not contrary to public policy;
e the documents sought are identified with reasonable specificity; and
f the order sought is not unduly burdensome.27

viii Access to court files

Canada has an open court policy, meaning that, with certain limited exceptions, courts are open to the public. Courtroom access may be limited when it is not in the interests of justice to have a public hearing (except in the case of a proceeding involving trade secrets). Publication of court files and decisions are also generally made available to the public. It is possible, however, to obtain a publication ban in cases where such a ban is necessary to prevent a real and substantial risk to the fairness of the trial, and the salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.28

ix Litigation funding

Litigation funding in Canada originally developed to help reduce risk for representative plaintiffs seeking remediation in personal injury and class action cases. However, the process continues to evolve, with recent applications in commercial and insolvency proceedings.29 Further, although court approval is required prior to the advancement of funding in the context of class actions, the Federal Court recently held that the same requirement does not exist in the context of private litigation because ‘there is no legal or logical basis to extend the requirement of pre-approval outside of class proceedings’.30 Litigation funding may also be used to cover fees, disbursements and adverse costs, depending on the particular circumstances.31

IV LEGAL PRACTICE

i Conflicts of interest and ethical walls

The Canadian Bar Association defines a conflict of interest as an interest that gives rise to a substantial risk of material and adverse effect on the representation.32 The legal profession in Canada is largely self-regulated, and each provincial law society has a code of professional conduct outlining a lawyer’s duties with regard to avoiding and handling conflicts of interest.33 A court will, however, address claims of breach of fiduciary duty or conflicts if they are brought before it.

27 Friction Division Products Inc v. EI Du Pont de Nemours & Co (No. 2) (1986), 56 OR (2d) 722 at para. 25.
33 See for example, Law Society of Upper Canada, Rules of Professional Conduct, Section 3.4.
In Canadian National Railway Co v. McKercher LLP, the Supreme Court of Canada clarified the scope of the ‘bright-line’ rule that applies to conflicts of interest among current clients. This bright-line rule provides that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client – even if the two mandates are unrelated – unless both clients consent after receiving full disclosure and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other. In McKercher, the Supreme Court held that the rule is engaged only where the immediate interests of clients are directly adverse in the matters on which the lawyer is acting, and that the rule does not apply in unrelated matters where it is unreasonable for a client to expect that its law firm will not act against it.

In some circumstances, ethical walls may be put in place to prevent the involved lawyer or lawyers (and staff) from being exposed to confidential information relating to a matter currently or previously handled by other lawyers or staff at the same firm. Erecting ethical walls is a common practice in large Canadian law firms.

ii Money laundering, proceeds of crime and funds related to terrorism

The provincial law societies enforce specific requirements for verifying clients’ identities and specific practices when receiving funds over a certain monetary threshold. These professional regulations and ethical standards seek to ensure lawyers will not unknowingly assist in, or turn a blind eye to, money laundering or terrorism financing. Although the Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCTFA) regulates these issues with respect to other institutions such as banks and accounting firms, the Supreme Court of Canada has confirmed that lawyers, notaries and law offices are exempt from the PCTFA’s record-keeping, client-identification and disclosure obligations.

iii Data protection

The collection, use, disclosure and management of personal information in Canada is governed by the Federal Personal Information Protection and Electronic Document Act (PIPEDA). PIPEDA governs the inter-provincial and international collection, use and disclosure of personal information, and also applies to organisations that collect, use and disclose personal information while undertaking commercial activities within a province. Certain provinces have enacted separate privacy statutes, which apply instead of PIPEDA.

Canada has also enacted anti-spam legislation (Canada’s Anti-Spam Law (CASL)), which prohibits numerous technology-related activities, including sending commercial electronic messages (CEMs) to an electronic address without consent. Foreign entities that communicate to Canadians should be aware that CASL applies to any CEM received by a computer system located in Canada. Accordingly, communications sent from outside the country may attract liability under CASL.

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34 2013 SCC 39 at para. 32.
36 Proceeds of Crime (Money Laundering) and Terrorist Financing Act, SC 2000, c 17.
38 Personal Information Protection and Electronic Document Act, SC 2000, c 5.
39 British Columbia’s Personal Information Protection Act, SBC 2003, c 63; Alberta’s Personal Information Protection Act, SA 2003, c P-6.5; Quebec’s An act respecting the protection of personal information in the private sector, CQLR c P-39.1.
V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

In Canadian civil litigation, all relevant and material evidence relating to the issues before a court must generally be disclosed to all parties. This requirement is subject to a number of exceptions where Canadian law recognises that the public interest in preserving and encouraging particular confidential relationships justifies a departure from the general rule that all relevant and material evidence be disclosed. Canadian law allows for such communications to remain privileged and be exempt from disclosure.

Legal privilege is one of the most well-recognised privileges. By successfully invoking legal privilege, a person is entitled to resist the disclosure of information or the production of documents to which an opposing litigant would otherwise be entitled. Canadian law generally recognises two main categories of legal privilege: solicitor–client privilege and litigation privilege. Solicitor–client privilege, also known as legal advice privilege, prevents disclosure of information communicated to the lawyer for the purpose of obtaining legal advice, as well as information communicated to the client by the lawyer to give legal advice. Litigation privilege protects any documents or communications created for the dominant purpose of preparing for existing or anticipated litigation.

The Supreme Court has recently affirmed the court’s recognition of the fundamental role that both solicitor–client and litigation privilege play in ensuring access to justice.

In Canada, both categories of legal privilege apply equally to the advice and activities of in-house lawyers and to the advice and activities of external lawyers. In R v. Campbell, the Supreme Court of Canada expressly endorsed the right of in-house counsel to claim privilege. The in-house designation did not affect ‘the creation or character of the privilege’. With respect to solicitor–client privilege, in-house lawyers must be acting in their capacity as legal advisors. A lawyer cannot assert this privilege over non-legal advice, for example, business advice given to a client.

At present, there is uncertainty surrounding the applicability of privilege to foreign lawyers. Although some cases have protected communication with a foreign lawyer in Canada regarding Canadian law even though the lawyer is not entitled to practise law in Canada, others have not. Whether legal advice regarding foreign law is protected if given outside Canada is also unclear. Traditionally, legal privilege has been characterised as a procedural matter for conflict-of-laws analysis, meaning that its existence will be governed by the law of the place in which the litigation occurs. Thus, even if the advice is not privileged in the foreign jurisdiction, it would still be protected in Canadian proceedings. However, the Supreme Court of Canada in R v. National Post, stated that legal advice privilege is a matter of substantive law, which would, under traditional conflict-of-laws rules, mean that its existence would be governed by foreign law. Such a characterisation would result in the risk of

40 Blood Tribe Department of Health v. Canada (Privacy Commissioner), 2008 SCC 44.
43 This position was confirmed in Pritchard v. Ontario (Human Rights Commission), 2004 SCC 31 at para. 21.
44 2010 SCC 16.
foreign legal advice provided outside Canada not being recognised in Canadian proceedings as privileged, depending on the particular laws of the foreign jurisdiction and the facts of the particular case.\(^{45}\)

**ii Production of documents**

In Canada, the rules for documentary production are governed by each province’s rules of civil procedure or rules of court. The obligation of documentary disclosure in civil litigation is limited by the fact that only relevant documents must be disclosed. In most provinces, the rules governing the scope of disclosure provide that parties must disclose every document relating to or relevant to a matter in issue that is in their power, possession or control.\(^{46}\) The determination of what qualifies as ‘relevant’ varies slightly between provinces. Under the Federal Court Rules, a document is relevant if the party intends to rely on it or if the document tends to adversely affect the party’s case or to support another party’s case.\(^{47}\)

Canadian courts generally apply a broad interpretation of the term ‘document’ to include sound recordings, videotapes, files, charts and data and information in electronic form. With respect to electronic documents, the principle of proportionality governs – the scope of electronic discovery depends on the necessity and availability of electronic evidence as balanced by the costs of retrieving, reviewing and producing that evidence.\(^{48}\)

Only in exceptional circumstances will a person who is not party to the proceeding be ordered to produce documents for discovery. A court order is required to compel such production, and will only be granted in situations where it would be unfair to require the moving party to proceed to trial without having discovery of the documents in question. The following factors will be considered when making such a determination:

\[\begin{align*}
  a & \quad \text{the importance of the documents in the litigation;} \\
  b & \quad \text{whether production at the discovery stage is necessary to avoid unfairness to the appellant; and} \\
  c & \quad \text{whether the discovery of the defendants with respect to the issues to which the documents are relevant is adequate and, if not, whether responsibility for that inadequacy rests with the defendants.}\(^{49}\)
\]

Parties are required to disclose and produce not only documents in their possession, but also those within their ‘control or power’. This includes documents that the party has the ability to obtain from others. In some jurisdictions, this production obligation extends to documents in the control of a subsidiary or parent company of the litigant.\(^{50}\)

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45 For further discussion on this topic, see Brandon Kain, ‘Solicitor–Client Privilege and the Conflict of Laws’ (2011) 50 The Canadian Bar Review 243.

46 MB Rules, note 12, r. 30.02; NB Rules, note 12, r.31.02, NWT Rules, note 12, rr. 219 and 222; ON Rules, note 12, r. 30.02; PEI Rules, note 12, r. 30.02.

47 Federal Court Rules, SOR/98-106, Rule 222(2).


50 ON Rules, note 12 r. 30.02(4) and MB Rules, note 12, r. 30.02(4).
VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

Canada offers a wide variety of methods and procedures for arriving at a solution to a dispute other than a judicial decision. Some examples of these alternatives, each falling under the category of alternative dispute resolution, include negotiation, mediation, arbitration (and hybrid procedures such as med-arb) and expert determination.

ii Arbitration

Each jurisdiction in Canada has enacted legislation regulating international and domestic arbitrations, and every province has adopted the UNCITRAL Model Law on International Commercial Arbitration 1985 (the Model Law) into its international arbitration legislation.

In addition, Canada is a signatory to the New York Convention and every Canadian jurisdiction has enacted legislation to give it effect. Outside of Quebec, the Convention only applies to relationships considered ‘commercial’ under the laws of Canada.

There are many arbitral institutions present in Canada, including the ADR Chambers, the ADR Institute of Canada, the Canadian Arbitration Association, the Canadian Commercial Arbitration Centre, the International Centre for Dispute Resolution and the International Chamber of Commerce.51

For international arbitration, an award cannot be appealed on its merits to a court. A court may, however, set aside the award under Article 34 of the Model Law.52 For domestic arbitrations, there are limited rights of appeal, usually only on a question of law. Appeal rights vary by province and territory. Some provinces and territories do not provide for any right of appeal, whereas others provide a right to appeal after having obtained leave.

A party can apply to the court for an order staying a court proceeding where an agreement to arbitrate is in place. Courts must stay the proceeding if the arbitration agreement is not void, inoperative or incapable of being performed.

Canadian courts generally enforce foreign arbitral awards, pursuant to the New York Convention and the Model Law. A party must file the award, along with evidence of the arbitration agreement on which it was founded.

iii Mediation

Mediation is extremely common in Canada and is encouraged by the legal profession as well as the judiciary. In fact, in some cases, mediation is required by statute. Although mediation is not a new phenomenon in Canada, it has become much more prominent in recent years, particularly in commercial disputes.

In Ontario, the proliferation of mediation is at least in part related to the enactment of the Commercial Mediation Act (CMA).53 The CMA ensures that parties settling a commercial

51 For a full list, see Department of Justice, ‘Dispute Prevention and Resolution’, online: www.justice.gc.ca/eng/abt-apd/dprs-sprd/index.html.
52 Article 34 states that an arbitral award may be set aside only if: (1) the party was legally incapable; (2) the party was not given proper notice of the appointment of the arbitrator; (3) the party was not given proper notice of the proceeding; (4) the party was denied the opportunity to present its case; or (5) the tribunal’s decision went beyond the scope of what the parties agreed was arbitrable.
53 2010, SO 2010, c 16, Sch 3.
dispute through mediation will be able to register their settlement agreement with the court, gaining the advantage of having it treated like a judgment for enforcement purposes. Ontario was the second province, after Nova Scotia, to enact legislation of this nature.

Judicial mediation is also available in certain provinces. This type of mediation allows for a judge to preside over pretrial conferences, either on an ad hoc basis or on application by the parties. In Quebec, the Code of Civil Procedure sets out a formal legislative scheme for judicial mediation.

One of the attractive features of mediation is the confidentiality that shrouds the process. The Supreme Court of Canada has confirmed that in the context of mediation, parties can agree to a higher degree of confidentiality than is afforded under the common law. This can be done if the parties clearly stipulate in the mediation contract that they intend to override the exception to common law settlement privilege that allows a party to disclose protected communications to prove the existence or scope of a settlement.

iv Other forms of alternative dispute resolution
Med-arb is a hybrid approach that combines the benefits of both mediation and arbitration. Parties first attempt to reach an agreement through mediation. If the issues remain unresolved, the parties move on to arbitration.

Sometimes parties will insert an expert determination clause rather than an arbitration clause in their agreement — the main difference being that the dispute will be determined by a third-party ‘expert’ rather than an arbitrator. This generally occurs when the agreement involves some specialised or technical field. It is important to note that, in certain provinces, expert determination clauses will not attract the same legal regulation as they would if structured as an arbitration clause.

VII OUTLOOK AND CONCLUSIONS
Cases currently under reserve or appeal will likely lead to developments in the areas of transnational jurisdiction, arbitration rights and antitrust class actions.

In *Nevsun Resources Ltd v. Gize Yebeyo Araya, et al.*, the Supreme Court will hear an appeal from the British Columbia Court of Appeal, where the court upheld a finding that Canadian courts have jurisdiction to hear claims made against Canadian defendants for alleged human rights violations that occurred in foreign countries. The Supreme Court will weigh the practical challenges associated with hearing these claims in Canada against the possibility that such plaintiffs will not otherwise receive a fair trial, and consider whether a civil remedy even exists for violations of customary international law.

In *Telus Communications Inc v. Avraham Wellman (Ontario)*, the Supreme Court heard an appeal from the Ontario Court of Appeal, where the court upheld a motion judge’s decision to certify a class action brought by individual consumers and business customers against Telus. The class was certified despite the fact that the claims of Telus’ business customers were

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54 As is the case in Alberta.
55 As is the case in Ontario.
58 SCC File No. 37919.
59 SCC File No. 37722.
governed by a mandatory arbitration clause. The Supreme Court reserved judgment and will rule on whether a contractual requirement to arbitrate vitiates the possibility of proceeding by way of class action.

Finally, in *Godfrey v. Sony Corporation*,60 the Supreme Court will hear an appeal from the British Columbia Court of Appeal, where a motion judge’s decision to certify a class action was upheld. The class action was brought by individuals who purchased optical drives at inflated prices as a result of an alleged price-fixing scheme and included ‘umbrella purchasers’ – those who purchased the optical drives from companies that increased their prices, but were not engaged in the scheme. The Supreme Court will consider the nature of harm that must be suffered by umbrella purchasers to enable them to recover as a class, and whether the principle of indeterminate liability should apply to limit the scope of liability owed to such purchasers.

60 SCC File No. 37809.
I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

The Cayman Islands is a British Overseas Territory. A Governor, a Cabinet of ministers and a Legislative Assembly have executive and legislative power, subject to a power of disallowance by the British Secretary of State for Foreign and Commonwealth affairs. The Cayman Islands enacts statutes and regulations, and, unless expressly extended to apply there, English statutes enacted after 1727 have no general application to the Cayman Islands.

The courts of the Cayman Islands reach their decisions in cases before them on the basis of the law of the Cayman Islands and applicable precedent. Where there are no binding Cayman Islands decisions, then decisions from English courts and those of other common law jurisdictions will be considered persuasive argument.

The Grand Court of the Cayman Islands (the Grand Court) is, in most cases, a Superior Court of Record of First Instance, having unlimited jurisdiction in both criminal and civil matters. Appeals from the Grand Court go to the Cayman Islands Court of Appeal, which is also a Superior Court of Record. The final level of appeal from the Cayman Islands Court of Appeal is the Judicial Committee of the Privy Council.

An action for relief up to a value of CI$20,000 can be brought in the Summary Court. Claims for a higher value, or other matters such as judicial review or winding up companies, should be brought in the Grand Court. The business of the court takes place in six divisions: civil, criminal, matrimonial and family, admiralty, probate and administration and financial services. Civil law claims, for example, for breach of contract, tort, trust matters and companies, would be brought in either the civil division or the financial services division, the latter being used for complex and higher value civil cases that normally arise out of the Cayman Islands’ financial sector. Cases in the civil and financial services divisions are decided by a judge sitting alone and only in a civil case for fraud would the defendant have the option of a jury trial.

Subject to approval by a judge, evidence may be given and hearings conducted by telephone or video link. Employment cases will in the first instance be dealt with by a labour tribunal, with rights of appeal to the Grand Court. Immigration decisions are appealed to the Immigration Appeals Tribunal with rights of appeal to the Grand Court.

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1 Kai McGriele is a partner and Richard Parry is an associate at Solomon Harris.
II THE YEAR IN REVIEW

The year 2018 saw many important decisions including those on the nature of the illegality defence, the application of alternative dispute resolution (ADR) and choice of jurisdiction clauses to non-parties to a contract, litigation funding approval requirements and the court's ability to consider a company's petition made without shareholder approval when a creditor's petition has been filed. These decisions are summarised below.

i Ahmad Hamad Algosaibi & Brothers v. Saad Investment Finance Corporation Limited & Others (Unreported Judgment) (FSD Cause No. 54 of 2009) Grand Court, Financial Services Division (Smellie, CJ)

The Chief Justice handed down his judgment in one of the largest running fraud trials earlier this year, dismissing Ahmad Hamad Algosaibi & Brothers' (AHAB) claims in addition to dismissing counterclaims brought by two of the defendants.2

The litigation began as a result of a family dispute between the Algosaibi family, which controlled AHAB, and Mr Maan Al Sanea, who had married into the family. One of the divisions of AHAB was the Money Exchange of which Al Sanea was the managing director between 1981 and its collapse in 2009. The financial crisis of 2009 affected AHAB's credit lines, which led to a default prompting AHAB to commence proceedings against Al Sanea and over 40 corporate defendants seeking to recover US$9.2 billion in borrowing on the basis that a fraud had been perpetuated against AHAB by Al Sanea (the corporate defendants were alleged to be vehicles of the fraud). The claim was pursued in Cayman against 16 corporate defendants, which were placed into official liquidation shortly after the claim was brought under the control of liquidators.

The judgment exceeds 1,300 pages and deals with several issues of fact and areas of law, primarily:

a the knowledge and authority of the borrowing of AHAB was 'overwhelming';
b the forgery allegations were without foundation;
c AHAB's claims were proprietary in nature in tracing the proceeds and the legal test for establishing these was not met. The Court held that in law it was possible to infer the required links in transactions to establish a tracing claim, but on the facts this was not made out; and
d as the tracing claim failed so did the dishonest assistance, conspiracy and unjust enrichment claims.

The Court upheld the defendants' assertion of the illegality defence against AHAB, endorsing the principle from the 18th century case of Everett v. Williams3 that parties to a fraudulent partnership or enterprise will not be entitled to invoke the Court's powers to recover the proceeds of their fraudulent partnership from their fellow criminal.

Several aspects of the judgment are subject to appeal, which is expected to be heard in 2019.

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3 (1811) 104 ER 725.
ii Argyle Funds SPC Inc (In Official Liquidation) v. BDO Cayman Ltd

On 8 October 2018, the Cayman Islands Court of Appeal (CICA) delivered its judgment in Argyle Funds SPC Inc (In Official Liquidation) v. BDO Cayman Ltd. CICA’s decision allowed a partial appeal by the joint official liquidators of Argyle to bring claims in the New York courts for gross negligence and fraud against three entities affiliated with Argyle’s Cayman auditors, BDO Cayman Ltd. These claims arose as a result of BDO’s alleged failure to identify and alert Argyle, during the course of four audits, of two obliterating frauds that ultimately resulted in Argyle’s collapse. CICA’s unanimous decision was made despite express contractual provisions in BDO’s Engagement Letters that purported to restrict dispute resolution to mediation or arbitration and a clause giving Cayman courts exclusive jurisdiction.

CICA decided that for BDO’s affiliates to be able to rely on the sole recourse and exclusive jurisdiction clauses there would have had to be clear and express terms to that effect in Argyle’s contract with BDO. In particular, CICA considered that while claims between the parties fell within the dispute resolution clause restrictions, whether or not those restrictions applied to non-parties needed to be considered in the context of the contract as a whole, not just the language used in the exclusive jurisdiction clause.

In this case, the contract claims against the affiliates for fraud and wilful misconduct fell within the carve-out in the sole resource clause. The intended effect of that clause was that Argyle should be free to bring claims that fell within the carve-out in judicial rather than arbitration proceedings. If it had been the parties’ intention to limit such judicial claims to being brought in the Cayman courts, then CICA’s view was that the parties would have expressly provided for this in the carve-out or the jurisdiction clause, but they did not do so. Instead the carve-out clause referred to ‘applicable laws’, which was an indication that the parties’ contemplated claims would be brought in jurisdictions other than Cayman.

The main takeaway for the professional services industry in the Cayman Islands is that where work is delegated to related entities outside of the Cayman Islands, any attempt to contractually limit a client’s rights to bring claims against those entities must be expressly articulated within the contract – any ambiguity risks rendering such clauses nugatory.

iii In the Matter of CW Group Holdings Limited

This matter concerned two competing applications to appoint joint provisional liquidators (JPLs) over CW Group Holdings Ltd (the Company). The first application was brought by Bank of China (BOC), a creditor of the Company, pursuant to a winding up petition by another creditor, Fubon Bank (Hong Kong) Ltd. A week later, Brownstone Ventures Limited (Brownstone), also a creditor, filed an application seeking the winding up of the Company on the ground that the Company was unable to pay its debts as they fell due.

Simultaneous with and pursuant to Brownstone’s application, the Company, acting through its board of directors, applied to appoint different joint provisional liquidators over the Company to those put forward by BOC, on the basis that the Company intended to present a compromise or arrangement to its creditors. The Cayman Court heard both BOC and the Company’s respective applications for the appointment of JPLs at the same hearing.

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4 Argyle Funds SPC Inc v. BDO Cayman Ltd, Unreported, Field JA, CICA 8 of 2018, 8 October 2018.
The judgment in this case confirms, applying the 2017 judgment of McMillan J in *Re CHC Group Ltd*, that where a creditor has already filed a winding-up petition in respect of a company, the directors of the company may apply for the appointment of JPLs without a shareholder resolution or express provision in the company’s articles of association. In *CHC Group Ltd*, McMillan J considered himself able to distinguish the case before him and that before Mangatal J in the *Matter of China Shanshui Group Limited*,[^6] when Mangatal J held that directors of a company do not have standing to apply for the appointment of JPLs unless expressly authorised to do so by the company’s articles of association or a valid shareholders resolution, on the basis that in *CHC Group Ltd*, the application by the Company for the appointment of JPLs was made pursuant to a creditor’s winding-up petition already in existence and pending.

In terms of the competing applications for the appointment of JPLs, in preferring the application for ‘light touch’ JPLs, namely, whose involvement was designed to restructure and rescue the Company, the Court affirmed that the evidential threshold to be crossed in order to assert that a company intends to present a compromise or arrangement to its creditors is low. The company need only demonstrate that it intends to present a compromise or arrangement – there is no need for a plan to have been formulated.

iv  A Company v. A Funder

The case involved a Korean multinational seeking the sanction of the Cayman Court that it could legally obtain third-party funding from a professional funder, which it intended to use to issue proceedings in Cayman to seek recognition and enforcement of a New York arbitration award and related judgments.[^7]

In a landmark decision, the Grand Court approved a third-party funding agreement and provided clear guidance to funders and plaintiffs alike as to the criteria that will be considered in assessing whether an agreement is enforceable. The case is significant because while the Cayman courts had previously sanctioned third-party funding agreements in principle, most notably in the case of *Re ICP Strategic Credit*,[^8] the approval was limited to the use of funding for the benefit of impecunious litigation estates. This case, on the other hand, involved a large international company looking to benefit from third-party funding for other commercial reasons, most notably the ability to manage risk and cost.

In his judgment, Segal J summarised the developments of the common law in the Cayman Islands and highlighted leading case law in other common law jurisdictions, most notably the England and Wales Court of Appeal decision in *Giles v. Thompson*,[^9] which had previously laid down a test to assess the competing public policy principles at play when considering funding agreements. Segal J helpfully identified seven factors that should be taken into consideration when assessing whether a third-party agreement is enforceable pursuant to Cayman Islands law:

- the extent to which the funder controls the litigation;
- the ability of the funder to terminate the funding agreement at will or without reasonable cause;
- the level of communication between the funded party and the attorney;

[^6]: [2015] (2) CILR 255.
The decision in *Re A Funder* was subsequently tested in *The Trustee v The Funder*,\(^\text{10}\) in which a trustee sought a declaration that a proposed funding agreement would be enforceable and would not be deemed a form of maintenance or champerty under Cayman law.

Segal J considered the proposed funding agreement and went through the seven features he identified in *Re A Funder* when considering whether a litigation funding agreement gave rise to a tendency to corrupt public justice, undermined the integrity of the litigation process or gave rise to a risk of abuse. Upon review, he found that it did not constitute or involve maintenance or champerty and issued a proposed declaration using the same wording as was used in *Re A Funder*.

### III COURT PROCEDURE

#### i Overview of court procedure

Civil litigation in the Cayman Islands involves the commencement of an action by an aggrieved party setting out the nature of the claim made and whom it is made against. There are procedures for both parties to set out the facts and law applicable to the dispute, provide documentary and witness evidence and then have a trial of the issue. There may be rights of appeal of the decision made.

Procedures, forms and fees for civil proceedings worth over CI$20,000 are governed by the Grand Court Rules 1995 (GCR),\(^\text{11}\) subsequent amendments, sub-rules and practice directions. The GCR do not apply to disputes governed by Parts I to III of the Succession Law (Probate and Administration) Rules 1977 (as amended); the Matrimonial Causes Rules 1986, (as amended); the Grand Court (Bankruptcy) Rules 1977 (as amended); Summary Court Rules 2004; and The Companies Winding Up Rules 2008 (as amended).\(^\text{12}\)

#### ii Procedures and time frames

**General: Grand Court Rules**

**Originating process**

Civil proceedings in the Grand Court may be begun by writ, originating summons, originating motion or petition (originating process) sealed by the court. All originating process must be in the prescribed form. The majority of claims commence with the aggrieved party (plaintiff) issuing a writ, endorsed with a general statement of the nature of the claim and the relief the plaintiff is seeking (generally endorsed writ). Alternatively they may issue the writ with a statement of claim that gives full details of the facts of the claim (statement of claim).

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\(^{10}\) *In the Matter of the Litigation Funding – FSD 98 of 2018 (NSJ) Note of Proposed Ruling.*

\(^{11}\) Grand Court Rules 1995 (Revised). G24/2003 Section 1.

Service
The writ must be served on the party named in the writ (defendant) together with a form of acknowledgement of service (AS) within four months of the writ being issued if the defendant is located or domiciled in the Cayman Islands, or six months if the writ must be served outside of the jurisdiction. The plaintiff may apply to extend the deadline.

Other pleadings
Where a writ has been served on a defendant in the Cayman Islands, the defendant has 14 days to complete and file the AS with the court to indicate whether they will defend the claim. Where a generally endorsed writ has been served the plaintiff must serve the statement of claim within 14 days of the date for filing the AS. When the defendant has been served with the statement of claim they have 14 days from the date for filing the AS to file a defence and any counterclaim. The plaintiff then has 14 days from the date for filing the defence and any counterclaim to file any reply and any defence to counterclaim. The defendant may then file a reply to the defence to counterclaim within 14 days of the date for filing the reply and any defence to counterclaim.

Challenges to jurisdiction
Any challenge by the defendant to the jurisdiction of the Grand Court must be brought by motion or summons within 14 days of the date for filing the AS.

Case management
Once the pleadings are deemed to be finalised (14 days from the expiry of the time for filing the last pleading), the plaintiff then has one month to file for an order for directions from the court on how to proceed.

Discovery
Within 14 days of the pleadings being finalised, the parties must serve on the other party a list of the documents that are or have been in his possession, custody or power relating to any matter in question between them in the action.

Extensions of time
All the above 14-day deadlines can be, and usually are, extended by agreement between the parties or order of the court.

Interlocutory applications
Interlocutory applications to determine matters such as procedure or points of law, or applications to strike out a claim or give summary judgment, are begun by asking the court to issue a summons. The summons must be served on the other party not less than four clear business days before the hearing date given by the court. Depending on the urgency, degree of complication and time required to hear the application, the court will be able to hear a summons within two to six weeks of it being issued. Evidence is given by affidavit. Cross-examination on affidavit evidence may be sought by court order but is not usual.
**Injunctions**

A plaintiff or counterclaiming defendant can apply to the court for various injunctions, usually where it considers urgent action is needed. These are generally held with only the applying party present (ex parte) with a subsequent hearing held later with both parties present (inter partes). To prevent the process being abused, the party making the application will usually be required to provide the court with an undertaking or money paid into court as security for any loss caused. This is in the event that the court later decides, when all the facts are available that the injunction should not have been granted. The types of injunction include:

- **a** to prevent action being taken or to compel someone to do something;
- **b** to prevent assets being dissipated by freezing them (a Mareva injunction);13
- **c** to trace assets by ordering someone who is not a party to the action but who has innocently facilitated a wrongdoing to disclose information (a Norwich Pharmacal injunction);14
- **d** to trace assets by ordering a non-party such as a bank to make full disclosure of confidential information to trace assets (a Bankers Trust injunction);15
- **e** to enter and search premises to find documents or movable property and prevent their destruction (an Anton Piller injunction);16
- **f** to appoint a receiver or to prevent disposal of company property before the appointment of a receiver (under GCR Order 30);
- **g** to appoint a receiver or grant other interim relief in aid of proceedings outside the Cayman Islands (under Section 11A of the Grand Court Law 2015 Revision) (including a stand-alone Mareva injunction).

**iii  Class actions**

There is no formal process for class actions in the Cayman Islands as exists in other jurisdictions, such as the United States. Where many plaintiffs would like to bring similar claims, the Grand Court can allow a representative claim to proceed, rather than have many actions with the same subject matter and issues. The result of a representative action is binding on all the parties to that action, but others that are represented but not named cannot have a judgment enforced against them without leave of the court.

**iv  Representation in proceedings**

Natural persons can represent themselves or can instruct a Cayman Islands qualified attorney to represent them. Those whose claim is for under CI$5,000 are encouraged to act for themselves in the Summary Court. For claims in the Grand Court the Judicial Administration recommends using an attorney. Companies must be represented by an attorney. Overseas lawyers, generally senior advocates, may be granted limited admission to the Grand Court for the duration of the hearing for which they have been retained by local attorneys.

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14 *Norwich Pharmacal Co. v. Customs and Excise Commissioners* [1974] AC 133.


v Service out of the jurisdiction

Unless the action is one where a Law provides that leave is not required for service out of the jurisdiction, a party wishing to serve an originating process on a person (natural or unnatural) located outside the Cayman Islands needs to apply for leave of the court to do so. A supporting affidavit must set out the cause of action, show that it has a good chance of success, demonstrate that there is a real issue which the court should try, where the defendant is or is likely to be and the method of service needed. The method need not be in person, so long as it is in accordance with the law of the country in which service is to be effected. The court will not grant leave unless the party makes it sufficiently clear to the court that the case is a proper one for service out of the jurisdiction.

vi Enforcement of foreign judgments

A final and conclusive foreign judgment on the merits (i.e., not obtained by default in appearance of the defendant) for money, which is not contrary to Cayman Islands public policy (for example a tax judgment or punitive award) may be enforced by an action in the Cayman Islands for debt, if it is shown that the judgment debtor has assets in the Cayman Islands. A writ is issued and served and if the judgment debtor enters an appearance, summary judgment can be sought on the basis that there is no defence, using the foreign judgment as evidence of that fact. This includes where the judgment is under appeal provided that execution of the judgment has not been stayed. The plaintiff will need to satisfy the court that the foreign court had jurisdiction over the defendant as they were ordinarily resident in that jurisdiction, voluntarily participated in the proceedings (not simply to challenge jurisdiction) or submitted to that court's jurisdiction. The defendant may be able to show that it would be contrary to public policy to recognise or enforce the foreign judgment, for example: because it was obtained by fraud; the foreign court was not competent to pronounce the judgment; or it was obtained in proceedings contrary to natural justice or where the defendant's rights were grossly violated.

Under the Foreign Judgments Reciprocal Enforcement Law (1996 Revision), a foreign judgment may be registered in the Cayman Islands on application to the Cayman court, after which the judgment is deemed to have the same force and effect as if originally made by the Cayman court. However, this law has only been extended to foreign judgments from Australia and its external territories.

Foreign arbitration awards can be enforced in the Cayman Islands under the Foreign Arbitral Awards Enforcement Law (1997 Revision) or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).
vii Assistance to foreign courts

Part XVII of the Companies Law

On the application of a foreign liquidator or other insolvency representative, the Grand Court may make orders recognising the right of the representative to act in the Cayman Islands on behalf of the debtor; to stay proceedings against the debtor; to examine witnesses and have documents produced to it; and transfer property of the debtor to the representative.

Non-statutory power

The Grand Court also has jurisdiction at common law to assist a foreign liquidation, even if the liquidator is not appointed in the jurisdiction where the company is incorporated. The September 2017 judgment in China Agrotech granted recognition and assistance to liquidators appointed by the High Court of Hong Kong to present a scheme of arrangement under Section 86 of the Companies Law (2015 Revision) on behalf of the company. The assistance sought must be of a type available to the liquidator under the law governing the liquidation.

Evidence in support of foreign proceedings

On a request by a court with jurisdiction in foreign proceedings, the Grand Court can make orders to produce documents or examine witnesses to obtain evidence in support of foreign proceedings.21

Hague Conventions

The Hague Conventions apply to both service of documents abroad and taking evidence abroad.

viii Access to court files

The clerk keeps a register of writs and other originating processes. This file contains an office copy of all originating process documents issued by the Grand Court and is available for public inspection upon payment of the prescribed fee. The Clerk must also keep a register of judgments that must be available to the public for inspection and copies are available on payment of the prescribed fee. The Grand Court may give leave, on application, to any person to inspect or to take a copy of any document on the court file. All hearings in open court are publicly accessible and hearings in Chambers are generally accessible but the parties to the case can object and it is at the judge’s discretion whether to accede to the objection or not.

ix Litigation funding

The common law torts of maintenance (where a third party assists or encourages a claim without any benefit to the third party) and champerty (where the assistance or encouragement is given in return for an interest in the proceeds of litigation) still apply in the Cayman Islands.

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20 In The Matter Of China Agrotech Holdings Limited 19 September 2017.
21 Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978.
22 Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.
Islands. While the Grand Court has previously approved third-party funding agreements subject to certain conditions, the scope for such agreements has been limited to liquidation proceedings involving impecunious estates.

However, recent decisions of the Grand Court have approved funding agreements in commercial disputes. This represents a notable evolution in the judicial interpretation of the law as it applies to the Cayman Islands, as well as a perceived shift in public policy.

The decision will be welcomed by litigation funders and is likely to encourage further development in this sensitive area of law in the near future. It should also prompt law makers to reconsider the discussion paper prepared by the Cayman Islands Law Reform Commission in 2015, which included a draft bill.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

Conflicts of interest

Under the Code of Conduct for Cayman Islands Attorneys at Law, without the prior informed consent of a client, an attorney must not act for a client where there is or it is reasonably foreseeable that there might be in the future, a conflict of interest with the attorney or an existing or prospective client, nor may the attorney act for more than one party in the same matter or transaction.

Chinese walls

The use of Chinese walls is provided for under Rule 1.13(2) of the Code of Conduct, which provides:

Unless the relevant parties have given their prior informed consent, it is not acceptable for attorneys in the same firm to continue to act for more than one client in a transaction. The use of an information barrier such as a ‘Chinese wall’ should be considered carefully and appropriate safeguards adopted with respect to segregating confidential information. Such a device does not overcome a conflict of interest that has already arisen.

ii Money laundering, proceeds of crime and funds related to terrorism

There is a long list of laws and regulations that apply in the Cayman Islands. Further, the UK government has issued overseas territories orders for sanctions or restrictive measures against countries, regimes or individuals deemed to be in violation of international law on matters relating to money laundering, terrorism financing and proliferation financing.
The most significant of the Cayman Islands laws is the Proceeds of Crime Law (2016 Revision) (PoCLaw), under which the Anti-Money Laundering Regulations 2017 (AML) have been issued. The AML applies to those carrying out relevant financial business, defined in Section 2 (definitions and interpretation) and in Schedule 6 of the PoCLaw and so do not generally apply to dispute resolution.

Under the PoCLaw, an attorney, who in the course of his or her profession knows or suspects or has reasonable grounds to know or suspect that another person is engaged in criminal conduct, commits an offence if they do not report that information to the Financial Reporting Authority as soon as is practicable. There are exceptions, including where the information or other matter came in privileged circumstances. The privilege exception does not apply where the information or other matter was communicated or given with the intention of furthering a criminal purpose.

Also an attorney who has any information which may be of assistance in preventing an act of terrorism or which would secure an arrest or prosecution under the Terrorism Law (2017 Revision) (including the belief that a person has committed an act of terrorism) must report that to the relevant authority. The exception is where the information came in privileged circumstances that did not involve the intention of furthering a criminal purpose.

### Data protection

The Data Protection Law, 2017 (DPL) has been passed in the Cayman Islands but is not yet in force. It is expected to come into effect in September 2019. Once in force the DPL will impose restrictions (based on eight principles) on the processing of any personal data relating to an identifiable living person, by or on behalf of, a Cayman Islands-established individual responsible for determining the manner in which the data will be processed. Under the DPL sensitive personal data such as racial or ethnic origin, religion, health, sex life, offences or court sentences is afforded special protection. As well as the DPL, how attorneys treat or process personal data is governed by the Code of Conduct for Cayman Islands Attorneys at Law. This requires attorneys to protect the confidentiality of the affairs of present or former clients, unless otherwise allowed or required by law or applicable rules of professional conduct as well as common law duties on the treatment of information that must by its nature be confidential (such as health, legal or financial information), which is neither common knowledge nor in the public domain, and which is disclosed in circumstances where it gives rise to a duty of confidence.

The Confidential Information Disclosure Law 2016 also applies to confidential information where it is necessary to apply to the court for directions in proceedings where confidential information is required to be given in evidence.

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(2017 Revision); The Terrorism (Amendment) Law, 2017. Proliferation Financing (Prohibition) Law (2017 Revision); Anti-Money Laundering Regulations (2017). The Cayman Islands Law Society has indicated that they expect their members to observe the Guidance Notes on the Prevention and Detection of Money Laundering and Terrorist Financing in the Cayman Islands August 2015 (soon to change to a new 2017 version) and the List of Amendments to the Guidance Notes August 2015 insofar as they conduct relevant financial business, within the scope of the regulations. See also the Cayman Islands Monetary Authority – http://www.cimoney.com.ky/AML_CFT.  
30 Code of Conduct for Cayman Islands Attorneys at Law Section 4.
V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege
A person or entity may claim that documents in their possession or control are protected from disclosure in litigation. This protection is known as privilege and only the client can claim privilege and only the client can waive it. A lawyer is under a professional obligation to assert it on behalf of the client until such time as it is waived by the client. Privilege continues even if the client ceases to exist. Privilege can be expressly waived by the client if it chooses, and care must be taken not to waive privilege inadvertently. The two categories of privilege are litigation privilege and legal advice privilege.

Litigation privilege applies to confidential documents that are sent between an attorney and a client, or an attorney and a third party, or a client and a third party, and are brought into being when litigation has been commenced or is reasonably in contemplation. The test for whether litigation is contemplated is an objective one, and is satisfied if litigation is ‘reasonably in prospect’. Where there is more than one purpose behind the creation of the document, the party claiming privilege must establish that the ‘dominant purpose’ was the litigation.

Legal advice privilege applies to documents that record confidential communications between attorneys acting in their professional capacity and their clients and created for the purpose of obtaining or providing legal advice.

Without prejudice
Where there has been a genuine attempt to resolve a dispute then without prejudice privilege can prevent such communications between the parties for that purpose from being put before the court.

ii Production of documents

Discovery
Once the pleadings close, within 14 days of the last pleading each party must serve on the others a list of all the documents (including those held electronically, film, photographs etc.) which are or have been in his or her possession, custody or power relevant to the matters between them in the action which the court is being asked to decide. (The definition of documents includes all forms of electronic documents.) Disclosure of documents is not limited to those documents on which a party wishes to rely in the proceedings, but also documents that may harm or undermine a claim or defence. Documents that may not be in the possession of a party may be under its power or control, for example, they are held by a related third party such as a subsidiary.

If a party considers another has not disclosed all the documents it should, then it can apply to the court to order that further documents be disclosed, identifying which documents it considers are missing. The documents or class of documents need to be identified carefully and their relevance explained, as the courts will not allow a party to abuse the process by going on a ‘fishing expedition’ to see what it might find.

Where full disclosure would result in the parties spending a disproportionate amount of time comparing the value or complexity of the issues in dispute or the relevance or usefulness of the documents to be disclosed, parties can ask the court to limit the extent of discovery.
VI ALTERNATIVES TO LITIGATION

i Arbitration

The Cayman Islands Arbitration Law (2012) (the Arbitration Law) provides procedural rules regulating the Grand Court’s practice and procedures in relation to arbitrations (which can be varied by agreement) and sets out the duties of arbitrators. It is based on the UNCITRAL Model Law and the English Arbitration Act 1996. Foreign arbitration awards can be enforced in the Cayman Islands under the Foreign Arbitral Awards Enforcement Law (1997 Revision) or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958). The court supports the arbitration or mediation process where it has the power to do so, for example: in adjourning or staying proceedings to enable an arbitration or mediation to take place; enforcement or support for procedural or other interlocutory decisions; or (with leave) hear an appeal on a point of law of an arbitrator’s decision. An arbitral award can be appealed to the Grand Court on a point of law and set aside under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). Under Section 28 of the Arbitration Law an arbitral tribunal must act fairly and impartially, allow each party a reasonable opportunity to present his or her case, and conduct the arbitration without unnecessary delay or expense.

ii Mediation

Aside from the introduction of compulsory mediation by the Family Division of the Grand Court, there is no provision, currently, in the Cayman Islands court rules for court-mandated alternative dispute resolution (ADR), with consequent costs consequences for failure to comply.

The court may apply a stay of proceedings where the parties have contractually agreed to submit to an ADR process. However, ADR is not commonly used in Cayman Islands disputes.

VII OUTLOOK AND CONCLUSIONS

There is a significant decision expected in the Weavering liquidation from the Privy Council in 2019 related to redemption clawback claims, and we also expect to continue to see more ‘fair value’ cases brought by dissenting shareholders involved in mergers. In the context of the developing line of litigation funding cases, we anticipate that more applicants will be seeking the sanction of the Cayman Islands courts for funding outside of the insolvency arena. Schemes of arrangement are expected to be a popular method of restructuring, particularly in light of the courts’ recent acceptance of debtor in possession rescue financing through such a scheme and the court’s confirmation that there is a low bar for a company to show intention to prevent a compromise or arrangement. The Cayman Islands courts are dedicated to providing a ‘best in class’ service and have received praise for the speed and manner in which they listed and disposed of cases in 2018. The efficient management of the Saad trial in 2018 is a prime example of the courts’ ability to effectively deal with large and complex cases.

32 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), Article V.
I  INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

Since the mid 19th century, particularly with the issuance of the Chilean Civil Code, Chile has had one of the most developed and influential legal systems in Latin America. In fact, several other countries in the region that adopted the Chilean Civil Code have followed other more recent regulations such as the Antitrust Law, Concession of Public Works Law, pension laws and banking laws, among others, and regularly cite Chilean authors as well as court decisions.

Those modern regulations contrast with the Chilean Civil Procedure Code, which has ruled Chile's civil and commercial litigation for over a century, and the Chilean Organic Court’s Code, which has ruled the Chilean court structure since 1943. As an alternative to the outdated proceedings established in the Chilean Civil Procedure Code, arbitration and alternative dispute resolution (ADR) proceedings have gained popularity during the past two decades.

Chilean law supports both domestic and international arbitration proceedings, and ADR mechanisms. Domestic arbitration and ADR mechanisms are mandatory for some disputes, such as those regarding public works concessions or energy law.

Regarding international arbitration awards, their execution in Chile can be challenged by the Chilean set-aside procedure; and domestic arbitration awards can be challenged according to general Chilean rules, unless the judicial recourses have been waived by the parties. However, some specific judicial recourses cannot be waived by the parties.

Chilean courts have a hierarchical structure. The Supreme Court is at the top of the pyramid, then there are 17 courts of appeal throughout the Chilean territory and they have jurisdiction over several lower civil courts, which in turn have jurisdiction over different matters. While the courts of appeal are in charge of ruling over appeals and other judicial recourses filed against decisions issued by lower civil courts, the Supreme Court is in charge of ruling cassation appeals and disciplinary recourses filed against the rulings of the courts of appeal. The Supreme Court also supervises the administrative, economic and disciplinary aspects of lower courts, with the exception of some specialised courts (e.g., the Constitutional Court).
II THE YEAR IN REVIEW

During the past months, two significant developments have taken place in the context of dispute resolution. One of them relates to the recognition of the loss of chance as a cause of action in torts litigation, and the other one to the grounds for setting aside an international arbitral award.

The loss of chance, when admitted, allows the plaintiff to obtain compensation from a defendant for losing the opportunity to avoid damage or gain certain benefit, even if the plaintiff cannot prove beyond any doubt that the suffered damage or lost benefit was directly and necessarily caused by the defendant’s negligence.

As in other legislation, for a person to be held liable for damages that are wrongfully caused, Chilean law requires both but-for causation and proximate causation to be proven. The traditional rule for determining but-for causation requires proof that the damages would not have occurred without the defendant’s conduct. As causation in loss of chance is essentially uncertain and merely based in the probabilities of obtaining a benefit or avoiding a loss without the defendant’s conduct, for years it has been uncertain if Chilean law should support the loss of chance as cause of action. Although Chilean authors and some arbitrators have recognised the loss of chance as a cause of action, courts have been historically reluctant to accept it until a few years ago, with a few notable exceptions.2

In 2014,3 a new trend slowly started developing when the Supreme Court began to expressly recognise the loss of chance as a cause of action in public hospitals’ medical malpractice cases and – to a limited extent – in governmental authorities’ negligence. This trend has been more consistent during the past two years, with the Chilean Supreme Court developing a detailed basis for its application in tort disputes.4

In all these cases, the Supreme Court has only considered the loss of chance as a cause of action to hold the government liable for the public hospital’s medical malpractice under governmental administration when the plaintiff’s chance of early recovery, complete recovery or survival has been lowered or lost; as well as in governmental authorities’ negligence in two cases where a tsunami alert was not given in time so that people could take emergency measures to avoid the damages caused by the tsunami.

As loss of chance cannot be compensated as direct damage under the Chilean Civil Code, and the Supreme Court’s decisions are strictly limited; its application will rarely be extended to other cases, such as contract breaches or cases with defendants other than the government.

With regard to the grounds for setting aside an international arbitration award, although it has been generally accepted that Chilean law and international treaties only allow annulment recourses against international arbitration awards, time and again domestic arbitrations’ recourses have been filed against those awards (such as complaint recourses

2 Such as in Causa n° 7326/2009, de Corte Suprema de Chile - Sala Tercera (Constitucional), 31 September 2009.
3 Segura v. Fisco de Chile Case No. 12.530-2013, Supreme Court, 15 April 2014.
4 Such as in Méndez con Corporación Municipal de Salud Case No. 35.721-2017, Supreme Court, 29 June 2018; or Catalán v. Servicio de Salud Metropolitano Central Case No. 41.890-2017, Supreme Court, 2 October 2018; and dozens of other cases.
and cassation appeals). Those recourses were always immediately dismissed during the admissibility test, until a case regarding the International Chamber of Commerce (ICC) sole arbitrator of an international arbitration proceeding, Ms Valeria Galíndez.\(^5\)

One of the parties challenged Valeria Galíndez’s arbitration award before the Santiago Court of Appeal by recourse of a disciplinary nature (complaint recourses), which is only admissible in domestic arbitration, as the Court of Appeal has ruled time and again. Consequently, the petitioner asserted that this arbitration was not international but domestic, arguing that the arbitration proceeding involved Chilean parties that were domiciled in Chile, and that the place of the arbitration and the place of contract’s execution was also in Chile.

In this regard, it is not unusual for a losing party of an international arbitration to try to change to a domestic arbitration, so the award can be challenged under the Chilean general rules (including complaint recourses) instead of the limited rules available for international arbitration awards.

Unexpectedly, and for the first time ever, the Court of Appeal agreed to admit the complaint recourses; however, after a public hearing on the merits of the case – instead of during the previous admissibility test – the Court considered the complaint recourses to be inadmissible. The Court argued that it was not possible to deem this international arbitration to be domestic because the judge was a foreign national and the proceeding was held in English and subjected to the rules of the International Arbitration Court, whose terms and conditions were accepted by the parties before the initiation of the proceeding.

The Court of Appeal’s ruling sets an important precedent regarding the nature of international arbitration proceedings, taking in more elements than those usually considered.

### III COURT PROCEDURE

#### i Overview of court procedure

Civil and commercial procedures are mainly carried out in writing, and the judges have almost no personal interaction with the parties to the dispute. The proceeding moves forward based upon the parties’ written presentations, and the courts’ jurisdiction is limited by the petitions, arguments and evidence provided by them. In such regard, civil and commercial courts have minimal ex officio powers.

In connection with the rules of evidence, civil courts have to weigh the evidence submitted by the parties according to special rules established in the Chilean Civil Code and Civil Procedure Code. If these rules are breached by the court, its final judgment may be challenged by an appeal or a cassation appeal, and amended by the Court of Appeals or annulled by the Supreme Court.

In the event a court’s resolution or final judgment is deemed to be unfair or irregular, the legal system provides for set of judicial recourses based either on procedural mistakes (wrongful interpretation and application of procedural rules) or substantive mistakes, regarding the governing law or its scope.

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Appeals, cassation appeals and complaint recourses fall within the jurisdiction of the Court of Appeals and the Supreme Court. Also, there are special judicial recourses that fall within the jurisdiction of the lower courts, which will decide on a challenge made to their own judicial resolution.

All the above results in a very slow civil procedure, currently unable to fulfil the practical needs of Chilean society. This problem was identified years ago and a commission was formed to draft the guidelines for a new civil procedure system and a new Civil Procedure Code. This new Code will most likely vest the courts with a more active role, and make the procedure orally based.

ii Procedures and time frames

The Chilean Civil Procedure Code establishes a proceeding that has a long discussion phase that ends with a mandatory mediation hearing. If the parties fail to reach an agreement to end the dispute, the court will issue a resolution identifying the main facts in dispute that need to be proven. Once this resolution is served to the parties, the evidentiary phase begins. Once the evidentiary phase finishes, the court will issue its final judgment.

The discussion phase includes the lawsuit, the defendant’s reply, the plaintiff’s replication and the defendant’s rejoinder. A counter lawsuit is also allowed in the same proceeding.

From filing, it may take up to six years to conclude the lawsuit, including the judicial recourses to which the parties are entitled.

Also, Chile’s legal system provides for an exceptional special procedure for certain lawsuits, which are shorter, faster, have fewer stages or phases and are orally based, admitting only the plaintiff’s lawsuit and defendant’s reply. Generally, there is no space for a counter lawsuit.

In order to ensure the effective enforcement of a court’s final judgment, Chile’s legal system provides for emergency or preliminary interim measures that may be granted whenever the *fomus boni iuris* and *periculum in mora* requirements are met. The plaintiff must also prove that the interim measures are appropriate and proportionate to the requests made to the court. This means (1) evidence must be submitted about the claimed right; (2) specific requirements for the requested interim measures must be met, according to the law; and (3) collateral security must be given whenever applicable.

iii Class actions

Class actions can be filed in connection with breaches of the Consumer Rights’ Law (Law No. 19,496), the Antitrust Law (Law No. 20,169) and the laws governing construction defects (Decree with Force of Law No. 458).

iv Representation in proceedings

Most of the proceedings require lawyers to appear before courts. Only under limited circumstances may a party appear without legal representation, for example, before *ex aequo et bono* arbitrators and the Court of Appeals when filing the special constitutional actions such as *habeas corpus*. Also, in some circumstances, a party may be represented by the court’s legal officer, a law school student or a recently graduated law school student who has not been admitted to practise yet.

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v Service out of the jurisdiction

To serve natural persons or corporations outside the Chilean jurisdiction, the principle *lex loci regit actum* applies. This means that Chilean courts will require the assistance of the court of the country where the person or corporation is domiciled, to whom the documents to be served will be sent by means of a letter rogatory.

vi Enforcement of foreign judgments

For the recognition and enforcement of a foreign judgment, the Chilean Civil Procedure Code provides for an *exequatur* proceeding. First, if an international treaty regarding the recognition and enforcement of foreign judgments has been agreed with the foreign judgment’s country of origin, the foreign judgment will need to comply with the specific requirements of that treaty. Second, in the absence of any of those treaties, the recognition of the foreign judgment will depend upon reciprocity. Chilean law establishes that foreign judgments will be recognised and executed with the same terms and conditions as Chilean judgments in that country.

Even when there is no treaty or reciprocity, the foreign judgment will be recognised in Chile if four minimum requirements are met (this is known as international regularity or the minimum international due process standard):

a. not being contrary to Chilean law (with the exception of the procedural laws under which the judgment would have been issued in Chile);

b. not being in conflict with the Chilean courts;

c. the foreign judgment should have been duly served to the losing party. Even in that case, the losing party may challenge the *exequatur* proving that, among other reasons, it was prevented from presenting a defence; and

d. the foreign judgment should be final and irrevocable in accordance with the laws of the country in which it was issued.

Regarding international commercial arbitration awards, Law No. 19,971 provides limited grounds for refusing recognition or enforcement of the international arbitral award, which are included in the 1985 UNCITRAL Model Law.

If the *exequatur* is governed by an international treaty, such as the New York Convention, the defendant will be entitled to file only the defences allowed by the treaty to challenge the recognition of the foreign judgment or foreign award. With regard to the recognition of international arbitration awards, the defendant will be able to challenge the recognition based upon the grounds indicated in Chapter VIII, Law No. 19,971, which are those of the 1985 UNCITRAL Model Law. The Supreme Court has sustained, regarding the *exequatur* proceeding of an arbitral award, that is not possible to discuss legal and factual issues that were discussed before the tribunal that issued the award, or to discuss defences that can be filed in the enforcement proceeding, but only to review the legal requirements established by Law No. 19,971 to determine whether to recognise the award. The purpose of the *exequatur* proceeding is limited to determining whether or not to authorise the enforcement of awards rendered in foreign countries.6

In general terms, when enforcing foreign judgments in Chilean courts, the defendant’s defences are limited to those established in Article 464 of the Chilean Civil Procedure Code,

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6 Qisheng Resources Limited Case No. 7.854-2013, Supreme Court, 21 April 2016.
if no more than three years have passed since the judgment became final. If more than three years have passed, the defendant will be entitled to all Chilean legal defences against the enforcement.

**vii Assistance to foreign courts**

The Bustamante Code regulates communications and mutual cooperation between foreign courts. Thereby, foreign courts require the assistance of Chilean courts by means of letters rogatory, or any other agreed form of transmission in civil or criminal matters.

Chile has also ratified the Inter-American Convention on Letters and Letters Rogatory from 1975, applicable in civil or commercial matters whose purpose is:

- a) the performance of procedural acts of mere procedure, such as notifications, summonses or placements abroad; and
- b) the receipt and obtaining of evidence abroad.

According to the Convention, these letters rogatory are processed according to the laws of the requested state. The Chilean Procedure Code provides for a specific procedure for the processing of requests made by foreign courts.

Additionally, Chile has ratified the Inter-American Convention on the Taking of Evidence Abroad from 1975 and the cooperation and jurisdictional assistance agreement on civil, commercial, labour and administrative matters between the states party to MERCOSUR and the Republic of Bolivia and the Republic of Chile from 2002.

Considering all the international conventions ratified by Chile, the protocol for processing communications between international courts was recently modified to speed up the process, which is now the responsibility of a specialised Supreme Court’s office called the Central Authority.

**viii Access to court files**

Generally, all case files are kept in electronic dockets that are available to the parties and the public through the internet. There are some exceptions established by law, based on privacy as in family law cases, preliminary interim measures and cases where secrecy is needed for criminal investigations to succeed.

**ix Litigation funding**

Chile does not have any regulation to allow or prohibit a third disinterested party to fund litigation, and third-party funding is not common. On top of that, it would be hard to know whether a case has been funded by a third party, as it is generally agreed under a private agreement.

Nevertheless, the Chilean Civil Code regulates the transfer of rights subjected to a judicial dispute, called derechos litigiosos. This is, however, different from third-party funding since the buyer of the right in dispute publicly replaces the seller in the proceeding (Article 1911 and subsequent Articles of the Civil Code). Also, the Civil Code establishes that the debtor is not obliged to pay the buyer more than the adjusted value paid by the buyer to the seller. This limitation substantially reduces any interest in profiting from buying rights subject to a judicial dispute.

Even though it is not strictly litigation funding, only lawyers are allowed to charge fees contingent on the outcome of the litigation (cuota litis). Its only limitation is provided...
by the Code of Ethics issued by the Chilean Bar Association (Article 36), which states that the contingent fee cannot be larger than the amount to be received by the client. During the litigation, however, the lawyer cannot provide financial assistance to the client (Article 76).

IV  LEGAL PRACTICE

i  Conflicts of interest and Chinese walls

The only legal provisions dealing specifically with conflicts of interest regarding law practitioners are established in the Criminal Code. According to such provisions, it is a crime to assume simultaneously the defence of two parties with opposing interests in a dispute. More generally, it is also a crime to wilfully harm the interests of a client or to disclose privileged information of a client (e.g., to another client).

However, the Code of Ethics of the Chilean Bar Association contains more specific provisions regulating the possible conflicts of interest of lawyers and law firms. Notwithstanding that such provisions are only enforceable against lawyers who voluntarily join the Bar Association, they are generally applied by Chilean courts as general principles or standards in cases where lawyer’s compliance with his or her duties is judicially challenged.

According to the Code of Ethics, there is a conflict of interest whenever a lawyer’s professional intervention in a matter adversely affects another client; or when there is a material risk of impairing the fulfilment of his or her duties of loyalty and independence owing to personal interest, or to the duties owed to another current or former client, or to third parties.

Chinese walls are not expressly regulated in the Code of Ethics. Nevertheless, the same code contains certain provisions regulating situations where a lawyer may represent two or more clients jointly, provided that all risks and disadvantages that may arise throughout his work are explained in writing, and all clients agree in writing to hire the same lawyer.

Likewise, if lawyers should represent two or more clients in the same or different matters, they may not take part in negotiations where they are on opposing sides without their prior written authorisation, after giving them detailed and complete information about all interests involved in the negotiation. In any case, the Code of Ethics forbids any negotiation that involves waiving the rights of one client in favour of another without the written and informed consent of the affected party.

According to the Code of Ethics, conflicts of interests that affect a lawyer also apply to the other members of his or her firm.

To summarise, in the absence of regulations on Chinese walls, the Code of Ethics allows lawyers (or law firms) to take part in a matter where there is a conflict of interest, provided that there is no breach of the confidentiality and loyalty duties owed to clients, and the interested clients give their express and informed consent. In any case, Chinese walls, at least in connection with disputes, are not very common in Chilean legal practice.

ii  Money laundering, proceeds of crime and funds related to terrorism

The regulations issued by the Financial Analysis Unit, the governmental agency that seeks to prevent the use of the financial system and other economic sectors for money laundering and financing of terrorism, requires from certain persons and entities (e.g., banks and other financial institutions) certain due diligence, ‘know-your-client’ and the report of suspicious activities that may result in money laundering.
Chile

Lawyers and law firms are not among the persons and entities who are subject to these reporting duties. In any case, lawyers who take part in their clients’ illegal activities may also be held liable for such actions.

In this regard, the Chilean Bar Association, in line with the recommendations of the Financial Action Task Force on Money Laundering, issued some guidelines and recommendations in 2014, with the purpose of providing lawyers with a tool to help them to assess the risks associated with certain clients and activities, preventing them from engaging in money laundering. These recommendations are limited to certain activities, including purchase and sale of real estate, managing assets for a client, managing a bank account for a client, and incorporation, management and transfer of companies.

iii Data protection

From a legal practice perspective, data protection obligations arise from the interaction of Law No. 19,628 on the Protection of Personal Data, and the provisions of the Code of Ethics.

Law No. 19,628 imposes a confidentiality or secrecy obligation on all those people working (or who have worked) in personal data processes, when this information comes from or has been collected from sources not available to the public, as well as in connection with all other data related to the data bank.

The Code of Ethics contains provisions regarding the use of the information provided by the client as well as the handling of documents that belong to the client. The information provided by the client may only be used in his interest, and confidential information may not be used for the benefit of the lawyer or third parties without the express permission of the client. Lawyers must keep custody of all documents handed to them by their clients, and they must be ready to give the originals or copies back to them if they wish so.

In addition, the Code of Ethics makes partners or directors of law firms responsible for ensuring that all members of the firm (whether administrative staff, other lawyers, interns and others) abide to its rules. Lawyers are also responsible for adopting all reasonable measures to ensure that their working staff are aligned with the professional obligations of those practising law, as well as delegates or third parties that are hired.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

In Chile, the violation of attorney–client privilege is considered a crime, but there are no legal provisions dealing with the specific content and scope of privilege. However, according to a ruling issued by the Supreme Court in 2012, the rules on privilege emanate from the Constitution, as they are part of the due process constitutional guarantees, and they are specified in the Code of Ethics issued by the Chilean Bar Association. The Supreme Court held that although the Code of Ethics is not law in a formal sense, it is in a material sense, as it imposes general, permanent, abstract and mandatory conduct requirements to all lawyers...

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7 Code of Ethics, Article 42.
8 Code of Ethics, Article 113.
9 Code of Ethics, Article 115.
10 Code of Ethics, Article 116.
in Chile, irrespective of the fact of being a member of the Bar (which is voluntary), and that they represent the minimum ethical requirement that may be expected from those who have received a professional title enabling them to practise law.

According to the provisions of the Code of Ethics, privilege covers all the information related to the client matter received by the lawyers during their legal assistance. A lawyer must refrain from revealing any information covered by privilege, as well as from delivering, revealing or facilitating the access to any device or storage device under his or her custody containing such information.

Whenever a lawyer is required by law or by any authority to report or declare on a matter subjected to privilege, the lawyer must enforce the privilege. In this regard, a lawyer must defend himself or herself based upon constitutional and legal provisions trying to free him or her from the obligation to report or declare it, guaranteeing the fulfilment of his or her duty regarding privilege.

In this regard, the lawyer must limit himself or herself to express that the information requested is covered by privilege and refrain from giving further explanations. In general, lawyers must challenge all decisions issued by authorities when they order them to declare on matters covered by privilege.

There are no legal provisions nor case law dealing with how privilege should apply to in-house lawyers. The lack of legal culture in this area and the absence of precedents have led, in some cases, to agencies and prosecutors seizing documents produced within the scope of internal investigations.

ii Production of documents

Chilean law distinguishes between two kinds of documents: public and private.\(^{11}\)

According to the Chilean Civil Code a public document is ‘one that has been issued in accordance to legal formalities by a competent public officer’.\(^{12}\) Any other document that does not comply with those requirements is considered to be a private document (e.g., contracts privately signed by the parties).

The rules regarding the production of documents are mainly contained in Title XI of the Chilean Civil Procedure Code.

During trial (and exceptionally before one) parties are entitled to obtain relevant documents that they do not currently possess, by means of a ‘documents exhibition’ process. In this regard, parties can request the court to order the opposing party or third parties to produce certain documents and submit them to the court. The court will accept this request under two conditions:\(^{13}\) the documents must be directly related to the dispute; and the documents should not be confidential. If the requested party fails to comply with the court’s order, sanctions may be imposed.\(^{14}\)

Since the text of the law only enables the ‘exhibition’ of the requested documents, when asking the court to order the documents exhibition it is advisable to explicitly request copies, as permitted by Article 283 of the Chilean Civil Procedure Code.

The documents exhibition may also be requested from the court before the trial, in order to prepare any future litigation.

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11 Chilean Civil Procedure Code, Title XI.
12 Chilean Civil Code, Article 1699.
13 Chilean Civil Procedure Code, Article 349.
14 Chilean Civil Procedure Code, Article 277.
Notwithstanding the latter, the sanctions contained in the Chilean Civil Procedure Code for the parties or third parties that fail to comply with the exhibition are deemed to be immaterial, and, hence, unhelpful for the interested party.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

Chile has a long-established tradition of domestic arbitration. In recent years, as a consequence of different legal reforms, the use of other ADR mechanisms, such as mediation and dispute boards, have become widespread.

On the other hand, while the legal framework for domestic arbitration has remained relatively unchanged in the Chilean Civil Procedure Code, the legal framework for international arbitration – primarily based on Law No. 19,971 issued in 2004 – is relatively new.

In connection with this regulation, the relevance of Chile as a seat of international arbitration has increased in the past decade, after local courts have consistently supported the new legal framework governing international arbitration, by rejecting several challenges to the recognition and enforcement of international arbitral awards, confirming the limited scope of the annulment grounds set out in the law governing international arbitration.

ii Arbitration

Chile has a dual arbitration system. International and domestic arbitrations are governed by different legislation and subject to different standards.

Domestic arbitration has a long history in Chile (the first legislation dates back to 1875), and the current regulation has been in force since 1902 (the Chilean Civil Procedure Code) and 1943 (the Chilean Organic Courts’ Code). As proof of the consolidation of arbitration as an ADR mechanism in Chile, Chilean law provides for mandatory arbitration in certain types of commercial disputes.

The majority of complex commercial agreements entered into in Chile have arbitration clauses. This led the Santiago Chamber of Commerce to create a specialised Arbitration and Mediation Centre (CAM) in 1992, which is the most important arbitration centre in the country, having dealt with thousands of cases since its creation.

Chilean law allows the parties to determine by themselves the proceeding rules in arbitration, the governing law and an ex aequo et bono arbitrator, with only certain limitations based upon Chilean public policy.

International arbitration is governed by Law No. 19,971, which is an almost identical transcription of the 1985 version of the UNCITRAL Model Law, the New York Convention of 1958, ratified by Chile in 1975, and the Panama Convention from 1975, ratified by Chile in 1976, all applicable to the enforcement of foreign arbitral awards.

The request for recognition of a foreign arbitral award must be brought before the Supreme Court through an outdated proceeding governed by the Chilean Civil Procedure Code called exequatur. However, the substantive review will follow the rules set forth under Law No. 19,971, which provides for exclusive grounds to refuse the recognition of an arbitral award, following the standard of the New York Convention.

If an international award has been rendered in Chile, the only recourse available to the parties is the set-aside procedure established in Article 34 of Law No. 19,971, which mirrors the grounds to for refusing recognition of a foreign award.
Since Law No. 19,971 was passed, the Supreme Court has consistently enforced certain foreign awards and rejected certain challenges, confirming the limited scope of the review allowed by the law and the New York Convention.

iii Mediation

There are no legal rules governing mediation in the context of civil and commercial disputes. Nevertheless, mediation has become more widespread in those areas, thanks to the efforts of Chilean arbitral centres and the cultural changes, leading to recent legal reforms providing for mandatory mediation in different areas.

In this regard, in 2000, CAM issued the Mediation Procedural Rules so those interested in submitting a national or international commercial dispute to mediation in this centre may request its services.

However, CAM also promotes staggered clauses that combine mediation and arbitration, avoiding arbitration in cases where mediation yields a favourable result, which saves time and money for the parties involved.

These trends follow what has been happening in labour law, family law and health law. In 2001, in compliance with Law No. 19,759, the Labour Directorate established a mediation centre, which has been involved in more than 15,000 cases at a national level. In family law, mediation became mandatory in 2004 and between 2009 and 2015, the number of cases subject to mediation increased from 79,707 to 242,905.

Finally, in health law, claims related to damage suffered by a patient of a public institutional provider (hospitals, emergency rooms and others) can be subject to mediation conducted by a specialised team of the state’s defence council. In 2007, 827 claims requesting a mediation procedure were filed at a national level. In 2017, the national total was 1,298, and during the first semester of 2018 it was 730.

iv Other forms of alternative dispute resolution

Dispute boards have been in use in Chile since 2004 in connection with conflicts arising between companies and other entities subject to energy law, and, since 2010, in connection with conflicts arising in contracts for the construction, maintenance and operation of public works concessions.

These two dispute resolution boards operate on a short and concentrated procedure basis. Both panels must issue a decision within 30 days of a public hearing, where the parties orally explain their arguments. Only the energy law dispute board issues a binding recommendation.

In 2014, CAM entered into a Cooperation Agreement with the Chilean Chamber of Construction with the purpose of implementing panels of experts to solve construction disputes. It also entered into a collaboration agreement in 2014 with the International Dispute Board Federation, becoming the first South American institution to do so.

Considering that dispute boards are composed of impartial professionals with technical knowledge, they are a highly efficient alternative for the early resolution of disputes; especially when the parties are entitled to request assistance from the dispute board in any disagreements or conflicts, which can be treated in a flexible and appropriate manner, with greater possibilities of solving the potential conflict and restoring the trust of the parties involved.

Finally, in January 2018, CAM entered into an agreement with the ICC to manage ICC arbitrations and other ICC ADR mechanisms.
VII OUTLOOK AND CONCLUSIONS

One of the main complaints against the Chilean judicial system is the length of time the civil courts take to issue final decisions, owing to the outdated procedures established by the Chilean Civil Procedure Code. As a temporary response to this problem, in 2016, Law 20,886 (the Digital Proceedings Law) was issued, which amended the Chilean Civil Procedure Code and the Chilean Organic Courts’ Code. The Digital Proceedings Law completely changed all the rules that, since 1902, only allowed paper-based presentations from the parties to the courts, as well as paper-based courts decisions.

The new law requires the parties, as well as the courts, to use digital documents (such as pdfs) during the proceedings, leaving the requirement for paper-based documents only in exceptional cases (e.g., original signed documents). As a consequence, many of the outdated trial rules established by the Chilean Civil Procedure Code have changed, for example, now there is no obligation to pay for copies of files in order to appeal a certain court decision.

Although other civil procedure rules were not changed by the Digital Proceedings Law, its practical impact was tremendous. For instance, there is no longer a physical trial file but a digital one, which not only saves space in courtrooms, but eases and speeds up the review process. As a consequence, proceedings at first instance courts that would typically last up to three years before a final decision is issued, may take less than two years. As a result, it is not uncommon to find proceedings before the lower court that started under the Digital Proceedings Law in early 2017 that are about to end less than two years later.

In spite of the many difficulties faced during the implementation of the Digital Proceedings Law, it has become a positive change to the judicial system.

There are still several issues that need to be solved. Indeed, the digital proceedings software has certain glitches that need to be amended, and there is not yet uniform criteria for applying all the rules of this law, creating great legal uncertainty, as every court is construing these rules in their own way. The law specifically gives the Supreme Court enough power to fill these loopholes with instructions to the lower courts, but since the implementation of the Digital Proceedings Law, those instructions are few and still not enough.

One important pending issue to be solved by the Supreme Court refers to the parties’ legal right to combine a paper-based case with a digital one when meeting the legal requirements established by the Chilean Civil Procedure Code, so they can be judged by only one court, avoiding the risk of contradictory final decisions that could be issued by different courts when referring to a same issue. This procedural institution is mainly used in tort proceedings, where there are multiple plaintiffs that sue the defendant in multiple different proceedings (e.g., transit accidents where several pedestrians are injured, and each one of them files a lawsuit against the responsible party).

As an example, in April 2016, the main river in Santiago overflowed and flooded multiple properties near to the riverbed, leading to the most important massive tort case of the century. Two companies and the state of Chile have been held responsible for this incident, and several lawsuits have been filed against them under different courts. Some of these lawsuits were filed before the implementation of the Digital Proceedings Law – hence, they are paper-based – but most of them were, or still are, being filed according to the new rules.

All of these proceedings are substantially the same, and the plaintiffs are claiming damages caused by the river overflow, but as a consequence of the Digital Proceedings Law some of them have a paper-based file and others a digital file. This has been used by some courts to deny the fusion of several proceedings that otherwise would be fused.
Recently, the Santiago Court of Appeals decided that paper-based cases can be combined with digital cases by printing the documents of the latter and applying the old rules to them.\(^\text{15}\) This decision was a breakthrough. Hopefully the issue will be solved by the Supreme Court in a definitive fashion.

Although Chile has been taking steps to improve its dispute resolution system, creating new specialised venues to solve technical matters, rules for civil and commercial litigation have room to improve. The Chilean Civil Procedure Code was enacted more than a century ago, and it has not been properly updated to match the public’s needs.

For years, Congress has been debating a new and modern Civil Procedure Code, but the authorities have been reluctant to embrace it as a priority, which is in contrast to the approach taken with the new Criminal Procedure Code and the Labour Code (that established new and modern litigation proceedings). The Digital Proceedings Law is just a small improvement on the outdated civil and commercial procedure rules that have encouraged people to choose arbitration over going to the ordinary courts, even when the costs are much higher, as arbitration gives the opportunity to establish modern procedural rules and a faster resolution time.

Chapter 7

CYPRUS

Soteris Pittas and Nada Starovalah

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

Cyprus was a British colony until 1960 when the island became an independent republic. It was essentially the English legal system that applied to Cyprus whereby the applicable laws included the Constitution of Cyprus, the laws retained in force by virtue of Article 188 of the Constitution, the principles of common law and equity and the laws enacted by the House of Representatives. Following the accession of Cyprus to the European Union in 2004, the Constitution was amended so that EU law has supremacy over the Constitution and the domestic law of Cyprus. Moreover in 1960 the House of Representatives of Cyprus passed the Law referred to as the Courts of Justice No. 14/1960, which remains the backbone of the Cypriot legal system stating that ‘the common law and the principles of equity shall apply, save where they do not coincide with or where they are in conflict with the Constitution of the Republic of Cyprus or where any law provides differently’.2

Like most legal systems, the judicial procedure in Cyprus can be divided into the criminal procedure, the civil procedure and the administrative procedure. As regards civil procedure the relevant applicable law is mainly the Civil Procedure Rules and the Supreme Court case law that is published online and accessible to everyone via the website www.cylaw.org. It is worth noting that the procedure with respect to the labour courts, rent control courts and the family courts is based on civil procedure.

There are two tiers of courts in Cyprus, the Supreme Court and the subordinate courts. In both civil and criminal proceedings there are no jury hearings. The Supreme Court, which comprises 13 members, one of whom is its president, is the highest court in the Republic of Cyprus. The Supreme Court acts as an admiralty court with jurisdiction to adjudicate on all admiralty matters both at first instance and on appeal, and has exclusive jurisdiction to issue the prerogative orders of certiorari, habeas corpus, mandamus, prohibition and quo warranto. It is also the final appellate court and has jurisdiction to hear and determine appeals in both civil and criminal cases from the other subordinate courts.

The five district courts, one for each geographical district, exercise initial criminal and civil jurisdiction. Assize courts are vested with unlimited jurisdiction to try all criminal offences and to impose punishment provided by the law. Family courts have jurisdiction in all family matters including divorce, custody disputes and any property divisions, while labour

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1 Soteris Pittas is a managing director and Nada Starovalah is a barrister at law at Soteris Pittas & Co LLC.
2 Section 29(i)(c) of Law 14/1960.
II    THE YEAR IN REVIEW

i   Amendments to Orders 25 and 30 of the Civil Procedure Rules

Orders 25 and 30 of the Civil Procedure Rules have been amended in order to speed up the court process especially the proceedings in relation to smaller claims that used to be heard within five or six years of their filing, creating costs even greater than the amount claimed via the action.

Order 25

With regard to Order 25, a party to an action may proceed with the amendment of its pleadings either with or without the leave of the court, which depends on the stage of its case. The plaintiff may amend the writ of summons without the leave of the court any time after the filing of the writ of summons and before the service of the latter. Furthermore following the exchange of the pleadings and before the issuance of the summons for directions, a matter governed by Order 30, any amendment is permitted without obtaining the permission of the court. In such a case, the other party has then 15 days after the filing of the amended pleading to file its own amended pleading, if this is considered necessary. However, after the issuance of the summons for directions as per Order 30, no amendments are permitted unless these are related to a (1) bona fide mistake relating to the drafting of the pleadings or (2) to new facts that were not in existence at the time when instructions were received or at the time of the filing of the writ of summons or of any other pleading.

Order 30

As per Order 30 of the Civil Procedure Rules, irrespective of the scale of each lawsuit, a plaintiff must issue a summons for directions within 30 days upon the completion of the pleadings. Consequences can arise if the plaintiff fails to do so, particularly where the defendant notifies the plaintiff of its omission to file a summons for directions and the defendant once again neglects to comply with same. In such cases the lawsuit will be rejected by the court. Provided, however, that a summons for directions is issued, each party has 30 days after the filing and the service of the said summons, to specify in a written annex, which is Form 25, the precise directions that the plaintiff wants the court to issue.

With regard to this Order, a distinction must also be drawn between claims under €3,000 and those above €3,000. For the actions under €3,000, the court will direct the parties to submit and exchange their testimony in writing and state for example the number of witnesses they intend to call during the hearing. The trial of such actions is completed solely via written testimony. With regard to actions above the scale of €3,000, the parties

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3 Section 25(1) of the Civil Procedure Rules.
4 Section 25(2) of the Civil Procedure Rules.
5 Section 25(2) of the Civil Procedure Rules.
6 Section 25(3) of the Civil Procedure Rules.
7 Annex 25 to the Civil Procedure Rules.
are required to file a list including the names of the witnesses they intend to call together with a summary of each witness' testimony. The trial of such actions is based on the written testimonies that have been filed with the court and the latter allows each party to proceed into an examination-in-chief, cross-examination or re-examination. However, the new Order 30 makes reference to time limits whereby examination-in-chief is 15 minutes and the time for cross-examination and re-examination will be set by the court depending on the statements and documents that have been submitted by each witness during the latter's examination-in-chief.

ii  Amendment to the Courts of Justice Law 14/60

Amendments have also been made with regard to the Courts of Justice Law 14/60 in particular with regard to the matter as to which decisions are subject to appeal. Under the new Article 25 of the Courts of Justice Law 14/60, the following decisions are subject to appeal:

- every final decision or order of the court that exercises civil jurisdiction;
- prohibitory orders or orders for the issuance of receiver that are issued as per the provisions of any law; and
- interim decisions that are absolutely decisive as to their effect on the rights of the parties.

Furthermore in any event, a party is not deprived of the right to raise issues relating to any interim decision at the stage of appeal against the final decision.

iii  With regard to the Company Indigo Travel Retail Group Limited, first instance interim decision dated 31/01/2017, District Court of Nicosia

In a recent judgment issued by the District Court of Nicosia, it had been adjudicated that an affidavit was inadmissible owing to the fact that the jurat was not in one of Cyprus' two official languages being Greek or Turkish. Without going into detail on the facts of the case, the Court had concluded that a proper jurat is a mandatory requirement for an admissible affidavit. It had furthermore considered whether a jurat can be considered as being evidence with the meaning of the Official Languages of the Republic Law 67(I)/88. In coming to its decision the Court ruled that a jurat is a validation of an affidavit and therefore wholly separate from the affidavit itself. Accordingly, a jurat, unlike an affidavit, must always be in one of the two official languages of the Republic of Cyprus.

The above judgment is a first instance judgment and it remains to be seen what the stance of other judges and perhaps the Supreme Court will be on this issue. It raises huge problems especially since it is very common for practising lawyers to ensure that a jurat is in the same language as the affidavit it purports to validate. It also questions the practice adopted until recently to have affidavits executed before an English notary or a solicitor as per Order 39 of Cypriot Civil Procedure Rules.

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8  Article 5 of the official Languages of the Republic Law 67(I)/88.
iv Right to paternity leave

The parliament of Cyprus voted on legislation introducing two weeks’ paid paternity leave for new fathers. Under Section 3 of the Law,9 an employee is entitled to paternity leave when his wife is giving birth to a child, when his wife is having a child by a surrogate mother and when both parents are adopting a child up to the age of 12. The permitted leave is two weeks’ consecutive leave and must be taken within the 16 weeks after the birth of the child or the placement for adoption. In order to take paternity leave, an employee must give his employer at least two weeks’ written notice before the intended start date.10 Other issues that are raised in the said Law relate to the prohibition of termination of employment, the rights during and after paternity leave, and any penalties to be imposed on an employer if it is in breach of such provisions.

v Tax residency under the 60-day rule

On 14 July 2017, the parliament of the Republic of Cyprus unanimously approved a bill that allows an individual to acquire Cyprus tax residence by staying at least 60 days in Cyprus per year. The 60-day rule has been in effect as from 1 January 2017 and an individual is considered to be a tax resident in Cyprus provided he or she:

- remains in Cyprus for at least a period of 60 days during the tax calendar year;
- is not a tax resident of any other state or remains in any other state for a period or periods exceeding 183 days during the year in question;
- maintains a permanent residence in Cyprus, which can either be owned or rented by him or her; and
- carries out business activities in Cyprus or have employment in Cyprus or is a director of a company that is tax resident in Cyprus at any time during the tax year in question.

III COURT PROCEDURE

i Overview of court procedure

The Civil Procedure Rules of Cyprus deal with all of the procedural steps for the trial of civil actions, and the relevant law with regard to evidentiary matters in the course of proceedings is the Evidence Law. Further to the above, different rules of procedure may also depend on whether, for example, Company Rules apply to a particular case or any other Rules.

ii Procedures and time frames

Before commencing proceedings one will need to examine the limitation or prescription periods for the filing of civil claims, a matter governed by the Limitation Law 66(I)/2012.11 The said Law states the limitation period for civil wrongs,12 contracts,13 secured loans14 and various other types of actions.

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9 Section 3 of the Protection of Paternity Law 117(I)/2017.
10 Section 4 of the Protection of Paternity Law 117(I)/2017.
11 Limitation Law 66(I)/2012.
12 Section 6 of the Limitation Law 66(I)/2012.
13 Section 7 of the Limitation Law 66(I)/2012.
14 Section 5 of the Limitation Law 66(I)/2012.
Once the above issue has been examined, then civil proceedings may either be commenced with the filing of an originating process that states the nature and extent of the claim made or the remedy or relief sought by the plaintiff. The forms of an originating process are the writ of summons, the application for originating summons and the petition. Most civil actions in Cyprus commence by a writ of summons having the form of either a writ with a general endorsement or a writ with a special endorsement. The difference is that the specially endorsed writ of summons has the statement of claim of the plaintiff providing a factual background whereas the generally endorsed writ has only a concise statement of the nature of the claim made and the relief sought. When a generally endorsed writ is filed, a statement of claim should be filed separately. With regard to originating summons, the body of the summons must include a statement of the questions on which the plaintiff seeks the court’s determination of the relief or remedy claimed. Moreover, petitions are those related to the bankruptcy of individuals and winding up of companies.

Following the determination of commencement for any action to be filed, legal proceedings in a district court are commenced when a writ of summons or an originating summons is filed and sealed. Actions filed by resident Cypriot plaintiffs must be accompanied by a retainer that demonstrates the appointment of the advocate, whereas this is not a requirement with regard to foreign resident plaintiffs. Following the above, the next step for the plaintiff is to serve the legal proceedings to the relevant parties to the action. Service nowadays under Order 5B of the Civil Procedure Rules is effected through private bailiffs approved by the Supreme Court of Cyprus for carrying out this type of service upon payment of a fee. With regard to service upon foreign defendants to the action, the plaintiff is under an obligation to file an ex parte application in order to obtain the authorisation of the Court to serve the relevant party through methods that shall be included and supported by the plaintiff in the said application. The service of the writ of summons, or the notice thereof to the foreign defendants, is made in accordance with any multilateral or bilateral conventions concluded between the Republic of Cyprus and the country where such service is to be made. Customarily, this is effected through the Ministry of Justice of the Republic of Cyprus. In the absence of any such bilateral arrangement service may be effected by registered post, courier or any other method approved by court.

Copies of all of the relevant documents to be sent for service need to be stamped by the court registrar as true copies in order to be served accordingly and shall be accompanied by translations into the language of the country where the defendant resides. Particular importance lies in the service of a corporate entity whereby service must be effected either at its registered office to a person authorised to accept judicial documents or one of the company’s directors or its secretary. Recently the Civil Procedure Rules, Order 5 Rules 9 and 10 have been amended, permitting substitute service via email, fax and other electronic means, methods that had not been permitted previously.

Once service is effected, the defendant has to file a notice of appearance before the court within 10 days in cases of local defendants. Usually in cases of service out of jurisdiction orders, the court limits the time after such service or notice within which the defendant is to enter an appearance since in cases where the relevant parties fail to do so, an application for default judgment may be filed on behalf of the plaintiffs. In these circumstances the plaintiff proves his or her case before the judge in the absence of the defendant on an ex parte basis.

15 Order 5B of the Civil Procedure Rules, Cap 6.
16 Order 5, Rules 9 and 10 of the Civil Procedure Rules, Cap 6.
If, however, the particular defendant disputes the jurisdiction of the court or wishes to apply to set aside the service effected upon same, then the defendant may apply for leave to file a conditional appearance.

Where the writ of summons is specially indorsed the plaintiff may apply for summary judgment, meaning that upon appearance of the defendants, the plaintiff may apply to the court for judgment as per the amount claimed in the writ of summons unless the defendant satisfies the court that he or she has a good defence to the action. This procedure for summary judgment is normally used where it is obvious from the facts of the case and the evidence that the defendant has no real defence and has entered an appearance merely for the purposes of delaying the matter (i.e., claims under promissory notes, cheques, bill of exchange, etc.). In practice, if the defendant shows that he or she has some reasonable defence, summary judgment will not be entered and he or she will be allowed to file his or her defence.

Pleadings consist of the statement of claim, whether it be on special writ of summons or filed subsequently, the defence and counterclaim if any and the reply and defence to the counterclaim. In the statement of claim the plaintiff is required to set out the facts of the case on which he or she intends to rely upon in order to prove his or her cause of action. It is vital to note that evidence in such circumstances is never pleaded. The statement of defence must contain a reply to the various allegations contained in the statement of claim, setting the material facts on which the defendant relies for his or her defence. A counterclaim may also be filed together with the defendant’s statement of defence. The next step is for the plaintiff to file its reply to the statement of defence answering any issues as a matter of response to the defence. Provided that the defendant’s statement of defence also included a counterclaim then the plaintiff may also file the reply and defence to the counterclaim. The Civil Procedure Rules also provide for time frames upon which the parties need to abide in order to file their respective pleadings; however, in practice the parties do not follow the prescribed time limits. Usually each party may file an application before the court to obtain an order for extension of time to file the statement of defence, a practice commonly used in Cyprus courts and granted by the courts.

Once the pleadings have been closed, the case will be set for directions before the judge, who will give directions to the parties for, among others, matters such as the disclosure and discovery of documents and requests for further and better particulars. When all of the interim procedures have been concluded, the case shall be set for hearing and, depending on the availability of the court’s schedule, usually it may take three to four years from the date of the filing of the action for the case to be adjudicated. During the hearing it is the duty of the plaintiff to prove his or her case on a balance of probabilities. The Civil Procedure Rules, particularly Order 33, provide for the procedure to be followed at trial.

Provided that the plaintiff’s action is successful, he or she will need to take steps to enforce the judgment against the defendant, such as by the enforcement against movable or immovable property and third party enforcement orders against banks that hold the funds or the assets that belong to the particular judgment debtor. Orders 40–47 of the Civil Procedure Rules provide for the procedure and the method of effecting execution under a writ of movables or writ for the seizure and sale of movable property or for the issue of a writ of sale of immovable property. Provision is also made under Order 42A for the attachment and sequestration as well as Order 44 with regard to the power and duties of the bailiffs entrusted with execution and Order 45 with regard to receivers.
The issuance of interim orders before the Cyprus courts

The Courts of Justice Law 14/60, particularly Section 32, confers power on the Cyprus courts to grant an injunction ‘in all cases in which it appears to the Court just or convenient so to do’. The ability to grant interim orders secures satisfaction of any final court judgment or arbitral award, ensuring that for example property is not alienated or assets are not disposed of. The different types of interim orders include interim injunctions, freezing injunctions that may include ancillary disclosure orders, search order and disclosure or inspection orders, appointment of interim receiver, etc.

A plaintiff seeking to obtain the interim order will need to satisfy the court that there is (1) a serious question to be tried; (2) that there is a likelihood that the plaintiff will succeed in its claim; and that (3) it will otherwise be difficult or impossible to do justice at a later stage. The issuance of such an interim order lies within the discretion of the court taking into account all of the relevant conditions and by weighing the balance of convenience, whether damages are likely to be an adequate remedy to either party and the ability of the other party to pay as well as maintaining the status quo. Applications for such interim orders are filed usually on an ex parte basis; however, there are certain occasions when it is not adequate to file ex parte applications as there is no matter of urgency or exceptional circumstances that can be proved by the plaintiff and that gives jurisdiction to court to hear the application on ex parte basis. In such cases, the plaintiff opts to file an application by summons.

Generally under such interim order applications, the plaintiff needs to provide a strong affidavit supporting the said application because, besides the above three conditions to be proved, it also needs to illustrate and provide evidence regarding the risk of alienation or disposal of assets if the application relates to this aspect. Such evidence may be evidence that the defendant has already taken steps to remove or dissipate assets, past incidents of debt default by the defendant or even whether the evidence supporting the substantive cause of action discloses dishonesty or suspicion of dishonesty on the part of the defendant.

Cypriot courts have jurisdiction to issue interim injunctions in the context of civil proceedings pending in Cyprus or in aid and in support of international commercial arbitrations to be commenced or that are pending, either in Cyprus or abroad, as per Section 9 of Law 101/87 or in aid and in support of cases filed before courts of EU Member States (except Denmark), as per EU Regulation 1215 or the Lugano Convention (i.e., Switzerland, Iceland, Norway and Denmark).

The Supreme Court of Cyprus (single judge) in a certiorari application decided to cancel an anti-suit injunction issued by a first instant court, pursuant to Section 9 of Law 101/87, in aid or in support of an international commercial arbitral case on the ground that such order does not constitute ‘an interim measure of protection’ within the meaning of Section 9 of the UNCITRAL Model Law.

iii Class actions

Class action lawsuits can be brought by a number of people, particularly where they share similar harm or the same issue in an action both in law and in fact, against another entity or person, as this is a form of collective redress. Cases involving class action lawsuits can

include consumer fraud, or the haircut Cyprus cases by bank depositors or even cases where shareholders act on behalf of all other shareholders in an attempt to redress wrongs that have been committed against the company.

The English common law derivative action recognised and adopted by Cypriot law is one strong tool that minority shareholders can use to redress wrongs committed by the majority shareholders against their company.

iv Representation in proceedings
In Cyprus, physical persons may decide to either represent themselves in legal proceedings or opt to have an experienced lawyer act on their behalf. It very much depends on the financial ability of each litigant but also the type of case since, for example, for simple small claims cases many choose to represent themselves. Legal entities cannot be represented by their directors but only by lawyers.

v Service out of the jurisdiction
In Cyprus, the issue as to the service of proceedings is governed by the Civil Procedure Rules. Particularly, Order 5 deals with the service of the writ of summons and explains how service of the writ of summons is to be effected and thereafter considered as good service depending on the category of defendants in the particular action. Furthermore, Order 5B of the Civil Procedure Rules provides for service of court documents effected by private bailiffs approved by the Supreme Court of Cyprus. Besides the said Orders, Order 5A is also relevant when dealing with the service out of the jurisdiction of foreign defendants. Such an application must be supported by an affidavit or other evidence satisfying the court that the plaintiff has prima facie a good cause of action and showing in what place or country such defendant is or probably may be found, and whether such defendant is Cypriot or not, and the grounds upon which the application is made.

It is vital to note that there are mandatory methods of service depending on the country of residence of the defendant. For example, Cyprus has entered into bilateral treaties with, inter alia, Ukraine and Russia and hence the method of service provided by in the said Treaty or a Convention (such as the Hague Convention) will need to be followed. Usually service to Ukraine and Russia is completed via the Ministry of Justice. Moreover, service to EU Member States is governed via Council Regulation (EC) No. 1393/2007. Besides the above, on various occasions usually where the said defendant could not be found at the given address, the plaintiff is given the right as per the Civil Procedure Rules to file an ex parte application requesting an order of the court for the purpose to serve the said defendant by an alternative substitute service method such as by courier, email, Facebook messenger or even service via the local daily newspaper where the particular defendant is residing.

vi Enforcement of EU foreign judgments
All types of EU judgments issued by any EU Member State court are enforceable in Cyprus pursuant to the relevant EU Regulations. Of significance is the fact that the judgment creditor as the applicant is time barred based on actions to enforce a foreign judgment, which, pursuant to the Limitation of Actionable Rights Law of 2012, No. 66(I)/2012, become statute barred 15 years from the date on which the judgment became final.

For EU judgments that fall within the sphere of EU Regulation 44/2001 or the Brussels Recast Regulation 1215/2012, the judgment creditor must provide to the Cyprus courts, a certificate of authenticity for the judgment, issued by the court of origin, and a declaration
of enforceability from the court of origin if filed pursuant to EU Regulation 44/2001 or the standard certificate issued by the court of origin pursuant to the applicable regulation pursuant to Article 53 of the Brussels Recast Regulation 1215/2012. As per the changes effected by the Brussels Recast Regulation 1215/2012 the judgment creditor will solely need to present a copy of the judgment and a standard form certificate and can then begin the enforcement process. It is worth noting that the procedure for the enforcement of judgments given in another Member State shall be governed by the law of the Member State addressed. As per Article 43 of the Brussels Recast Regulation 1215/2012, where enforcement is sought of a judgment given in another Member State, the certificate issued pursuant to Article 53 shall be served on the person against whom the enforcement is sought prior to the first enforcement measure. The certificate shall be accompanied by the judgment, if not already served on that person.

Besides the above EU Regulations, EU judgments may also fall within the ambit of the European Enforcement Order Regulation No. 805/2004 creating a European enforcement order for uncontested claims. For applications filed pursuant to this EU Regulation, the judgment creditor must provide the European enforcement order issued by the competent authority in the country of origin. Automatic recognition and enforcement is allowed once a certificate is issued by the court of origin, following an application to the court of origin. Other EU Regulations include the EU Regulation No. 1896/2006 whereby the creditors have the choice to apply for a European order for payment. Such European order is recognised and enforced in all EU Member States (except Denmark) without the need for any intermediary proceedings in the EU country of enforcement or a declaration of enforceability, prior to its recognition and enforcement. EU Regulation No. 861/2007 is also applicable for the small claims procedure in cross-border litigation to civil and commercial matters for monetary claims of under €2,000.

Provided that the judgment creditor applies before the Cyprus courts for the enforcement of a foreign judgment, it will need to comply with certain formal requirements including providing:

- a complete and certified copy of the foreign judgment;
- if the foreign judgment was rendered by default, the originals or true copies of the documents required to establish that the summons was duly served to the judgment debtor;
- all documents required to establish that the foreign judgment is no longer subject to ordinary forms of review in the country of origin and, where appropriate, that the judgment is enforceable in the country of origin, unless indicated in the judgment itself; and
- unless otherwise provided for in a convention or treaty between Cyprus and a third country, all documents referred to above must be accompanied by a certified translation into Greek.

18 Article 43 of the Brussels Recast Regulation 1215/2012.
Cyprus is bound by bilateral treaties relating to the recognition and enforcement of foreign judgments with the Czech Republic, Serbia, Slovenia, Slovakia, Ukraine, Russia, Bulgaria, China, Greece, Hungary, Poland, Syria and Egypt. Further to the above, Cyprus is also a signatory to various multilateral conventions including the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters and Supplementary Protocol the European Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the New York Convention for enforcement of international arbitral awards.

In Cyprus, the rules that relate to the procedure for the recognition, enforcement and the execution of foreign judgments are contained in Law 121(I)/2000, a law that applies where the judgment issued is by a non-EU Member State or a country with whom Cyprus has concluded an agreement for mutual recognition and enforcement of both judicial judgments and arbitral awards. With regard to non-EU judgments from countries with which Cyprus has no bilateral treaty, the foreign judgment has no direct operation in Cyprus but it may be enforced by an action or counterclaim at common law. In such circumstances a judgment creditor has the option of bringing an action on the foreign judgment. The creditor may, in the meantime, also apply for interim relief (i.e., freezing orders) blocking assets held by the judgment debtor, etc.

vii Assistance to foreign courts

Assistance can be provided to foreign courts for among others the service of judicial and extrajudicial documents, the taking of evidence by witnesses or experts, the extradition of persons and in the recognition and enforcement of court judgments or arbitral awards. Cyprus has entered into the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters as well as Council Regulation EC 1206/2001 on Cooperation between the Courts of the Member States in the Taking of Evidence in Civil and Commercial Matters.

viii Access to court files

Parties to an action are permitted to inspect or obtain copies of the pleadings that are filed before the court and kept in the court file. In order to do so, the relevant party who wishes to inspect or obtain copies will need to pay a small fee and fill in the details in the certification form which is located at the Registrar of the District Court the case is before. Thereafter the Registrar will hand the case file to the relevant party who will inspect and possibly obtain copies of any pleadings in the said case file.

Besides the parties to the action, any other interested party can obtain access to court files only provided that they file an ex parte application before the court explaining the reasons

19 Ratifying Law 68/82.
20 Ratifying Law 179/86.
21 Ratifying Law 179/86.
23 Ratifying Law 172/86.
24 Ratifying Law 18/84.
25 Ratifying Law 55/84.
26 Ratifying Law 10/97.
why they require access to the court file and what their interests are. In most cases permission is granted where such parties are allowed to intervene in the proceedings and added as parties or for collection of evidence to be used in pending or new cases to be filed.

**ix  Litigation funding**

With regard to litigation matters the winning party is usually awarded an order for costs, and usually the losing party bears the costs of the winning party. The litigation is funded by the parties themselves while there is also the possibility of a party to request legal assistance from the state depending on his or her financial abilities. Another issue is also the third-party litigation funding whose legality has not yet been examined by the Cypriot courts but if it is examined, Cyprus courts will look for guidance from English and other common-law case law. In the context of litigation funded by third parties, the English courts have taken an increasingly liberal approach to the principles of champerty and maintenance.

**IV  LEGAL PRACTICE**

**i  Conflicts of interest and Chinese walls**

Qualified practising lawyers and trainees are subject to the Code of Conduct Regulations, which set out their legal duties with respect to their clients and the profession in general. As stated expressly under Article 21 of the Code of Conduct Regulations, advocates must not ‘act as counsellors or representatives or advocates of more than one client in the same case, if there is a conflict of interests among the said clients or significant risk of such a conflict arising’.27 Furthermore, even in cases where there is an issue as to conflict of interest, advocates must abstain from handling the cases of all concerned clients, since there is the risk of violation of secrecy or of prejudice to their independence.28 The practical approach is for law firms who are approached by new clients to undergo a conflict of interest check before accepting and moving forward to any engagement agreement between the said client. If this is not complied with, then disciplinary actions can be initiated against the particular law firm. The Cyprus Securities and Exchange Commission regulates companies and includes Cysec Rules and Regulations establishing policies and procedures to manage conflict of interest that may arise.

**ii  Money laundering, proceeds of crime and funds related to terrorism**

In an effort to combat money laundering and the financing of terrorists’ activities and to increase transparency the European Commission issued the Fourth AML Directive 2015/849, which should have been fully implemented by all EU Member States including Cyprus by 26 June 2017. One of the main issues under the Fourth AML Directive is the identification of the beneficial owner, a matter that still has no place in Cyprus. Under the existing regime applicable in Cyprus banks, lawyers, accountants and other professionals are obliged to know the ultimate beneficial owners of entities they are dealing with, but with the register supervision will be made faster and simpler, if ultimately implemented by Cyprus.

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27 Article 21(1) of the Code of Conduct Regulations.
28 Article 21(2) of the Code of Conduct Regulations.
Other issues covered by the Fourth AML Directive include:

\(a\) The creation of a national central register whereby Member States will be required to hold satisfactory, precise and up-to-date information on the beneficial owners of all corporate and other legal entities incorporated within their territory in a National Central Register. No such national central register has yet been created in Cyprus.

\(b\) The widening of the scope of obliged entities that is achieved by submitting gambling services to the Directive beyond casinos. Member States, having carried out a risk assessment, may exempt certain gambling services some or all of the requirements laid down in this Directive but must provide justification for doing so and also notify accordingly the Commission.

\(c\) Introduction of provisions to facilitate cooperation between financial intelligence units.

\(d\) Enabling the financial intelligence units to identify holders of bank and payment accounts. The Commission proposes to require Member States to set up automated centralised mechanisms so as to swiftly identify holders of bank and payment accounts.

MOKAS is a unit for combating money laundering and its tasks include receiving, requesting, analysing and disseminating disclosures of suspicious transactions reports and other relevant information concerning suspected money laundering and terrorist financing. Furthermore, the Central Bank of Cyprus is the main body that cooperates with MOKAS on any such issues. Other bodies that work with MOKAS include the Cyprus Bar Association, which is the supervisory authority of lawyers, and the Cyprus Association of Certified Public Accounts, which supervises all auditors and accountants licensed to practise in Cyprus. They cooperate with MOKAS in order to monitor the compliance of their members. The relevant law on the above matters in Cyprus is Law No. 58(I)/2010, which has replaced the Prevention and Suppression of Money Laundering Activities Law 2007 No. 188 (I) 2007.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

\(i\) Privilege

Privileged documents are those that cannot be used as evidence and their admissibility may be challenged by the party who claims privilege. Documents considered as being privileged include a confidential document, a self-incriminating document or documents protected by legal professional privilege. There are two types of legal professional privilege, namely legal advice privilege and litigation privilege. Legal advice privilege protects communications between client and lawyer while litigation privilege protects communications between client and lawyer and even third parties in the context of reasonably contemplated or actual litigation. It is vital to stress that as a matter of Cyprus law, in-house lawyers are not members of the legal profession for the purposes of legal advice privilege and this position is very different from the United Kingdom where in-house lawyers enjoy the same privilege as external lawyers. Furthermore, documents holding the title of ‘without prejudice’ have in some cases been adjudicated before the Cyprus courts and been held admissible in evidence while the general rule is for them to be inadmissible.
ii Production of documents

Order 28 of the Civil Procedure Rules provides that a party to the proceedings may apply to the court for an order directing the other party to make discovery on oath of the documents that are or have been in his possession or power. If a party ordered to make discovery of documents fails to do so, he or she shall not afterwards be at liberty to put in evidence on his or her behalf in the action any document he or she failed to discover or to allow to be inspected, unless the court is satisfied that he or she had sufficient excuse for so failing, in which case the court may allow such document to be put in evidence on such terms as it may think fit. Additionally, documents that are referred to in pleadings need to be produced or if required admissible for inspection.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

Litigation is the predominant method for resolving disputes in Cyprus; however, there is also an increased trend of the use of arbitration particularly relating to cross-border transactions and commercial matters and disputes relating to construction, insurance, shipping and trade. Moreover, negotiation mediation is a method used either before legal proceedings are initiated or during the period when proceedings are commenced for an amicable out of court settlement of a dispute.

ii Arbitration

Arbitration is progressively considered a more popular choice within the business community of Cyprus predominantly where the disputes involve complex technical issues or foreign parties since arbitration offers confidentiality, efficiency, less expense, faster adjudication of disputes, etc., and is conducted in an informal way that avoids the adversarial litigation system in Cyprus.

In Cyprus, arbitration proceedings are governed by two separate legal regimes. Domestic arbitration is governed by the 1944 Arbitration Law, which provides for the procedure to be followed. International arbitration is governed by Cypriot International Arbitration in Commercial Matters Law of 1987 (L. 101/87), which is identical to the United Nations Convention on International Trade Law Model Law on International Commercial Arbitration. It is vital to note that the route to arbitration lies within the parties who via their written agreement, choose and submit their disputes, and gives discretionary powers to an impartial person specialising in the subject matter of the dispute to be resolved. The arbitral tribunal’s decision on the given matter is final and binding and also enforceable. In particular, Cyprus has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards by Law 84/79 and therefore arbitral awards issued in Cyprus may be registered in and enforced in other states that are signatories to the New York Convention and vice versa.

Cyprus has satisfied the Washington Convention of 1965 concerning awards issued by the International Centre of Settlement of Investment Disputes.

29 Order 28(1) of the Civil Procedure Rules.
30 Order 28(3) of the Civil Procedure Rules.
The most prominent alternative dispute resolution centres in Cyprus are the Cyprus Eurasia Dispute Resolution Centre, the Cyprus Chamber of Commerce and Industry and the Cyprus Arbitration and Mediation Centre.

Cyprus courts have jurisdiction to issue interim measures of petition (e.g., freezing injunctions, etc.) in aid or in support of international commercial arbitration cases before the filing of the requests for arbitration or during the arbitral proceedings.

### iii Mediation

Besides arbitration another commonly used method of alternative dispute resolution in Cyprus is mediation and is a method that is increasingly becoming popular. Mediation is a flexible, non-binding, private and confidential procedure that helps the parties to find common ground and work towards resolving their dispute by agreement. Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters has arguably given a boost to mediation and Cyprus has implemented this directive via Law 159(I)/2012. In Cyprus there is the Cyprus Mediation Association with its seat in Nicosia, which is an established society of experienced professionals who have been specially trained to provide high-quality mediation services in a variety of fields.

### iv Other forms of alternative dispute resolution

Besides mediation and arbitration, there are also various other methods of dispute resolution available to parties including conciliation that is a non-binding procedure, similar to mediation that is considered as an extension of mediation in that it provides a non-binding opinion to the parties in cases where they are unable to agree with the third party.

### VII OUTLOOK AND CONCLUSIONS

#### i EU General Data Protection Regulation

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data took effect on 25 May 2018, being directly applicable in all Member States without the need for implementing national legislation. The main amendments relating to personal data include:

- higher standards for obtaining the data subject’s consent;
- profiling;
- broadening the meaning of personal data;
- significant sanctions;
- the duty to designate a data protection officer; and
- the obligation to notify the supervisory authority in the event of a personal data security breach.

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ii Commercial court to be established

It is expected that by 2019 a commercial court will be set up in Cyprus that shall have jurisdiction over matters including claims arising from contracts or disputes between companies, the purchase or sale of goods, the exploitation of oil or gas, the purchase or exchange of shares, intellectual property and insurance affairs. It shall apply to cases the scale of which shall exceed €2 million. The seat shall be in Limassol and Nicosia, with five judges being appointed holding the title of district court president. The commercial court will have a separate structure and will operate independently from the district courts.

The idea is to have a fast-track procedure that is completed within 18 months at first instance. The establishment of the commercial court is to increase the speed and efficiency of the system in Cyprus and is an attempt to attract further investment and companies to Cyprus as well as promoting Cyprus as an attractive and efficient dispute resolution centre.

In October 2018, the bill aiming at the establishment of a commercial court was approved by the Cabinet and contains aspects relating to the court’s defining structures, its jurisdiction, the qualifications required from judges who shall be appointed to conduct hearings as well as the procedural guidelines and regulations of the court. This bill is expected to be presented before the parliament in due course.

iii Electronic system

Besides the above establishment of the commercial court, radical changes in the way justice is served may be expected. According to the 2017 EU Justice Scoreboard, Cyprus had the lowest use of electronic systems in the judiciary and therefore there is an eagerness for civil justice procedures to be amended introducing an e-justice and e-court case management system. At the time of writing, there is no further information on this situation.

iv Amendment of the Civil Procedure Rules

By the end of 2019 at the latest, there will also be an amendment to the Civil Procedure Rules, which are in many ways outdated. A team of experts led by Lord John Dyson presented suggestions on the review of the courts’ civil procedure rules, which are expected soon. At the time of writing, there is no further information on this situation.

v Implementation of the New EU Pensions Directive in Cyprus

The EU Pensions Directive 2341/2016/EC on the activities and supervision of institutions for occupational retirement provisions came into force in January 2017, and EU countries, including the Republic of Cyprus, are entitled to enact the regulations and administrative provisions required to comply with the Directive by 13 January 2019. Some of the most vital requirements under the new Directive include the implementation of a remuneration policy, risk management, an independent internal audit and actuarial functions.

vi Cyprus arbitration forum

A Cyprus arbitration forum – in the form of a limited by guarantee company – is in the process of being established. Its main aim is the promotion of the development of arbitration, as well as mediation in Cyprus. Furthermore, it shall organise annual conferences and seminars both in Cyprus and abroad for the promotion of the use of Cyprus as a preferred venue for hosting international arbitrations, whether in *ad hoc* proceedings, or in proceedings administered under the rules of Cypriot arbitration institutions, as well as leading international arbitration
institutions. It will also serve as a forum for carrying out educational work for use in arbitration
and mediation as the best method and mechanism of dispute resolution. A Cyprus chapter of
the European Court of Arbitration was recently launched – it aims to provide opportunities to
Cypriot and foreign entrepreneurs to amicably resolve their differences in a fast and efficient
way through specialised and experienced arbitrators. Its success will, without a doubt, attract
citizens from other countries and in particular from neighbouring countries who choose
Cyprus to resolve their commercial disputes. In this way, Cyprus will become well known as
a reliable international centre of arbitration and mediation.
I

INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

The Kingdom of Denmark comprises Denmark, Greenland and the Faroe Islands. In general, Denmark, Greenland and the Faroe Islands share their legal system and culture, but certain features of Greenlandic and Faroese law are not part of the Danish legal system.

Danish and Nordic law share several common denominators with continental European legal systems. Notwithstanding this, the legal systems of the Nordic countries have evolved with their own distinctiveness and, despite many common law traits, Denmark and its fellow Nordic countries make up a legal family of their own.

Danish law is characterised by extensive bodies of systematic and written law. The main sources of law are statutes. Preparatory works, case law and legal doctrine constitute secondary sources of law. Private law is dominated by a range of individual statutory acts and, in some areas, by unwritten law guided mainly by cases and custom. Generally, criminal law is governed by the Criminal Code, and administrative law is governed by two general statutory acts of public administration and a complex body of sector-specific statutory acts.

Denmark’s membership of international organisations and participation in international conventions have changed the legal landscape significantly throughout the past 50 years. Since 1973, Denmark has been a member of the European Union, which has significantly influenced the Danish legal system. Denmark has four opt-outs from EU cooperation. The opt-outs were agreed among the Member States following a referendum in 1992 where a majority voted ‘no’ to the Maastricht Treaty. The opt-outs are outlined in the Edinburgh Agreement and concern the monetary union, common security and defence policy, justice and home affairs, and citizenship of the European Union.

Denmark has held two referenda on the opt-outs. In 2000, the Danes voted ‘no’ to the euro. As a consequence, Denmark has kept the krone as its currency. In December 2015, the Danes voted against an opt-in model for Denmark’s participation in justice and home affairs.

Denmark is also a party to the European Convention on Human Rights, which has conferred a number of legal guarantees and standards on the courts and court procedure in both civil and criminal cases.

1 Jacob Skude Rasmussen is a partner and Andrew Poole is a dispute resolution consultant at Gorrissen Federspiel. The authors acknowledge the valuable assistance of assistant attorney Mathilde Emilie Svensson in producing this chapter.

2 The Edinburgh Agreement was entered into on 12 December 1992 by the European Council. The Edinburgh Agreement, inter alia, included the four opt-outs from EU cooperation requested by Denmark in its memorandum ‘Denmark in Europe’ of 30 October 1992. See Part B of the Edinburgh Agreement.
Executive, legislative and judiciary powers in Denmark are divided between the government, the parliament and the courts, respectively. This is a fundamental principle that has been enacted by the Danish Constitution since it was adopted in 1849. The Danish Constitution ensures the judiciary’s organisational, functional and personal independence. It also provides the fundamental principles and standards on which the Danish legal system is built.

The Danish legal system is based on the two-tier principle, which means that the parties generally have the option of appealing the ruling of one court to a higher instance. Most cases begin at district court level with the option of appealing to one of the two High Courts.

In 2007, the Danish courts went through significant structural and organisational changes, often referred to as ‘the statutory reform of court proceedings’.

Since 1 January 2007, the judiciary system has comprised:

- the Supreme Court;
- the High Courts;
- the Maritime and Commercial High Court;
- 24 district courts; and
- the Land Registration Court.

The court of the Faroe Islands and the courts of Greenland are also part of the Danish legal system. In addition to the courts, some sector-specific disputes may be settled by specialised bodies such as the Danish Press Council, the Danish Consumer Council and the Danish Bar and Law Society.

Finally, Danish law allows for the settling of disputes privately by way of arbitration or mediation. Arbitration is governed by the Arbitration Act (No. 553 of 24 June 2005), which is based on the UNCITRAL Model Law on International Commercial Arbitration. Institutional arbitration is widely used, and the Danish Institute of Arbitration plays an important role in relation to commercial disputes in Denmark. For example, the Institute has published suggestions for updating the Arbitration Act, including as regards interim remedies.

II THE YEAR IN REVIEW

Highlights from 2018 include three cases from the Danish courts – one is good news for insurers’ liability, the second confirms the limitation of *locus standi*, and the third sets the benchmark for future decisions on manager liability.

i Insurance

Noreco’s North Sea oil platform was insured through policies that were based on English marine insurance law. The platform incurred damage and Noreco claimed against insurers for a total of approximately US$383.5 million. The Maritime and Commercial High Court ruled in favour of Noreco regarding the majority of its claims.

The insurers appealed the judgment to the Eastern High Court, and on 4 May 2018 this Court ruled against Noreco regarding the majority of its claims, finding that it had not been proven that the relevant insured event fell within the insurance period.3

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3 4 May 2018, Eastern High Court, FED2018.04.
In October 2018, the Appeals Permission Board declined permission to appeal to the Supreme Court.

The final judgment confirms that the insured has the burden of proof regarding when an insured event occurred and highlights the Danish courts’ facility in considering laws of other jurisdictions.

### ii Locus standi

The Patient Data Association was created to protect patient data in the public healthcare system. It brought an action against the Region of Southern Denmark, claiming that the Region had copied unapproved data. The question was whether the association had *locus standi*. As it was a question of general legal importance, the case was heard at three instances.

On 16 October 2018, the third instance Supreme Court judged that the association did not have *locus standi* because the association was not specifically and individually affected by the issues that were to be decided in the case.4 The Supreme Court also stated that the law did not grant the association *locus standi* nor special status in relation to data processing of patient information.

The case highlights the Danish conditions of *locus standi*, particularly for legal persons such as associations.

### iii Manager liability following the financial crisis

In the wake of the financial crisis, several Danish banks were wound up and taken over by the state-owned company, Financial Stability, to ensure the stability of the Danish economy. Following the banks’ takeover, Financial Stability initiated legal proceedings for professional liability and mismanagement regarding certain of the banks.5

At the end of 2018, the Supreme Court held hearings for the first time for one of these cases. It found that there was no general liability for poor bank management or for heavy loan exposure. However, it did find three individuals liable regarding individual loans, depending on certain factors, for example, if a loan had been granted after the financial crisis or granted in other interests than those of the bank. For such liability, the Supreme Court ordered the chair of the bank’s board, a board member and the bank’s general manager to pay damages to Financial Stability at a total of approximately 89 million kroner.6

This case sets the benchmark for future Danish court decisions regarding manager liability and confirms that individuals such as board chairs and general managers can be held liable for significant amounts for certain actions taken.

### III COURT PROCEDURE

Danish court proceedings are governed by the Danish Administration of Justice Act (No. 1284 of 14 November 2018), which sets out detailed rules of procedure. The Administration of Justice Act was originally adopted in 1916 and is complex legislation with more than 1,000 provisions.

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4 16 October 2018, Supreme Court, U.2019.437H.
5 Banks include Eik Bank Danmark, Capinordic Bank and Roskilde Bank.
6 15 January 2019, Supreme Court, Case 226/2015, regarding Capinordic Bank.
The Administration of Justice Act is based on three fundamental principles that are predominant in Danish judicial procedure: the principles of immediacy, orality and concentration.

According to the principle of immediacy, the court may only base its judgment on what has been said and argued at the main hearing. The principle of orality entails that the parties, in principle, have to present their full case at the main hearing and that witnesses must appear before the court to give their testimony in person. The principle of concentration entails that the case should be heard and concluded at the main hearing, and that no new evidence should be presented during the main hearing.

The above principles mean that during the course of the proceedings parties are able to dispose materially of the subject matter of the case. In this context, the court plays a very limited role, although the court may ask questions if a party’s allegations are unclear. Accordingly, the Danish court system may generally be described as an adversarial system.

Even if the above principles are predominant in court proceedings, they have been modified by means of a revision of the Administration of Justice Act in 2008. Following this revision, the parties are no longer required to read aloud all the documents and present all the facts on which they seek to rely, but may now refer to the case file instead. Further, in special circumstances, the parties may now also present witness statements in writing. The purpose of the 2008 revision of the Administration of Justice Act was to increase the efficiency and speed of court cases.

Following this purpose of efficiency, from February 2018 communication with all Danish courts in civil cases must be through a specific court website. If a party has a Danish company or civil registration number, methods such as individual emails and letters are no longer possible. However, communication can be made at any time and parties have access to the case documents online.

In general, anyone can attend court proceedings. However, subject to certain criteria, the court may decide that the proceedings for the entire case or a part of it are conducted behind closed doors.

Danish law contains no formal rules in relation to the courts’ evaluation of evidence and the level of proof required. The courts are not generally entitled to apply a subjective evaluation of the evidence in question, but the principle of the courts’ freedom of evaluation entails that the discretion of the courts is very wide. Moreover, the courts are neither bound by experts’ reports nor by other kinds of expert evidence.

i Overview of court procedure

In Denmark, civil disputes may be brought before the courts by natural and legal persons. Foreigners generally have the same procedural legal status as Danish nationals, and are therefore entitled to bring a civil dispute before the Danish courts provided that the Danish courts have jurisdiction. The defendant may demand that a foreign plaintiff provides security for the payment of the cost of the proceedings, unless the plaintiff is a national of an EU country or of certain other countries.

All cases are usually initiated before a district court as the court of first instance. However, the parties may request that the case is referred to a High Court or to the Maritime
and Commercial High Court, or the district court may refer the case on its own motion, if the case has general legal importance and is important for the application or the development of the law.

A fundamental principle of the Danish legal system is the two-tier principle. This principle allows the parties to appeal a judgment to a higher instance. If the case is brought before a district court (as the court of first instance), the parties may appeal the judgment to a High Court, and cases brought before a High Court at first instance may be appealed to the Supreme Court. Cases may be brought before the Supreme Court as the court of third instance if the case has general legal importance. The Appeals Permission Board decides whether a case may be tried at three instances.

District courts comprise ordinary civil and criminal courts. They also encompass enforcement courts and probate courts. Enforcement courts deal, *inter alia*, with enforcement of judgments and interlocutory remedies. The probate courts handle the administration of estates and insolvency cases, such as bankruptcies and applications for debt restructuring.

The High Courts are divided into a Western High Court and an Eastern High Court. The highest instance of the Danish court system is the Supreme Court. As noted, it is the court of appeal for judgments decided by the High Courts. The Supreme Court is also the court of appeal for judgments decided by the Maritime and Commercial High Court, if the case has general legal importance and is important for the application or the development of the law; otherwise the court of appeal is a High Court.

The Maritime and Commercial High Court is a special court with jurisdiction over market-related disputes, such as matters regarding competition and intellectual property cases, cases that have an international commercial dimension, and cases concerning sea, air or land transport.

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<th>Third instance/second instance</th>
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<td>Second instance/first instance</td>
<td>Western High Court</td>
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<td>First instance</td>
<td>The Land Registration Court</td>
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### Procedures and time frames

Danish court proceedings can be divided into two phases: the preparation and the main hearing.

Civil proceedings commence when the plaintiff submits a statement of claim. The Administration of Justice Act sets out strict requirements as to the information required in a statement of claim, and the courts may dismiss a case if the statement of claim does not fulfil these requirements.

Upon the court’s receipt of the statement of claim, court proceedings have officially been initiated. The court will then fix a date for the defendant’s submission of a statement of defence. Any claim for dismissal on formality grounds, such as lack of jurisdiction, shall be submitted in the statement of defence. If the defendant does not submit the statement of defence within the deadline set by the court, the court may issue a judgment in accordance with the plaintiff’s claim. Following the first round of pleadings, the parties will normally be allowed to exchange further pleadings.

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10 See Section 348(2) of the Administration of Justice Act.
As a part of the preparation phase, the court might summon the parties to appear at a preparatory meeting. During this meeting the court is in charge of the agenda and will set the deadlines of the procedural calendar, including, if possible, the date for the main hearing. If a party has submitted a claim for dismissal on formality grounds, the court may decide upon this claim separately, and an oral hearing may be held to deal with the issue.

During the preparation phase, the courts will normally refrain from making any actual examination of the evidence, the allegations or the claims. The court will restrict itself to managing the exchange of submissions during the proceedings and to looking into any formality issues. However, the court often has to decide on issues such as expert evidence, including the potential appointment of a court-appointed expert.

Following the conclusion of the preparation phase, the parties will usually prepare a summary of submissions and the court will set a date for the main hearing if not done earlier. After this date, the parties may no longer submit new claims or allegations without the opponent's and the court's consent.

The main hearing may be divided into three subphases:

- the opening address;
- the presentation of evidence and the hearing of witnesses; and
- the closing arguments.

The first subphase is commenced upon each party's presentation of its claims before the court. Subsequently, the plaintiff's legal representative will review and explain the case to the court on the basis of the documents presented to the court by the parties. The defendant's legal representative is then invited to comment. The opening address must be objective.

The next subphase constitutes the parties' presentation of evidence and the hearing of witnesses. A witness is first examined by the party who called him or her, and then the opponent is allowed a cross-examination.

At the closing arguments, counsel summarise the case and the legal points raised.

Following the closing arguments, the court will withdraw directly for its deliberations. The court must pass its final judgment as soon as possible following the hearing and usually within either four weeks or two months after the main hearing. The court may, at its own discretion, suggest a settlement or issue an advisory opinion, but the parties may at any time request a final judgment.

Small claims

On 1 January 2008, special rules governing small claims were introduced into the Administration of Justice Act. The guiding principle is that the court will guide proceedings and instruct the parties both on factual and legal circumstances to allow parties to litigate in person. The small-claims procedure is only available for claims with an economic value equal to or less than 50,000 kroner. Appeal of a judgment of 20,000 kroner or less requires permission from the Appeals Permission Board.

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iii  Class actions

In 2008, provisions on class actions were included in the Administration of Justice Act. The new provisions allow similar claims to be filed with the Danish courts as a class action on behalf of a group of people or legal entities. Plaintiffs must affirmatively opt-in in order to join the class action. To ensure an effective opt-in scheme, the Danish courts publish an inventory list of class actions on their official website.

Class actions are brought before the courts. No special court or tribunal deals with class actions. Case law is still scarce but recent decisions have dismissed such actions owing to the claims not being similar and the class action process not being the best method for resolution.

iv  Representation in proceedings

When acting as parties, natural persons have procedural capacity and are competent to represent themselves in court, and legal persons may be represented by employees. Otherwise, only Danish-qualified attorneys may represent parties in court. The court may order a party to retain an attorney if, given the circumstances of the case, it considers that professional representation is required.

v  Service out of the jurisdiction

Documents in civil matters may be served out of the jurisdiction, within as well as outside the framework of treaties and conventions.

For service of documents within the European Union, EU Regulation No. 1393/2007 applies. The Regulation provides that Danish courts may forward an application directly to the competent authority in the Member State where service is required.

For service of documents within the Nordic countries, the Nordic Convention on Mutual Legal Assistance in Service and Taking of Evidence of 1974 applies. Pursuant to Article 1 of the Convention, a contracting state may apply directly to the relevant authority in the Nordic state for the service of documents and the taking of evidence.

Denmark has also ratified the Hague Convention of 15 November 1965, on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, and this Convention applies between Denmark and the signatory states.

vi  Enforcement of foreign judgments

For a foreign court judgment to be enforced in Denmark, a treaty on enforcement between Denmark and the foreign state is normally required.

Where a judgment has been issued by a court of a state in respect of EU Regulation No. 1215/2012 (the recast Brussels Regulation) or where the Lugano Convention applies, the judgment will be enforceable in Denmark.

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12 See Chapter 23a of the Administration of Justice Act.
13 See decisions of 12 August 2015, Eastern High Court, U.2016.104Ø and 12 June 2018, Eastern High Court, U.2018.3361Ø.
14 See Section 259(1) of the Administration of Justice Act.
15 See Section 259(2) of the Administration of Justice Act.
16 The Nordic Convention was ratified on 26 April 1974 by Executive Order No. 100 of 15 September 1975.
The Hague Convention of 30 June 2005, on Choice of Court Agreements, entered into force on 1 September 2018. Among other provisions, the Convention states, subject to various exclusions and grounds, that a judgment of a contracting state designated in an exclusive choice of court agreement shall be enforceable in other contracting states. Judgments from states with which Denmark has concluded no treaties are, as a matter of principle, not enforceable in Denmark. Scholarly writings have discussed whether Danish law under certain criteria allows for recognition of foreign judgments, even if Denmark is not bound by a treaty obligation, but case law is scarce.

vii  Assistance to foreign courts
EU Regulation No. 1206/2001 on mutual assistance within the European Union on the taking of evidence does not apply to Denmark.

As noted, Denmark is party to the Nordic Convention on Mutual Legal Assistance in Service and Taking of Evidence. This Convention is based on direct contact, and a request for legal assistance is submitted directly to the relevant authority.

The Hague Convention of 18 March 1970, on the Taking of Evidence Abroad in Civil or Commercial Matters, governs Denmark's assistance to foreign courts of signatory states in taking evidence in Denmark.

viii  Access to court files
The main rule is that court hearings and court files are open to the public. Certain information such as trade secrets may, however, be kept secret.

ix  Litigation funding
Litigants generally fund their litigation by themselves or by means of insurance. However, public aid to civil proceedings may be granted to parties with low personal and capital income or under certain other conditions. If a person is granted public aid by the state, the person does not pay court fees, is reimbursed for expenses relating to the case and is exempted from paying the counterparty's costs.

IV  LEGAL PRACTICE

i  Conflicts of interest and Chinese walls
Conflicts of interest are managed within the framework of the Danish Bar and Law Society. The overriding principle is that any member of the Danish Bar and Law Society should be independent and not represent conflicting interests. Chinese walls are not accepted.

ii  Money laundering, proceeds of crime and funds related to terrorism
The current Act on Measures against Money Laundering (No. 651 of 8 June 2017) implements the fourth EU Directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.¹⁷

Under the Act, attorneys are under an obligation to confirm the identity of new clients and conduct client due diligence checks before taking on a matter within certain practice areas. Matters such as disputes are generally excluded from these obligations. Members of the Danish Bar and Law Society are under an obligation to notify the Public Prosecutor for Special Economic Crimes of any suspected money laundering.

### Data protection

On 25 May 2018, the EU General Data Protection Regulation \(^{18}\) (GDPR) came into force, harmonising data protection rules across the European Union, tightening processing rules and increasing sanctions. The Danish Data Protection Act (No. 502 of 23 May 2018) also came into force, supplementing the GDPR’s effect in Denmark in areas such as criminal convictions and national identification.

### DOCUMENTS AND THE PROTECTION OF PRIVILEGE

#### Privilege

The relationship between attorney and client is privileged; \(^{19}\) correspondence and other documents on the attorney’s file may not be subject to disclosure and attorneys may (with minor exceptions) refuse to testify on issues relating to the client–attorney relationship. There are no specific rules concerning in-house counsel, and communication with in-house counsel is not privileged.

#### Production of documents

At the request of a party, the court may order another party to produce certain documents. The party seeking production shall identify the documents with reasonable specificity and explain what the documents are intended to prove. Certain categories of documents may also be requested.

The parties are not obliged by law to disclose the requested documents. However, if a party fails to produce the documents requested, the court may draw adverse inferences.

### ALTERNATIVES TO LITIGATION

#### Overview of alternatives to litigation

Disputes are generally settled by the Danish courts. Although the courts remain the standard forum in relation to commercial disputes, the trend of using arbitration is increasing. Further, as part of the general reform of the Danish courts, the courts offer mediation.

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\(^{19}\) See Section 170 of the Administration of Justice Act. From 1 July 2018, European Patent Attorneys also benefit from client–attorney privilege before the Danish courts.
ii  Arbitration

Arbitration is regularly used to settle commercial disputes in Denmark.

The Danish Arbitration Act is based on the UNCITRAL Model Law of 1985, and applies to national and international arbitration proceedings taking place in Denmark.\(^{20}\)

The overriding principle of the Arbitration Act is party autonomy. The control of the dispute lies with the parties, and they may to a large extent agree on how the arbitration is conducted. Consequently, the majority of the rules are non-mandatory.

Denmark is a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, and arbitration awards are therefore recognised as binding and enforceable, and a valid arbitration agreement will normally deprive the courts of their jurisdiction. However, the Danish courts can refuse to recognise and enforce an award in special circumstances.\(^{21}\) In a judgment rendered by the Supreme Court in 2016, it was held that an arbitral award may only be set aside in extraordinary circumstances; for example, if the arbitral tribunal has committed such extraordinarily serious mistakes that the arbitral award is manifestly incompatible with the domestic legal system (i.e., public policy).\(^{22}\)

Arbitration proceedings commence when the respondent receives the written request for the dispute to be referred to arbitration, unless the parties agree otherwise.\(^{23}\) Generally, this request includes a summary of the dispute, a preliminary statement of the relief sought, and if three arbitrators, appointment of one arbitrator. The respondent will then generally submit a reply and, if three arbitrators, also appoint one arbitrator. The arbitration is normally concluded after an oral hearing.

iii  Mediation

In 2008, rules on court-based mediation were introduced in the Administration of Justice Act.\(^{24}\) The parties to a civil dispute are, as a matter of routine, given the option to attempt mediation within the court system before starting litigation proceedings. The court-based mediation scheme in Denmark is voluntary. Accordingly, both parties have to agree on mediation. The mediator is appointed by the court and is normally a judge or attorney with special training in mediation.

Mediation is becoming more popular as an alternative dispute resolution method. It is prevalent in family-related and probate matters, such as divorce, paternity, child support and child custody. Also, in relation to large commercial matters, it is becoming more common to have a multi-tier clause referring a matter to mediation before the case goes to arbitration.

\(^{20}\) See Section 1 of the Arbitration Act.
\(^{21}\) See Section 39(1) of the Arbitration Act.
\(^{22}\) 28 January 2016, Supreme Court, U.2016.1558/2H.
\(^{23}\) See Section 21 of the Arbitration Act.
\(^{24}\) See Chapter 27 of the Administration of Justice Act.
VII OUTLOOK AND CONCLUSIONS

In the past decade, the government has focused on modernising the civil court system and implementing effective rules in relation to court proceedings. The emphasis has been on expediting court proceedings and employing cost-effective solutions. Two examples in 2018 are the online-only communication system for all Danish courts in civil cases and granting European Patent Attorneys the same client–attorney privilege as Danish-qualified attorneys. The first increases efficiency and the second brings Denmark in line with other jurisdictions. The Danish legal position on manager liability following the financial crisis has also become clearer with the first Supreme Court judgment on the issue ordering individuals to pay millions of kroner in damages.

The Nordic Offshore and Maritime Arbitration Association is now up and running and is gaining ground as the dispute resolution method of choice among Danish maritime companies.
Chapter 9

ENGLAND AND WALES

Damian Taylor and Smriti Sriram

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

i England and Wales, the United Kingdom and the European Union

The United Kingdom (UK) comprises four countries – England, Northern Ireland, Scotland and Wales – which share a common (albeit uncodified) Constitution but have three separate legal systems. England and Wales share a common legal system (often referred to colloquially as ‘English law’) while Scotland and Northern Ireland each have their own independent system. The Supreme Court of the United Kingdom hears appeals from all three legal systems in civil cases in addition to cases concerning powers devolved to the Scottish, Welsh and Northern Irish executive and legislative authorities. The UK is a Member State of the European Union (EU) and, by virtue of the European Communities Act 1972, certain EU legislation and decisions have effect in the legal systems in force in the UK. This chapter focuses on the legal system in England and Wales only.

ii Private and public resolution

Disputes in England and Wales may be adjudicated privately (e.g., by an agreed arbitrator) or litigated publicly in the courts. Although the use of private dispute resolution mechanisms is increasing, the courts still determine the vast majority of adjudicated disputes. The courts remain the only forum in which a claim can be determined without the agreement of the other party. Private forms of dispute resolution are considered separately in Section VII, below.

iii The structure of the courts

Depending on the financial value and nature of the dispute, a party may bring a civil claim in either the County Court or the High Court. Most non-complex civil litigation is dealt with in the County Court through hearing centres in towns and cities throughout England and Wales. Most commercial claims, and all complex litigation, are heard in the High Court, either in district registries located in provincial cities or in the Royal Courts of Justice in London. Recent changes to the Civil Procedure Rules (CPRs) emphasise that cases can be tried outside London regardless of their size. These changes have been made in the context of the launch of the Business and Property Courts, discussed further below. The High Court

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1 Damian Taylor is a partner and Smriti Sriram is an associate at Slaughter and May. The authors wish to thank Rob Brittain (professional support lawyer at Slaughter and May) for his contribution and assistance.

2 On 23 June 2016, a referendum was held on the UK’s membership of the EU in which a majority of the UK electorate voted to leave. For consideration of the dispute resolution implications, please see Chapter 1.
has jurisdiction to hear any civil case in England and Wales at first instance, and has an appellate jurisdiction in respect of certain matters in the courts below. The High Court is divided into three divisions, two of which are relevant for commercial disputes, namely the Queen’s Bench Division and the Chancery Division.\(^3\) Within these divisions there are a number of specialist courts or lists, including the Commercial Court, the Financial List, the Circuit Commercial Court (previously the Mercantile Court), the Admiralty Court, the Technology and Construction Court (TCC), the Administrative Court, the Planning Court, the Companies Court, the Bankruptcy Court, the Intellectual Property Enterprise Court and the Patents Court. The High Court, the Crown Court (which deals with criminal cases) and the Court of Appeal are collectively known as the Senior Courts of England and Wales. The Court of Appeal hears appeals in civil cases from the High Court and, in certain circumstances, from the County Court and various tribunals.

Following changes made in October 2017, the Commercial Court, Circuit Commercial Court, Chancery Division (including Companies Court, Patents Court and Intellectual Property Enterprise Court), TCC, Admiralty Court and Financial List are known collectively as the Business and Property Courts of England and Wales. The individual courts retain their identities, but the work of the Chancery Division has been spilt into seven lists according to the substance of the dispute.\(^4\) There are also Business and Property Courts in Birmingham, Manchester, Leeds, Bristol and Cardiff, with expansions to Newcastle and Liverpool likely in the future.

The final court of appeal in civil cases (and, in England, criminal cases) is the Supreme Court of the United Kingdom, created by the Constitutional Reform Act 2005. The Supreme Court will generally only hear cases that involve a point of law of general public importance; its decisions bind all courts below.

In addition to the courts, a number of statutory tribunals have been established to hear disputes arising under the jurisdiction granted to them by the relevant legislation. The members of the tribunal will often comprise a legally qualified chairperson as well as lay members with appropriate experience. It is often possible to appeal a decision made by a tribunal to the High Court.

iv Relationship with European courts

There is no general right of appeal to the Court of Justice of the European Union (CJEU),\(^5\) although a court or tribunal in England and Wales may refer questions regarding the interpretation of the Treaty on European Union and the Treaty on the Functioning of the European Union or the validity or interpretation of acts of the EU institutions to the CJEU for a preliminary ruling. Having obtained such a ruling, the case will (often after many years’ delay) return to the referring court or tribunal, which must apply the CJEU’s ruling, together with any non-conflicting national law, to the facts before it. The court or tribunal

\(^3\) The third division is the Family Division, which deals with matrimonial and other family-related matters.

\(^4\) These are: business; competition; insolvency and companies; intellectual property; property; trust and probate; revenue; and Chancery appeals.

\(^5\) Formerly the Court of Justice of the European Communities (the collective name for the Court of Justice (commonly known as the ECJ), the Court of First Instance (CFI) and the Civil Service Tribunal). Following the Treaty of Lisbon, the collective court is known as the Court of Justice of the European Union (CJEU). The ECJ remains the Court of Justice and the CFI is now known as the General Court.
is not required to make a reference where previous CJEU decisions have already dealt with the point or where the correct application of EU law is so obvious as to leave no scope for reasonable doubt (referred to as *acte clair*).

The European Court of Human Rights (ECtHR) hears cases relating to alleged violations of the European Convention on Human Rights (the Convention). The Court and the Convention are separate from the EU and its institutions. There is no general right of appeal to the ECtHR. A claimant who alleges breaches of the Convention may apply to the ECtHR only after having exhausted his or her rights of appeal in the domestic courts; in England and Wales, this will usually mean that the claimant must have pursued a claim and all available appeals in the domestic courts pursuant to the provisions of the Human Rights Act 1998. The decisions of the ECtHR are not binding on courts in England and Wales, although Section 2 of the Human Rights Act 1998 requires domestic courts to ‘take into account’ such decisions.

II    THE YEAR IN REVIEW

The past year has produced a number of important decisions by the courts. It is not possible to review all the developments that have taken place, but the following are of particular interest.

i    Rock Advertising Ltd v. MWB Business Exchange Centres Ltd [2018] UKSC 24

The Supreme Court has overturned the Court of Appeal’s decision by holding that a No Oral Modification (NOM) clause was legally effective. The Court of Appeal had found that the oral agreement to vary the payments was valid and amounted to an agreement to dispense with the NOM clause. The Supreme Court disagreed, upholding the trial judge’s decision that a NOM clause is effective, with the decision providing welcome certainty to contracting parties. The decision also recognises that NOM clauses carry the risk that a party may act on the contract as varied orally.

ii    Morris-Garner & Anor v. One Step (Support) Ltd [2018] UKSC 20

In this case, the Supreme Court has clarified the circumstances in which damages for breach of contract can be assessed by reference to the sum that the claimant could hypothetically have received in return for releasing the defendant from the obligation which he failed to perform (*Wrotham Park* damages). The main judgment explicitly abandons the term ‘*Wrotham Park* damages’, in favour of ‘negotiating damages’. Negotiating damages can be awarded for breach of contract where the loss suffered by the claimant is appropriately measured by reference to the economic value of the right that has been breached. This may be the position where the breach of contract results in the loss of a valuable asset created or protected by the right that was infringed (as in the case of the breach of a restrictive covenant over land or an intellectual property agreement). The rationale is that the claimant has in substance been deprived of a valuable asset, and his loss can therefore be measured by determining the economic value of the right in question, considered as an asset. The defendant has taken something for nothing, for which the claimant was entitled to require payment. The substance of the claimant’s case was that it had suffered financial loss as a result of the defendants’ breach of contract (loss of profits and possibly goodwill). While the loss was difficult to quantify, the justices found that it was a familiar type of loss and could be quantified in a conventional manner. The claimant had not lost a valuable asset created or protected by the right that was infringed.
iii  Wm Morrison Supermarkets plc v. Various Claimants [2018] EWCA Civ 2339
In this claim brought by over 5,000 employees of Morrisons against the retailer, the Court of Appeal has dismissed Morrisons’ appeal against a High Court ruling that it was vicariously liable for an employee’s deliberate disclosure of the claimants’ personal data on the internet. Morrisons is liable in damages to the claimants, the quantum of which is to be decided separately. Among the court’s findings were:

a  that the common law remedy of vicarious liability for misuse of private information and breach of confidence was not expressly or impliedly excluded by the Data Protection Act 1998; and

b  that the employee’s actions at work and the disclosure on the internet was a seamless and continuous sequence of events: the steps he had taken and his attempts to hide them were all part of a plan.

This decision will have serious implications for employers who may be vicariously liable for misuse of employee personal data by a rogue employee even if they are otherwise compliant with data protection legislation. Morrisons has indicated that it intends to appeal to the Supreme Court.

iv  Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd [2018] EWCA Civ 2006
The Court of Appeal has overturned the controversial High Court decision ([2017] EWHC 1017 (QB)) by clarifying that documents prepared during the internal investigation, both by its lawyers and a firm of forensic accountants, are protected by litigation privilege. The Court stated that it is ‘obviously’ in the public interest that companies should be prepared to investigate allegations of wrongdoing, before going to a prosecutor such as the SFO, without losing the protection of privilege for any documents generated by their investigation. The Court of Appeal recognised that, otherwise, ‘the temptation might well be not to investigate at all, for fear of being forced to reveal what had been uncovered’ to the prosecuting authority.

v  Belhaj and another v. Director of Public Prosecutions and others [2018] EWHC 513 (Admin) and [2018] EWHC 514 (Admin)
In two related judgments in the same proceedings, the High Court has considered:

a  whether a waiver of privilege, expressed to be limited to a specific situation, did in fact constitute a broader implied waiver for purposes connected to the specific situation; and

b  whether the government could reassert privilege over documents (which had been inadvertently disclosed in closed proceedings) so that the claimants were unable to rely on them.

On the first issue, the Court stated where the party entitled to assert privilege intends for any waiver of privilege to be limited, the court will be reluctant to extend the waiver on the basis that an extension is to be inferred. However, arguably, once privilege is waived, it might be taken to have been waived in respect of composite proceedings. On the second issue, upholding the inadvertent waiver threshold of ‘obvious mistake’ set out in Al Fayed v. Commissioner of Police for the Metropolis [2002] EWCA Civ 780, the Court found that
the disclosure of privileged documents had been an obvious mistake as it would have been
counterintuitive and improbable for the government to have disclosed part but not all of its
legal advice.

vi **Iranian Offshore Engineering and Construction Company v. Dean Investment
Holdings SA [2018] EWHC 2759 (Comm)**

Dicey, Morris & Collins, *The Conflict of Laws* states at Rule 25(2) that, in a case to which
foreign law applies, the court will apply English law in the absence of satisfactory evidence of
foreign law. The Court stated that it is necessary for a claimant to plead the existence of, or an
intention to rely on, Rule 25(2) at trial. While it is open to a claimant to choose not to plead
foreign law if it pleaded a viable cause of action under English law, if a defendant wished to
challenge the determination of the claim under English law, it should expressly plead this,
setting out the matters particular to the claim which made English law inappropriate. In
this case, the defendant had not done so, and they had not pleaded any case denying the
appropriateness of applying Rule 25(2) at trial. The fact that foreign law might, in principle,
apply to a claim, did not, of itself, disapply Rule 25(2).

III COURT PROCEDURE

i **Overview of court procedure**

Civil procedure in England and Wales is governed by the CPRs and accompanying practice
directions (PDs). These are supplemented by guides produced by different courts summarising
particular procedures that apply in those courts. They do not have the force of law but courts
will generally expect compliance (and may punish non-compliance with adverse costs orders).
These and other sources are available online on the Ministry of Justice’s website⁶ and, with
commentary, in *The White Book* published annually (with interim updates) by Sweet &
Maxwell.

ii **Procedure and time frames**

Time frames and procedure for claims vary depending upon the court and division in which
the relevant claim is issued and the nature of the claim itself; the commentary below is
therefore only a general summary.

Before even commencing a claim, a claimant should ensure that one of the pre-action
protocols does not apply to the type of claim being made (e.g., claims for professional
negligence, defamation and judicial review have specific pre-action protocols that should be
followed). Even where there is no specific pre-action protocol,⁷ the claimant will be expected
first to write a letter before claim to the prospective defendant setting out in detail his or her
claim and allowing the defendant a reasonable period in which to respond (what is reasonable
may depend on the complexity of the allegations).

Following any pre-action steps, proceedings are started (and the court is treated as
seised) on the date that the claimant issues a claim form in the relevant court. The claim
form must then be served on the proposed defendant or defendants within four months of

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issue (assuming the relevant defendant is within the jurisdiction) or within six months if the defendant is outside the jurisdiction (see Section III.vi, Service out of the jurisdiction). It can be served by a range of different methods, including handing it to the defendant in person or by post. The courts have wide discretion in this area: they have, for example, permitted service of an order to be made via the social networking site Twitter against an anonymous defendant who had impersonated the claimant’s blog on that site. The claimant must serve particulars of claim with the claim form or within 14 days of service of the claim form; the particulars set out its case, the relevant facts and basis for the claim in law as well as the remedy sought. Both the claim form and the particulars of claim must be verified by a statement of truth signed either by the claimant (or authorised signatory on behalf of the claimant where the claimant is an organisation) or the claimant’s legal representative.

Assuming the defendant intends to defend the claim and acknowledges service by the appropriate court form, his or her response is by way of the defence, to be served within 28 days of receipt of the particulars of claim (note that this timescale can vary between different courts and is in any event subject to extension by agreement between the parties or by court order). The defendant should respond in the defence to each of the allegations made in the particulars of claim by either admitting it, denying it (with explanation), or putting the claimant to proof. Following service of the defence, the claimant has a right of reply in relation to any new issues or allegations raised in the defence, as well as a right to defend any counterclaim raised in the defence. The claimant’s reply should be served within 21 days of service of the defence (again, subject to extension by agreement or by court order). From this point on, it is not expected that any further statements of case will be exchanged between the parties (unless permission to do so has been granted by the court).

Following the filing of the defence, the court will send a notice of proposed allocation to the parties (CPR 26.3(1)), which will provisionally allocate the claim to a ‘track’ and require the parties to provide further information about the claim in the form of a directions questionnaire so that it can give appropriate directions as to the conduct of the proceedings and ensure that it is allocated to the correct track. The different tracks are used to ensure that the procedure adopted to trial is proportionate to the importance of the issues and amount at stake. Claims below £10,000 are generally allocated to the small-claims track and are dealt with quickly without many of the CPRs applying; for example, parties typically bear their own costs, most interim remedies are not available, there are limited disclosure obligations and witness statements are not normally exchanged before trial. Claims between £10,000 and £25,000 are generally allocated to the fast track, where the claim will still be processed quickly (trial will usually be set for a date within 30 weeks of the allocation decision) but more extensive preparation is permitted than on the small-claims track and interim remedies are available. The multi-track is reserved for the most important and high-value disputes, and the court will adopt a much more hands-on role in ensuring that the procedure adopted to trial is tailored to the requirements of the case.

For multi-track cases subject to costs management under CPR 3.13, parties will be required to complete a costs budget in the form of a template known as Precedent H. Costs management applies (subject to the discretion of the court to apply or disapply the regime) to most multi-track cases commenced on or after 1 April 2013, except for proceedings where the amount of the money claimed or value of the claim as stated on the claim form is £10 million
or more.\(^8\) Parties subject to the regime are required to file and exchange budgets setting out estimated costs for each stage in the proceedings. These must be approved by the court and effectively cap the amount that the winning party can recover from the losing party at the end of the proceedings unless it can demonstrate a good reason for departing from the budget.\(^9\)

Cases on the multi-track may require one or more case management conferences (CMCs) at which the court will, usually after hearing submissions from the parties, give directions regarding the timetable for disclosure, exchange of factual witness statements and exchange of expert reports (if any), as well as indicating broadly when it expects the trial itself to be listed. For complex matters, it is not unusual for the period between the first CMC and the trial to be at least a year. Once listed, trial dates (across all tracks) are treated as set and only in exceptional circumstances will the court agree to postpone a trial.

CPR 25.1(1) contains a non-exclusive list of interim remedies available from the court, including interim injunctions and declarations, orders for delivery up of goods, orders freezing property, orders for the provision of information and search orders. Interim applications may be made without notice to the person against whom the relief is sought, although the applicant is under a duty to disclose fully and fairly all material facts to the court, even if they are adverse to its case. Overseas lawyers have been encouraged to note that practitioners within this jurisdiction bear this heavy responsibility and that ill-prepared applications are to be avoided.\(^10\)

### iii Court reform

In 2014, the Ministry of Justice announced that between 2015 and 2020, HM Courts & Tribunals Service (HMCTS) would oversee a series of reforms aimed at modernising and improving the efficiency of courts and tribunals. The programme will involve substantial investment in digital technology to allow cases to be managed better, with less paper and fewer delays. This will allow a reduction in the number of court buildings, so generating further savings. The digitisation process is considered below (see Section III.iii, Digitisation, below). Other separate but complementary steps to reform and rationalise court processes are also considered directly below.

#### Reform of the appeals process

Secondary legislation came into force on 3 October 2016, and is intended to reduce the time it takes for cases to be heard by the Court of Appeal. The Access to Justice Act 1999 (Destination of Appeals) Order 2016 simplifies the appeals process by ensuring that, in

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\(^8\) A recent case has held that costs budgeting and proportionality considerations can be taken into account and directed by the Court in certain circumstances, even in cases exceeding £10 million in value (see Sharp & Ors v. Blank & Ors [2017] EWHC 141 (Ch)).

\(^9\) Recent case law on costs budgeting includes Harrison v. University Hospitals Coventry and Warwickshire NHS Trust [2017] EWCA Civ 792, where it was held that in order to depart from budgeted costs already agreed in the claimant’s costs budget at the Costs and Case Management Conference, the established principle of ‘good reason’ was required. However, costs incurred before a budget would be the subject of detailed assessment in the usual way; there was no requirement for ‘good reason’ to be shown if there was to be a departure from the approved budget. In Merrix v. Heart of England NHS Foundation Trust [2017] EWHC 346 (QB), where a case settled before trial, when assessing costs on the standard basis, a costs judge should not depart from the receiving party’s last approved budget unless satisfied that there is good reason to do so.

\(^10\) Lewis v. Eliades (No. 1) [2002] EWHC 335.
most cases, an appeal will lie to the next highest level of judge. In particular, appeals from a decision of a district judge in the County Court will generally lie to a circuit judge in the County Court (the next most senior judicial rung), while appeals from a circuit judge will lie to the High Court. In the High Court, appeals from a master will lie to a full judge of the High Court, and appeals from a High Court judge will lie to the Court of Appeal. The Civil Procedure (Amendment No. 3) Rules 2016 revised CPR Part 52 accordingly. The new Part 52 made two other important changes:

\[ a \] the removal of the default right to renew, at an oral hearing, a failed paper application for permission to appeal to the Court of Appeal; and

\[ b \] a clarification of the test for grant of permission to appeal in second appeals (i.e., appeals of appeals) such that a ‘real prospect of success’ must be shown, or there must be some other compelling reason for the second appeal to be heard.

Shorter and flexible trial schemes

Two pilot schemes, one for shorter trials, the other for flexible trials, began in the Business and Property Courts in London in October 2015. After three years of piloting, both schemes became permanent on 1 October 2018. The objective of the pilot schemes is to achieve more efficient trials in the context of commercial litigation. This was prompted, in part, by a recognition that comprehensive (and costly) disclosure is not always required for justice to be achieved. The Shorter Trials Scheme is open to cases that can be tried in no more than four days – this means cases in which only limited disclosure and oral evidence is required, and in practice means factually complex or multiparty claims (including fraud and dishonesty claims) are excluded. The intention is that a trial will take place within 10 months of the issue of proceedings, with judgment to follow within six weeks thereafter. The first case directly commenced under the Shorter Trials Scheme in March 2016 was National Bank of Abu Dhabi PJSC v. BP Oil International Ltd. [2016] EWHC 2892. A one-day trial took place eight months after issue and judgment was handed down two weeks after the hearing, on 22 November 2016. It is also worth noting that an appeal against the judgment was heard in July 2017, quicker than many comparable appeals.

Financial List

In October 2015, the High Court introduced a specialist Financial List for the determination of claims by judges with expertise in the financial markets. There are three criteria for inclusion (only one of which needs be fulfilled). A claim must either:

\[ a \] relate to banking and financial transactions where over £50 million is in issue;

\[ b \] require particular judicial expertise in the financial markets; or

\[ c \] raise issues of general importance to the financial markets (see CPR Part 63A).

The Financial List initiative included a two-year pilot financial markets test case scheme, which was extended in May 2017 for a further three years until 30 September 2020. This permits the court to decide cases that raise issues of general importance to the financial markets in relation to which immediately relevant authoritative English law guidance is needed, even where there is no present cause of action between the parties to the proceedings.

In Property Alliance Group Ltd v. Royal Bank of Scotland plc [2016] EWHC 207 (Ch), following a contested application to transfer existing proceedings to the Financial List, the Master of the Rolls (the second most senior judge in England and Wales) clarified that when deciding whether to transfer a case to the Financial List, CPR 30.3 and the overriding
objective must be taken into account. The instant case was transferred to the Financial List even though the total value of the claim was £29 million (below the £50 million indicative threshold). This was because, in circumstances where the issues in the case were of broad significance for the market and a judgment would affect other proceedings already issued or in contemplation, it was desirable that it be dealt with by a judge of the Financial List, in order for the resulting judgment to carry appropriate weight and respect in the financial markets.

**Digitisation**

The digitisation of the courts has continued with:

1. a new electronic filing and case management system being rolled out across the Business and Property Courts, starting with those located at the Rolls Building in London;
2. a proposed online court system – intended to deal with straightforward money claims of up to £25,000. The Civil Money Claims Project has committed to delivering a new, largely automated, system for such claims by November 2019;
3. the introduction of pilot programmes allowing the cross-examination of victims and witnesses of crime to be pre-recorded so as to avoid the pressure of a live hearing. It was announced in March 2017 that because of the success of a pilot scheme for the evidence of certain witnesses (mainly children), it is intended that the number of courts where such witnesses can give pre-recorded evidence will be increased. Also, from September 2017, courts in Kingston, Leeds and Liverpool will pilot pre-recorded cross-examination for complainants and witnesses in respect of certain offences;
4. a pilot running from August 2017 to November 2019, which has been set up to test an online claims process known as the Online Court. The pilot applies to certain money claims in the County Court; and
5. the Courts and Tribunals (Judiciary and Functions of Staff) Bill passed in December 2018, which permits judges to delegate a range of work to court staff, such as granting an extension of time or issuing a summons.

**iv Class actions**

**Pre-October 2015**

The concept of class actions has been a part of English civil procedure for some time, but does not bring with it many of the characteristics that would, for example, be familiar to a US lawyer. CPR Part 19 sets out the framework for:

1. a representative actions, where one person brings (or defends) a claim as a representative of others who share the same interest in the claim;\(^\text{11}\) and
2. group litigation orders (GLOs),\(^\text{12}\) where claims brought by parties that give rise to common or related issues of fact or law are managed together.

Represented persons are not formally parties to the proceedings and are therefore not subject to disclosure obligations or liable for costs (therefore leaving the representative liable for any costs). They do not have to opt in to be represented, although they can apply to the court to opt out. By contrast, parties to claims covered by a GLO are fully fledged parties and are likely

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11 CPR 19.6.
12 CPR 19.10–19.15.
to have to pay their share of the common costs of the litigation if they lose. The Court of Appeal confirmed the High Court’s rejection of a US-style class action brought against British Airways by two flower importers who sought to bring proceedings as representatives of all direct and indirect purchasers of airfreight services affected by an alleged cartel.\textsuperscript{13} The Court upheld the first instance decision to strike out the representative element of the claim as it was not in the interest of justice to bring an action on behalf of a class of claimants so wide that it was impossible to identify members of the class before and perhaps even after judgment. This opposition to US-style class actions has been strengthened by the government’s decision to remove provisions in the Financial Services Bill (enacted as the Financial Services Act 2010), which would have extended the options for collective actions in the financial services sector to include ‘opt-out’ actions.

Orders made in a representative action are binding on all represented persons and may be enforced, with the court’s permission, against any other person. Judgments issued in claims subject to a GLO are binding on every party entered on the ‘group register’ (which will have been established pursuant to the GLO).

A single claim can be selected from any set of similar claims (including those governed by a GLO) to be advanced as a test case. There are no formal rules governing test cases and it is usually the parties who decide which cases will be selected to proceed to judgment while others are stayed pending judgment in the test case. A recent example of a test case was the bank charges litigation where thousands of customers’ claims in the County Court were stayed pending the outcome of the OFT’s claim.\textsuperscript{14}

Although there have been some high-profile cases involving representative actions and GLOs,\textsuperscript{15} class-action proceedings of any kind are still relatively uncommon in England and Wales, in part because of the risks of adverse costs orders against unsuccessful claimants and, more generally, the costs of commencing and maintaining proceedings. Parties are increasingly able to mitigate these risks through the increased availability of after-the-event insurance, third-party litigation funding, conditional fee agreements and damages-based contingent fee arrangements with lawyers who are willing to share the risks with their clients in return for a share of any damages (see Section III.x).


\textsuperscript{15} See the class actions brought by shareholders of RBS in respect of the 2008 RBS rights issue and the shareholders of Lloyds/HBOS in respect of alleged losses suffered as a consequence of Lloyds’ acquisition of HBOS in January 2009 and the subsequent recapitalisation of the merged entity. On 5 December 2016, RBS announced that it had settled with three of the five claimant groups in the rights issue litigation, and in April 2017 further settlements occurred with additional shareholders, resulting in an effective settlement of 87 per cent of the claim (by value). The trial on liability began in May 2017; however further settlements were announced in June 2017, and the High Court vacated the trial. The Lloyds/HBOS case is still working its way through the High Court. See also, the Equitable Life litigation (in the House of Lords: Equitable Life Assurance Society v. Hyman [2002] 1 AC 408), where Equitable Life sponsored one defendant, Hyman, to represent around 90,000 of its policyholders to establish the correct interpretation of a life insurance policy it had issued. In January 2017, the High Court granted a GLO that will see a class action against the Post Office regarding claims that sub-postmasters were wrongly punished because of flaws in the Post Office’s Horizon computer system. 522 current and former postmasters have attached to the claim as eligible claimants. Also this year, an application was made to the High Court for a group litigation order to pursue Volkswagen Group UK for financial compensation due to the NOx emissions scandal. The application was originally made in January but was then adjourned. The pretrial hearing took place on 27 November 2017, by which time 45,000 claimants had joined the class action.
Collective proceedings for breaches of competition law

Section 47B of the Competition Act 1998 as amended came into force on 1 October 2015. It creates a genuine class action regime for the first time in the UK, allowing private individuals to seek collective redress for breaches of competition law. The regime operates in the Competition Appeal Tribunal (CAT) only. It accommodates follow-on damages claims, where a breach has already been established by a regulator, and stand-alone claims, where a claimant must prove breach itself. Claims that would raise the same, similar or related issues of fact or law may be pursued as collective proceedings; they are initiated by a representative of the class of affected persons and it is for the CAT to authorise that representative and make a collective proceedings order (CPO) permitting the proceedings to be continued. That order will also specify whether the proceedings are to be opt-in or opt-out. This places the UK in a minority in the EU (which typically does not support ‘opt-out’ claims) and may potentially make the UK a more attractive place for large groups of claimants to commence claims.

In mid-2016, an application was made to commence a £14 billion claim against MasterCard for damages arising from the EU Commission’s 2007 decision that MasterCard’s European Economic Area (EEA) multilateral interchange fees breached Article 101(1) of the Treaty on the Functioning of the European Union. The CPO application was made by Walter Merricks, former Chief Ombudsman of the UK Financial Ombudsman Service, on behalf of approximately 46 million customers (on an opt-out basis). Mr Merricks needed to show that the claims of those he purported to represent raised common issues and were suitable to be brought in collective proceedings. In a judgment dated 21 July 2017, the CAT refused to make a CPO. The judgment considered the commonality requirement and confirmed that it was not necessary for an applicant to show that all of the issues that would arise on an individual claim would be common to every other individual’s claim. However, the CAT found that the expert methodology put forward by Mr Merricks on the assessment of damages of all the claims was not suitable as it did not satisfy the test set out by the Supreme Court of Canada in *Pro-Sys Consultants Ltd v. Microsoft Corp.* [2013] SCC 57 (at Paragraph 118):

> the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.

It therefore remains to be seen how the procedure (which affords considerable discretion to the CAT in terms of, for example, class certification) will be applied in practice.

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v  Representation in proceedings
Any person who is not a child nor lacks capacity as a result of an impairment or disturbance of the mind has the right to begin and carry on civil proceedings without professional representation. The courts generally seek to accommodate litigants who represent themselves in proceedings. 17

vi  Service out of the jurisdiction
The court’s permission is not required for service of the claim form or other documents out of the jurisdiction where the court has jurisdiction under the Judgments Regulation (Regulation (EU) No. 1215/2012), the Lugano Convention or the Hague Convention on Choice of Court Agreements and the criteria in CPR 6.33 are met:

a  there are no proceedings between the parties concerning the same claim pending in the courts of any other Member State or Lugano Convention state; and

b  either (1) the party to be served is domiciled in either the UK or a Member State or a Lugano Convention state (Iceland, Norway or Switzerland); (2) there is a jurisdiction clause giving the English courts jurisdiction; or (3) the English courts have exclusive jurisdiction under Article 24 of the Regulation or Article 16 of the Lugano Convention; or

c  where each claim against the defendant to be served and included in the claim form is a claim that the court has power to determine under the Hague Convention, and the defendant is party to an agreement conferring exclusive jurisdiction on the English court.

Claim forms must be filed and served accompanied by a statement explaining the grounds supporting service out of the jurisdiction. CPR 6.32 makes specific provision for service without permission in Scotland or Northern Ireland. In all other cases, an application must be made to the High Court for permission to serve a claim form on a party situated outside the jurisdiction. The applicant must establish that it has a good arguable case and that the claim falls within one of the stipulated categories set out in CPR 6BPD.3.1. The categories include claims to enforce a judgment or arbitral award, or for a breach of contract committed within the jurisdiction. The applicant must also satisfy the court that England and Wales is the most appropriate jurisdiction in which to bring the proceedings (i.e., that it is forum conveniens) and that there is a serious issue to be tried.

vii  Enforcement of foreign judgments
In broad terms, there are three enforcement regimes available:

a  By European Regulation or Convention – a judgment on an uncontested money claim issued by a court of a Member State and certified by it as a European enforcement order may be enforced very simply under the European Enforcement Order Regulation as though it was a judgment of the English court. Other judgments may be enforced using the procedure in the Judgments Regulation or the Lugano Convention. This involves making an application to the Queen’s Bench Division of the High Court (without notice to the defendant) for registration of the judgment. The grounds on which registration can be challenged are limited; for example, if the judgment was not enforceable in the

17  See, for example, Nelson v. Halifax plc [2008] EWCA Civ 1016.
Member State in which it was given or if one of the specific exceptions in Article 45 of the Judgments Regulation apply. The Judgments Regulation in its recast form applies to judgments in proceedings commenced on or after 10 January 2015; such judgments may be enforced more easily without the need for registration at the High Court.

b By statute – judgments from Commonwealth countries and other countries that have reciprocal enforcement agreements with the UK may be enforced pursuant to the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933 by making an application for registration to the High Court. Once registered under either Act, the judgment is enforceable as though it were a judgment of the English court.

c At common law – judgments for a sum of money from all other jurisdictions (including, e.g., the United States) may be enforced at common law. This requires claimants to issue a claim in debt and then apply for summary judgment to enforce the judgment.

viii Assistance to foreign courts

The English courts will, in certain cases, assist foreign courts to collect evidence in civil or commercial matters. Courts of EU Member States (other than Denmark) may request that the English courts take evidence on their behalf or grant permission for the requesting court to take evidence in England directly under the Taking of Evidence Regulation (Council Regulation 1206/2001/EC). The grounds for refusing the application are limited (for instance, where the witness has a right not to give evidence under English law or the law of the requesting Member State), and the court must either comply with the request or refuse to do so within 90 days.

Courts of non-EU Member States (and courts of EU Member States, if necessary) can request assistance under the Evidence (Proceedings in Other Jurisdictions) Act 1975 in relation to civil or commercial matters. Generally, the English court will exercise its discretion to assist the foreign court; however, the court will not make orders for pretrial discovery, general disclosure or require a witness to do anything he or she would not be required to do in English civil proceedings.

ix Access to court files

As a general rule, members of the public may obtain copies of statements of case, judgments or orders without the permission of the court. Parties or any person mentioned in a statement of case may apply to the court in advance for a pre-emptive order restricting the release of statements of case to non-parties.

The right of access does not extend to documents attached to statements of case, witness statements, expert reports, skeleton arguments and correspondence between the court and the parties, although members of the public may obtain access with the court’s permission. The court will normally grant permission to access documents where the documents are considered to be in the public domain as a consequence of having been read out in public or treated as having been read out in public. In Cape Intermediate Holdings Ltd v. Dring (Asbestos Victims Support Group), the Court of Appeal confirmed that the public were not entitled to access documents that were merely referred to, rather than being read out in open court.

18 CPR 5.4C(1).
19 2018] EWCA Civ 1795.
Litigation funding

Historically, the common law rules against maintenance (support of litigation by a disinterested third party) and champerty (where the supporting party does so for a share of the proceeds) prevented the funding of litigation by anybody who was not party to the relevant litigation. Today, these restrictions are much narrower and third-party funding has become accepted as a feature of modern litigation.

Case law and practice are still developing in this area, but the approach of the courts has so far been to uphold such arrangements so long as they do not breach the general prohibition on containing an element of impropriety. Relevant factors include the extent to which the funder controls the litigation (e.g., whether they take strategic decisions); the nature of the relationship between the funded party and the solicitor and the extent to which the funded party can make informed decisions about the litigation (this should be a genuine and independent relationship); the amount of profit the funder stands to make (it has been held that 25 per cent may not be excessive); whether there is a risk of inflating damages or distorting evidence; whether the funder is regulated; and whether there is a community of interest between the funder and the funded party.

Lord Justice Jackson recommended in his final report on civil litigation costs, published on 14 January 2010, that a voluntary code should be drawn up to which all litigation funders should subscribe. The Code of Conduct for Litigation Funders was launched on 23 November 2011. The Code contains provisions concerning effective capital adequacy requirements, restrictions upon a funder’s ability to withdraw support for ongoing litigation and restrictions on a funder’s ability to influence litigation and settlement negotiations. Third-party funders may also be potentially liable for the full amount of adverse costs, subject to the agreement between the funder and the litigator. The Court of Appeal considered the basis and extent of funders’ liability to a successful opponent in Excalibur Ventures LLC v. Texas Keystone Inc and others. Indemnity costs were awarded against the funded claimants on the basis that their ‘spurious’ claims had been pursued to trial despite having ‘no sound foundation in fact or law’. The Court of Appeal dealt with the issue of whether third-party funders could be made liable on the same basis as an unsuccessful party. Agreeing with the trial judge that the litigation was ‘egregious’ and a ‘war of attrition’, the Court of Appeal held that a funder should ‘follow the fortunes’ of the funded party. A funder seeks to derive financial benefit from the pursuit of a claim, just as much as the funded litigant. It cannot avoid any downside that may instead arise (subject to the ‘Arkin cap’, which limits a funder’s adverse liability to the amount of its investment). In any event, in the matter of liability for indemnity costs it was not appropriate to seek to differentiate between a party to litigation and those who stand behind that party purely on that basis; that would be to misconstrue one of the tests for indemnity costs, which requires a court to consider the character of the action and its effect on the successful party (and not any other party).

Solicitors (and sometimes barristers) acting for clients with the benefit of third-party funding will typically be required, as a condition of that funding, to enter into some form of contingency arrangement in respect of their fees. Two structures, both permitted only insofar as they comply with regulations, predominate:

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21 See http://associationoflitigationfunders.com/code-of-conduct/.
22 [2016] EWCA Civ 1144.
Conditional fee agreements (CFAs) are defined in Section 58 of the Courts and Legal Services Act 1990 as agreements between a lawyer and a client by which the lawyer’s fees and expenses, in part or in whole, are payable only in specified circumstances (meaning, usually, victory for the client either at trial or by way of settlement). At its most basic, a CFA will provide that a losing client has no liability for its lawyer’s fees (no win, no fee) while a winning client will be required to pay its lawyer for work done on the case and, in addition, a success fee, intended to compensate the lawyer for the risk it took of earning nothing at all.

As the market has developed, more sophisticated variants of this model have developed. For instance, a client may agree to pay its lawyer throughout the life of the case, but on the basis of a discount to the lawyer’s usual hourly rate. If the client loses the case, it will have no further costs liability to its lawyer. If the client is successful, it will be liable to top up the lawyer’s fees to the full hourly rate and, in addition, pay a success fee calculated by reference to the full hourly rate. Regulations set out the form and permissible limits of a CFA. For instance, any success fee may not exceed 100 per cent of the fees which would have been payable to the lawyer had there been no CFA in place.

Under CFAs entered into before 1 April 2013, a winning party could recover any success fee payable to its lawyer from its losing opponent (in addition to the ordinary fees for which the client was liable to its lawyer). Reforms introduced following Lord Justice Jackson’s report on civil litigation costs abolished the recoverability of success fees.

Damages-based agreements (DBAs) are a species of contingency fee arrangement in which the amount payable by the client to the lawyer in the event of a successful outcome is calculated as a percentage of the damages received. Arrangements of this kind, in which the contingent payment is expressly linked to level of the client’s recovery, were outlawed in all but employment disputes until Section 45 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012) was brought into effect. DBAs will only be valid if they comply with the requirements set out in the Damages-Based Agreements Regulations 2013 (SI 2013/609).

Contingency fee arrangements do not protect a party to litigation from the risk of adverse costs liability. In other words, a losing claimant with the benefit of a CFA may not have to pay anything to its lawyer, but it will, in the ordinary course, remain liable to pay a large part of the winning party’s legal costs. Funded claimants (and sometimes those funding a claim from their own resources) will typically seek to insure against that risk. A large market has grown up for such after-the-event (ATE) insurance (so named because it is usually taken out once a claim has arisen and been formulated). Before the Jackson reforms of 2013, ATE insurance premiums were recoverable from a losing party. The end of recoverability does not appear to have significantly reduced the availability of ATE insurance and it is frequently offered in conjunction with third party funding of a party’s own legal costs. The liberalisation of the regime for third party funding and the corresponding development of a market for professional funders is making it easier for claimants to commence and maintain proceedings, particularly in relation to class actions where there can be very many claimants and such funding options represent an opportunity to spread the funding risk.
Bill of costs

In October 2015, as part of the Jackson reforms, a voluntary pilot scheme was introduced at the Senior Courts Costs Office with a view to establishing a new mandatory model form electronic bill of costs based on uniform task-based time-recording codes. This was aimed at reducing the time and expense of drawing up the bill of costs by aligning it with the time-recording technology used in practice. On 6 April 2018, the electronic bill of costs scheme became mandatory in the Senior Courts Costs Office and County Courts. CPR 47 and the associated PD were amended accordingly.

IV LEGAL PRACTICE

i Conflicts of interest and information barriers

Conflicts of interest are governed by the rules contained in the Solicitors Regulation Authority’s (SRA’s) Code of Conduct 2011 (for solicitors) and the Bar Standards Board Handbook (for barristers). Generally, lawyers must refrain from acting in circumstances where there is a real or significant risk that a conflict exists between the interests of two or more different clients in either the same matter or a related matter, or where there is a conflict or a significant risk of a conflict between the lawyer’s interests and those of his or her client.

There are two exceptions to this rule whereby lawyers may be permitted to act for two or more clients despite there being an actual or significant risk of a conflict between his or her clients’ interests. The first relates to situations in which the clients have a substantially common interest in relation to the matter or a particular aspect of it, as might be the case with a non-contentious commercial transaction. The second is where the clients are competing for the same objective, which if attained by one client will be unattainable to the other (e.g., in the case of bidders competing for the same asset in a private auction).

There are, however, some preconditions that must be met before either exception can be relied on. Most significantly, all relevant issues must be drawn to the attention of clients and they must give their consent in writing. In addition, lawyers must be satisfied that it is reasonable to act in all the circumstances.

If an actual or a significant risk of conflicts of interest exists, it may be possible for an existing client to seek an injunction to prevent the lawyer from continuing to act. Further, if a lawyer is found to have continued to act where there was a real or significant risk of a conflict arising, the retainer may be considered an illegal contract, which would impact on the lawyer’s ability to recover fees or to rely on any professional indemnity insurance to respond. In addition, he or she may face disciplinary proceedings before his or her relevant professional body.

Lawyers have a duty to protect all confidential information regarding their clients’ affairs, unless disclosure is required or permitted by law or the client consents to the disclosure. In addition, a lawyer who is advising a client must make that client aware of all information material to the retainer of which the lawyer has personal knowledge. Where a lawyer’s duty of confidentiality to one client comes into conflict with the duty of disclosure to another client, the duty of confidentiality takes precedence (but this will not mean that the duty of disclosure has not been breached).

In addition, lawyers may not represent a potential client (A) in circumstances where the potential client has an interest adverse to another client (or former client) (B) and the lawyer holds confidential information regarding B that may reasonably be expected to be material to A unless the confidential information is protected by the use of safeguards and:
a A is aware of and understands the relevant issues and gives informed consent; and
b either B also gives informed consent and the lawyer agrees with them what safeguards will be put in place to protect the confidential information, or where the lawyer is unable to seek B's consent, he or she puts in place common law compliant information barriers.

In most cases, a firm will be unable to proceed unless both clients consent, in writing, to the arrangement. In *Marks and Spencer Group plc v. Freshfields Bruckhaus Deringer*,23 the court confirmed that where a firm is unable to implement effective measures to ensure that its former client’s confidential information is protected, the former client may be granted an injunction to prevent the firm from continuing to act for the new client.

ii Money laundering, proceeds of crime and funds related to terrorism

The key money laundering offences are contained in the Proceeds of Crime Act 2002 (POCA) and the Terrorism Act 2000. These ensure that the balance of responsibility for detecting and preventing financial crime rests more than ever before on the firms participating in the UK financial markets, including law firms.

There are essentially three ‘principal’ money laundering offences. A person (including a firm, corporation or individual) commits a money laundering offence if he or she:

a conceals, disguises, converts or transfers the proceeds of criminal conduct or of terrorist property;
b becomes concerned in an arrangement to facilitate the acquisition, retention or control of, or to otherwise make available, the proceeds of criminal conduct or of terrorist property; or
c acquires, possesses or uses property while knowing or suspecting it to be the proceeds of criminal conduct or of terrorist property.

There are also essentially three ‘secondary’ or third-party offences:

a failure to disclose any of the offences (a) to (c);
b disclosing or ‘tipping off’ that a report of suspicion of money laundering has been made to the authorities in circumstances where that disclosure might prejudice an investigation; and
c prejudicing an investigation in relation to money laundering or terrorist financing offences.

The POCA offences in particular cast a wide net. Criminal conduct is defined as conduct that constitutes an offence in any part of the UK, or would do so if the conduct occurred in the UK. Further, its scope is not limited to offences that might be considered more serious offences with the effect that it is necessary to report relatively minor offences to the National Crime Agency. The ‘failure to disclose’ offence is subject to an objective test and will therefore be committed if a person does not actually believe that another person is engaged in money laundering but a jury later finds that he or she had reasonable grounds for knowing or suspecting such activity. Lawyers are not required to make a disclosure if the information

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or other matter on which their knowledge or suspicion of money laundering was based, or which gave reasonable grounds for knowledge or suspicion, came to them in privileged circumstances.

The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (which implemented the Fourth Money Laundering Directive (2015/849)), came into force on 26 June 2017. This Regulation replaces the Money Laundering Regulations 2007 and the Transfer of Funds (Information on the Payer) Regulations and prescribes standards that regulated persons (including law firms) must meet in relation to, among other things, client identification, employee training and record-keeping. These are designed to prevent firms from being used for money laundering. The Regulation also seeks to give effect to the updated Financial Action Task Force global standards which promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system.

### Data protection

The processing of personal data is primarily regulated by the Data Protection Act 1998 (DPA) and certain secondary legislation made under the DPA. The DPA implements the EC Data Protection Directive (95/46/EC) into UK legislation. The General Data Protection Regulation (Regulation (EU) 2016/679) was adopted on 27 April 2016 and entered into force on 25 May 2018 after a two-year transition period (see Section VIII.vi, below). The GDPR automatically applies in the UK, irrespective of the UK’s future relationship with the EU.

The principal elements of the GDPR can be summarised as follows:

- **a** both data controllers and data processors have statutory obligations under the GDPR;
- **b** data controllers and data processors must comply with the six data protection principles under Article 5(1) GDPR and the additional accountability principle under Article 5(2) GDPR (the Principles); and
- **c** data subjects have certain rights, including to access personal data held about them, to rectify erroneous personal data, to object to the processing of their personal data and to the erasure of their personal data.

The Information Commissioner’s Office (ICO) is charged with policing and enforcing the regime. The Commissioner’s enforcement powers include serving an enforcement notice requiring a data controller to comply with the relevant Principle after a specified period (failure to comply with an enforcement notice is a criminal offence) and, in the case of serious contraventions likely to cause substantial damage or distress, serving a monetary penalty notice requiring the payment of a penalty up to £500,000. Details of most enforcement actions taken by the Commissioner are also published on the ICO’s website.

Data and personal data are widely defined under the GDPR such that any electronic information (and some information held in structured hard-copy filing systems) that relates to an identified or identifiable natural person (the data subject) is likely to be personal data. Processing is also widely defined under the GDPR to include anything that can be done with or in relation to data, including obtaining, recording, holding, organising, altering, retrieving, using, disclosing, transferring and destroying data. A data controller is a natural or
legal person, public authority, agency or other body that determines the purposes and means
of the processing of personal data. A data processor is a natural or legal person that processes
personal data on behalf of the controller.

Access to, analysis of and disclosure of electronic information held by a client (or a third
party) by legal professionals for the purposes of advising or acting on a dispute will almost
always be subject to the GDPR. This is because such data will usually contain the names,
e-mail addresses or other identifying information of the client’s employees or customers, or
other living individuals and will therefore be personal data. It may also contain sensitive
personal data, which is personal data containing information about (among other things)
the data subject’s racial or ethnic origin, political opinions, religious beliefs, trade union
membership, physical or mental health, sexual life or the commission or alleged commission
of an offence by the data subject. Additional, more stringent conditions for processing apply
in respect of sensitive personal data.

Law firms acting as data controllers or data processors (or both) and the clients who
are providing them with personal data (for example, for the purpose of locating relevant
documents or evidence in relation to a dispute) need to comply with the new data protection
Principles. In the context of dispute resolution practice, the relevant conditions for processing
personal data for the purposes of the First Principle include that the data subject consents
to the processing, that the processing is necessary in order to comply with a legal obligation,
or that the processing is in the legitimate interests of the controller or a third party. Even
when one of those conditions is met, the client and law firm will also need to ensure that
the processing is otherwise fair, transparent and that the other Principles are complied with.

The new accountability Principle contains two elements: first, the controller is
responsible for complying with the GDPR and second, the controller must be able to
demonstrate this compliance. Date processors are also liable to the extent that they do not
comply with their obligations under the GDPR. The subject access rights under the GDPR
can be used as a means to seek relevant information for the purpose of a dispute involving
a living individual. Law firms acting in a dispute with an individual and their clients may
receive subject access requests by that individual for documents containing personal data
relating to that individual. However, information that is subject to legal privilege is exempt
from the subject access rights under the GDPR.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

Legal privilege in England and Wales is governed by the common law and entitles its holder
to refuse to produce the privileged document for inspection. The recognised categories of
privilege that may be claimed by a party in respect of its documents or communications are:

i Legal advice privilege

The House of Lords confirmed in its decision in Three Rivers District Council and Others v.
Governor and Company of the Bank of England (No. 4)24 that legal advice privilege protects
confidential communications between a lawyer and client made for the dominant purpose of
receiving or giving advice in the relevant legal context. However, the House of Lords did not

interfere with the Court of Appeal’s previous ruling in *Three Rivers (No. 3)*, which warned that care must be taken when identifying the ‘client’ for the purposes of legal advice privilege. Particularly in large, but potentially in any, organisations, the client may be limited to a defined group within the instructing entity with the responsibility for regular correspondence with the solicitors and not simply any employee or member of the instructing entity. In *Serious Fraud Office (SFO) v. Eurasian Natural Resources Corporation Ltd (ENRC)*, although the Court of Appeal declined to revisit *Three Rivers (No. 5)*, it did acknowledge that there were still outstanding questions (and issues) in relation to this case. In *Re the RBS Rights Issue Litigation*, the High Court dismissed an application by RBS to withhold from disclosure notes of interviews (which were created pursuant to internal investigations). The High Court decided that legal professional privilege did not apply as: (1) applying *Three Rivers (No. 3)*, the notes of interviews were preparatory information gathered from current or former employees who did not form part of the lawyers’ client (notwithstanding that the information was collected in order to be shown to a lawyer to enable legal advice to be given to RBS); and (2) the interview notes could not be said to be privileged as ‘lawyers’ working papers’ as it was not sufficiently clear that the notes would give an indication as to the legal analysis or advice undertaken or given to RBS. The UK Supreme Court confirmed in *R (on the application of Prudential Plc) v. Special Commissioner of Income Tax* that legal advice privilege applies only to legal advice provided by members of the legal profession and not to members of other professions who give legal advice in the course of their business (such as accountants who provide tax advice).

ii **Litigation privilege**

Litigation privilege arises only when litigation is in existence or contemplation. In those circumstances, any communication between a lawyer and client, or a lawyer or his or her client and a third party, is privileged if made for the dominant purpose of obtaining or giving legal advice or collecting evidence or information in relation to the litigation. Litigation privilege is wider in scope than legal advice privilege in that it may cover communications with third parties and therefore avoids the difficulties in identifying the client inherent in legal advice privilege. In *SFO v. ENRC*, the Court of Appeal held that, in the context of internal investigations, litigation privilege arises where criminal proceedings are in reasonable contemplation. The Court of Appeal further held that, in both civil and criminal contexts, legal advice given for the purpose of avoiding or settling contemplated proceedings was protected by litigation privilege to the same extent as advice given for the purpose of resisting or defending such proceedings.

iii **Privilege against self-incrimination**

Documents that tend to incriminate or expose a person to criminal proceedings in the UK or to proceedings for the recovery of a penalty in the UK (including civil contempt) are

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26 [2018] EWCA Civ [2006].
28 [2016] EWHC 3161 (Ch).
30 It is unlikely that the privilege applies to non-adversarial situations; *Re L (A Minor)* [1997] AC 16.
31 [2018] EWCA Civ [2006].
England and Wales

generally protected by privilege (although the privilege is subject to statutory exceptions, especially in the context of regulatory investigations). It is sufficient if the document might tend to incriminate or so expose the person, provided the risk is apparent to the court.32

iv Common interest privilege

Common interest privilege arises where communications are made between parties who share a common interest in the legal advice. This will arise where parties share the same interest in litigation (or potential litigation) or in a commercial transaction to which the legal advice relates. In such cases, communications of privileged information between the parties will be privileged even if neither legal advice privilege nor litigation privilege applies.

v Public interest immunity

This immunity applies where production of the document would be so injurious to the public interest that it ought to be withheld, even at the cost of justice in the particular litigation.33 The procedures for claiming this immunity (which in most practical respects operates as another head of privilege) are set out in CPR 31.19.

vi Without prejudice communications

Any communications made in a good faith effort to settle proceedings are covered by the without prejudice privilege. However, the without prejudice rule is not absolute and evidence of without prejudice communications may be admitted in certain circumstances; for example, to determine whether the communications resulted in a concluded settlement agreement (and to interpret the terms of such an agreement)34 or whether the agreement was procured by fraud, misrepresentation or undue influence.

The case of Brown v. Rice35 reinforced that without prejudice privilege applies to communications made during a mediation; however, on the facts, the communications were admitted as evidence to establish whether a settlement had been concluded. In Farm Assist Limited (in Liquidation) v. the Secretary of State for the Environment, Food and Rural Affairs (No. 2),36 Ramsey J clarified that without prejudice privilege is the privilege of the parties and not the mediator. On the facts of the case, the parties had waived the privilege, and so the mediator could not rely upon the privilege to resist a witness summons.

Communications between a company and its qualified in-house legal advisers are capable of being privileged to the extent that the communication concerns the lawyer in his or her legal capacity rather than some other managerial role (for example, as company secretary).37 However, the European Court of First Instance and ECJ have ruled that such communications

35 [2007] EWHC 625 (Ch).
37 Three Rivers (No. 4) [2004] UKHL 48.
communications are not privileged in relation to Commission competition investigations.\textsuperscript{38} Communications with qualified lawyers in other jurisdictions in relation to foreign or English law may also be privileged before the English courts.\textsuperscript{39}

VI DOCUMENT PRODUCTION

\textbf{i Disclosure and inspection}

Parties to English litigation are required to produce to their opponent and the court documents within their control upon which they rely. They are frequently also required to produce documents that tend to harm their case. A party is entitled to withhold from inspection documents that are legally privileged (but must still disclose their existence). The relatively expansive nature of document production is reflective of the ‘cards on the table’ approach that characterises English court procedure.

From 1 January 2019, a new disclosure pilot scheme will apply to the majority of new and existing proceedings in the Business and Property Courts of England and Wales. The main objectives of the disclosure reforms, which will almost entirely replace the old menu-based system, are to improve costs and streamline the process of disclosure. The new rules provide for a two-stage disclosure: initial disclosure and extended disclosure. As a general rule, each party will need to give initial disclosure by providing with their statements of case the key documents on which they have relied (expressly or otherwise), and key documents that are necessary to enable other parties to understand the claim or defence they have to meet. Extended disclosure is not an automatic right: a party seeking disclosure in addition, or as an alternative, to initial disclosure will need to request this from the court. Extended disclosure will be ordered by reference to five disclosure models in relation to issues for disclosure drawn up by the parties. The five models range from a basic ‘no search needed’ disclosure through to a more onerous train of enquiry approach from \textit{Peruvian Guano}.\textsuperscript{40} The new rules also impose express duties on parties and their lawyers, such as confirming document preservation and disclosure of known adverse documents, with sanctions for non-compliance.

CPR 31.4 makes it clear that a document is anything in which information is recorded. Examples of documents include, for these purposes, photographs, emails, text messages and voicemail recordings. CPR 31PD.2A.1 even extends this definition of document to cover metadata (i.e., information about an electronic document that is not visible on its face, such as electronic records of who created the document).

CPR 31.8 provides that parties are only required to produce documents that are or have been under their control. The definition of ‘control’ includes documents that a party has or had in its possession, or has or had a right to possess, or has or had a right to inspect or copy. In \textit{Lonrho Ltd v. Shell Petroleum Co Ltd (No. 1)},\textsuperscript{41} the court confirmed that a document will be considered to be in a party’s control if the party has a presently enforceable right to obtain inspection or copies of the document without the need to consult anyone else. The fact that a document may be situated outside the jurisdiction is irrelevant.

\textsuperscript{38} See joined Cases T-125/03 and T-253/03 \textit{Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. Commission} in the General Court and the subsequent decision of the ECJ in C-550/07 P.

\textsuperscript{39} \textit{Lawrence v. Campbell} (1859) 4 Drew 485 and \textit{IBM Corp v. Phoenix International (Computers) Ltd} [1995] 1 All ER 413.

\textsuperscript{40} CPR 31.7.

\textsuperscript{41} [1980] 1 WLR 627.
The CPR and courts recognise that the disclosure of electronic documents may present unique challenges to parties because of the potential volume of material that might have to be recovered and reviewed and the technical challenges of so doing. CPR 31PD.2A sets out the procedure parties should follow in attempting to define and sensibly restrict the scope of electronic disclosure. Similar provisions are included in the Commercial Court Guide.

Searches for relevant electronic documents may include using specialist software to conduct keyword searches across computers, or even entire servers. It may also involve the restoration of backup tapes (or other electronic archives that are not readily accessible) for the purpose of conducting electronic searches for relevant material.

PD 31B was introduced with effect from 1 October 2010 and encourages the parties to complete an electronic documents questionnaire (EDQ) at an early stage of proceedings, setting out details of material held electronically that they intend to disclose. The EDQ must be supported by a statement of truth. The parties are then expected to discuss the disclosure of electronic documents, including the scope of the reasonable search for such documents and any tools and techniques that might reduce the burden and cost of the disclosure of electronic documents.

ii Predictive coding

Parties are making increasing use of information technology to assist in the review of large bodies of data. Such technology can take many forms. ‘Predictive coding’, for example, refers to the use of software to assess the likely relevance of documents to a dispute, so as to limit the time and expense incurred in conducting a reasonable search for disclosable document under CPR 31.7. In *Pyrrho Investments Limited v. MWB Property Limited and others*, Master Matthews approved the use of predictive coding to expedite the search of more than 17 million documents. Ten reasons were given, chief of which was that predictive coding allows parties to search vast amounts of electronic documents at proportionate cost. Courts have since shown an increased inclination to order the use of predictive coding over and above other search methods, such as keyword searches. *Pyrrho* was approved in *Brown v. BCA Trading Ltd* in which the use of predictive coding in electronic disclosure was endorsed. The court also stated that predictive coding would be significantly cheaper than a keyword search and there was no evidence to suggest that it would be less effective.

iii Privilege lists

Document production is a two-stage process: the parties disclose the existence of relevant documents by serving on each other a list of those documents. They then provide their opponent with copies of all those documents save for those which they have some legal basis for withholding (most commonly, documents over which privilege is claimed). Each document over which privilege is claimed should be described. In *Astex Therapeutics Ltd v. AstraZeneca AB*, the High Court ruled that a generic statement to the effect that the categories of documents referred to in the relevant section of the disclosure list are privileged is insufficient to discharge the requirement under CPR 31.10(4)(a). In *Hutchison 3G UK Ltd*
v. EE Ltd, the court refused an application for specific disclosure on the basis that a party could not rely on the court’s general management powers to avoid the specific disclosure provisions in CPR 31.12.

VII ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

There are a number of forms of alternative dispute resolution mechanisms available in England and Wales. The glossary to the CPR defines alternative dispute resolution (ADR) as a ‘collective description of methods of resolving disputes otherwise than through the normal trial process’. ADR encompasses a variety of dispute resolution methods ranging from non-binding negotiations, in which there is no third-party involvement, to formal binding arbitral proceedings. ADR has achieved acceptance as it is normally conducted in private, its outcome is normally subject to agreement of the parties, confidential, and it may offer a faster and more cost-effective resolution to a dispute than traditional litigation. The Civil Justice Council ADR Working Group recently considered, and dismissed, the idea of imposing mandatory ADR in its Interim Report, which was published in October 2017. The report notes that in England and Wales there are already a number of ADR processes that are effectively mandatory and introducing compulsory pre-action ADR would be ‘too heavy-handed’. The following reasons were cited in the report: the difficulties with avoiding unnecessary cost and hassle, the risk of delay due to difficulties with engaging defendants pre-action and the largely negative feedback about mandatory pre-action systems from jurisdictions such as Italy (which is the only European system with a mandatory pre-action mediation requirement).

ii Arbitration

The Arbitration Act 1996 (the 1996 Act) restated and aimed to improve the law in England and Wales relating to arbitration pursuant to an arbitration agreement. Certain provisions (those listed in Schedule 1 of the 1996 Act) are mandatory and have effect notwithstanding any agreement to the contrary, whereas other provisions apply only in the absence of any agreement between the parties. Key mandatory provisions include:

a Section 9 – a party to an arbitration agreement may apply for a stay of proceedings if proceedings are brought against it in respect of a matter that, under the agreement, should be referred to arbitration. The court in which proceedings are brought shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed;

b Section 40 – the parties are under a general duty to do all things necessary for the proper and expeditious conduct of the arbitral proceedings;

c Section 67 – a party may apply to the court to challenge a tribunal’s substantive jurisdiction; and

46 Hutchison 3G UK Ltd v. EE Ltd (unreported) 6 October 2017 (Commercial Court).

47 Some practitioners would exclude arbitration as a form of ADR and would emphasise instead the procedural informality of ADR mechanisms. However, since an arbitration can only be commenced with the consent of the parties, it is treated here as an alternative to the formal court process.
Section 68 – a party may apply to the court to challenge an award for ‘serious irregularity’.

Section 69 of the 1996 Act permits parties to appeal to the court on a question of law arising out of an award made in the arbitral proceedings, unless they have agreed otherwise. This right to appeal will usually be excluded if the parties have agreed to arbitrate the dispute using institutional rules (see below). A party seeking leave to appeal an award must complete an arbitration claim form within 28 days of the award date stating the reasons for the appeal sought. The court will determine an application for leave to appeal without a hearing unless it appears to it that a hearing is required. On an appeal, the court has the discretion to confirm the award, vary it or set it aside in whole or in part or to remit the award to the arbitral tribunal, in whole or in part, for reconsideration in the light of the court’s determination.

Arbitration may be institutional or ad hoc. In institutional arbitration, the parties will agree to submit to an institution to administer the arbitration, applying the rules of that institution. The major institutions used in English arbitration are the Chartered Institute of Arbitrators, the International Chamber of Commerce and the London Court of International Arbitration. There are also established arbitral institutions for industry-specific arbitration, including maritime, construction and engineering, and insurance disputes.

In ad hoc arbitration, parties may agree all procedural issues themselves. The United Nations Commission on International Trade Law (UNCITRAL) procedural rules are widely used in appropriate ad hoc English arbitration.

Section 66 of the 1996 Act (another mandatory provision) governs the enforcement of foreign arbitral awards in England and Wales. It permits the enforcing party to apply to the High Court to enforce the award as if it were a judgment or order of the court to the same effect.

Where an arbitral award is made in a country (other than a country in the UK) that is a signatory to the UNCITRAL Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention), that foreign award is recognised as binding and, with the court’s permission, may be enforced in England, Wales and Northern Ireland under Section 101 of the 1996 Act. Section 103 sets out the limited circumstances where a court must or may refuse to allow a foreign award to be enforced: for example, if the award was invalid under the governing law of the arbitration or the seat of the arbitration. If the court permits the foreign award to be enforced, the options available on enforcement will be the same as if it were a judgment of the English court.

The New York Convention applies to arbitration in England and Wales. In IPCO (Nigeria) Ltd v. Nigerian National Petroleum Corp.48 the Supreme Court held that the terms of the 1996 Act and the New York Convention did not enable the court to order a partial enforcement of an arbitral award.

iii Mediation

In England and Wales, there are no rules obliging parties to mediate or determining how mediations are conducted or concluded. Parties are free to agree between themselves all aspects of the mediation process.

The potential benefits to parties of being able to resolve their disputes through mediation, even where normal trial processes are contemplated, continue to be recognised by the English courts. The CPR strongly encourages parties to consider mediation at several stages during litigation, including before formal proceedings commence, when the case is allocated to track and at any CMCs. The court may also impose or grant a request for a stay of proceedings pursuant to CPR 26.4 to enable the parties to attempt mediation.

The Jackson ADR Handbook was published in April 2013 following Jackson LJ’s recommendation. It has been endorsed by Jackson LJ, the Judicial College, the Civil Justice Council, and the Civil Mediation Council and is the authoritative guide to ADR in England and Wales.

The approach of the court in this area has frequently been to treat mediation and ADR as effectively synonymous terms. In *Dunnett v. Railtrack plc*, the court declined to order that the defeated claimant pay Railtrack’s costs because Railtrack had, unreasonably in the court’s view, refused to consider an earlier suggestion from the court to attempt ADR. In *Halsey v. Milton Keynes General NHS Trust*, the court stated that it was for the unsuccessful party at trial to demonstrate that the successful party’s costs should be reduced because of its failure to consider ADR. Relevant factors when assessing whether ADR was unreasonably refused include the nature of the dispute, the merits of the case, the relative costs of ADR to the case and whether ADR had a reasonable prospect of success. However, in *PGF II SA v OMFS Company 1 Limited*, the Court of Appeal made it clear that parties are expected to engage with a serious invitation to participate in ADR and they may be penalised in costs if they refuse to do so. In that case, the court refused to award the defendant its costs as it had ignored an offer from the claimant to mediate.

Mediation is becoming increasingly popular in England and Wales for disputes of all sizes. In 2008, the EU adopted Council Directive 2008/52, the Mediation Directive, which applies to all Member States when engaged in cross-border disputes within the EU. The Directive seeks to ensure that Member States facilitate mediation. This includes ensuring that local law does not prevent parties who emerge from unsuccessful mediations from being time-barred from litigation, and that settlement agreements reached in mediation are enforceable under local law.

At present, mediations and mediation services providers are not regulated by a central body, and there are no formal qualifications mediators must possess to be able to practise. In 2004, a voluntary code of conduct for mediators was introduced in EU Member States, and there is increased debate over whether a central regulatory body should be created, along with compulsory training or standardised accreditation for mediators.

### Other forms of alternative dispute resolution

In addition to arbitration and mediation, there exists a range of other processes available to parties seeking to settle their disputes out of court. These include early neutral evaluations, a non-binding process intended to provide parties at an early stage in a dispute with an independent assessment of facts, evidence or respective legal merits; expert determinations, typically a contractually binding determination by a neutral expert of a dispute involving

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49 Available from Oxford University Press.
52 [2013] EWCA Civ 1288.

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technical or valuation issues; and adjudication, a statutory process, mandatory for disputes arising under specified construction contracts entered into since 1 May 1998. Ultimately, private dispute resolution can take any form that the parties wish. In most cases, the procedures are non-binding and without prejudice, which allows the parties to commence or continue litigation or arbitral proceedings, if necessary.

VIII OUTLOOK AND CONCLUSIONS

There are a number of upcoming macro-level challenges to the existing state of the English legal system and its component parts, together with some substantive changes to practice and procedure.

i EU Referendum
The UK electorate’s June 2016 vote to leave the EU may have a number of legal and practical implications. Please see Chapter 1 for an analysis of the issues as they relate to the resolution of disputes.

ii Reform of the courts
In 2014, the Ministry of Justice announced that between 2015 and 2020, HMCTS would oversee a series of reforms in order to modernise and improve the efficiency of courts and tribunals. It is anticipated that the reforms will comprise an upgrade of facilities as well as the modernisation of technology. In the Autumn Statement 2015, the Chancellor of the Exchequer announced a funding package of £700 million to modernise the court estate across the country and to fully digitise services. A number of procedural reform initiatives have already been rolled out, such as the establishment of the Business and Property Courts, the introduction of a two-year pilot for shorter and flexible trials, and the Financial List (which have since been made permanent), as have initiatives aimed at digitising the courts system (see Section III.iii). Reform by The Disclosure Working Group, chaired by Lady Justice Gloster, to address the excessive costs, scale and complexity of disclosure, in the form of a new PD to modernise and streamline the disclosure process takes effect in 2019 (see Section VI). The mandatory disclosure pilot scheme will run in the Business and Property Courts for two years.

iii Witness statements
A survey is being undertaken by the Witness Evidence Working Group in relation to the use of witness evidence in the Business and Property Courts (High Court, London). The Working Group is seeking court users’ views regarding the current rules and practice on factual witness evidence, as well as possible alternatives. Potential reform could address judicial fatigue over unnecessarily lengthy statements or seek to curb the practice of lawyers drafting statements for witnesses to suit the cases being advanced.
I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

The legal system in Finland adheres to the civil law tradition. The primary institutional source of law is legislation and statutes, whereas legislative history and praxis by the higher courts are secondary sources of law. Other permitted sources of law such as legal literature and comparative law can be invoked, but do not hold an institutional position. In addition to national sources, multinational sources, such as regulation by the European Union and praxis by the Court of Justice of the European Union, are also considered sources of law in Finland. If there is a conflict of norms between national and binding international norms, the international norm will generally prevail.

The general court, which handles both civil and criminal cases, is three-tiered and consists of the district courts, the courts of appeal and the Supreme Court. The jurisdiction of a district court will in most cases be determined by one of the parties’ domicile, and the court of appeal will thereafter be determined by the district court that has tried the case. As jurisdiction is determined by geography, most courts handle a wide array of cases and the judges in Finnish general courts are therefore mostly generalists who do not specialise in a particular case type. A few special case types, for example, military, maritime and land courts, are, however, concentrated in specific general courts.

In addition to the general courts, Finland has specialist tribunals for cases that require expert knowledge. The current specialist tribunals are the Market Court, the Labour Court, the Insurance Court and the High Court of Impeachment. From a corporate point of view, the Market Court is the most relevant, as it deals with cases concerning market law, competition law, supervisory matters, public procurement and intellectual property rights.

Finland also has administrative courts specialising in administrative law and cases relating to the exercise of public power. The administrative court is two-tiered consisting of the administrative courts and the Supreme Administrative Court. The decisions of public authorities can generally be appealed to the administrative courts and the jurisdiction of the court is generally determined by the district of the decision-making authority.

The primary arbitration institute is the Arbitration Institute of the Finland Chamber of Commerce (FAI), which provides arbitration and mediation services in domestic and international disputes. Arbitrations are generally conducted under the FAI Arbitration Rules. Arbitration in Finland is also governed by the Arbitration Act of 1992.

Mediation and other forms of alternative dispute resolution have gained popularity in Finland on a theoretical level but are not yet widely used in commercial disputes.

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II  THE YEAR IN REVIEW

During the past few years there have been no significant legislative amendments or new legislation enacted in the field of dispute resolution. Neither has the Finnish Supreme Court rendered any significant decisions of wider cross-border interest.

III  COURT PROCEDURE

i  Overview of court procedure

General court proceedings in civil cases in Finland are governed by the Code of Judicial Procedure, which originates from the Swedish Civil Code of 1734 but has been revised several times since, including a fundamental revision in the 1990s.

Court proceedings are generally limited to the claims and demands made by the parties and the court may not *ex officio* initiate proceedings, with the exception of matters of public interest (criminal cases and non-discretionary disputes). Court proceedings in Finland follow the principles of immediacy, orality and concentration. According to these principles, proceedings should be conducted – and evidence presented – orally and directly in person to the judge deciding on the case, and only information that has been presented during the main hearings may affect the outcome of the case. Written witness statements are generally not allowed in hearings. Witnesses may, however, resort to written notes in order to recollect, for example, complicated technical data.

Following the 2015 revisions of the Code of Judicial Procedure, an appeal to the court of appeal now generally requires a leave to appeal, which should be requested in conjunction with the appeal. The threshold for the leave to appeal is not very high; the leave is granted if there is cause to suspect the correctness of the final result of the decision of the district court or if the correctness cannot be assessed without granting the leave. The appeal procedure is written, unless a party requests that a new main hearing be held and the court of appeal does not find this clearly unnecessary. In practice, a main hearing is held in all notable disputes.

In order to appeal a decision of the court of appeal, leave to appeal shall be requested from the Supreme Court. Leave to appeal may be granted only if it is important to bring the case before the Supreme Court for a decision that concerns the application of the law in other similar cases or because of the uniformity of legal practice; if there is a special reason for this because of a procedural or other error that has been made in the case on the basis of which the judgment is to be reversed or annulled; or if there is another important reason for granting leave to appeal. The threshold for the leave to appeal from the Supreme Court is much higher than that of the courts of appeal, with an average of less than 10 per cent of leave being granted.\(^2\) The procedure in the Supreme Court is, in general, in writing, though the court may hold a hearing if it deems it necessary.

ii  Procedures and time frames

The civil litigation procedure is initiated by an application for a summons to the (district) court with jurisdiction in the matter. The application shall include the specified relief sought by the plaintiff and the circumstances on which the claims are based. If the application has no

major flaws, the court shall issue a summons without delay and a response shall be requested from the respondent. The respondent shall state in its reply whether it admits or contests the action, and the grounds for the statement.

The procedure may continue with written preparation, where written submissions to the court are requested from the parties, or proceed directly to a preparatory hearing. The goal of these preparatory measures is to summarise the demands of the parties and the legal grounds therefrom to determine the disputed and undisputed facts of the case, and to identify the evidence that the parties intend to present and what they intend to prove with each piece of evidence (i.e., the themes of evidence). The parties generally may not present new legal grounds or evidence after the preparatory phase.

Once the preparatory phase has been conducted, the proceedings continue with a main hearing, unless it has been deemed unnecessary. During the main hearing, the parties present their case by giving short oral opening statements. Thereafter, the parties present the evidence supporting their arguments, both through written evidence and witnesses. All written evidence is typically presented by the parties. Witness hearings are generally conducted by the counsels of the parties in an adversarial manner and without interference from the judge. The main hearing is concluded with oral closing statements by both parties. A judgment should, in general, be given within two weeks of the conclusion of the main hearing, but in practice this only happens in very simple cases. In cases demanding more deliberation, rendering a judgment usually takes several months.

The duration of court proceedings depends greatly on the amount of evidentiary material to be presented, as well as the caseload of the court and the judge presiding. For a typical corporate dispute, one could expect a duration of 12 to 18 months from an application for a summons to a judgment per instance.

The court may order precautionary measures based on a party’s application at any time during the proceedings or even prior to the initiation of proceedings. The applicant needs to demonstrate that it is probable that he or she has a right and that there is a danger that the opposing party may infringe or inhibit that right in some way. The threshold for probability is, however, as a rule not too high, and precautionary measures are relatively easy to obtain.

The court may, as a precautionary measure, order attachment of the opposing party's property, prohibit or order the opposing party to do, or not to do, something under threat of a fine, or order other measures necessary for securing the right of the applicant to be undertaken. In urgent cases, a temporary precautionary measure can be placed by the court ex parte without hearing the opposing party, and this can at best be done within a day. The applicant is liable for any damage the precautionary measure causes to the opposing party if the measure turns out to be unjustified. The applicant is generally obligated to place a security to cover such potential damage as a condition for the enforcement of the precautionary measure.

iii Class actions

The Finnish Act on Class Actions of 2007 permits class actions in consumer civil cases against businesses. A class action can be brought by the Consumer Ombudsman if several persons have claims against the same defendant that are based on the same or similar circumstances. A class action can be filed, for example, in disputes concerning defects in consumer goods or the interpretation of a consumer contract. Class actions may not be brought by individual persons or by the initiative of a law firm. The members of the class action can choose to opt in to the action but are not considered parties in the case.
Since the Finnish Act on Class Actions entered into force in 2007, there have been no class actions filed by the Consumer Ombudsman. This is most likely because of the cases being solved by the Consumer Complaints Board or settled otherwise. The possibility of a consumer class action may, however, have been used as leverage for negotiations in consumer cases.

iv  Representation in proceedings
A litigant may always represent itself in proceedings. This means that a legal representative for a company or other legal entity may act as a representative for that entity. Natural persons may also represent themselves.

In order to act as counsel for someone else in court proceedings in Finland, one must be an attorney, a public legal aid attorney or a licensed legal counsel. A legal representative must therefore have a law degree and, in addition, fill the requirements that are placed on attorneys and licensed legal counsel – mainly training, experience and the supervision of a professional supervisory board. Representatives of their employers who are lawyers, namely, in-house counsel, form an exception to this rule and may represent their employers in court without filling the aforementioned qualifications.

v  Service out of the jurisdiction
If the recipient of a notice resides abroad and his or her address is known, and if the service of the notice has not been entrusted to a party, the court shall ensure that the documents to be served are sent as provided in law or agreed with the foreign state in question. Finland has entered into several international treaties that govern the service of documents outside the jurisdiction.

Service within the European Union is governed by EU Regulation No. 1393/2007, which allows service of judicial documents from one Member State to another without diplomatic channels. The main principle is that the competent authorities (courts in Finland) send documents directly by post to an addressee residing in another EU Member State. Secondarily, documents are transmitted to the competent authority in the receiving country.

Between the Nordic countries, the Agreement between Finland, Denmark, Iceland, Norway and Sweden on Mutual Legal Assistance in Service of Documents and Production of Evidence (Treaty Series 26/1975) is applied (the Nordic Agreement). This Agreement is based on the principle of direct transmission between the competent authorities. In Finland, courts send the documents directly to the receiving authority in the other Nordic country.

Finland has also ratified the Hague Service Convention (Treaty Series 51/1969). When this Convention is applied, the Finnish courts send the documents to be served abroad through the central authority (e.g., the Ministry of Justice).

Documents to those countries with which Finland has no agreement are transmitted by the courts to the Finnish Ministry for Foreign Affairs, which forwards them for service abroad to the relevant authority.

vi  Enforcement of foreign judgments
Enforcement of foreign judgments in Finland can only be done by virtue of binding legislation or international treaties.

Within the European Union, civil judgments are directly enforceable in accordance with Brussels I Regulation (EU) No. 1215/2012. Under Brussels I, judgments issued in other EU Member States may be enforced directly under the same conditions as national
judgments without a separate declaration of enforceability by the district courts. The recast Brussels I Regulation became fully applicable on 10 January 2015. Any judgments following proceedings that were initiated prior to this date fall under the scope of the prior Brussels I Regulation (EC) No. 44/2001, which requires that a court in the state of enforcement first declares the judgment enforceable.

In relation to Iceland, Norway and Switzerland, the Lugano Convention is applied. Under the Lugano Convention a judgment must be declared enforceable by a Finnish district court before it can be enforced.

If there is no binding legislation or treaties governing the enforcement, it is in practice very difficult to obtain. This is the case with most judgments from outside of the European Union, including from the United States.

vii Assistance to foreign courts

Finland can assist other EU Member States in the taking of evidence in civil cases. EU Evidence Regulation (EC) No. 1206/2001 allows for a court to send the requests for taking evidence directly to the competent court in the receiving EU country. The Nordic Agreement also allows for direct requests between courts.

Finland has also acceded to the Hague Evidence Convention (Treaty Series 37/1976). Under this Convention, Finnish courts transmit the requests for taking evidence abroad through a central authority. The Convention is applied, for instance, in relation to the United States of America and Turkey. In relation to Russia, Finland may apply the Hague Evidence Convention or the bilateral agreement between the Republic of Finland and Russia on legal protection and legal assistance in civil, family and criminal matters (Treaty Series 48/1980).

If no treaty or binding legislation is applied, requests for taking evidence must be transmitted through the Ministry for Foreign Affairs.

Besides taking evidence, Finnish courts may also assist foreign courts by providing information on foreign law under the European Convention on Information on Foreign Law (Treaty Series 58/1990).

viii Access to court files

All court proceedings and documents are public in Finland unless provided otherwise by law or ordered by the court. This means that the public has access to all the information relating to ongoing or completed proceedings, including pleadings and evidence, unless secrecy has been granted.

The Act on the Publicity of Court Proceedings in General Courts (370/2007) states that the court may, at the request of a party, decide that a court document shall be kept confidential to the extent necessary, if public access would probably cause significant detriment or harm to the interests protected by confidentiality obligations, such as trade secrets. Regardless of confidentiality, the parties to a case are entitled to access all court documents of the case.

ix Litigation funding

Litigation is generally funded by the parties themselves. Litigation funding by a third party is not prohibited, but it is not common practice.
IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls
The Code of Conduct of the Finnish Bar Association states that a lawyer shall be free of conflicts of interest when accepting and performing an assignment. A conflict of interest can arise from two or more clients’ conflict within the same matter, conflict owing to an obligation of loyalty or secrecy, or conflict based on a lawyer’s personal or financial interests. Conflict limitations apply generally and with few exceptions to the entire law firm of the attorney who has a conflict of interest in the matter. Information barriers (Chinese walls) cannot, therefore, be used to forego limitations of conflicts of interest. However, in some cases clients may authorise an attorney to perform an assignment despite a conflict of interest by giving their consent.

ii Money laundering, proceeds of crime and funds related to terrorism
The Fourth EU Anti-Money Laundering and Counter Terrorist Financing Directive (EU) 2015/849 has been implemented in the Finnish Act on Detecting and Preventing Money Laundering and Terrorist Financing (444/2017) (the Anti-Money Laundering Act). This Act states that an attorney is obliged to know who their clients – and the beneficial owners of their clients – are. Attorneys should also know their clients’ business, and detect and examine suspicious business operations, and report any such operations to Finland’s Financial Intelligence Unit, the national anti-money laundering unit.

The Fifth EU Anti-Money Laundering and Counter Terrorist Financing Directive (AMLD) (EU) 2018/843 is yet to be implemented in Finland. The current Anti-Money Laundering Act is being revised and is set to enter into force in 2019. The fifth AMLD aims to improve international cooperation between Financial Intelligence Units and targets digital currencies, among other things.

iii Data protection
The European General Data Protection Regulation (EU) 2016/679 (GDPR) entered into force on 25 May 2018 and is directly applicable in Finland. The GDPR states that personal data can only be processed if there is a lawful basis for the processing. Lawyers must take this into consideration when storing case material containing personal data, such as correspondence and evidence. The GDPR sets high standards for data protection and privacy settings, which means that lawyers and law firms must make sure that the systems for storing and processing data are not susceptible to breaches.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege
According to the Code of Conduct of the Finnish Bar Association, a member of the Finnish Bar Association (attorney) may not, with some exceptions, disclose the secrets of an individual or a family, business or professional secrets, or any other information that has come to his or her knowledge in the course of professional activities.

The Finnish Code of Judicial Procedure also includes a provision regarding attorney–client privilege. In general, a member of the Finnish Bar Association or a licensed legal counsel may not, without permission of the client, testify regarding what he or she has learned in providing legal services to a client.
The provision above does not apply to in-house counsel. Under Finnish law, communication with in-house counsel is not privileged, but may, to some extent, be protected by the right to refuse to reveal business secrets.

ii Production of documents

In general, it is the parties’ obligation to obtain the necessary evidence in litigation. In a civil matter that is amenable to settlement, the court may not, as a main rule, on its own initiative and without the parties’ consent, decide that a new document is to be presented.

The court may, however, pursuant to a party’s request, order the opposing party or a third party to produce a document if the document could be of relevance as evidence in the matter. The party requesting production of a document must identify the requested document and specify why it is of evidentiary relevance by defining the theme of evidence for the document in the other party’s or third party’s possession. The person requested to produce a document is reserved an opportunity to be heard before the court makes its decision regarding the request for production of a document. The person requested to produce a document can oppose the request, for instance, by claiming that the document includes business secrets or is subject to legal privilege.

The Finnish courts have adopted a rather strict practice on requests on production of documents. Quite often, the requests are dismissed on the basis of insufficient identification of the requested documents or the lack of established relevance.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

In many cases arbitration is the preferred method for settling larger commercial disputes, and, thus, it is quite common for a Finnish commercial agreement to include an arbitration clause.

During recent years, mediation has become more general and the experiences of mediation have been positive.

ii Arbitration

Under Finnish law, most disputes that can be settled amicably can be brought to arbitration. There are, however, some statutory limitations to arbitration. For instance, an arbitration clause in a consumer contract concluded between a business and a consumer before a dispute arises is not binding on the consumer.

Arbitration is governed by the Finnish Arbitration Act of 1992, which applies to both domestic and international arbitration. The Finnish Arbitration Act does not accord with the UNCITRAL Model Law on International Commercial Arbitration.

The Act includes provisions on the arbitrators and the proceedings as well as provisions on foreign arbitral awards and agreements providing for arbitration outside Finland. Provisions on the appointment of arbitrators and commencing an arbitration proceeding included in the Act are quite detailed, whereas provisions on the actual proceedings are very limited. The proceedings are largely based on party autonomy. In domestic arbitrations, the proceedings are in practice often carried out largely in a manner corresponding to the civil case proceedings in a court.

It is worth mentioning that the Finnish Arbitration Act does not include provisions on precautionary measures. If a party to an ad hoc arbitration carried out in accordance with
the Finnish Arbitration Act wishes to apply for a precautionary measure, the application is
made to a district court in accordance with the provisions governing precautionary measures
included in the Finnish Code of Judicial Procedure.

The FAI provides arbitration services in domestic and international disputes. The
current FAI Rules were issued in 2013. The FAI Rules are applied to arbitration proceedings
provided that there is an arbitration clause referring to the FAI Rules or the parties have
otherwise entered into an arbitration agreement with reference to the FAI Rules.

The FAI Rules can be considered state-of-the-art arbitration rules. The proceedings
are commenced by the claimant submitting a request for arbitration and the respondent
submitting an answer to the request for arbitration to the FAI. Thereafter, the proceedings
will be continued by appointment and confirmation of the arbitral tribunal. After the case
file has been transmitted to the tribunal, the proceedings are continued by exchange of the
parties’ written briefs and the hearing.

Pursuant to the FAI Rules, the final award shall be made no later than nine months
from the date on which the arbitral tribunal received the case file from the FAI. The FAI may
extend this time limit.

The FAI Rules also incorporate rules on emergency arbitrators. According to these rules,
a party in need of urgent interim measures of protection that cannot await the constitution
of an arbitral tribunal may apply for the appointment of an emergency arbitrator before
the matter has been referred to an arbitral tribunal. The emergency arbitrator shall make its
decision within 15 days of the date of receipt of the case file. The FAI may extend this time
limit.

The FAI also has separate rules for expedited arbitration. The expedited arbitration
is intended for smaller disputes with lesser monetary interest. In expedited arbitration the
arbitral award is rendered within three months of the date the case file is transferred to the
arbitral tribunal.

Finnish arbitral awards are not open to appeal on the merits. An arbitral award may,
however, be set aside by the court upon request of a party owing to procedural errors
enumerated in the Finnish Arbitration Act – in other words, if the arbitrators exceeded their
authority; an arbitrator has not been properly appointed; an arbitrator could have been
challenged pursuant to the Finnish Arbitration Act, but a challenge properly made by a
party was not accepted before the arbitration award was made; if a party became aware of the
grounds for a challenge so late that he or she was unable to challenge the arbitrator before
the arbitration award was made; or if a party was not given sufficient opportunity to present
his or her case.

The action requesting setting aside an arbitral award must be made within three months
of the date the requesting party received a copy of the award.

An award may also be declared null and void upon a party’s request to the extent the
arbitrators have in the award decided on an issue not eligible for settlement by arbitration
under Finnish law, to the extent that recognition of the award is to be deemed contrary to
the public policy of Finland, if the arbitration award is so obscure or incomplete that it does
not indicate how the dispute has been decided, or if the arbitration award was not made
in writing or signed by the majority of the arbitrators. There is no time limit for a request
regarding declaring an arbitral award null and void.
The court procedure related to requesting an arbitral award to be set aside or declared null and void is three-tiered. The district court’s decision is open to an appeal in the court of appeal, and the court of appeal’s decision may be appealed in the Supreme Court, provided that the Supreme Court grants a leave to appeal.

During the past few years, the number of actions requesting the setting aside of an arbitral award has increased. However, these actions do not usually succeed. The threshold for setting aside an arbitral award is high.

Finland has ratified the Convention on the Recognition and Enforcement of Foreign Awards (the New York Convention) without making the reciprocity reservation or the commercial nature reservation. Provisions regarding enforcement of a foreign arbitral award are implemented in the Finnish Arbitration Act, which states that a foreign arbitral award may be enforced upon written request to a district court.

iii Mediation

During recent years, there has been a lot of discussion about mediation within the Finnish legal community. Despite the ongoing discussion, mediation is still not very common in Finland.

In Finland, court mediation has been available since 2006. Court mediation typically takes place after submission of the application for a summons and the answer to the application for a summons before continuing the court proceedings. Court mediation can, however, also be commenced in a dispute not pending before a court. Compared to court proceedings, court mediation is considered speedier, more informal, more flexible and more cost-effective.

Court mediation is governed by the Finnish Act on Court-annexed Mediation. Mediation is always voluntary, and, therefore, all the parties to the dispute must consent to it. The court, however, makes the final decision on commencement of court mediation. The mediator is a judge in the court where the case is pending. Primarily only judges who have been trained as mediators act as mediators in court mediation.

A party may, at any time during the mediation, notify the mediator that he or she no longer wishes to have mediation in the matter. In this case, the mediation will be concluded. The mediator may also decide, after hearing the parties, that there is no justification for continuing the mediation and conclude it. A settlement accepted by the parties may be confirmed by the court.

If an amicable settlement is not reached in court mediation, the possible pending court proceedings will be continued. The judge dealing with the matter in a trial will not be the same as the mediator. A party may not, in any later proceedings, without the consent of the other party, rely on representations made by the other party in the interest of settlement.

Out-of-court mediation is also available in Finland. For instance, the Finnish Bar Association and the FAI provide out-of-court mediation.

According to the mediation rules of the Finnish Bar Association, the mediator shall be a member of the Finnish Bar Association who has been trained to act as a mediator and who is included in the list of mediators maintained by the mediation board of the Finnish Bar Association.

The FAI administers mediations under the Mediation Rules of the Finland Chamber of Commerce, which entered into force on 1 June 2016. The parties may jointly nominate a mediator for confirmation by the FAI. At the request of the parties, the FAI may also propose prospective mediators for the parties to consider. If the parties do not jointly nominate a mediator, the FAI shall make the appointment. It is common to have only one mediator.
If the parties have reached an agreement in the out-of-court mediation, the settlement may, upon application, be confirmed as enforceable in a district court.

iv Other forms of alternative dispute resolution

Agreements related to mergers and acquisitions (M&A) typically include provisions whereby disputes involving valuation or other kinds of financial determination are to be resolved by expert determination, for instance by an independent auditor. Other kinds of M&A-related disputes are, however, typically resolved in arbitration.

Use of referees as an alternative dispute resolution method is not common in Finland. Typically, dispute resolution provisions involving the use of referees can be found in construction agreements, if at all.

Other alternative dispute resolution methods are also available in relation to different kinds of disputes. For example, consumer advisers and the Consumer Disputes Board deal with disputes related to consumer protection. The decisions of the Consumer Disputes Board are solely recommendations and cannot, thus, be enforced.

VII OUTLOOK AND CONCLUSIONS

In Finland, the prevailing dispute resolution method in business disputes is arbitration. Often a court procedure is considered to take too long. In many cases, even the court proceedings in a district court take longer than an arbitration proceeding. Also, the publicity of court proceedings as well as the courts’ lack of special expertise are often considered to favour arbitration.

Finnish arbitration proceedings, as well as the arbitration community, have grown and developed during recent years, and the trend is continuing. For instance, in 2018 the Finnish Ministry of Justice launched an assessment of the need to reform the Finnish Arbitration Act. Many Finnish businesses, law firms and other entities and institutions involved with arbitration have submitted statements supporting the reformation and incorporating the UNCITRAL Model Law into the Finnish Arbitration Act.

It is expected that business disputes will increasingly be resolved in arbitration and mediation.
Chapter 11

FRANCE

Tim Portwood¹

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

In 1958 the Fifth Republic was formed under a new Constitution replacing the Fourth Republic that had existed since 1946. Under the Fifth Republic, France is governed by a mixed system of presidential and parliamentary democracy.

In addition to mainland France and Corsica, the territory of France includes 10 overseas departments and territories. The administration of the state is organised centrally, although some administrative functions have been devolved to the regions, departments and communes.

Although the origins of French law are in customary law, by the end of the 18th century much of the law had become uniform and committed to writing by jurists. In 1804, the Civil Code was passed into law. This Code was prepared under the authority of Napoleon and forms the basis of most of the civil law of France today.

French law is structured around a division between public law and private law. The existence of the two systems of jurisdiction sometimes results in difficulties in determining their respective powers, and thus justifies the arbitration of the Conflicts Tribunal. However, the frontiers between the judicial and administrative branches are now quite stable and only about 40 to 50 cases are submitted to the Conflicts Tribunal each year.

Generally speaking, public law and the administrative courts are concerned with the relationship of the various organs of the civil administration with each other and with the individuals. There is a wide involvement of public authorities in French national life, from the government down to the commune, and public law includes its own distinct rules governing contracts entered into by and wrongdoings involving public officials and institutions. Most claims for damages for breach of contract or tort to which a public authority is a party must be brought in an administrative court. The system of administrative courts consists of local courts of first instance, administrative courts of appeal and the cassation jurisdiction of the Council of State.

Private law governs all matters not subject to public law and it encompasses civil, commercial and labour matters. Ordinary courts are also concerned with criminal law and some aspects of tax law. There are two levels of ordinary civil courts of first instance, the courts of common pleas and the superior courts, with separate business tribunals for commercial cases and labour courts for employment cases. The regional courts of appeal hear appeals from all these first instance courts. Jurisdiction in cassation is exercised over the whole of France by the Supreme Court for Civil and Commercial Matters, which is based in Paris.

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Although it does not constitute a fourth jurisdictional level above Supreme Courts, the Constitutional Council ensures the conformity of all French laws with the provisions of the Constitution. Until a major reform that came into force in 2010, the Council could only control the constitutional conformity of bills prior to their final adoption and upon request of a few executive and legislative bodies. The reform has completed this constitutional verification system by allowing all litigants to question the constitutionality of provisions applied to them – such mechanism being referred to as the priority preliminary rulings procedure or question prioritaire de constitutionnalité (QPC). The QPC is forwarded either to the Council of State or the Supreme Court for Civil and Commercial Matters, and then by them to the Constitutional Council, if the constitutionality of the legal provision in question (1) has not been considered before, (2) is legitimate, and (3) is applicable to the case at hand. The decision of the Constitutional Council is binding on everyone. The QPC system has become a jurisdictional path in itself, playing an important role in French lawyers’ trial strategies: more than 10,000 QPCs have been raised, with 400 resulting in a decision from the Constitutional Council.

Lastly, alternative dispute resolution (ADR) procedures sit alongside the courts as consensual means of resolving disputes for most matters (for those matters for which ADR is not available, see Section VI), and have been the subject of codification efforts that culminated in 2012. As such, although the Code of Civil Procedure (CPC) contains specific rules, for instance, for arbitration proceedings, there is no specific framework in which the procedures are to be carried out. For instance, they can be ad hoc or under the auspices of a private institution, and provided that principles of public policy are respected can result in binding solutions that are themselves enforceable by the courts.

II THE YEAR IN REVIEW

i Justice in the 21st century

The year 2018 was marked by the first court decisions following the reform of the Law on the Modernisation of Justice in the 21st Century, which was promulgated on 17 November 2016. The reform aims at modernising the justice system and was seen by the government as being necessary, primarily because the system was considered to be too complex and slow. The main axes of the Law are intended to render access to justice easier, to simplify civil procedure, to promote alternative methods of dispute resolution, to improve the organisation and functioning of the justice system and to extend the scope of class actions.

Another highlight of the year was the entry into force of European Regulation No. 2016/679 on 25 May 2018, known as the General Data Protection Regulation (GDPR). It establishes a harmonised data protection framework for individuals in the European Union and generates various obligations upon companies and professionals while sanctions have been tightened. The second half of the year has thus seen a significant increase in complaints raised by individuals before the National Commission for Information Technology and Civil Liberties (CNIL).

ii International disputes

The principal development in 2018 was the creation of the International Chamber of the Paris Court of Appeal, which has jurisdiction over international commercial disputes. By introducing the possibility to have a bilingual procedure in French and English and by
borrowing some procedural features from common law countries, such as cross-examination, the aim of this chamber is to increase the attractiveness of Paris as an international venue for dispute resolution.

III COURT PROCEDURE

i Overview of court procedure

The civil court system is structured as a three-tier pyramid. The judicial reform that was completed in December 2010 reduced the number of courts and rearranged the courts’ territorial jurisdiction.

The first instance tier comprises four main courts:

a The High Court has, subject to a €10,000 threshold, jurisdiction over any dispute involving private interests unless the law has expressly conferred jurisdiction on another court. The superior courts are organised by administrative departments. There are currently 164 superior courts.

b Small-claims courts have jurisdiction over any civil matter involving monetary claims up to €10,000 and over certain specific matters such as landlord and tenant disputes. There are 307 small-claims courts in France today. As noted above, the Law on the Modernisation of the Justice System in the 21st Century requires that all disputes up to €4,000 must be submitted to a free conciliation service before they can be brought before the courts.

c Commercial courts are manned by non-professional judges elected from the professional community. They have jurisdiction over commercial matters, including insolvency proceedings – for complex cases of which the Macron Law created 18 specific commercial tribunals. There are 134 commercial courts in France today.

d Labour tribunals have equal numbers of employers and employees elected by their peers. They sit in panels of four and exercise exclusive jurisdiction over employment disputes. There are 210 labour tribunals sitting throughout France today.

A law promulgated on 13 December 2011 that entered into force on 1 July 2017 abolishes the lay judges. Cases formerly heard by these lay judges will then be heard by the small-claims courts.

The second tier comprises the courts of appeal, of which there are 36 organised on a regional basis. Appeal from any first instance decision is automatic except for judgments for less than €4,000, for which appeal lies only on points of law directly to the Supreme Court for Civil and Commercial Matters. The third, top tier of the civil court system is the Supreme Court for Civil and Commercial Matters. It is divided into four sections: a civil section (formally divided into three discrete civil sections); a commercial and financial section; an employment section; and a criminal section. Appeal to the Supreme Court for Civil and Commercial Matters lies only on points of law. If such an appeal is successful, the case is remanded to another court of appeal for a rehearing of both fact and law.

Under the CPC, the claimant commences proceedings by having a summons served by a bailiff directly on the defendant.

Two criteria must be considered when considering which particular court has jurisdiction over a given claim. First, to determine subject-matter jurisdiction one must consider whether
the proceedings must, as a matter of law, be brought before a specialist court. Second, one
must apply the rules of territoriality, the particulars of which were modified by the judicial
reform.

Regarding subject-matter jurisdiction, the most important specialist jurisdictions are
the commercial courts for business disputes and the labour tribunals for employment disputes.
Parties should also bear in mind the existence of quasi-judicial bodies with authority over
matters relating to, for instance, competition law (the Competition Council) and securities
law (the Financial Markets Authority).

Within each court, cases are allocated by the president of the court at his or her
discretion.

The prehearing phase is important given the focus on written pleadings. The hearing
of witnesses is rare. Oral evidence is considered inferior to documentary evidence as proof.

The court manages the written phase, which begins with an organisational hearing
fixed by the court. The purpose of this hearing is to fix a schedule of the case after discussion
with counsel. The court has the option to decide that the case is already ripe for judgment
in light of the documents and proof before it, in which case it will fix a date for the final
hearing; schedule a new organisational hearing to give the parties time to exchange further
written evidence and briefs; or send the matter to the specifically assigned judge to oversee
the proceedings (the procedural judge) to oversee the preparation of the case. When satisfied
that the case is properly prepared and ready for hearing, the court will declare the preparatory
phase over. A hearing will be scheduled.

At the oral hearing on the merits before the full court, counsel present their oral
arguments. Again, it is rare for witnesses to be heard. At the close of the hearing, each counsel
submits a dossier on the merits containing all formal procedural papers, from the summons
to the last written submissions, the documentary evidence relied on and often a written
summary of the oral arguments. This dossier is not usually communicated to opposing
counsel. At the end of the hearing (which often lasts little more than a matter of minutes),
the court invites counsel to reappear at a fixed date, when the judgment will be handed down.

Expert determinations play an important role within the framework of court
proceedings and are often used by the courts as a means of fact finding. The CPC contains
specific provisions dealing with expert proceedings. Whenever an expert is appointed by a
court to perform a fact-finding mission, there is a natural tendency for the courts to place
considerable weight on the conclusions reached by the expert. Participation by the parties in
any expert proceedings is therefore of great practical importance. Two decisions of a mixed
chamber of the Supreme Court for Civil and Commercial Matters dated 28 September 2012
clarify the consequences of a lack of adversarial debate in the presentation of an expert’s
findings. The Court has reaffirmed the possibility of using extrajudicial expert reports in
proceedings as long as these are submitted to adversarial debate in court, and provided they
do not provide the sole basis for the judge’s decision; they must only constitute one element
in the body of evidence used by the judge to reach his or her decision. In addition, that
mixed chamber has clarified the applicable sanction for a failure to guarantee the principle of
adversarial debate in the presentation of the judicial expert’s findings when the parties attend
the hearings. It has declared that the applicable sanction will be the nullity of the expert’s

Judgments are pronounced in open court and take effect on the date of pronouncement.
Usually it is only the operative section of the judgment (the dispositive) that is read out, the
reasoning being communicated to counsel later.
To enforce the judgment, the prevailing party must retrieve an original of the judgment from the court. It must then serve the judgment on the losing party by way of signification. This is done by a bailiff. Upon notification, the time limits for appeal start to run. Default judgments must be served within six months of retrieval of the original of the judgment, otherwise the judgment lapses. Judgments given in adversarial proceedings may be served during the 30 years following retrieval of the original of the judgment.

Proceedings before the other first instance courts (small-claims courts, commercial courts and labour tribunals) follow similar rules to those applicable to the superior court, although they tend to be less formal given the right to litigate in person.

If a party wishes to appeal a first instance judgment, notice of appeal must be lodged with the relevant court of appeal within one month of notification of the judgment. This used to be done by an attorney, special counsel who enjoyed a monopoly on representation before the court of appeal. While this monopoly was abolished in 2012, given the specificity of appellate procedure, lawyers often have recourse to former attorneys to represent their clients before the court of appeal for procedural matters. The notice of appeal is usually succinct, identifying the parties, the judgment under challenge and, since the 2017 reform, reasons which are criticised (an overall appeal is no longer available). The registrar of the court of appeal communicates the notice of appeal to the respondent. The matter is then assigned to a particular chamber of the court of appeal. Written submissions are then exchanged. The instruction of the appeal is similar to that at first instance bearing in mind that appeal is a rehearing of the facts and law of the case. Although new claims are no longer allowed, parties can still invoke new legal arguments and present new evidence.

For international disputes, the International Chamber of the Paris Court of Appeal was created in February 2018 to adapt the French judicial system to contemporary economic and international issues. It has jurisdiction over international commercial disputes, particularly in the fields of transport, competition and the termination of commercial relationships. It is a bilingual chamber: provided the parties consent, the court may permit the production of exhibits as well as the making of oral submissions in English and cross-examination of witnesses and experts, under the supervision of the judge in charge of the case. Decisions will also be translated into English.

Decisions of a court of appeal (or judgments of lower courts of last resort) may be challenged before the Supreme Court for Civil and Commercial Matters only on the five grounds of error of law, incompetence of the court, formal defects of procedural orders and judgments sanctioned by nullity, lack of reasons, or denaturation. Recourse to the Supreme Court for Civil and Commercial Matters does not suspend enforcement of the judgment. The cassation appeal is lodged by a notice submitted to the registrar of the Supreme Court for Civil and Commercial Matters in a succinct form similar to that before the court of appeal. The Supreme Court Counsel have a monopoly on representation before the Supreme Court for Civil and Commercial Matters.

Following notification of the cassation appeal, the petitioner has five months to submit its written submissions. The respondent then has three months to answer.

One of the judges of the chamber assigned to hear the case is designated as the reporting judge, who prepares a written analysis of the written submissions made by the parties. The report is sent to the Public Prosecutor, who represents the state’s interest in the proper functioning of the legal system and who is required to express his or her view in writing in all cases before Supreme Court for Civil and Commercial Matters.
Depending upon the importance of the point of law at stake, the further appeal will be heard by a single chamber, a mixed chamber or a plenary chamber of the Supreme Court for Civil and Commercial Matters.

A decision rejecting the cassation appeal constitutes a definitive resolution of the action. If the cassation appeal is allowed in full or in part, the parties must appear before the court to which the case is remitted by the court within two months of service of the decision. That court will then judge those parts of the case affected by the rejection in the same manner as the court whose decision was annulled.

ii Procedures and time frames

Case management is the responsibility of the court.

Before the High Court and the court of appeal, a judge is specifically assigned to oversee the proceedings (the procedural judge). This judge sets the procedural timetable within certain mandatory time limits, especially before the court of appeal. Most delays set by the CPC are extended in the case of foreign parties.

There is no procedural judge before a commercial court or labour tribunal. The period between the filing of the case and the hearing is therefore not supervised.

As a general rule, the parties have no direct influence over case management. Although parties may apply for extensions of deadlines and for leave to file additional briefs or evidence, the final decision lies with the court.

The French courts are overloaded with work and under-resourced. It is difficult to predict the time required for a case to be heard at first instance. A period of at least 10 to 12 months is not uncommon. The timescale for the two levels of appeal is often longer, with 18 months not being uncommon for each stage.

Proceedings on the merits may be accelerated if circumstances so merit by way of a summons for a specific date. In such cases, rather than serving a summons on the defendant, the plaintiff presents unilaterally an ex parte request to the court to be authorised to serve a summons for a specific date in the near future. The urgency of the matter must be explained in such a request and a complete written brief with supporting documentary evidence must be filed. If leave is given, the plaintiff will serve a summons in the normal manner indicating a specific day and hour for the hearing. The defendant must file its documents before the hearing date.

Exceptionally, a plaintiff may be authorised to issue a summons on the same day as the hearing. If counsel does not appear for the defendant, the case is treated as a default proceedings and judgment is entered. If counsel for the defendant does appear but has not filed any documents, the case is still heard provided that the judge is confident that there was adequate time for the defence to be prepared. If it transpires that the case is more complex than originally thought, the judge may transfer the case to the ordinary docket where it will be overseen by the procedural judge.

The principal pre-action remedies available relate to the protection or establishment of evidence. Parties may seek a court-supervised inquiry into the facts of a dispute before the start of formal proceedings to preserve or even establish proof (Article 145 CPC). The range of the inquiry is wide, including personal and site inspections, the ordering of parties and non-parties to appear for questioning and the appointment of court experts.

Applications are made ex parte to the relevant court that would have jurisdiction over the proceedings on the merits. A real and pressing risk of the loss of the evidence must be shown.
In addition to the limited pre-action remedies discussed above, French law provides a summary procedure by way of emergency interim proceedings by which a party may obtain protective or other urgent or provisional orders from the court. Such orders are always *inter partes* and in theory do not finally determine the dispute on the merits.

Certain protective measures may be obtained on an *ex parte* application for the purpose of securing a defendant’s assets with a view to enforcement. One such protective measure is the protective attachment. Applications must be made to the court with subject-matter jurisdiction in the area where the defendant is domiciled or where the assets to be attached are situated. The application must set out the grounds for seizure showing a *prima facie* case on the merits and must specify the amount for which security is claimed. It must also demonstrate some urgent threat to the satisfaction of the claim and the assets over which security is sought. If proceedings in respect of the claim have not already been started, the order of the court will set a time limit within which they must be commenced, failing which the order will lapse.

In addition to the protective attachment, the courts have power to direct the provisional registration of a charge over the defendant’s business or property or on shares or stocks owned by him or her. Attachments on earnings and other monetary debts are also available.

If judgments are not voluntarily complied with forced enforcement of judicial decisions settling the dispute – thus excluding acts of judicial administration – can be sought in two cases: either the court has ordered the provisional enforcement of the decision, or the decision has been duly signified and the time period to file an appeal has elapsed. Enforcement will not be available in cases of ongoing insolvency proceedings, and immunity from execution of foreign States. On this latter point the Sapin 2 Law of 9 December 2016 clarified which assets are presumed unseizable. More strikingly the reform introduced a preliminary judicial authorisation procedure. Although the authorisation is obtained on an *ex parte* application, it will not be possible to directly seek enforcement of a decision having recourse to a bailiff (as is possible in regular cases) against a foreign state.

Although exchanges between parties and courts are traditionally made via courier, the decree on simplification of civil procedure dated 11 March 2015, together with the circular dated 20 March 2015, encourages the use of emails and text messages. All information said to be communicated by courts without formal conditions can be sent to parties via emails or text messages, provided the receiving party had previously agreed on the use of such communications means. Said party is held responsible in case of modifications of email address or phone number. Since 1 January 2013 exchanges in appeal proceedings or in any court proceedings requiring legal representation by a lawyer are made via a virtual private network for lawyers and courts which ensures secure electronic transmission.

### iii Class actions

Class actions were introduced in France by a statute promulgated on 17 March 2014. These *actions de groupe* are defined at Article L.432-1 of the French Consumer Code. They were initially limited in scope, such that only consumers (i.e., persons not acting in the course of their profession) who have opted into one of the 15 nationally approved consumer associations are entitled to compensation from a business sued successfully by the consumer association. Also, consumer compensation for pecuniary losses has been extended by the Law on the Modernisation of the Justice System in the 21st Century. Class actions may now be brought in respect of discrimination claims, environmental claims and disputes over data protection.
iv Representation in proceedings

Litigants (individuals or corporate entities) may represent themselves or be represented by any other person of their choice before any court in any proceedings in which legal representation is not compulsory.

Legal representation by a lawyer is compulsory in ordinary civil proceedings before the High Court except for emergency interim proceedings before that Court. Legal representation is not required before any other courts of first instance.

In the court of appeal, litigants must be represented by a lawyer although procedural matters are often entrusted to those attorneys, mentioned previously, who used to have a monopoly on the right of audience before the appellate courts. Representation before the Council of State and the Supreme Court for Civil and Commercial Matters is reserved to approximately 120 specially appointed lawyers.

There is no geographical restriction on the rights of audience of a lawyer, although he or she may only formally represent a client in the courts for the court of appeal district in which he or she is enrolled. In practice, a lawyer in one court of appeal district will instruct a lawyer in the district that has geographical jurisdiction over the client’s case to act as an agent, to be on the formal record and to accomplish administrative tasks associated with the proceedings.

v Service out of the jurisdiction

Civil proceedings are generally commenced by the service of a summons on the defendant by a bailiff. The summons must be served personally on the defendant, although if this is not possible, it may be served on a member of the family, an employee, a neighbour or guardian at their domicile or, if this is not known, at their place of work. If there is no appropriate person who is able or willing to accept service, the bailiff delivers the summons at the relevant town hall and sends a registered letter to the defendant at his or her last known address informing him or her of this fact. If the domicile, residence or place of work of the defendant is unknown, the bailiff records any attempts to effect service in a formal minute that is sent to the defendant’s last known address by registered letter.

Service on a foreign defendant who is present or resident in France or on the branch of a foreign company established in France is effected in the same manner.

In the absence of any other provision in an international convention, or EU Service Regulation No. 1384/2000, service on a defendant abroad (whether a natural person or corporate entity) is effected by the bailiff delivering the summons to the representative of the state. The summons is then transmitted to the defendant through diplomatic channels. Regardless of whether or when the summons is actually received by the foreign defendant, service is deemed to be complete when the summons is delivered to the representative of the state.

Service of documents after the commencement of the proceedings is made by simple delivery to the address of the lawyer representing the litigant whenever this is compulsory or is effected voluntarily or, where representation is not required, to the address of the litigant provided for the purposes of service by registered letter.

vi Enforcement of foreign judgments

As mentioned in Section II, above, pursuant to Chapter III of the Brussels I bis Regulation, any judgment rendered by (and enforceable in) a Member State must now be recognised and equally enforceable in all other Member States without any special procedure. However, the recognition and enforcement of a judgment can still be challenged on grounds of French
international public policy or if it is irreconcilable with another judgment between the same parties in France or with an earlier judgment rendered in another state on the same cause of action and between the same parties.

In the absence of an enforcement treaty, enforcement proceedings for foreign judgments are the exclusive jurisdiction of the superior court and will succeed if the court is satisfied that the court that rendered the decision had jurisdiction under French rules of jurisdiction, that enforcement would not breach French international public policy and that the judgment was not obtained by fraud. The procedure is commenced by a summons and is made inter partes.

vii  Assistance to foreign courts
The taking of evidence in France that is likely to be used in foreign proceedings (of any nature) is a criminal offence unless carried out under an international treaty. The main multiparty treaty that provides for rules and procedures for the taking of such evidence is the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. This Convention was signed by France on 24 August 1972 and officially incorporated into French law with the publication of the Decree dated 9 April 1975.

The Convention sets forth two procedures – one by a letter rogatory and one by diplomat, consulate agent or commissioner (i.e., an attorney mandated by the requesting party) – that both entail an order, issued by the foreign court in which the litigation is pending, granting the request for the collection and communication of French-based documents to a foreign signatory state for the purposes of eventually being submitted in a foreign judicial or administrative proceeding.

In a similar vein, the London Convention on Information on Foreign Law entered into force in France on 11 July 1972. The Convention provides for the obligation to state parties to give information on law and procedure in civil and commercial fields as well as on their judicial organisation to any judicial authority in another state party when requested.

With respect to other forms of assistance to foreign proceedings, there are no specific provisions in the CPC other than the measures of interim and urgent relief available to the parties (and not to the foreign judge) in ex parte proceedings where the French courts have jurisdiction.

viii  Access to court files
Public access to documents and information regarding pending civil proceedings is extremely limited. Generally, rights of access are limited to the parties and their counsel. Further, the use of documents produced in the course of proceedings is limited to the purposes of the proceedings themselves.

Except for rare cases where the court decides that the hearing should be held in camera (usually for reasons of public interest), hearings are held in public, although again members of the public that are present do not have access to any of the documents on file.

Judgments are public, although there is no generalised system for the publication of all judgments. Members of the public can obtain copies of any such judgment from the court offices in question. Documents on the court file are, however, not available to the public.

ix  Litigation funding
Legal aid is available to anyone resident in France who has insufficient resources to enforce or protect his or her rights. It is also available to non-residents when so provided by international treaty. It is not available to commercial companies. The process of obtaining legal aid usually
France

takes several months, although an expedited procedure is available for urgent cases. Access is means-tested (currently, full legal aid is available to persons with a monthly income of less than €1,017, and partial aid is available to persons with a monthly income of up to €1,525). The applicant also has to show that he or she has prospects of success, although in practice few applications are refused. When granted, the application is passed to the head of the local Bar, who appoints counsel to act for the legally aided party (who can be a lawyer already chosen by the party). Legal aid covers the court fees and the costs of enforcement of any judgment. Since 2017 legal aid is also available to persons taking part in participatory procedures and settlement agreements. Counsel receive a fixed-scale fee from the state. If the legally aided party loses, he or she is not protected, by reason of lack of means, from an order to pay the winning party’s costs.

Partial contingency or conditional fee arrangements are permitted under French law. Full contingency fees are not.

Disputes over fees are brought before the head of the local Bar, who must rule on the matter within four months. The decision may be appealed to the president of the relevant court of appeal within a further month.

Given the limited scope and effect of the rules on costs, there are no specific provisions in French law regarding security for costs. Claimants domiciled outside France are no longer required to give security for costs.

There is to date no regulation of third party litigation or arbitration funding in France.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

The professional rules of conduct governing the exercise of the legal profession in France require all lawyers to avoid any conflicts of interest in the practice of their profession. A relatively wide definition of ‘conflict of interest’ is applied that covers not only individual lawyers but also any grouping of lawyers, whatever the nature of their structure.

Each case is, however, considered casuistically. This means in practice that, provided that a Chinese wall can be shown to be fully effective, there is no reason in principle why it should not be sufficient to avoid breaching the professional rule of conduct in any given grouping of lawyers.

Breaches of the no-conflict rule are treated as disciplinary matters and sanctioned by the Bar Association.

ii Money laundering, proceeds of crime and funds related to terrorism

French law imposes two types of obligations on a lawyer advising a client in non-judicial matters with respect to money laundering, etc. The first is an obligation of awareness and the second is an obligation to inform of any suspicion of money laundering, etc.

The obligation of awareness requires the lawyer to undertake certain due diligence steps to know exactly who the client is, the transactions on which he or she is to advise, to conserve certain documents and to put in place internal procedures to ensure that these due diligence steps are always accomplished for any new client or any existing client that comes with a new matter.

The obligation to inform of any suspicion of the commission of money laundering or similar offence applies whenever the lawyer has reason to believe that such an offence may
have been committed – there being no statutory definition of suspicion. The information must be given first to the head of the local Bar, who must then make an assessment of the case before deciding whether to inform Tracfin (the competent government body) or not.

iii Data protection

The EU Data Protection Directive of 1995 was implemented in France by the Data Protection Act 1978 (as amended) (DPA). Under the DPA, the competent national regulatory authority is the CNIL, based in Paris. The CNIL has the power to take enforcement action in France including imposing fines, which may be publicised. Prosecution of criminal offices for violation of the DPA (and other sector-based data protection laws) are brought before the French criminal courts.

The DPA applies to personal data (i.e., any information relating to a natural person who is or can be identified, directly or indirectly, by reference to an identification number or to one or more factors specific to that person). It regulates the processing of personal data if the person determining the purposes and means of the data processing is established or carries out its activity in France or such a person uses a means of processing located in France.

The usual regime permitting the processing of personal data involves a prior declaration to the CNIL using a form available on the CNIL’s website. In a limited number of cases, however, express prior authorisation by the CNIL is required. These latter cases include:

a the processing of certain types of sensitive data (i.e., personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership and data concerning health or sex life);
b the transfer of data outside the European Economic Area to a country without adequate protection;
c automated processing consisting of a selection of people aimed at excluding some from the advantages of a right or the benefit of a contract;
d automated interconnection files; and
e biometric identity checks.

The processing of data relating to criminal offences and proceedings, health or social security numbers is also restricted. There are also a number of exceptions to the usual regime covering, for instance, the maintenance of public registers.

All personal data must be processed fairly and lawfully, collected for and processed in accordance with specific, explicit and legitimate purposes, collected in an adequate, relevant and non-excessive way, be accurate, comprehensive and when necessary kept up to date and kept in a form that permits identification of the data subject only for as long as is necessary for the purposes for which the data was collected. Certain information must be given to data subjects about the processing of their personal data.

The consent of data subjects is required before processing personal data unless an exemption applies (such as to enable performance of a contract to which the data subject is a party, to protect the data subject’s life, or to allow the data controller to perform a public service entrusted to it).

Finally, the European GDPR entered into force on 25 May 2018. It establishes a harmonised data protection framework for individuals in the European Union and also applies to third country companies offering their services within the European Union. Individual rights such as the right of access to information and to erase personal data are reinforced. In France, the CNIL has the power to sanction any violation of the Regulation.
V  DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i  Privilege

Correspondence between outside legal counsel is privileged. It is confidential to the lawyers in question and may not even be disclosed to the lay client. This privilege may be waived by the counsel themselves (but not by the lay client). When counsel wishes a particular piece of correspondence to be capable of disclosure, it will be marked as being ‘official’ or ‘not confidential’. While confidential correspondence between the parties themselves will normally not be admissible in proceedings, this is not on the grounds of privilege but simply upon the confidentiality agreement between the parties, which can be set aside by the court.

Privilege does not attach to correspondence with or between in-house lawyers.

There are no specific rules governing privilege between French and foreign lawyers. The European Code of Conduct, which has legal force by way of incorporation in the rules governing the profession, gives no confidential character to exchanges between foreign lawyers unless specifically agreed. Whenever a French lawyer works with a foreign correspondent, it is important to check on the rules of privilege and professional conduct that apply to the foreign lawyer and ensure that they provide sufficient protection for the client’s interests. If not, the best that the lawyers can do is to establish a contractual framework from the outset in which their correspondence and exchanges will take place to ensure that professional secrecy and confidentiality is not breached. There is no certainty, however, that any such contractual protection will be sufficient to protect fully the client’s interests.

ii  Production of documents

French law requires litigants to prove the facts on which they intend to rely. Judgments can only be based on the evidence produced during the proceedings. Evidence may be introduced in two ways: disclosures by the parties or enquiries supervised by the court.

While no party is required to produce all documents relevant to its case, court proceedings are governed by the adversarial principle, which implies that each party must be able to examine the documents relied upon by the other. The production of documents must be spontaneous and timely. The judge may refuse to take account of documents produced late, although this power is rarely exercised.

The parties are obliged to cooperate with the court in its enquiry into the facts of a dispute. The court may draw such inferences as it sees fit from a failure by a party to cooperate. Failure to comply with disclosure orders may be punished by a fine. The same may apply to third parties if there is no legitimate reason for the documents to be withheld.

There are no specific classes of document that do not require disclosure, subject to the rules on privilege (see Section V.i). Conversely, there are no specific rules regarding documents stored overseas, whether electronically or otherwise. Similarly, there are no specific rules regarding electronically stored documents and their reconstruction. All such documents, if within the possession or control of a litigant, may be subject to production if relied upon by that party or if ordered by the court.

There are no specific rules regarding disclosure by third parties, and indeed the measures available to the court include orders on third parties to disclose documents that are not privileged.

In general, documents obtained by disclosure in civil proceedings may not be used for any other purpose than as evidence in those proceedings.
VI ALTERNATIVES TO LITIGATION

i Arbitration

Arbitration is a widely used form of ADR in France. The original French international arbitration rules contained in the CPC predate the first UNCITRAL Model Law and were considered to be flexible and among the most liberal of all arbitration rules. French law on arbitration has been reformed by a decree that came into force in May 2011 designed to render the legal regime applicable to both domestic and international arbitrations taking place in France more user-friendly. The fundamental principles of the old law have been retained; what the new law has done is to codify much of the case law that has allowed the old law to evolve over the past 30 years.

Arbitration is the submission of a dispute by agreement for resolution by a panel of private decision makers (composed of an odd number of members – usually either one or three) who are mandated to apply either the substantive law of a given jurisdiction or to decide the case on the basis of equity. The proceedings may be brought under the auspices of an institutional body, such as the International Chamber of Commerce (ICC), whose headquarters are based in Paris, or the French Arbitration Association, or on an ad hoc basis where the arbitrators determine and supervise all aspects of the procedure to be followed. Typically a written phase of the procedure is followed by a hearing of oral evidence and argument. The arbitral tribunal issues an award that is enforced by way of a court decision granting an exequatur order.

Only French law on international arbitration is considered here. The rules of French law on international arbitration apply provided that the interests of international trade are at stake and that the case bears some connection with France (e.g., the chosen place of arbitration is France). The interests of international trade will be concerned each time the dispute relates to an arrangement involving cross-border movement of goods, services, payments or involving the economies of two states.

The rules are distinct and distant from the French national legal system. The parties and the tribunal are given the widest possible freedom to organise the procedural aspects of the arbitration.

International arbitration agreements are not subject to any formal requirement or content. Provided that they evidence the intention of the parties to resort to arbitration, they are enforceable.

If the parties encounter difficulties in constituting the arbitral tribunal, they may apply for assistance to the president of the superior court who has authority to nominate the members of the tribunal in place of the parties.

French international arbitration law grants the parties and the arbitral tribunal wide freedom to organise the arbitration proceedings, the only true limits being due process and respect of the principles of French international public policy (since a failure to respect either will constitute grounds for annulment of the award).

The general principle is that French courts will interfere in arbitral proceedings only on an exceptional basis and even then only when the urgency of the circumstances so require.

There is no requirement as to when and in what form the award is to be issued (as opposed to domestic arbitration, which imposes an extendible six-month period). However, parties and arbitrators are bound to a duty of loyalty and celerity in the conduct of the proceedings. No appeal lies against an international arbitration award (again as opposed to domestic arbitration, where awards may be subject to appeal before the court of appeal if parties agreed to it). The only recourse is for annulment on certain limited specific grounds,
namely: that the arbitrator wrongly asserted or denied jurisdiction; that the tribunal was irregularly constituted; that the arbitrator exceeded his or her terms of reference; that the principle of due process was breached; or that recognition or enforcement of the award would be contrary to French international public policy. The courts interpret the last ground very strictly, and apply a high threshold for a finding of violation of international public policy. The courts will never review the merits of the award or set it aside for a wrong application of the law. Courts indeed follow a minimum control approach except in cases of alleged corruption. Since 2011, the parties can waive (in writing and in an express and specific waiver) their right to bring an action for annulment to challenge the validity of an arbitral award before French courts.

The arbitral tribunal will normally make an order for costs as part of its award. The general practice today is for the tribunal to order at least part of the costs to follow the event.

France has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958. The New York Convention came into effect in France on 24 September 1959. The only outstanding reservation made by France is the ‘reciprocity reservation’ to recognise and enforce only awards that are made in the territory of another contracting state.

The rule that the enforceability of arbitral awards is suspended if there is an appeal against the grant of an order for enforcement (or an action for annulment of the award) has been reversed by the 2011 decree. The filing of an appeal no longer suspends the enforceability of the award, although the court may stay or set conditions for enforcement of an award if enforcement could severely prejudice the rights of one of the parties, including by ordering payment into court of award amounts in the event of an appeal to avoid a successful appellant being unable to recover such amounts paid to the award creditor if such amounts are substantial.

The general rule as to the arbitrability of any given matter is set forth in Article 2059 of the Civil Code, which provides that ‘all persons may agree to arbitration in relation to rights which they are free to dispose of’. Article 2061 of the Civil Code has been rephrased following the 18 November 2016 reform of the Justice in the 21st Century to state that ‘where one of the parties has not contracted in the course of his or her professional activity, the clause may not be opposed to him or her’. Arbitration is therefore an available dispute resolution mechanism for non-professionals as well, provided that they do not oppose it.

Certain types of dispute cannot, however, be submitted to arbitration:

- matters of civil status and capacity of individuals;
- matters relating to divorce or judicial separation of spouses;
- disputes concerning public communities and public establishments (i.e., municipalities);
- matters relating to domestic employment (except for arbitration agreements concluded after the termination of the employment contract);
- bankruptcy proceedings (although arbitration is possible where provided for by the underlying contract for claims against the insolvent debtor); and
- matters relating to the validity of compulsory licensing or the validity, nullity and infringement of patents (although arbitration is possible where ownership or exploitation of the patent is the main issue).
ii Conventional mediation and conciliation

Decree No. 2012-66, which entered into force on 20 January 2012, promulgates a separate book (Book V) of the CPC, dedicated specifically to the amicable settlement of disputes. It provides a common definition for conventional mediation and conciliation, directly inspired by Directive 2008/52/CE of 21 May 2008. Yet, while some of the new provisions apply to both mediation and conciliation, some are specific to one or the other procedure.

As to common provisions, the Code provides that both the extrajudicial mediator and the conciliator must accomplish their mission with impartiality, competence and due diligence. The Decree does not refer to any independence requirement, however, and simply refers to Article 21-3 of law No. 95-125 of 8 February 1995 concerning confidentiality.

There is a significant difference between the level of training required for mediators and for conciliators. Mediators are not required to have received specific mediation training or to have any experience of mediation, as long as they are qualified to understand the nature and object of the dispute. By contrast, conciliators are unpaid officers of the court, who must have had at least three years of legal experience.

In addition, while the views of the conciliator are not binding upon the parties, the agreement reached through mediation can be given binding force with the consent of both parties, which is a novelty brought by the ordinance of 16 November 2011. The binding force of such an agreement will then be recognised in all Member States of the European Union.

In 2014, a particular focus was placed on mediation by the ICC, the latter issuing its Mediation Rules (accompanied by the ICC Mediation Guidance Notes), comprised of 10 articles dealing with such issues as the selection of the mediator, the conduct and termination of the mediation, and confidentiality issues, as well as fees and costs.

The Law on the Modernisation of the Justice System in the 21st Century has underlined the policy in France of favouring mediation and conciliation by rendering conciliation mandatory for small claims (of up to €4,000). An implementation decree set up an official list of mediators attached to the court of appeal in October 2017.

iii Participatory procedure

In addition, the Decree of January 2012 provides for ‘participatory procedure’, a negotiation mechanism that is both procedural and contractual in nature. This amicable method of dispute settlement was first introduced into the Civil Code by Law No. 2010-1609 of 22 December 2010. The 2012 Decree defines its scope and effects, and deals with confidentiality issues.

iv Other forms of alternative dispute resolution

In certain specialist areas French law provides for specific tribunals, commissions or quasi-judicial organs with jurisdiction (examples include matters of social security, competition, journalism and broadcasting). Proceedings before such specialist tribunals or quasi-judicial bodies are governed by their own particular rules.
VII  OUTLOOK AND CONCLUSIONS

The Law on the Modernisation of the Justice System in the 21st Century marked a significant step by allowing arbitration agreements in all contracts, thus extending it beyond disputes between professionals. Data protection continues to be another interesting topic to follow in the French dispute resolution landscape in 2018, and there has already been an increase in complaints submitted to the CNIL.

This landscape is also shaped by the necessity of the French judicial system to adapt to contemporary economic and international issues and by the desire to attract international disputes both in state court litigation and arbitration. This was the main goal of the International Chamber of the Paris Court of Appeal. It will be interesting to see how successful it will become as a tool, and whether it will find its place among the various international dispute resolution venues.
Chapter 12

GERMANY

Henning Bälz and Carsten van de Sande

I  INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

The Federal Republic of Germany is a federation consisting of 16 states. While, in theory, the competence for enacting legislation lies with the federal states, federal law governs almost all areas of private law.

Germany has a civil law system characterised by codified legal provisions. Comprehensive statutes and regulations cover nearly all aspects of law. Nevertheless, court rulings, in particular rulings by the federal courts, play a significant role in the development and interpretation of the law.

Courts in Germany can be classified into five categories: ordinary courts including civil and criminal courts, which are competent for all lawsuits unless a specific rule provides for the competence of one of the following courts: labour courts competent in all matters related to labour issues; administrative courts dealing with lawsuits between a state authority and a citizen in matters of administrative law comprising, for example, municipal law, public construction law, trade concessions and environmental law; social courts in cases involving specific social law matters; and financial courts in tax matters. In addition, the jurisdiction of the Federal Constitutional Court and the European Court of Justice play an important role.

In cases involving matters of civil law, the court of first instance is either a local court or a regional court. Local courts have jurisdiction for disputes regarding claims in an amount of up to €5,000, for disputes between a landlord and a tenant and for matters of family law. In any other case, proceedings commence before a regional court. Matters before local courts are handled by a single judge and matters before regional courts by chambers consisting of one presiding judge and two associate judges (with the possibility to assign a case to one of the judges). Regional courts may also establish special chambers for commercial matters consisting of one professional judge and two lay judges from the business community. These chambers have jurisdiction over most commercial disputes on application by one of the parties.

The court of second instance is either the regional court (in cases commencing before a local court) or the higher regional court. In principle, these courts decide on appeals based on both factual and legal issues, although it must be observed that the parties to a lawsuit must submit all relevant facts in the proceedings of first instance, leaving only limited scope to introduce new facts in appeal proceedings. Senates of the higher regional court consist of one presiding and two associate professional judges.

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In certain cases, a party may submit a further appeal against a decision of a higher regional court with the Federal Supreme Court, which will review the legal aspects of the case only and will neither examine factual issues nor take evidence. Senates of the Supreme Court comprise five professional judges.

Jury trials and lay judges – with the exception of commercial law matters as described above – are alien to German civil litigation proceedings. It is solely the (professional) judge’s task to decide matters of law and of fact.

A court will always render a decision as to which party is to bear the costs of the proceedings, comprising court fees as well as the other party’s expenses. The general rule is that each party bears the costs to the extent it loses the lawsuit. For example, if A pursues a claim in the amount of €1,000 against B and obtains a ruling providing for the payment of €750, A will bear one-quarter of the costs, whereas B will bear three-quarters of the costs. The total reimbursable amount is subject to, and limited by, statutory law.

II THE YEAR IN REVIEW

i German legislator implements collective redress mechanism for consumers

On 14 June 2018, the German legislator passed a law to strengthen collective legal redress for consumers in Germany. The new law came into force on 1 November 2018 and introduces a model case proceeding. It implements the EU Commission’s recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in Member States, concerning violations of rights granted under EU Law.

Under the new law, certain consumer associations can file suit to clarify factual or legal requirements of claims between consumers and enterprises if at least 10 consumers are concerned. The law provides for an opt-in model allowing consumers to register their claims, which suspends the applicable limitation period.

The first model case was filed immediately on 1 November 2018 and is directed against Volkswagen in respect of diesel issues.

ii The new 2018 DIS Arbitration Rules

On 1 March 2018, the amended Rules of Arbitration of the German Institution of Arbitration (DIS) came into force. They apply to all claims filed with the DIS on or after 1 March 2018 by German and international parties who have agreed on arbitration clauses providing for the application of the DIS Rules.

The new DIS Arbitration Rules replace those of 1998, which had remained unchanged for 20 years. Given that arbitration has changed considerably, numerous international arbitration institutions amended their rules in recent years. In order to remain competitive – especially in respect of international disputes – the DIS also initiated a review of its Arbitration Rules in 2016.

The new Arbitration Rules contain a large number of new provisions to increase procedural efficiency and speed, which, in addition to confidentiality, is one of the most frequently cited advantages of arbitration over state proceedings. In order to initiate the proceedings and, thus, to prevent the application of the statute of limitation with respect to the asserted claims, a rather slim action limited to certain minimum requirements is sufficient. According to the new Arbitration Rules, the statement of defence must be submitted within 45 days of the submission of the arbitration claim, even if the arbitral tribunal has not yet been fully constituted.
Once the arbitral tribunal has been constituted, a procedural conference shall be held within 21 days, at which the further course of the proceedings and other measures enhancing efficiency shall be discussed. The new procedural rules also contain provisions on expedited proceedings in which an arbitral award must be rendered no later than six months after the procedural conference. In addition, the regulations provide that poor quality and efficiency of the arbitrators’ work can influence their fees.

Perhaps the most striking innovation in the new Arbitration Rules is the introduction of the DIS Council. This council of experts will take over certain activities previously incumbent on arbitrators. In particular, the introduction of the DIS Council results in the arbitrators no longer having to decide on questions regarding their own matters; for example, on the amount in dispute and, in particular, on challenges of an arbitrator.

iii Exclusion of members of representative body of parties from office of arbitrator

The German Federal Court of Justice decided in a case where the claimant sought enforcement of two awards rendered by a ‘contract advisory board’. The board was staffed with the directors of both contracting parties and vested with the power of deciding disputes arising out of the parties’ contracts. The Court had to address the question of whether directors of a party are eligible as party-appointed arbitrators to decide whether a so-composed panel constituted an arbitral tribunal meeting the requirements of the German Code of Civil Procedure.

The Court referred to the well-established principle of German law that no one can be the judge in his or her own case, and rejected the directors’ nomination. It held that members of a party’s representative body are not eligible for party-appointed arbitrator positions even though the claimant referred to an earlier case in which the Court had approved the nomination of a board member. However, in that case the director had been jointly appointed as sole arbitrator after the dispute had arisen. The Court pointed out that these specific details, especially the fact that the parties had appointed the arbitrator in full awareness of the existing dispute, do not allow for the general extension of its reasoning to all cases. Therefore, the Court did not treat the panel as an arbitral tribunal and refused to enforce the awards.

III COURT PROCEDURE

i Overview of court procedure

The principal statute governing private law proceedings is the German Code of Civil Procedure. The Code contains rules governing proceedings before state courts as well as ad hoc arbitration proceedings. Further, it deals with the enforcement of judgments of German and foreign courts, as well as of arbitral awards.

Other relevant civil procedure laws are the Act on the Constitution of Courts, the Act on Enforcement of Claims with respect to Real Estate, the Lawyers Remuneration Act, the Court Fees Act and the Act on the Remuneration of Expert Witnesses, Witnesses and Others. Finally, several EU directives and regulations on the matter of civil procedure apply, and supersede domestic German law.

2 Document number I ZB 12/17.
Procedures and time frames

Any ordinary proceeding starts with the filing of a statement of claim. The timing mainly depends on the applicable limitation period, which is a matter of substantive law. The general limitation period is three years and commences on the last day of the year in which the claimant became aware of the existence of the claim and the identity of the debtor, or would have been so aware had he or she not shown gross negligence. In principle, this period applies to claims for the performance of contracts, damages, tort, restitution or unjust enrichment. The filing of a statement of claim suspends the applicable limitation period.

The German judicial system requires the parties to submit all facts supporting their case and there are only limited means to have the opponent produce documents (see below). The concept is that each case should be dealt with within one single oral hearing, although it is not unusual that more than one hearing is held, for example to allow for the taking of evidence or the discussion of issues pointed out in an earlier hearing. In preparation for the hearing, a judge may either give the parties the opportunity to present their case in a preparatory oral hearing or – as is more often the case – order the parties to submit their arguments in written briefs.

Although the Code of Civil Procedure provides for the principle that the decision of a court shall be based on the statements made in the oral hearing, the focus in almost all cases is on the written submissions of the parties (with the exception of the taking of evidence). The parties should always ensure that they plead all factual and legal submissions relevant to their case in writing. Written submissions are to be filed within the time limits set out by the judge in his or her discretion. If parties fail to comply with such time limits without proper excuse, late submissions may be precluded.

Court proceedings must be conducted in German. Since the beginning of 2010, however, proceedings can be conducted in English before specific courts in certain areas of Germany. Accordingly, complaints and other written submissions by the parties may be in English, and the court’s decisions would also be rendered in English. This pilot project is an initiative to establish special ‘chambers for international commercial matters’ at the regional court level. The initiative is aimed at increasing the attractiveness of German courts as a forum for international commercial litigation.

Oral hearings often take a surprisingly short time, during which the parties primarily refer to their written briefs. Permitted sources of evidence are documents, inspection by the court, witness statements, expert opinions and, to a rather limited extent, party testimony. As a general rule, written witness statements do not qualify as evidence. At the conclusion of a hearing, the judge usually sets a specific date on which he or she will render a decision, be it a judgment or an order as to the further procedure.

The Code of Civil Procedure provides that the court shall consider at all times during the proceedings whether a settlement can be reached. In particular, courts are required to enquire whether an amicable solution is an option prior to the first oral hearing. It is at the discretion of the judge how far he or she pursues such an enquiry. Whereas some judges merely ask whether the parties wish to settle the case and, if this is denied, promptly enter into the proceedings, other judges discuss their preliminary evaluation of the case with the parties in detail and make concrete proposals as to what the terms of a settlement could be.

While the duration of any litigation depends on the complexity of the case and, to a large extent, is subject to the discretion of the court, the average duration from the initiation
of an action until the issuance of a judgment is in the range of seven months (local courts) to 15 months (regional courts) in the first instance and between 22 months (regional courts) and 27 months (higher regional courts) in the second instance.

In addition to regular court procedures, a party may initiate a number of alternative proceedings. Summary collection proceedings provide for a rapid procedure by which the applicant may obtain a collection order without an oral hearing if the subject matter is the payment of a certain sum of money. The evaluation by the court is limited to whether the claim appears to be plausible. Upon written objection by the defendant, the dispute is transferred to the competent court and the matter turns into a regular lawsuit. Generally speaking, a collection procedure is only an option if the defendant is likely to pay immediately or fail to respond, or if a limitation period needs to be suspended on short notice.

Further, a plaintiff may initiate summary proceedings that allow for documents or a bill of exchange as the only means of evidence. If a judgment is rendered against the defendant, the latter may ask for the judgment to be set aside in subsequent proceedings. If the defendant makes use of this right, the dispute remains pending as a regular lawsuit, entitling both parties to resort to regular means of evidence.

Along with these options, a party may initiate ancillary proceedings, such as a procedure for the taking of evidence independent of a pending lawsuit or proceedings for interim measures.

Two different kinds of interim measures exist: attachment orders and preliminary injunctions. Both are provisional court orders issued in summary proceedings to obtain security for the future execution of a claim. While an attachment order secures satisfaction of monetary claims, a claim for payment of a purchase price or damages, for example, a preliminary injunction may be issued with regard to a non-monetary claim, for example a claim for the omission of a contractual violation.

To support a motion for interim measures, the applicant must submit facts establishing the jurisdiction of the court, the potential claim and the reasons why interim relief is required. In doing so, the applicant – unlike in regular proceedings – is not required to provide full evidence but may rely on prima facie evidence. In contrast to regular proceedings, this includes the submission of written affidavits regarding the facts of the case by the applicant or by third parties.

The execution of interim measures follows, in principle, the same rules as the enforcement of a regular judgment. Enforcement is restricted, however, to measures that safeguard the applicant’s interests without fully satisfying the claim.

Proceedings concerning provisional remedies are handled with priority and can be extremely fast. In urgent cases, a judge may decide without an oral hearing. Thus, in practice, it may take no longer than a few days, sometimes only hours, to obtain a court order or injunction.

In any case, the defendant may oppose the order of the court. Upon such a motion, the court will decide by judgment. Appeals against such judgments follow the general rules.

iii Class actions

In Germany, class actions in a formal sense are not permitted. It is a fundamental principle of German law that a litigant must appeal to the court as an individual to benefit from, or to be bound by, civil litigation.

The Capital Market Model Case Act, however, provides the possibility to establish certain factual or legal aspects of claims on behalf of a group of plaintiffs. The Act is designed
for certain capital market mass disputes, claims for damages due to false or omitted public
capital markets information or claims based on an offer under the Securities Acquisition and
Takeover Act. In these disputes, the court of first instance may initiate a model case before
the higher regional court upon the application of the plaintiff or the defendant, seeking the
establishment of the existence of certain conditions or even the mere clarification of specific
legal questions. The decision of the higher regional court will only be binding on the parties
whose cases are already pending. The mere registration of a claim with the higher regional
court is sufficient to suspend the running of the statute of limitations if the claim is based on
the same facts as the model case proceedings.

On 1 November 2018 a new law introducing model case proceedings came into force.
Unlike other forms of collective redress (e.g., under the Act on Model Case Proceedings
Under Capital Markets Law), this new procedural tool for collective redress is broad in scope
and covers all disputes involving consumers on the one side and enterprises on the other side.
The action aims to establish whether certain factual or legal requirements for the
existence of claims or legal relationships between consumers and a business are met. However,
it is limited to actions aiming at declaratory judgements and does not allow for filing
payment claims. The focus on declaratory objectives (mirroring the Model Case Proceedings
for Disputes under Capital Markets Law) is designed to resolve certain recurring issues of fact
or law that concern all affected consumers alike. It remains to be seen how this criterion will
be interpreted by courts, for example, when it comes to whether or not an alleged breach of
a contract or tortious act caused a certain (kind of) damage.

Actions under the new law may be brought only by certain qualified institutions
that, among other things, have a certain number of members, have been registered for a
certain time and do not file model cases in order to make a profit. When filing the suit,
the institution must show that the declaratory judgement sought will be relevant for claims
or legal relationships of at least 10 consumers; the action becomes admissible if at least 50
consumers register their claims or legal relationships within two months after the public
announcement of the model case action. In the further course of the proceedings, consumers
may register until the day before the first oral hearing; they may withdraw their registration
until the end of the day on which the oral hearing took place.

An amicable settlement reached by the institution that lodged the action and the
defending enterprise will be binding on every consumer registered at the time at which the
court approves the settlement unless that registered consumer opts out of the settlement
within one month after he or she was informed about the settlement. The settlement only
comes into force if fewer than 30 per cent of registered consumers opt out.

A judgment rendered in a model action is binding on the court dealing with the lawsuit
between a registered consumer and the defending enterprise. Thus, after termination of the
model case proceedings, consumers who have registered their claims may file individual suits
against the defendant in which the competent court will be bound by the established legal
and factual aspects of the model case.

In addition to the new model case law, some specific statutes provide for actions by
organisations on behalf of groups of individuals: under the Act on Actions for Injunctions
(UKlaG), certain qualified representative organisations, such as consumer protection
associations and chambers of commerce, may initiate actions in the interests of consumers.
In 2016, the German legislator decided to add the possibility of such an action based on
specific data protection law violations.
Further, in the framework of proceedings to determine the fair compensation of minority shareholders in relation to the transformation or reorganisation of companies, the conclusion of a control agreement, or a squeeze-out under the Stock Corporation Act, the court may appoint a representative to protect the rights of non-participating shareholders.

**iv Representation in proceedings**

The question of whether a party must be represented by a lawyer or whether it is entitled to represent itself depends on the court with which the case is pending. In all lawsuits before a regional court, a higher regional court or the Supreme Court, as well as in family courts, a lawyer must represent the parties. In all other legal proceedings the parties may represent themselves.

**v Service out of the jurisdiction**

Service Regulation No. 1393/2007 of 13 November 2008 governs the service of documents within the EU. The Hague Service Convention, the Hague Civil Procedure Convention and further bilateral treaties apply in the case of service of documents from Germany to any other foreign country.

Under the Service Regulation, each Member State must establish ‘transmitting and receiving agencies’ responsible for the transmission and receipt of the relevant documents. The transmitting agency issues the documents accompanied by a standard form to the foreign receiving agency. In Germany, the transmitting agency is the competent court initiating the service, and the receiving agency is the local court located in the district in which the document shall be served. The receiving agency located in the state of the defendant will examine the request and take all necessary steps to serve the document as soon as possible. It will serve the document in accordance with its domestic law or, if possible under its domestic law, by the method requested by the German courts.

Under the Hague Convention, each contracting state must designate a ‘central authority’, which, in Germany, is typically the Ministry of Justice of the respective federal state. Thus, a German court will first send the request for service to the Ministry, which in turn will transfer the request to the competent authority of the foreign state. The foreign central authority will then effect service in the same manner as under the Service Regulation.

Within the scope of the Hague Convention, the procedure described above applies to the service of statements of claim and initial court orders. For any subsequent document, the German court will request that the defendant nominates a service agent or attorney in Germany. If the defendant fails to comply with the order, the court will send the documents to the defendant’s foreign address by regular mail. This does not apply, however, under the Service Regulation. The Supreme Court has declared that the service of documents within the EU must adhere to the requirements provided for therein (until a domestic service agent or attorney is nominated).³

These rules apply regardless of whether the recipient is an individual or a corporation.

**vi Enforcement of foreign judgments**

With effect from 10 January 2015, Regulation No. 1215/2012 (Brussels Ia Regulation) replaced Enforcement and Recognition Regulation No. 44/2001. The main features of the

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³ Docket numbers VIII ZR 114/10 and VIII ZR 190/10.
recast Regulation are the abolition of *exequatur*, changes to the *lis pendens* provisions addressing the problem of ‘torpedo actions’ as well as amendments to the rules relating to jurisdiction agreements. In addition, the Lugano Convention on Recognition and Enforcement applies to judgments of the Swiss, Norwegian and Icelandic courts. German domestic law may apply, either if these rules do not apply, or if it is necessary to apply German law in order to complete the provisions of bilateral treaties. The relevant provisions are contained in the Code of Civil Procedure and in the Recognition and Enforcement Implementation Act.

Under the Brussels Ia Regulation, a creditor seeking enforcement of a foreign judgment must present a copy of the judgment and a standard certificate issued by the court that rendered the decision to the enforcing court. It is no longer necessary to file a request for execution as it was under the *exequatur* procedure. This process is in line with Regulation No. 805/2004, which abolished the *exequatur* proceedings for uncontested claims in 2005 and introduced a uniform European enforcement order that is directly enforceable in all EU Member States (for which a creditor may apply to the competent court of its own jurisdiction).

The grounds for non-recognition of a judgment under both the Brussels Ia Regulation and the Lugano Convention are essentially the same as under the Code of Civil Procedure. They are listed in Article 45 of the Brussels Ia Regulation, Article 34 of the Lugano Convention and Section 328 of the Code of Civil Procedure. The only difference is that, under the Code, recognition is also denied if reciprocity is not guaranteed or if the foreign court has no jurisdiction in accordance with German law.

vii  **Assistance to foreign courts**

Service of foreign documents follows the same rules as service of German documents abroad. In addition, under the Brussels Regulation No. 1206/2001, any court of a Member State may request that a German court takes evidence in Germany. In doing so, it may directly approach the competent German local court.

German authorities will also execute requests for the taking of evidence under the Hague Evidence Convention and the provisions of various bilateral treaties. Under the Hague Evidence Convention, the foreign authority sends a letter of request to the designated German central authority (usually the Ministry of Justice of the relevant German federal state). Such a letter must comply with several substantive and formal requirements and be accompanied by a certified translation. The German authority may refuse execution only on limited grounds.

Requests of foreign courts for information on German law are subject to the European Convention on Information on Foreign Law. The foreign court will send its request to the Federal Ministry of Justice in Berlin.

viii  **Access to court files**

In principle, oral hearings, including the court’s decision and final judgments, are public (exceptions apply to proceedings before family courts). Only the parties to the litigation, however, may inspect the court files. Any other person seeking inspection of files must demonstrate a legally recognised interest to inspect all or part of the court records of a particular case. Another possible way for third parties to gain access to the files is to intervene in the pending action if the requirements of a third-party intervention are met.
Litigation funding

Third-party litigation funding by specialised litigation financing entities, usually insurance companies, has been permitted since the late 1990s.

According to one model, the insurer covers all court and attorneys’ fees in exchange for a share of up to 50 per cent of what is recovered in successful claims or settlements. According to a more recent model, companies solely founded for such a purpose may acquire the entire claim.

In principle, lawyers must not fund actions by means of contingency fees or conditional fees. Following a judgment of the Federal Constitutional Court from 2007, the legislator introduced an exception into the Lawyers Remuneration Act pursuant to which contingency fees are permissible in exceptional circumstances, where otherwise a plaintiff would be unable to pursue a claim.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

According to the Federal Lawyers Act, a lawyer may not represent parties with conflicting interests. In contrast to many other jurisdictions, the prohibition against prevarication does not apply merely when the representation of one client may impair another client’s (legal or commercial) interests. A conflict of interests is rather only deemed to exist where a lawyer advises or has advised another party (or is or has been active in another capacity, for example as a judge, arbitrator, public prosecutor or notary) in ‘the same legal matter’.

Under certain circumstances, a lawyer must disclose potential conflicts of loyalty with existing clients, even if no conflict of interest is given: the Supreme Court held that a lawyer must inform a new client if the new client’s opponent frequently retains that lawyer or law firm in other legal matters.4 This duty applies, in particular, where the lawyer is not willing to represent the new client in court or arbitration proceedings against the opponent.

The scope of the prohibition against prevarication is further defined by the Rules of Professional Practice. According to the Rules, where a lawyer is or has been active for a party in a legal matter, the prohibition extends to all lawyers who work in the same law firm as, or who share office space with, this lawyer. When a lawyer moves to a new law firm, the prohibition against prevarication also extends to all lawyers who work in the new law firm with respect to all matters in which the lawyer advised a party at his or her former law firm.

The prohibition does not apply, however, if the clients have been comprehensively informed of the conflict of interest and have expressly agreed to be represented by different lawyers of the same law firm, provided that the representation does not impair the competent administration of justice.

The majority of legal scholars and legal practitioners seem to agree that establishing Chinese walls or similar measures to limit the flow of information within a law firm does not, in and of itself, redress an existing conflict of interests. Where the clients have agreed to be represented by the same law firm, however, Chinese walls are widely regarded as a permissible means of safeguarding the confidentiality of a client’s information. There are, however, no clear guidelines in German statutory or case law, or in the Rules, as to what Chinese walls must entail to be considered effective. In practice, Chinese walls are typically implemented by

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4 Docket number IX ZR 5/06.
identifying teams of lawyers and staff who will work on the matter for one client, restricting access to a client’s confidential information to the team working on the matter for that client (e.g., by implementing access control mechanisms in the law firm’s IT system) and limiting interactions with the team working on the matter for another client (e.g., by arranging for each team’s work space to be located in a different office of the law firm or, if in the same office, on a different floor or in a separate area).

ii Money laundering, proceeds of crime and funds related to terrorism

Under the Money Laundering Act, lawyers are subject to certain obligations aimed at detecting and preventing money laundering and the financing of terrorism. These obligations apply where a lawyer is involved on behalf of a client in the planning or execution of transactions related to the purchase or sale of real property or businesses, the administration of money, securities or other assets, the opening or administration of bank accounts, the establishment, operation or management of trust companies, companies or similar entities or structures and the procurement of funds required for such purposes.

Most importantly, lawyers must determine and verify the client’s identity and, where the client is acting for the account of a third party beneficiary, also the beneficiary’s identity. The Money Laundering Act, *inter alia*, imposes the following further obligations on lawyers: to implement adequate internal safety measures to prevent the lawyers’ involvement in money laundering and terrorism financing, to continuously monitor the relationship with the client for suspicions of money laundering and terrorism financing, and to report any such suspicions to the competent authorities. Certain exceptions apply where an ongoing relationship with the client exists if the lawyer has already complied with the identification and verification requirements in connection with a previous mandate for that client. Since 2011, however, lawyers have a general obligation to determine and verify the identity of all clients and continuously monitor the relationship.

iii Data protection

The data protection requirements applicable to private data controllers are set out in the General Data Protection Regulation (GDPR) and the recast Federal Data Protection Act. As a general rule, the collection, processing and use of personal data is prohibited except to the extent permitted by German privacy laws. There are no provisions in the German privacy laws that expressly deal with, or generally permit the collection, processing and use of personal data for purposes of court proceedings. Whether, and to what extent, the access to and review of material containing personal data by legal counsel and the processing of such material by legal outsourcing service providers is permissible in the absence of consent by the data subjects depends on the circumstances of the individual case.

Since there is in principle no pretrial discovery, the access to, and review by legal counsel of, material containing personal data will typically not relate to material in the possession of the other party to the court proceedings, but to material in the possession of the lawyer’s own client. As a general rule, the collection, processing and use of personal data (or material containing personal data) for purposes of asserting claims of the data controller or defending the data controller against claims by third parties is only permissible to the extent necessary to protect a legitimate interest of the data controller.

Where a third party reviews the material on behalf of the data controller, the rules governing data processing by agency may apply (which require the implementation of additional contractual, operational and technical safeguards). This will typically not be the
Germany

case where legal counsel reviews the material for purposes of representing its client in court proceedings. Review of the material by a legal outsourcing services provider is, however, generally considered to constitute data processing by agency. Where the legal outsourcing services provider is located in a country outside the European Economic Area (EEA), whose laws do not provide for an adequate level of data protection, the data controller will have to ensure by contract that the service provider adheres to data protection standards that are equivalent to those applicable within the EEA.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

German law protects communications between a lawyer and the client by recognising a lawyer’s right to refuse to testify in court in respect of matters to which the lawyer’s professional duty of secrecy extends, namely all matters of which the lawyer becomes aware in the exercise of his or her profession. This ‘lawyers’ privilege’ also applies to the production of documents in the lawyer’s possession. It does not, however, apply to documents in the possession of third parties, including the client, even where the documents have been prepared by a lawyer.

In criminal proceedings, the courts are prohibited from ordering the seizure of written communications between the defendant and his or her lawyer as well as the lawyer’s files. By extending the application of certain provisions of the Code of Criminal Procedure, the German legislator promoted equal treatment of the counsel of defence and all other lawyers in criminal proceedings. These rules apply, mutatis mutandis, to administrative proceedings, for example investigations by the Federal Cartel Office or other regulatory authorities.

Lawyers’ privilege also applies to foreign lawyers practising in Germany, provided that they have become a member of the Bar association at their place of business in Germany.

In the past, courts have been reluctant to apply the lawyers’ privilege to in-house lawyers, while scholars and practitioners have generally advocated for the extension of lawyers’ privilege to them. In 2010, the European Court of Justice held that the lawyers’ privilege does not apply to communication with in-house lawyers owing to the fact that they are not independent of their clients.5 The court elaborated that a coherent interpretation and application of the lawyers’ privilege throughout the European Union is crucial to ensure equal treatment for all companies subject to inspections by the Commission in antitrust proceedings.

ii Production of documents

Under the rules regarding burden of proof, each party to court proceedings is responsible for pleading and proving all facts relevant to support its claim or defence. As a general rule, litigants do not have to disclose information enabling the opponent to plead and prove its case. General pretrial discovery proceedings are alien to the German judicial system. Consequently, an obligation of the opponent or a third party to produce documents at a litigant’s request only exists where the requesting litigant has a right to demand the production of such documents under contract or statutory law. In the absence of such a right, a litigant must obtain all information required to support its case from publicly available sources or from documents in its possession or to which it has access.

5 Docket number C-550/07.
Germany

The court may, *ex officio*, order litigants and third parties to produce documents (including documents stored electronically) in their possession that either party has referred to in the proceedings. The obligation to produce documents is independent of the allocation of the burden of proof among the litigants. The Supreme Court held that, where the party who bears the burden of proof has referred to documents in the other party’s possession, the court may order the other party to produce the documents.\(^6\)

In practice, the courts tend to exercise the sweeping power afforded them by the new rule rather cautiously. To avoid ‘fishing expeditions’ by the litigants, courts will only order the production of documents where it is required in light of a party’s conclusive and specific assertion of concrete facts. The Supreme Court has eased these stringent requirements for claims based on an alleged infringement of intellectual property rights. Acknowledging the difficulties a plaintiff typically faces in proving that the defendant has infringed its intellectual property rights, the Court held that the defendant or a third party may be ordered to produce documents where an infringement of the plaintiff’s intellectual property rights appears likely.\(^7\)

A court may not order the production of documents if such an order would constitute an undue and disproportionate burden. Moreover, third parties are not required to produce documents to the extent they are entitled under statutory law to refuse to testify as witnesses.

As regards documents located abroad, a court may, in principle, order a litigant or a third party to produce documents regardless of where they are located. Such an order is not regarded as an infringement of the sovereignty of the foreign state in which the documents are located, provided the court does not impose, or threaten to impose, sanctions in the event that the addressee does not comply with the order.

Where it is not possible to obtain the documents from abroad for legal or practical reasons, the court may instead request that the competent authorities in the foreign state assist with the taking of evidence in accordance with the procedures set out in Regulation (EC) No. 1206/2001, the Hague Evidence Convention, bilateral treaties and the Code of Civil Procedure.

The 9th Amendment of the German Act against Restraints of Competition will implement EU Directive No. 2014/104/EU on Antitrust Damages Actions and introduce pre- and in-trial discovery proceedings with regard to actions for damages in antitrust cases. The German cabinet agreed on the relevant amendment on 28 September 2016 and it entered into force on 9 March 2017.

The revised law provides litigants with pre- and in-trial discovery claims against the other party or third parties that are in possession of evidence required to establish a cartel-damage claim or defence. Litigants will be able to obtain a court order for the disclosure of documents. A plaintiff must prove to the court’s satisfaction that he or she is entitled to a cartel-damage claim, and specify the documents that shall be produced as exactly as possible on the basis of the facts accessible with reasonable effort. A defendant must show that a cartel damage litigation is pending against him or her and also sufficiently specify the documents.

The judge concerned will have to ensure that disclosure orders are proportionate and that confidential information is protected. He or she must also balance a party’s interest in favour of disclosure against the other party’s interest in keeping the documents undisclosed. Thus the court must pay particular attention to the protection of company secrets as well as to the scope and content of the documents demanded, and the costs of the production.

\(^6\) Docket number XI ZR 277/05.

\(^7\) Docket number X ZR 114/03.
Further, specific documents such as leniency statements and settlement documents shall not be disclosed, and the opposing party may deny the production of documents if it is entitled to a statutory right to refuse testimony.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation
German corporations increasingly accept out-of-court means of dispute resolution such as arbitration, mediation and conciliation.

ii Arbitration
The rules governing arbitration proceedings in Germany are contained in the Tenth Book of the Code of Civil Procedure. To promote domestic and international arbitration, the German legislator essentially incorporated the provisions of the UNCITRAL Model Law into the Code of Civil Procedure. Consequently, the same set of rules governs proceedings in Germany as in any other major arbitration venue around the globe.

The following arbitration-friendly features of German law are noteworthy.

a Arbitrability extends to any domestic or foreign dispute unless it concerns residential lease agreements or matters that are not at the parties’ disposal (e.g., marital, child custody or guardianship matters).

b Certain statutory presumptions facilitate the fulfilment of the form requirements for arbitration agreements in commercial transactions.

c Before the constitution of an arbitral tribunal, the parties may obtain a binding decision by a state court regarding the admissibility of arbitral proceedings.

d If the arbitration agreement places one party at a disadvantage regarding the composition of the arbitral tribunal, that party may request that a state court appoint the arbitrator regardless of what the arbitration agreement stipulates.

e If the parties have not designated the substantive law applicable to the dispute, the tribunal must apply the law of the country that is most closely connected with the subject matter of the dispute.

f Assistance by state courts (e.g., by ordering interim measures) is not restricted by the principle of territoriality and, in addition to the taking of evidence, extends to ‘other judicial acts’ that the arbitral tribunal is not authorised to take (e.g., service of process).

g Domestic arbitral awards, namely awards rendered in Germany, have the same effect between the parties as a final and binding judgment of a state court.

h Arbitral tribunals must decide on the allocation of the costs of the proceedings taking into account the circumstances of the case and the outcome of the proceedings.

i If an arbitral award is set aside by a state court, the arbitration agreement will continue to apply to the subject matter of the dispute unless the parties agree otherwise.

Germany is a signatory to various international agreements relating to arbitration: the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (the New York Convention); the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (the ICSID Convention); the European Convention on International Commercial Arbitration of
21 April 1961 (the 1961 European Convention); and the Protocol on Arbitration Clauses of 24 September 1923. In addition, Germany has concluded numerous bilateral treaties on international arbitration.

The principal arbitral institution in Germany is the Deutsche Institution für Schiedsgerichtsbarkeit (DIS), whose revised DIS Arbitration Rules of 1 March 2018 provide parties with a framework applicable to both national and international proceedings. The DIS also rendered a set of supplementary rules for expedited proceedings designed to enable the arbitral tribunal to issue an award within six to nine months. Such ‘fast-track’ proceedings are increasingly used in connection with M&A transactions, for example to determine whether a party may withdraw from the agreement under a material adverse change clause. The DIS also adopted supplementary rules for corporate law disputes to implement decisions of the Supreme Court confirming the arbitrability of disputes regarding the validity of shareholder resolutions.

Further arbitral institutions are the Schiedsgericht der Handelskammer Hamburg, the Waren-Verein der Hamburger Börse, the German Maritime Arbitration Association, the Schlichtungs- und Schiedsgerichtshof Deutscher Notare and the Deutsche Börse AG/Frankfurter Wertpapierbörse.

As in most countries, parties to arbitration proceedings in Germany may appeal an arbitral award on very limited grounds only. An appeal to a German state court against an award rendered abroad is not possible.

The reasons for setting aside an award are, in principle, limited to procedural irregularities. A court may not review the award on its substance. The procedural irregularities that may form the basis of setting-aside procedures correspond to those set out in the UNCITRAL Model Law: invalidity of the arbitration agreement, violation of due process, lack of subject-matter jurisdiction or the improper composition of the tribunal, and non-arbitrability of the subject matter. In addition, the appellant may base a request on the violation of public policy.

The recognition and enforcement of foreign arbitral awards is governed by the New York Convention. In addition, bilateral and multilateral treaties apply if they are more favourable to the applicant. In 2010, the Supreme Court held that, according to the principle of most-favoured treatment provided for in the New York Convention, German courts must enforce a foreign arbitral award if the underlying arbitration agreement meets the formal requirements under German law (but not those provided for in the New York Convention).8

There is a clear trend towards arbitration in Germany, in particular in complex and international cases requiring a highly skilled tribunal with particular knowledge of foreign languages and law as well as of the subject matter of the dispute. Its arbitration-friendly legal framework and the increasingly recognised competence and effectiveness of its arbitral institutions makes Germany an attractive place for arbitration, even for those who are less familiar with the German language or legal system. The Supreme Court has furthered this development through several rulings reinforcing the independence and effectiveness of arbitral proceedings in Germany. According to the statistics of the DIS, the number of proceedings administered per year has more than trebled from 1998 to 2015 and rose to 160 cases in 2017.

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8 Docket number III ZB 69/09.
iii  Mediation

The Mediation Act of 2012 transforms Directive No. 2008/52/EG into German law. The Act is confined to fundamental provisions, so that the mediator is free to organise the mediation proceedings at her or his discretion (unless provided for otherwise by the parties). The Act defines mediation as a confidential and structured procedure in which the parties, assisted by one or several mediators, voluntarily and on their own responsibility seek an amicable resolution of their dispute. It contains provisions aimed at ensuring the independence and impartiality of the mediator as well as the confidentiality of the mediation.

Provisions regarding the enforcement of agreements achieved in mediation proceedings were included in earlier drafts but not included in the Act. Given the limited scope of the Act, it is doubtful that it will have the positive impact on the acceptance of mediation as a means of dispute resolution expected by many proponents of the earlier, more ambitious bill.

The DIS Mediation Rules correspond to international standards and provide a detailed and comprehensive framework for mediation proceedings. Several other national and regional institutions have also adopted mediation rules, for example the Bundesverband Mediation in Wirtschaft und Arbeitswelt, the European Institute for Conflict Management, the Centrale für Mediation and several local chambers of commerce. The European Institute for Conflict Management has acquired a leading position in the field of business mediation in Germany.

In recent years, corporations and individuals alike have increasingly accepted mediation as a means of resolving disputes. Notwithstanding its rising acceptance, mediation still plays a relatively small role. The reason may lie within the court system. As described above, judges are obliged to initiate conciliation hearings prior to regular hearings and to foster amicable solutions at all stages of the court proceedings. Thus, the incentive to take recourse to alternative forms of dispute resolution outside the courtroom is small.

The Introductory Law to the Code of Civil Procedure authorises the federal states to require obligatory mediation procedures for certain types of claims (e.g., claims of up to €750, disputes between neighbours) as a prerequisite for access to state courts. Some federal states have made use of this option, and the results vary as to their success.

iv  Other forms of alternative dispute resolution

The other forms of alternative dispute resolution (ADR) available in Germany are expert determinations and dispute resolution boards (DRBs).

Parties commonly resort to expert determinations for disputes regarding technical or accounting questions, for example in connection with the determination of the purchase price in M&A transactions. They typically request that the expert produces a written opinion which may, depending on the parties’ determination, be either binding or non-binding.

DRBs are particularly popular in the field of construction law. They are project-specific, stand-by dispute resolution mechanisms established by contract between the parties to avoid the escalation of disputes. Although the mechanism has proved very successful in practice, there are no specific regulations in Germany.

The 2013 EU Directive on consumer ADR and the regulation on consumer online dispute resolution (ODR) are aimed at providing consumers and traders with a simplified, quick, low-cost, out-of-court procedure to settle their disputes. The directive has been directly applicable in the EU Member States since January 2016 and was implemented into German law in February 2016.
The past year has brought fundamental innovations, especially in the area of collective redress in Germany. With the new law on collective redress for consumers, the German legislator implemented a prestigious project of the grand coalition. Seldom has a law gone through the legislative process at such speed – accompanied by a lot of criticism in principle and in detail. The law replicates in large parts the framework for the model procedure for claims arising from capital markets disputes. Unlike a traditional class action lawsuit, a claim cannot be asserted by a single claimant on behalf of every class member. Instead, legal and factual issues relevant to all of the claims are to be addressed and ruled on in a judicial model proceeding. Thereby, the assertion of the individual claim remains the responsibility of each individual claimant, but has been facilitated by the new law.

The new law offers further advantages to consumers – in order to incentivise consumers to participate in the model declaratory action and to reduce the number of parallel litigation proceedings, the filing of a model declaratory action suspends the statute of limitations with respect to consumer claims that have been validly registered with the claims register. Furthermore, registration is free of charge and comes without the risks generally associated with litigation. Consumers who have registered their claims can wait for the outcome of the model proceedings and then decide whether or not to pursue their individual claims in court.

The new law only allows recognised and particularly qualified consumer protection associations to initiate a model procedure. The aim is to ensure that model actions are initiated only in the interests of affected consumers and to prevent the emergence of a ‘claim industry’.

The new law will have to prove itself in the next year and it remains to be seen whether it will live up to the expectations of many who have long argued in favour of an efficient means of collective redress in Germany.
I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

Gibraltar is a British overseas territory and can generally be described as an English common law jurisdiction.

The territory of Gibraltar has its own legislature, known as the Gibraltar Parliament, whose powers are governed by the Constitution of Gibraltar 2006 (the Constitution), which empowers it to make laws subject to the Constitution. The Constitution, *inter alia*, enshrines the fundamental rights and freedoms of the individual.

Section 2(1) of the English Law (Application) Act (the Act) applies the common law and rules of equity to Gibraltar insofar as they are applicable to local circumstances.

Statutory law in Gibraltar mainly comprises laws passed by the Gibraltar Parliament, but certain English statutes also apply.

Gibraltar is part of the European Union through the United Kingdom’s membership on the basis that it is a European territory for whose external affairs the United Kingdom is responsible. European directives are transcribed into Gibraltar law by local acts of parliament. Pursuant to the European Communities Act EU legislation and decisions can have direct effect in Gibraltar. Notwithstanding the United Kingdom’s and Gibraltar’s withdrawal from the European Union, the Government of Gibraltar has established a Withdrawal Bill Team in preparing Gibraltar’s legislation for Exit Day. A Gibraltar Bill, equivalent to the UK’s European Union (Withdrawal) Act 2018, is at an advanced drafting stage. This work has required, among other things, the examination of over 20,000 pieces of EU legislation. From this, around 1,600 have been identified as requiring further scrutiny and possible amendment.

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1 Stephen V Catania is a partner at Attias & Levy.
2 Section 32 of the Constitution.
3 Sections 1 to 18 of the Constitution.
4 The English statutes that apply to Gibraltar are those listed in the Schedule to the Act, and any other statute extended to Gibraltar by Order in Council or by express provision in the Act – see Section 3(1) English Law (Application) Act.
5 Sections 3 and 4.
Civil cases are commenced in the Supreme Court of Gibraltar, whose powers are largely contained in the Supreme Court Act, and importantly, Section 12 of the Act provides that the Supreme Court shall possess and exercise all the jurisdiction, powers and authorities of the High Court of Justice in England.7

The Supreme Court does not have any formal divisions. There are currently three Supreme Court judges – the Chief Justice and two puisne judges – one of whom hears predominantly family cases, and the other two judges hear a wide variety of civil and sometimes criminal cases. English judges sometimes join the Gibraltar bench to hear specific cases. Additionally, the Registrar, as an acting puisne judge, also hears cases in the Supreme Court, primarily in smaller civil disputes.

Appeals from the Supreme Court lie with the Court of Appeal for Gibraltar, whose powers and procedure are governed by the Court of Appeal Act and the Court of Appeal Rules 2004.

The Court of Appeal is composed of recently retired English Court of Appeal judges, some of whom may still sit in the English Court of Appeal on an ad hoc basis. The Court usually sits twice a year, usually in February and September, but may sit on other occasions as required.

Decisions from the Court of Appeal may be appealed to Her Majesty's Judicial Committee of the Privy Council.8

Court proceedings are the principal method of dispute resolution, even though there are a number of English-qualified mediators in Gibraltar. However, in recent years, a number of cases have been settled via mediation.

The Gibraltar Bar is mainly constituted by English-qualified barristers and solicitors who are then called to the Bar locally. The profession is a fused profession, whereby barristers can additionally act as solicitors and vice versa. It is not infrequent to call English specialist counsel and Queen's Counsel to the Gibraltar Bar to appear in the Gibraltar courts for specific cases.

II THE YEAR IN REVIEW

During 2018, the Court of Appeal decided two long-standing cases; the Jyske case and the RBS case. Both these decisions relate to accessory liability of banks connected with the Marrache fraud.9

In the Jyske10 case, the claimants were the joint liquidators of Marrache & Co who were appointed as representatives on behalf of 16 former clients who were defrauded by the firm. They were also acting in their capacity as trustees of the trust monies stolen by the Marrache brothers from those clients. The claimant sought to recover some of their losses from Jyske

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7 It was held in the case of Jones v. Simoni [SC] 1995-96 Gib LR 45 that Section 12 was not restricted by the English Law (Application) Act, or the Interpretation and General Clauses Act, and was not confined to procedural matters.
8 See Section 66 of the Constitution and Section 22A of the Court of Appeal Act.
9 By way of background, R v. Marrache (2013/2014 GibLR 540) was the longest criminal trial ever in Gibraltar's history. Grigson J (Ag) found the Marrache brothers guilty of conspiracy to defraud. The brothers had stolen from the client account of the law firm Marrache & Co and the total deficit of the firm was approximately £30 million.
10 Edgar Lavarello and Adrian Hyde (as representatives of certain clients of the firm of Marrache & Co and/or as trustees) v. Jyske Bank (Gibraltar) Ltd (Civil Appeal Nos 6 and 7 of 2017) available at http://gcs.gov.gi/
who were one of the banks with whom Marrache & Co had office and client accounts. Recovery was sought on the basis of allegations of dishonest assistance and knowing receipt of some of the stolen monies. The key issue was whether Jyske was dishonest. In May 2017, after a 12-day trial, Mr Justice Jack made an order against Jyske for what the judge found to be its dishonest assistance in fraudulent breaches of trust and its knowing receipt of part of the fruits of those breaches. The case came down to one issue of fact: did an account manager at Jyske know or suspect, at any time between 2003 and 2009, that the brothers were stealing money from their clients or were stealing money from one client to pay another?

In its appeal, Jyske argued against the judge's findings of dishonesty against the account manager. The Court of Appeal recognised that such challenges are difficult to sustain, for reasons given in judgments of high authority, but that they can succeed where an appellant can identify material errors of approach by the trial judge.

The Court of Appeal found inter alia that the judge should have taken Jyske's expert and other banking practice evidence into account, in particular the evidence as to how an account manager would have been expected to process instructions from a solicitor affecting their own client account. The Court of Appeal further determined that the account manager was not to be judged by reference to the understanding and experience of a lawyer with the sort of specialist experience the judge had, but was instead to be judged by reference to the understanding and experience of a reasonable banker. It concluded that the judge's refusal to have regard to the expert and other banking evidence adduced by the bank was wrong and amounted to a material error by the judge. The Court of Appeal concluded that the judge's findings in relation to the client accounts were unfair; the judge's finding of perjury by the account manager was unjustified; and the judge's finding of deliberate dishonesty by Mr Bishop in relation to two bonds was unjustified, wrong, and seriously so. Accordingly, the Court of Appeal allowed the bank's appeal and set aside the order of Mr Justice Jack and ordered a retrial of the matter.

In the RBS case, the claim was brought on behalf of a trustee and private individual. Again, the key issue was whether RBS was dishonest or not. In August 2017, made after an 11-day trial, Mr Justice Jack ordered that RBS compensate the claimants for what he held was RBS’ dishonest assistance in fraudulent breaches of trust involving the misappropriation of the respondents’ money, and its knowing receipt of part of that money. Again, the case came down to one issue of fact: did an account manager at RBS dishonestly assist the Marrache brothers to steal from the client accounts? The judge found he did.

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11 Paragraph 111.
12 Paragraph 110.
13 Paragraph 112.
14 Paragraph 163.
15 Paragraph 165.
16 Paragraph 166.
17 Paragraph 193.
Once again, the Court of Appeal recognised that there are cases where appeals on fact will succeed and that success will ordinarily require the appellant to show a material error of approach by the judge, for example the suffering or committing of a procedural error rendering the trial unfair; or demonstrable errors underlying the basis on which he made the challenged findings.¹⁹

The Court of Appeal overturned Mr Justice Jack’s order that RBS dishonestly assisted the Marrache brothers. The Court of Appeal found, inter alia, that his findings of dishonesty against the account manager were unjustified and should not have been made.²⁰ Unlike the Jyske case, the Court could not see any proper basis upon which another judge should be asked to retry the same issue.²¹

III  COURT PROCEDURE

i  Overview of court procedure

The English Civil Procedure Rules (CPR) largely govern procedure in the Supreme Court. The CPR apply by default when there are no local rules and are also displaced when specific rules formerly in force in England are retained in Gibraltar.²²

Service of documents within the jurisdiction is also covered by local rules in conjunction with the CPR.²³

Civil cases may be commenced by the lodging of a claim form in the Supreme Court Registry pursuant to the CPR, application to appoint a liquidator or divorce petition.

Cases that are fully pleaded and proceed to a full trial may take between one and two years to get to trial.

Interlocutory applications for relatively non-urgent lengthy matters are usually given return dates six to eight weeks after the application is lodged.

The Supreme Court normally makes time to hear very urgent applications such as freezing orders and will usually grant a hearing date almost immediately upon the lodging of the application.

Applications to appoint a liquidator are usually given return dates of around two months from their lodging with the Supreme Court Registry.

ii  Class actions

Gibraltar law and procedure on class actions are the same as in England given that the matter is governed by the Part 19 of the CPR.

iii  Representation in proceedings

Any adult who is not suffering from a disability may commence proceedings and represent him or herself in court in civil proceedings. The Supreme Court, while not encouraging litigants in person, normally shows understanding to such litigants.

¹⁹ Paragraph 109.
²⁰ Paragraph 214.
²¹ Paragraph 213.
²² See Section 15 of the Supreme Court Act, Rule 6(1) and (2) of the Supreme Court Rules 2000 (SCR).
²³ Rule 3 of the SCR.
iv Service out of the jurisdiction

The Civil Jurisdiction and Judgments Act 1993 applies the Brussels Convention\(^{24}\) and the Lugano Convention\(^{25}\) to Gibraltar. The CPR applies fully to proceedings under the Act and the position as regards law and procedure is therefore much the same as in England and Wales, with a few exceptions.

Generally, with regard to service out of the jurisdiction, the matter is determined in two ways, depending on whether the Conventions apply to the case.

If the Brussels or Lugano Conventions apply, a defendant may be served outside the jurisdiction without the permission of the Court if the provisions of CPR 6.33 are met and a statement setting out the grounds relied on to serve outside the jurisdiction is filed and served with the claim form.

If the claim does not fall under the Brussels or Lugano Conventions, permission to serve a defendant outside the jurisdiction is required. The application for permission is made *ex parte* to the Supreme Court. Like in England and Wales the claimant must stipulate what the grounds of CPR 6BP.3 are that he or she relies on,\(^{26}\) and the claimant must also establish that the claim on its merits has a reasonable prospect of success.\(^{27}\)

Additionally, pursuant to CPR 6.37(3) the claimant must establish that Gibraltar is the proper place in which to bring the claim, which the Court will determine in accordance with the English common law principles of *forum conveniens*.

v Enforcement of foreign judgments

In general terms there are four main ways to enforce foreign judgments in Gibraltar. These are as follows.

*The Brussels and Lugano Conventions*

Judgments can be enforced pursuant to the provisions of the Conventions as applied to Gibraltar by the Civil Jurisdictions and Judgments Act 1993 (CJJA) upon their registration in Gibraltar. Procedure is governed by CPR 74.3, which requires an application to be made to the Supreme Court for the registration of a judgment of a contracting state; the application may be made without notice. The grounds on which the registration of a judgment can be challenged are very limited and are generally contained in Articles 27 and 28 of the Brussels Convention.

*The Recast Brussels Regulation*

The Recast Brussels Regulation was implemented in Gibraltar and came into operation on 10 January 2015 by virtue of Legal Notice 3 of 2015, which amended the CJJA in order to implement the said regulation.\(^{28}\) Article 36 of the Recast Brussels Regulation provides for automatic recognition resulting in no requirement for a special procedure. The grounds

\(^{24}\) Section 4(1).
\(^{25}\) Section 4(3).
\(^{26}\) CPR 6.37(1)(a).
\(^{27}\) CPR 6.37 (1)(b).
\(^{28}\) The preamble to LN 3 of 2015, made by the Minister for Justice reads 'In exercise of the powers conferred upon it by Section 23(g) (ii) of the Interpretation and General Clauses Act, and in order to implement Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012
for the refusal to recognise and enforce a judgment are contained in Articles 45 and 46. Article 37 of the Recast Brussels Regulation provides the documentation that the applicant must produce for recognition of the judgment. Article 42 of the Recast Brussels Regulation provides the documentation that the applicant must produce for enforcement of the judgment. Notwithstanding the implementation of the Recast Brussels Regulation, the Brussels Regulation (44/2001) still continues to apply to judgments given in legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded before 10 January 2015 that fall within the scope of that Regulation.29

Other statutes
Judgments may also be registered under the Judgments (Reciprocal Enforcement) Act 1935, which closely follows the 1933 English act of the same name. This Act applies in relation to judgments of various Commonwealth countries including the United Kingdom. These countries have entered into reciprocal enforcement agreements with Gibraltar. The procedure to be followed to register judgments and the grounds to challenge the registration of a judgment are, broadly speaking, similar to those under the CJJA.

Common law
Judgments from all other jurisdictions not covered by statute may be enforced at common law in the same way they are enforced in England and Wales. It requires the claimant to commence a fresh action to recover the judgment debt.

vi Assistance to foreign courts
The Gibraltar courts will assist foreign courts or tribunals in both civil and criminal matters. There are four relevant Gibraltar statutes: the Evidence Act, the Drug Trafficking Offences Act, the Mutual Legal Assistance (Schengen Convention) Act and the Mutual Legal Assistance (International) Act.

The Evidence Act includes procedures for the obtaining of evidence in Gibraltar to assist foreign civil and criminal proceedings. The process is begun by or on behalf of a foreign court or tribunal by way of letters of request and in civil (but not criminal) cases proceedings do not necessarily need to have been instituted in the foreign court, although grounds must be shown that civil proceedings are contemplated. The Supreme Court of Gibraltar’s powers include making orders for the provision of oral or written testimony and the production of documents.

In relation to drug trafficking offences, the Gibraltar Drug Trafficking Offences Act confers upon Gibraltar’s Attorney General the power to nominate a Gibraltar court to receive evidence (including documents) upon a letter of request being issued by a foreign court or tribunal exercising jurisdiction in a Convention state, a state to which the Vienna Convention on jurisdiction and the recognition and enforcement of judgment in civil and commercial matters (recast) the Government has made the following Regulations.’ Regulations were then set out in the legal notice effecting amendments to the CJJA to implement the Recast Brussels Regulation.

29 Article 66.3 of the Recast Brussels Regulation. This has been given effect through Regulation 4 of the Civil Jurisdiction and Judgments Act 1993 (Amendment) Regulations 2015.
has been extended or a country that appears to have the function of making such requests. Requests must be in connection with criminal proceedings or investigations in respect of offences of drug trafficking.

The Mutual Legal Assistance (European Union) Act and the Mutual Legal Assistance (International) Act both concern only criminal proceedings; the former enables evidence to be taken in connection with criminal proceedings or investigations in an EU state and the latter in non-EU states. They empower Gibraltar’s Attorney General, upon receipt of a letter of request from a foreign state to nominate a Gibraltar court to receive evidence. The appointed court also has the power to direct that a search warrant be applied for.

vii Access to court files
The Supreme Court Registry pursuant to CPR 5.4(1) keeps a publicly accessible register of claims, which any person may inspect upon payment of the prescribed fee. As in England and Wales, members of the public may obtain copies of a statement of case but not of any documents filed with it. They may also obtain copies of a judgment or order made in public without permission once the defendants have filed acknowledgments of service. Any wider access to records requires the permission of the court.

viii Litigation funding
Third-party funding, the provision of funds by non-parties to a suit to fund litigation, is not illegal in Gibraltar, though if challenged the validity of funding arrangements is open to judicial scrutiny on the same grounds as in England and Wales.

This is so since Section 41 of the Contract and Tort Act, which mirrors Section 14 of the UK Criminal Law Act 1967, abolished criminal and civil liability for champerty (i.e., funding litigation for a share of any proceeds) and for maintenance (the provision of financial support for litigation, by a non-party); however, champerty and maintenance are retained as defences in contract, in the sense that such actions may render a contract void or voidable as being contrary to public policy or illegal.

Conditional fee agreements are enforceable in Gibraltar to the same extent as in England and Wales.

IV LEGAL PRACTICE
i Conflicts of interest and Chinese walls
In Gibraltar conflicts of interest are governed by the rules contained in the Code of Conduct of the Bar of England and Wales and the Solicitor’s Code of Conduct 2011 by virtue of Section 33 of the Supreme Court Act. The Code of Conduct is implemented through the Barristers and Solicitors Rules, which govern the making of any complaints and disciplinary proceedings that may arise.

30 CPR 5.4(2).
31 CPR 5.4C(2).
32 In the matter of an application to the Chief Justice pursuant to the Supreme Court Rules, Rule 2 [2001-02 Gib LR 329].
Given that the disciplinary rules, as well as the case law in relation to client confidentiality, are the same as in England and Wales, information barriers may be set up by firms to deal with conflicts on the same terms and conditions as in England.

ii Money laundering, proceeds of crime and funds related to terrorism

Gibraltar has fully implemented the Third Money Laundering Directive (the Directive),\(^{33}\) the purpose of which is to provide a common EU basis for implementing the Financial Action Task Force 2003 Recommendations on Money Laundering. Gibraltar’s Crime (Money Laundering and Proceeds) Act 2007 (the Money Laundering Act)\(^{34}\) is the statute by which the Directive was implemented. However, the Proceeds of Crime Act 2015 (POCA) commenced in January 2016, which consolidated the legislation on money laundering in Gibraltar and created a single statutory regime, thus repealing the Money Laundering Act, dealing with the recovery of money from drugs offences in the same manner as the recovery of money from other criminal conduct. It also introduced a new procedure enabling the seizure and confiscation of assets arising from any criminal conduct, even where no criminal proceedings are brought against anyone, in a manner similar to those regimes that exist in other jurisdictions such as the United Kingdom.

POCA has created a number of money laundering offences. A person commits an offence under POCA if he or she:

\(a\) enters into or is otherwise concerned in an arrangement whereby:

- the retention or control by or on behalf of another (A) of A’s proceeds of criminal conduct is facilitated (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise); or
- A’s proceeds of criminal conduct are used to secure that funds are placed at A’s disposal or are used for A’s benefit to acquire property by way of investment, knowing or suspecting that A is a person who is or has been engaged in criminal conduct;

\(b\) knowing that any property is, or in whole or in part directly or indirectly represents, another person’s proceeds of criminal conduct, he or she acquires or uses that property or has possession of it;

\(c\) conceals or disguises any property that is, or in whole or in part directly or indirectly represents, his or her proceeds of criminal conduct; or converts or transfers that property or removes it from the jurisdiction, for the purpose of avoiding prosecution for an offence under POCA or the making or enforcement of a confiscation order;

\(d\) he or she discloses any matter within subsection (2);\(^{35}\) and the information on which the disclosure is based came to him or her in the course of a business or activity to which Section 9(1)\(^{36}\) applies; and

\(e\) makes a disclosure concerning a state or territory that is prohibited.

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\(^{33}\) 2005/60/EC.

\(^{34}\) Formerly known as the Criminal Justice Act.

\(^{35}\) Section 5(2) of POCA:

_The matters are (a) that either he or another person has made a disclosure under this Part (i) to a police officer; (ii) to a customs officer; (iii) the appropriate person under Section 28; or (iv) to the GFIU, of information that came to him in the course of a business or activity listed in Section 9(1); or (b) that an investigation into allegations that an offence under this Part has been committed, is being contemplated or is being carried out._

\(^{36}\) Relevant Financial Business is defined in Section 9(1) of POCA: www.gibraltarlaws.gov.gi/ articles/2015-22o.pdf.
In addition, the expression ‘money laundering’ also includes any act that constitutes an offence, under Sections 5, 6, 7 or 8 of the Terrorism Act 2005 and any act that constitutes an offence under any other enactment that applies in Gibraltar and that relates to terrorism or the financing of terrorism.

Under POCA, responsibility for preventing and detecting money laundering or terrorist financing lies with relevant financial businesses, including entities licensed by the Financial Services Commission and other firms such as estate agents, tax advisers, banks, notaries and other independent legal professionals when they participate, by assisting in the planning or execution of transactions for their client, in matters concerning:

- buying and selling real property or business entities;
- managing client money, securities or other assets;
- opening or managing a bank, savings or securities accounts; and
- acting on behalf of and for their client in any financial or real estate transaction.

Firms must report or disclose suspicious transactions if they have reasonable grounds for knowing of or suspecting money laundering. POCA sets out standards that firms must meet relating to customer identification, the adoption of policies and procedures to deter and detect money laundering and terrorist financing, record-keeping and the training of staff.

iii Data protection

Data protection, and its governance, is supervised by the Gibraltar Regulatory Authority (GRA). As a statutory body, it is responsible for regulating data protection, the electronic communications sector, the gambling sector and, as from 2012, broadcasting in Gibraltar.

Pursuant to the principles underlined in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995, the GRA is responsible for the implementation of data protection law and protection of individuals with regard to the handling of personal data and on the free movement of such data.

The Data Protection Commissioner, through the GRA, has ensured that a system is in place that monitors the executory function of the Data Protection Act.

The GRA works closely with its counterparts abroad, and through its website provides comprehensive advice on the implementation of the law in the workplace. Further, the complaints procedure in place allows for individuals, as well as corporations, to make data protection-related complaints to an extent such that it vastly extends the GRA’s continued responsibility to monitor the implementation of the law by corporations and individuals.

The basic principles that must be applied by businesses in relation to the handling of data are:

- the data must be obtained and processed fairly;
- it must only be used in relation to one or more specified and lawful purposes;
- data must be stored confidentially and only released to third parties with prior written consent from the individual permitting such release to third parties;
- it is a requirement that it be stored in a safe and secure manner;
- the data must be accurate and up to date;
- the data that is obtained must be exact and not excessive in consideration of the purpose for which it is held;

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38 Data Protection Act 2004.
the data must be retained only for the period required for the specified purpose;

b copies of a client’s personal data must be supplied to them on the client’s request; and

c if requesting data on behalf of a client, this must be requested in writing together with written permission from the client permitting collection or receipt of that data.

Significant changes have entered the data protection framework in the form of the EU General Data Protection Regulation (2016/679) (GDPR). GDPR emphasises transparency, security and accountability by data controllers and processors, and imposes a significant number of additional obligations on them. The headline changes coming as a result of GDRP are, _inter alia_, as follows:

a data processors will be subject to specific direct legal obligations (rather than contractual only), including maintaining records of personal data and processing activities, and will have significantly more legal liability if they are responsible for a breach;

b data subjects will have the right to sue controllers and processors directly for material and non-material damage;

c the definition of ‘personal data’ in GDPR is more detailed and includes information such as online identifiers (e.g., IP addresses, device identifier tags and location identifier tags);

d GDPR requires further information to be provided to individuals before collecting data, including the legal basis for processing, retention periods and the right to complain;

e GDPR has much stricter requirements for using consent as a ground for legally processing data; and

f GDPR makes notifying the data protection commissioner of any breaches mandatory.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

English common law is applied to the issue of privilege and in broad terms is divided between documents used or prepared when providing legal advice and those prepared or used in litigation or contemplated litigation.

ii Production of documents

The Civil Procedure Rules of England and Wales apply to Gibraltar by virtue of Section 38A of the Supreme Court Act 1960. As such, the rules governing the production of documents in litigated civil cases in Gibraltar is contained in these Civil Procedure Rules, more specifically Part 31, and mirrors the procedure followed in England and Wales.

VI ALTERNATIVES TO LITIGATION

i Arbitration

Arbitration in Gibraltar is governed by the Arbitration Act 1895, which has undergone several amendments since its initial commencement. Schedule 1 contains certain provisions that are to be implied in all arbitration agreements, unless the arbitration agreement contains a provision expressly stating the contrary. These provisions are general in their nature and relate to the appointment of arbitrators, the nature of the award and the costs therein.
Part 1 of the Act deals with the general provisions that would generally apply to most arbitration agreements. Sections worth noting include:

a Section 3: makes an arbitration agreement irrevocable without the leave of the court and serves to give the agreement the same effect as an order of the court;

b Section 6: the provisions contained in Schedule 1 are deemed to be implied in all arbitration agreements unless the contrary is expressly stated within the agreement;

c Section 8: grants the courts powers to stay any proceedings to which there is an ongoing arbitration agreement so as to facilitate the arbitration;

d Section 21: this section allows for an arbitration award to be enforced in the same manner as a judgment or order, albeit with the leave of the court, and allows for judgment to be entered in terms of the actual award itself; and

e Section 22: allows for the award to carry interest equal to that of a judgment debt.

The Arbitration Act 1895 gives the New York Convention effect via Part IV, which contains the provisions for awards under the New York Convention. Section 48 allows for the courts to stay any ongoing court proceedings in relation to agreements that are not ‘domestic arbitration agreements’ and it serves as the equivalent of Section 8 to all agreements deemed not to be ‘domestic’. However, the factors the court may take into account in deciding whether to stay the proceedings differ from Section 8 in that they focus more on whether the agreement is capable of being performed rather than whether the applicant is ‘ready and willing to do all things necessary to the proper conduct of the arbitration’.

Part IV also allows the courts to enforce arbitration awards made pursuant to agreements outside Gibraltar, albeit only among states that are a party to the New York Convention (Section 50). These are enforced in the same manner as those under Section 21 and carry equal weight and Section 51 states what must be produced by a party seeking to enforce such an award. Section 52 states the grounds upon which the courts may refuse to enforce an award under the New York Convention and these are self-explanatory in nature.

ii Mediation

In Gibraltar, there are no rules that make this course of action mandatory or that provide definitive guidelines on how mediations are to be conducted. Parties are generally free to agree between themselves all aspects of the mediation process as in England and Wales. Under the CPR mediation is encouraged; however, resorting to mediation is becoming more commonplace in Gibraltar.

VII OUTLOOK AND CONCLUSIONS

Formal methods of alternative dispute resolution have not taken root in Gibraltar, despite much encouragement by the judiciary after the CPR were introduced locally in 2001; however, the Gibraltar Bar has a long tradition of following a process of airing disputes informally and without prejudice between lawyers acting for opposing parties, which leads to many actions being settled before proceedings are issued or before trial.

In general, litigation in Gibraltar, as it is a small jurisdiction, is extremely varied and most of its experienced practitioners have very wide fields of practice and competence.
I  INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

Although Hong Kong is a special administrative region of the People’s Republic of China (PRC), its legal system operates independently and there are very few similarities between PRC law and Hong Kong law. Hong Kong law is based on principles of common law, similar to those that apply in England, Australia and other Commonwealth jurisdictions, and this is formally acknowledged by the Basic Law (Hong Kong’s mini Constitution). The policy of ‘one country, two systems’ is constitutionally guaranteed until 2047.²

There are two levels of court dealing with civil claims of substance³ at first instance: the District Court (which has jurisdiction over claims of up to HK$3 million)⁴ and the Court of First Instance (CFI), which has unlimited jurisdiction.

The Court of Appeal (CA) hears appeals from both the CFI and the District Court. It also hears appeals from the Lands Tribunal as well as other statutory bodies. The Court of Final Appeal (CFA) is the highest court in Hong Kong and is made up of local permanent judges and distinguished judges from (currently) England and Australia who serve as non-permanent judges. It hears appeals from the CA and the CFI.

There are a range of specialist tribunals established under statute, such as the Lands Tribunal, which deals with cases concerning real property; the Labour Tribunal, which deals with employment matters; and the Competition Tribunal, which deals with cases connected with competition law in Hong Kong.

Hong Kong is a major centre for international arbitration. There is a sophisticated statutory regime in place to support arbitrations (see Section VI). Mediation has also become widely accepted in Hong Kong (see Section VI).

II  THE YEAR IN REVIEW

The moderate growth of the Hong Kong economy continued in 2018, supported by growth in private consumption expenditure, export of goods, inbound tourism and retail sales. Although the outlook for Hong Kong’s economy remains broadly positive, global trends – such as the rising tide of US protectionism, the PRC–US trade war and a period of transition in the EU – have all combined to introduce inherent uncertainty.

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1 Mark Hughes is a partner and Kevin Warburton is a counsel at Slaughter and May.
2 Article 5 of the Basic Law of the Hong Kong Special Administrative Region.
3 Claims involving monetary value of over HK$50,000.
4 The amendment came into effect on 3 December 2018.
Hong Kong deservedly retains a reputation for a relatively \textit{laissez-faire} style of capitalism. However, there is now a perceptible legislative trend toward what might be considered a more socially responsible development model. The coming into effect of the Competition Ordinance on 14 December 2015, aiming to create a fairer marketplace for Hong Kong consumers by prohibiting certain anticompetitive conduct, is one example of the efforts being made by the Hong Kong government to achieve its stated objective of creating a fairer and more balanced society.

Regulators have maintained their prominent position in newspaper headlines in Hong Kong. On 3 May 2016, Mr Thomas Atkinson, the former Director of the Enforcement Branch of Canada’s Ontario Securities Commission, was appointed Executive Director of Enforcement to the Securities and Future Commission (SFC). Under his tenure, the SFC signed a memorandum of understanding with the Hong Kong Police on 25 August 2017 for stronger cooperation in combating financial crime. In November 2018, the SFC and the Independent Commission Against Corruption (ICAC) for the first time jointly raided offices of suspect companies. In the quarter ending 30 June 2018, the SFC alone started 61 investigations, a decrease from the 89 it began in the corresponding quarter of the previous year, but still indicative of the SFC’s rigour in relation to enforcement. In the same period, the SFC disciplined five licensed corporations and three representatives, resulting in total fines of HK$83.5 million. In its 2017–2018 Annual Report, the SFC continued to list corporate fraud and misbehaviour as a top enforcement priority area.

The ICAC has stayed in the headlines. In 2017, the ex-Chief Executive Donald Tsang was held liable for misconduct in public office and was sentenced to 20 months in prison. His sentence was later reduced to 12 months by the CA. His application for leave to appeal to the CFA was heard on 20 December 2018 (see Section II, below). On 31 August 2018, the ICAC charged a former Deputy Secretary for Economic Development and Labour and a former director of Hong Kong Express Airways with bribery and misconduct in public office in relation to a flats-swap deal.

Headlines in Hong Kong have continued to be dominated by constitutional law issues. On 17 August 2017, three pro-democracy activists Joshua Wong, Nathan Law and Alex Chow were sentenced to prison over their role in the Umbrella Movement protests that took place in 2014. The three young men were convicted on unlawful assembly charges. Initially, the trial magistrate sentenced Wong to 80 hours of community service, Law to 120 hours of community service, and Chow to a three-week suspended jail sentence. Subsequently, however, the Department of Justice requested a review of the sentences, arguing, among other things, that the sentences imposed failed to reflect the gravity of the offences, the culpability of the respondents and the fact that the respondents did not show genuine remorse for their actions. As a result, the CA sentenced the activists to between six and eight months’ imprisonment. On 6 February 2018, the CFA overturned the lower court’s decision and upheld the original non-custodian sentence. Nonetheless, the CFA endorsed the new guideline laid down by the CA to impose stricter sentences for large-scale unlawful assemblies involving violence. In November 2018, the trial began for the nine leaders, including the three founders, of the Umbrella Movement for various public nuisance offences. The trial lasted for four weeks and the court’s judgment is expected to come in April 2019.

Meanwhile, the joint border checkpoint with the PRC at West Kowloon Station, the Hong Kong terminal for the Guangzhou-Shenzhen-Hong Kong Express Rail Link, remains a focus of debate despite the opening of the railway on 23 September 2018. In June 2018, the Legislative Council (Legco) passed the heavily contested bill setting up a joint border
checkpoint with the PRC at the West Kowloon Station. The joint border checkpoint allows passengers travelling on the express rail to clear border checks for both Hong Kong and the PRC at a single location, thereby avoiding the need to clear the Hong Kong border check at the West Kowloon Station and the PRC border check at the Shenzhen Station–Shenzhen–Hong Kong border. The decision has been controversial as the arrangement means Chinese law will be enforced in Hong Kong.

A number of activists in Hong Kong have applied for judicial review against the constitutionality of the joint border checkpoint at West Kowloon Station, relying, for example, on Article 18 of the Basic Law of Hong Kong. The hearing was at the end of October, after which judgment was reserved.

i Regulatory enforcement

The SFC, as the independent non-government statutory body responsible for regulating the securities and futures markets in Hong Kong, has been continuing its high-profile campaign to pursue enforcement actions under both its criminal and civil jurisdictions.

On 28 June 2018, the SFC commenced proceedings in the Market Misconduct Tribunal (MMT) against Mr Li Kwok Cheong and Mr Li Han Chun, former chairman and chief executive officer of China Forestry Holdings Company Limited (China Forestry), respectively, for suspected disclosure of false or misleading information, which induced transactions in China Forestry's shares. The SFC alleged that China Forestry disclosed false or misleading information in relation to its financial performance. The SFC also alleged that the purported supporting documents were falsified and China Forestry had maintained a separate set of accounting records showing its true financial position, which had not been provided to its then auditors. The SFC commenced proceedings in the CFI in January 2017 but the proceedings have been stayed pending the outcome of the MMT proceedings.

On 12 August 2018, the CFA allowed the SFC’s appeal against the MMT findings that two former executives of Asia Telemedia Limited (ATML), Mr Charles Yiu Hoi Ying (Yiu) and Ms Marian Wong Nam (Wong), had not engaged in insider dealing. The MMT, upheld by the CA, had found that:

a the sole motivation of both Yiu and Wong to sell ATML shares was to seize the opportunity to sell at the surge prices; and

b they did not use the inside information since they believed that whatever threatened the share price of ATML stemming from the company’s problems would be resolved ‘behind closed doors’ in the future, and would not influence the market price of the shares.

The CFA, in a majority of four to one, set aside the decisions made by the lower court and the MMT and held that Yiu and Wong had failed to establish that they did not use inside information to secure profits. The CFA remitted the case back to the MMT to deal with sanctions.

In late October and early November 2016, respectively, two banks in Hong Kong announced that the SFC intended to take action in relation to their respective roles as

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5 Article 18 provides that ‘National laws shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to this Law . . . Laws listed in Annex III to this Law shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by this Law’. © 2019 Law Business Research Ltd
joint sponsors in certain initial public offerings in 2009. In January 2017, the SFC filed proceedings against the two banks, alleging market misconduct. Over the past two years, the SFC has reprimanded and fined three investment banks in Hong Kong, namely CCB International Capital Limited (HK$24 million), Citigroup Global Markets Asia Limited (Citigroup) (HK$57 million) and BOCOM International (Asia) Limited (HK$15 million), for failing to discharge their duties as sponsors in listing applications. A number of other related investigations continue.

In 2016, the SFC reprimanded and fined Moody’s Investors Service Hong Kong Limited (Moody’s) over its publication of a report entitled ‘Red Flags for Emerging-Market Companies: A Focus on China’, which was published on 11 July 2011 and claimed to identify risk factors of PRC-rated companies. The SFC concluded that in preparing and publishing the report, Moody’s failed to, *inter alia*, give sufficient explanations for the ‘red flags’ they assigned to companies and thus constructed a misleading picture of the companies and failed to properly ensure the accuracy of the red flags assigned to the companies. The Securities and Futures Appeals Tribunal subsequently affirmed the SFC’s conclusions and found that Moody’s had breached General Principles 1 and 2 of the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission, which requires that a licensed or registered person, such as Moody’s, should act honestly, fairly, and in the best interests of its clients and the integrity of the market in conducting its business activities. Moody’s subsequently appealed unsuccessfully against this determination to the CFA. In October 2017, the CA dismissed Moody’s application for leave to appeal the decision to the CFA. On 3 September 2018, the CFA dismissed Moody’s appeal, which brought an end to Moody’s challenge to the SFC’s jurisdiction to take disciplinary action against it in this matter.

**ii Disclosure of inside information**

The SFC has brought further proceedings in the MMT in respect of the disclosure obligations imposed on listed companies, which came into force under the SFO as Part XIVA on 1 January 2013.

In April 2018, the SFC commenced proceedings in the MMT against Fujikon Industrial Holdings Limited (Fujikon) for failing to disclose inside information as soon as reasonably practicable on discontinuing headphone production for one of Fujikon’s top customers. The SFC alleged that discontinuing the headphone production was specific information relating to Fujikon, price sensitive and not generally known to those who were accustomed to deal in Fujikon shares at the material time. The SFC also alleged that the senior management of Fujikon failed to take steps to cause the Board of Fujikon to disclose the inside information as soon as reasonably practicable after becoming aware of such information.

Similarly, in May 2018, the SFC commenced proceedings in the MMT against Magic Holdings International Limited (Magic) and its nine directors for failing to disclose inside information as soon as reasonably practicable on the potential acquisition of Magic’s issued shares by L’Oréal SA (L’Oréal), a French cosmetics group, in 2013. The SFC found that Magic and L’Oréal had several discussions in relation to L’Oréal’s proposal to acquire the shares of Magic since early March 2013 and even reached a preliminary agreement regarding the sale of all the issued shares of Magic during a meeting on 29 March 2013. Nevertheless, Magic only announced that L’Oréal had put forward a proposal to acquire all the issued
shares of Magic on 15 August 2013. The SFC alleged that Magic had failed to comply with the requirement of disclosing inside information when they had reached a preliminary agreement in late March.

iii  Competition Ordinance

The Competition Ordinance was passed on 14 June 2012 and came into full effect on 14 December 2015. Under the new regime, the Competition Commission (the Commission) is the main investigatory body. As at the end of August 2018, the Commission had received over 3,200 complaints and enquiries, 30 per cent of which related to alleged cartel conduct including market-sharing and price-fixing. The Competition Tribunal (the Tribunal) meanwhile has jurisdiction to hear cases brought before it by the Commission as well as private follow-on actions, and is armed with a wide range of powers including the power to grant injunctive relief.

On 23 March 2017, the Commission brought its first case before the Tribunal for alleged bid-rigging in a tender for the supply and installation of a new server by five information technology companies: Nutanix Hong Kong Limited, BT Hong Kong Limited, SiS International Limited, Innovix Distribution Limited and Tech-21 Systems Limited. Notably, the case was initially prompted by a complaint. In a strike-out hearing in November 2017, the Tribunal clarified the application of privilege against self-incrimination to companies, a decision with potential broader relevance to the conduct of interviews by regulators in Hong Kong. The presiding judge, Mr Justice Godfrey Lam (President of the Tribunal), held that statements made during interview are inadmissible only against the subject of compulsion, which is the person named on the interview notice, but not anyone else. The statements were therefore admissible against the defendant companies. Given the broad powers provided to the Commission by the Competition Ordinance to summon any person to attend an interview, the privilege against self-incrimination would appear to offer companies little (if any) protection in relation to statements made during such interviews.

On 6 September 2018, the Commission announced that it had, for the first time, brought proceedings against individuals in what was then its third case before the Tribunal. The case relates to alleged market-sharing and price-fixing by three construction companies in the provision of renovation services at a subsidised housing estate developed by the Hong Kong Housing Authority. In its associated press release, the Commission stated that ‘Companies cannot act on their own. Every corporate contravention involves individual wrongdoing. For that reason, to deter a company from engaging in cartel conduct, it is also necessary to deter the individuals through which the company acts. Individual pecuniary penalties and disqualification are necessary deterrents’.

December 2018 marks the third anniversary of the Competition Ordinance and the Competition Ordinance is currently being reviewed for its effectiveness by the government.

iv  Third-party funding in arbitration

On 14 June 2017, Legco passed the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016, allowing third-party funding in domestic arbitrations and work done in Hong Kong in association with foreign-seated arbitrations and mediations. The amendments remove the common law principles of maintenance and champerty in the context of arbitration and mediation.
There have been significant anti-corruption cases in recent years. The first case involves the former chief executive Donald Tsang Yam Kuen. Tsang was charged with misconduct in public office for failing to disclose his interests in a Shenzhen penthouse while he was in office and one count of bribery relating to renovations of the penthouse.

The ICAC alleged that between November 2010 and January 2012, Tsang failed to disclose his negotiations with a major shareholder of Wave Media Limited in respect of a lease for a residential property in Shenzhen while Wave Media Limited’s various licence applications were discussed and approved by the Executive Council. The ICAC further alleged that, between December 2010 and July 2011, Tsang failed to disclose his engagement of an architect to carry out interior design work at his personal residential property while referring for consideration for nomination this same architect under the Hong Kong Special Administrative Region (HKSAR) honours and awards system.

In February 2017, nine jurors, by a majority verdict of eight to one, concluded Tsang had deliberately concealed the negotiations with the major shareholder of Wave Media Limited. Tsang was sentenced to 20 months in prison for misconduct in public office. The jury unanimously acquitted Tsang on the count relating to the referral of the architect for an honour under the HKSAR honours and awards system. On the separate bribery charge of Tsang accepting an advantage relating to the interior design work of the Shenzhen penthouse, the jurors were unable to reach a verdict. The government sought a second trial, which resulted in, for the second time, a hung jury on 3 November 2017. While it is possible the government may seek a third trial, it is considered unlikely that the Department of Justice will insist upon it.

Tsang appealed against his conviction for misconduct in public office. In July 2018, the CA rejected Tsang’s appeal but reduced his original 20-month sentence to 12 months. In August 2018, the CA heard Tsang’s application for leave to appeal to the CFA but the judges rejected his application. On 20 December 2018, the CFA granted Tsang’s application for leave to appeal and his case is scheduled to be heard on 14 May 2019.

The second anti-corruption case involved a well-known television personality, Chan Chi Wan Stephen (Chan). Chan was charged under Section 9 of the POBO, which addresses bribery in the private sector (specifically, between a principal and an agent). Section 9 provides that it is an offence for an agent, without lawful authority or reasonable excuse, to solicit or accept an advantage as an inducement to or reward for his or her: (1) doing or forbearing to do, or having done or forborne to do, any act in relation to his or her principal’s affairs or business; or (2) showing or forbearing to show, or having shown or forborne to show, favour or disfavour to any person in relation to his or her principal’s affairs or business.

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6 Chapter 201 of the Laws of Hong Kong.
The prosecution accused Chan, an employee and thus agent of Television Broadcasts Limited (TVB), of accepting an advantage from a director of another company to act in relation to the affairs of TVB, Chan’s principal.

The case reached the CFA, where Chan’s conviction by the lower courts was quashed. Ribeiro PJ, who delivered the majority judgment, clarified the elements of a Section 9 offence, concluding that it must involve an advantage intended as an inducement for an agent to act or forbear to act in a manner detrimental to the interests of the principal and that the ‘detriment’ may include reputational damage to the principal or undermining the principal’s trust and confidence in its agents. As there was no detriment in the present case to TVB, Chan’s actions were found not to be corrupt and his conviction was quashed. The significance of this ruling is that any prosecution of a Section 9 offence will need to prove that an agent’s action involved detriment to the principal. On the other hand, however, Ribeiro PJ has also made clear that ‘detriment’ may be construed more widely than previously thought, and covers not only tangible economic loss, but reputational damage to the principal’s business or unauthorised disclosure of confidential information as well.

The third anti-corruption case involved a well-known lawyer, Kennedy Wong Ying-ho (Wong), who is also a delegate to the Chinese People’s Political Consultative Conference. Wong was accused of transferring 15 million preference shares of Hong Kong Resources Holdings Company Limited (HKRH), a listed company, which he was an executive director of, to his fellow director, the late Herbert Hui Ho-ming (Hui), in order to gain influence over him in the operations of HKRH. The prosecution accused Wong of bribing Hui while Wong contended that the gift was to reward Hui’s past performance and was in the interest of HKRH. The case was heard in the District Court at the end of 2017. The judge accepted Wong’s defence unreservedly and acquitted him in January 2018.

III  COURT PROCEDURE

Civil procedure in Hong Kong is governed by the Rules of the High Court and the accompanying Practice Directions issued by the Chief Justice. These Rules were substantially revised by the enactment of the Civil Justice Reforms (CJR), which came into effect on 2 April 2009.

i  Ordinary commercial court proceedings

Reducing the cost of delay associated with litigation proceedings and proper case management are the declared cornerstones of the CJR. The reforms were introduced to counter a trend of multiple interlocutory applications, excessive discovery and unfocused proceedings that led to delay and unnecessary expense. Parties that do not follow the revised procedures as set out in the CJR can expect adverse cost orders or, in severe cases of non-compliance, to have their claims struck out by the court. Costs will no longer be necessarily awarded to the successful party and the court can now have regard to whether the costs that were incurred were in proportion to the amounts at stake in the claim.

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7 See, for example, Cheung Man Kwong Thomas v. Mok Chun Bor [2009] HKEC 1636.
There are a number of different procedures by which court proceedings can be commenced in Hong Kong. In particular, certain types of actions (such as judicial review) have their own specialised procedures. Nevertheless, most commercial actions are commenced by a writ of summons. A typical set of court proceedings will consist of the following steps.

The plaintiff (claimant) issues in the CFI a writ of summons endorsed with a statement of claim. In a typical claim for breach of contract, it will recite which provisions of the contract have been breached, the key facts supporting it and the remedy sought.

The defendant files its acknowledgement of service indicating whether it intends to defend the proceedings.

At this point, the plaintiff can apply for summary judgment if it considers that there is no defence to the claim. This application will be decided quickly by the court on affidavit evidence from both parties. Judgment may be given for the whole or part of the claim if the court is satisfied there is no real defence. If otherwise, the matter goes to a full trial, the stages of which are as follows:

a. the defendant files its defence, which must answer each of the matters raised in the statement of claim, and any counterclaim;
b. the plaintiff files its reply and defence to counterclaim;
c. the parties are then expected to proceed to disclose to each other documents relevant to the issues in dispute without the need to wait for an order of the court (this process, which is called ‘discovery’, is described in detail below);
d. the parties file and serve a timetabling questionnaire indicating their readiness for the trial;
e. the parties agree directions for trial and attend a case management conference where directions relating to the management of the case are made by the court;
f. there is the exchange of witness statements and any expert evidence (if required); and
g. trial.

It is difficult to generalise the time frame for a piece of civil litigation. This will depend on a variety of factors, including the extent of discovery, the availability of witnesses and the complexity of the issues in dispute. Nevertheless, one can usually expect a judgment at first instance within two years of the commencement of proceedings; a summary judgment application may be determined within as little as three, but usually within six, months of proceedings being initiated.

ii. Urgent or interim relief

The Hong Kong courts will hear urgent or interim applications in relation to a wide range of matters.

Interim applications

Among the most common interim applications are those for summary or default judgment. As mentioned above, the plaintiff may apply for summary judgment on the grounds that the defendant has no defence to its claim, or no defence to a claim for liability, but possibly a
defence to the amount of damages claimed.\textsuperscript{9} A plaintiff may enter default judgment against a defendant who has failed either to give notice of intention to defend or to serve a defence within the times prescribed in the rules.\textsuperscript{10}

\textbf{Mareva injunctions}

There is sometimes a risk that an unscrupulous defendant may remove its assets from the jurisdiction or otherwise dissipate them when it learns that proceedings have been commenced against it. This is a particular concern given the ease with which funds can now be transferred electronically across borders. A \textit{Mareva} injunction can be obtained at the outset of proceedings to restrain the defendant from disposing of assets that may be held in Hong Kong and, in certain circumstances, outside Hong Kong. The injunction is ancillary to the main proceedings and is made after the court has considered affidavit evidence from the plaintiff. Typically, the injunction order is served on banks that hold funds of the defendant and the banks must comply with the order. There are very strict requirements for full and frank disclosure in the evidence filed, and the plaintiff must give an undertaking to compensate the defendant and other parties affected by the injunction if it is subsequently held that the injunction should not have been granted.

\textbf{Anton Piller relief}

A party to litigation in Hong Kong can apply to court for an order permitting it to enter the premises of another party to inspect and preserve property belonging to that party that may, for instance, be needed as evidence in proceedings. The difficulty with following this procedure is that the other party will be alerted to what may happen if the order is granted and may take advantage of the delay to destroy the property concerned. To address this possibility, in exceptional circumstances, the court may grant an \textit{Anton Piller} order, without prior notice to the defendant, which directs the defendant to allow the people specified in the order to enter its premises and take away and preserve evidence. Given the draconian nature of the order, which is almost akin to a criminal search warrant, it has been described as a ‘nuclear weapon’ in the law’s armoury.\textsuperscript{11} Accordingly, the courts are very concerned to ensure that the process is not abused.

As with a \textit{Mareva} injunction, if an \textit{Anton Piller} order is later found by the court to have been wrongfully obtained, the party who obtained the order is liable to compensate the other party and other affected third parties for losses suffered as a consequence of the order.

\textbf{iii Class actions}

Unlike many other jurisdictions, Hong Kong does not currently have specific provisions for dealing with multiparty litigation. In May 2012, the Law Reform Commission (LRC) published a report, following a three-month consultation period in February 2010, recommending the introduction of a comprehensive regime for multiparty litigation. The LRC further recommended that the new class action regime should adopt an opt-out approach (unless one of the plaintiffs is foreign, in which case the LRC recommended an opt-in approach), so that once the court certifies a case as suitable for a class action, the

\textsuperscript{9} Hong Kong Civil Procedure, Rules of the High Court, O.14.
\textsuperscript{10} Hong Kong Civil Procedure, Rules of the High Court, O.19.
\textsuperscript{11} For instance, by \textit{Sakhrani v Overholt v Overholt} [1999] 2 HKLRD 445.
members of the class would automatically be considered bound by the litigation, unless within a prescribed time limit a member opts out. Responding to reservations expressed during the consultation period, the LRC recommended an incremental approach of implementation whereby a restricted regime covering only consumer cases is introduced first, to be extended to other cases once sufficient experience has been gained. Consumer cases are considered to be a suitable starting point because potential representative plaintiffs can take advantage of the existing Consumer Legal Action Fund to fund the class action. In the long term, the LRC recommended that a general class actions fund be established to make discretionary grants to all eligible impecunious class action plaintiffs and be reimbursed by successful ones.

In late November 2012, the Department of Justice announced that it would establish a working group to study and consider the LRC's proposals. The working group would be chaired by the Solicitor General and consist of members representing the major stakeholders in the private sector, the relevant government departments, the two legal professional bodies and the Consumer Council. The working group has conducted 23 meetings as at the end of September 2018. In addition, a subcommittee of the working group was formed to assist the working group on technical issues that might arise during its deliberations.

However, the LRC’s recommendations have not been implemented. Until they are, the only alternative is a ‘representative procedure’ that has been generally criticised as being too restrictively interpreted. A slight variation of facts or a possibility of a different defence to a claim brought by one member of the ‘class’ may be sufficient to deny the entire class the ‘same interest’ in the proceedings.

iv Representation in proceedings and solicitors’ higher rights of audience

Currently (and generally), companies may not begin or carry on proceedings without being represented by a solicitor. Previously, only barristers (instructed by a firm of solicitors) could appear in the higher courts on behalf of parties; however, this restriction was removed by the Legal Practitioners (Amendment) Ordinance 2010 (LPAO). The Higher Rights Assessment Board (HRAB), established under the LPAO, was tasked to devise the eligibility requirements for solicitors who wish to apply for higher rights of audience. The resultant Higher Rights of Audience Rules (HRA Rules) came into operation in June 2012. According to the HRA Rules and the Legal Practitioners Ordinance, as amended by the LPAO, in order to be eligible, the applicant must hold a current practising certificate, have practised for at least five years aggregate in the seven years preceding the application and have the ‘necessary professional competence’, which, as elaborated in an explanatory document published by the HRAB, is equivalent to the level of competence expected of a barrister appearing in higher courts in the areas of ethics, evidence and procedure, general advocacy, trial advocacy and appellate advocacy. The first round of assessments took place in autumn 2012. Fifteen solicitors passed and were registered to practise in the highest court in February 2013. To date, a total of 54 practitioners have been appointed as solicitor-advocates.

A notable exception to the audience rule is in hearings before the Labour Tribunal where neither barristers nor solicitors have rights of audience unless they are appearing on their own behalf as a claimant or defendant in proceedings. If a company is a defendant in proceedings, it is expressly empowered to give notice of its intention to defend by any person

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12 HRAB, ‘Standards of Professional Competence’.
13 Section 23(2) of the Labour Tribunal Ordinance (Chapter 25).
duly authorised to act on its behalf. Generally, litigants in person may represent themselves in proceedings except where the litigant is a minor or under a disability pursuant to the Mental Health Ordinance.

v  Service out of the jurisdiction

A party who intends to serve documents initiating proceedings on a person outside of Hong Kong must, except in certain limited circumstances, obtain the prior leave of the court in order to do so.14 There are a number of different grounds under which leave to serve out may be obtained. These include, for instance, actions commenced in respect of contracts where the Hong Kong courts have explicitly been granted jurisdiction and contracts governed by Hong Kong law. However, in addition to a valid ground, applicants seeking the court’s leave to serve out of the jurisdiction need to satisfy the court that there is a serious issue to be tried on the merits of the claim and that Hong Kong is the most convenient forum for the trial of the case.

vi  Enforcement of foreign judgments

At common law, an action may be brought in Hong Kong to enforce a foreign judgment debt (without the need to relitigate the underlying cause of action).

Under the Foreign Judgments (Reciprocal Enforcement) Ordinance, the judgments of certain countries (including Australia, Belgium, Brunei, France, Germany, India, Israel, Italy, Malaysia, New Zealand and Singapore) are capable of more direct enforcement by registration. Once registered, the foreign judgment may be enforced in the same way as a judgment obtained in a court in Hong Kong.

The Mainland Judgments (Reciprocal Enforcement) Ordinance, which provides a mechanism by which certain judgments made in the PRC may be enforced in Hong Kong and Hong Kong judgments in the PRC, came into operation on 1 August 2008. The effectiveness of this Ordinance has always been seen as quite limited since it applies only to judgments for damages arising from commercial agreements where the relevant agreement provides for exclusive jurisdiction of the chosen (Hong Kong or PRC) court. Although the Hong Kong government and the Supreme People’s Court of the PRC had since concluded two arrangements on mutual recognition and enforcement of judgments between the PRC courts and Hong Kong courts, namely the Choice of Court Arrangement (in 2008) and Arrangement for Enforcement of Civil Judgments in Matrimonial Home and Family Cases (in 2017), both arrangements have limited effect on alleviating the constraints stipulated by the Ordinance. However, in January 2019, the Hong Kong government announced that it had concluded the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters (the Arrangement). The Arrangement, signed on 18 January 2019, has a significantly expanded scope of application compared with the existing Ordinance and arrangements. It provides specific guidance on recognition and enforcement of judgments arising from IP infringements, civil disputes over acts of unfair competition and awards of property. It will cover judgments in relation to civil damages awarded in criminal cases. It will also allow the enforcement of both monetary and non-monetary relief. Restrictions remain, such as the requirement for underlying contracts to give the relevant PRC or Hong Kong

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14 Hong Kong Civil Procedure, Rules of the High Court, O.11 r.1.
court exclusive jurisdiction to resolve disputes that may arise. Nevertheless, the Arrangement is a welcome development in terms of providing clarity to existing arrangements. It is not yet known when the Arrangement will come into effect.

vii  Assistance to foreign courts
Hong Kong courts will assist foreign courts to serve process in Hong Kong and to obtain evidence from witnesses resident in Hong Kong for use in foreign proceedings.

viii  Access to court files
As a general rule, the full court file cannot be inspected by members of the public; in exceptional cases the public may be granted leave from the High Court Registrar to inspect affidavits, pleadings and other evidentiary court documents if there are very cogent reasons for them to do so. However, the public may inspect and obtain copies of writs or other documents by which proceedings are commenced. Final and interlocutory court judgments are filed in the High Court library and are also freely accessible by the public on the judiciary website.

ix  Litigation funding
Generally, third-party funding of litigation is prohibited under Hong Kong law. There are, however, three limited exceptions. First, a person may have a legitimate common interest in the outcome of the litigation sufficient to justify him or her supporting the litigation. Second, an individual may be permitted to fund litigation of a claimant who would otherwise be unable to pursue litigation owing to a lack of funds. This is because of the public interest in promoting access to justice. Finally, as recently confirmed by a decision of Harris J in the CFI, third-party funding may be permitted by the courts in order to allow a liquidator to pursue litigation that may improve the return to creditors. However, outside these situations, the Hong Kong courts take a firm approach towards third parties who aid litigation in return for a share of the profits.

x  State immunity
The doctrine of state immunity applies in Hong Kong. State immunity only applies to foreign states, and therefore does not apply to the PRC or Hong Kong. On the other hand, the common law doctrine of crown immunity applies to the Central People's Government of the PRC and its state organs. Crown immunity in Hong Kong is also absolute meaning that there is no exception for commercial acts of a state organ. Nevertheless, the extent to which immunity applies to a state-owned enterprise is often subject to dispute. The scope of

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15 Hong Kong Civil Procedure, Rules of the High Court, O.69.
16 Hong Kong Civil Procedure, Rules of the High Court, O.70; see also Section 75 Evidence Ordinance.
18 See Paragraphs 4 to 11 of the judgment of Harris J on 4 May 2010, In Re Cyberworks Audio Video Technology Limited (HCCW 1113/2002).
crown immunity has recently been clarified in the case of *TNB Fuel Services Sdn Bhd v. China National Coal Group Corporation*\(^{22}\) in 2017. It was held that China National Coal Group Corporation, a state-owned enterprise that operates its business with significant autonomy and independence, is not a state organ and is therefore not protected by crown immunity. Separately, the Hong Kong government and its entities can still be sued under the Crown Proceedings Ordinance.\(^{23}\)

### IV LEGAL PRACTICE

#### i Conflicts of interest and Chinese walls

Solicitors in Hong Kong are subject to rules of the Law Society of Hong Kong, which impose strict duties to:

- **a** hold in strict confidence all information concerning the business and affairs of the client that the solicitor acquires through acting for the client;\(^ {24}\)
- **b** pass on to a client all information relevant to the subject matter in relation to which the solicitor has been instructed regardless of the source of the information;\(^ {25}\) and
- **c** not to accept instructions from a new client where it is likely that the solicitor would be duty-bound to disclose to that new client, or use for its benefit, relevant confidential knowledge where this would be in breach of the solicitor’s duty of confidentiality owed to an existing or former client.\(^ {26}\)

The effect of these duties is that a solicitor who is in possession of confidential information concerning one client that is, or might be, relevant to another client is put in an impossible position because he or she owes duties to both clients that conflict; he or she must keep the information confidential but at the same time must pass it on to the other client. Thus, managing conflicts of interest in Hong Kong can be a difficult process compared with, say, England, where the rules make allowances for this type of situation.

#### ii Money laundering, proceeds of crime and funds related to terrorism

Lawyers in Hong Kong, as elsewhere in the world, are vulnerable to being used unwittingly to launder the proceeds of crime or to fund terrorism. The *Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions)* Ordinance\(^ {27}\) came into force in April 2012, imposing stricter statutory requirements on financial institutions relating to customer due diligence and record keeping, and an obligation to report suspicious transactions to the authorities. The Ordinance empowers the Hong Kong Monetary Authority to prosecute or discipline banks for ignoring or assisting in money laundering or terrorist financing. In

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22 HCCT 23/2015.
23 Cap 300 of the Laws of Hong Kong.
24 Principle 8.01.
25 Principle 8.03.
26 Principle 9.02.
27 Chapter 615 of the Laws of Hong Kong.
addition to the Ordinance, and other statutory requirements that apply generally to everyone in Hong Kong, solicitors in Hong Kong are subject to mandatory requirements (which reflect the statutory law) to:

- have appropriate policies and internal control procedures in place for identifying and reporting suspicious transactions;
- take reasonable steps to identify and conduct due diligence on all clients and to maintain detailed records;
- consider with special care unusual transactions and high-risk clients, especially those from internationally recognised high-risk jurisdictions such as offshore tax havens and the PRC; and
- report to the Hong Kong authorities, without reference to the client or potential client, any suspicion of money laundering or terrorist financing that the solicitor may have. This would include suspicions that a solicitor may have in the course of representing a client in litigation; for example, the subject matter of the litigation may arouse suspicions that it relates to money laundering. Solicitors can face criminal sanctions if they fail to do this or if they tip off a client or potential client about their suspicions or the fact that they are about to or have reported the matter to the Hong Kong authorities. Note, however, that any communications protected by legal professional privilege (LPP) would not be covered by the ambit of these strict requirements.

Where a report is made to the Hong Kong authorities, they will assess the information provided and advise the solicitor whether or not he or she should act for the particular client or in relation to the specific matter. Apart from the possibility of criminal sanctions in serious cases, solicitors can face disciplinary proceedings for non-compliance with these requirements.

On 11 July 2016, the CFA in HKSAR v. Yeung Ka Sing Carson declined to follow English law and confirmed the position in Hong Kong that for a defendant to be convicted for dealing with the proceeds of crime under Section 25(1) of the Organized and Serious Crimes Ordinance, it is not necessary for the prosecution to prove that the property with which the defendant dealt in fact represented the proceeds of a serious offence. To secure a conviction it is sufficient to establish that the defendant had reasonable grounds to believe that it was.

On 28 June 2017, the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) (Amendment) Bill 2017 was introduced into Legco. The bill aims to extend statutory customer due diligence and record-keeping requirements to solicitors, foreign lawyers, accountants, real estate agents, trust and company service providers and introduce a new licensing regime for trust and company service providers. The amendments came into effect on 1 March 2018. The Guidelines on Anti-Money Laundering and Terrorist Financing (Practice Direction P) issued by the Law Society of Hong Kong have also been revised with effect from 1 September 2018. Similarly, the revised Guideline on Anti-Money

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28 See the Drug Trafficking (Recovery of Proceeds) Ordinance, the Organised and Serious Crimes Ordinance and the United Nations (Anti-Terrorism Measures) Ordinance.

29 The reasoning of the English Court of Appeal in Bowman v. Fels [2005] EWCA Civ 226 has been adopted in Hong Kong under Section 81 of the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance.

30 [2016] HKEC 1506.
Laundering and Counter-Financing of Terrorism for Money Service Operators, Authorised Institutions, Stored Value Facility Licensees, Insurance related intermediaries, Licensed Corporations, Associated Entities came into force on 1 November 2018 superseding the previous version.

iii Data protection

The protection of personal data in Hong Kong is governed by the amended Personal Data (Privacy) Ordinance (PDPO). One of the principles provided in the PDPO is that personal data may not be used for any purpose except with the prescribed consent of the data subject.\(^{31}\)

Two exceptions to this rule are:

\(a\) the restriction does not apply to data that is required by any rule of law or court order in Hong Kong in connection with any legal proceedings in Hong Kong, or for establishing, exercising or defending legal rights in Hong Kong;\(^ {32}\) and

\(b\) data may be transferred for the necessary due diligence exercise in the course of mergers and acquisitions, provided that goods or services provided to the data subject would be the same or similar after the completion of the proposed transaction.\(^ {33}\)

New provisions on the regulation of direct marketing activities and the provision of legal assistance under the PDPO came into force on 1 April 2013. First, a new opt-in system has been introduced to strengthen the right of data subjects to control their personal data. Direct marketers must have notified the data subject and obtained his or her consent before approaching the data subject with marketing messages. Second, the data subjects have the right to opt out from direct marketing activities, even if they have previously consented to receiving direct marketing messages or if they have not responded to requests to indicate their objection. There is no time limit for exercising the right to opt out.

Following the implementation of the General Data Protection Regulation in the European Union in May 2018, the Office of the Privacy Commissioner for Personal Data of Hong Kong published a booklet that aims at raising awareness among organisations and corporations of its possible application in Hong Kong.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

The two main forms of LPP – legal advice privilege and litigation privilege – that apply in Hong Kong are essentially the same as those recognised under English law.

Confidential communications between a lawyer and his or her client for the purpose of giving or receiving legal advice are protected from disclosure by legal advice privilege. This privilege is unlikely to extend to legal advice that may be given by other professionals such as accountants and surveyors, with the Hong Kong courts expected to follow the approach of the United Kingdom Supreme Court in its decision of \(R\) (on the application of Prudential plc and another) \(v\). Special Commissioner of Income Tax and another.\(^ {34}\)

\(^{31}\) Schedule 1 (Principle 3) of the Personal Data (Privacy) Ordinance (Chapter 486).

\(^{32}\) ibid, Section 60B.

\(^{33}\) ibid, Section 63B.

\(^{34}\) [2013] UKSC 1.
Where there is litigation or it is reasonably contemplated that it will occur, not only will communications between the solicitor and a client be privileged but also communications they have with third parties, if it can properly be said that their sole or dominant purpose is preparing for the litigation.

In both cases, the privilege belongs to the clients and only the clients can properly choose to waive it. They can also lose it if, for example, legal advice is disclosed to third parties where there is no litigation or it is not reasonably contemplated.

In 2015, the CA, in CITIC Pacific Limited v. Secretary for Justice and Commissioner of Police,35 set down a broader definition of ‘client’ to state that the client is the corporation, and the key question is therefore which employees are or should be regarded as authorised to act on behalf of the company in obtaining legal advice. The CA also adopted a broader test for legal advice privilege, which can now protect internal confidential documents in a client organisation that have been produced for the dominant purpose of obtaining legal advice. The court recognised that the definition of ‘client’ has to be broad enough to take into account the fact that various members of a corporation, not simply those in the legal team, may be required to obtain legal advice for the corporation. The CA in the CITIC decision declined to follow the approach of the English Court of Appeal in Three Rivers No 5.36 In the Three Rivers case, the court defined ‘client’ more narrowly to refer only to those employees who had been authorised by the company to give instructions to legal advisers. Both the CITIC and Three Rivers cases were Court of Appeal decisions in Hong Kong and in the United Kingdom respectively. The issue of who is capable of constituting the client for the purposes of legal advice privilege has yet to be considered by the United Kingdom Supreme Court or the CFA in Hong Kong.

ii Privilege and regulators

As a general rule, a lawyer or client cannot be compelled to disclose legally privileged communications in the context of a regulatory inquiry. Some statutes setting out the powers of the regulator expressly recognise this; for example, the SFO, which provides that persons being investigated by the SFC can rely on LPP in the same way as they could in the context of court proceedings. While this is the strict statutory position, the SFC has adopted a policy37 of effectively rewarding those under investigation (by discounting any penalty to be imposed) for voluntarily disclosing material relevant to an issue under investigation that otherwise would be protected by legal privilege.

Sometimes there is no real practical alternative to disclosing privileged material to demonstrate to the regulator what happened in a transaction that is under investigation. There is, however, a potential danger in doing this, in that the SFC is a party to numerous cooperation arrangements with other regulators in Hong Kong and overseas, as a consequence of which the SFC may be obliged to produce to other regulators the disclosed privileged material. The question is whether such danger could be alleviated if a person could claim ‘partial waiver’ (i.e., waive LPP as against the regulator but retain it as against other parties, or waive LPP only for limited purposes).

37 See the Guideline of March 2006 – Cooperation with the SFC.
The trio of cases of *Rockefeller & Co Inc v. Secretary for Justice*,38 *James Daniel O’Donnell v. Lehman Brothers Asia Ltd (In Liq)*39 and *CITIC Pacific Ltd v. Secretary for Justice and Commissioner of Police*40 have explored the concept of ‘partial waiver’ of LPP in the context of the SFC’s regulatory investigations.

In the *Rockefeller* case, the plaintiff disclosed documents protected by LPP to the SFC subject to an express agreement not to waive any confidentiality or privilege in the documents. The documents were eventually passed on to a third party, against whom the plaintiff sought an injunction from using the document. The plaintiff argued that the relevant documents were only disclosed to the SFC for a limited purpose (i.e., LPP was only partially waived). The CFI held that the waiver given was limited for a particular purpose but an injunction was not appropriate in the circumstances.41 The judgment was affirmed on appeal, with an *obiter* comment from Keith JA that the ‘partial waiver’ may be ‘conceptually unsound’.

In the *Lehman* case, the SFC sought from the liquidators documents that were relevant to the offering of the Lehman minibonds. The liquidators declined to disclose the minibond documents to the SFC on the grounds that the documents contained legal advice or were created for the purpose of obtaining legal advice. Instead, the liquidators disclosed redacted versions of the documents. The CFI held that the redacted portions indeed constituted a record of legal advice or were created for the purpose of obtaining legal advice. Accordingly, most of the documents should remain to some extent redacted. This decision confirms that the partial waiver of LPP for limited purposes could be achieved by tailoring the evidence to fulfil only the stated purposes.

The principles in the *Rockefeller* case were further discussed in the *CITIC* case in 2012. In this case, certain documents were surrendered to the SFC pursuant to an authority to require production of and a direction to produce records and documents. A declaration, *inter alia*, that the surrendered materials be returned was sought by CITIC. The CA unanimously held in favour of CITIC, overturning the lower court’s ruling that CITIC’s waiver was absolute and finding instead that it was partial and solely for the purpose of the SFC investigation.

While the CA’s decision in the *CITIC* case is very helpful, the CFA has not yet given a definitive judgment in this area. The risk that any disclosure might still be treated as a blanket waiver should not be lightly dismissed. Therefore, any partial waiver should be considered with great care and should not be granted unless it is clearly justified. Where the company has made the commercial judgment that the benefits of partial waiver outweigh the risks of prejudice, it should mitigate its risk by putting the specific terms in writing at the outset when the documents are handed over, making clear the precise purpose and scope of investigation for which the partial waiver is made (e.g., for the purposes of the SFC’s investigation only).

### iii In-house lawyers

As a general rule, in-house lawyers are treated like external lawyers and thus communications to and from in-house lawyers conveying or seeking legal advice will be treated as covered by legal advice privilege. The main qualification to this is where the in-house lawyer has both a business and a legal role in an organisation. Requests for legal advice and pure legal advice given will still be privileged. However, where there is a mix of legal and business advice, for

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38 [2000] 3 HKC 48 (CA).
39 HCMP 1081/2009 (unreported).
40 [2012] 2 HKLRD 701.
example, if the in-house lawyer in an internal memorandum proposes a course of action having regard to legal advice and other factors, it becomes more difficult to properly assert that the document is protected by legal privilege.

iv Legal privilege and foreign lawyers
Hong Kong law recognises legal privilege whether the lawyer involved in giving the legal advice is admitted in Hong Kong or elsewhere. Thus legal advice given by, say, a French lawyer on issues of French law will be protected by legal privilege in the same way as legal advice on Hong Kong law given by a Hong Kong lawyer. This principle applies equally to legal advice given by an in-house lawyer. Thus legal advice on an issue of New York law given by an in-house lawyer admitted in New York working in a Hong Kong branch of a US bank will be protected.

v Production of documents
A party to proceedings before the Hong Kong courts is under a strict duty to preserve and disclose to the other parties to the proceedings all documents in its possession, custody or control that are relevant to the matters in question in the proceedings. This disclosure of documents is an automatic consequence of proceedings and generally must be given shortly after the parties have formally pleaded their respective cases. The reforms under the CJR allow for orders to be given to limit discovery in appropriate cases and ways; and the availability of pre-action and third-party discovery has been extended to all cases (previously these were only available in personal injury actions). The issues that have been pleaded provide the yardstick for determining what documents are relevant. The parties do not have to make a request for disclosure of particular documents. It is for the lawyers on each side to decide which documents are properly relevant to the pleaded issues and should therefore be disclosed. In doing this, the lawyers are deemed to act as officers of the court and not simply on the instructions of their clients. Parties are required to disclose the existence of all relevant documents. It is irrelevant that a document is prejudicial to a party’s case: it must still be disclosed if it is relevant and a party cannot choose which documents to disclose. A document is relevant if it may assist one or other of the parties to advance his or her own case or damage his or her opponent’s in relation to any issue, or if it may lead to a train of enquiry that may (indirectly) have that result. Such a result need not be inevitable: if disclosure of the document may potentially have that result, disclosure must be made. This rule applies equally to documents stored overseas, which must be brought into the jurisdiction for the purpose of litigation.

This obligation covers both documents in existence and those produced at any time after a dispute has occurred. A party will have to account for documents that are lost or destroyed and unfavourable inferences may be drawn if it is apparent that documents have been destroyed. The parties and their lawyers must preserve documents relevant to a dispute and thus destruction of unhelpful documents is not an option. The exception to this obligation is that a party may claim legal privilege as an objection to production of documents.

‘Documents’, for these purposes, are widely defined and they include anything on which information or evidence is recorded in a manner that is intelligible to the senses or capable of being made intelligible by the use of equipment. Thus computer records, tape recordings, emails and manuscript notes are all potentially disclosable to the other side in proceedings. Information on a computer database that is capable of being retrieved and converted into readable form is treated as a ‘document’.
The test of whether documents held by a third party are in the power of a party to proceedings is whether the party has a presently enforceable legal right to obtain the documents from the third party. Merely because a party is the majority shareholder of a subsidiary does not mean that it is deemed to have control over relevant documents that are held by the subsidiary. If a professional adviser holds relevant documents that are the property of the party, and the party has the immediate right to demand their return, they will be treated as being in the party’s control. However, the internal working papers of the adviser will generally not be treated as belonging to and thus under the control of a party.

The burden of disclosing documents may fall disproportionately on one party compared with another. Sometimes, because of the nature of the dispute and the degree of its involvement, a party may have a great deal more documents to disclose than the other parties. That is a risk of litigation and a factor to be taken into account when embarking on litigation (a plaintiff may quite possibly have a heavier discovery burden than the defendant in a case), and in the past the courts have not intervened to address any imbalance. It is possible that this position may begin to change following the introduction of the CJR that now requires parties and the judiciary to have regard to proportion and procedural economy in the conduct of proceedings. In particular, the new Practice Direction 5.2 requires parties ‘to try to agree directions for modifying discovery obligations … with a view to achieving economies in respect of discovery’. This may be of particular relevance, for example, with respect to disclosure of electronic records. The courts in the future may not require parties to expend disproportionate resources on retrieving electronic documents that have been ‘deleted’ from a computer system. However, it remains to be seen how this new approach will work in practice.

The parties will usually agree on a date by which they will exchange lists of documents, accompanied by a notice that the other party may inspect and take copies of documents (though parties are now encouraged to dispense with formal lists if this would be more economical).

In response to concerns regarding the increasing burden on parties of providing their electronic documents for discovery, the Hong Kong judiciary introduced the Practice Direction SL 1.2 – Pilot Scheme for Discovery and Provision of Electronically Stored Documents for Commercial List Cases. The Practice Direction came into effect on 1 September 2014, and is mandatory in terms of all actions commenced on, or transferred into the Commercial List on or after, 1 September 2014 in which the claim or counterclaim exceeds HK$8 million and there are at least 10,000 documents to be searched for the purposes of discovery.

VI ALTERNATIVES TO LITIGATION

Arbitration

Arbitration is commonly stipulated in commercial agreements relating to Asia as the method of resolving disputes. The 2015 International Arbitration Survey, prepared by Queen Mary University of London’s School of International Arbitration, listed Hong Kong as one of the top three jurisdictions that organisations have preferred and selected to use as the seat of arbitration in their contracts. There are a number of reasons for Hong Kong’s popularity as a seat and venue for arbitration.
A new Arbitration Ordinance came into operation on 1 June 2011 (replacing the former Arbitration Ordinance in force since 1963). The Arbitration Ordinance is intended to simplify arbitration law in Hong Kong and make it more user-friendly by following the UNCITRAL Model Law structure from ‘Arbitration Agreement’ through to ‘Recognition and Enforcement of Awards’. There is now a unitary regime of arbitration on the basis of the UNCITRAL Model Law, thereby abolishing the distinction between domestic and international arbitrations previously applicable under the old Ordinance. In general, the provisions under UNCITRAL previously applicable to international arbitrations now apply to all arbitrations together with most of the other provisions that previously applied to all arbitrations.

There are no restrictions on the arbitration rules that parties may choose to resolve disputes in Hong Kong. Equally, there are no restrictions on the laws governing a contract that can be applied when determining a dispute by arbitration. Thus, in theory, an arbitration under the International Chamber of Commerce (ICC) Rules could be conducted in Hong Kong between a Norwegian and Indonesian party applying Swiss law. Whether that would be a sensible commercial way of resolving a dispute is another matter.

Hong Kong has a highly regarded arbitration centre, the Hong Kong International Arbitration Centre (HKIAC), and has, since the end of 2008, hosted the Asian branch of the ICC Court Secretariat. In 2012, Hong Kong also became the first jurisdiction outside the PRC to host a China International Economic and Trade Arbitration Commission arbitration sub-commission. In January 2015, the Permanent Court of Arbitration (PCA) also signed a Host Country Agreement with the PRC government and a related Memorandum of Administrative Arrangement with the Hong Kong government to facilitate the conduct of PCA-administered arbitration in Hong Kong, including state-investor arbitration. In December 2017, the Hong Kong government and the National Development and Reform Commission of the PRC government signed an agreement aiming to advance Hong Kong’s full participation in and contribution to the Belt and Road Initiative, which included establishing Hong Kong as a hub for international legal and dispute resolution services for the Belt and Road Initiative.

Hong Kong has a wealth of lawyers experienced in arbitration and enjoys a reliable independent court system to support the use of arbitration. The latest available figures published on the HKIAC website, for example, indicate that in 2017, the HKIAC handled 297 arbitrations, of which 73.1 per cent were international in nature and featured parties from 39 jurisdictions.

In terms of statutory amendments, the Arbitration (Amendment) Ordinance 2017 was gazetted on 23 June 2017 and became effective on 1 January 2018, clarifying the law to allow disputes over intellectual property rights to be resolved by arbitration and that enforcing arbitral awards involving intellectual property rights is not contrary to Hong Kong public policy. Legislation allowing third-party funding in arbitration was also passed. This particular amendment, however, will not apply to funding provided by lawyers representing any parties to the arbitration, as professional conduct rules prohibit lawyers from acting on a contingency fee basis.

The HKIAC further revised its Administered Arbitration Rules with effect on 1 November 2018. The key amendments include the following: 43

parties may agree to deliver documents through the use of their own secured online repository or a dedicated repository provided by the HKIAC;

b a third-party funded party is required to disclose promptly the existence of a funding agreement, the identity of the funder and any subsequent changes to such information. A funded party is permitted to disclose arbitration-related information to its existing and potential funder;

c after the commencement of an arbitration, where the parties agree to pursue alternative means of settling their dispute, a party may request the HKIAC, arbitral tribunal or emergency arbitrator to suspend the arbitration and resume at any time during or after the alternative process; and

d a party may file an application for the appointment of an emergency arbitrator before the commencement of an arbitration, provided that a Notice of Arbitration is submitted to the HKIAC within seven days unless the emergency arbitrator extends this time limit.

The Hong Kong court has generally adopted a pro-arbitration policy and a ‘hands off’ approach to cases involving arbitration. Recently, in Chee Cheung Hing & Company Limited v. Zhong Rong International (Group) Limited, the CFI considered an application to stay proceedings and refer the matter to arbitration under Section 20 of the Arbitration Ordinance. Although the existence of the underlying contract between the parties (and thus whether the parties are bound by an arbitration clause therein) was in dispute, the CFI nonetheless held that the proceeding be stayed (and the matter be referred to arbitration) on the basis that the applicant had demonstrated ‘a prima facie and plainly arguable case’ that the parties were bound by an arbitration clause. By refusing to decide on the validity of the arbitration clause and leaving the matter to the arbitration tribunal, the CFI firmly endorsed the competence-competence principle – that an arbitration tribunal should have the power to rule on its own jurisdiction. This principle was also applied by the CFI in Macao Commercial Offshore Ltd v. TL Resources Pte Ltd, in which it was held that where the claimant had apparently departed from the applicable arbitration agreement between the parties by commencing proceedings before the ICC rather than the Singapore International Arbitration Centre, the court should leave the matter to the ICC tribunal to determine its own jurisdiction over the case.

Hong Kong, through the PRC, is a party to the New York Convention. As between Hong Kong and the rest of the PRC, there is an arrangement for reciprocal enforcement of arbitration awards called the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region, which broadly follows the New York Convention. Hong Kong also entered into a similar arrangement with Macau in January 2013. The enforcement arrangements for the New York Convention and arbitration awards concerning parties from the PRC remain in place and are unaffected by the Arbitration Ordinance.

The CFA considered the application of the New York Convention to Hong Kong in Hebei Import & Export Corp v. Polytek Engineering Co Ltd, and in particular the ‘public policy’ ground for refusal of enforcement is to be narrowly construed and

44 [2016] HKEC 656.
45 [2015] HKEC 2439.
applied. It also held that the courts have a residual discretion to uphold leave to enforce an award, even if the grounds for setting aside such leave have been demonstrated. The CFA noted in this respect that it was appropriate to have regard to the principles of ‘finality and comity’ contained within the New York Convention.

Such a pro-enforcement approach was reaffirmed by the CA in the case of Pacific China Holdings Ltd (In Liquidation) v. Grand Pacific Holdings Ltd in May 2012. The case concerned an arbitral award made against Pacific China Holdings Ltd (Pacific China) in favour of Grand Pacific Holdings Ltd (Grand Pacific) in 2009. Pacific China filed a petition to set aside the award for serious procedural irregularity (e.g., the refusal of the arbitral tribunal to consider Pacific China’s responses to Grand Pacific’s post-hearing submissions) pursuant to Article 34(2) of the UNCITRAL Model Law. The CFI found that Article 34(2) was indeed violated. It directed itself that if the result of the arbitration may have been different had the violation not occurred, it must set aside the award. The CA unanimously overturned the CFI’s decision and reinstated the award, holding that there was in fact no violation of Article 34(2). This case was conclusively resolved in February 2013, when the CFA refused to grant leave to appeal from the CA decision, expressing its view that the award complained of was made by the arbitral tribunal in the proper exercise of its procedural and case management discretions. The judgment illustrated the court’s reluctance to interfere with arbitral awards and its preference for a pro-enforcement approach that is in line with the principles of ‘finality and comity’.

The pro-enforcement approach was further affirmed by the CFI in U v. A in February 2017. The case concerned a preliminary assignment contract (PAC), under which the claimant agreed to purchase majority shareholdings in a PRC joint venture company. The PAC also provided for transfer of assets from the second respondent to the joint venture company and certain changes in the joint venture’s board composition. Disputes arose between the parties, and the claimant commenced arbitration proceedings in Hong Kong for various breaches under the PAC. The claimant was awarded specific performance, damages and costs. Subsequently, the claimant obtained an order from the court for leave to enforce the arbitral award. The respondents applied to set aside the order, arguing that: (1) the arbitrator had refused to admit a PRC judgment the respondents relied heavily on, such that the respondents were not able to have a full opportunity to advance their case on the invalidity of the PAC; (2) the arbitral award dealt with an issue outside the scope of the submissions; and (3) it would be contrary to public policy to enforce the award as the PAC was invalid and ineffective under PRC law. The court rejected their arguments on the grounds that: (1) refusing to admit the PRC judgment did not cause any prejudice as the respondents were given a fair opportunity to present expert evidence to the arbitrator; (2) only decisions clearly unrelated to, or not reasonably required for, the determination of the subject dispute are decisions which can be rightly said to be beyond the scope of the submission; and finally, (3) an error of law made by the tribunal is not sufficient basis for refusing enforcement and that public policy arguments should not be used as a ‘catchall provision whenever convenient’. This case demonstrates the Hong Kong courts’ overall unwillingness to set aside arbitral awards without compelling grounds.

48 FAMV 18/2012.
49 HCCT 34/2016.
Moreover, the court is generally in favour of speedy and efficient enforcement of arbitration awards. Even in circumstances where the court is willing to stay enforcement of an arbitration award pending the result of a challenge made to set aside the award, substantial security is likely to be required from the party applying for the stay. In *L v. B*,50 an arbitration award of approximately US$41.8 million was made against B in an arbitration seated in the Bahamas. B commenced proceedings in the Bahamian court to set aside the award on the ground of serious irregularity and to appeal on a question of law. At the same time, B applied to the CFI to stay enforcement of the award in Hong Kong. After considering the strength of the arguments and the ease or difficulty of enforcement of the award if enforcement is delayed, the CFI granted a four-month stay of enforcement on the condition that B must provide a sum of HK$41.6 million as security. This decision demonstrated the court’s reluctance in postponing the enforcement of arbitral awards.

In *Shandong Chenming Paper Holdings Limited v. Arjowiggins HKK 2 Limited*,51 the CFI further indicated its openness to wind up a foreign company for failure to make payment of an arbitral award. In this case, the plaintiff was incorporated in the PRC and had a secondary listing on the stock exchange of Hong Kong. In 2012, the defendant was awarded damages by the arbitration tribunal in relation to a dispute arising out of a joint venture agreement. Later, the defendant was granted leave from the CFI to enforce this award. The plaintiff subsequently failed to make the payment. When the Defendant served a statutory demand on the plaintiff as a signal to an impending winding-up order, the plaintiff sought to contend that the court could not exercise its discretion to issue a winding-up petition against it as it did not have any assets or conduct business in Hong Kong. The plaintiff’s only connection with Hong Kong was its secondary listing. Despite this, the CFI nevertheless held that it indeed had jurisdiction to wind up the plaintiff. This decision clearly conveys the robust measures the courts are willing to take in order to ensure the enforcement of arbitral awards.

ii Mediation

Mediation has been achieving increased prominence following the implementation of the CJR. Practice Direction 31, which came into force on 1 January 2010, requires parties to have made genuine attempts to resolve disputes by mediation. Any party that resists this could face a potential costs penalty if at the conclusion of the proceedings the court determines the party has unreasonably failed to engage in mediation. The HKIAC has its own mediation rules and maintains a list of accredited mediators.

The Mediation Ordinance (MO)52 came into force on 1 January 2013. The primary purpose of this relatively short Ordinance is to provide statutory underpinning to support the confidentiality of mediation communications, defined as anything said or done, any document prepared or any information provided for the purpose of or in the course of mediation. The MO specifies situations where a disclosure may be made, for instance, where both parties and the mediator consent to the disclosure, where the disclosure is necessary to prevent danger of injury to a person or of serious harm to the well-being of a child or where the disclosure is required by law.

The Financial Dispute Resolution Centre (FDRC) came into operation on 19 June 2012. The FDRC’s primary function is to allow retail investors alleging mis-selling by banks

50 HCCC 41/2015.
51 HCMP 3060/2016.
52 Chapter 620 of the Laws of Hong Kong.

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and other financial intermediaries the opportunity to make claims for compensation not exceeding HK$1 million under a framework of ‘mediation first, arbitration next’. Prior to the establishment of the FDRC, an aggrieved customer’s options were limited. He or she could have elected to report the alleged mis-selling to the SFC or the HKMA, but while the regulators may examine the practices of the financial institutions and impose penalties in appropriate cases, they do not adjudicate on claims for financial remedy. Instead, an aggrieved customer’s only way of recovering financial losses was to go through the court system, which was considered often too costly and time-consuming for relatively low-value claims. The FDRC was established to provide investors with an alternative avenue of dispute resolution that is hopefully more expeditious and affordable.

In order to facilitate the establishment of the FDRC, the SFC introduced amendments to the Code of Conduct for Persons Licensed by or Registered with the SFC, which took effect on 19 June 2012. The key amendment requires licensed or registered persons regulated by the SFC or the HKMA to comply with the FDRC Scheme and be bound by its process.

In order to enhance the Financial Dispute Resolution Scheme, the Terms of Reference of the FDRC were revised with amendments to become effective in phases from 1 January 2018 onwards. Pursuant to the updated Terms of Reference, the FDRC may handle cases with a claim up to HK$1 million (as compared with HK$500,000 in the past). Further, it may handle cases with a claim exceeding HK$1 million provided that all parties consent to such an arrangement.

The Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 also introduced a new Section 7A to the Mediation Ordinance, allowing third-party funding in mediation.

VII OUTLOOK AND CONCLUSIONS

The number of investigations and enforcement actions begun by the key regulators is expected to remain consistent into 2019. The SFC has indicated a determination to exercise its prosecutorial powers for breaches of the SFO where available and is displaying a growing appetite for seeking to establish personal as well as corporate liability for relevant civil contraventions and criminal offences under the SFO against officers of corporations and other entities as well as the organisations themselves.

Hong Kong meanwhile continues to consolidate its position as an arbitration hub. With more flexible funding arrangements for arbitrations now available in Hong Kong, Hong Kong will likely further enhance its competitiveness as a seat of choice for international arbitrations.

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53 FDRC’s Term of Reference 2018 – the revised limit applies to claims where the date of first knowledge of loss by the claimant falls on or after 1 January 2018.
INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

As with most common law countries, Indian law may broadly be classified as substantive or procedural law. While substantive law determines rights and liabilities of parties or confers legal status or imposes and defines the nature and extent of legal duties, procedural laws prescribe practice, procedure and machinery for the enforcement or recognition of rights and liabilities. To put it another way, substantive laws are those that are enforced while procedure deals with the rules through which the substantive law is enforced.

Dispute resolution in India may be through courts, specialised tribunals (such as those for recovery of debt by banks or company disputes, among others) or alternative dispute resolution mechanisms that include arbitration, mediation and conciliation. The recent introduction of the Commercial Courts Act 2015 (the Commercial Courts Act) also provides for the constitution of commercial courts at a district level, except areas where the High Court exercises ordinary civil jurisdiction, commercial divisions (in all High Courts having ordinary civil jurisdiction) and commercial appellate divisions in each High Court for the adjudication and speedy disposal of commercial disputes of a specified value of not less than 10 million rupees or such other notified value within the limits of the relevant territorial jurisdiction.

The primary laws codifying court procedure in India are the Code of Civil Procedure 1908 (CPC) and the Code of Criminal Procedure 1973 (CrPC). Charter High Courts such as the High Courts of Bombay, Calcutta, Delhi and Madras may also apply Letters Patent Rules, which when applicable may override the provisions of the CPC. The procedure to be applied by tribunals is often governed by the statute that establishes the tribunal (and rules framed thereunder). Courts have held that the principles contained in the CPC would continue to apply to the tribunals even if the tribunals are not bound to follow specific provisions of the CPC.

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4 Section 2(c) of the Commercial Courts Act.
5 Sections 3, 4 and 2(i) of the Commercial Courts Act.
While the legislative and executive branches of the Indian government follow a federal structure, the Indian judicial system comprises a unified three-tier structure with the Supreme Court of India (the Supreme Court) holding the position of the apex court. Below the Supreme Court are the High Courts, functioning (in most cases) in each state. Lower in the hierarchy are the subordinate courts, which include courts at district level and other lower courts.

Law declared by the Supreme Court is binding on all other courts in India. By acceptance of the doctrine of stare decisis, law declared by High Courts binds subordinate courts and may have persuasive value over High Courts of other states. The Supreme Court and the High Courts are charged with original, appellate and writ jurisdiction. Under the writ jurisdiction they have the power to review administrative action including for the purposes of the enforcement of constitutional and fundamental rights granted under Part III of the Constitution of India.

The Arbitration and Conciliation Act 1996 (the Arbitration Act) governs the law related to domestic arbitration, foreign-seated arbitration and enforcement of foreign awards, in India. The Arbitration Act is based on the UNCITRAL Model Law as adopted by the United Nations Commission on International Trade Law on 21 June 1985. Mediation and conciliation have also been given statutory recognition through the Arbitration Act.

As a recent trend, even courts often promote alternative dispute resolution. This was discussed in great detail in the case of Afcons Infrastructure Limited v. Cherian Varkey Construction, where the Supreme Court laid down guidelines for courts to follow for the effective implementation of Section 89 of the CPC, which encourages parties to settle their disputes by means of alternative dispute resolution.

II THE YEAR IN REVIEW

The year 2018 witnessed a series of amendments aimed at introducing greater ease of doing business in India, and at bringing the current law in tune with the rapid economic growth in the country in order to aid foreign direct investments, public private partnerships, public utilities infrastructure developments, etc.

One of the primary legislative changes brought about during 2018 are the amendments to the Insolvency and Bankruptcy Code 2016 (IBC), which introduce significant changes on the substantive as well as procedural aspects of the IBC. The IBC, which came into effect on 1 December 2016, is a comprehensive legislation that seeks to replace extant insolvency and restructuring laws in India and proposes to cover corporate persons (i.e., companies and limited liability partnerships), individuals and partnerships. The National Company Law Tribunals (NCLT) have been vested with the jurisdiction in respect of insolvency and restructuring proceedings against corporate persons in India, while the Debt Recovery Tribunal will oversee proceedings against individuals and partnerships. Some of the important amendments to the IBC include the following.

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7 Article 141 of the Constitution of India.
8 Banadakanta Misra v. Bhimsen Dixit (1973) 1 SCC 446.
Under the IBC, various categories of creditors, including foreign creditors, may trigger the insolvency resolution process and provide a single forum to oversee resolution and liquidation proceedings. The recent amendment to the definition of ‘financial debt’ includes amounts raised from allottees in respect of a real estate project (as defined under the Real Estate (Regulations and Development) Act 2016), thereby recognising their status as financial creditors. Homebuyers can now initiate the insolvency process against errant real estate developers and will be entitled to representation on the Committee of Creditors (CoC) of the corporate debtor. Homebuyers will be treated as a class of creditors. Given the large number of homebuyers for a project, they will be represented in the CoC by an authorised representative to be appointed by the National Company Law Tribunal.

The IBC provides that the Corporate Insolvency Resolution Process (CIRP) may be initiated on the occurrence of a single payment default of 100,000 rupees and the NCLT will determine whether a payment default has taken place. Accordingly, a CIRP application can be admitted against the corporate debtor. The recent amendment provides that the law of limitation will apply to IBC applications, removing earlier confusion in this regard.

Under the IBC, the NCLT is required to declare a moratorium of 180 days (that may be extended for a further period of 90 days) against any recovery actions and new cases filed against the corporate debtor and its assets, and appoint an interim resolution professional who will oversee the formulation of the restructuring plan. However, in a few cases, courts took the view that the moratorium in an ongoing CIRP will also stay enforcement of guarantees or security interest from promoters and group companies of the corporate debtor. The amendment now clarifies that the moratorium period shall not apply to the enforcement of guarantees granted by promoter guarantors or other group companies that are not undergoing a CIRP. The Supreme Court has also clarified that this does not cover the assets of the personal guarantor of the corporate debtor. Where there is conflict, especially when there is a direct clash between moratoriums under the two statutes, then the IBC will take precedence over any other legislation.

Once the CIRP has been initiated, the NCLT becomes the sole forum to entertain disputes either initiated by the corporate debtor or against the corporate debtor. In order to protect the interest of all creditors, the amendment:

- bars withdrawal of corporate insolvency proceedings even if the matter is settled between the parties, unless it is approved by 90 per cent of the Committee of Creditors;
- reduces the threshold from 75 per cent to 66 per cent for the CoC to approve certain actions such as appointment of a resolution professional, approval of the resolution plan, approaching the NCLT for passing of liquidation order, etc.;

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11 Sections 7 and 9 of the IBC.
12 Inserted by the Insolvency and Bankruptcy (Second Amendment) Act 2018 as Section 6A of the IBC.
13 Sections 7 and 9 of the IBC.
14 Inserted by the Insolvency and Bankruptcy (Second Amendment) Act 2018 as Section 238A of the IBC.
15 Section 14 of the IBC.
16 Section 13 of the IBC.
17 Section 14 of the IBC amended by the Insolvency and Bankruptcy (Second Amendment) Act 2018.
20 Section 60(5) of the IBC.
21 Section 12A of the IBC inserted by the Insolvency and Bankruptcy (Second Amendment) Act 2018.
22 Amended by the Insolvency and Bankruptcy (Second Amendment) Act 2018.
India

c lists disqualifications to restrict the participation of persons in the resolution process who are likely to rig the resolution process, such as the promoters of the corporate debtor or persons responsible for the default of the corporate defaulter in the past, including persons related to such defaulters; and
d states that the consent of shareholders of the corporate debtor is generally required for significant corporate actions.

The Ministry of Corporate Affairs (MCA) released a clarification in the past year to the effect that approval of shareholders of the company for any corporate action in the resolution plan (otherwise required under any law) is deemed to have been given on its approval by the NCLT. The IBC is amended to incorporate the clarifications proposed by the MCA.

The IBC provided that financial creditors who were related to the corporate debtor would not be allowed to participate, attend or vote in CoC meetings. Financial institutions that had converted their debt into substantial equity stakes in the corporate debtor under any previous restructuring were deemed related to the corporate debtor and were thereby precluded from attending or voting in CoC meetings. The amendment provides an exemption from this prohibition for such financial creditors provided they are regulated by a financial sector regulator.

Another significant legislative change brought about in the past year is the recent amendments to the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2015, which established special courts governed by procedures tailored for the speedy resolution of commercial disputes. Reducing the ceiling limit from 1 million to 300,000 rupees, the recent amendment has increased the pecuniary jurisdiction of commercial courts. In order to reduce the caseload of all commercial cases to be heard by a high court, additional commercial courts, based on their pecuniary threshold, have been created below district judge levels for states where high courts do not have original civil jurisdiction, and at the district judge level for states where high courts have ordinary original civil jurisdiction. Appeals from the orders of the commercial courts below district judge level would be filed before commercial appellate courts specially created for the purpose. Interestingly, with a view to encourage resolution of commercial disputes by alternate dispute redressal mechanisms, the amendment provides that no commercial suit can be instituted unless the plaintiff exhausts the remedy of pre-institution mediation, except in cases where urgent interim relief is contemplated.

23 Section 29A of the IBC inserted by the Insolvency and Bankruptcy (Second Amendment) Act 2018.
24 Section 10 of the IBC amended by the Insolvency and Bankruptcy (Second Amendment) Act 2018.
25 Section 21 of the IBC amended by the Insolvency and Bankruptcy (Second Amendment) Act 2018.
26 Section 3 of the principal Act was amended by the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act 2018.
27 ibid.
28 Section 3A to the principal Act inserted by the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act 2018.
29 Section 12A to the principal Act inserted by the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act 2018.
Further, the Specific Relief Act 1963 that prescribes remedies for enforcement of certain civil rights also introduced key amendments in its provisions dealing with specific performance of contracts. Prior to the amendment, specific performance of contract would be granted by the courts subject to their discretion only if:

\[ \begin{align*} 
& a \quad \text{the monetary compensation for breach of contract was inadequate;} \\
& b \quad \text{if the damage caused by the breach could not be determined.} 
\end{align*} \]

However, under the amended law, the conditions for the grant of specific performance are better defined. The amendment bars grant of injunction in suits involving infrastructure project or contracts where injunctions would delay or hinder the progress of the projects. Special courts will be designated for hearing suits in respect of infrastructure project contracts. The amendment posits that disposal of suits within a period of 12 months from the service of process are subject to extension for an aggregate period of six months.

There were a number of significant judgments of courts in 2018.

In *Board of Control for Cricket in India v. Kochi Cricket Private Limited*, the Supreme Court laid to rest the ambiguity that existed around the applicability of the amended provisions of the Indian Arbitration and Conciliation Act 1996 (the Arbitration Act), especially to court proceedings that arise out of an arbitration that commenced before 23 October 2015, the date of commencement of the amendment. Prior to 23 October 2015, mere filing and pendency of an application for setting aside an arbitration award would lead to an automatic stay against its enforcement. The 2015 amendment did away with this provision (under Section 36 of the Arbitration Act), but its applicability on the pending applications for setting aside the arbitral awards caused conflicting decisions by various high courts in India. The Supreme Court has held that amended provisions would apply to pending applications for setting aside the arbitral award. The judgment debtor would now need to specifically seek a stay of the arbitration award or prepare to pay the award notwithstanding the pending challenge to set aside the award.

In *Union of India v. Hardy Exploration and Production (India) INC*, the Supreme Court decided on the principle to be applied for determining the seat of an arbitration when the arbitration agreement specifies the venue for holding the arbitration but does not specify the seat. The Supreme Court held that when an arbitration clause only specifies the term ‘place’ and no other condition is attached to it, it is equivalent to ‘seat’ and that finalises the issue of jurisdiction. However, if a condition is attached to the term ‘place’, the same has to be satisfied for the place to become equivalent to seat.

In *M/s Emkay Global Financial Services Ltd. v. Girdhar Sondhi*, the Supreme Court has held that an application to set aside an arbitration award are summary proceedings and the courts should ordinarily not allow the parties to lead evidence unless necessary.

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30 Section 10 of the Specific Relief Act 1963.
31 Section 10 is amended by the Specific Relief (Amendment) Act 2018.
32 Section 20A inserted in the principal Act by the Specific Relief (Amendment) Act 2018.
33 Section 20B inserted in the principal Act by the Specific Relief (Amendment) Act 2018.
34 Section 20C inserted in the principal Act by the Specific Relief (Amendment) Act 2018.
36 AIR 2018SC 4871.
37 2018 (10) SCALE 15.
In *Cheran Properties Ltd v. Kasturi and Sons Ltd and Ors*, the Supreme Court has paved the way for expedient execution of arbitral awards. The Supreme Court held that an arbitral award is capable of being enforced as if it were a decree of the Court, and that to effectuate transfer of shares awarded in arbitration, recourse to the remedy of the rectification of the register was appropriate and necessary. Thus, armed with this decree, a party is entitled to seek rectification of the register by approaching the NCLT under the relevant provisions of the Companies Act 1956. The Supreme Court, relying on the Group of Companies doctrine, further held that since the facts of the present case indicate a mutual agreement by parties (including non-signatories) to be bound by the arbitral award, an arbitral award can be enforced against a third party. In a similar vein, the Division Bench of the Madras High Court in *SEI Adhavan Power Private Limited and Ors v. Jinneng Clean Energy Technology Limited and Ors* set aside an anti-arbitration injunction and stated that the duty of the court is to impart a sense of business efficacy to the commercial understanding reflected in the terms of the agreement between the parties. Applying the Group of Companies Doctrine, the court held that a non-signatory or third party could be subjected to arbitration only in exceptional cases. In addition to factors such as the direct relationship of the party signatory to the arbitration agreement, direct commonality of the subject matter and the agreement between the parties being a composite transaction, the Court would have to examine whether a composite reference of such parties would serve the ends of justice.

In *Ahmed Abdulla Ahmed Al Ghurair v. Star Health And Allied Insurance Company Limited & Ors*, the Supreme Court of India held that a derivative action of a foreign company is not maintainable in India and upheld the principle of *forum non conveniens* while granting leave to a party to institute a suit before the Madras High Court under Clause XII of the Letters Patent Act. It further held that if a person holding beneficial interest in shares fails to make necessary declarations under Section 89 of the Companies Act 2013 then neither the beneficial owner nor any person claiming through it can thereafter try to enforce the beneficial interest by seeking declaratory relief from an Indian court.

### III COURT PROCEDURE

#### i Overview of court procedure

It can be seen in connection with the Indian legal system (as a criticism more than a compliment) that ‘there is ample – sometimes excessive – due process; and one has to be patient and persevering’. Broadly, court procedure in India is governed by the CPC for civil matters and the CrPC for criminal matters. As discussed above, even where statutes create specialised tribunals and courts to deal with particular disputes, it is sometimes recognised

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38 2018 SCC OnLine (SC) 431.
39 Original Side Appeal Nos.170 to 175 and 206 to 210 of 2018.
40 2018 (15) SCALE 133.
41 Clause XII of the Letters Patent of the High Court of Madras sets the limits of the original jurisdiction of the Court. Except for certain suits, the High Court of Madras has jurisdiction to entertain suits where, *inter alia*, part of the cause of action has arisen within its territorial limits. However, for this purpose, the leave of the Court has to be first obtained.
that the principles contained in the CPC and CrPC would continue to apply. This is often so because provisions in the CPC and the CrPC are recognised as the embodiments of the principles of fair play, natural justice and due process.

**ii Procedures and time frames**

The primary statute governing limitation is the Limitation Act 1963. As a general rule, most suits, especially those relating to contracts and accounts have a limitation period of three years for filing. Some suits relating to immovable property may fall within a longer limitation ranging from 12 to 30 years. The periods prescribed under the Limitation Act may not apply in the event a specific statute prescribes a period of limitation.

Where a plaintiff approaches a court for injunctive relief, especially at an interlocutory stage, the court may require the plaintiff to demonstrate (quite aside from being within limitation) that the plaintiff has acted in a timely manner and has not acquiesced to the infringement of its rights.

A writ court may require a petitioner (although no limitation is prescribed for writs) to demonstrate that he or she has approached the court without delay, since a delay may disentitle a petitioner to relief.

After amendments in 2002, the CPC requires written statements of defence to be filed in a timely manner. This is normally within 30 days of the service of summons, which may be extended by a further 60 days. The CPC also curtails the number of adjournments that may be sought and attempts to curtail practices that are often perceived as dilatory, such as belated amendments to pleadings and belated production of documents.

It is pertinent to note that the Arbitration Amendment Act now mandates time-bound arbitrations. A time limit of 12 months has been prescribed from the date that the arbitrators have received notice in writing of their appointment. Parties may also agree in writing to have their dispute resolved by fast-track procedures, which would require the award to be made within six months from the date of entry of the arbitral tribunal upon reference. If the court passes any interim measure under Section 9 of the Arbitration Act, the arbitral proceedings must commence within 90 days of the court passing such an order.

The Commercial Court Act has also set a time of 30 days for the submission of written arguments and 90 days from the date of conclusion of arguments for the pronouncement of a judgment. Appeals have to be disposed of by the appellate body within 60 days from the date of the appeal.

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43 Schedule I to the Limitation Act 1963.
44 For instance, the Consumer Protection Act 1986 sets out a period of limitation of two years from the date when the cause of action arose for filing a complaint. Or, for instance, under the Arbitration Act an application for setting aside a final award can be made within three months from the date of the award. A court at its discretion taking on record reasons for delay can grant an extension of 30 days.
47 Order VIII, Rule 1 of the CPC.
48 Order VI, Rule 17 of the CPC.
49 Order VII, Rule 14 of the CPC; Order XII Rule 2 of the CPC.
50 Section 15 of the Arbitration Amendment Act.
51 Section 5 of the Arbitration Amendment Act.
The IBC provides a period 180 days from the date of admission of an application for initiating CIRP as the period of the insolvency resolution process that culminates with the submission of a resolution plan to the NCLT.\(^\text{52}\)

In spite of these recent developments to reduce time frames, the time taken for the completion of a trial in civil and criminal proceedings may be several years.

### iii Class actions

The CPC recognises that where there are numerous persons with the same interest in one suit, one or more of such persons may, with the permission of the court, sue or be sued, or may defend such suit on behalf of or for the benefit of all persons interested.\(^\text{53}\)

The Companies Act 1956 and the Companies Act 2013 stipulate that a specified number of members or depositors may, if they are of the opinion that the management or control of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors, file an application before the company law tribunal on behalf of the members or depositors.\(^\text{54}\)

The Supreme Court has in the exercise of its writ jurisdiction long recognised the ability of an individual or a group of individuals to bring ‘public interest litigations’ to espouse the cause of larger sections of society.\(^\text{55}\)

### iv Representation in proceedings

The Constitution of India guarantees the right of a person accused of an offence to be represented by a legal practitioner of his or her choice.\(^\text{56}\)

In other proceedings, while litigants are typically represented by advocates enrolled under the Advocates Act 1961, there may be exceptions to the rule. For instance, the Family Courts Act\(^\text{57}\) stipulates that a party may be represented by an advocate only if the court thinks that it is necessary for a fair trial. Further, the Industrial Disputes Act\(^\text{58}\) restricts the conditions under which a lawyer can appear before the industrial tribunal. The Advocates Act\(^\text{59}\) empowers a court to permit any person who has not been enrolled as an advocate to appear before it in any particular case.

### v Service out of the jurisdiction

The CPC\(^\text{60}\) and the CrPC\(^\text{61}\) contain provisions for service out of the territory of India. India has also entered into bilateral treaties and multilateral conventions for these purposes.

Under the CPC, when a defendant resides outside India and no agent in India is empowered to accept service, summons or notice may be sent by courier or post service as

\(^{52}\) Section 12 of the IBC.

\(^{53}\) Order I, Rule 8 of the CPC.

\(^{54}\) Section 241 read with Section 244 and Section 245 of the Companies Act 2013. Sections 397, 398 and 399 of the Companies Act 1956.

\(^{55}\) People’s Union for Democratic Rights v. Union of India 1983 SCR (1) 456.

\(^{56}\) Article 22 of the Constitution of India.

\(^{57}\) Section 13 of the Family Courts Act 1984.

\(^{58}\) Section 36 of the Industrial Disputes Act 1947.

\(^{59}\) Section 32 of the Advocates Act 1961.

\(^{60}\) Order V, Rule 25 of the CPC.

\(^{61}\) Section 105 of the CrPC.
approved by the appropriate High Court. This provision must, however, be read together with the procedure prescribed by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 to which India is a party.

The CrPC recognises bilateral arrangements and makes compliance with such an arrangement mandatory. It is prescribed that summons or warrants issued by a court in India should be served and executed in accordance with the bilateral arrangement, if any. Also, the Ministry of Home Affairs in India has, by a circular dated 11 February 2009, clarified the procedure to be followed for the issuance of summons to a foreign resident (the MHA Circular). Under the MHA Circular, all requests for service of summons, notices or judicial processes on persons residing abroad shall be addressed to the Under Secretary (Legal) of the Ministry of Home Affairs. Thereafter, the Ministry, after scrutinising the request, can forward it to the relevant foreign officer.

vi Enforcement of foreign judgments

A money decree obtained from a court of a jurisdiction notified by the Indian Union government as a reciprocating territory under the CPC can be enforced in India directly by filing an execution petition in a court of competent jurisdiction.\(^{62}\) As a result, judgments of courts not notified as reciprocating territories or decrees other than money decrees cannot be executed directly in India. A decree holder in such a case may file a fresh lawsuit in the Indian courts on the basis of the foreign judgment. In either execution proceedings or fresh suits filed on the basis of foreign judgments, parties may rely on Sections 13\(^{63}\) and 14\(^{64}\) of the CPC.

Section 44 of the Arbitration Act prescribes that a foreign award that arises out of (1) an agreement to which the New York Convention on the Recognition and Enforcement of Foreign Awards (the New York Convention) applies and (2) is made in one of the territories in respect of which the Central Government declares that the New York Convention applies on satisfaction that reciprocal provisions are being made, may be enforced in India. In this regard, the Arbitration Amendment Act has clarified that a foreign arbitration award may be set aside if it violates the public policy of India on the same grounds as described for domestic awards above. However, unlike domestic awards, foreign awards cannot be set aside on the ground of patent illegality.

\(^{62}\) Section 44A of the CPC.

\(^{63}\) Section 13 of the CPC states:

* A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except (a) where it has not been pronounced by a Court of competent jurisdiction; (b) where it has not been given on the merits of the case; (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable; (d) where the proceedings in which the judgment was obtained are opposed to natural justice; (e) where it has been obtained by fraud; (f) where it sustains a claim founded on a breach of any law in force in India.

\(^{64}\) Section 14 of the CPC states:

* The Court shall presume upon the production of any document purporting to be a certified copy of a foreign judgment that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.
vii Assistance to foreign courts

Assistance may be given to foreign courts on the basis of bilateral agreements with the reciprocating territories. In civil matters, the CPC provides for the service of foreign summons issued by certain specified courts only. In such cases, assistance is given when a defendant resides or works for gain or carries on trade or business within India and the summons itself may be a summons for the appearance of the defendant, production of documents or furnishing of information.

Also as discussed above, India is a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965, whose key objective is to improve the organisation of mutual judicial assistance by simplifying and expediting procedures.

viii Access to court files

Rules relating to access to court files may vary depending on the nature of the proceeding, who is seeking access and whether the proceeding is ongoing or concluded. In most cases a person who is a party to the proceeding is allowed to search, inspect or have copies of all pleadings and other documents or records of the case. A third party seeking the information or record may need to apply to the court and show cause to be allowed to do so.

ix Litigation funding

Disinterested third-party funding is not common. While some courts have found that third-party funding may be permissible, other courts have often declined to uphold such agreements on the grounds of public policy or professional ethics.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

The Bar Council of India Rules (the BCI Rules), notified by the Bar Council of India (BCI) under the Advocates Act 1961, impose standards on advocates to ensure that conflicts of interest are avoided. These include:

a a prohibition on appearing for opposite parties in the same matter, and from taking instructions from anyone other than the client and the client’s authorised agent;

b a prohibition on lending to a client, or converting funds in the advocate’s hands to a loan, or adjusting fees against personal liability owed by an advocate to the client;

c a prohibition on bidding for, or acquiring an interest in property of actionable claim involved in litigation;

d a prohibition on appearing in matters where the advocate has a pecuniary interest;

e a prohibition on representing establishments of which the advocate is a member;

f a prohibition on appearing in matters where he or she is a witness;

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65 Section 2(5) of the CPC defines a ‘foreign court’ as a court situated outside India and not established or continued by the authority of the central government.

66 Section 29 of the CPC.


68 Re KL Gauha AIR 1954 Bom 478; In Re: Mr ‘G’, A Senior Advocate of The Supreme Court AIR 1954 SC 557.
a prohibition on appearing before relatives who are judges;
the obligation to make a full and frank disclosure to client relating to his or her connection with the parties and any interest in or about the controversy likely to affect his or her client’s judgement in either engaging him or her, or continuing the engagement; and
the obligation not to disclose information or instructions provided by the client.

ii Money laundering, proceeds of crime and funds related to terrorism

While there are no specific obligations on lawyers with respect to money laundering, India has a strong legislative framework, including the Prevention of Money Laundering Act 2002, the Income Tax Act 1961, the Foreign Exchange Management Act 1999, the Foreign Contribution Regulation Act 2010 and the Companies Act 2013, that serves to detect and prevent money laundering and the proliferation of the proceeds of crime.

iii Data protection

Data protection in India is primarily governed by the Information Technology Act 2000 and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011 (the IT Rules). These rules define sensitive personal data and information (SPDI) and prescribe the manner in which SPDI may be collected, processed, transferred, disclosed or stored. The IT Act provides for damages in the event that the SPDI is not protected and wrongful loss is caused as a result.

The introduction of the IT Rules has affected how lawyers may collect and use SPDI. To the extent that SPDI is collected directly from the data subject, the consent of the data subject is required for the purpose of using the SPDI or transfer of SPDI.

In the context of due diligence and onward sharing of data with other law firms and LPOs, the levels of compliance appear higher in as much as data sharing agreements usually incorporate the requirements of the IT Rules.

However, compliance with the procedures specified in the IT Rules by lawyers generally appear to be relatively lax when it comes to collection and use of data in the course or for the purposes of litigation, especially as damages may be claimed only if wrongful loss can be proved.

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69 The ‘sensitive personal data or information’ is defined in the IT Rules as personal information that consists of (1) the password; (2) financial information such as bank account, debit or credit card; (3) physical, psychological and mental health condition; (4) sexual orientation; (5) medical records and history; (6) biometric information; (7) any detail relating to the above as provided to the body corporate for providing a service; or (8) any of the information received under each of the heads by the body corporate for processing, or to be stored or processed under a lawful contract.
iv Other areas of interest

As discussed above, most provisions of the Companies Act 2013 have been notified. There are certain significant changes with respect to the liability of actors such as directors and auditors under the Companies Act 2013.

For instance, directors of companies facing civil and criminal proceedings are now required to demonstrate that they had ‘acted diligently’ in connection with the subject matter of the dispute in order for them to be excused from personal liability. Under the previous jurisprudence, it was acceptable in some circumstances for non-executive and independent directors to take the defence that they were not involved in the day-to-day operations or management of the company. It is likely that this defence will no longer be available.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

Subject to specified exceptions, Section 126 of the Indian Evidence Act, 1872 (the Evidence Act) prohibits an attorney from disclosing without his or her client’s express consent any communication made to him or her in the course of and for the purpose of his or her employment as an attorney. Recognising the role of interpreters, clerks and other support staff employed by attorneys, the privilege is extended by Section 127 of the Evidence Act to facts coming into their knowledge in the course of their employment. Section 129 protects a client from being compelled to disclose any confidential communication that has taken place with his or her ‘legal professional adviser’.

70 See, for instance, Section 2(60), which includes directors within the definition of ‘officers in default’. Section 166 also lays down duties of directors, which if contravened would result in penal consequences in the form of fines. Section 42(10) stipulates that contravention of the procedure of private placement would impose liability on the directors of the company for a penalty up to 20 million rupees or the amount involved in the offer, whichever is higher. In general, the penal provisions are Sections 447 to 457 of the Companies Act 2013.

71 See, for instance, Section 140, which empowers NCLT to suo moto or on an application, if it is satisfied that an auditor has acted in a fraudulent manner, direct a company to change its auditor. Such auditor will also be liable to penal action under Section 447. Section 147 also penalises auditors for contravention of duties of auditors and auditing standards as set out under the Companies Act 2013. Separately, Section 247 of the Companies Act 2013 imposes penalties on a valuer who has not exercised adequate due diligence.

72 Section 166(3) imposes a specific duty on a director to exercise his or her duties, inter alia, with due and reasonable care. Separately, however, Section 463(1) empowers the court to grant relief if the director has acted honestly and reasonably.

73 Section 149 read with Schedule IV provides for a code of conduct to be followed by independent directors. Specifically, Section 149(12) imposes a liability of independent directors in respect of actions or omissions that had occurred through his or her knowledge or where he or she had not acted diligently.

74 There are two statutory exceptions to the rule of client–attorney privilege. First, any communication made in furtherance of any illegal purpose is not protected and second, facts observed by the attorney in the course of his or her employment, showing that any crime or fraud has been committed since the commencement of his or her employment, are not protected.

75 The Evidence Act predates the Advocates Act 1961. The expressions ‘barrister’, ‘attorney’, ‘pleader’ or ‘vakil’ refer to various categories of legal practitioners recognised when the Evidence Act was enacted. The Advocates Act 1961 now recognises a single category of legal practitioner qualified to practise law, and defines them as ‘advocates’.
As discussed above, an advocate is also prohibited by the BCI Rules from disclosing client communications or advice given by him or her to the client.

A contemporary area of interest around this question is whether the protection of attorney–client communication extends to in-house counsel. The area is not free from doubt. While the Bombay High Court in its judgment in Municipal Corporation of Greater Bombay v. Vijay Metal Works\textsuperscript{76} took the view that in-house counsel would be covered by privilege, this view was doubted by the same court in Larsen & Toubro Limited v. Prime Displays Private Limited\textsuperscript{77} in light of the observations of the Supreme Court in Satish Kumar Sharma v. Bar Council of Himachal Pradesh.\textsuperscript{78}

### ii Production of documents

Under the CPC, the court can, at any time during the pendency of any suit, order the production (under oath) of such documents, relating to any matter in question in such suit. Further, the Evidence Act provides that a witness summoned to produce a document must, if it is in his or her possession, bring it to court regardless of any objection to its production or admissibility.\textsuperscript{79}

If a party asserts privilege over a document that it is asked to produce and this assertion is disputed by the opposite party or not accepted by court, it is likely that the court would review the claim for privilege and possibly the documents under seal and decide on whether the protection of privilege applies.\textsuperscript{80}

### VI ALTERNATIVES TO LITIGATION

#### i Overview of alternatives to litigation

Since India has permitted foreign investments in various industries and sectors through its new liberal policies, there is a considerable increase in the number of commercial disputes. As a mechanism to deal with its heavy caseload, India has striven to encourage alternative dispute resolution (ADR) mechanisms. In several areas and even at the level of the High Courts and the Supreme Court, the law has allowed for parties to be directed towards ADR.\textsuperscript{81}

#### ii Arbitration

Apart from the Arbitration Act, the Supreme Court of India in Salem Bar Association v. Union of India\textsuperscript{82} recommended the adoption of arbitral rules that were formulated by the Jagannadha Rao Committee. The draft rules made by the Committee were circulated to all the High Courts. The rules provide for the procedure according to which the referral to ADR mechanisms under Section 89 of the CPC can take place, including the stage at which the referral can take place. Guidelines to be observed by the court before making such referral have also been set out.

\textsuperscript{76} AIR 1982 Bom 6.
\textsuperscript{77} (2003) 114 CompCas 141 (Bom).
\textsuperscript{78} (2001) 2 SCC 365.
\textsuperscript{79} Section 162 of the Indian Evidence Act 1872.
\textsuperscript{80} See, for instance, the judgment of the Bombay High Court in Larsen & Toubro Limited v. Prime Displays Private Limited (2003) 114 CompCas 141 (Bom).
\textsuperscript{82} AIR 2005 SC 3353.
The arbitration framework, however, has been outlined in the central Arbitration Act, which provides for various matters such as the interpretation of the arbitration agreement, interim measures that can be taken, appointment and termination of arbitrators, place and procedure for the arbitration and grounds for challenges. India is also party to the three main international conventions that govern international arbitrations in different territories and that have been consolidated under the Arbitration Act:

\[\text{a}\] the Geneva Protocol on Arbitration Clauses of 1923;
\[\text{b}\] the Convention on the Execution of Foreign Awards 1923 (the Geneva Convention); and
\[\text{c}\] the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention).

The Arbitration Act is applicable both to domestic and foreign-seated arbitrations. Part I covers the scope of domestic arbitrations, whereas Part II covers foreign-seated arbitrations and the enforcement of foreign awards. Part I defines the scope of what constitutes arbitration, the essentials of an arbitration agreement and the procedure for determining the validity of such an agreement. It is important to note in this regard that there are limited instances and time-bound procedures for challenging the validity of such an agreement and the arbitral tribunal has the power to determine its jurisdiction. Section 5 of the Arbitration Act specifically provides, with respect to Part I, that no judicial authority may intervene in arbitration except in a case where a stipulation to this effect has been made.

The initial years of the implementation of the Arbitration Act saw regressive interpretation that allowed frequent and wide-sweeping judicial intervention from Indian courts. The judgments of the Supreme Court and High Courts have, however, broken the trend and are serving to restore confidence in India as a potential arbitration destination. The Arbitration and Conciliation (Amendment) Act 2015 has also introduced various provisions that promote arbitration by reducing the timelines and costs involved.

Further, although statistically there are more ad hoc arbitrations conducted in India, the use of institutional arbitration is growing gradually. This has to do in part with the reputed arbitration institutions, such as the Singapore International Arbitration Centre, setting up establishments in India. India’s first international arbitration centre, the Mumbai Centre for International Arbitration, was set up in Mumbai in 2016. The High Courts at Delhi, Karnataka, Punjab and Haryana, and Madras, inter alia, have set up arbitration centres with the objective of providing recourse to credible yet affordable arbitration.

iii Mediation

The most important component of mediation is that it is the parties to the dispute who decide the terms of settlement. In conciliation on the other hand, the conciliator makes proposals, and formulates and reformulates the terms of settlement. Mediation was first given statutory recognition in the Industrial Disputes Act 1947, where officers appointed under Section 4 of the Act are ‘charged with the duty of mediating in and promoting the settlement of industrial disputes’. Mediation, as a form of dispute resolution has not obtained independent force in India but is mostly institutionally annexed to the courts through Section 89 of the Code of

83 Section 2(1)(f) of the Arbitration Act.
84 Section 7 of the Arbitration Act.
85 Section 16 of the Arbitration Act.
Civil Procedure Code 1809. To that extent, this might compromise the independence of mediations from court-related procedures and interference. Nevertheless, it gives mediations greater legitimacy and compatibility with the formal dispute resolution processes in society.

Another point to be noted is the growing importance of mediation clauses in commercial agreements. Both mediation and consultation form a mandatory aspect of pre-arbitration procedure. It has also been held by courts that mediation and consultation are a substantial part of the agreement and are to be followed prior to any arbitration being initiated. In the event that the dispute is referred first to arbitration, the tribunal has the power to render the petition inadmissible on the grounds of the pre-arbitration procedure prescribed by the agreement being violated by the parties.

Akin to the Arbitration Rules 2006, the judges of the Salem bench also recommended the adoption of the Civil Procedure Mediation Rules 2006. These rules govern almost the whole of the mediation process starting from the procedure for appointment of the mediator by both the parties from a panel of mediators who have already been formed for this purpose by the district courts. The qualifications and disqualifications for the panel, the venue of the mediation, the removal of a mediator from the panel, their impartiality and independence, the procedures during the mediation itself, confidentiality, privacy, the settlement agreement and many other aspects are governed by these rules.

It is pertinent to note also the popularity of court-annexed mediation whereby mediation centres have been set up by various High Courts including in Delhi, Madras and Bangalore.

iv Other forms of ADR

Conciliation has been inserted in Part III of the Arbitration Act and is less formal than arbitration, but more formal than mediation. To the extent that it requires only mutually consenting parties and not a formal written document executed to be able to conciliate, it proves an easier form of dispute resolution. The parties can appoint up to three conciliators. An important requirement of conciliation proceedings is the independence and impartiality of the conciliator and the attempt to ensure the appointment of a conciliator not having the nationality of either of the parties. The conciliators form a medium of communication between the parties inviting them for proceedings and helping them exchange documents and evidence. When the conciliators are of the opinion that elements of a settlement exist, they can draw up the terms of conciliation and, after being signed by the two parties, it shall be final and binding on both to the same extent as an arbitral award.

VII OUTLOOK AND CONCLUSIONS

In India, the judge-to-population ratio is not adequate to meet the huge volume of litigation, effectively adding to the delay in redressal. This phenomenon is often referred to as the ‘docket explosion’. Considering the extensive legal framework and significant backlog of litigation, Indian arbitration has made strong attempts to bring about a dynamic change. However, the

86 Thermax Limited v. Arasmeta 2008 (1) ALT 788.
87 Section 62 of the Arbitration Act.
88 Section 63 of the Arbitration Act.
89 Section 64(2) of the Arbitration Act.
90 Sections 73 and 74 of the Arbitration Act.
ordinances, especially if enacted by Parliament, are expected to reduce many difficulties with regard to timing, cost, finality of awards and interim reliefs faced by both foreign and Indian parties wishing to arbitrate in India.

i **Arbitration in India**

In a practical scenario, a foreign investor will have the ability to approach a court for protective relief with respect to Indian shares and Indian assets and for other support, such as the recording of evidence in India. On the other hand, the ability to apply to an Indian court for annulment of an award may not be beneficial in all cases. Indian courts in exercise of jurisdiction under Section 34 of the Arbitration Act have previously taken an expansive interpretation of the grounds for challenge of an award. While the Arbitration Amendment Act has attempted to narrow the scope of interpretation around the term ‘public policy’, this remains untested in Indian courts. Therefore, it is possible that an Indian arbitral award may be re-litigated in an Indian court.

ii **Arbitration outside India**

Unlike the previous regime, where parties to arbitrations seated outside India did not have recourse to Indian courts under Part I of the Arbitration Act, the Arbitration Amendment Act extends certain provisions of Part I (discussed above) to foreign-seated arbitrations, subject to an agreement to the contrary. This amendment may therefore enable a foreign investor who thinks an Indian party may dissipate its assets or transfer or devalue Indian shares, to approach an Indian court for interim relief. Therefore, even if the Indian party does not have a presence or assets at the foreign location where the arbitration is seated, given the extension of certain provisions of Part I of the Arbitration Act by the Arbitration Amendment Act, foreign investors may be able to obtain protective orders in India. This reduces the risks attached to waiting until an award is finally pronounced by the tribunal.

In this regard, an award of a foreign tribunal, if required to be enforced in India, would need to be presented for enforcement under Section 48 of the Arbitration Act. An Indian court can review the foreign award to the limited extent provided under Section 48 of the Arbitration Act to examine whether it may be enforced. As stated above, since the definition of ‘court’ under the Arbitration Act has been amended to mean the jurisdictional High Court for international commercial arbitrations, the proceedings for enforcement of foreign arbitral awards will now lie before the High Court. Additionally, if the subject matter of the dispute resulting in the foreign award is in excess of the ‘specified value’ as defined under the Commercial Courts Act, all such matters will be heard and disposed of by the commercial appellate division of that High Court. The impact of judicial precedents on the arbitration regime in India remains, however, to be seen. It may be too soon to ascertain the prospects for a young country such as India.
I

INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

i

Structure of law

The Republic of Indonesia inherited most of its legal system from the Dutch colonies. Indonesia is a civil law country and is characterised by codified legal provisions, and that written laws and regulations are the primary sources of laws.

The formulation of laws in Indonesia is carried out in accordance with Law No. 12 of 2011 on Formulation of Laws and Regulations (Law No. 12/2011). This Law stipulates the type and hierarchy of Indonesian laws and regulations, as follows:

a. the 1945 Constitution;
b. the Decree of the People’s Consultative Assembly;
c. law, or government regulation in lieu of law;
d. government regulation;
e. presidential regulation;
f. provincial regulation; and
g. regency or municipality regulation.

The foregoing hierarchy must be understood in conjunction with the principle of lex superior derogat legi inferiori (a law higher in the hierarchy repeals the lower one). The purpose of this principle is to ensure conformity with all of the laws and regulations listed in the hierarchy.

Although Indonesia does not acknowledge the binding force of precedents, former precedents that have frequently been referred to in adjudicating similar cases are considered to have a ‘persuasive power’ among the judges. If the judges find such a precedent to be relevant to the case, they will refer to it in the final ruling of the case, and thus the judges have the choice of whether to follow the precedent or not.

Another aspect of precedents in Indonesia is they tend to set a trend in understanding laws and regulations. In some cases, precedents may provide a fully different interpretation of laws and regulations – compared to the one provided by the relevant laws and regulations – on the grounds of equity or public policy. This often provokes concerns on the degree of legal certainty in Indonesia. However, some precedents may also be worthy of appreciation owing to their groundbreaking legal importance.

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1 Ahmad Irfan Arifin is a litigation partner at Lubis, Santosa & Maramis. The author wishes to thank the firm associates Kristian Takasdo Simorangkir and Edgar Christian Martua Raja for their great help in the preparation of this chapter.
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In addition, customary laws and shariah law also influence the Indonesian legal system. The above laws are applicable with the following limitation:

a. customary laws only prevail to the extent that they do not contravene prevailing written laws and regulations; and
b. shariah law only prevail for:
   • civil matters stipulated under the prevailing laws and regulations (e.g., marriage and inheritance for Muslims); and
   • regions stipulated under the prevailing laws and regulations (i.e., the province of Nanggroe Aceh Darussalam).

ii Structure of courts

The judiciary of Indonesia comprises the Constitutional Court and the Supreme Court. The Constitutional Court holds the authority to conduct a constitutional review of laws, which may result in revocation of certain provisions or the whole law if it is found to contravene the 1945 Constitution. As for regulations having hierarchy below the laws, the Supreme Court has the authority to review whether a regulation contradicts certain laws that again may result in certain provisions or the whole regulation being annulled by the Supreme Court.

Aside from the above, the Supreme Court serves as the highest court of appeal for the following judicial bodies:

a. general courts whose jurisdiction encompasses civil and criminal cases;
b. state administrative courts that deal with state administrative disputes;
c. religious courts that have jurisdiction over civil disputes between Muslims, for example, marriage and inheritance law, and economic shariah law; and
d. military courts whose jurisdiction covers military criminal cases and military administrative cases.

Any party conducting a dispute through these Indonesian courts (unless stipulated otherwise under certain laws) should do so in the following order:

a. district courts (first instance);
b. high courts (appeal); then
c. the Supreme Court (cassation).

Judgments rendered by district courts may be appealed to the relevant high courts, whether on the ground of legal issues or factual issues. The disputing parties may also file a petition for cassation against high court judgments; however, the grounds for such petition for cassation are limited to issues pertaining to the application of laws.

Save for cassation judgments, all district court judgments and high court judgments shall not be deemed as final and binding unless all available legal recourse has been exhausted. However, under the procedural laws, even a final and binding decision may also be appealed.

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2 In criminal cases, judgments stating that the defendant is acquitted or discharged from all legal charges may not be appealed to the high court. The available legal recourse for such judgment is by filing for cassation to the Supreme Court. Nevertheless, filing for cassation against a judgment that acquits a criminal defendant was once prohibited by Article 244 of Indonesian Code of Criminal Procedure until the provision was amended under the ruling of Constitutional Court Judgment No. 114/PUU-X/2012 dated 28 March 2013.
through an extraordinary legal recourse (a case review) at the Supreme Court. In this regard, the grounds for filing a case review are limitative and must be submitted within a specific time period, in accordance with the prevailing laws and regulations.

iii Framework of arbitration and alternative dispute resolution

Alternative dispute resolution (ADR) in Indonesia is mainly regulated through the Arbitration Law. The Arbitration Law defines ADR as an institution for the resolution of disputes or differences of opinion through procedures agreed by the parties, namely resolutions outside the courts by:

a consultation;
b negotiation;
c mediation;
d conciliation; or
e expert assessment.

The Arbitration Law does not provide detailed rules and procedures of conducting ADR. The disputing parties are at liberty to choose ADR rules and procedures.

Although the same principle applies to virtually every ADR, rules and procedures of court-annexed mediation are strictly regulated under the Supreme Court Regulation. In Indonesia, the Arbitration Law also serves as *lex arbitri*. As such, all arbitration proceedings conducted in Indonesia must not contradict the provisions of the Arbitration Law.

Even though Indonesia has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, international arbitral awards are enforced in accordance with the provisions of the Arbitration Law.

Indonesia has also become a signatory to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) since 1968. However, Indonesia excludes disputes arising from state administrative decisions issued by regencies from the types of dispute that may be settled by ICSID.

II THE YEAR IN REVIEW

i Fugitives are prohibited from commencing pretrial proceedings

In Indonesia, any criminal suspect is entitled to commence pretrial proceedings to challenge the validity of its arrest or detention. Although pretrial proceedings basically serve as a complaint mechanism against violation of due process, recent developments show that they may also be used to challenge the naming of a suspect.

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3 Law No. 30 of 1999 on Arbitration and ADR.
4 Supreme Court Regulation No. 1 of 2016 on Procedure of Court-Annexed Mediation.
5 Under Article 1 Paragraph 9 of the Arbitration Law, international arbitration awards are awards rendered by an arbitration institution or *ad hoc* arbitration outside the legal jurisdiction of the Republic of Indonesia, or such awards are deemed as international arbitration awards under Indonesian laws and regulations.
6 Articles 65–69 of the Arbitration Law.
7 President Decree No. 31 of 2012 on Disputes Whose Settlement Shall Not Be Submitted to the Jurisdiction of International Centre for Settlement of Investment Disputes.
Before 2018, this legal recourse was commonly used by Indonesian fugitives to challenge the validity of their being named as a suspect while at the same time avoiding the law by going abroad.

More recently, this issue caused the Supreme Court to issue Circular Letter of Supreme Court No. 1 of 2018 on Prohibition to Commence Pretrial Proceedings for Suspect Who is Running Away or Whose Name is Listed as Fugitive (CL No. 1/2018). CL No. 1/2018 essentially states that:

a. a suspect who is running away or whose name is listed as fugitive is not allowed to commence a pretrial proceeding;
b. if the suspect insists on commencing a pretrial proceeding through his or her attorney or family members, the judge shall declare the petition for pretrial inadmissible; and

the judgment shall not be subject to any legal recourse.

While there has been criticism of the above, the following compliments have been made:

a. the act of running away from the law enforcers constitutes avoidance of law; and

b. a person who attempts to avoid the law is not entitled to commence pretrial proceedings.

Meanwhile, criticism was given as some people see the provision of CL No. 1/2018 as a form of deprivation against human rights. Nevertheless, recent practice shows that there have already been several court decisions implementing the provision of CL No. 1/2018 to declare that a petition for pretrial is inadmissible.  

The hearing of suspension of debt payment must also be attended by the other creditor whose name is mentioned in the petition for suspension of debt payment

Law No. 37 of 2004 on Bankruptcy and Suspension of Debt Payment (Law No. 37/2004) provides both the debtor and creditor with the right to file a petition for suspension of debt payment (PKPU) under the following requirements:

a. there are two or more creditors (including the petitioner); and

b. one of the creditors’ debts is due and payable.

Failure to satisfy such requirements shall cause the petition to be rejected.

Regardless of the foregoing requirements, on 6 April 2018, the Commercial Court at the Central Jakarta District Court rendered a judgment that added a requirement in filing a PKPU petition. The judgment was made in relation to a PKPU petition filed by Molucca Holding Sarl (Molucca) against PT Pelita Cengkareng Paper (Pelita Cengkareng).  

In this case, Molucca argued that it is entitled to receive payment of receivables – previously owned by PT Bank Permata, Tbk – from Pelita Cengkareng. However, after the assignment of receivables was made, Molucca did not receive any payment from Pelita Cengkareng, therefore, Pelita Cengkareng has committed default.

Further, Molucca also claimed that it has satisfied the PKPU Petition requirements because there are three other creditors of Pelita Cengkareng. Nevertheless, the Commercial

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8 See, among others, Pekanbaru District Court Decision No. 19/Pid.Pra/2018/PN Pbr of 13 August 2018; and South Jakarta District Court Decision No. 15/Pid.Pra/2018/PN JKT.SEL of 10 April 2018.
9 See: Central Jakarta Court Decision No. 30/Pdt.Sus-PKPU/2018/PN.JktPst of 6 April 2018.
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Court stated otherwise and rejected the PKPU petition. This is because the other creditors claimed by Molucca have never attended the hearing. Therefore, the judge could not ascertain whether Pelita Cengkareng still has any debt to these creditors.

Basically, Law No. 37/2004 does not require the petitioner to ensure the attendance of other creditors during the hearing. It only requires the petitioner to prove the existence of these creditors (through documentary evidence or witnesses). As such, it is apparent that the Commercial Court has set out an additional requirement of filing a PKPU petition. Some practitioners see that this requirement is unnecessary and may complicate PKPU proceedings. This is because the schedule for PKPU proceedings is very tight, and creditors (other than the petitioner) are not always available to attend the PKPU proceedings.

III COURT PROCEDURE

i Overview of court procedure

The official language to be used in the court proceedings is Indonesian. A civil court case is commenced by filing a lawsuit that is addressed to the chairman of the relevant district court – in general, the district court whose jurisdiction encompasses the defendant’s domicile. The lawsuit must comprise factual grounds and legal bases, and prayer for relief (where the plaintiff describes the remedies that they seek from the court).

After the filing of lawsuit, the chairman of the district court appoints the examining panel of judges. The panel of judges determines the first hearing date and summons the defendant to appear before the court.

In the first hearing, the panel of judges verifies the parties’ credentials and orders the parties to enter into a court-annexed mediation process. If the mediation process fails, the court will proceed with the pronouncement of the lawsuit and allow the defendant to produce a statement of defence consisting of a demurrer and response to the case merits. The demurrer section may contain a challenge to the court’s competence, the formality of the lawsuit, or both.

At the same time, the laws also provide the defendant with the right to file a counterclaim against the plaintiff.

Afterwards, the plaintiff may file a counter plea against the defendant’s statement of defence and a statement of defence against the defendant’s counterclaim (if any). Subsequently, the defendant is given the right to submit a rejoinder against the plaintiff’s counter plea and a counter plea against the plaintiff’s statement of defence in the counterclaim (if any). For final submissions, the court gives the opportunity for the plaintiff to lodge a rejoinder against the defendant’s counter plea in a counterclaim.

Before proceeding to the evidentiary process, the court shall render an interlocutory judgment over the court competence demurrer. If the court grants the court competence demurrer, then the court shall declare the lawsuit to be inadmissible. Otherwise, the court shall proceed with the evidentiary hearing.

In the evidentiary hearing, the judges will provide the widest opportunity for the parties to submit any and all evidence that the parties deem to be relevant and in support of their argument.

10 Under Article 225 Paragraph 3 of Law No. 37/2004, PKPU proceedings must be concluded no later than 20 days as of the registration of PKPU petition.
Subsequent to the evidentiary process, the court shall provide the opportunity for the parties to submit a written statement of conclusion. After receiving the statement of conclusion, the panel of judges will adjourn the hearing in order for the judges to prepare the judgment, usually within two to four weeks.

The laws provide the litigants with the right to file an appeal to the district court. If the litigants are not satisfied with the judgment of the appeal court, the litigants may also file a cassation petition to the Supreme Court.

**ii  Time frames**

The Supreme Court has been encouraging the district courts to conclude their proceedings within five months; and the high courts to conclude appeal proceedings within three months.\(^\text{11}\) In practice, however, there have been cases where the district court proceedings take around six to 12 months.

For cassation and case review proceedings, the Supreme Court has determined that such proceedings shall be concluded within 250 days of when the case dossiers are received by the Supreme Court.\(^\text{12}\) Nonetheless, in practice, owing to its load of cases, it is very rare for the Supreme Court to finish case examination within that period.

**iii  Class actions**

Class actions are permissible only if the claim satisfies the following requirements:

\(\begin{align*}
\text{a} & \quad \text{there are so many group members that it would be ineffective and inefficient if the lawsuit was separately filed or jointly filed;} \\
\text{b} & \quad \text{there is a similarity of facts or events, legal bases, and types of prayer for relief between the representative of the group and its group members; and} \\
\text{c} & \quad \text{the group representative has the honesty and determination to protect the interest of its group members.}
\end{align*}\)

The above requirements will first be assessed by the panel of judges in order to determine whether or not the class action may proceed. Subject to fulfilment of these requirements, the plaintiff will be required to provide a proposal for the notification to the group members. The remaining procedure shall follow the prevailing civil procedural laws.

**iv  Representation in proceedings**

In general, it is the right of the litigants to be represented by lawyers.

All representation, except for the representative in class action proceedings, must be based on power of attorney. If power of attorney is executed outside the territory of Indonesia, then it must be consularised at the embassy of Indonesia and notarised in the country where the power of attorney is executed.

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\(^{11}\) Circular Letter No. 2 of 2014 on Resolution of Case in The First Instance Court and Appeal at 4 (Four) Types of Judiciary dated 13 March 2014.

\(^{12}\) Decree of the Chairman of Supreme Court Number 214/KMA/SK/XII/2014 dated 31 December 2014.
v  Service out of the jurisdiction and assistance to foreign courts

Indonesia is not a member of any convention pertaining to judicial assistance, and, to date, Indonesia only has mutual judicial assistance with the Kingdom of Thailand. As such, in general, when Indonesian courts are in need of judicial assistance from foreign court or the other way around, the procedure will be done through a diplomatic channel.

Up to now, there are no laws and regulations regulating the procedure of service out of the jurisdiction. The same applies to matters concerning assistance to foreign courts.

vi  Recognition and enforcement of foreign court judgments

A foreign court judgment cannot be enforced in Indonesia. If a party would like to enforce its right based on a foreign court judgment then it must file a new lawsuit at a relevant Indonesian district court (relitigate the case). During the court proceedings, the plaintiff may submit the foreign court judgment to the court as documentary evidence.

vii  Access to court files

Indonesian courts have adopted a case tracking system that allows the public to access information regarding ongoing or concluded cases at the relevant court. This includes:

a  date of case registration;
b  classification of case;
c  names of the parties;
d  prayer for relief;
e  hearing schedule; and
f  the administrative cost of the case and its disbursement report by the court.

If the case has been concluded by the first instance court, the case tracking system may publish the names of judges and the substitute registrar of the case.

Members of the public may obtain an unofficial copy of a court judgment or court decree, but court submission or pleading documents or evidence are unavailable for the public in principle.

viii  Litigation funding

Any practice of litigation funding is not recognised by Indonesian laws and regulations. Some law practitioners argue that litigation funding may raise issues of ethics and may violate decency or any other source of unwritten laws in Indonesia.

IV  LEGAL PRACTICE

i  Conflicts of interest and Chinese walls

The Advocates Law\textsuperscript{13} does not set forth a rule on conflict of interest. However, the Indonesian Advocate Code of Ethics\textsuperscript{14} provides a basic rule that an advocate (lawyer) handling the joint interest of two parties is required to fully resign from handling such interest, if in the future there is a conflict of interest between the relevant parties.

\textsuperscript{13} Law No. 18 of 2003 on Advocates.
\textsuperscript{14} Indonesian Advocate Code of Ethics, ratified on 23 May 2002.
There is no specific provision for explaining this basic rule. Some law practitioners argue that the above rule may be broadly interpreted, and it may depend on the advocate. Indonesian legal practice does not recognise the concept of Chinese walls, and as such no set of rules provide any definition of Chinese walls.

ii  Money laundering, proceeds of crime and funds related to terrorism

For some matters outside litigation or arbitration proceedings, Indonesian advocates are obliged to:

a  provide a report on suspicious financial transactions\(^{15}\) to the Indonesian Financial Transaction Reports and Analysis Center (PPATK); and

b  apply the principle of ‘know your service user’.\(^{16}\)

The matters outside litigation or arbitration proceedings are related to:

a  the purchase and sale of a property;

b  the management of money, stocks or other financial service products;

c  the management of a checking account, savings account, deposit account or stocks account;

d  the operation and the management of a company; and

e  the establishment, purchase and sale of legal entities.

Advocates are obliged to apply the principle of know your service user at the following times:

a  there is a business or commercial relation with its service user;

b  there is a financial transaction in Indonesian rupiahs or foreign currency involving a minimal amount of or equal to 100 million rupiahs;

c  there is a suspicious financial transaction relating to money laundering and terrorism funding; or

d  the advocate has doubts regarding the truth of the information from its service user.

\(^{15}\) Article 1 Paragraph 8 of Government Regulation No. 43 of 2015 on Reporting Party in the Prevention and Eradication of Money Laundering provides that suspicious financial transaction is (1) a financial transaction that deviates from the profile, characteristic or behaviour of transaction pattern of the service user; (2) a financial transaction conducted by the service user that is reasonably considered as having the purpose of avoiding the reporting obligation of the service user under the laws and regulations pertaining to the prevention and eradication of money laundering; (3) a financial transaction that is conducted by or being cancelled to be carried out by using assets that allegedly originated from proceeds of crime; and (4) a financial transaction that is requested by the PPATK to be reported by the advocate because the transaction involves assets that allegedly originated from proceeds of crime.

\(^{16}\) Article 1 Paragraph 3 of PPATK Regulation No. 10 of 2017 on the Application of the Principle of Know Your Service User for Advocates provides that the principle of know your service user is the principle applied by advocates to know the profile and transaction of its service user by implementing certain obligations under the regulation.
iii Data protection
The legal framework of personal data protection comprises various laws and regulations. The following is considered as protected personal data under Indonesian laws and regulations:

a Based on the Public Information Disclosure Law:
- the history and condition of a family member;
- the history, condition, treatment and medication of physical and psychological health;
- finances, assets, income and condition of bank account;
- the result of evaluation in connection with the capability and intellectuality recommendation; and
- records concerning the individual with regard to formal education and non-formal education.

b Pursuant to population administration laws and regulations:
- records on physical or mental disability;
- fingerprints;
- iris recognition;
- signatures;
- other data elements regarding a person that are considered unacceptable;
- citizen identification number;
- place and date of birth;
- parent names;
- home address;
- records on marriage, as well as the date and status of marriage;
- religion;
- records on divorce as well as the date of divorce;
- blood type;
- sex;
- records concerning children born outside of marriage;
- records on adoption;
- type of work;
- last education; and
- the ownership of deed of birth or marriage.

Government and private institutions are prohibited from making personal data public information. Specifically for personal data in electronic systems, the Indonesian Minister of Communication and Informatics has issued a regulation that specifies that the protection of personal data includes protection of the acquisition, collection, processing, analysis, storage, appearance, announcement, transmission, dissemination and destruction of personal data.

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V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

The Advocates Law provides that advocates have the right on confidentiality of relationship with their clients, including protection of materials and documents against seizure or examination measures, and protection against recording or tapping of electronic communications.

The Indonesian Advocates Code of Ethics further provides that letters sent by advocates to other advocates in a case may be presented before the judges unless they are made ‘without prejudice’. Also, advocate-to-advocate correspondence or contents of conversations in the failed attempt of amicable settlement shall not be presented as evidence before the court.

The Advocates Law and Indonesian Advocates Code of Ethics are silent on whether its provisions may also be applied to in-house lawyers.

ii Production of documents in civil proceedings

In principle, a party asserting or rebutting a right or entitlement is obliged to prove it based on the available evidence. The law does not require the disputing parties to produce all documents or evidence relevant to the case; as such, it fully depends on the parties’ strategy and possession of documents.

Indonesian civil procedure laws consider written evidence as primary evidence. To be accepted by the court, the parties must be able to present the original written evidence before the court because, under Indonesian civil procedure law, the power of written evidence lies within its originals.

Indonesian civil procedure law provides that a party may request the judges to order the opponent to submit letters or documents belonging to the disputing parties concerning matters being disputed if such letters or documents are possessed by the opponent.18 Nonetheless, in practice, the foregoing provision has rarely, if ever, been invoked by Indonesian litigants. As such, in practice, the disputing parties rely on any evidence in their possession to prove their right or to rebut the opponent’s arguments.

VI ALTERNATIVES TO LITIGATION

i Arbitration

In Indonesia, Arbitration is commonly used to resolve commercial disputes involving particular expertise (e.g., construction, capital market, insurance). Meanwhile, the major arbitral institution commonly used in Indonesia is the Indonesian National Board of Arbitration.

The Arbitration Law categorises arbitration awards according to the place where the arbitration award is rendered. If the arbitration award is rendered outside the jurisdiction of Indonesia, it shall be deemed as an international arbitration award. If it is the other way around, the arbitration award shall be deemed a domestic arbitration award.

18 Article 1886 of the Indonesian Civil Code; Article 300 of Civil Procedure Law for Regions Outside Java and Madura.
The Arbitration Law does not recognise the right of appeal against arbitration awards. However, the district court may refuse to enforce the domestic arbitration award for the following reasons:  
  a the arbitration agreement is absent;  
  b the dispute is not allowed to be resolved through arbitration; or  
  c the award violates morality and public policy.

As for international arbitration awards, the Central Jakarta District Court may refuse to enforce such awards if:  
  a the award is not rendered by an arbitrator or arbitral tribunal in a country bound to Indonesia by a bilateral or multilateral treaty on the recognition and enforcement of international arbitration awards;  
  b the award does not fall within the scope of commercial law under Indonesian law; or  
  c the award violates public policy in Indonesia.

The grounds for refusal of recognition and enforcement of international arbitration awards under the Arbitration Law are more limited, compared to the one provided by the New York Convention. Moreover, in Indonesia, the disputing parties are entitled to request annulment of the arbitration award on the following grounds:  
  a letters or documents submitted in the hearing, after the award is rendered, are acknowledged to be false or declared to be forgeries;  
  b discovery of documents, after the award has been rendered, which are decisive in nature and were deliberately concealed by the opposing party; and  
  c the award is rendered as a result of fraud committed by one of the parties in the proceedings.

The Arbitration Law does not clearly state that the grounds for annulment are applicable for domestic and international arbitration awards. However, most decisions have declared that Indonesian courts have no jurisdiction to adjudicate matters regarding annulment of international arbitration awards.

ii Mediation

There are two types of mediation recognised under Indonesian law; namely, court-annexed mediation and voluntary mediation (non-court mediation). While court-annexed mediation has been used since the Dutch colonial era, non-court mediation was introduced in 1999 through the promulgation of the Arbitration Law.

With regard to court-annexed mediation, the Supreme Court has also issued a regulation pertaining to Procedure of Court-Annexed Mediation.  

There are two major differences between court-annexed mediation and voluntary mediation, namely:  
  a court-annexed mediation is mandatory in nature, thus it must be conducted at the preliminary stage of civil court proceedings. On the other hand, voluntary mediation will only be conducted upon the disputing parties’ agreement; and
rules and procedures of court-annexed mediation shall comply with the prevailing laws and regulations, while rules and procedures of voluntary mediation fully depend on the agreement between the disputing parties.

Although mediation has long been recognised by law, it has yet to be as popular as arbitration in terms of alternatives to litigation. This might be for several reasons, including:

- the disputing parties are pessimistic that mediation will result in a win-win solution, as their first attempt to negotiate has already been failed;
- the settlement agreement remains vulnerable to any violation by the disputing parties, which later ends up in court or arbitration proceedings; and
- court-annexed mediation still contains shortcomings, such as a relatively short time period for conducting mediation without considering the degree of complexity of the cases (i.e., only 30 business days with a chance to extend the period by up to another 30 business days with the parties’ consent).

**VII OUTLOOK AND CONCLUSIONS**

The Supreme Court has made efforts to modernise Indonesian court proceedings. This is evident by many Supreme Court regulations governing particular areas in court proceedings in order to expedite the time frame and simplify the court bureaucracy. The Supreme Court has also issued regulations for Indonesian courts to apply regarding electronic filing of some court documents (e.g., lawsuit documents). However, such efforts are minimal because the core set of rules for Indonesian court proceedings mostly still derive from Dutch colonial laws, and it seems there is still no concrete plan from the government or the house of representatives for amendment of those ‘old’ laws. As such, we do not predict that there will be any significant changes in Indonesian court proceedings in the near future.
Chapter 17

IRELAND

Andy Lenny and Peter Woods

I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

The Constitution of Ireland, enacted in 1937, is the basic law of the state. It provides the framework for the separation of powers between the legislature, executive and judiciary; the courts structure; and the fundamental rights of Irish citizens that are enforceable through those courts in addition to those prescribed by the legislature. Under Article 29 of the Constitution, EU law applies and shall not be invalidated by any provision of the Constitution.

Ireland is a common law jurisdiction and the Irish courts are bound by the doctrine of precedent, which means that all courts must follow prior decisions of superior courts and courts of equal jurisdiction.

Civil claims up to €15,000 are dealt with in the District Court; claims up to €75,000 are dealt with in the Circuit Court (€60,000 for personal injury actions); and the High Court has an unlimited monetary jurisdiction.

The Court of Appeal, which was established in October 2014, has the jurisdiction that was previously vested in the Supreme Court and is the default court for all appeals from decisions of the High Court and its decision will, except in certain limited circumstances, be final. Only in exceptional circumstances, and subject to the Supreme Court’s own ‘leave to appeal’ requirements, is it possible to bypass the Court of Appeal and to bring a ‘leapfrog appeal’ directly to the Supreme Court. The Supreme Court continues to exercise the function of an appellate court, where an issue of general public importance arises or where, in the interests of justice, it is necessary to hear an appeal.

The Commercial Court is a division of the High Court dealing with commercial disputes with a value of over €1 million. Intellectual property disputes and appeals (or judicial reviews) of a regulatory decision may be entered into the Commercial Court list regardless of the value of the case. Application for admission is made by way of motion to the Commercial Court, grounded on the applicant’s affidavit and a certificate from the applicant’s solicitor. There is no automatic right for any case to be admitted to the Commercial Court list.

Statutory tribunals are also in place to deal with specialist disputes and there are various alternative dispute resolution (ADR) mechanisms available, including arbitration, mediation, conciliation, expert determination and adjudication, for resolving disputes either without recourse to the courts or within the context of existing proceedings.

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II THE YEAR IN REVIEW

i Litigation trafficking
Following the Supreme Court decision in *Persona Digital Telephony Ltd v. Minister for Public Enterprise, Ireland and the Attorney General* [2017] IESC 27, which confirmed that professional third party litigation funding is prohibited in Ireland, the Supreme Court in *SPV Osus Limited v. HSBC Institutional Trust Services (Ireland) Ltd & Ors* [2018] IESC 44 found that the assignment of a right to litigate to an unconnected third party with no legitimate interest in the litigation was trafficking in litigation and was contrary to Irish public policy. The Supreme Court applied the test adopted by the House of Lords in *Trendtex Trading Corporation v. Credit Suisse* [1982] AC 679 that an assignment of the right to litigate is unenforceable unless the assignee had a genuine commercial interest in the assignment.

ii Mediation Act 2017
The Mediation Act 2017 (the Mediation Act) came into force on 1 January 2018. Before issuing proceedings on behalf of clients, solicitors now have to advise them to consider mediation as a form of dispute resolution and provide them with information on mediation generally and mediation services. Solicitors also have to swear a statutory declaration confirming they have done so.

Section 10 states that all communications (including oral statements) and all records and notes relating to the mediation shall be confidential and shall not be disclosed in any proceedings before a court or otherwise.

Section 11(2) states that a mediation settlement shall have effect as a contract between the parties to the settlement except where it is expressly stated to have no legal force until it is incorporated into a formal legal agreement or contract to be signed by the parties. Section 11(3) provides that a court may enforce the terms of a mediation settlement subject to certain factors.

Section 16 provides that a court may, on the application by a party to proceedings or of its own motion where it considers it appropriate to do so, invite the parties to the proceedings to consider mediation.

Section 21 states a court may, where it considers it just to do so, take into account any unreasonable refusal or failure by a party to consider using mediation, or to attend mediation, when awarding costs in the proceedings.

iii Media access to court documents
On 1 August 2018, new court rules were introduced to give *bona fide* members of the media a specific right to access documents referred to in open court. These rules give effect to Section 159(7) of the Data Protection Act 2018 and are for the purpose of facilitating the fair and accurate reporting of court proceedings. The rules do not have retrospective effect. The Courts Service intends to issue guidelines on accessing court records.

*Bonafide* members of the media may now request that information contained in a court record be disclosed to them. They may (1) inspect the document under the supervision of an officer of the court or Courts Service personnel; (2) take a copy of the document forming part of the court record on the undertaking that they will return the copy on completion of the media report; or (3) be given a press release or other information in oral or written form by an officer of the court or by the Courts Service personnel concerning the proceedings.
The new court rules do not change the position in relation to non-party access to court documents. In practice, if a non-party wishes to have access to documents opened in court, they require a letter of consent from the parties in the proceedings or permission from the judge who heard the proceedings.

Reporting restrictions continue in place for cases subject to the *in camera* rule (e.g., family law) or any order or direction made by a judge.

### III  COURT PROCEDURE

**i  Overview of limitation periods**

The commencement of civil proceedings in the District Court, Circuit Court and High Court is usually preceded by issuing a warning letter to the defendant, setting out the basis of the plaintiff’s claim and requiring an admission of liability.

The time limits within which an action can be brought pursuant to the Statute of Limitations 1957 (as amended) are as follows:

*a*  Actions under contract and tort, and claims for rent arrears: six years from the date on which a cause of action accrues.

*b*  Actions upon an instrument under seal, and for the recovery of land: 12 years from the date on which the right of action accrues.

*c*  Actions for personal injuries under negligence, nuisance or breach of duty: two years from the date on which a cause of action accrues or the date the plaintiff first had knowledge, if later.

*d*  Actions for personal injuries under assault and battery: six years from the date on which a cause of action accrues or the date the plaintiff first had knowledge, if later.

*e*  Actions for defamation: one year from the date of publication of the defamatory statement or two years from that date if the court so directs.

**ii  Procedures and time frames**

The procedures and time frames vary across the courts. The general summary below relates to plenary proceedings in the High Court:

*a*  Actions are initiated by way of plenary summons, which broadly sets out the plaintiff’s claim and the relief being sought. Under the rules introduced in November 2017, a plenary summons may be served on a person by registered post instead of by personal service.

*b*  The defendant then enters an appearance to signal a willingness to defend the claim. This also serves to cure any defects in respect of service. Extended time is given to defendants outside the jurisdiction to enter an appearance. A defendant who wishes to challenge the jurisdiction of the Irish courts to hear and determine the claim files a conditional appearance.

*c*  The plaintiff then delivers a statement of claim setting out the nature of the claim.

*d*  A notice for particulars is usually raised on this statement of claim seeking more detailed information – by way of replies – on the claim.

*e*  The defendant delivers a defence. At this juncture, any application to bring in a third party will usually be made. The plaintiff may deliver a reply to the defence.

*f*  The parties will then commence the discovery process, discussed further below.
In the event that a party has defaulted in delivering a pleading or adequately dealing with a discovery request, a motion can be brought compelling its delivery or a response, which will have costs consequences for the party in default.

Once discovery has been completed then either party is at liberty to serve the notice of trial.

A typical non-jury case may take at least 12 months to obtain a hearing date.

Cases are usually heard by one judge and without a jury, except for defamation and civil assault claims.

The High Court has increasingly assumed an active case management role, which will vary the above time frame. This has been influenced by the success of the Commercial Court, whose main objective is to hear complex commercial disputes as efficiently as possible, pursuant to Order 63A of the Rules of the Superior Courts (RSC). Parties must comply strictly with the time frames set down by the Commercial Court for the exchange of pleadings, witness statements, case summaries, submissions and agreed booklets of documents. Significant cost penalties are imposed on any party that does not comply with the prescribed time frames. On average it is taking 12 months from entry into the Commercial Court list to judgment. Therefore, depending on the urgency of the case and the number of issues to be dealt with, it is possible to have cases resolved very quickly.

Interim injunctive relief is available from the High Court and parties may seek prohibitory or mandatory injunctions. The most common mandatory injunctive reliefs are *quia timet* (to prevent imminent irreparable harm occurring), *Mareva* injunctions (freezing orders) and *Anton Piller* orders (search of the other party’s premises and the removal of certain identified material).

Application for interim injunctive relief is made on an *ex parte* basis, and can be brought on an emergency basis. If the interim order is granted, it will generally be for a limited number of days until the interlocutory hearing when the plaintiff will seek a continuation of the order. The defendant must be on notice of this interlocutory hearing.

### Class actions

Recourse to class actions is restricted in Irish law and there is no legislation that deals with these actions. The courts are wary of allowing plaintiffs to represent large bodies of persons who have not consented to such representation lest their constitutional right of access to the courts be frustrated. There are currently two mechanisms available for multi-plaintiff litigation: representative actions and test cases.

Representative actions are permitted by the RSC. Order 15, Rule 9 of the RSC provides that where numerous persons have the same interest in a cause or matter, one or more of those persons may sue or be sued on behalf of or for the benefit of all interested parties. The representative plaintiff must be duly authorised to sue on behalf of each individual party, and evidence of same must be presented to the court before a representative order will be made. Any decision of the court will, in the absence of fraud or other special circumstance, bind all interested parties to the action. Similar provisions are to be found in the Circuit Court Rules. Such actions are a rarity in Irish law.

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2 See Rules of the Superior Courts (Conduct of Trial) 2016 (SI No. 254 of 2016), which came into operation on 1 October 2016.

3 Order 6, Rule 10.
Test cases may also be brought whereby a small number of cases are selected from a group of cases that arise from the same circumstances. While the results of these cases are not binding on the parties in the other cases unless there is an agreement in place, test cases have a persuasive value under the doctrine of precedent.

The Multi-Party Actions Bill 2017 (the 2017 Bill) reflects a Law Reform Commission paper from 2005, which recommended the facilitation of multiparty litigation. The 2017 Bill provides for class actions to allow multiple plaintiffs to bring one claim arising from common or related issues of fact or law. If a judge decides that proceedings are to be certified as a multiparty action, they will make an order establishing a register that other relevant parties can apply to join. The costs of a multiparty action will be divided equally among the members of the register who are jointly and severally liable.

iv  Representation in proceedings

Parties (including natural and legal persons) are usually represented by solicitors and barristers (senior or junior counsel). A company must be legally represented and cannot be represented in court by its officers or servants. In the Circuit Court the parties will generally only be represented by a solicitor and one junior counsel, whereas in the High Court the parties will also have at least one senior counsel. Alternatively, lay litigants have full rights of audience. In exceptional circumstances, the courts have allowed a lay litigant to be represented by an unqualified advocate but have limited the scope of assistance that can be provided (Re: Applications for Orders in Relation to Costs in Intended Proceedings: Coffey & Ors [2013] IESC 11).

v  Service out of the jurisdiction

A party seeking to serve Irish proceedings in another EU Member State does not require leave from the Irish court. However, the service of Irish proceedings in a non-EU Member State requires leave from the Irish court and certain criteria must be satisfied.

Regulation (EC) No. 1393/2007 and the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Convention) provide that service will be effected in accordance with the law of the destination country. Where the destination country is not governed either by Regulation (EC) No. 1393/2007 or the Hague Convention, service is in accordance with Irish procedural rules.

Where the person to be served is not an Irish citizen or the company is not domiciled in Ireland, a notice of summons and not a summons itself should be served.

vi  Enforcement of foreign judgments

Enforcement and recognition of foreign judgments between Member States is governed by Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the Brussels I Regulation) and Regulation (EU) No. 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast) (the Recast Regulation). The Recast Regulation applies to judgments given in proceedings commenced on or after 10 January 2015. The Brussels I Regulation continues to apply to judgments given in proceedings instituted before

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4  Article 66(1).
The Brussels Convention (which the Brussels I Regulation and the Recast Regulation supersede) still applies to territories in Member States that are excluded from the Brussels I Regulation and the Recast Regulation. The Brussels II Regulation applies in respect of Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility (except in Denmark). The Lugano Convention continues to apply as between Member States and members of the European Free Trade Association.

A parallel method of enforcement of Member State judgments and orders is provided by Regulation (EC) No. 805/2004, which creates a European enforcement order for uncontested claims. This allows a party to have a judgment certified as a European enforcement order in a Member State that is automatically recognised and enforced in another Member State without the need for the judgment creditor to take any intermediate steps. Regulation (EC) No. 861/2007 is relevant to cross-border civil or commercial claims that do not exceed €5,000. Regulation (EC) No. 1896/2006 established the European Order for Payment, which provides for simplified procedures in connection with recovering uncontested (unlimited) money debts.

The procedures for enforcing a Member State judgment in Ireland are set out in Order 42A of the RSC. To enforce a judgment from a non-EU or EFTA country for a liquidated sum, new proceedings for the recovery of a simple contract debt must be commenced in Ireland by way of summary summons pursuant to the Irish common law rules of enforcement. There are a number of prerequisites to be met under Irish common law for enforcement of a non-EU or EFTA judgment: the judgment must be (1) for a definite sum, (2) final and conclusive and (3) given by a court of competent jurisdiction. The Irish court may decline jurisdiction if the plaintiff cannot show that there is a solid practical benefit to enforcement in Ireland (Albaniabeg Ambient Shpk v. Enel SpA and Enelpower SpA [2018] IECA 46).

vii Assistance to foreign courts

The European Communities (Evidence in Civil or Commercial Matters) Regulations 2013 facilitate the taking of evidence in one Member State at the request of another Member State court. This request must be in the official language of the place where the evidence is to be taken. The requested court must acknowledge the request and execute it within 90 days.


The Foreign Tribunals Evidence Act 1856 governs the taking of evidence in Ireland for use by a tribunal or court in a non-EU Member State.

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5 Article 66(2).
Access to court files

The Courts Service website records details of parties in dispute and the stage of the pleadings. Copy pleadings are not made available. There is no such search mechanism for the lower courts.

In terms of completed proceedings, written judgments made available by the Supreme Court, Court of Appeal, High Court, Circuit Court, District Court, Central Criminal Court, Court of Criminal Appeal and Courts-Martial Appeal Court are available on the Courts Service website.

The decision of the High Court in Allied Irish Bank plc v. Tracey (No. 2) addressed the issue of a non-party’s entitlement to court documents. Mr Justice Hogan held that a non-party was entitled to have access to the affidavits filed by a party that were opened in open court without restriction. This High Court decision only extends to documents opened in open court without restriction and does not apply to documents filed but not opened in court.

Order 123 of the Rules of the Superior Courts (Recording of Proceedings) provides for the procedure regulating applications for access to a record of court proceedings (i.e., a transcript). Rule 9 states that any party or person who seeks access to a record of proceedings may apply to the court by motion on notice to the other party or the parties to those proceedings, grounded on affidavit. The court may, where it considers it necessary in the interests of justice so to do, permit the applicant to have such access to all or such part of the relevant record.

Members of the public may attend all court hearings, except in camera proceedings, which generally relate to family law matters, those involving minors or certain proceedings brought under data protection legislation.

New court rules that were introduced on 1 August 2018 give bona fide members of the media a specific right to access documents referred to in open court.

Litigation funding

The recent decision of the Supreme Court in Persona Digital Telephony Ltd v. Minister for Public Enterprise, Ireland and the Attorney General [2017] IESC 27 confirmed that maintenance and champerty were still prohibited under Irish law. Maintenance is where an individual, without a legitimate interest, funds the litigation of another. Champerty is a subset of maintenance and arises where an individual provides maintenance in return for a share of the proceeds.

The only form of third-party funding that is acceptable in Ireland is that provided by a third party that has a legitimate interest in the outcome of the litigation. The High Court in Thema International Fund plc v. HSBC Institutional Trust Services (Ireland) Limited & Ors, (referring to its decision in Moorview Developments Ltd v. First Active plc) implied that bona

7 www.courts.ie.
9 See also Ewing v. Ireland & Anor [2013] IESC 44.
10 Part 2 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013 modified the in camera rule to grant bona fide representatives of the press access to family law and child care court proceedings. There are strict reporting rules imposed on attendees, including a prohibition on the publication of material likely to lead to the identification of the parties or any child to whom the proceedings relate.
fide creditors and shareholders may fund legal actions on the basis that then they are funding a company in which they have a legitimate interest in the hope that the company will be able to pay them the monies due (creditors) or dividends or capital distributions (shareholders).

Where a third-party funder has funded litigation on behalf of an impecunious party, the Irish courts have jurisdiction to make an order for costs against that third party.

The Irish courts have determined that after-the-event insurance does not breach the rules on maintenance and champerty in certain circumstances.

x Costs
In terms of payment of costs, although the courts have discretion as to how costs are to be awarded following the hearing, the general rule is that costs follow the event, namely that the unsuccessful party will pay the costs of the successful party. Costs are usually awarded on a party and party basis, which means that costs reasonably incurred by the successful party in prosecuting or defending an action are recovered.

IV LEGAL PRACTICE
i Conflicts of interest and Chinese walls
Actual or perceived conflicts of interest are governed in Ireland by the Law Society’s Guide to Professional Conduct of Solicitors in Ireland (the Ethics Guide), which provides that where a conflict of interest exists between the interests of a solicitor and those of his or her client, the solicitor must not act for the client. If the conflict arises during the course of a transaction, the solicitor must cease to act for that client.

The Ethics Guide deals with the situation where a conflict of interest arises between two clients in a matter in which a law firm is acting for both. In such a scenario, the Ethics Guide provides that the firm must cease to act for either client in that matter. In exceptional circumstances in non-contentious matters one of the clients may consent to the other client remaining, for example, in a situation where the firm acts for more than one party in a commercial transaction such as an acquisition (see ‘Chinese walls’ discussed below).

The Ethics Guide is silent on the issue of Chinese walls, which are permissible in Ireland and are common in the larger Irish law firms. Where a law firm acts for more than one party to a commercial transaction they must notify both parties and put in place a strict Chinese wall procedure.

The Irish Supreme Court in O’Carroll v. Diamond\(^{13}\) cited with approval the decision of the UK’s House of Lords in Hilton v. Barker Booth & Eastwood.\(^{14}\) In the Hilton case it was recognised that a solicitor may act for both parties in a transaction, provided that he or she has obtained the informed consent of both clients to so act. However, the court ruled that a solicitor could not be exonerated from his or her duty to act in the best interests of his or her client where irreconcilable conflicts emerged. The solicitor who had conflicting duties to

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both clients could not prefer one to the other. He or she had to perform both as best he or she could, and this may involve performing one duty to the letter of the obligation, and paying compensation for his failure to perform the other.15

ii Money laundering, proceeds of crime and funds related to terrorism

The Criminal Justice Act 1994 (as amended) imposes obligations on certain bodies for the purposes of preventing laundering of money. Directive 2001/97/EC sought to extend these obligations to professional advisers such as accountants and solicitors. This Directive was implemented in Ireland by the Criminal Justice Act 1994 (Section 32) Regulations 2003 (the 2003 Regulations). On foot of these Regulations, there are now obligations on Irish solicitors to establish the identity of their clients; maintain records of transactions; introduce staff training in respect of money laundering; and introduce internal reporting in respect of money laundering and make reports of suspicious transactions to the Garda Síochána and to the Office of the Revenue Commissioners, as appropriate. Solicitors are subject to severe sanctions, both fines and imprisonment, if they breach any obligations under the 2003 Regulations.

In line with the Directive, the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (the 2010 Act) came into operation on 15 July 2010, repealing the 2003 Regulations. This was most recently amended by the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act 2018. The 2010 Act (as amended) adopts a ‘risk-based’ approach to the client identification rules. Firms should assess the risk of money laundering occurring at the beginning of the relationship and monitor this risk throughout the duration of the relationship. The 2010 Act (as amended) requires firms to adopt a ‘customer due diligence’ standard as opposed to the pre-existing ‘know your client’ rules.

iii Data protection

The Data Protection Act 2018 was signed into law on 24 May 2018 to coincide with the General Data Protection Regulation. This new Act, together with the Data Protection Acts 1988 and 2003 (collectively, the Data Protection Acts 1988 to 2018), govern data protection in Ireland. The laws apply to individuals or organisations established in Ireland that collect, store or process data about living people and regulate the processing of data that is broadly defined to encompass the performance of any operation in relation to information or records, either automatically or otherwise.

Processing personal data is fundamental to legal practice, and all practitioners must comply with the Data Protection Acts 1988 to 2018. Special rules apply to the processing of certain categories of personal data.

The Data Protection Acts 1988 to 2018 provide for exceptions to consent requirements for the processing of personal data, which includes where the processing is required for the purposes of obtaining legal advice or for the purposes of, or in the course of, legal proceedings in which the person making the disclosure is a party or a witness.

15 The Solicitors (Professional Practice, Conduct and Discipline – Conveyancing Conflict of Interest) Regulation 2012 prohibits solicitors from acting for both sides in a commercial property transaction subject to certain exceptions.
Privilege in Ireland is governed by the common law. The main recognised categories of privilege are as follows.

**Legal professional privilege**

This head extends to include two distinct categories of communication between a lawyer and a client: legal advice privilege and litigation privilege. The term 'lawyer' includes solicitors, barristers, foreign lawyers and in-house counsel (although the position of in-house counsel is affected by the decision in the *Akzo Nobel* case referred to below).

**Legal advice privilege**

Confidential communications (which have a broad interpretation and include draft notes and electronic documents) between a lawyer and a client for the sole purpose of giving or seeking legal advice are subject to legal advice privilege, provided the communications took place in the course of a professional legal relationship. Legal assistance, on the other hand, does not benefit from privilege.\(^{16}\)

In *Ochre Ridge Ltd v. Cork Bonded Warehouses Ltd & Anor*,\(^{17}\) the High Court ruled that legal advice privilege does not extend to advice of a legal nature provided on business matters. The decision of the Court of Justice of the EU in *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. European Commission*\(^{18}\) makes it clear that, in relation to European Commission competition investigations, communications between in-house lawyers and their internal clients are not entitled, in certain circumstances, to the same protection or privilege as communications between a company and its external lawyers.

**Litigation privilege**

Confidential communications made in contemplation of litigation or after litigation has commenced between a lawyer and a client or third party for the sole purpose of the litigation fall into this category of privilege.

In this regard, all communications between a party and his or her legal advisers or with third parties (such as potential witnesses or experts) or internally, which are created predominantly for the purposes of or in contemplation of litigation, are privileged. This type of privilege also attaches to the work product of the parties' legal advisers such as draft pleadings for the case, notes or memoranda.

**Without prejudice privilege**

In *Ryan v. Connolly*\(^{19}\) the Supreme Court adopted the following statement of the law relating to without prejudice privilege from Halsbury's *Laws of England*: 'Letters written or oral

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\(^{16}\) *Smurfit Paribas Bank v. AAB Export Finance Limited* [1990] 1 IR 469.

\(^{17}\) [2004] IEHC 160.

\(^{18}\) Case C-550/07 P, ECLI:EU:C:2010:512.

\(^{19}\) [2001] 1 IR 627.
communications made during a dispute between the parties, which are written or made for the purpose of settling the dispute and which are expressed or otherwise proved to have been made “without prejudice” cannot generally be admitted in evidence.’

This protection can only be waived with the agreement of both parties.

Privilege in mediation
Confidentiality and privilege are particularly vital for the proper functioning of an ADR regime.

The Mediation Act defines mediation as ‘a confidential, facilitative and voluntary process in which parties to a dispute, with the assistance of a mediator, attempt to reach a mutually acceptable agreement to resolve the dispute’. Section 7 provides that the ‘agreement to mediate’ shall note that the mediation is to be conducted in a confidential manner. Section 10 contains the specific confidentiality provisions.

The European Communities (Mediation) Regulations 2011 provide that any person involved in a mediation that is governed by these Regulations shall not be compelled to give evidence in civil or commercial proceedings relating to a matter arising out of, or connected with, mediation. Such parties may be compelled to give evidence in situations where non-disclosure of the information would be contrary to public policy. Most communications made in the course of mediations will of course attract without prejudice privilege as well as this added statutory protection.

Common interest privilege
This privilege exists where another party along with the lawyer’s client has a common interest in the subject matter of the privileged communication. The existence of this privilege was recognised by the High Court in Moorview Developments Ltd & Ors v. First Active plc & Ors.20 The effect of common interest privilege is that the documents will remain privileged, notwithstanding their release to a third party.

In the case of Redfern Limited v. O’Mahony,21 the Supreme Court confirmed that legal privilege will not be lost where there is limited disclosure for a particular purpose or to parties with a common interest. Further, the Supreme Court confirmed that there is no general principle whereby legal professional privilege in documents is waived by putting in issue allegations to which the privileged documents are relevant.

Privilege against self-incrimination
In Re Haughey22 the Supreme Court described the privilege against self-incrimination in the following terms: ‘[I]t is the duty of the judge to warn a witness that he is privileged to refuse to answer any question if the answer would tend to incriminate him.’

Production of documents
Discovery is the process by which one party to civil proceedings obtains the disclosure of documents from another party or from a non-party in advance of a trial. Discovery in High Court actions is governed by the RSC and the obligations are more onerous than those in the

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20 [2008] IEHC 274.
Circuit Court and District Court. In High Court actions, however, there is a requirement that parties seeking discovery must specify precise categories of documents that they require and provide reasons why they are relevant and necessary. The High Court in *Walsh v. The Health Services Executive & Ors* [2017] IEHC 394 set out a checklist of questions to be deployed by a court in determining discovery applications.

The meaning of what constitutes a ‘discoverable’ document was supplemented by the Rules of the Superior Courts (Discovery) 2009 (the 2009 Discovery Rules) to include documents ‘necessary for disposing fairly of the cause or matter or for saving costs’. A party is obliged only to discover those documents relevant to the categories agreed or the court order that it has or has had in its ‘possession, power or procurement’. The party applying to the court for discovery must show on affidavit that the discovery sought is relevant and necessary to dispose fairly of the matter or to save costs.

The RSC do not prescribe a definition of ‘document’; however, the term has been broadly defined in case law as meaning anything containing information. This includes any document in writing, handwritten notes, maps, drawings, photographs, discs, computerised or electronically stored information.

Relevance of the documents is determined with regard to the pleadings. The courts have expressly reserved the right to decide whether documents are relevant and, if appropriate, the courts will examine the documents to ascertain their relevance. Necessity is also decided by the courts on the specific facts of each case. The High Court, in the cases of *Flogas Ireland Limited v. Tru Gas* and *Flogas Ireland Limited v. Langan Fuels Limited*, observed that ‘the courts should exercise special care to ensure that a party is not given free access to [confidential information] without having satisfied the court that there is some basis on which the documentation is likely to be relevant and necessary’. Even so, depending on the documentation involved, the court may decide that the balancing of rights demands an order against discovery.

Pursuant to the 2009 Discovery Rules, a party may seek electronic data from its opponent and a court may order a party to give inspection and search facilities for electronic data on its computer systems. The fact that a document is situated outside the jurisdiction does not preclude it from being discoverable.

It is possible to seek discovery against a non-party. A party seeking such an order should indemnify such person and pay their costs.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

Reference to arbitration is commonplace in commercial contracts. However, as arbitration becomes increasingly formalised and thus more akin to traditional adversarial proceedings, there is an increasing trend towards consent-based non-binding forms of ADR such as mediation and expert determination as more flexible and cost-efficient ADR mechanisms.

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23 Order 31 Rule 12 (1) RSC as amended by SI No. 93 of 2009.
25 [2012] IEHC 259. See also Goode Concrete v. CRH PLC & Ors [2017] IEHC 534 and Word Perfect Translation Services Limited v. The Minister for Public Expenditure and Reform (No.2) [2018] IECA 87 in connection with putting in place a confidentiality ring to protect commercially sensitive information.
Arbitration

The Arbitration Act 2010 (the 2010 Act) came into operation on 8 June 2010, repealing all previous arbitration legislation in Ireland. The 2010 Act incorporates the UNCITRAL Model Law (the Model Law) and applies to all domestic and international arbitration commenced after 8 June 2010.

The 2010 Act led to a number of significant changes to the previous regime. In strengthening the integrity of the arbitration process, the 2010 Act abolished the ‘case stated’ procedure, whereby the arbitrator could refer a question of law to the High Court. In addition, the jurisdiction of the arbitrator was increased as they are given the power to review challenges to their appointment and can determine their own jurisdiction. The provisions of the 2010 Act go further to increase Ireland’s attractiveness as a potential destination for commercial arbitration by requiring the arbitrator to give reasons for his or her award, unless the parties have agreed otherwise and also by allowing the parties to agree allocation of costs, whether before or after the dispute has arisen. The 2010 Act also restricts the grounds for setting aside an award to those grounds specified under Article 34 of the Model Law:

a. a party to the agreement is under some incapacity or the agreement is invalid;

b. improper notice was given regarding the arbitrator’s appointment or arbitral proceedings;

c. the award deals with matters outside the scope of the submission to the arbitrator;

d. the tribunal or procedure was improperly constituted;

e. the subject matter of the dispute is not capable of settlement by arbitration under the law of the state; or

f. the award is in conflict with the public policy of the state.

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention) applies in Ireland and an award made in the territory of the state that is party to the New York Convention shall be enforceable in the same manner in Ireland as the award of an arbitrator made in a domestic arbitration.

The New York Convention has been overtaken in Ireland by the incorporation of the Model Law into Irish law on foot of the Arbitration (International Commercial) Act 1998. A party may seek to have an arbitral award recognised and enforced regardless of whether it has been made in a signatory or non-signatory country, subject to that country having adopted the Model Law.

To enforce an award, application may be made to the High Court by way of originating notice of motion grounded on affidavit exhibiting the original arbitration agreement and the award (together with a translation of same).

Enforcement will only be refused on limited grounds such as where it would be contrary to public policy. However, in Broström Tankers AB v. Factorías Vulcano SA,26 the High Court held that the public policy defence was of narrow scope and could only be invoked where there was some element of illegality or where enforcement of the award would be clearly injurious to the public good or wholly offensive to the public.

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iii  Mediation

The Mediation Act came into effect on 1 January 2018. The Mediation Act applies to all civil disputes with some exceptions, including arbitrations, Workplace Relations Commission disputes, applications seeking leave to apply for judicial review and judicial review proceedings.

Under the Mediation Act, solicitors, including in-house solicitors, are required to advise their clients to consider mediation as a form of dispute resolution and make a statutory declaration confirming they have done so. More particularly, a solicitor is required to:

a  provide the client with information regarding mediation, including the names and addresses of the people who provide mediation services;

b  inform the client of the advantages of ADR and of the benefits of mediation;

c  inform the client that mediation is voluntary and, if relevant, that it may not be an appropriate means of resolving the dispute where the safety of the client or their children is at risk;

d  inform the client that they (the solicitor) will need to make a statutory declaration confirming that they have complied with their obligations; and

e  inform the client that if the statutory declaration is not provided the court will adjourn the legal proceedings.

A party does not have to go to mediation and can proceed directly to court if they wish.

If the parties agree to mediate, time stops running for the purpose of the limitation period in which to bring proceedings on the date when the parties sign the agreement to mediate. Time will recommence 30 days after any termination of the mediation.

A court may adjourn legal proceedings to afford parties an opportunity to engage in mediation. A party who refuses to engage in mediation without good reason may later be penalised in costs. The Court of Appeal in Danske Bank & Anor. v. SC [2018] IECA 117 refused an application to adjourn proceedings to allow the parties to mediate, having regard to the conduct of the litigation, the stage of the proceedings, the potential effect of an adjournment on the proceedings, the likely success of the mediation and the *bona fides* of the application. The Court of Appeal referred to its decision in Atlantic Shellfish Ltd v. Cork County Council [2015] 2 IR 575 and the principle that a court should only exercise its discretion to invite parties to mediate if it considers it appropriate to do so having regard to all of the circumstances of the case.

There is a growing group of individuals who have trained to act as professional mediators. Mediation institutions such as the Mediators’ Institute of Ireland, the Centre for Effective Dispute Resolution and the Irish Commercial Mediation Association promote mediation by offering training, advice and, in many cases, a link to a panel of mediators. The Law Society of Ireland also has a panel of accredited mediators.

iv  Other forms of ADR

Conciliation is often used in employment and construction disputes. Expert determination and adjudication have been most often utilised in specialist disputes, for example, construction disputes. Reference to expert determination is usually also included in agreements for lease in the context of rent review disputes.
VII OUTLOOK AND CONCLUSIONS

In terms of outlook generally, we believe that Brexit will create valuable opportunities in this jurisdiction, particularly in the field of financial services litigation. The expected withdrawal of the United Kingdom from the EU is considered to likely be a key factor for companies in the EU when it comes to choice of law and choice of jurisdiction clauses in agreements. Ireland will be able to offer these companies all the advantages that are currently available through its continued membership of the EU.

The enthusiasm of practitioners and the judiciary to embrace electronic alternatives (e.g., predictive coding, technology assisted reviews, paperless hearings) to traditional paper-based practices is continuing to grow and it is widely considered that these alternatives will have a positive impact on the legal landscape in this jurisdiction.
INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

Italy is a civil law country. The law is not created by court decisions, as in common law countries, but through legislative statutes.

Disputes on civil and commercial matters are resolved by either state courts of law or private arbitrators.

The state courts having jurisdiction over civil and commercial disputes are the following: courts of first instance, courts of appeal and the Supreme Court.

i  Courts of first instance

There is one justice of the peace and one tribunal in all major municipalities.

The justice of the peace is a single honorary judge, whose competence is limited to specific disputes, including disputes relating to movable goods for a maximum value of €5,000, which will be increased to €30,000 starting from 31 October 2021.

Tribunals, in addition to deciding on appeals against the decisions of justices of the peace, rule on all civil and commercial disputes that fall outside the competence of justices of the peace. Tribunals can be composed of one or three ordinary magistrates, depending on the nature of the dispute.

Certain tribunals have specialised divisions that deal with specific matters (such as employment, bankruptcy, corporate and intellectual property).

ii  Courts of appeal

There are 26 courts of appeal in Italy. Courts of appeal are composed of three ordinary magistrates and rule on appeals against decisions of the first instance court and arbitral awards.

Generally, only the claims, objections and evidence submitted by the parties before the first instance tribunal are admissible in appeal proceedings.

If, following appeal, the decision of a court is overruled, the court of appeal also decides on the merits of the dispute and its decision replaces the annulled decision. Particular rules apply in this respect where the court annuls an arbitral award.

iii  Supreme Court

There is one Supreme Court in Italy, in Rome. The grounds for recourse to the Supreme Court are strictly established by Article 360 of the Italian Code of Civil Procedure (CCP).

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II THE YEAR IN REVIEW

i Supreme Court, sitting en banc, 24 September 2018, No. 22437
The Supreme Court sitting en banc held the validity of insurance contracts providing the ‘claims made clause’ (i.e., a clause limiting the insurance coverage to liabilities claimed after the execution of the insurance contract and before its expiry date, independently from the date of the accidents).

ii Constitutional Court, 30 January 2018, No. 13
The Constitutional Court held that Article 829 CCP (see Section VI), as emended by Legislative Decree No. 40/2006, is constitutional and has to be interpreted as follows:

a if the arbitration agreement was executed after the entry into force of Legislative Decree No. 40/2006, the provision precludes the appeal for the annulment of arbitral awards based on errors of judgment, unless this ground for appeal is expressly authorised in the arbitration agreement; and

b if the arbitration agreement was executed before the entry into force of Legislative Decree No. 40/2006, the arbitral award can be appealed on grounds of errors of judgment even if this right is not stated in the arbitration clause.

III COURT PROCEDURE

i Overview of court procedure
The CCP establishes the general rules that govern the first, second and third instance proceedings before state courts relating to civil and commercial disputes. Moreover, it governs enforcement proceedings and special proceedings such as summary proceedings seeking interim protective measures or payment injunctions. It also establishes the general rules that govern arbitration (see Section VI).

The CCP provides for three paradigmatic categories of court procedures: ordinary proceedings, summary proceedings and labour proceedings.

However, there are other laws that govern proceedings before state courts that relate to particular disputes on civil and commercial matters, such as bankruptcy (Royal Decree No. 267/1942), divorce (Law No. 898/1970), and intellectual property (Legislative Decree No. 30/2005).

ii Procedures and time frames

Ordinary proceedings
Ordinary proceedings before the courts of first instance begin with a writ of summons served by the claimant.\(^2\)

Should the defendant intend to raise counterclaims or objections that only the parties can raise, or call third parties, the defendant must file a statement of defence at least 20 days before the first hearing. If not, the defendant can file its statement of defence on the hearing date.

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\(^2\) Article 163 bis of the Italian Code of Civil Procedure (CCP).
At the first hearing, at the request of one of the parties, the court must authorise both parties to simultaneously file three subsequent briefs within strict deadlines (30 days, 30 days and 20 days). In these briefs, the parties must better specify their claims and objections and offer further evidence.

The subsequent hearings are devoted to taking evidence, which the court admits at its discretion.

When the court holds that no further evidence needs to be taken, it schedules a hearing at which the parties must state their final conclusions. The parties must then file two conclusive briefs within 60 days and 20 days of the hearing date. However, different rules may apply.

Generally, the court issues decisions within 30 or 60 days of the date of filing the second and final brief, depending on whether the court is composed of one or three judges.

**Summary proceedings**

These proceedings start with an application filed directly with the judge, who then fixes the hearing for the parties’ appearance. After having been served with the notice of application and the judge's order fixing the hearing, the defendant submits a written reply 10 days before the hearing. During the hearing, if the judge concludes that the parties’ defences can be examined summarily, he or she proceeds in the most appropriate manner and issues an order, which has the same effect as a judgment.

**Interim measures**

The CCP allows a court to grant interim measures in favour of one party, prior to or pending a trial, on one party’s application.

The subject of the interim protective measures varies from case to case. Protective measures range from an order to refrain from interfering with the applicant’s right to freely dispose of its properties, to an order to refrain from calling a first-demand performance bond issued by the applicant’s bank, to a temporary seizure of goods or property held by the defendant, etc.

As a general rule, interim protective measures can only be granted if the applicant provides the court with clear evidence of the existence of both the right that the measure is aimed at protecting and the serious and actual risk that the right be harmed if not temporarily protected pending the trial on the merits. Protective measures can be granted *ex parte* if the circumstances so dictate, subject to confirmation, revision or annulment at a later stage, after a hearing, based on the defences of the other party.

**Class actions**

In Italy, consumer class actions are governed by Article 140 *bis* of Legislative Decree No. 206/2005 (the Consumer Code). This article entered into force on 1 January 2010 and applies to allegedly unlawful activities carried out after 15 August 2009.

Consumers can bring class actions against companies for damage caused by breach of contract, by product liability or by unfair and restrictive business practices. Only consumers have the right to appear and be heard in court, but associations and committees of which they are members may represent the class (provided that they demonstrate their ability to adequately represent the interests of each class member).

Class actions must be brought before the civil court of the capital of the region of the company’s registered office; however, certain regional courts have jurisdiction over smaller
regions. At the first hearing, the court decides and issues an order on admissibility. The order may be challenged before the court of appeal within 30 days of its disclosure or notification (whichever occurs first). The order also sets out the procedure for the public notice and the requirements, including the deadline, for joining the class action (consumers that join the class need not appoint legal counsel).

A class action is admissible only if (1) multiple consumer rights are affected, and (2) the asserted rights are homogeneous. A class action is inadmissible if the court holds that:

- it is clearly ungrounded;
- a conflict of interest exists;
- the asserted rights are not homogeneous; or
- the class representative appears unable to adequately represent the interests of all the class members.

After the admissibility stage, the proceedings continue in accordance with the standard procedural rules and the instructions in the admissibility order.

If the court rules in favour of the class, it either orders the losing party *ex aequo et bono* to pay the amounts due to the claimants or establishes the criteria for calculating the amounts.

The class action legal framework is based on an opt-in mechanism, meaning that the court’s ruling is binding only on the parties that joined the class action. Non-joiners may file individual claims, but a class action relating to the same facts and brought against the same parties as in another class action may not be filed after the deadline to join the other class action.

Very few class actions have progressed beyond the admissibility stage since class actions were introduced in Italy. However, one class action dispute was decided in 2017 and ruled in favour of the claimants (a group of roughly 6,000 commuters): each claimant was awarded €300 as compensation for damages suffered following a series of delays and cancellations of trains from 9 December 2012 to 17 December 2012. Other pending class actions that have progressed beyond the admissibility stage include the following:

- two class actions against two major automobile manufacturers (for unfair and restrictive business practices involving the misrepresentation of vehicle emissions);
- one against a major smartphone and tablet producer (which allegedly misrepresented the storage capacity of its devices); and
- one against a water supplier brought by people who are resident in certain towns in central Italy (the defendant allegedly invoiced undue fees to its customers).

Another type of class action (governed by Legislative Decree No. 198 of 20 December 2009) may be brought against the public administration and public services providers. This type of

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3 Only 11 civil courts have jurisdiction over class actions. The Court of Turin has jurisdiction over the Valle d’Aosta region; the Court of Venice over Trentino-Alto Adige and Friuli-Venezia Giulia; the Court of Rome over Marche, Umbria and Molise; and the Court of Naples over Basilicata and Calabria.

4 The Supreme Court clarified that, if a court of appeal regards a claim as admissible or inadmissible, the decision may not be further challenged (Supreme Court Decisions Nos. 26725 of 23 October 2018; 2610 of 1 February 2017 (sitting *en banc*); and 23631 of 21 November 2016).

5 Court of Appeal of Milan, Decision No. 3756/2017 of 25 August 2017.
class action does not seek to obtain damages, but rather to restore the correct performance of a function or a service to the public, and thereby enhance the quality of the public administration.

iv Representation in proceedings

Parties, both individuals and entities, must be represented by a qualified lawyer before state civil courts. However, an individual may stand in trial without counsel before a justice of the peace, provided that he or she is at least 18 years old and is not legally incapacitated, and the value of the case does not exceed €1,100.

v Service out of the jurisdiction

The service from Italy to a Member State of the European Union of judicial and extrajudicial documents relating to civil and commercial matters is governed by EC Regulation No. 1393/2007.

With regard to the service of documents to a non-Member State, Italy has ratified the Hague Convention of 15 November 1965.

If the state of destination has not ratified the 1965 Hague Convention, but a bilateral treaty is in place, the service method established by the treaty shall apply. In the absence of a bilateral treaty, the service shall be made according to Articles 37 and 77 of Legislative Decree No. 71/2011 (i.e., transmission from and to consular authorities) or, if not possible, according to Article 142 CCP (i.e., transmission by the court’s clerk of two copies, one by mail directly to the addressee and one through the office of the Public Attorney to the Ministry of Foreign Affairs, which will then deliver it to the addressee).

vi Enforcement of foreign judgments

If the judgment has been rendered by the court of a Member State of the European Union, EU Regulation No. 1215/2012 applies and no declaration of enforceability is required.

If the judgment has been rendered by the court of a non-EU state, it will be recognised and enforced according to the specific bilateral treaty between Italy and that state. In its absence, it will be automatically recognised in Italy, under Article 64 et seq. of Law No. 218/1995 (though the counterparty has the right to raise an opposition) if specific conditions are met:

a the court that issued the decision had jurisdiction according to Italian rules on jurisdiction;
b the defendant was served with the writ of summons according to the lex fori and the principle of due process has been complied with;
c the judgment has become res judicata according to the lex fori;
d the judgment does not contradict a judgment issued by an Italian court that has become res judicata;
e there are no proceedings pending before Italian courts between the same parties and on the same dispute that were commenced prior to the foreign proceedings; and
f the judgment is not contrary to public policy.

vii Assistance to foreign courts

The assistance by Italian courts to courts of another Member State of the European Union (other than Denmark) in the taking of evidence in civil or commercial matters is governed by EC Regulation No. 1206/2001.
The assistance by Italian courts to courts of another state that is not a member of the European Union shall take place according to the specific bilateral treaty between Italy and that state. In its absence, it shall take place in accordance with the provisions of Law No. 218/1995, according to which, both a party in a foreign trial and the court before which the trial is held may request the assistance of the Italian courts in the taking of evidence in Italy.

viii Access to court files
The parties and their officially appointed counsel may access the court file at any time.
Third persons may not access the court files. However, unless otherwise provided, the court must grant permission to third parties to make copies of acts or documents contained in the file (Articles 743 and 744 of the CCP).
Courts’ final judgments are public.

ix Litigation funding
The parties bear litigation costs. Each party must advance the relevant fees. However, as a general rule, the court shall order the losing party to refund the legal expenses borne by the counterparty, unless either both the parties have partially lost or the question of law of the case was exceptionally new or there was an overruling or the expenses borne by the winning party were exorbitant or unnecessary.

Litigation can be funded by a third party; however, this is not common in Italy.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls
As of 15 December 2014, conflicts of interest are regulated by a professional code of conduct (the Code). The relevant provisions are binding on Italian lawyers and foreign lawyers working in Italy. The sanctions are provided for by the Code and are meted out in proportion to the seriousness of the infringement, ranging from a simple warning to disbarment.
Lawyers must carry out their professional activity with loyalty. Any behaviour that can be construed as consciously acting against a client’s interest is cause for disciplinary action.6

With some specific exceptions, a lawyer has the right and the duty to not divulge, and to keep confidential, the professional activities performed on behalf of a client, as well as all information received from a client or of which he or she has become aware as a result of an assignment. The duty of confidentiality also applies to former clients and persons who requested the lawyer’s services without the lawyer accepting the assignment.7

Lawyers must refrain from performing any professional activities in favour of a client if doing so would or may potentially cause a conflict with the interests of another client, or would interfere with the performance of another assignment, even a non-professional one. A conflict of interest would also exist if, in carrying out a new assignment, the lawyer should disclose information concerning another client, or if the cognisance of a client’s business could unfairly favour another client, or if the carrying out of a former assignment could limit the lawyer’s independence in performing a new assignment.8

6 Article 10 of the Code.
7 Article 28 of the Code.
8 Article 24 of the Code.
If the lawyer acts in situations of conflicts of interest even after having obtained clear and conscious consent from every client, he or she will infringe the ethical rule. Accepting an assignment against a former client is only possible two years after having completed the former client’s assignment, and provided that the object of the new assignment is unrelated. Furthermore, the lawyer cannot use information acquired on account of the preceding assignment.9

Article 24(5) of the Code establishes that the lawyer’s duty to refrain from acting in situations of actual or potential conflict of interest applies also where the parties with conflicting interests consult two different lawyers belonging to the same firm or partnership, or working in the same office.

Chinese walls are possible and frequent, but do not necessarily excuse lawyers from complying with their duty to refrain from acting in situations of actual or potential conflicts of interest. Even where information barriers are put in place, every lawyer should decline an assignment in cases of existing or potential conflict, if these barriers are insufficient to exclude the conflict.

ii Money laundering, proceeds of crime and funds related to terrorism

Legislative Decree No. 231 of 21 November 2007 (as last emended by Legislative Decree No. 90 of 25 May 2017, which transposes European Directive 2015/849 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing) binds lawyers to strict obligations regarding:

- due diligence measures concerning clients, when participating in financial or corporate transactions, including when providing tax advice; and
- reporting to authorities any suspect transactions.

Furthermore, by virtue of deontological rules, a lawyer must not accept any assignment from a potential client when he or she can reasonably assume that professional services would be connected with an illegal business or transaction, and must not receive from or manage any funds of a client where the client cannot be properly identified.

Lawyers must record and keep all documents and information relating to their client’s transactions for 10 years after the business relationship with the client has ended.

As regards the reporting obligations, on their own initiative lawyers must promptly inform the competent authority where they know, suspect or have reasonable grounds to suspect that money laundering or terrorist financing is being or has been committed or attempted. However, pursuant to Article 35(5) of Legislative Decree No. 231/2007, this obligation does not apply to information acquired by lawyers in relation to any judicial proceedings, or in the course of ascertaining the legal position of a client; therefore, legal advice remains subject to the obligation of professional secrecy.

iii Data protection

On 25 May 2018, the General Data Protection Regulation (GDPR) came into force, repealing Directive 96/95 and forcing national legislators to change domestic law. Thus, Italy’s legislative framework for the processing and protection of personal data is now subject to the GDPR and Legislative Decree No. 196 of 30 June 2003, as amended by Legislative

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9 Article 68 of the Code.
Decree No. 101 of September 2018 (the Italian Data Protection Code). The GDPR changed
data processing rules and introduced new principles (such as accountability); however, the
basic rules and principles remain the same. Thus, the role of privacy information notices has
remained the same, as has that of requiring a legal basis for data processing – but consent no
longer has a central role: it is now on the same level as the other legal bases required by law.
The legal bases are the following:
a. the data subject’s consent;
b. the necessity to perform a contract to which the data subject is party or to take steps at
the request of the data subject before entering into a contract;
c. a legal obligation to process data;
d. the necessity to protect the vital interests of the data subject or of another natural
person;
e. a public interest in processing data or the exercise of official authority vested in the
controller; and
f. a legitimate interest pursued by the controller or by a third party, except where such
interests are overridden by the interests or fundamental rights and freedoms of the data
subject that require protection of personal data.

Thus, the controller’s legitimate interest in processing personal data (i.e., the processing is
necessary to carry out an investigation or to exercise or defend a legal claim or right) constitutes
an adequate legal basis to do so.10 As the practice of law generally involves exercising or
defending a legal claim or right, a lawyer authorised by client or a private detective hired
via a written agreement may carry out processing for this purpose without the data subject’s
(i.e., the client’s or a third party’s) consent. The clients themselves may also process the data in
these cases, for instance, to audit work email accounts or computers to seek evidence against
employees.

The ability to carry out the above type of investigation without the data subject’s
consent is confirmed by the Italian Code of Practice Applying to the Processing of Personal
Data Performed with a View to Defence Investigations (published in Official Journal No. 275
of 24 November 2008).

The code – which still applies – stresses the importance of respecting the minimisation
principle. Indeed, the following applies to lawyers when processing personal data for
investigative purposes.

Purpose limitation, data minimisation and non-excessiveness principles shall be
applied, the envisaged safeguards shall be assessed as to their substance rather than their form
and the quality and amount of the information to be processed shall be taken into account
along with the risks.

Similarly, the sharing of personal data between lawyers (whether nationally or
internationally)11 is allowed only if strictly necessary to defend a legal claim or right, and the
principles above must be applied.

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10 Before the GDPR, Article 24(f) of the Italian Data Protection Code/past provisions of the Italian Data
Protection Code (Article 24(f)) expressly provided that no consent was needed for legitimate, lawful
investigations.

11 Data may be transferred outside the EU only if a lawful basis for doing so exists and the European
Commission has issued an adequacy decision or other appropriate safeguards are in place, in accordance
with Article 46 of the GDPR. The GDPR provides derogations in the absence of these conditions: for
In any case to lawfully process personal data for investigative purposes, it is necessary to provide the data subject with a specific information notice. A lawyer or a private detective must not provide the information notice if data are collected from third parties or are processed exclusively for as long as may be necessary to establish or defend a judicial claim or for the purpose of defence investigations. It is possible to postpone the information notice provision when a disclosure of the investigative purpose would lead to the detriment of the investigation itself.

Finally, the admissibility in civil legal proceedings of personal data processed in breach of data protection rules must be assessed solely based on the CCP – not the Data Protection Code. The CCP does not provide a specific rule for unlawfully collected evidence, but according to most legal doctrine and case law, breach of the Data Protection Code does not preclude personal data being used as evidence in civil proceedings if the evidence is genuine, verifiable by the court and relevant. Conversely, personal data collected through equipment used to monitor employees and processed in breach of data protection rules may not be used as evidence in labour law proceedings.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

The CCP contains no rules relating to correspondence among counsel and parties.

According to Articles 210 and 118 of the CCP, the court may order a party to produce documents, or may order the inspection of specific places if it deems it relevant for the purpose of deciding the case. However, the court may not uphold the request by one party to order the disclosure of documents if this may cause unjustified harm to the other party or violate a professional secret.

Article 48 of the Code establishes that, unless otherwise provided, the correspondence between the parties’ counsel expressly qualified as confidential, or regarding the negotiation of an amicable settlement, cannot be filed nor referred to in the court proceedings.

The Code does not apply to in-house counsel. If the in-house counsel is registered with the Italian Association of In-House Lawyers (AIGI), he or she must abide by the rules of conduct provided by the AIGI’s code. Although this does not contain specific provisions regarding confidential correspondence, it establishes in its Article 7 that in-house counsel must keep confidential all the information of which they become aware by reason of their professional activity, even after termination of their employment.

12 For example, if a transfer is necessary for the establishment, exercise or defense of legal claims. The European Data Protection Supervisor (formerly the Article 29 Working Party) adopted a strict interpretation of the ‘defence’ exception for personal data transfers outside the EU (see Working document on a common interpretation of Article 26(1) of Directive 95/46/EC of 24 October 1995, adopted on 25 November 2005), aimed at avoiding ‘massive’ personal data transfers. In this regard, the processing of personal data for the purposes of defending a legal claim must be necessary.

13 As expressly stated in Article 160 bis of the Italian Data Protection Code.

14 Supreme Court Decision No. 7783 of 3 April 2014, confirmed by Supreme Court, Criminal Section, Decisions Nos. 43414 of 13 October 2016 and 33560 of 28 May 2015.
ii Production of documents in civil litigation

As a general rule, the burden of proof lies on the party asserting a right or entitlement (under Article 2697 of the Italian Civil Code).

According to Article 115 of the CCP, the court might reach a decision not only on the basis of the evidence filed by the parties but also on the basis of the uncontested facts and might even rely on factual elements that are common knowledge.

In the Italian civil judicial system, the key role in the taking of evidence is played by the parties, as they may produce all the documents that prove the facts on which their claims rely, without any prior authorisation by the judge.

With certain exceptions (e.g., notarised deeds), the court can evaluate any evidence at its cautious discretion, provided that specific motivations of such evaluation are given in the judgment. The notarised deeds, unless proven to be false, conclusively prove the declarations of the parties set out therein and the facts that the notary declares to have occurred in his or her presence.

Email and electronic documents are considered as signed documents if they bear the electronic signature of their author in accordance with Legislative Decree No. 82/2005.

According to Articles 210 et seq. of the CCP, subject to certain conditions, the court may order a party or a third person to produce a document that has not been filed.16

VI ALTERNATIVES TO LITIGATION

i Overview of alternative dispute mechanisms

The law allows civil or commercial disputes to be resolved either directly by the parties (e.g., by a settlement agreement), or by the parties assisted by a third person deprived of decision-making authority but empowered to suggest possible solutions (e.g., mediation) or, if the type of dispute allows it, by a third party entrusted by the parties with decision-making authority (i.e., arbitration).

ii Arbitration

The rules in general

Arbitration on civil and commercial disputes is very common in Italy. Although arbitration is faster and ensures a high level of technical expertise and confidentiality, court proceedings are often preferred as costs can be lower.

The arbitrator’s decision shall be legally binding on the parties and is as enforceable as a state judge’s decision.

The general rules governing arbitration are set out in Articles 806 to 840 CCP. Specific rules are established by Legislative Decree No. 5/2003 for corporate matters, and by Legislative Decree No. 50/2016 for disputes arising out of public procurement contracts.

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15 Article 116 CCP.
16 Supreme Court Decisions No. 31182 of 29 December 2017; No. 6511 of 4 April 2016; No. 13072 of 8 September 2003; No. 4363 of 16 May 1997.
The arbitration agreement

A dispute may only be referred to arbitration through a specific agreement of the parties (i.e., the arbitration agreement). To be valid and effective, the arbitration agreement must be in writing (not necessarily in a single document), and the concerned parties must have the legal capacity to enter into it.\textsuperscript{17} An arbitration clause may also be set out in a contract.\textsuperscript{18} With the exception of specific cases provided by the law, an arbitrator cannot order interim measures.\textsuperscript{19} Consequently, only the state judge may grant such measures prior to or pending the arbitration proceedings.\textsuperscript{20}

Arbitrable disputes

The dispute may be referred to arbitration only when it concerns rights of the parties deriving from a relationship of civil or commercial nature that the parties can dispose of.\textsuperscript{21} In addition, other specific limits are provided for by the CCP and other laws. For example, individual employment disputes are arbitrable, but only if the collective employment contract or the law so provide. Disputes concerning bankruptcy and other insolvency proceedings are subject to the exclusive jurisdiction of the state courts.

Domestic and foreign arbitration

If the arbitration is domestic, the support and verification measures regarding the arbitration will fall within the jurisdiction of the Italian judiciary: Italian judges have jurisdiction to appoint or replace arbitrators,\textsuperscript{22} to decide on challenges against arbitrators,\textsuperscript{23} to issue interim measures and to grant the \textit{exequatur} of the arbitral award.\textsuperscript{24} The party wishing to enforce the award in Italy must deposit the award within the competent court of first instance, which, after verifying its formal regularity, will declare it enforceable. This rule does not apply if the arbitral award has a contractual nature (non-jurisdictional arbitration, see below). If the place of the arbitration is in Italy, the parties may challenge an arbitral award before the Italian courts.\textsuperscript{25} The annulment proceedings will be governed by Italian law.\textsuperscript{26}

In foreign arbitration, the parties cannot seek support measures from Italian courts. A party seeking recognition and enforcement of a foreign award must apply to the competent court of appeal, which will decide on the basis of the regime set out in Articles 839 and 840 of the CCP (reflecting the criteria established by Articles IV and V of the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards entered into force for Italy on 1 May 1969).

\textsuperscript{17} Articles 807, 808 and 808 \textit{bis} CCP.
\textsuperscript{18} Article 808 CCP.
\textsuperscript{19} Article 818 CCP.
\textsuperscript{20} Article 669 \textit{quinquies} CCP.
\textsuperscript{21} Article 806 CCP.
\textsuperscript{22} Articles 810 and 811 CCP.
\textsuperscript{23} Article 815 CCP.
\textsuperscript{24} Article 825 CCP.
\textsuperscript{25} Articles 829 and 831 CCP.
\textsuperscript{26} Articles 827–831 CCP.
The arbitration can be either *ad hoc* or administered. In Italy, arbitration governed by institutional rules (e.g., those of the ICC or the Milan Chamber of Arbitration) is quite common.

**Non-jurisdictional arbitration**

When the parties agree to this type of arbitration, the arbitral award has the effect of a contract between parties. It is debatable whether this contractual determination is subject to the recognition and enforcement rules established by the 1958 New York Convention.

**The challenge of the award**

The arbitral award can be challenged before the court of appeal of the district at the seat of arbitration. The parties to the arbitration may request that the award be annulled or revoked. Moreover, a third party may file an opposition against the award where it causes prejudice to its rights.

**Appeal**

The appeal for the annulment of the award must be notified to the defendant within 90 days of the day on which the award has been notified to the appellant or, failing the notification, within one year of the day the arbitrator has signed the award.

The grounds for appeal are established by Article 829 of the CCP and there are two types: procedural errors and errors of judgment.

The appeal on the grounds of procedural errors is admissible in any case, even if the parties have agreed that the award is not subject to appeal. The appeal based on errors of judgment is admissible only if expressly provided by the arbitration agreement or by the law.

**Revocation**

The award can be revoked if it stems from one party’s fraud, or it is based on evidence that is proven to be false after the award, or documents that could not be filed in the arbitration proceedings because of *force majeure* or the other party’s behaviour are discovered after the award, or the award stems from the arbitrator’s fraud established by a final decision by the judge.

**Third-party opposition**

An opposition against the award may be filed by a third party if it causes prejudice to its rights, and by one party’s creditors if the award stems from one party’s fraud that is detrimental to them.

**iii Mediation**

With regard to certain matters (e.g., insurance, financial and banking agreements), Legislative Decree No. 28/2010 provided for a compulsory attempt at conciliation with the assistance of a qualified mediator prior to commencing court proceedings.

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27 Article 832 CCP.
28 Articles 828 and 831 CCP.
29 Article 828 CCP.
30 Article 831 CCP by reference to Article 404 CCP.
**Other forms of alternative dispute resolution**

Arbitrage is governed by Article 1349 of the Civil Code and is entirely different from arbitration. In arbitrage the parties delegate a third person, by means of an \textit{ad hoc} agreement, to determine an element of a legal relationship in the process of being created. The parties commit themselves to the third person's determination.

Contractual expertise is not regulated by the law. By means of an \textit{ad hoc} agreement, the parties appoint a third party to ascertain a certain fact requiring specialist knowledge, committing themselves to the expert's decision. Contractual expertise is rather common, especially in insurance matters to determine the amount of damage.

Lawyer negotiation is a procedure regulated by Law Decree No. 132/2014. It must be triggered by the party wishing to begin a lawsuit in the specific cases indicated by the law. The result of this negotiation is a written agreement, which – in case of breach of the obligations provided therein – is title both for the commencement of an enforcement proceeding and for the raise of a mortgage against the defaulting party.

**OUTLOOK AND CONCLUSIONS**

Unlike in recent years, in 2018 there have been no significant reforms to the Italian rules on civil procedure. The reforms enacted from 2009 to 2014, designed to reduce the number of pending disputes before Italian courts and to expedite the average duration of court proceedings, have been partially successful: the number of pending cases has significantly decreased from 5,700,105 in 31 December 2009 to 3,719,284 in 30 June 2017. Furthermore, the average duration of first instance proceedings has also dropped, from 487 days in 2014 to 360 days in 2017.
I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

Japan is a civil law country influenced by Western legal models. Litigation continues to be the most common dispute resolution mechanism, while various forms of alternative dispute resolution (ADR), including arbitration, have gradually become more popular in recent years.

In Japan, legal professionals typically pursue one of three career paths as a judge, public prosecutor or attorney (in government, private practice or in-house). Applicants must pass the national bar examination and complete mandatory training for one year at the Legal Research and Training Institute governed by the Supreme Court of Japan. In 2004, Japan introduced a US-style post-graduate law school system and students who pass the ‘preliminary bar examination’ are deemed to graduate, and are qualified to sit for the national bar examination. Related legal professionals include patent attorneys, judicial scriveners and administrative scriveners.

Judges are appointed by the Supreme Court for 10-year terms and selected from graduates of the Legal Research and Training Institute. Judges serve as associate judges for the first 10 years of their career, and from the sixth year they are allowed to manage a case alone. The 10-year term is usually continuously renewed until retirement.

A jury system is not utilised in civil cases, although Japan introduced a lay-judge system for serious criminal cases in 2009.

The Japanese court structure consists, in principle, of three tiers of civil courts: district courts, high courts and the Supreme Court. Summary courts have jurisdiction over cases where the amount in controversy does not exceed ¥1.4 million and civil conciliations (regardless of the amount in controversy).

There is no split qualification in Japan, as exists for barristers and solicitors in the United Kingdom, and all attorneys may appear before the court. There are no added requirements for attorneys to appear before the higher courts. Patent attorneys may appear in certain categories of cases related to intellectual property (IP) (extra certification or joint representation with attorneys is needed, depending on the case). Judicial scriveners who are certified by the Ministry of Justice may appear before the summary courts.

Civil cases are usually commenced at the district court as the court of first instance. The district court located at the place where the defendant resides or has its registered main office has personal jurisdiction over the case. Cases are administered by a single judge or a panel of three judges, depending on their nature and complexity. Some large district courts have
special divisions or concentrated divisions for matters such as bankruptcy, administrative, labour, medical, commercial or IP claims. Parties who are not satisfied with the judgment rendered at the district court may file an appeal to the regional high court.

In 2005, the IP High Court, a court specialising in intellectual property cases, was established in Tokyo. Regardless of the territorial jurisdiction of the applicable court of first instance, an appeal of a judgment rendered at the court of first instance involving IP is brought to this specialist court. Further, cases involving the revocation of decisions issued by the Patent Office are handled by the IP High Court.

The most common form of ADR in Japan is the civil conciliation procedure at summary courts under the Civil Conciliation Act. Three conciliators appointed by the court consisting of a judge and two part-time conciliators (not necessarily attorneys) administer the conciliation procedure.

Even after the commencement of the litigation, the court may, if it considers it appropriate, transfer the case to the conciliation procedure. Further, civil conciliation may be required by laws in advance of the commencement of the litigation in certain areas of disputes, such as those concerning the Act on Land and Building Leases.

Other forms of ADR are explained in Section VI.

II THE YEAR IN REVIEW

On 12 December 2017, the Supreme Court reversed and remanded the decision of the Osaka High Court, which set aside a Japan Commercial Arbitration Association (JCAA) arbitration in which the chairperson of the arbitral tribunal had failed to disclose its potential conflict of interest to the parties.3

In this case, after the chairperson – who belonged to the Singapore office of an international law firm – was appointed as an arbitrator of the case, another attorney, who had been retained by the subsidiary of a party as the counsel of a case that was not related to the arbitration, moved to the San Francisco office of the same international law firm. The tribunal rendered the arbitral award without disclosing the lateral transfer of the attorney to the international firm to which the chairperson belonged.

The Supreme Court held that the arbitrator’s abstract statement that potential conflicts of interest could arise in the future (advance waiver) was not sufficient to exempt the arbitrator from his or her ongoing duty to disclose facts that are ‘likely to give rise to doubts as to his or her impartiality or independence’ under the Arbitration Act.4 The Supreme Court further held that, in order to find that the arbitrator violated his or her ongoing disclosure obligation, the arbitrator must have been aware of such facts, or he or she should have been able to be aware of the facts by conducting an inspection of reasonable scope.

The Supreme Court remanded the case to the Osaka High Court, stating that it was not clear whether the chairperson was aware of the lateral transfer of the attorney before rendering the arbitral award and that the operation of the conflict-check system of the international law firm to which the chairperson belonged was also unclear.

2 Act No. 222 of 9 June 1951.
4 Act No. 138 of 1 August 2003.
This is the first Supreme Court decision in which it ruled on the interpretation of the arbitrator’s disclosure obligation under the Arbitration Act that came into force in 2004. This decision is important for practitioners who are involved in international commercial disputes and law firms that run conflict checks on a regular basis.

III  COURT PROCEDURE

i  Overview of court procedure

Litigation is commenced by the plaintiff’s submission of a written complaint to the court specifying the relief sought and factual grounds for the claim. After the court’s review of the submitted written complaint from a technical point of view, it serves a copy of the complaint with a summons on the defendant and requests the defendant to submit the answer. If the defendant fails to submit the answer before the date of the first oral hearing without appearance, it is deemed to admit the factual grounds alleged by the plaintiff in the written complaint. In other words, if the alleged facts in a written complaint are insufficient to satisfy the requirement for the legal claim, even if the defendant fails to respond, a default judgment that awards the full extent of the plaintiff’s relief sought will not be rendered.

The court may hold oral hearings or preparatory meetings in order to identify the factual and legal issues, and the evidence required. In Japan, oral hearings or preparatory meetings are non-consecutive and usually held about once a month. In cases where the parties live far away from the court, the court may hold preparatory meetings via telephone conference. Court procedure in Japan basically follows the adversarial system. On the other hand, judges often actively manage the cases, and encourage the parties to submit further evidence and even to reach settlement.

The jury system does not exist in civil cases and professional judges examine the substance and credibility of evidence. Therefore, the rules of evidence are not complex and in general any evidence is admissible. The court has discretion to determine the necessity of the review of evidence submitted by the parties including adoption of witnesses. The judges tend to put less value on the testimony of a witness than documentary evidence. Therefore, although it depends on the nature of a case, the court is relatively strict about allowing a large number of witnesses for examination at the hearing.

ii  Procedures and time frames

Historically, it was not unusual in Japan for civil court proceedings at the court of first instance to take two or three years until completion. In 2003, the Act on the Expediting of Trials was enacted to expedite civil court proceedings. The Act sets out that the objective of expediting trials is to conclude civil court proceedings of the first instance in as short a time as possible within a period of two years. Following the Act, the Supreme Court has conducted comprehensive reviews of the expediting of trials, and published its results every two years. The following are some notable statistics for 2016 from the Supreme Court’s latest report:

a  The average duration at the district court (the court of first instance) from the commencement to the end of a civil case was 8.6 months (which was 17.3 months in

6  The 7th Report Regarding Observation of the Expediting of Trials.
1973, 13.4 months in 1983 and 12.9 months in 1990). Cases lasting six months or less accounted for 57.1 per cent of the total, while those requiring two years or more accounted for 5.8 per cent. Cases lasting over five years represented only 0.2 per cent.

Of the cases concluded in 2016, 41.4 per cent ended in a court-issued judgment (60 per cent of which were rendered with the defendant’s appearance), 35.8 per cent reached settlement in court, and in 16 per cent, the action was withdrawn (6.8 per cent were categorised as ‘other’).

The average duration of the cases that ended in a court-issued judgment with the defendant’s appearance was 12.9 months.

The average number of court hearings or preparatory meetings was 4.7.

Witness examinations occurred in 14.6 per cent of cases.

The average number of examined witnesses was 0.9 for witnesses and 1.8 for parties.

Of the cases ending in a court-issued judgment, 21.5 per cent were appealed.

A party facing imminent harm may request the court for interim relief pursuant to the Civil Provisional Remedies Act. In general, there are three categories of remedies: provisional attachment order, provisional order preserving property and provisional order preserving the status quo of the relationship between the parties, detailed below:

A provisional attachment order is an order to freeze the respondent’s identified assets, such as bank deposits and registered real estate, in order to secure enforcement of a future monetary judgment. This order is usually issued by the court after the claimant’s ex parte meeting with the judge.

A provisional order preserving property is an order to temporarily prohibit the transfer of the possession or ownership of property that is the subject of the claim. This order is also usually issued by the court after the claimant’s ex parte meeting with the judge.

Provisional orders preserving the status quo of the relationship between the parties (e.g., the labour relationship between the employer and the employee who has been allegedly discharged). This order may be issued only after holding a meeting with judge at which the respondent is given the chance to attend.

As above, some categories of interim measures can be issued via ex parte review by the judge when the claimant can establish a prima facie case of the provisional relief sought. This does not necessarily mean that such provisional relief is freely granted because the claimant must prima facie prove the significant difficulty of future compulsory execution, or significant damage or imminent harm to the claimant, and the judge always considers possible counterarguments by the respondent.

The court usually requires the claimant to provide a monetary deposit in advance of the issuance of the provisional order to cover possible damage to the respondent. The court limits the scope of the order only to the extent necessary to cover the claimant’s claim or status. For example, a provisional attachment order on the respondent’s bank deposits is allowed only where the claimant prima facie establishes that the respondent does not own non-pledged real estate assets, because courts are cautious in allowing provisional attachment on liquid assets.

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7 Act No. 91 of 22 December 1989.
iii Class actions

In December 2013, the Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers was enacted and came into effect from 1 October 2016. The Act establishes a new lawsuit system (the Collective Recovery System) that allows for a single collective action for compensation for damage by many consumers against a business operator. Thus, this is ostensibly a class action system in Japan. However, it is quite different from the class action system in the United States.

Only specified qualified consumer organisations (SQCOs) that are certified by the government have standing to bring an action to claim collective compensation for consumer damages. A SQCO must be a qualified consumer organisation (QCO) that is certified to exercise the right to demand an injunction to protect the interests of consumers. According to the Consumer Affairs Agency of Japan, as at September 2018, 19 QCOs have been certified, of which only three are certified as SQCOs.

Collective actions are limited to certain categories of monetary claims by consumers against a business operator. Lost profit damages, damages based on harm to the life or body of a human and damages based on emotional distress may not be claimed under this collective action. Punitive damages are also prohibited.

The Collective Recovery System adopts a two-step, opt-in system. As a first step, an SQCO must seek a declaratory judgment on liability issues that are common between a business operator and consumers (an action for common obligations). The consumers cannot intervene in the action for common obligations raised by the SQCO. After obtaining the court’s declaratory judgment, the SQCO commences an action to claim damages against the business operator on behalf of the consumers who hold claims for monetary payments against the business operator who was found to be liable under the declaratory judgment. The SQCO must then provide notice of the commencement of the second step to the known individual consumers and publicly announce the same to those who are unknown to the SQCO by official gazette. Consumers may then opt in to the collective action.

iv Representation in proceedings

Representation by an attorney is not mandatory in any kind of court proceeding in Japan. The representative person of the legal entity (who must register in the corporate registration under relevant laws) may appear to the court on behalf of the legal entity. Summary courts permit non-attorney representation.

v Service out of the jurisdiction

There are seven ways to deliver judicial documents outside Japan, depending on the applicable treaties and agreements between the states:

- service via consular channels;
- service via a central authority;

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8 Act No. 96 of 11 December 2013.
9 http://www.caa.go.jp/policies/policy/consumer_system/collective_litigation_system/about_qualified_consumer_organisation/.
10 Possible claims are limited to (1) performance of contractual obligation of the contract executed between a consumer and a business operator (the Consumer Contract); (2) unjust enrichment of the Consumer Contract; (3) breach of contract under the Consumer Contract; (4) damages based on a warranty against defects; and (5) damages based on a tort (limited to a claim based on the provisions of the Civil Code).
While important judicial documents such as written complaints must be delivered as ‘service’ by the means listed in points (a) to (g) under Articles 108 and 110 of the Code of Civil Procedure, judicial documents that are not required to be delivered via service may be delivered via courier.

vi Enforcement of foreign judgments

A party seeking enforcement of a foreign judgment must obtain an enforcement judgment at a Japanese court declaring such enforcement pursuant to the Civil Execution Act. The requirements for recognition of a foreign judgment set forth in the Code of Civil Procedure are that:

a. the foreign court has jurisdiction over that dispute under laws or regulations, or conventions or treaties;
b. the defendant has received proper service (excluding service by publication or any other service similar thereto) of a summons or order necessary for the commencement of the lawsuit, or appeared without receiving such service. Personal service on a defendant within Japan will not usually be valid, unless the defendant has entered an appearance;
c. the content of the judgment and the court proceedings are not contrary to public policy in Japan; and
d. the courts of the relevant foreign country provide reciprocal recognition of Japanese judgments.

If all of the above requirements are met, the foreign judgment will be effective and enforceable in Japan. The Japanese court does not review the foreign judgment on its merits. The Supreme Court has refused enforcement of a judgment that ordered payment of punitive damages on the ground that it was against public policy in Japan (see point (c) above).

vii Assistance to foreign courts

With respect to civil cases, Japan provides assistance to foreign courts for the service of judicial documents and examination of evidence (including examination of witnesses). Assistance for the service shall be requested via:

a. the central authority (the Ministry of Foreign Affairs);
b. the requested authority (also the Ministry of Foreign Affairs); or
c. the court.

Assistance for the examination of evidence shall be requested via:

a. the requested authority (the Ministry of Foreign Affairs); or
b. the court.

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11 Act No. 109 of 26 June 1996.
12 Act No. 4 of 30 March 1979.
viii  Access to court files
Any person may review the record of a case including pleadings and evidence, except for records that are subject to a confidentiality order. The right to obtain a copy of the record is limited to the parties to the case and third parties with a legal interest in the case. The court may restrict access to the record if it would be detrimental to preservation of the record or performance of the court’s duties.

ix  Litigation funding
Litigation funding is not common in Japan, although some practitioners have begun discussions on this issue. The Japan Legal Support Centre provides legal aid (advance payment) to economically disadvantage persons. This is largely irrelevant to international commercial disputes because aid may not be provided to legal entities, although it is open to legally domiciled foreign nationals in Japan.

IV  LEGAL PRACTICE
i  Conflicts of interest and Chinese walls
The Attorney Act\(^\text{13}\) sets forth the rules on conflicts of interests of attorneys. Basic Rules on Duties of Practicing Attorneys, issued by the Japan Federation of Bar Associations, also set forth the rules on conflicts of interest. Depending on the nature of conflicts of interest, an attorney may be able to take on a certain case if he or she obtains the client’s approval. A Chinese wall may, depending of the nature of the wall and the case, be regarded as one factor that the attorney belonging to a firm may use to assert that he or she can maintain impartiality.

ii  Money laundering, proceeds of crime and funds related to terrorism
The Japan Federation of Bar Associations amended the Rules Concerning Client Identity Verification and Record Preservation, Etc.\(^\text{14}\) on 8 December 2017. Under these rules, an attorney is required to confirm the identification of the client with an identification card or certificate of corporate registration if he or she is requested by the client to manage the client’s money or receives a deposit for not less than ¥2 million; or he or she is involved in certain categories of the client’s transactions such as sales of real estate or corporate M&A. Receiving a deposit for the purpose of court proceedings, such as a filing fee or remittance of the settlement payment, and management activities as a bankruptcy trustee or an executor or the testator’s will, etc., are exempted from such obligation.

\(^{13}\) Act No. 205 of 10 June 1949.
iii  Data protection

The Act on the Protection of Personal Information,\textsuperscript{15} the Act on the Protection of Personal Information Held by Administrative Organs\textsuperscript{16} and the Act on the Protection of Personal Information Held by Incorporated Administrative Agencies, etc.\textsuperscript{17} regulate the protection of personal information held by private sectors and governmental organisations.

Pursuant to the Attorney Act, an attorney may, through the bar association to which he or she belongs, make enquiries to a public or private organisation related to the case to which the attorney has been retained. The public or private organisation may, in response to this enquiry based on the Attorney Act, disclose the requested personal information without obtaining advance consent of the principal. Further, under the Family Registry Act\textsuperscript{18} and the Act for Basic Register of Residents,\textsuperscript{19} certain professionals, including attorneys, are allowed to obtain the certificate of family registration and resident record related to the case to which the attorney has been retained. Attorneys who divulge the personal information to a third party or use the obtained personal information for purposes other than grounds for obtaining such personal information could be subject to disciplinary action.

V  DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i  Privilege

The common law concept of attorney–client privilege is not recognised under Japanese law. However, attorneys have an obligation to keep secret information obtained in confidence in the course of their professional duties under the Attorney Act. Therefore, attorneys have the right to refuse to testify at court and are thus exempted from the disclosure obligation under the Code of Civil Procedure. Further, as explained in Section V.ii, documents that are created solely for the purpose of the holder’s internal use are exempted from production in a civil case. Thus, the communication between the attorney and his or her client can be kept confidential to a similar extent as in common law jurisdictions in civil cases.

ii  Production of documents

Under Japanese law, in principle, parties have a responsibility to collect evidence to prove their case. The holders of the documents have an obligation to disclose documents in certain categories under the Code of Civil Procedure, such as documents the retaining party has cited in its brief and documents that were created with regard to the legal relationship between the parties. Further, the holders of the documents have a general catch-all obligation to disclose documents that do not fall under the categories of the listed exceptions, such as:

\begin{itemize}
  \item [a] documents that are created solely for the purpose of the holder’s internal use;
  \item [b] confidential information held by professionals (such as attorneys and doctors); and
  \item [c] public officials’ documents, the disclosure of which would cause harm to the public.
\end{itemize}

\textsuperscript{15} Act No. 57 of 30 May 2003.
\textsuperscript{16} Act No. 58 of 30 May 2003.
\textsuperscript{17} Act No. 59 of 30 May 2003.
\textsuperscript{18} Act No. 224 of 22 December 1947.
\textsuperscript{19} Act No. 81 of 25 July 1967.
The court may assist the party in collecting evidence by ordering the disclosure of documents either by another party to the proceedings or a third party. However, when making a request for disclosure, in principle, the requesting party has to specify:

- **a** the indication;
- **b** the purport;
- **c** the holder;
- **d** the facts to be proven; and
- **e** the cause of the obligation of disclosure of the document.

If it would be extremely difficult to disclose the documents, the requesting party is alternatively allowed to present only ‘matters by which the holder of the document can identify the document pertaining to the petition’.

If the other party of the case fails to comply with the court’s order to produce the document, the court can make a negative inference of fact in favour of the requesting party. If the third party refuses to produce the documents ignoring the court’s order, the possible sanction under the Code of Civil Procedure is an administrative fine of no more than ¥200,000.

The court’s order to produce the document is subject to an immediate appeal to the higher court. Because the court proceeding on the merits of the case would be essentially suspended during the period of the appellate court’s review of the immediate appeal, depending on the nature of the application and likelihood of success, the court sometimes suggests that the requesting party limit the scope of the requested documents and that the other party voluntarily produces the entirety or a part of the requested documents.

### VI ALTERNATIVES TO LITIGATION

#### i Arbitration

The Arbitration Act was enacted in August 2003 and came into force in March 2004. This Arbitration Act is applicable to arbitral proceedings whose place of arbitration is in Japan. The Arbitration Act generally adopts the UNCITRAL Model Law (prior to its 2006 amendment) with some deviations.

The JCAA is most frequently used for commercial arbitrations in Japan. The JCAA accepts approximately 20 new cases per year. The Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange Inc (TOMAC) is commonly used for maritime arbitrations. TOMAC accepts approximately 10 new cases per year. There are several other arbitration institutions in Japan, including in the areas of IP and construction.

In recent years, Japanese corporations have gradually become familiar with international arbitration and the number of international arbitrations in which Japanese corporations are involved has seemingly increased.

The parties to an arbitration are not allowed to file an appeal to request a review of the arbitral award. Alternatively, the parties are entitled to file a petition for setting aside the arbitral award to the court. The grounds for setting aside an arbitral award are set forth in the Arbitration Act, which are substantially the same as those set out in the UNCITRAL Model Law.

Under the Arbitration Act, the grounds for setting aside are basically limited to the procedural defect of the arbitration proceeding, such that the arbitration agreement is not valid, that the party was not given the chance to appear before the tribunal and that the
composition of the arbitral tribunal or the arbitral proceedings were not in accordance with the provisions of the laws. In other words, a defect in the arbitral award with respect to the merits of the case does not constitute grounds for setting aside the arbitral award unless it amounts to violation of public policy in Japan. Incorrect application of substantive law or disregard of applicable law itself is not sufficient for setting aside the arbitral award. Further, the court has discretion not to set aside the arbitral award even if it had grounds for setting it aside. In this regard, the standard of the judicial review on the merits of a case is deferential to the arbitral award.

The party must file a petition for setting aside the arbitral award to the court within three months of the date of the receipt of the copy of the arbitral award. The court must hold at least one hearing before rendering its decision.

A party may file a petition for enforcement of the arbitral award to the court. A copy of the arbitral award, which must be identical to the arbitral award, and a Japanese translation of the arbitral award must be submitted in conjunction with the petition for the enforcement. The standard for review and grounds for recognition and enforcement are substantially the same as those contained in the UNCITRAL Model Law.

Japan is a signatory to the 1958 New York Convention subject to the reciprocity reservation. In addition, Japan is also a signatory to the Geneva Convention on the Execution of Foreign Arbitral Awards. Further, Japan has bilateral treaties with multiple countries. These treaties guarantee the enforcement in Japan of arbitral awards made in other treaty countries.

Following the Basic Policy on Economic and Fiscal Management and Reform 2017 approved by the Cabinet of Japan, which stipulated that the government would promote the development of total legal support and reliable judicial systems, including a foundation to stimulate international arbitration, with the cooperation of the public and private sectors, in February 2018, the Japan International Dispute Resolution Centre (JIDRC) was established. Subsequently, in May 2018, the Japan International Dispute Resolution Centre (Osaka) (JIDRC-Osaka) opened as the first set of facilities specialised for international arbitration hearings or other types of ADR in Japan.20

ii Mediation

The Japan Association of Arbitrators has established the Japan International Mediation Centre in Kyoto (JIMC-Kyoto) and commenced operations from 20 November 2018. The JIMC-Kyoto offers a dispute resolution mechanism combining mediation and arbitration by providing parties with options such as:

- filing for mediation, but if the parties fail to reach a settlement in mediation, then moving on to an arbitration proceeding (med-arb); and

- filing for arbitration, moving to a mediation proceeding, but if the parties fail to reach a settlement, then moving back to the arbitration proceeding (arb-med (-arb)), etc.

iii Other forms of alternative dispute resolution

The Act on Promotion of Use of Alternative Dispute Resolution21 was enacted in 2007 as a basic law concerning ADR. Since then, civil dispute settlement procedures that do not rely on the courts have been rapidly expanding. With respect to financial instruments,
the Financial ADR System was adopted on 1 October 2010 to facilitate disputes between customer and financial business operators. Commencement of the designated dispute resolution organisation’s procedures has the effect of a bar to the statute of limitations. If a lawsuit is filed within one month of the termination of the procedures of the Financial ADR System owing to failure of mediation, the statute of limitation shall be deemed to have been barred at the time of the filing of the petition to the Financial ADR System.

Owing to the Great East Japan Earthquake of 11 March 2011, radioactive material was emitted from Fukushima No. 1 and No. 2 nuclear power plants over a broad area. As a result, many residents were forced to evacuate or to abandon business activities. The Dispute Reconciliation Committee for Nuclear Damages Compensation, which was established based on the Act on Compensation for Nuclear Damages, formulated a guideline for settling damages disputes associated with the nuclear accident and established the Conflict Resolution Centre for Disputes over Nuclear Damages Compensation (the Centre) on 1 September 2011. As a result, victims now have three methods to pursue a claim:

a petition to the Centre;
b direct request for compensation against the Tokyo Electric Power Company (out of court); or
c file a lawsuit with the court.

Bar associations organise various forms of ADR including mediation and arbitration. There are multiple ADR centres specialised for particular areas such as the Japan Intellectual Property Arbitration Centre and Council for Construction Disputes.

VII OUTLOOK AND CONCLUSIONS

Court proceedings (and judges) in Japan are considered fair and reliable. In the past, Japanese corporations generally preferred litigation in court to arbitration. Recently, however, the importance of ADR has been considered, particularly for the resolution of international disputes, and several ADR schemes and facilities have become available in Japan. Japan is a pro-arbitration country and a recent high court decision confirmed an extremely cautious attitude towards the setting aside of arbitral awards.23

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22 Act No. 147 of 17 June 1961.
23 Decision of Tokyo High Court dated 1 August 2018, the Financial and Business Law Precedents No. 1,551, page 13.
INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

The judicial system in Korea operates under a three-tier system that primarily consists of the following:

- district courts as the courts of first instance;
- high courts as the courts of second instance; and
- the Supreme Court of Korea.

While district courts mainly handle cases involving civil and criminal law matters, there are also specialised courts such as the Patent Court for matters involving patents, family courts for family law matters, and the Administrative Court, which deals with matters involving administrative law. As the pinnacle of the judicial system, the Supreme Court has the competence to make final and binding decisions on given cases, and its interpretation of the law in effect binds the lower courts. Separate from the Supreme Court, there is also the Constitutional Court of Korea, which has jurisdiction over cases involving questions of constitutionality of statutes.

The most distinguishing characteristic of Korean law is that Korea is a civil law country that relies primarily on statutes enacted by the Korean National Assembly. Nonetheless, the courts still play an equally important role in interpreting and developing the law. Although Korea does not recognise the common law principle of stare decisis, the Supreme Court’s decisions still have very strong precedent value on lower courts, as lower courts’ decisions are most likely to be overturned in the appeal process if they stray from the Supreme Court’s interpretations.

In addition to the courts, arbitration as an alternative dispute resolution method has become increasingly important in Korea. Notably, the demand for international arbitration in Korea has been growing, reflecting the fact that countless Korean companies carry on dealings every day on an international level.

THE YEAR IN REVIEW

In 2018, Korean courts made a great effort to be more ‘international’. Namely, on 1 July 2018, the amended Court Organisation Act entered into force. In accordance with Article 62-2 of the amended Court Organisation Act, court proceedings for certain categories of cases,
such as those cases under the jurisdiction of the Patent Court, can now be conducted in a foreign language with the parties’ consent. In such cases, the usual requirement to provide an interpretation and attach a translation when a foreign language is used does not apply.

### III COURT PROCEDURE

#### i Overview of court procedure

Civil court procedures can be divided into litigation procedure; provisional attachment and provisional disposition procedure; enforcement procedure; and property specification procedure comprising statement of property, debt defaulter roster and property inquiry. The litigation procedure is prescribed by the Civil Procedure Act (CPA), and the provisional attachment and provisional disposition procedure is prescribed by the Civil Execution Act (CEA).

#### ii Procedures and time frames

A civil litigation proceeding commences when the plaintiff files a complaint to the court of first instance. Upon receipt of such written complaint, the court serves a copy of the complaint to the defendant. Private deliveries are not permitted. Once the defendant receives the copy of the complaint, he or she must submit a written defence within 30 days of the date of such receipt. Should the defendant fail to file a defence within the designated time period, the court may rule without a hearing.

In general, after the defendant has filed a written defence, the court then schedules the first hearing. During the hearing, the parties make oral pleadings regarding the aforementioned written claims, submit evidentiary documents and conduct witness examinations. The hearings are typically held once a month, and although there is no limit to the total number of hearings, there can be as few as two or as many as eight hearings. As such, it is usual for the court of first instance to take about six months to one year to complete its proceedings and render its judgment; generally, a court decision is rendered one month after the final hearing.

The unsuccessful party may file an appeal within two weeks of the date of receiving the court’s service of written judgment. In a common appellate procedure at the court of second instance (usually at the high courts), the unsuccessful party first submits a written brief with the statement of appeal, to which the counterparty submits its reply. Then the court designates a date for the hearings. Since an appellate procedure at the court of second instance is considered as a continuation of the hearing from the court of first instance, the parties are able to submit additional briefs with new arguments and introduce additional factual evidence. Similar to the proceedings at the court of first instance, the hearings at the court of second instance also usually take place once a month. Although there is no limit to the number of hearings, normally fewer hearings are involved at the court of second instance, unless a new evidence has been introduced. As such, court proceedings at the court of second instance will normally take four to six months.

The unsuccessful party may further appeal the appellate court’s judgment to the Supreme Court within two weeks of the date of receiving the appellate court’s written

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2 Article 256(1) of the CPA.
3 Article 257(1) of the CPA.
4 Article 396(1) of the CPA.
judgment. Appealing to the Supreme Court does not require any approval from the court. The Supreme Court is only able to rule on questions of law, and therefore, no hearing date is designated and all proceedings are conducted in writing.

However, if no reasonable grounds for appeal are presented, the Supreme Court may dismiss the proceedings by a decision without further examination. The Supreme Court must render its decision to dismiss within four months of the date it received the record of the case from the lower court. In such cases, the Supreme Court is not required to state any reasoning for its decision to dismiss.

After the four-month period, the Supreme Court must designate a date to render its verdict, then announce its judgment on that date. However, it is very difficult to predict how long it will take the Supreme Court to actually render its judgment, since there is a large number of ongoing cases that it must deal with. From the initial filing of an appeal until the rendering of the final judgment, it may take five to six months or as long as three to four years.

Aside from the court litigation procedure, there is also a separate provisional attachment and provisional disposition procedure. Provisional attachment is a provisional remedy whereby the debtor's right to dispose of a property in advance is temporarily seized, which means its assets to secure the execution of the creditor's monetary claims are preserved. Provisional disposition prevents the object of dispute from being disposed of, thereby securing the status quo until the execution of the judgment.

The provisional attachment or provisional disposition proceeding also commences when the plaintiff submits a written application. Generally, provisional attachment or provisional disposition cases are decided without hearings, and they normally take two to three weeks from the filing of an application to the court's ruling.

### Class actions

Class actions are not generally permissible in Korea, and there is no single statute that sets out a procedure for class actions. However, there are certain areas of law, such as securities law, that provide for class actions.

First, under the Securities-related Class Action Act, a class action may be filed in cases of claims for damages caused by false documentation of securities registration statements and business reports by investors.

Second, under the Framework Act on Consumers, when a business directly infringes on consumers' rights and interests with respect to their lives, bodies or properties, and when such infringement persists, consumer organisations that meet certain requirements may file a class action seeking prohibition and suspension of such infringement.

Lastly, under the Personal Information Protection Act, if a business that possesses and controls the personal information of its consumers rejects or does not accept the results of a collective mediation, then the consumer organisations may bring a class action to court and seek prohibition and suspension of the infringement.

### Representation in proceedings

In Korea, both persons and corporations have the capacity to stand trial. Any association or foundation, provided it is not a corporation, is allowed to file a lawsuit under its name to the extent that it is represented by its representative or administrator. A foreigner's capacity to
stand trial is also generally not limited by law. Even where the foreigner does not have such capacity pursuant to the laws of his or her home country, he or she has the capacity if it is provided under Korean law.

Meanwhile, other than the above-mentioned class actions pertaining to securities-related actions, consumer rights and personal information protection rights, representation by an attorney is not required for legal proceedings. However, in principle, only lawyers are eligible to represent others in litigation procedures.

v Service out of the jurisdiction

The CPA prescribes that ‘service to be effected in a foreign country shall be entrusted by the presiding judge to the Korean ambassador, minister or consul stationed therein or the competent government authorities of such country’. The method of ‘entrustment to the competent government authorities of such country’ shall be divided into entrusting to a foreign competent court through a diplomatic channel (the competent court method) and entrusting to a foreign central authority through a non-diplomatic channel (the central authority method). The common practice seems to be to entrust the case to the relevant foreign competent government authority.

Meanwhile, the Hague Service Convention and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, to which Korea is a signatory, follow the central authority method. Therefore, the central authority shall be entrusted where such conventions apply; otherwise, the foreign competent court shall be entrusted (Articles 3, 5(1) and 6 of the Act on International Judicial Mutual Assistance in Civil Matters).

Under the CPA, court documents can also be serviced to the place of business or an office in addition to a person’s domicile or residence (Article 26 of the CPA) and, therefore, if the place of business or office is located within the territory of Korea, no service abroad is necessary.

vi Enforcement of foreign judgments

A foreign judgment that satisfies the requirements for recognition and enforcement under Article 217 of the CPA is accorded the same effect as a final and conclusive judgment in Korea. Pursuant to Article 26(1) of the CEA, compulsory execution based on a foreign judgment may be carried out in Korea once it has been formally recognised through an enforcement judgment by a Korean court. The above-mentioned requirements for an effective foreign judgment are as follows:

a the international jurisdiction of the foreign court is recognised under the principle of international jurisdiction pursuant to the statutes or treaties of Korea;

b the defendant who lost the case must have been served with the complaint and the summons or any order in a lawful manner in advance so that he or she had sufficient time to prepare a defence;

c the recognition of the judgment must not be contrary to the public policy of Korea;

5 Article 191 of the CPA.

6 For example, a lower court ruled that, in cases where damages awarded by a foreign judgment are considered to be grossly excessive, the court may limit the recognition of the foreign judgment that
there must be a guarantee of reciprocity between South Korean and the foreign country to which the foreign court belongs.

The enforcement proceeding is initiated by application to the court by the party seeking compulsory execution based on a foreign judgment. In general, the application for an enforcement judgment shall be filed to the district court located at the counterparty’s general forum, such as a person’s domicile. The same rules that govern court proceedings for domestic judgments apply to the enforcement proceedings of foreign judgments. In principle, foreign judgments that are appropriate for recognition and enforcement are those that contain orders for defendants to perform, but declaratory judgments may also be enforced to the extent that there is legal interest to do so. The court shall not examine the merits of the foreign judgment during the enforcement proceedings.

vii Assistance to foreign courts

For the purpose of mutual assistance in civil matters, Korea is a Member State of the Hague Service Convention and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, and has entered into a number of bilateral treaties with certain countries.

Meanwhile, Article 12 of the Act on International Judicial Mutual Assistance in Civil Matters states that ‘Any judicial cooperation with respect to an entrustment by a foreign country may be given only when it conforms to the following requirements’:

a a judicial cooperation treaty is concluded with the country to which the entrusting court belongs, or there is a guarantee as provided in Article 4;

b it will not be detrimental to public peace and order, and good public morals in the Republic of Korea;

c the entrustment is made through a diplomatic channel;

d the entrustment of service is made in writing specifying the name, nationality, address or residence of the person to be served;

e the entrustment of evidence examination is made in writing specifying the party, summary of case, methods of evidence or the name, nationality, address or residence of the person to be inquired and matters to be inquired, in a case of witness inquiry;

f a translation in the Korean language is appended; and

g the country to which the entrusting court belongs guarantees the payment of expenses needed for implementing the entrusted matters.

viii Access to court files

In principle, a party or a third party that has prima facie proven its interest in a given case may, as prescribed by the Supreme Court Regulations, file a request to the court to peruse and make copies of the records.
Moreover, anyone may apply to peruse records of final and conclusive judgments for the purposes of protecting and pursuing one's rights, carrying out academic research or promoting public interest. However, even in such cases, the records of cases that the courts have ordered to be conducted in private cannot be revealed. Also, the court shall not allow perusal of the cases if the relevant interested parties do not consent to it at the time of the application.10

Notwithstanding the above, any person may peruse or duplicate a written judgment that is final and conclusive by using electronic methods. However, perusal or duplication may be restricted for those written judgments of which the courts have prohibited disclosure. In such cases, court administrative officers shall take protective measures prescribed by the Supreme Court Regulations before such perusal and duplication to ensure that personal information, such as names, stated in a written judgment is not revealed.11

ix Litigation funding
There is no specific law or regulation regarding litigation funding that allows a third party with no interest in a certain case to bear the cost of litigation and reserve the rights to parts of the damage award.

However, those who have difficulty affording legal services can apply to the courts for litigation aids or seek legal aid services from the Korea Legal Aid Corporation. With regard to litigation aid, the CPA provides that ‘a court may grant a litigation aid, either *ex officio* or upon request of a person who is unable to pay for the costs of a lawsuit’ (Article 128 of the Civil Procedure Act). The Korea Legal Aid Corporation provides legal aid to persons with low income with or without service charges (Articles 1 and 8 of the Legal Aid Act).

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls
Conflicts of interest are regulated by the Attorney-at-law Act (the Attorney Act) and the Code of Ethics prescribed by the Korean Bar Association (KBA). The key provision is Article 31(1) of the Attorney Act, which restricts the acceptance of certain legal cases. According to this provision, no attorney shall provide services with respect to a case that falls under any of the following:

\[ \begin{align*}
\text{a} & \quad \text{a case brought by the opposing party for which the attorney has already provided consultation and accepted to handle (or represent) the case;}
\text{b} & \quad \text{a different case brought by the opposing party of a case that the attorney is currently handling (or representing); or}
\text{c} & \quad \text{a case that the attorney handles or has come to handle in his or her capacity as a public official, mediator or arbitrator.}
\end{align*} \]

However, with regard to point (b), the attorney may take the case if the client the attorney is currently representing gives consent. In the application of points (a) and (b), any law office in which two or more attorneys represent or handle cases or jointly operate with a

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10 Article 162(2), (3) of the CPA.
11 Article 163-2(1), (2) of the CPA.
uniform organisation while sharing profits and expenses, even though it is not a law firm (legal person), limited liability company or partnership, shall be considered as one entity (Article 31(2) of the Attorney Act).

If one begins his or her practice as a lawyer after retiring as a judge, a prosecutor or a public official, for one year after his or her retirement, he or she shall not accept cases that are related to or being handled by a state agency, such as a court, a prosecutor’s office, the Financial Services Commission and the Fair Trade Commission, as the case may be, in which he or she has worked for one year prior and up to his or her retirement (Article 31(3) of the Attorney Act).

There is no express mention of Chinese walls in either the Attorney Act or the KBA Code of Ethics for attorneys. However, to the extent that the Attorney Act allows, there are several cases in practice in which a Chinese wall is arranged in the process of handling cases with the consent of the client.

ii Money laundering, proceeds of crime and funds related to terrorism

Although, there is no specific provision with respect to lawyers’ responsibilities in connection with money laundering and proceeds of crime, laundering of proceeds of crime in general is regulated by the Act on Regulation and Punishment of the Concealment of Criminal Proceeds. Also, under Article 24 of the Attorney Act, as a general rule in performing his or her duties, a lawyer is prohibited from concealing the truth or making false statements. Furthermore, the Code of Ethics provides that a lawyer shall not collaborate in any criminal acts or any other illegal activities committed by clients. In the event that the lawyer finds that the client’s activities amount to criminal acts or other illegal activities, he or she shall promptly suspend the collaboration (Article 11(1) of the Code of Ethics).

As for funds related to terrorism, the Act on Prohibition Against the Financing of Terrorism and Proliferation of Weapons of Mass Destruction prohibits the provision of funds for the purpose of acts of terrorism, directly or indirectly via a third person. Additionally, Article 3(3) of the Act on Real Name Financial Transactions and Confidentiality prescribes that ‘no person shall perform financial transactions under the real name of another person for the purposes of concealing illegitimate property, money laundering or financing of terrorism and evading compulsory execution, and other evasions of the law’.

iii Data protection

According to Article 17(1) of the Personal Information Protection Act, an entity that controls personal information (a personal information controller) may provide (or share) someone’s (the information owner’s) personal information to a third party under the following circumstances:

a where consent is obtained from the information owner; and
b where the personal information is provided within the scope of purposes for which it was collected pursuant to Article 15(1)2, 3, and 5.

Article 17(2) of the Personal Information Protection Act prescribes matters that need to be addressed when obtaining consent under the above-mentioned paragraph, such as the recipient of the personal information, the purpose of the information, particulars of the information to be provided, and the time period for which the recipient retains and uses such information.
According to Article 18(2) of the Personal Information Protection Act, where necessary for the investigation of a crime, indictment and prosecution, or for the court to proceed with the case, etc., a personal information controller may use personal information or transfer it to a third party for purposes other than those intended, unless it is likely to unfairly infringe on the interest of the information owner or the third party.

Meanwhile, Article 12 of the KBA Code of Ethics sets forth that ‘a lawyer must act with prudence in protection of personal information in his or her conducts’. However, no further provision is provided in detail.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

Unlike the United States, in Korea, attorney–client privilege is not expressly stated in the law. Under Korean law, no statute expressly provides for the client’s right to refuse disclosure of the communication he or she exchanged with the lawyer.

However, according to Article 26 of the Attorney Act, no lawyer or former lawyer shall disclose any confidential information that he or she has learned in the course of performing his or her duties. A lawyer may disclose such confidential information only when there is a special provision in statutes that compels or allows for the disclosure. In this respect, the CPA allows an attorney to refuse to testify as a witness (Article 315) and refuse to produce documents for which a confidentiality obligation has not been waived (Article 344(1)(3)(c)). Similarly, the Criminal Procedure Act allows the attorney to refuse to testify as a witness (Article 149) and resist seizure of articles held in his or her custody or possession as a consequence of the mandate he or she has received in the course of the work and that relates to confidential information of other persons (Article 112).

Where the admissibility of evidence is at issue with a legal memorandum, the Seoul High Court had ruled that for ‘an exchange of confidential communication between a client and an attorney while the client was seeking a legal advice, it is deemed that such a client reserves the right to refuse the disclosure thereof’. However, the Supreme Court rejected the Seoul High Court’s ruling and decided that ‘privilege cannot be accorded to the legal opinion exchanged between an attorney and a client under normal circumstances, where such a person has not yet been designated as the accused or the defendant of an official criminal procedure such as investigation, indictment or prosecution thereof’.

ii Production of documents

In comparison to common law-style discovery, Korean courts allow for somewhat limited production of documents as set out in the CPA. According to Article 343 of the CPA, when a party intends to offer any documentary evidence, he or she shall submit a document or file a request for a court order to make the person in possession of the document submit it. Once ordered by the court to submit the document, the person ordered is generally (with some exclusions) obligated to submit the document under any of the following circumstances (Article 344 of the CPA):

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12 Seoul High Court decision 2008Noh2778, 26 June 2009.
13 Supreme Court decision 2009Do6788, 17 May 2012.
when the person possesses the document that the party has referenced in the court proceedings;

b when the applicant holds a legal right to ask the holder of the document to transfer or show it to him or her; and

c if the document has been prepared for the benefit of the applicant or prepared in relation to the legal relationship between the applicant and the holder of the document.

Following a party’s document request pursuant to Article 345, the court may, if deemed necessary for such request, order the other party to submit a list of documents it possesses in relation to the party’s document request or a list of documents containing descriptions of the document it intends to submit in response to the document request (Article 346 of the CPA).

With regard to the burden of proof, the Supreme Court has ruled that ‘for the court to render an order to submit the documents, the burden of proof is on the applicant to prove that such documents exist and are in possession of the other party’.14 Furthermore, in relation to whether the court should accept or reject the applicant’s document request, the Supreme Court has decided that ‘if the court deems that the document requested is an unnecessary exhibit, then such motion for a document production order may be dismissed’. Additionally, such dismissal may be given when there is no direct connection between the claim and the fact to be substantiated by the document requested.15 A video file shall not be subject to document production orders.16

When rendering a document production order, the court may offer the counterparty an opportunity to state its opinion. Once the counterparty states its opinion on whether it possesses such document and whether such document has relevance to the case, the court shall examine the document’s existence, possession and necessity as an exhibit, and whether the counterparty is obligated to produce the document. When the court finds that there is reasonable cause to render a document production order, the court shall render such an order in the form of a judgment (Article 347(1) of the CPA).17 However, in practice, the court first advises the counterparty to provisionally furnish the document. The judgment by the court may be immediately appealed (Article 348 of the CPA).

Meanwhile, the court may order the person holding such document to furnish the document if the court deems it necessary to determine whether the document falls under Article 344 (i.e., a document that the holder is obligated to produce). In this case, the court shall not allow other persons to view the document (Article 347(4) of the CPA).

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

There are various forms of alternative dispute resolution (ADR) mechanisms in Korea such as settlement, negotiation, arbitration, mediation and conciliation. Among them, the most frequently used method is arbitration, both for domestic and international disputes. Korea is a country with heavy emphasis on trade with foreign countries, and this reality has been well

14 Supreme Court decision 2007Ma725, 14 April 2008.
15 Supreme Court Decision 2014Ma2239, 1 July 2016.
16 Supreme Court decision 2009Ma2105, 14 July 2010.
17 When rendering an order of submission to a third party, such third party or a person designated thereby must be examined (Article 347(3) of the CPA).
reflected in the constant inflow of international arbitration cases seated in Korea in recent years. To further facilitate international arbitration in Korea, the Korean Arbitration Act was amended in 2016 to adopt the key provisions of the 2006 UNCITRAL Model Law on International Commercial Arbitration (the UNCITRAL Model Law), which reflect the most up-to-date norms regarding arbitration.

ii Arbitration

The bedrock of arbitration in Korea is the Korean Arbitration Act, which was first promulgated in 1966 and went through a major change in 1999, when Korea adopted the 1985 UNCITRAL Model Law. It went through another major amendment in 2016 to reflect the 2006 UNCITRAL Model Law.

The Korean Commercial Arbitration Board (KCAB) is the major arbitral institution used by domestic and international parties in Korea. The KCAB was established as an independent arbitration institution in 1970 and, as a designated commercial arbitration institution by the Minister of Trade, Industry and Energy, it receives substantial subsidies and assistance from the government. It has separate arbitration rules for domestic and international arbitrations. The KCAB International Arbitration Rules underwent a significant change in 2016, adopting many of the most up-to-date international practices. Most notably, the rules introduced an emergency arbitration procedure and procedures for a multi-party arbitration.

In 2017, the KCAB administered 385 arbitration cases, of which 307 were domestic arbitrations and 78 were international arbitrations. Within Asia, Korean companies are some of the most active in utilising arbitration as the method of dispute resolution.

If an arbitration is seated in Korea, then a party may file an application to set aside its award in accordance with Article 36 of the Korean Arbitration Act. The grounds for setting aside is largely similar to those provided in Article 5 of the New York Convention. For an arbitration seated in a foreign country that is a signatory to the New York Convention, a party may seek to refuse enforcement of the award at the enforcement stage on the grounds provided in Article 5 of the New York Convention.

Korean courts have abundant experience in dealing with issues related to arbitration and there is a large reservoir of court precedents. For many controversial issues, Korean courts have taken a favourable view towards arbitration, respecting the parties’ intention to arbitrate. For example, with regard to the existence of a valid arbitration agreement, the Supreme Court has held that where an arbitration agreement shows clear intention for arbitration to settle disputes, the requirements for a valid arbitration agreement are fulfilled and the agreement does not need to state the place of arbitration, the governing law or the arbitral institution.¹⁸

The most notable recent development in relation to arbitration was the 2016 amendment to the Korean Arbitration Act. A few of the most significant changes were as follows. First, the scope of arbitrable disputes was broadened to cover disputes concerning economic interests as well as non-economic interests. Second, the requirements for valid arbitration agreements were mitigated by allowing the agreement to be concluded orally, by conduct or by other means other than writing. Third, the efficacy of arbitration was strengthened by adopting interim measures from the 2006 UNCITRAL Model Law and simplifying the award enforcement procedure. Instead of a court judgment, there is now

a court decision, which requires simpler procedures and is enough for enforcement of an award. Finally, the court assistance in taking evidence was improved by allowing tribunals to participate directly in the court evidence examination process.

Arbitration in Korea is becoming an important method of ADR with help from both the courts and the legislature.

iii Mediation

Common law-style mediation seems to be somewhat less common in Korea. The more common method of ADR is conciliation administered by courts pursuant to the Judicial Conciliation of Civil Disputes Act.

Conciliation may be initiated by an application or by a decision of the court. Conciliation cases are normally handled by the conciliation judge, and cases may be conciliated by the conciliation judge or a conciliation council composed of three commissioners. During a conciliation proceeding, the conciliation judge actively participates and tries to draw out an agreement between the parties. In that respect, the conciliation judge is given wide discretion to decide on how to proceed with the conciliation. A conciliation process is completed by writing the terms of agreements between the parties in the court record. The conciliation has the same effect as a settlement in court.

VII OUTLOOK AND CONCLUSIONS

In 2018, the judicial system in Korea took a big leap towards becoming more international with the amended Court Organisation Act, which allows court proceedings to be conducted in a foreign language at the Patent Court, and the planned amendment to the Korean Private International Law Act, which would introduce detailed provisions regarding international jurisdiction for greater predictability and stability.

Along with these developments, Korea has also pushed to promote ADR by enacting a new law, the Arbitration Industry Promotion Act, and establishing a new arbitral institution, the Asia-Pacific Maritime Arbitration Centre, which is dedicated to maritime arbitration cases.

With important amendments to key legislation such as the Korean Arbitration Act and the Korean Private International Law Act, it will be interesting to see the courts interpret the changes in law and develop their jurisprudence.
Chapter 21

LIECHTENSTEIN

Stefan Wenaweser, Christian Ritzberger and Laura Vogt

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

The Liechtenstein court system and procedural laws were both largely copied from the Austrian model. The Liechtenstein legal system is a civil law system. The laws relating to dispute resolution are the Civil Procedure Law (ZPO), the Jurisdiction Act (JN) and the Execution Code (EO). Non-contentious proceedings are governed by the Special Non-Contentious Civil Proceedings Act (AussStrG).1

The Liechtenstein courts are all located in Vaduz, the capital of the country. There are three levels of ordinary civil law courts:

a the Princely Court of First Instance (LG);
b the Princely Court of Appeal (OG); and
c the Princely Supreme Court (OGH).

Besides the three instances mentioned above, there is the Constitutional Court (StGH) acting as an extraordinary court of appeal. A party may have recourse to the StGH against final decisions that ultimately determine a matter for alleged violations of constitutional rights or rights granted by international conventions such as the European Convention on Human Rights. There are no specialist courts or juries adjudicating in civil or commercial law matters.

As a rule, the party that has lost the proceedings must reimburse the costs of the successful party according to the Lawyers’ Tariffs Law and bear the court’s fees. If a plaintiff is only partially successful, then the court normally adjudicates the costs of the proceedings in proportion to the success. There are, however, some exceptions and special rules.

The Lawyers’ Tariffs Law defines costs of lawyers in accordance with the value in dispute and is not based on hourly rates. Court fees are determined according to the Court Fees Act. Where the value in dispute is relatively low, a cost award may not cover all the lawyer’s fees that the client has to bear. Usually, the majority of the costs involved will be recovered by the winning party where a value in dispute of several hundred thousand Swiss francs is concerned. In certain cases, for example, supervisory court cases, the value in dispute is often relatively low (e.g., 50,000 francs) because there is no monetary claim at issue that lends itself to set the value in dispute.

Court decisions as precedents do not have the same legal quality as they have in common law countries under the stare decisis doctrine. However, they are of great factual

1 Stefan Wenaweser is a partner and Christian Ritzberger and Laura Vogt are associates at Marxer & Partner Attorneys-at-Law.
2 Liechtenstein laws are promulgated in the Legal Gazette (LGBl). All Liechtenstein laws are available at www.gesetze.li (in German only).
significance, because they provide an interpretation of the statutory framework. For the sake of legal certainty, an existing interpretation is only changed if there are new and convincing arguments justifying a decision different from the precedent.

The most important alternative dispute resolution paths are arbitration (governed by the ZPO) and mediation proceedings (governed by the Law regarding Mediation in Civil Law Matters (ZMG)).

II THE YEAR IN REVIEW

i Jurisdiction agreement in emails
The OGH decided in this case (bound by an earlier judgment of the StGH) that it is sufficient if a jurisdiction agreement can be shown by emails that are sufficiently attributable to the parties.3

ii Legal aid for legal entities
According to Section 63(2) ZPO, legal aid may only be granted to a legal entity if the legal entity’s inability of asserting its rights in court would contravene public interests. The StGH decided that the constitution requires that this condition must not be construed restrictively. Rather, this condition has to be construed in such a way that the courts have to make a balanced overall assessment taking into account different kinds of public interests (including the reputation of the Liechtenstein jurisdiction) as well as the question of whether the legal entity suffers a serious violation in its constitutionally guaranteed access to justice in the case of denial of legal aid.4

iii Wrong instruction on right of appeal
The OGH decided that an order of the court of appeal to interrupt the proceedings can generally not be appealed. The fact that the court of appeal wrongly declared the order to be appealable does not change this.5

iv Limiting the claim to the costs
The OGH decided that in cases where the claimant limits his or her claim to the costs of the proceedings, the continuous proceedings are subject to the rules of small-claim proceedings irrespective of the amount of costs asserted. Thus, appeals against orders of the court of appeal are excluded.6

III COURT PROCEDURE

i Overview of court procedure
International jurisdiction is given once the jurisdiction of the Liechtenstein courts is established.7 National jurisdiction is given either where the general jurisdiction applies or

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3 OGH 7 September 2017, 7 CG.2015.311.
4 StGH 4 December 2017, StGH 2017/044.
5 OGH 8 June 2018, 5 CG.2016.474.
7 OGH in LES 2009, 167; OGH in LES 2006, 480.
one of the ‘special jurisdictions’ is given. If a defendant is resident in Liechtenstein, general jurisdiction is established. For practical purposes, the special jurisdiction based on assets is of particular importance. This means that monetary claims may be pursued against an individual or legal entity that does not have its domicile in Liechtenstein if that party has assets within Liechtenstein; for example, in the form of a deposit with a Liechtenstein bank or a claim against a debtor resident in Liechtenstein. Besides this, the parties may also submit themselves to Liechtenstein jurisdiction by express agreement (prorogation).

Civil proceedings are initiated by filing a legal action or statement of claim with the LG. In the legal action, the plaintiff has to set out the facts on which he or she bases his or her claim and the evidence with which he or she intends to prove the asserted facts. If the court accepts that it has jurisdiction, it serves the legal action on the defendant and at the same time sets a date for the first hearing. At the first hearing, the defendant may invoke formal objections and must apply for the order of a security for costs, if the prerequisites are given. Persons who have no residence in Liechtenstein or who lose such during the legal proceedings and are plaintiffs or appellants in a Liechtenstein court are in most cases obliged, if so required, to furnish the defendant or respondent with a security for the costs of the proceedings. Likewise, legal entities that do not have sufficient property on which execution can be levied may also be required to furnish a security for the costs of the proceedings.

Natural persons who are not able to bear the costs of litigation without detriment to the necessary maintenance may apply for legal aid in civil matters with the LG. Likewise, legal persons may apply for legal aid if the means necessary to cover the costs of litigation cannot be borne by the legal person itself or the beneficial owners of the same. Legal aid is only granted if the litigation is not considered vexatious or futile (Section 63 ZPO). If legal aid is granted, the party may also be (and in general is) freed from the payment of court fees and from the provision of a security for costs (Section 64 ZPO).

In cases where the claimant is ordered by the court to deposit a security for costs, the defendant is invited by the court to submit a reply to the statement of claim, if such a security for costs is deposited in time. Thereafter, depending on the complexity of the case, the court usually sets a hearing to decide on the evidence that will be taken. The matter is then heard in one or more oral hearings where the parties may plead their case, witnesses are examined, etc. Once the judge is satisfied and finds that the factual basis of the case is duly presented and the matter ready for taking a decision, he will close the hearing and then deliver the written judgment. As a general rule, further factual pleadings and new evidence may be put forward or offered by the parties to support their pleadings until the closure of the oral hearing.

8 The LG, for example, has exclusive jurisdiction over disputes regarding immovable property located in Liechtenstein pursuant to Section 38 JN.
9 See Sections 30 et seq. JN.
10 It should be noted that free choice of forum is restricted, for example, in consumer cases and in insurance law cases.
11 Where the court concludes that its jurisdiction is not given, the action is normally dismissed ex parte.
12 Defendants not residing in Liechtenstein are normally served by way of letters rogatory to the competent court where they reside.
13 For example, the lack of jurisdiction.
14 This defence has to be raised.
15 However, the court may refuse to accept the pleadings or take further evidence if it concludes that the new pleadings or evidence have not been brought forward earlier owing to gross negligence, and if their admission would considerably extend the proceedings (Section 179 (1) ZPO).
The control of the proceedings is exercised by the judge who opens, directs and closes the oral hearing and thereby is in charge of the control of the duration of the proceedings (Section 180 ZPO). He may order the parties to submit written pleadings and sets the dates for the examination of witnesses, experts and the production of evidence. He or she is also obliged to discuss the factual and legal pleadings with the parties (Section 182a ZPO) and may not base his or her decision on any legal ground that one of the parties obviously was not aware of unless he or she discussed it with the parties (Section 182a ZPO).

**Ordinary appeals**
The Liechtenstein civil procedure distinguishes between judgments and orders.

Each judgment passed by the LG may be appealed to the OG within four weeks. In appellate proceedings, the OG gives its decision either by confirming the judgment of the LG or by setting it aside and referring the matter back to the LG, or by itself amending the contents of the judgment. According to the revised ZPO, which entered into force on 1 January 2019, the OG in general does not conduct an oral hearing on the appeal. An oral hearing only takes place by specific request by one of the parties or if the OG considers it necessary because of the specific circumstances. To specify the grounds for avoidance, new facts and evidence may be submitted as long as the claim remains identical (novation is not prohibited before the second instance court). However, the court may refuse to accept new pleadings or take further evidence if it concludes that the new pleadings or evidence have negligently not been brought forward in first-instance proceedings (Section 452(3) ZPO). Moreover, the parties may also contest procedural errors or the LG’s factual and legal findings. Procedural errors regarding the form of procedural measures, however, may only be contested if they have already been contested in first instance right after the violation happened (Section 196 ZPO).

Judgments of the OG may, in general, be appealed to the OGH within four weeks. An appeal to the OGH is, however, not possible and the judgment of the OG is final in the following cases:

- small-claims proceedings (values in dispute up to 5,000 Swiss francs; Section 471(1) ZPO in connection with Section 535(1) ZPO); and
- generally cases with values in dispute up to 50,000 Swiss francs in which the OG has confirmed the decision of the LG.

The OGH conducts a non-public hearing and is solely concerned with legal errors. Fact-finding by the lower level courts can, therefore, no longer be contested (novation is prohibited). Accordingly, the parties may only raise points of law on material or procedural issues, but new evidence or pleadings are not allowed.

Most orders by the LG, such as the order to lodge a security deposit for costs and fees or the refusal to accept jurisdiction, may be appealed to the OG within two weeks. Decisions by the OG may be appealed to the OGH in general as follows: an order overturning the decision of the LG may be appealed to the OGH within 14 days. Where an order of the OG confirms an order of the LG, no further appeal to the OGH is possible. Pursuant to the revised ZPO,

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16 An order regarding the production of documents is not enforceable by the court. But the court may of its own discretion take into consideration a party’s non-compliance with such an order in the weighing of the evidence pursuant to Section 307 (2) ZPO.

17 Some exceptions apply.
there are, however, certain exceptions from this general rule with respect to orders concerning
the sequence of the proceedings which can, in any event, only be appealed to the OG and
not to the OGH (also in cases in which the OG does not confirm the decision of the LG,
but overturns it).

An appeal against a judgment to the OG or to the OGH has suspensive effect,
which means that the appealed decision has no res judicata effect and cannot be enforced
(Section 436 ZPO). In contrast, an appeal against a court order does not, in principle, have
suspensive effect (Section 492(1) ZPO). Upon application of the appealing party, the court
may, however, grant suspensive effect to the appeal (Section 492(2) ZPO).

Extraordinary appeal to the StGH

Decisions of the OGH that are final and ultimately determine a matter (i.e., which are, for
example, not merely referring a matter back to the lower instance) and orders by the OG that
confirm an LG order may be appealed to the StGH within four weeks for alleged violation of
fundamental rights granted by the Constitution or by international conventions such as the
European Convention on Human Rights. An appeal to the StGH does not have the effect of
staying the judgment, unless such stay is specifically granted by the StGH, acting through its
president, upon request of one of the parties. The StGH can only quash the challenged order
or judgment; it cannot pass a new decision on the merits. The ordinary courts are, however,
bound to the legal considerations of the StGH and have to revise the quashed decision in
accordance with the same.

ii  Procedures and time frames

The duration of proceedings before the first instance obviously depends on the subject matter
and complexity of the case at hand. If extensive evidence has to be taken, for example, by
hearing a large number of witnesses or if the court needs to appoint an expert witness for
special questions of fact or if a witness needs to be heard abroad via letters rogatory, the
duration of the proceedings before the LG may take up to one year and in complex cases
even longer. As a general rule, a decision of the LG may be expected within one year. A final
decision that may only be obtained from the OGH can take up to three years. If a matter is
of great complexity and if decisions of the lower instances are lifted and the matter handed
down to the lower instance for a new decision proceedings may also take considerably longer.

Both prior to the opening of a lawsuit and during litigation, and even during the
execution proceedings, interim injunctions may be issued (Article 270 EO). They serve
to secure the right of the party complainant if, in the absence of a protective injunction,
there is the risk that a future execution will be prevented or made difficult; for instance, if a
claim has to be enforced outside Liechtenstein. Interim injunctions may take the form of a
protective order to secure money claims, or of an official order to secure other claims. The
applicant must furnish prima facie evidence both of his or her claim and of the risk that may

18  To avoid delays, the revised ZPO provides for the opportunity of hearing a witness in a video conference
instead of hearing the witness abroad via letters rogatory (Section 283(4) ZPO).
19  In urgent matters, Article 272 EO provides for the possibility to issue provisional security measures. The
applicant has to apply for an interim injunction at court within two days of being notified of the security
measure (Article 272(4) EO).
render future executions more difficult. Therefore, the only effect of the interim injunction is that it temporarily maintains the status quo (protective injunction). An interim injunction is normally issued ex parte within two to three days. It is up to the court to decide if the defendant shall be heard prior to the passing of the interim injunction. Under Liechtenstein law, it is not possible to obtain a free-standing injunction. This is because in all cases where an interim injunction is granted the court will set a time limit for the claimant to file a statement of claim and commence ordinary civil proceedings. If that time limit is not adhered to, the injunction will be lifted.

iii Class actions

Generally, class actions are not included in Liechtenstein procedural laws. Section 11 et seq. ZPO contain provisions regarding the joinder of parties (either as joined plaintiffs or joined defendants). Pursuant to these provisions, several persons may act as joint claimants or joint defendants if their rights are based on the same legal and factual grounds. The Liechtenstein Consumer Protection Act (KSchG) enables certain consumer protection organisations to claim on behalf of several individuals, for example, against terms and conditions of businesses that are disadvantageous to consumers (Article 41 et seq. KSchG). However, these are not class actions in the strict sense.

iv Representation in proceedings

The civil procedure law of Liechtenstein does not provide for compulsory representation: irrespective of the amount claimed or the object in dispute or the instance, every person may represent himself or herself or be represented. In practice, however, it rarely occurs that parties act without representation before the courts.

v Service out of the jurisdiction

Although Liechtenstein is not a member of the Hague Treaty on International Service, service on foreigners is regularly effected via letters rogatory to the competent court where the defendant resides. The rules regarding service out of the jurisdiction are contained in Article 13 of the Law regarding the Service of Official Documents. In the absence of any international treaties, service has to be effected in the way provided for by the laws or other legal provisions of the country in which a court document has to be served, or alternatively, as permitted by international custom, or where necessary via the diplomatic route. The LG will request the foreign court to which the letter rogatory is addressed to provide a confirmation of service. The rules of service for natural and legal persons do not differ.

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20 The court may order the provision of a security if, for example, it does not consider the prima facie evidence for the alleged claim to be sufficient (Article 283 EO). According to Article 287 EO, the applicant has to reimburse any pecuniary loss suffered by the defendant if, for example, the applicant loses the main proceedings.

21 The term ‘free-standing injunction’ refers to an injunction granted by a court pending the resolution of a dispute before a foreign court.

22 According to new case law, it is possible to obtain a free-standing injunction, if a lawsuit is pending in Austria and Switzerland and the decision rendered there could be recognised in Liechtenstein (see Section III.vi).

23 Article 284 (4) EO.
vi Enforcement of foreign judgments

The levying of execution or the performance of individual acts of execution on the basis of a foreign judgment (or other foreign enforceable instruments) is possible in Liechtenstein according to Article 52 et seq. EO only if this is provided for in treaties or if reciprocity is guaranteed to the government by treaties or government policy statements. There have not been any such statements guaranteeing reciprocity so far.

The few bilateral and multilateral treaties concluded by Liechtenstein and the enforcement of foreign judgments in the absence of an enforcement treaty are discussed below.

Bilateral treaties


Both treaties require all of the following conditions to be met in order to recognise a judgment:

- recognition of the judgment must not be contrary to public order of the state in which the judgment is asserted and a plea of res judicata must not be possible;
- the judgment must have been passed by a court with jurisdiction relating to the subject matter according to the principles set out in the treaty;
- the judgment must have entered into legal force according to the law of the state where it has been passed; and
- in case of a default judgment, the writ of summons, by which proceedings are instituted, must have been served on the party in default personally or on a proper representative.

Multilateral treaties


The Liechtenstein Parliament consented to the signing of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 on 19 May 2011. The New York Convention was then ratified and entered into force on 5 October 2011.24


24 LGBl. 2011 No. 325.
Enforcement of a foreign judgment in Liechtenstein

As mentioned above, foreign judgments may generally not be enforced in Liechtenstein. Consequently, a judgment creditor must obtain a Liechtenstein enforceable instrument against the judgment debtor, before he can successfully levy execution in Liechtenstein. A foreign judgment is sufficient to be granted what is called Rechtsöffnung, in other words, simplified proceedings to obtain a Liechtenstein enforceable instrument.\textsuperscript{25} On the account of the Rechtsöffnung, the creditor who has obtained a default summons\textsuperscript{26} or other decision within summary proceedings\textsuperscript{27} may have the debtor’s opposition or legal proposal annulled by the court, if the claim he has put forward is based on a Liechtenstein or foreign public instrument.\textsuperscript{28} The respondent in such proceedings may avoid an enforceable instrument only by bringing an action for denial.\textsuperscript{29} Once an action for denial has been brought, the merits of the case are decided upon in contentious proceedings before a court of law. In practice, this means that if the opponent does not want a foreign judgment to be validated by Rechtsöffnung, the whole case has to be re-tried on the merits before the Liechtenstein courts.

vii Assistance to foreign courts

The provisions of Section 17 et seq. JN provide assistance to foreign courts. Pursuant to Section 27 JN the LG has to grant legal assistance unless the requested act does not fall within the competence of the LG or if an act is requested that is prohibited by Liechtenstein law or if reciprocity is not given. Where the LG doubts the existence of reciprocity, it has to obtain a binding declaration from the OG in this respect.\textsuperscript{30}

The most common cases of legal assistance for a foreign court in civil proceedings are the service of documents and the examination of witnesses. The court has to provide legal assistance in accordance with the Liechtenstein procedural laws pursuant to Section 28(1) JN.

viii Access to court files

As a rule, court hearings in civil cases are open to the public. However, in specific cases, where the public interest or the protected interests of a person are directly affected, the public may be excluded. Written submissions in civil proceedings are not made available to the public. Therefore, non-parties are not granted access to the court file, unless the parties of the lawsuit agree to grant information to the third party or such third party can prove some legal interest (for example, if the information is required for a lawsuit) and is granted access through a court decision. Judgments may be requested by anyone, but are only made available in anonymised form.

ix Litigation funding

There are no rules in Liechtenstein regarding litigation funding by disinterested third parties. It is in principle up to the litigating parties how they fund their litigation.\textsuperscript{31} Parties may

\textsuperscript{25} Articles 49–53 Liechtenstein Code of Securing Legal Rights (RSO).
\textsuperscript{26} Zahlbefehl according to Section 577 et seq. ZPO.
\textsuperscript{27} Rechtsbot according to Section 592a et seq. ZPO.
\textsuperscript{28} Article 49 (1) RSO.
\textsuperscript{29} Aberkennungsklage according to Article 53 RSO.
\textsuperscript{30} Section 27(2)(3) JN.
\textsuperscript{31} A limitation exists only as regards lawyers in Article 23(3) RAG, which provides that \textit{quota litis} agreements or the assignment or pledging of the disputed claim or object are not permitted.
therefore use third-party funding to pay the legal costs in order to reduce their risks. Litigation funding usually occurs in large arbitration and litigation disputes or when a number of people suffer losses with a common cause (so that in aggregate, those losses are significant).

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

The duty to avoid any conflict of interest is one of the crucial duties of a lawyer and is stipulated in Article 17 of the Law regarding Lawyers (RAG). Where a lawyer has represented the opposing party in the same matter or in a matter connected thereto, he must not accept the mandate. Likewise, a lawyer may not advise both parties in the same case. These duties are specified in the Professional Conduct Guidelines. Section 18 of the Professional Conduct Guidelines provides that a lawyer must not advise, represent or defend more than one client in the same matter if a conflict of interest or the immediate danger of a conflict of the interest of these clients exists. If such a conflict arises or if there is a danger of a violation of the duty of secrecy or if the lawyer’s independence is at risk, the lawyer has to lay down his mandate with regard to all clients. Pursuant to Section 19 of the Professional Conduct Guidelines, a lawyer must not accept a mandate if the danger of a violation of his duty of secrecy in respect of information entrusted by a former client or the knowledge of the affairs of a former client could present a disadvantage to the former client or an unjustified advantage for the new client. The same obligation to avoid conflicts of interest applies to different lawyers of the same law firm, who are, for this purpose, regarded as one and the same lawyer.32 The duty of a lawyer to exercise his profession independently is of utmost importance as the client needs to be sure that he is being advised independently and in a manner free from conflicts of interest.33 With a view to this duty and the rules relating to the avoidance of conflicts of interest, Chinese walls are not permissible in Liechtenstein.

ii Money laundering, proceeds of crime and funds related to terrorism

To the extent that lawyers provide tax advice to their clients or assist in the planning or execution of transactions for their clients concerning:

a) the buying and selling of undertakings or real estate;

b) the managing of client money, securities or other assets;

c) the opening or managing accounts, custody accounts or safe deposit boxes;

d) the organisation of contributions necessary for the creation, operation or management of legal entities; or

e) the establishment of a legal entity on the account of a third party or acting as a partner of a partnership or a governing body or general manager of a legal entity on the account of a third party or carrying out a comparable function on the account of a third party;

lawyers are subject to the Due Diligence Act (SPG) and are obliged to:

• identify and verify the identity of their contractual partner;

• identify and verify the identity of the beneficial owner;

• establish a profile of the business relationship; and

• carry out adequate monitoring of the business relationship for risk.

32 Section 19 (2) Professional Conduct Guidelines (Standesrichtlinien).
33 Article 11 RAG and Section 4 Standesrichtlinien.
In conducting due diligence, lawyers must immediately report in writing to the Liechtenstein Financial Intelligence Unit (FIU) where there is suspicion of money laundering, a predicate offence of money laundering, organised crime or terrorist financing. They must not execute any transaction unless refraining in such a manner is impossible or would frustrate efforts to pursue a person suspected of being involved in money laundering, predicate offences of money laundering, organised crime or terrorist financing. The representation of a client in litigation or arbitration matters is not subject to the SPG.

iii Data protection

By a decision of 6 July 2018, the European Economic Area (EEA) Joint Committee announced the incorporation of the General Data Protection Regulation (Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC; GDPR) into the EEA Agreement, making the GDPR directly applicable to Liechtenstein as of 20 July 2018. Besides this, the data protection law (DSG) applies, which has been completely revised. The new DSG entered into force on 1 January 2019.

In short, personal data obtained through any professional activity has to be kept secret without prejudice to other legal secrecy obligations, unless there is a legally permissible reason for the transmission of the entrusted data. It follows from this that the strict secrecy obligations stipulated by the RAG provide complete protection of personal data provided by the client to the lawyer. Therefore, a lawyer can neither grant access to data that may contain personal data of a client to any third party, nor can he or she share such data with other law firms.

The violation of the strict professional secrecy obligations that cover all aspects of the lawyer’s relationship with his client provided in the RAG is punishable pursuant to Section 121 of the Criminal Code and represents a disciplinary offence.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

The legal privilege of lawyers is stipulated in Article 15 RAG. The lawyer is obliged to keep confidential all affairs entrusted to him, and all other facts that have become known to him or her in his or her professional capacity and that have to be kept secret in the interest of his or her client. The law provides that the lawyer has a right to this professional secrecy privilege in all court and other official proceedings in accordance with the applicable procedural laws. The procedural laws contain provisions allowing the lawyer to preserve secrecy. In particular, Section 321(1)(4) ZPO provides that the lawyer is entitled to refuse to testify as a witness regarding information entrusted to him or her by his or her client. This privilege must not be circumvented by other means; for example, the examination of employees of the lawyer (Article 15(2) RAG).

The legal privilege extends, in particular, to correspondence between the lawyer and the client, irrespective of where and in whose possession this correspondence covered by the professional secrecy protection is (Article 15(3) RAG).
In-house lawyers are not protected because they are not lawyers in the sense of the RAG. A lawyer who is admitted to a foreign Bar may invoke professional secrecy obligations in the same way as a Liechtenstein lawyer, and therefore the same level of legal privilege applies to such lawyers.

In a regulatory context, the lawyer has to provide information only to the Financial Market Authority and FIU and just in case the lawyer carries on activities that are subject to the SPG. The information the lawyer has to provide is limited to information and documents that the regulatory authorities require to fulfil their tasks (Article 15(4) RAG). Since the representation of a client in a dispute resolution matter or, more specifically, in court proceedings is not an activity subject to the SPG, this provision is not of great significance in dispute resolution practice.34

ii Production of documents
There is no disclosure process or pretrial discovery in Liechtenstein. And yet, in specific and narrowly defined circumstances, the taking of evidence as a form of precautionary measure prior to trial is possible. While third parties or authorities must produce relevant documents in their possession, unless they have a right to refuse to testify under Liechtenstein law, there is no effective means of asking the court to order disclosure of documents from a party for use in the proceedings.35

That is because according to Section 307(2) ZPO, even in relation to documents the production of which has been ordered by the court, a defendant cannot be forced effectively to produce such documents. If he or she refuses to present the documents, the court, in its discretion, may only take this into consideration in the weighing of evidence. The difficulty a plaintiff faces in this respect is that he or she often does not know what documents that might assist his or her case are in the hands of the defendant.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation
While arbitration is seen as the main alternative dispute resolution mechanism to ordinary state court litigation, mediation proceedings have less practical importance.

ii Arbitration
Liechtenstein passed new legislation regarding arbitration proceedings with effect from 1 November 2010.36 The new arbitration legislation generally follows the Austrian model, which again is based on the Model Law on International Arbitration (UNCITRAL Model Law). However, Liechtenstein arbitration law departs in certain aspects from its model to make it more attractive and effective.

The new arbitration law practically37 permits the submission of all types of disputes in relation to trusts, foundations or companies to arbitration, including, in particular:

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34 See Section IV ii.
35 Section 304 ZPO.
36 Sections 594–635 ZPO; LGbl. 2010/182.
37 Exceptions are matters falling within the public supervision of foundations (Government Report No. 53/2010, p. 13) and, in general, proceedings that are initiated ex officio or by a public authority (i.e.,
a the removal of trustees (or foundation council members);
b the challenging of resolutions of trustees (or the foundation council); and
c the appointment of extraordinary auditors.

The advantages of arbitration are the following:

a the composition of the arbitration tribunal and the appointment of its members may be freely determined;[38]
b the seat of the arbitration tribunal and the language of the arbitration proceedings may be freely determined;[39]
c speedy proceedings, as there is only one instance and the arbitral award may only be challenged before the OG on very limited formal grounds;[40]
d arbitration proceedings are confidential; and
e special provisions have been enacted to provide for extra confidentiality of the proceedings before the OG in case the arbitral award is challenged.[41]

iii Mediation

The rules governing mediation in Liechtenstein are contained in the ZMG. The commencement and proper continuation of mediation suspends the statute of limitations in relation to the rights and claims subject to mediation (Article 18(1) ZMG). The suspension of the statute of limitations is effective if one of the parties files a legal action with the LG within 14 days from the termination of the mediation (Article 18(3) ZMG). A settlement reached in the mediation is not binding on the parties and cannot be enforced. Mediation is available for all types of civil law matters. Mediation procedures are of minor importance in Liechtenstein, since Liechtenstein lawyers usually attempt to bilaterally settle a case (without the involvement of a mediator), before formal proceedings are initiated.

iv Other forms of alternative dispute resolution

Another form of alternative dispute resolution available in Liechtenstein is the Conciliation Board, with one mediator. It has been created to deal with conflicts between clients and various financial service providers such as asset management companies, banks, professional trustees and others. The Conciliation Board is regulated in the Ordinance Regarding the Extrajudicial Conciliation Board in the Financial Services Sector (FSV). It is up to the parties to refuse the conciliation proceedings or to abandon them at any time (Article 13 FSV). The conciliation proceedings come to an end if the motion is repealed, the parties reach an agreement, the Conciliation Board makes a proposal for a settlement, the rejection of the motion is obviously abusive or if a court or arbitration tribunal is seized of the matter.

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[38] Sections 603 and 603 ZPO.
[39] Sections 612 and 613 ZPO. This allows the appointment of, for example, English trust law experts as arbitrators or the use of English language documents.
[40] Section 628 ZPO. Theoretically, the decision of the OG may be challenged with the extraordinary remedy of an appeal to the StGH for alleged violation of constitutional rights.
[41] Section 633 (2), (3) and (4) ZPO. This was necessary as the proceedings before the OG are generally public. In this respect, it should be noted that, for example, supervisory court matters are generally heard in private to protect the privacy of the involved parties.
If no agreement is reached between the parties, they have to be referred to ordinary legal proceedings (Article 19(2) FSV). In practice, such conciliation proceedings do not play an important role. This is, among other reasons, probably due to the fact that parties may practically decide to abandon the proceedings at any time.

Furthermore, Liechtenstein implemented the EU Directive on Consumer ADR (Directive 2013/11/EU) in the law regarding Alternative Dispute Resolution in Consumer Matters (AStG). According to that, participation in such proceedings is voluntary. However, companies domiciled in Liechtenstein are obliged to inform consumers about the opportunity of ADR proceedings if they cannot reach an agreement in case of a dispute.

VII OUTLOOK AND CONCLUSIONS

On 1 January 2019, the revised ZPO aiming to facilitate and accelerate proceedings entered into force. Principally (with quite a lot of exceptions), the new rules also apply to proceedings already pending at the time of the entry into force. The following are the key points of the reform:

- limiting the appealability of orders and judgments of the OG to the OGH (see Section III.i);
- tightening the conditions for new pleadings and evidence in the course of the proceedings (see Section III.i, and in particular footnote 11); and
- changes with regard to the taking of evidence (e.g., making use of new technologies, lifting the subsidiarity of the hearing of the parties).

Time will tell whether the new rules in their entirety will really facilitate and accelerate the proceedings.

Generally, no substantive changes in the legislation governing dispute resolution in Liechtenstein are envisaged in the near future. Because of the liberal legislation relating to companies, foundations and trusts, cases involving foundations and trusts play an important role, in general, as do commercial and company law cases in Liechtenstein. The new and attractive arbitration law in combination with the New York Convention on the Recognition and Enforcement of Arbitral Awards makes Liechtenstein an attractive place for arbitration.
I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

i Structure of the law

Luxembourg’s legal system is based on the civil law tradition. The sources of law are international treaties, European Union law, the Constitution, national statutes and regulations, and general principles of law.

Case law

National case law

Theoretically, precedent does not bind judges; each decision must be confined to the particular case. In practice, however, earlier court decisions in comparable cases will be seriously considered. This is particularly the case where a statute is unclear or lacunar, which gives judges the opportunity to make law through interpretation.

European case law

The case law of the Court of Justice of the European Union affects the case law of Member States. Luxembourg is a Member State and, by virtue of Article 267 of the Treaty on the Functioning of the European Union, Luxembourg courts may request a preliminary ruling from the Court of Justice of the European Union in cases where the interpretation of EU treaties, or the validity and interpretation of acts of EU institutions, bodies, offices or agencies is raised.

ii Structure of the courts

Civil law proceedings in Luxembourg are conducted, at the first level, in the district courts (there are two district courts, one in Luxembourg-Ville and the other in Diekirch), which have jurisdiction in all civil and commercial matters for which the law does not confer jurisdiction on a specific specialised court.

Examples of such courts are:

a magistrates’ courts (there are three of them, one in Luxembourg-Ville, one in Diekirch, and one in Esch-sur-Alzette) hear claims under €10,000, and cases concerning employment and lease contracts; and

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1 Michel Molitor is the managing partner at Molitor Avocats à la Cour.
the Insurance Arbitration Council hears all disputes relating to the national insurance system (problems of affiliation, qualification to receive pensions, contributions, administrative fines, etc.).

There are no dedicated courts for commercial matters; specialised divisions of the district courts deal with these.

Appeals are generally brought before the Court of Appeal. By way of exception, appeals against decisions rendered by magistrates’ courts are heard before the district courts, except for cases related to employment that remain within the scope of the Court of Appeal.

After appeal, if a party still wishes to challenge a legal point, other than on the facts, the case can be brought before the Court of Cassation in the last instance.

### iii  Structure of alternative dispute resolution procedures

Alternative dispute resolution such as arbitration and mediation have been generating interest in Luxembourg for some years. In particular the Centre for Civil and Commercial Mediation has been very active in promoting mediation in Luxembourg. Specific legislation concerning civil and commercial mediation was introduced in Luxembourg in February 2012.

The Luxembourg New Civil Procedure Code (NCPC) provides for rules on arbitration. Luxembourg has also ratified international agreements regarding arbitration, and in particular the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention 1958).

### II  THE YEAR IN REVIEW

The past year has seen some interesting legislative developments.

On 17 February 2017, the European Regulation No. 655/2016 of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters (the EAPO Regulation) has entered into effect. The EAPO Regulation provides for a procedure for creditors to obtain a European Account Preservation Order (EAPO) to secure payment of pecuniary claims in civil and commercial matters in cross-border cases. The Luxembourg legislator has implemented the EAPO Regulation by the Law of 17 May 2017. However, the EAPO Regulation does not regulate the interim phase of the above attachment procedure and refers to the national law of each EU Member State for the executory phase, namely, recovery of the debt after having obtained an EAPO. While some EU Member States make a distinction between the interim phase and the executory phase, Luxembourg Procedural law closely links the two phases and makes them indivisible. Accordingly, the procedural scheme provided by the EAPO Regulation was not transposable as such under Luxembourg law. The Luxembourg legislator, by an act as of 18 July 2018, has therefore introduced a new Title VII bis into the NCPC, which provides for the legal framework for the debt recovery procedure during the executory phase. Under this new title, the attaching creditor serves a deed of conversion on the garnishee including information on the obtained EAPO, the enforceable title on the underlying claim, the calculation of the amount payable and a request for payment. A copy of this deed must

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2  www.cmcc.lu/node/1.
also be served on the attached debtor who can challenge it before the courts within 15 days. If the deed is not challenged, the bailiff establishes a certificate that allows the garnishee to pay the amount owed to the creditor.

In another vein, with the aim of improving and simplifying the procedural rules in civil and commercial matters, Bill No. 7307 has been submitted to the Luxembourg Chamber of Deputies.

This Bill provides for two adjustments to the courts’ jurisdiction. Currently, magistrates’ courts hear claims, with some exceptions, in all civil and commercial matters under €10,000. The Bill intends to raise magistrates’ courts’ competence rate to €20,000 in order to relieve court congestion in the district courts. The Bill also amends Article L. 131-18 of the Luxembourg Labour Code. Disputes relating to a labour supply contract are currently exclusively handled within the jurisdiction of the district court sitting in commercial matters. The Bill proposes to attribute these disputes either to the magistrates’ courts, or to the district courts depending on the value of the litigation.

The Bill also amends and modernises the pretrial procedure by framing the means of defence that may be raised by the parties and by creating a simplified pretrial procedure. The aim is to reduce delays and to optimise the procedure’s efficiency.

Means of defence on the admissibility of the action or the jurisdiction of the court are sometimes raised at a late stage, which inevitably delays the outcome of the proceedings in these cases. The Bill thus obliges the parties to raise these pleas in law immediately before the pretrial judge or, if not, as soon as they are revealed. The Bill also restricts the parties’ positions on these pleas in law to only one per party in order to allow the pretrial judge to take a swift decision on the admissibility of the action. Furthermore, if these pleas in law have been revealed during the pretrial proceedings and none of the parties has raised them, the parties will no longer be entitled to raise them at a later stage.

The Bill establishes a simplified pretrial procedure, in parallel with the current ‘standard’ pretrial procedure, which should enable a quick evaluation of the simplest cases and avoid delaying practices. The simplified pretrial procedure will automatically apply to cases where the value of the litigation is less than or equal to €50,000 and that oppose only one plaintiff to a single defendant; or will apply upon a reasoned request by one of the parties accepted by the president of the relevant chamber. In this case, the president of the chamber will issue an order to decide whether or not to admit the case to the simplified pretrial procedure. The order will set the time limits for the parties to notify their submissions and communicate their documents, under pain of foreclosure.

Another important change is that this Bill, if passed, would introduce a simplified management case conference for the most straightforward cases under which all the deadlines for submitting evidence, documents and submissions will be mandatory. Along the same lines, the practice of the summary briefs would be introduced by the Bill. The summary briefs, which must be submitted at the end of the proceedings and before the ruling, must contain all the claims and arguments raised by a party for the purpose of effective analysis of the case by the judge.

As a consequence of these changes, the role of the judge rapporteur in the written proceedings should disappear. Currently, the purpose of the judge rapporteur is, at the pleading hearing, to read his or her report summarising the claims and arguments of each party to the dispute.
Finally, it is expected that appeals against decisions issued by the magistrate courts will be heard by the district courts through oral proceedings, which is not necessarily the case today.

III COURT PROCEDURE

i Overview of court procedure

The main rules governing court procedure are laid down by the NCPC. First instance civil proceedings and proceedings before the Court of Appeal differ from first instance commercial proceedings and proceedings before magistrates.

ii Procedures and time frames

The main stages in court proceedings are as follows.

Before the district court (in civil matters) and the Court of Appeal:

- a issue of a writ served on the defendant by a bailiff;
- b exchange of written statements between lawyers and disclosure of documents, exchange of witness and expert evidence in some cases;
- c closing of the investigation;
- d trial; and
- e handing down of the judgment.

Before the district court (in commercial matters) and magistrates:

- a issue of a summons to the defendant by a bailiff or by the clerk of the court, depending on the type of case;
- b court hearing of the parties or of their representatives; and
- c handing down of the judgment.

As a principle, judges strive to provide strict guidance on the time frames for the exchange of written statements, documents and expert evidence. This is done by issuing written notices or by calling parties before case management hearings where the progress of the case is assessed.

It is difficult to estimate the average duration of civil proceedings as it varies depending on the number of parties involved, the complexity of the matter and whether it is pending in front of first instance courts or on appeal.

iii Class actions

Class actions are not allowed under Luxembourg law.

However, professional groups or associations representing a particular interest are entitled to take legal action before the courts for collective damage. The admissibility of claims brought by these groups and associations will be subject to evidence that the legal action is motivated by a specific corporate interest and benefits all the members of the group. But if the claimed interest corresponds to the general interest, the legal action is in principle declared inadmissible.
iv  Representation in proceedings

Representation by a lawyer who is a member of the Luxembourg Bar is compulsory before the district court (with some exceptions, such as in commercial proceedings) and before the Court of Appeal, whereas parties can appear before the magistrates either in person or through a representative, who might be a lawyer, spouse, parent, etc.

v  Service out of the jurisdiction

The following rules apply to service out of the jurisdiction regardless of whether the recipient is an individual or a corporate entity.

If a document (a writ of summons or a judgment) related to a civil or commercial matter needs to be served in another EU Member State, the applicable rules are those in EU Regulation No. 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Service of Documents), and repealing Council Regulation (EC) No. 1348/2000.

This Regulation provides for different ways of transmitting and serving documents: transmission through transmitting and receiving agencies, transmission by consular or diplomatic channels, service by postal services and direct service. Transmitting agencies, determined by each Member State (the bailiff and the court clerk in Luxembourg), effect the transmission of judicial or extrajudicial documents to be served in another Member State. Receiving agencies, determined by each Member State (the bailiff in Luxembourg), are competent to receive judicial or extrajudicial documents from another Member State.

Luxembourg is also party to the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. This Convention provides that each party must designate a central authority (the Public Prosecutor of the Superior Court of Justice in Luxembourg) responsible for receiving requests for service arising from a foreign authority or judicial officer (with respect to civil or commercial matters) and dealing with them, as well as supplying information to the transmitting agencies and seeking solutions to any difficulties that may arise during transmission of documents for service.

In the absence of any applicable international provision (EU regulation, international treaty or bilateral convention), the NCPC applies to service abroad. The bailiff sends a copy of the judicial document to the domicile of the recipient by registered letter with acknowledgment of receipt unless the foreign state does not accept this kind of service, in which case the bailiff will require the Ministry of Foreign Affairs to serve it by diplomatic means.

vi  Enforcement of foreign judgments

The enforcement in Luxembourg of foreign judgments rendered in a country outside the EU is possible once such judgments are given an enforcement title by the Luxembourg District Court.

As for judgments originating in an EU Member State, Council Regulation (EU) No. 1215/2012 of the European Parliament and the Council of 12 December 2012 on the Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters, which came into force on 10 January 2015 and replaces Regulation No. 44/2001, provides for
the direct enforcement of judgments throughout the EU by means of a simplified procedure whereby the district court will only check if the required set of documents is complete, without any review of the merits of the case.

vii Assistance to foreign courts

Assistance in the taking of evidence

Council Regulation (EC) No. 1206/2001 of 28 May 2001 is designed to improve, simplify and accelerate cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

Under this regulation, any EU court (other than in Denmark) may request the competent court of another Member State to take evidence, or to be allowed to take evidence directly itself. The execution of such a request may be refused if:

a the request does not fall within the scope of Regulation No. 1206/2001 (if, for instance, it concerns criminal and not civil or commercial proceedings);

b the execution of the request does not fall within the functions of the judiciary;

c the request is incomplete;

d a person of whom a hearing has been requested invokes a right to refuse, or a prohibition, from giving evidence; or

e a deposit or advance relating to the costs of consulting an expert has not been made.

Luxembourg is furthermore party to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. Under this convention, a judicial authority from another contracting state may, in civil or commercial matters, ask the Public Prosecutor of the Luxembourg Superior Court of Justice to obtain evidence.

Assistance in relation to foreign law

Luxembourg is party to the European Convention on Information on Foreign Law of 7 June 1968. This convention obliges the parties to undertake to supply information concerning their law and procedure in civil and commercial fields as well as on their judicial system.

Each contracting state must set up or appoint two bodies: a ‘receiving agency’, to receive requests for information from another contracting state and to take action on its request (the Ministry of Justice in Luxembourg), and a ‘transmitting agency’, to receive requests for information from its judicial authorities and to transmit them to the competent foreign receiving agency (again, the Ministry of Justice in Luxembourg).

The requested state may not refuse to take action on the request for information unless its interests are affected by the case that gave rise to the request or if it considers that the reply might prejudice its sovereignty or security.

viii Access to court files

Court hearings are public, meaning that everybody may attend and listen to the trial.

However, third parties are not supposed to have access to the documents on file (i.e., submissions, pleadings and supporting documents).
Judgments dealing with interesting legal issues or particular matters are published in legal journals. Furthermore, in specific areas (for instance, a judgment declaring a company bankrupt), the judgment is published in a local newspaper and made available to the Trade and Companies Register.

**ix Litigation funding**

It is possible for a third party to finance litigation proceedings in which it is not involved. Depending on the circumstances, this funding could be regarded as a loan or a donation.

When the litigation involves a corporate entity that is part of a group of companies, in practice the entity’s fees will be funded by the mother company or by the beneficial owner.

**IV LEGAL PRACTICE**

**i Conflicts of interest and Chinese walls**

The law governing the profession of attorney expressly forbids an attorney from assisting or representing parties with conflicting interests.

In addition, the Luxembourg Bar guidelines on conflicts of interest recommend the following:

- refusing multiple mandates if there is a real risk of conflict at a later stage;
- if an attorney has advised several parties at a preliminary stage, he or she should refuse to represent one of them in litigation cases; and
- refusing cases against parties who are regular clients of the attorney.

Rules governing conflicts of interest apply to all attorneys working in the same law firm.

Although not regulated by law and professional regulations, Chinese walls are in practice set up subject to the interested clients’ prior approval.

**ii Money laundering, proceeds of crime and funds related to terrorism**

The Luxembourg Law of 12 November 2004 as amended on the Fight Against Money Laundering and Terrorist Financing provides for specific obligations, particularly for lawyers assisting their clients in the context of:

- transactions in respect of buying or selling of real estate or business entities;
- management of money, securities or other assets;
- opening or management of a bank or securities account;
- organisation of contributions necessary for the creation, operation or management of companies; or
- creation, domiciliation, operation or management of trusts, companies or similar structures.

These obligations are:

- the establishment of adequate and appropriate internal proceedings;
- the identification of the client and the beneficial owner and of the purpose of the business relationship as well as the origin of the funds; and
- cooperation with the Luxembourg authorities in charge of the fight against money laundering and financing of terrorism (mainly, the Bar and the Public Prosecutor), including reporting suspicions. The attorney’s professional duty of confidentiality does not apply in this respect.
iii Data protection
Any operation or set of operations whereby personal data is, for example, collected, recorded, organised, stored, retrieved, consulted, used or disclosed by transmission, dissemination or otherwise made available, including operations performed by lawyers in the normal course of business, is considered as processing of personal data and therefore falls within the scope of the Data Protection Regulation.

Applicable regulations
The General Data Protection Regulation (GDPR) took direct effect in Luxembourg on 25 May 2018. However, as it allows EU Member States latitude in specific areas, Luxembourg passed a new law on 1 August 2018 that repealed the former Luxembourg law on data protection of 2 August 2002: the 1 August 2018 Act concerning the organisation of the Luxembourg Data Protection Authority and the General Data Protection Regulation (the Data Protection Act), which took effect on 20 August 2018.

Luxembourg also enacted an Act, again on 1 August 2018, on the protection of individuals with regard to the processing of personal data in criminal and national security matters, which is a transposition into national law of Directive (EU) 2016/680 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

Finally, the Law of 30 May 2005 concerning specific provisions for protection of the individual in respect of the processing of personal data in the electronic communications sector, as amended, is still applicable and targets in particular the use of cookies.

Territorial scope of application
The territorial scope of the GDPR is determined by Article 3 thereof. It applies to the processing of personal data by controllers and processors in the EU, regardless of whether or not the processing takes place in the EU. The GDPR also applies to the processing of personal data of data subjects in the EU by a controller or processor not established in the EU, where the activities relate to: offering goods or services to EU citizens and the monitoring of behaviour that takes place within the EU. Non-EU businesses processing the data of EU citizens also have to appoint a representative in the EU.

The Data Protection Act
The Data Protection Act applies to all data processing that does not fall under the scope of the GDPR as well as the Data Protection Act in criminal and national security matters, and is subject to the Data Protection Act (provisions of Chapter I, Article 4, Chapters II–VI, VIII, IX and Chapter VII Section 1 of the GDPR). It does not apply to data processing made by individuals for personal or domestic purposes. It applies restrictively; in other words, provisions of Title II only apply to data controllers and data processors established in the Luxembourg territory.

3 Currently under discussion: European Data Protection Board Guidelines 3/2018 on the territorial scope of the GDPR.
Law firms are mainly construed as data controllers and are therefore required to comply with the GDPR and subsequent national data protection regulations. In this respect, the data processing of information, which is defined as ‘any information of any type regardless of the type of medium, including sound and image, relating to an identified or identifiable natural person’ (data subject), must comply with the provisions set out under the Data Protection Regulation.

The collection of personal data must be performed in a fair and lawful manner, in particular for specified, explicit and legitimate purposes, and not further processed in a way that is incompatible with those purposes.4

For a law firm, personal data may be processed in particular if:

a. it is necessary for compliance with a legal obligation to which the controller is subject;
b. it is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;
c. it is in its legitimate interests, or those of a third party recipient of the data subject’s personal data, in a way that can be reasonably expected as part of running the law firm, which is not detrimental to the data subject and that will have a minimum impact on its privacy; or
d. if the data subject has provided a clear, express and explicit consent.

It is standard practice, prior to establishing a client relationship, to inform the client about the processing of their personal data (i.e., categories of data, purposes of processing, retention period, transfer and access by third parties) and their rights regarding the processing of their data via the firm’s privacy policy.5

As a rule, the transfer of personal data is not restricted within the EU, provided that data subjects are duly informed of such transfer. Because the GDPR is effective, as a general rule, the transfer of personal data to a country outside the European Economic Area (EEA) may only take place if that country (where the recipient is located) ensures an adequate level of data protection. The EU Commission has the power to recognise a third country as providing an adequate level of protection where personal data can be transferred without any further protective measures or authorisation.

Where the recipient is located in a country that does not ensure an adequate level of protection, there are three different levels of situations when such a transfer can still be made, provided:

a. the controller or processor provides appropriate safeguards; and
b. enforceable data subject rights and effective legal remedies for data subjects are available.

**Level 1: Transfer of personal data to third countries that do not ensure an adequate level of protection**

A transfer will be lawful, without requiring any specific authorisation from a supervisory authority, if it is made by using:

a. binding corporate rules (i.e., internal rules adopted by a group of undertakings that define its global policy with regard to the international transfer of personal data within the same corporate group to entities in countries that do not provide an adequate level of protection and and are not previously approved by a national authority);
standard contractual clauses adopted by the EU Commission (i.e., the transfer of personal data to a third country that does not provide an adequate level of protection is also allowed if standard contractual clauses adopted by the EU Commission or by a supervisory authority (and approved by the Commission) are used);

approved codes of conduct; and

approved certification mechanisms.

**Level 2: Derogations for specific situations**

The GDPR contains various derogations from the prohibition to transfer personal data outside the EEA without adequate protection.

The derogations apply when:

- the data subject has explicitly consented to the proposed transfer, after having been informed of the possible risks of such transfers for the data subject owing to the absence of an adequacy decision and appropriate safeguards. It is insufficient simply to mention that data will be transferred to a third country;

- the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of pre-contractual measures taken at the data subject’s request; or

- the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and a third party.

**Level 3**

If the transfer cannot be based on safeguard measures described under Level 1 or Level 2, the transfer may take place if:

- it is not repetitive;

- it concerns only a limited number of data subjects;

- it is necessary for the purposes of compelling, legitimate interests pursued by the controller that are not overridden by the interests and freedoms of the data subjects;

- the controller has assessed all circumstances and has provided suitable safeguards; and

- the controller informs the supervisory authority of the transfer.

Additional rules on confidentiality may also apply. For example, the Code of Conduct of the Council of Bars and Law Societies of Europe requires that lawyers pay particular attention to their communications with lawyers in another Member State to ensure the confidentiality of the data they intend to transfer.6

**V  DOCUMENTS AND THE PROTECTION OF PRIVILEGE**

**Privilege**

Unlike in-house lawyers, attorneys and law firms are subject to rules of privilege provided for by Luxembourg law relating to the profession of attorney. As a matter of principle, communications between attorneys and their clients are confidential.

Communications between one Luxembourg attorney and another are also confidential unless otherwise specified or if the communication is by nature non-confidential. Relationships

6 Article 5.3 of the Code of Conduct of the Council of Bars and Law Societies of Europe.
between Luxembourg and non-Luxembourg attorneys are governed by the Code of Conduct for European Lawyers. According to the Code, communications between attorneys are in principle non-confidential unless otherwise expressly specified in a covering letter or at the head of the communication.

ii Production of documents

Any party must evidence the facts on which it bases its claim or its defence. Supporting documents must be communicated to all the parties involved in the litigation as well as to the court.

Depending on the type of case (civil or commercial), the proof must consist of written documents or may also be brought through a witness statement or hearing. Legal presumptions may also apply. In each case, the court itself assesses the credibility of supporting evidence.

If relevant, a court may, either by itself or at the request of one of the parties, appoint an expert responsible for examining documents stored electronically or other technical issues. In relation to documents stored overseas, courts may use mechanisms applicable for assistance in evidence (see above).

A court may also, either by itself or at the request of one of the parties, order a party to the proceedings or a third party to deliver documents considered as relevant.

VI ALTERNATIVES TO LITIGATION

i Arbitration

Arbitration is commonly used in Luxembourg to settle contract and commercial disputes. Owing to the geographical and economic position of the Grand Duchy, Luxembourg-Ville is more and more often chosen as a seat of arbitration, especially for cross-border disputes arising between parties from neighbouring countries such as France and Germany.

The rules governing arbitration proceedings are mainly provided for by the NCPC. Luxembourg has also ratified international agreements regarding arbitration (including the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10 June 1958). In addition, the Luxembourg Chamber of Commerce has its own Arbitration Centre, created in 1987, and has put its Secretariat at the service of parties interested in using arbitration to settle their dispute.

Arbitration can only take place if both parties have agreed. The agreement to arbitrate is made through an arbitration clause included in the contract or, after the performance of the contract, through the conclusion of a written agreement to arbitrate.

Under Article 1224 of the NCPC, a dispute may be submitted to arbitration provided that the issue at stake relates to rights of which parties have free disposal. Therefore, disputes involving family law, criminal law or, more broadly, involving public policy, cannot be subject to arbitration.

There are two kinds of arbitration proceedings in Luxembourg:

a Ad hoc arbitration: the parties use arbitration without submitting the proceedings to the rules of any arbitration institution. In this case, the parties and the arbitrators must use time limits and forms required before local courts.7

7 Article 1230 of the NCPC.
Institutional arbitration: most often, the parties will agree to use the rules of an established organisation such as the Arbitration Centre at the Luxembourg Chamber of Commerce or the International Court of Arbitration of Paris.

Arbitral awards under Luxembourg law have the same legal effect as a court judgment. However, in order to be enforceable, an arbitral award requires an enforcement order issued by the president of the district court of Luxembourg.

The only possibility to challenge an arbitral award is to take an opposition procedure against the order of the president of the district court to have it declared null and void.

**ii Mediation**

Specific legislation concerning civil and commercial mediation was introduced in Luxembourg by the Law of 24 February 2012 on the Introduction of Mediation in Civil and Commercial Matters. The Mediation Centre of the Luxembourg Bar (CMBL) was set up on 13 March 2003.

The CMBL can be contacted by any legal entity or individual within the context of their civil, commercial or labour dispute resolution. The mediator is then chosen from a list approved by the CMBL, taking into consideration the nature of the dispute and the wishes of the parties.

At the beginning of the process, the mediator must ensure that the parties sign a mediation agreement in which they undertake to settle their dispute through mediation. The mediation procedure is entirely confidential. The mediator’s mission is to help the parties negotiate a solution.

**iii Other forms of alternative dispute resolution**

**Ombudsman**

Claims against a public administration body may be submitted to an ombudsman. The ombudsman analyses the claim and issues a recommendation to the public administration body as to whether he or she finds the claim founded.

**Settlement agreement**

In practice, especially when the outcome of a dispute is not obvious, parties tend to negotiate and enter into out-of-court settlement agreements. These kinds of arrangements are usually confidential. They are very common in labour law cases.

Settlement agreements have the authority of *res judicata*.

**VII OUTLOOK AND CONCLUSIONS**

Reorganisation of the justice system is gradually being implemented in Luxembourg. The main purpose of Bill No. 7307 is to strengthen the effectiveness of civil and commercial justice by introducing significant changes in Luxembourg civil procedure. This will be achieved by modernising the Luxembourg judicial system, accelerating legal proceedings and strengthening the independence of judges. In order to meet these goals, other reforms are being prepared, such as Bill No. 7323 on the organisation of the Supreme Council of Justice, which is intended to be a collegiate body responsible for the independence of the magistrates but also in charge of the reception and treatment of the grievances of the litigants.
Although Bill No. 7307 is still under discussion in the Chamber of Deputies, the reform of Luxembourg procedural law will happen. The Luxembourg Bar Council is very enthusiastic about the content of Bill No. 7307 and has great expectations regarding the positive effects that such a reform will bring.
I  INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

Dispute resolution in Mauritius occurs via the traditional system of litigation before the courts and through alternative dispute resolution (ADR) procedures. A party may choose whether to apply to the courts for redress, or opt to have such a dispute resolved through mediation, conciliation or arbitration.

Disposal of commercial disputes through the Commercial Division of the Supreme Court of Mauritius is an inherent feature of Mauritius’s judicial system, which heard and disposed of more than 1,600 cases in 2017. The Mediation Division of the Supreme Court has also been actively involved in facilitating the settlement of ongoing civil and commercial disputes. However, there has been a drastic drop in the number of civil cases received at the Mediation Division of the Supreme Court – from 97 in 2016 to 31 in 2017.

For disputes that are submitted to courts in Mauritius, the ultimate appellate body is the Judicial Committee of the Privy Council in England (JCPC). Sittings of the JCPC are generally held in England, but they also regularly occur in Mauritius to expedite the hearing of appeals.

Mauritius positions itself as a centre for international arbitration. Several measures have been adopted by the Mauritius government to create conditions for sustainable development of international arbitration.

In November 2008, the International Arbitration Act 2008 (IAA), which is based on the UNCITRAL Model Law, was enacted by parliament. With the coming into force of the IAA in January 2009, and the conclusion of a host country agreement with the Permanent Court of Arbitration (PCA) at The Hague, the permanent representative of the PCA located in Mauritius is, as from September 2010, called upon to intervene, for example, in cases of failure to constitute the arbitral tribunal, to appoint the arbitrator if the parties have not done so, or if there is a challenge to the arbitrator.

As Mauritius is already a recognised jurisdiction for the setting up of global business licence companies, an interesting feature of the IAA is that it also provides for the arbitration of disputes under the constitution of global business licence companies incorporated in Mauritius. Furthermore, all court applications under the IAA, which are made to a panel of three judges of the Supreme Court, have a direct and automatic right of appeal to the JCPC.

At the domestic level, arbitration can be resorted to under the Code of Civil Procedure 1808, which allows parties to refer any dispute for arbitration either before or after a dispute has arisen.
Mediation and arbitration procedures are also available at the level of the Mauritius Chamber of Commerce and Industry (MCCI) and the Mauritius International Arbitration Centre (MIAC) as an independent arbitration centre.

i  The MCCI
The MCCI has, since 1996, had its own permanent court of arbitration, the MCCI Arbitration and Mediation Center (MARC). Under the Mediation Rules or Arbitration Rules of MARC, individuals, private-sector entities and public sector organisations can initiate arbitral proceedings in relation to both domestic and international commercial disputes.

ii  The Mauritius International Arbitration Centre
The LCIA-MIAC Arbitration Centre, which was established in 2011 as a joint venture between the government of Mauritius and the London Court of International Arbitration (LCIA), ceased to operate on the 27 July 2018 and its operations have been taken over by a new arbitration centre, the MIAC. It was mutually agreed that the LCIA will administer arbitrations and mediations arising out of agreements referencing the LCIA-MIAC Arbitration Centre that have already been concluded. The MIAC will perform under the legal framework for international arbitration in Mauritius, which includes the International Arbitration Act 2008 and the Permanent Court of Arbitration’s role thereunder. Besides this, the MIAC has set up new arbitration rules stemming from the UNCITRAL Rules 2010 and will also follow the tested provisions of the Mauritian Arbitration Act for arbitral appointments and challenges.

II  THE YEAR IN REVIEW

i  Case law affecting ADR

Laporte M v. Antolinos MR

A dispute arose in connection with a contract for the sale of shares. The contract provided for the settlement of any dispute through arbitration and further provided that the president of the Chambers and Notaries will be the arbitrator. The plaintiff objected to the dispute being resolved by arbitration because the defendant had already paid his half share of the arbitrator’s fees before the arbitration agreement was finalised. The Commercial Division of the Supreme Court held that in accordance with Article 1005 of the Code of Civil Procedure, any dispute relating to the constitution of the arbitration tribunal should be resolved by a judge in chambers. Accordingly, the Court upheld the preliminary objection to the effect that it had no jurisdiction to entertain the plaintiff in view of the arbitration clause in the agreement.

Flashbird Limited v. Compagnie de Securite Privee et Industrielle SARL

The applicant applied to the Supreme Court for an order to set aside an arbitration award contending that the arbitrator erred in his interpretation of the arbitral clause in an agreement between the parties. The arbitration clause provided for arbitration to be administered by MARC in accordance with the International Chambers of Commerce Rules (the ICC Rules).

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2  2018 SCJ 410.
3  2018 SCJ 402.
The arbitrator interpreted the arbitration clause to mean that the arbitrator could either be administered by MARC in application with the MARC Rules or administered by the ICC in application of the ICC Rules. The arbitrator then applied the MARC Rules. The applicant challenged the decision of the arbitrator on the ground that the arbitration should have been governed by the ICC Rules. The applicant argued that the arbitration award should be set aside on the ground that the composition of the tribunal or arbitral procedure was not in agreement of the parties as provided under Section 39(2)(a)(iv) of the International Arbitration Act 2008. The applicant argued that in accordance with the ICC Rules, three arbitrators ought to have been appointed to determine the dispute.

The Court held that, under the ICC Rules, the ICC has a discretion to appoint the number of arbitrators ranging from one to three as appropriate in any particular case, but the general rule is for the appointment of one arbitrator. The Court considered similar provisions based on the New York Convention and the dictum in Truilzi Cesare SRL v. Xinyi Group (Glass) Co Ltd [2014] SGHC 220 to hold that any breach, however minor or technical, committed by an arbitral tribunal will not necessarily lead to the award being set aside. The Court accordingly set aside the application as there was no evidence that if the arbitration were to be administered by the ICC, the ICC would necessarily have appointed three arbitrators.

**Societe Lazuli v. Luc Et Luc Ltd**

The applicant applied for an order under Article 1005 of the Code of Civil Procedure for appointment of an arbitrator to determine the dispute that has allegedly arisen between the shareholders of a company. The judge, applying the dictum in Unitech International Limited v. The State Trading Corporation [2001 SCJ 56], held that it was for the judge in chambers to ascertain under Article 1005 whether a dispute existed or not before proceeding further.

The judge also relied on foreign authorities such as WDR Delaware Corporation v. Hydox Holdings; In the matter of Hydox Holdings Pty Ltd [2016] FCA 1164 to hold that a petition lodged before Bankruptcy Division of the Supreme Court to wind up the company does not necessarily warrant a stay of arbitration proceedings, and the arbitration proceedings do not necessarily warrant a stay of the winding up proceedings. On the facts, the judge held that a dispute had indeed arisen between the parties and appointed an arbitrator to determine the dispute.

**The dispute between Betamax Ltd against the State Trading Corporation of Mauritius**

A contract of affreightment (COA) governing the transportation of petroleum products for Mauritius over a period of 15 years by Betamax Ltd was signed between the State Trading Corporation (STC) (state of Mauritius entity) and Betamax Ltd (Betamax) in November 2009. Following a change of government after the 2014 general elections, the newly instituted government alleged that the COA was one-sided, that it was entered into in breach of public procurement legislation and that colourable devices had been resorted to as to allocate the contract to Betamax. The STC therefore unilaterally decided to terminate the contract.

Betamax referred the dispute for arbitration before the Singapore International Arbitration Centre (SIAC). The preliminary objection to jurisdiction of the arbitrator raised by the STC has been overruled by the arbitrator, and the matter was fully argued by both parties before the arbitrator.

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4 2018 SCJ 77.
In June 2016 the SIAC rendered its arbitral award, reportedly to the effect that the STC was wrong and acted in breach by rescinding the COA. The STC would have to pay damages amounting to US$115–125 million to Betamax for unjustified breach of contracts as well as the legal cost and cost of arbitration.5

Following the decision of the SIAC, Betamax has applied to the Supreme Court in Mauritius for an order to enforce the arbitral award. The STC in turn has applied to the court for the setting aside of the provisional order enforcing the arbitral award. A full bench of the Supreme Court heard arguments in both cases in March 2018, but has not yet delivered its judgment.

ii Legislative changes

A new category of licence, the global legal advisory services licence, has been introduced in the Financial Services Act 2007 for foreign law firms who wish to provide legal services in Mauritius pertaining to, inter alia, global business and international arbitration. These foreign law firms will be required to set up an entity in Mauritius to hold the global legal advisory services licence subject to meeting certain prerequisites. Holders of such licences will be subject to regulation by the Financial Services Commission.

Mauritius enacted the International Arbitration (Miscellaneous Provisions) Act 2013, which came into effect on 1 June 2013 and brought about important changes in the field of international arbitration. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act that gave legislative force to the New York Convention was amended to provide that a foreign arbitral award is now recognised and enforceable in Mauritius irrespective of whether or not there is any reciprocity with the foreign state. French and English are each now deemed to be official languages for the purpose of the New York Convention, thus avoiding unnecessary translation of awards and ensuring that awards rendered in both anglophone and francophone arbitrations are enforceable without unnecessary expense and delay. In addition, actions for the recognition and enforcement of foreign awards in Mauritius will not be subject to any domestic period of limitation or prescription.

The IAA was amended to give the Supreme Court power to issue interim measures in relation to arbitration proceedings whether the judicial seat of arbitration is Mauritius or not. However, this power should be used only to support and not disrupt the existing or contemplated arbitration proceedings. An application for such interim measures shall in the first instance be heard and determined by a judge in chambers but shall be returnable before a panel of three designated judges.

The IAA was also amended to make it clear that the shareholders of global business licence companies also have the right to agree to the arbitration of disputes concerning or arising out of agreements other than the constitution of the company, for example, shareholders’ agreements. However, the juridical seat of any arbitration relating to a dispute arising out of the constitution of a global business company is Mauritius.

Although any hearing before the Supreme Court under the IAA will usually be conducted in public, the IAA was also amended to empower the court to hold hearings in private in appropriate circumstances to safeguard the confidential nature of certain types of arbitration.

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5 The arbitral procedure and its ensuing arbitral award before the SIAC are protected by confidentiality provisions and are thus not available for public consultation.
The IAA also puts in place a system of six designated judges to hear all international arbitration matters in Mauritius, thus ensuring that all applications under the IAA or the New York Convention Act are heard by specialist judges.

III COURT PROCEDURE

Evidential and procedural rules in Mauritius are inspired by English law. Litigation in Mauritius courts is based on an adversarial system.

i Overview of court procedure

The Supreme Court

Generally, the procedure to be followed before the Supreme Court is provided for under the Supreme Court Rules 2000.

Civil and commercial proceedings before the Supreme Court sitting in its original jurisdiction (other than the Bankruptcy Court), are initiated by way of plaint with summons. It must be noted that an action may be initiated by way of motion supported by affidavit, namely when such an action is for a prerogative order or if the circumstances require urgency.

The judge in chambers

An action before the judge in chambers is initiated by an applicant by way of praecipe and affidavit. Upon receiving this, the respondent may reply by filing a counter-affidavit, which the applicant can reply to with a second affidavit. The respondent has a final right of reply to the second affidavit. No further exchanges of affidavits will be allowed unless leave of the judge in chambers is obtained.

Where the judge in chambers is satisfied that all incidents of exchanges of affidavits have been dealt with and a case is ready to be argued before him or her on the merits, the case is fixed for the merits on such a date as the judge in chambers thinks fit.

The judge in chambers has the jurisdiction to deal with injunctive relief and urgent applications.

It must be noted that under Article 806 of the Code of Civil Procedure, the judge in chambers can sit as a judge of civil proceedings. The summary procedure is for those matters that require celerity, that is, where an order from the judge in chambers is required to prevent an imminent peril.

Apart from summary jurisdiction, the judge in chambers also has original jurisdiction in certain matters, such as for the granting of a writ habere facias possessionem.

Court of Civil Appeal

If a civil case is heard at first instance by a judge of the Supreme Court, an appeal lies to the Court of Civil Appeal within 21 days of the date of the judgment. The appeal must be lodged by way of notice of appeal in writing, and the grounds of appeal must be given in detail.

If the respondent wishes to resist the appeal, he or she must serve on the appellant and file in the Registry a notice of his or her intention to do so not later than two months after the date of service.

The appellant must, not less than 45 days before the date of the hearing of the appeal, serve on the other parties to the appeal and lodge in the Registry skeleton arguments and submissions on the grounds of appeal.
The respondent must, not less than 30 days before the date of the hearing of the appeal, serve on the other parties to the appeal and lodge in the Registry skeleton arguments and submissions on the grounds of appeal.

An appeal against an interlocutory judgment or order also lies to the Court of Civil appeal with leave of the judge giving the judgment. 6

**Appeal to the JCPC**

An appeal to the JCPC from a decision of the Court of Appeal or the Supreme Court may be as of right or with the leave of the Supreme Court.

An application to the Supreme Court for leave to appeal to the JCPC must be made by motion or petition within 21 days of the date of the decision to be appealed from, and the applicant must give all other parties concerned notice of his or her intended application.

The JCPC may also grant special leave to appeal from the decision of the Supreme Court in any civil or criminal matter. The procedure for appeal to the JCPC is governed by the Mauritius (Appeals to Privy Council) Order 1968.

Appeals to the JCPC can only be made against final decisions from the Court of Appeal or the Supreme Court. A final judgment is one that disposes finally of a suit; puts the plaintiff in the impossibility of moving further or proceeding with the hearing of his or her action on the merits; finally determines or concludes the rights of the parties; and puts an end to the main dispute. 7

**Subordinate courts – the district courts, Intermediate Court and Industrial Court**

An action before the subordinate courts is entered by way of praecipe served on the defendant by registered post with notice of delivery.

A party may appeal to the Supreme Court against a judgment of a district court, the Intermediate Court or the Industrial Court within 21 days of the date of the judgment. The computation of the 21 days excludes the day the judgment is delivered for subordinate courts.

### ii Procedures and time frames

The applicable procedures and time frames vary depending on the intricacy of the case, the sum or matter in dispute and the availability of all parties involved.

Generally, matters dealt with at the district court level (generally covering claims of up to 250,000 rupees) last for a minimum of six months.

District courts also have a small-claims jurisdiction for civil actions where the sum claimed or the matter in dispute does not exceed 100,000 rupees. The small-claims procedure is a simplified one where the strict rules pertaining to the lodging of a case before district courts do not have to be adhered to.

Matters before the Intermediate Court (for sums of 250,001 to 2 million rupees) can be determined within one year, depending on the complexity of the case.

Matters before the Supreme Court (covering money claims of more than 2 million rupees) may take more than one year to be determined, depending on the intricacy of the case.

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6 Section 3 of the Court of Civil Appeal Act 1963.

7 Seebun v. Doomun 2013 SCJ 428.
It must be noted that the specialised divisions of the Supreme Court, including the Commercial Division and the Mediation Division, enable cases to be disposed of more efficiently. Furthermore, a system for e-filing in the judiciary was introduced in Mauritius in 2012 to permit the electronic filing of court processes and provide a faster means of putting a case together.

It must be noted that in urgent matters, applications can be made to the judge in chambers and may be disposed of, for example, in relation to an application for an interim injunction, within one day or a couple of days.

iii Class actions
Class actions are provided for under Mauritian laws in respect to companies inasmuch as a shareholder of a company can bring proceedings against the company or director of the company by representing all or some of the shareholders having the same or substantially the same interest in relation to the subject matter of the proceedings.8

iv Representation in proceedings
In most cases, litigants appoint a legal representative to represent them in court. The Courts Act 1945 provides that in any proceedings before the Supreme Court, a barrister may address the Court or any party to the proceedings may address the Court with leave of the Court. If the proceedings are before the Bankruptcy Division, an attorney retained by or on behalf of any party may do so.

The parties to the case will usually need to retain the services of an attorney for the preparation of the pleadings of the case. The attorney will instruct a barrister, who will be responsible to conduct the case in court.

Legal entities can be represented in court by their duly authorised representative (e.g., for a company, a director or secretary of the company, or any other natural person duly authorised by the company to act on its behalf).

v Service out of the jurisdiction
Mauritius is not a party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. As such, the relevant procedure to be followed will be pursuant to the Code of Civil Procedure (CCP), which provides that the leave of the judge in chambers must be sought before the applicant can serve documents outside Mauritius. Such leave can be granted in specific cases provided for under the CCP. In this respect, the applicant must make an application to the judge in chambers by way of praecipe supported by affidavit. Where service is effected out of Mauritius it must be effected in the same way as actions are required to be served in that foreign country.

vi Enforcement of foreign judgments
The procedure for enforcing a foreign judgment varies depending on whether such a judgment has been obtained in England and Wales or outside England and Wales.

For a judgment obtained from countries other than England and Wales, the law relating to the recognition and enforcement of foreign judgments in Mauritius is to be found in Article 546 of the Code of Civil Procedure.

8 Section 177 Companies Act 2001.
Generally, courts in Mauritius will recognise and enforce a judgment given against a Mauritius entity in a foreign court other than England and Wales courts (the foreign court) without re-examination of the merits of the case if:

a. the foreign court that rendered such a judgment had jurisdiction to hear the claim;
b. the foreign court applied the proper law applicable to the determination of the claim against the Mauritius entity;
c. the judgment of the foreign court was not rendered in breach of any rule of procedural or substantive public policy applicable in Mauritius;
d. the judgment of the foreign court had not been obtained by fraud, or is not upon its face founded in error, or considered irregular and wrong by the law of the place where it is awarded;
e. the Mauritius entity had been summoned to attend the proceedings before the foreign court in accordance with the procedures set out in the rules of the foreign court; and
f. the judgment of the foreign court is still valid and capable of execution in the jurisdiction of the foreign court.

The procedure for enforcing the foreign judgment is made by way of motion supported by affidavit before the Supreme Court of Mauritius. The application must be supported by certain documents, duly apostilled, to certify the authenticity of the foreign judgment, including:

a. a photocopy of the foreign judgment sought to be enforced will be sufficient. Each page of the judgment must bear the seal of the foreign court delivering the judgment and the last page is to be signed by the Chief Registrar of the foreign court; and
b. a certificate issued by the foreign court stating that there has been no appeal against the said judgment.

In cases of a judgment obtained from England and Wales, the judgment creditor may apply to the Supreme Court of Mauritius within 12 months of the date of the judgment, or such longer period as may be allowed by the Supreme Court, to have the judgment registered. However, such a judgment will not be registered where:

a. the original court acted without jurisdiction;
b. the judgment debtor, who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court;
c. the judgment debtor, the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he or she was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court;
d. the judgment was obtained by fraud;
e. the judgment debtor satisfies the Supreme Court either that an appeal is pending, or that he or she is entitled to and intends to appeal against the judgment; or
f. the judgment was in respect of a cause of action that for reasons of public policy or similar could not have been entertained by the Supreme Court.
vii Assistance to foreign courts
Assistance to foreign courts is generally provided for in criminal and related matters. The Mutual Assistance in Criminal and Related Matters Act 2003 (MACRMA) provides for mutual assistance between Mauritius and a foreign state or an international criminal tribunal in relation to serious offences.

Under the MACRMA, a foreign state or an international criminal tribunal may make a request for assistance to the Attorney General of Mauritius in any proceedings commenced in the foreign state or before the international criminal tribunal.

The Attorney General may, in respect of a request from a foreign state, either promptly grant the request, in whole or in part, or refer the matter to the appropriate authority for prompt execution of the request; or refuse the request, in whole or in part.

Where the request has been granted, the Attorney General needs to apply to a judge in chambers for an evidence-gathering order or a search warrant for the search of a person or premises and the removal or seizure of any document or article; or for an order for the taking of the virtual evidence of the person, among others.

viii Access to court files
Pursuant to the CCP, a general cause list of cases pending before the Supreme Court is posted in a conspicuous place in the court house before the commencement of each term. Members of the public can thus ascertain when a case is coming for mention, trial or disposal. Details of cause lists for cases before the subordinate courts and the Supreme Court are also found on the website of the Supreme Court. In addition, the clerks of the different registries of the courts can be contacted by the parties to a case to know when the matter has been fixed before the courts.

Access to court files and papers is limited. Pleadings and evidence with respect to ongoing proceedings are generally not publicly available to non-legal practitioners or parties who do not have an interest in the matter at stake. However, for judgments that have been rendered in any subordinate court, the Supreme Court and the JCPC, members of the public can have access to those judgments that are posted on the website of the Supreme Court of Mauritius.

ix Litigation funding
There is no specific provision of the law on third-party funding of litigation in Mauritius.

IV LEGAL PRACTICE
i Conflicts of interest and professional conduct
The professional conduct of barristers, attorneys and notaries (law practitioners) in Mauritius is regulated by the Mauritius Bar Association, the Mauritius Law Society and the Chamber of Notaries, and their relevant codes of ethics. Under these codes of ethics, conflicts of interest are not allowed.

Under the Law Practitioners Act 1984 (LPA), law practitioners belonging to the same law firm must not appear for different parties in respect of any litigation where there is a conflict or significant risk of conflict between the interests of those parties.

The Attorney-General has the power to enquire into any act done by a law practitioner. If he or she is of the opinion that it is of such a nature as to call for the institution of
disciplinary proceedings, he or she will report the matter to the Chief Justice. The Supreme Court has exclusive jurisdiction to deal with matters of professional misconduct; the law practitioner risks, *inter alia*, suspension or erasure of his or her name from the roll of law practitioners.

**ii Money laundering, proceeds of crime and funds related to terrorism**

Under the Financial and Anti-Money Laundering Act 2002 (FIAMLA), ‘members of the relevant profession or occupation’, which includes legal practitioners, have the responsibility to take such necessary measures so as to ensure that their services are not capable of being used by a person to commit or to facilitate the commission of money laundering offences or the financing of terrorism.

Legal practitioners must also forthwith make a report to the Financial Intelligence Unit of any transaction that they have reason to believe may be a suspicious transaction. However, such an obligation is not applicable if the legal practitioner has acquired knowledge of the transaction in privileged circumstances, unless it has been communicated to the legal practitioner with a view to the furtherance of a criminal or fraudulent purpose.

Furthermore, everyone has the duty to verify the true identity of all customers and other persons with whom they conduct transactions and keep such records, registers and documents as may be required under the FIAMLA and its regulations. Legal practitioners are also required to make available such records, registers and documents as may be required upon a court order and put in place appropriate screening procedures to ensure high standards when recruiting employees to fight money laundering and terrorist financing.

**iii Data protection**

A new Data Protection Act 2017 (DPA) was enacted on 15 January 2018. According to the DPA, a controller or a processor must, before keeping or processing of personal data, register himself or herself with the Data Protection Commissioner (the Commissioner). The controller or processor shall also maintain a record of all processing operations under his, her or its responsibility.

A controller is statutorily defined as a person who or a public body that, alone or jointly with others, determines the purposes and means of the processing of personal data and has decision-making power with respect to the processing. Under the DPA, a processor is someone who or a public body that processes personal data on behalf of a controller.

The DPA provides for several instances where personal data processed for specific purposes is exempt from certain parts of the DPA and lays out some principles relating to processing of personal data. As such, every controller or processor must ensure that personal data are lawfully and fairly processed in relation to any data subject. It is also a requirement under the DPA to ensure that personal data collected for explicit, specified and legitimate purposes are not further processed in a manner incompatible with those purposes and that the data collected are adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed.

The DPA further requires the controller and processor to obtain authorisation and consultation from the Data Protection Office prior to processing personal data in order to ensure compliance of the intended processing with the law, and in particular to mitigate risks involved for the data subjects where a controller or processor cannot provide for the appropriate safeguards in relation to the transfer of personal data to another country.
Mauritius

iv \ Other areas of interest
The LPA was amended in 2008 to allow a law firm in a foreign country to make an application to the Attorney General for the registration of a local office. Similarly, a foreign lawyer may apply to the Attorney General for registration and the right to provide legal services within a law firm, foreign law firm or joint-law venture.

A foreign lawyer may provide legal services in relation to arbitration proceedings, for conciliation, mediation and such other forms of consensual dispute resolution as may be prescribed by tendering legal advice in relation to foreign law or international law, among others.

In addition a foreign law firm and a local law firm can form a joint law venture and provide legal services in respect of both local law and foreign law.

The LPA has also been amended to provide for the continuing professional development programme applicable to every law practitioner and legal officer in Mauritius.

Pursuant to the 2011 amendments to the Law Practitioners Act 1984, a Mauritian citizen who has a professional qualification entitling him or her to practise as a barrister in England and Wales, Australia, New Zealand, Canada or France can apply for admission to practise law in Mauritius.

V \ DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i \ Privilege
Mauritius follows the same principles of legal privilege as English common law. In Mauritius, professional privilege is provided under Section 300 of the Criminal Code, which makes it a criminal offence for certain persons including lawyers to divulge confidential information entrusted to them in their professional capacity. Generally, communications between a lawyer and his or her client are privileged; that is, the lawyer cannot disclose the information without the consent of the person who gave him or her the information. However, such privilege does not apply in the case of furtherance of a crime. The rules of privilege apply similarly to both local and foreign lawyers.

With regard to law firms, the LPA provides that law practitioner–client privilege shall exist between a law firm and its clients in the same manner as it exists between a law practitioner and his or her clients and extends to every law practitioner who is a partner, director or employee of the law firm.

ii \ Production of documents
The Mauritius law of evidence is based on English law.

In civil proceedings, a party who asserts facts must produce documentary evidence proving such facts in court. For example, a party who asserts that he or she is the owner of a certain premises must produce the title deed showing that he or she is the owner of such premises. The relevance of the documents produced will be analysed in relation to the fact in issue, to determine whether such documents will be admissible in court.

Documents may be authentic deeds or deeds under private signature. Documents that may be produced during a trial include copies of public documents such as the contents of
any record, book deed, map, plan or other document in the official custody of the Supreme Court, the Conservator of Mortgages, a government department, the Intermediate Court, a district court or any notary.

It must be noted that statements produced by computers are also admissible as evidence in civil proceedings under certain conditions as provided for under the Courts Act 1945. Under the Civil Code of Mauritius, electronic documents may also be produced in court. Furthermore, a person relying on a digital signature as evidence must also rely on a valid certificate containing the public key by which the digital signature can be verified.

It must be noted that for an affidavit that emanates from a foreign country to be admissible in Mauritius courts it will need to be apostilled or legalised.

For matters relating to the law of evidence not specifically covered by any Mauritian laws the Courts Act 1945 provides that Mauritius courts should follow English law of evidence.

VI ALTERNATIVES TO LITIGATION

i Arbitration

The use of arbitration as a means of dispute resolution is currently common in business and commercial circles, the local construction industry, and insurance and investment sectors in Mauritius.

Arbitration is not new to Mauritius. Since 1865, the Supreme Court has declined to review an arbitration award where the parties had expressly agreed that the decision of the arbitrator would be final and non-appealable.9 The intention of the parties to renounce the right to appeal must be clear and unequivocal.10

Regarding international arbitrations, when the juridical seat of arbitration is Mauritius, a party to an international dispute may request that such a dispute be referred to arbitration under the IAA. The IAA focuses on investment arbitration, and provides that the IAA will apply to ‘international arbitration’, as opposed to ‘international commercial arbitration’ under the UNCITRAL Model Law to cover such international investment arbitration.

Under the IAA, the Supreme Court, or any other relevant Mauritius court, will not intervene in an arbitral process, save to support such a process and to ensure that the essential safeguards provided for in the IAA are respected. Moreover, Mauritius courts will not intervene in an international arbitration agreement governed by the IAA except in specific instances provided for by the IAA, namely in relation to interim measures under Section 23 of the IAA whereby intervention of the Supreme Court is possible. In exercising its powers of intervention, the Supreme Court must adopt established and well-known principles of international arbitration.

The IAA seeks to maintain the validity of an arbitration clause, independently of the main agreement, through its Section 20. In relation to the validity of an arbitration agreement, the IAA provides that an arbitration clause that forms part of a contract will be treated as an agreement independent of the other terms of the contract, and a decision by the arbitral tribunal that the contract is null and void will not entail ipso jure the invalidity of the arbitration clause.

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9 Robert v. Martin 1865 MR 140.
10 The Central Electricity Board v. La Compagnie Usinière de Mon Loisir Limitée 2005 SCJ 1.
With regard to appeals, under Paragraph 2 of the First Schedule to the IAA, a party may appeal to the Supreme Court on any question of Mauritius law arising out of an award, upon leave being granted by the Supreme Court. The Court will not grant leave unless it considers that, having regard to all the circumstances, the determination of the question of Mauritius law concerned could substantially affect the rights of one or more of the parties.

Mauritius is a signatory member of the New York Convention 1958 (the New York Convention), which has been implemented in the local law by the Convention on Recognition and Enforcement of Foreign Arbitral Awards Act 2001. Foreign arbitration awards are thus enforceable in Mauritius subject to the qualifications set out in the New York Convention.

Mauritius courts will thus recognise and enforce an arbitral award given against a Mauritius entity without re-examination of the merits of the case subject to the party supplying the duly authenticated original award or the original arbitration agreement or duly certified copies of same.

Currently Mauritius courts may refuse to recognise or enforce an award where:

- the Mauritius entity was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present his or her case;
- the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;
- the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties;
- the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made;
- the subject matter of the difference is not capable of settlement by arbitration under the laws of Mauritius; or
- the recognition of the award would be contrary to public policy.

**ii Mediation**

With the creation of the Mediation Division of the Supreme Court, the Supreme Court now has the jurisdiction and power to conduct mediation in any civil suit, action, cause and matter that may be brought and may be pending before the Supreme Court.

The objective of the Mediation Division is to dispose of the civil suit, action, cause or matter by a common agreement, or to narrow down the issues in dispute, with the aim of reducing the costs and undue delays involved in a litigation matter; and facilitate a fair and just resolution or partial resolution of the dispute.

According to the Annual Report of the Judiciary 2017, the number of civil cases received at the Mediation Division of the Supreme Court has significantly decreased from 97 in 2016 to 31 in 2017. In 2017, agreement was reached in 10 cases before the Mediation Division and 36 cases were referred back to the Supreme Court for determination. The number of outstanding cases at the end of 2017 dropped to 11, from 26 for the same period in 2016.

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11 'Question of Mauritius law' is defined under the IAA as follows:

(a) includes an error of law that involves an incorrect interpretation of the applicable law (whether or not the error appears on the record of the decision); but (b) does not include any question as to whether (1) the award or any part of the award was supported by any evidence or any sufficient or substantial evidence; or (2) the arbitral tribunal drew the correct factual inferences from the relevant primary facts.
The government announced in its Budget 2018–2019 speech that it will bring legislative changes to enable cases before the Intermediate Court to be resolved through mediation.

### iii Other forms of alternative dispute resolution

Parties to an agreement may agree contractually to submit any dispute arising out of the agreement to an expert chosen by the parties. The agreement may provide that if the parties cannot agree on the choice of a common expert, each party will have the right to choose one expert, who will in turn choose a third expert for the settlement of disputes. This is usually resorted to in construction matters.

### VII OUTLOOK AND CONCLUSIONS

Despite the fact that the joint venture between the government of Mauritius and the London Court of International Arbitration has been terminated, the government remains fully committed to develop Mauritius as an arbitration centre to resolve international conflict, especially conflict involving Africa. After having benefited from its association with the LCIA since 2011, as well as gaining goodwill and practical experience from the leading institution, the MIAC is now in a position to stand on its own feet and proceed independently of the LCIA. In fact, the government gave full support to the termination of the LCIA cooperation at this level so as to allow the MIAC to further define its own distinctive identity to take full advantage of its position between Africa and Asia and to cooperate with a wider group of partners, including the Permanent Court of Arbitration. Henceforth, having the government as its backbone, the MIAC will continue to devote itself to the emergence of Mauritius as the regional hub for investment into Africa and to the diplomatic status of Mauritius as a state committed to the African continent and to its development.

The MARC adopted new arbitration rules in 2018. The new rules are meant to reflect best international practice and consist of a comprehensive tool kit of tried and tested provisions as well as several innovative provisions. An emergency arbitrator procedure has been introduced pursuant to which an arbitrator can be appointed within 24 hours and decide urgent interim and conservatory relief.

The MARC Advisory Board consists of 14 internationally renowned experts in the field of arbitration, and has fully operated since November 2017. During 2018, MARC has also been very active in organising training programmes, promotional events and activities both in Mauritius and abroad. MARC has also recently recruited a new head.
I  INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

Mexico is a federal country, with both federal and local courts.

Federal courts are competent to resolve any issue of a federal nature that is brought before them and also when the government acting as an authority is involved. Commercial matters are also of a federal nature, but the law determines that commercial litigation can also be heard by local courts.

Federal courts are divided into 32 circuits. The hierarchy of federal courts (starting from the bottom) is as follows: district courts, circuit unitary courts, collegiate courts and the Supreme Court of Justice of the Nation.

District courts are divided according to the nature of the cases they resolve, namely civil, administrative, labour and criminal.

Local courts are competent to resolve any issue that is brought before them that is not federal.

Local courts are divided into 31 different states and the local courts of Mexico City. The hierarchy of local courts (starting from the bottom) is as follows: justice of the peace courts, courts of first instance and courts of appeal. Local courts are divided according to the nature of the cases they resolve, namely civil, family, criminal and labour.

Besides the general framework mentioned above, the ultimate instance in a local case will be decided by a federal court (collegiate court or the Supreme Court of Justice) by means of a direct amparo.

With respect to alternative dispute resolution (ADR) proceedings, local courts have created a specific mediation body, the Centre for Alternative Justice. Besides this Centre, the parties can decide to resolve their disputes by any other means, other than through judicial authorities (e.g., arbitration).

II  THE YEAR IN REVIEW

In January of 2017, the Commerce Code suffered several amendments, being the most important the following:

In the court of appeals, if none of the parties continue with the appeal after 60 working days the appeal will be considered inexisten t and the court decisions that are the subject matter of such appeal will be considered valid.
New requisites have been added to the lawsuits: the taxpayer ID number of the plaintiff; the Entity Registry Code (CURP); and the evidence.

A new chapter has been added to the Commerce Code creating the ordinary oral proceedings as well as the executive oral proceedings.

On another important matter, the Supreme Court of Justice established that res iudicata was a valid limitation against judgments issued whereby excessive interest rates were considered legal, modifying a previous decision whereby the Supreme Court of Justice established that the concept of excessive interests could be reviewed at any stage of the proceeding, even if the parties did not argue such concept.

### III COURT PROCEDURE

#### i Overview of court procedure

In Mexico, court procedure follows these steps:

- a lawsuit;
- b answer to the lawsuit;
- c evidence period;
- d allegations; and
- e final judgment.

The rules governing court procedure vary from state to state and according to the nature of the conflict (civil or criminal).

#### ii Procedures and time frames

The procedures and time frames of the courts depend on two basic issues: the complexity of the case and the jurisdiction where the litigation takes place.

If the litigation takes place in a major city, the procedure can take between one and three years to be resolved. In some cases it may take more or less time, but such a case would be the exception.

**Commercial proceedings**

Commercial proceedings take place when the issue to be resolved has a commercial nature or when one of the parties in the relationship is a merchant.

Commercial proceedings are regulated in the Commerce Code and they can be one of four types: ordinary proceedings, executive proceedings, special proceedings and oral proceedings. Each type has its own set of rules.

**Ordinary proceedings**

Commercial proceedings begin with a lawsuit. After the lawsuit is accepted by the court, the court orders the serving of summons to the defendant and grants the defendant 15 days to answer the lawsuit, oppose exceptions and defences and file a counterclaim (if any). After the lawsuit is answered, if the defendant files a counterclaim, the court gives the defendant in the counterclaim nine days to answer the counterclaim. In any case, claim or counterclaim, the court grants the plaintiff three days to determine what it deems appropriate with respect to the exceptions and defences lodged by the other party, as well as for naming the witnesses that have any knowledge regarding the answer and for mentioning the documents that relate to
the answer. Afterwards the court, ex officio or by request of the parties, will open the evidence period, of 40 days in most cases; the first 10 days to offer the evidence and the next 30 to take the evidence offered. The court can open an evidence period of a shorter duration. If the evidence has to be taken outside the jurisdiction where the litigation is taking place, the court may grant an extension of up to 60 days to take such evidence if it has to be gathered in Mexico, and up to 90 days if it has to be gathered abroad.

Such an extension has to be requested during the first 10 days of the evidence period. In such a request, the complete names of the parties or witnesses to be deposed have to be inserted, and the questionnaire under which they will be deposed must be attached. In the event that documents have to be reviewed or copied, it should be established where the private or public archives are that hold the documents.

If the court grants such an extension, it will require the party that requests the extension to deposit a certain amount of money, so that if the evidence is not taken that amount will be given to the other party. The amount to be deposited cannot be, under any circumstance, an amount less than the value of 60 days of the minimum daily wage in Mexico City. The judge, when determining the amount to be deposited, will take into consideration the amount of the litigation and other circumstances that he or she deems appropriate. The amounts requested have to be deposited within three days. If the party requesting the extension does not deposit this amount within those three days, the judge will not admit the evidence offered.

If the judge admits the evidence to be taken outside his or her jurisdiction, he or she has to prepare letters rogatory for the foreign judge, and these will be given to the party that requested the extension, thus the party takes responsibility for obtaining the evidence, either via the central authority of Mexico or directly through the appropriate authorities where the evidence is to be gathered.

After the evidence period is over, the court grants the parties three days to file their allegations, and after those three days have elapsed the court gives notice to the parties that it is ready to enter judgment, which shall be rendered within the following 15 days.

Once the judgment is entered, any of the parties in the litigation, or even a third party, can appeal against the final judgment. The party against whom the judgment is entered can appeal if it believes that such a judgment was entered against the applicable laws. The party that won the litigation can also appeal against the final judgment if it did not obtain the restitution of products, indemnity for damage and loss of profits or costs. The party that won the litigation can also adhere to the appeal made by the losing party, at most within the three days following notification of the appeal filed by the losing party (when adhering to the appeal, the party submits more arguments to sustain or reinforce the opinions of the judge). A third party with a legitimate interest can also appeal if the resolution harms his or her rights.

An appeal can only take place in those cases where the principal amount of the litigation is more than 1 million pesos without taking into consideration interest or any other amount claimed.

Appeals have to be filed within a period of nine days after the notification of the final judgment is considered to be in full force and effect. The period for appealing interim judgments or any other court order is six days. In both cases the parties have to state the legal violations they consider the judgment to have. In the event that the appeal is such that it will be resolved along with the appeal against the final judgment, the time to file such an appeal is three days, and the parties are not required to make a statement of the order’s legal violations until required to do so in respect of the final judgment.
Once the parties have appealed the final resolution, the court will grant the other party six days to answer the writ of appeal filed by the appealing party.

After the six-day period has elapsed, with or without the answer of the party that did not appeal, the court will send the judicial docket to the court of appeal, which studies it and issues a final judgment. When studying appeals, the court of appeal first has to study the procedural violations claimed, and if it finds the existence of such violations and considers that they are fundamental to the merits of the case, it will issue a final judgment ordering that the final judgment issued by the lower court be invalidated so that the proceeding can be restored and a new judgment issued.

With respect to appeals that have to be resolved immediately because they involve execution over assets and could, therefore, cause irreparable (or severe) harm to the appealing party, the court can accept such an appeal. Such an acceptance suspends the proceedings in the lower court if the appealing party requests it and explains why such a request is made. If the request is accepted, the court would require the appealing party to post a bond or guarantee within the following six days for the suspension to take effect. The amount of the bond or guarantee will be determined by the judge, taking into consideration the importance of the litigation, but will never be less than 6,000 pesos and will be at the discretion of the court. If the party that requests the suspension does not post the guarantee, then the appeal will not suspend the proceedings carried out before the lower court.

Executive proceedings

Executive proceedings are those that are based on an executive title (examples of executive titles are: promissory notes; judicial confession of a debtor; invoices duly signed and judicially acknowledged by the debtor). They begin with the lawsuit, and the executive title has to be attached to such a lawsuit. In these kinds of proceedings the plaintiff has to offer his or her evidence in the lawsuit. After the lawsuit is accepted by the court, the court will issue an order requesting the debtor to pay, and the date of the summons will be served to the debtor or defendant. The court clerk will first request the debtor for payment of monies. If the debtor does not pay, the court clerk will proceed to seize assets from the debtor (the debtor will be the first to name the assets to be seized and, in the event that he or she does not do so, such a right will be transferred to the plaintiff or creditor), and once assets have been seized the debtor will be served with summons and granted eight days to answer the lawsuit, oppose exceptions and defences. In executive actions only very few exceptions are admitted by the court. In the same answer to the lawsuit the defendant has to offer evidence. After the defendant answers the lawsuit, the court grants the plaintiff three days to determine what it deems appropriate with respect to the exceptions and defences lodged by the other party, as well as for offering evidence related to the answer to the lawsuit. Afterwards, the court will open an evidence period of 15 days, during which all the evidence can be taken; the court can accept evidence after those 15 days when it deems this appropriate.

After the evidence period is over, the court grants the parties two days to file their allegations, and after those two days have elapsed, the court gives notice to the parties that it is ready to enter judgment, which shall be rendered within the next eight days.

With respect to appeals, the same rules mentioned for the ordinary proceedings apply to executive proceedings.

Once the judgment is entered and the merits of the case have been decided in a final instance, if the plaintiff proved its action the judge will declare that the assets seized should be sold at a public auction. Once such a declaration is made by the judge, the parties will
appoint experts in appraisal, and in cases where the value of the assets made by the experts differ by more than 20 per cent, the judge will appoint a third expert. Once the value of the assets is obtained, the court will announce the legal sale of the goods, via publication in a newspaper two times in three days if the assets to be sold are not real estate; in cases of real estate, the publication will be made during a period of nine days. Five days after the publications are made, the goods will be sold at a public auction.

**Special proceedings**

The special proceedings contemplated by the Commerce Code are:

\[ a \] the extrajudicial execution of guarantees granted through a pledge without transmission of the asset and guarantee trust; and

\[ b \] the judicial execution of guarantees granted through a pledge without transmission of the asset and guarantee trust.

**Oral proceedings**

This type of proceedings will only be available when the amount of the claim is less than 1 million pesos for 2018 (just the principal amount, without taking interest into consideration).

If a special proceeding has to take place, an oral proceeding will not be applicable, notwithstanding the amount of money of the claim.

The claim, answer to the claim and counterclaim have to be filed in writing.

There is a preliminary hearing for the purposes of ‘cleaning the proceeding’ (i.e., where the judge will review whether the parties have an interest in the litigation, and any of the defences or exceptions lodged by the parties that relate to the proceeding); conciliation or mediation of the parties; agreement of the non-controversial issues; admission of evidence; and notifying the parties for the main hearing.

In the main hearing the evidence will be taken. Any ancillary issues (that do not have a specific way of being carried out) should be made orally and the other party has to answer in such a hearing. If possible, the judge should resolve such ancillary issues in the same hearing. After the evidence has been taken, allegations will be made and the judge will call the parties to a new hearing within the next 10 days, where it will issue the final judgment.

The basic principles of these types of proceedings are that most of the proceedings will be carried out orally; hearings should not be suspended because of a lack of preparation of evidence.

For the executive oral proceeding, the amount of the claim should be no less than 500,000 pesos and no more than 4 million pesos.

**Civil proceedings**

Civil proceedings are regulated both in the Federal Code of Civil Procedure and in the code of civil procedure of each state, and they can be of different types: ordinary proceedings, executive proceedings, special proceedings, enforcement proceedings and oral proceedings. Each type has a different set of rules. A brief overview of the proceedings regulated in the Code of Civil Procedure of Mexico City is provided below.
**Ordinary proceedings**

Civil proceedings begin with a lawsuit. After the lawsuit is accepted by the court, the court orders the serving of summons to the defendant and grants the defendant 15 days to answer the lawsuit, oppose exceptions and defences and file a counterclaim (if any). After the lawsuit is answered, if the defendant files a counterclaim, the court gives the defendant in the counterclaim nine days to answer the counterclaim. In any case, claim or counterclaim, the court grants the plaintiff three days to determine what it deems appropriate with respect to the exceptions and defences opposed by the other party. Afterwards the court will call the parties to a preliminary hearing. In such a hearing the judge will review the standing of the parties in court and will try to get the parties to solve their differences through conciliation. In the same hearing the judge will review the procedural exceptions lodged by the parties. If the parties do not enter into a settlement, the court will open the evidence period on the day of the hearing or at most the following day, *ex officio* or by request of the parties, for 10 days for the parties to offer their evidence. After the evidence is offered by the parties, the judge will determine which evidence he or she accepts or rejects and will call the parties for a hearing, which will take place in the next 30 days, so that the evidence may be taken by the court. If all the evidence cannot be taken by the court at that hearing, then the court will call the parties for another hearing, which will take place within the next 20 days, to finalise taking the evidence offered by the parties. If the evidence has to be taken outside the jurisdiction where the litigation is taking place, the court may grant an extension of up to 60 days to take such evidence if it has to be gathered in Mexico, and up to 90 days if it has to be gathered abroad.

Such an extension has to be requested during the term when evidence has to be offered. In such requests, the complete names of the parties or witnesses to be deposed have to be inserted, and the questionnaire under which they will be deposed must be attached. In the event that documents have to be reviewed or copied, it should be established where the private or public archives are that hold the documents.

If the court grants such an extension, it will require the party that requests it to deposit a certain amount of money, so that if the evidence is not taken, the amount will be given to the other party. If the party requesting the extension does not deposit this amount, the judge will not mention anything with respect to the admission of such evidence.

If the judge admits the evidence to be taken outside his or her jurisdiction, he or she has to prepare letters rogatory for the foreign judge, and these will be given to the party that requested the extension, thus the party takes responsibility for obtaining the evidence, either via the central authority of Mexico or directly through the appropriate authorities where the evidence is to be gathered.

At the hearing where the evidence is taken by the court, after all the evidence is taken the court will finish the evidence period and open the allegations period, whereby the parties can render their oral allegations (the parties can file written allegations before the evidence hearing). After the allegations period is over, the judge has to issue the final judgment in the same hearing. In practice, final judgments are not usually rendered in such a hearing.

Once the judgment is entered, any of the parties in the litigation, or even a third party, can appeal against such a final judgment. The party against whom the judgment is entered can appeal if it believes that such a judgment was entered against the applicable laws. The party that won the litigation can also appeal against the final judgment if it did not obtain the restitution of products, indemnity for damage and lost profits or costs. The party that won the litigation can also object to the appeal made by the losing party, at most within the
three days following notification of the appeal filed by the losing party (when adhering to the appeal, the party that adheres to the appeal submits more arguments to sustain or reinforce the opinions of the judge). A third party with a legitimate interest can also appeal if the resolution harms his or her rights.

An appeal can only take place in those cases where the principal amount of the litigation is more than 212,460 pesos without taking into consideration interest or any other amount claimed.

Appeals have to be filed within 12 days after the notification of the final judgment is considered to be in full force and effect. The period for appealing interim judgments or any other court order is eight days. In both cases the parties have to state the legal violations they consider the judgment has. In the event that the appeal is such that it will be resolved along with the appeal against the final judgment, the time to file such an appeal is three days, and the parties are not required to make a statement of the order’s legal violations until required to do so in respect of the final judgment (within the 12 days granted to appeal against the final judgment).

Once the parties have appealed the final resolution, the court will grant the other party six days to answer the writ of appeal filed by the appealing party.

After the six-day period has elapsed, with or without the answer of the party that did not appeal, the court will send the judicial docket to the court of appeal, which studies it and issues a final judgment. When studying appeals, the court of appeal first has to study the procedural violations claimed in relation to legally offered evidence not admitted or taken by the court. If the court of appeal finds the existence of such violations, it will declare the appeal valid and will order the lower court to admit the evidence or take it and issue the appropriate order. In the event that the procedural violation is not related to evidence, if the violation can be repaired and is of such importance that it will impact the merits of the case, then the court of appeal will repair the violation claimed. Once the evidence is admitted and taken or the violation is repaired by the lower courts, the court of appeal will issue the final judgment with respect to the appeal filed against the final judgment. This judgment is appealable via an amparo proceeding. The time frame within which to issue a final judgment is 20 days, which can be extended to 30 days in the event that there are more than six interim appeals to be resolved together with the final judgment.

With respect to appeals that have to be resolved immediately because they can be executed and could, therefore, cause irreparable harm (or harm that is very difficult to repair) to the appealing party, the court can accept such an appeal, suspending the proceedings in the lower court if the appealing party so requests and explains the reasons for such a request. The court would require the appealing party to post a bond or guarantee within the following six days for the suspension to take place. The amount of the bond or guarantee will be determined by the judge taking into consideration the importance of the litigation, but will never be an amount less than 7,500 pesos. If the party that requests the suspension does not post the guarantee, then the appeal will not suspend the proceedings carried out before the lower court.

After the court of appeal issues its final judgment, any of the parties can resort to the amparo proceedings, which are constitutional proceedings, whereby violation of constitutional rights are claimed.
Executive proceedings
Executive proceedings are those that are based on an executive title (examples of executive titles are: the first copy of a public deed issued by the judge or notary public; judicial confession of a debt made before the competent judge by the debtor or its representative; and agreements made in a litigation before the judge, either made by the parties or third parties acting as depositaries or guarantors). The rules of executive proceedings are the same as for ordinary proceedings. Executive proceedings have two different sections:

a) the first section, which contains the lawsuit, answer to the lawsuit, preliminary and final judgment; and

b) the second section, which contains the order for the execution and everything related to the execution.

Special proceedings
The Code of Civil Procedure of Mexico City regulates the following special proceedings: loss of parental authority of minors that have been sheltered by public or private institutions of social assistance; mortgage proceedings; torts arising out of the use of motor vehicles; and the reissuance of certificates based on the reassignment of sex or gender.

Enforcement proceedings
These kinds of proceedings can only take place when the issue to be dealt with relates to the execution of a judgment, or relates to an agreement made in court or that arises from the agreement made by the parties before the judge or from an express agreement by the parties stating that rescission of the agreement does not require judicial intervention.

The nullity of concluded proceedings
The proceedings of nullity of concluded proceedings can only take place when a final judgment or court decision has been issued that cannot be revoked or reversed by any ordinary means and that falls within either of the following categories:

a) the judgment or order was based on evidence that has been acknowledged or declared false after the judgment or order was issued, and that the party that lost ignored; and

b) there is evidence of complicity or other fraudulent manoeuvres of the litigating parties against the plaintiff.

Oral proceedings
Such proceedings will only be available when the amount of the claim is less than 500,000 pesos (just the principal amount, without taking into consideration interest and other accessories). This amount is modified annually.

If special proceedings have to take place, the oral proceedings will not be applicable, notwithstanding the value of the claim.

The claim, answer to the claim and counterclaim have to be filed in writing.

A preliminary hearing is carried out so that the judge can review the whole judicial docket and if he or she finds that there are any defences, lack of proper representation or any other administrative mistakes or errors, he or she will review such defences and errors and ensure that the proceeding is in such a position that no one might claim such errors in the future; for conciliation or mediation of the parties; for agreement of the non-controversial issues; for the admission of evidence; and to notify the parties for the main hearing.
Evidence will be taken in the main hearing, and any ancillary issues (that do not have to be carried out in a specific way) should be made orally; the other party has to answer in this hearing. If possible, the judge should resolve such ancillary issues in the same hearing. After the evidence has been taken, allegations will take place and the judge will call the parties to a new hearing within the following 10 days, at which it will issue the final judgment.

The basic principles of these types of proceedings are that most of the proceedings will be carried out orally; hearings should not be suspended because of a lack of preparation of evidence.

**Amparo**

Amparo is the constitutional review of the decisions issued by the trial court or the court of appeal.

Amparo is considered the last instance in litigation, and is usually decided by the collegiate courts. Collegiate courts are comprised of three judges, and their scope of review is the violation of constitutional rights or guarantees. Sometimes amparo proceedings are resolved by the Supreme Court of Justice in cases when (1) the Supreme Court decides to take up the case, (2) the collegiate court determines that the Supreme Court of Justice should be the one to decide the case or (3) the Attorney General requests the Supreme Court of Justice to take up a specific case. In cases (2) and (3) the Supreme Court of Justice can deny the request.

Amparo proceedings are resolved by federal courts (district judges or collegiate courts or the Supreme Court of Justice).

To avoid execution of judgments or orders issued by lower courts, the parties requesting the amparo can request the suspension of the order that is contested through the amparo proceedings, so that the subject matter of the amparo is not changed, modified or terminated.

The purpose of the amparo is to restore the party requesting the amparo to the same status that he or she had before the constitutional violation took place. This restoration of the status quo is achieved by issuing a new judgment or order complying with the applicable laws. Under the new Amparo Law, the amparo court is very specific when ordering the authority to issue a new judgment or order. The judgment issued by the district court is not a final judgment since it can be modified through the review process, which is decided by the collegiate court or the Supreme Court of Justice.

**Urgent or interim applications**

The only urgent or interim applications that can be granted according to the Commerce Code are the order to a person to stay where litigation is taking place, and confinement of assets.

**Order to a person to stay where litigation is taking place**

The order to a person to stay where litigation is taking place will only be granted when there is reasonable fear that the person against whom a lawsuit will be initiated, or has been initiated, will leave the jurisdiction of the judge or will hide.

When a request is made that a person stay in the jurisdiction of the judge, it has to be demonstrated that the requester has the right to request such a measure. The Commerce Code establishes that proof of such a right might be established through documents or witnesses.

If the request is made before filing the lawsuit, the party that requests such a measure will have to guarantee payment of damages and lost profits if the lawsuit is not filed.
If the request is made when filing the lawsuit, the request of the plaintiff and the guarantee will be sufficient for the measure requested to be granted.

The order to a person to stay where litigation is taking place means that such person cannot leave the jurisdiction of the judge where the litigation takes place unless he or she leaves a representative with instructions and duly funded to comply with the judgment, if any.

If the person requested not to leave the jurisdiction of the judge violates the prohibition, he or she will be responsible for a felony according to the Criminal Code, regardless of whether enforcement measures are taken to return that person to the place where the judgment is taking place.

**Confinement of assets**

Confinement of assets will take place when there is reasonable fear that the assets given as guarantee, or against which an action *in rem* will be executed, will be disposed of, hidden, dissipated, transferred or be insufficient; or when exercising a personal action, if the person against whom such an action is brought has no other assets except those against which the action will be executed, and there is reasonable fear that they will be disposed of, hidden, dissipated or transferred.

The judge will always grant the request of confinement of assets if the party that so requests (1) demonstrates that he or she has credit that has matured; (2) expresses the value of the claims or the things claimed, giving specific details of the things claimed; (3) claims under oath the reasons why he or she has reasonable fear that the assets given as guarantee, or against which the action *in rem* will be executed, will be disposed of, hidden, dissipated, or transferred; (4) in personal actions, states under oath that the debtor has no other known assets different from those against which the action will be brought; he or she will also state the reason why he or she has reasonable fear that the debtor will hide, dissipate or transfer the assets, unless it is cash or a deposit made with credit institutions or other assets dissipated that can easily be replaced; and (5) guarantees damages and lost profits that the measure could produce for the debtor if the lawsuit is not filed in the following three days or, if the lawsuit is filed, the other party is acquitted.

**Interim measures**

Interim measures can be granted either before the proceedings or during the proceedings. If requested before the proceedings, the measure will be granted without hearing from the other party, if all the requisites are met. If requested after the proceedings have commenced, the judge will notify the other party of the request and will give him or her the right to answer to such a request.

### iii Class actions

Class actions are duly regulated in Mexico in the Code of Civil Procedure.

The main guidelines for class actions are as follows:

- the competent courts to review class action claims are federal courts;
- class action claims can only be brought with respect to relations of consumers of goods or services, private or public and environmental;
- the entities or persons that can bring a class action are very limited;
- there are only three types of class action: ‘diffuse’ class actions, class actions ‘in the strict sense’ and class actions of an ‘individual homogeneous nature’;

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• diffuse class actions are indivisible and are brought to claim diffuse rights, and the holders of such rights are an undetermined collectivity with the purpose of claiming the repair of the damage caused to a group of persons;
• class actions in the strict sense are indivisible and are brought to claim rights and collective interests, and the holders of such rights are a determined or determinable collective with the purpose of claiming the repair of the damage caused to individuals within such a group; and
• actions of an individual homogeneous nature are divisible and are brought to claim rights and individual interests that have a collective incidence, with the purpose of obtaining from a third party forceful compliance with an agreement or its rescission;

e class actions can be of a declarative, constitutive or condemnatory nature;
f in class actions interim measures can be requested; and
g the judges have the right to issue interim measures.

iv Representation in proceedings
Anyone can act by himself or herself, or through an attorney in fact, in proceedings as long as he or she has legal capacity to do so. In the case of corporations or legal entities, they have to be represented either by their legal representatives, which could be their directors, or by anyone with sufficient powers granted by such a corporation.

v Service out of the jurisdiction
Any person may be served with documents outside the jurisdiction, as long as their domicile is located outside the jurisdiction of the competent court that will hear the case at stake.

In such cases, the requesting party should inform the court that the address of the defendant is outside its jurisdiction, provide to the court the address of the defendant and request the court to issue a formal written request to the competent judge to serve summons to such a party.

vi Enforcement of foreign judgments
The Federal Code of Civil Procedure establishes that foreign judgments can be enforced in Mexico if they comply with the following:

a formalities related to letters rogatory were complied with;
b they were not issued in an *in rem* action;
c the foreign judge had jurisdiction according to international rules consistent with those mentioned in Mexican law;
d the defendant was notified or served personally;
e the judgment cannot be overturned or modified by any means in the jurisdiction where it was issued;
f the action brought in such a jurisdiction is not pending between the same parties before Mexican courts, and the case was not first heard in Mexican courts;
g the fulfilment of the obligation ordered is not contrary to Mexican public policy; and
h the judgment fulfils the conditions to be considered authentic (apostilled).
Mexican courts can deny the execution of foreign judgments, even if they comply with all the requisites mentioned above, if it is proven that Mexican judgments are not enforced in the jurisdiction where the judgment was issued.

For a foreign judgment to be executed, it has to be requested through a letter rogatory and this must comply with the following:

a) it must have an authentic copy of the judgment, award or judicial resolution;

b) it must have authentic copies proving that summons were served personally and that the judgment cannot be overturned or modified by any means;

c) it is translated into Spanish; and

d) the party that wishes to execute such a judgment gives an address where the homologation will take place.

The competent court to enforce a foreign judgment is the court of the domicile of the defendant or where the defendant has its assets.

Once the court receives the request for executing the foreign judgment, it will grant the parties nine days to lodge defences or exercise their rights. If they offer evidence, the court will set a date for a hearing. After the hearing the court will issue its judgment.

vii Assistance to foreign courts

Mexican courts are very open to assisting foreign courts. The Federal Code of Civil Procedure has a chapter devoted to assisting foreign courts, and it establishes that requests from foreign courts do not have to be legalised if they are transmitted by official authorities but that they do have to be translated into Spanish.

Mexican courts can assist foreign courts in any aspect, since the Federal Code of Civil Procedure does not establish any prohibition of assistance.

Letters rogatory have to be delivered to the required authority either through the parties, judicially or by diplomatic or consular agents or by the central authority of any of the countries involved in this process.

Once the letters rogatory are received by the court that will assist the foreign court, the court will assist the foreign court according to the applicable laws, but the foreign court can request the local court to avoid local formalities or to use specific formalities other than local formalities, if this is not in violation of Mexican public policy.

viii Access to court files

During the proceedings, court files are private; that is, only the parties in litigation or those authorised by the parties in litigation can access the court files.

After the proceedings, the judicial docket becomes public.

ix Litigation funding

It is not common for a third party to fund litigation, but it is not prohibited in Mexico.

IV LEGAL PRACTICE

i Conflicts of interests and Chinese walls

An attorney helping or representing different or several parties with opposing interests, either in the same case or in different cases, or accepting to represent first one of the parties and
then the other, is criminally liable for up to three years in prison, plus the payment of a fine and suspension of his or her right to exercise the profession of attorney for the same number of years.

Chinese walls are not employed in Mexico; as practitioners are aware of the broadness of the description of criminal liability in this area, members of the same law firm are very conscious of the need not to represent parties with opposing interests.

**ii  Money laundering, proceeds of crime and funds related to terrorism**

Mexican law does not establish specific responsibilities for lawyers with respect to money laundering, proceeds of crime and funds related to terrorism.

Any parties involved in any of these activities are treated in the same way, with a penalty of up to 40 years in prison.

**iii  Data protection**

The legal framework governing the processing of personal data is the Federal Law of Protection of Personal Data in the Possession of Individuals.

The Law is applicable to everyone, except credit bureaus and entities whose purpose is the collection and storage of personal data, for their own use, with no intention of commercial exploitation.

For the purposes of data protection, the individual whose data is being used can request that his or her information be deleted, and the entity that has such data has the obligation to delete it, unless:

a. it is related to parties in a private, social or administrative agreement, and such information is necessary for the development and fulfilment of such a contract;

b. the law requires it;

c. it is a barrier to judicial or administrative acts related to tax obligations, the investigation of crimes and updating of administrative sanctions;

d. it is necessary to protect the legal interests of the owner;

e. it is necessary for the purposes of public interest;

f. it is necessary to fulfil a legal obligation of the owner; or

g. it is being used in a specific treatment for the purposes of prevention or medical diagnosis, or health issues, as long as such a treatment is made by a health professional subject to secrecy.

Transfer or sharing of personal data with third parties, national or foreign, can be made without the consent of the owner of such information in the following cases:

a. when such a transfer is established in a law or treaty to which Mexico is a party;

b. when such a transfer is necessary for the prevention of disease or for medical diagnosis, sanitary aid, medical treatment or sanitary services;

c. when such a transfer is made to controlling companies, subsidiaries or affiliated companies under common control of the responsible individual or a flagship company or any other company of the same group of the individual responsible for the information that operates under the same principles and internal policies;

d. when such a transfer has to be made by virtue of an agreement entered into or that will be entered into by the owner, the person responsible or a third party;

e. when such a transfer is necessary and legally requested for the purpose of maintaining a public interest or for the administration of justice;
when such a transfer is necessary for the recognition, exercise or defence of certain rights in judicial proceedings; or

when such a transfer is needed to maintain and fulfil a legal relationship between the individual responsible for the information and its owner.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege
As a general rule all documents may be considered as privileged, understanding such a concept in the sense that parties have no obligation to give such documents to another party, unless so requested by an authority.

ii Production of documents
Even though parties are not obliged to open their files to other parties, this general rule has an exception. This exception exists where one of the parties requests specific documents from the other. The request has to be very clear; that is, establishing date, sender, recipient, etc.

Therefore, if parties in litigation do not have in their possession certain documents (documents that are the basis for their claim or defence), they can request certified copies of such documents from the person that has them in his or her possession. Once such a request has been made, if the requesting party can prove to the court that it has requested a document but the document has not been delivered by the other party, the court can order the other party to give the certified copy requested.

Full discovery is not permitted in Mexico.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation
Mexico accepts and to some extent encourages alternative dispute resolution (ADR) procedures to alleviate pressure on the courts from the overwhelming number of cases that have to be resolved.

ii Arbitration
Arbitration is very widely used in important commercial transactions. The Commerce Code has a specific chapter dealing with arbitration, and incorporates the UNCITRAL Model Law.

Awards issued by arbitrators are unappealable in Mexico, but the parties to arbitration may seek to nullify awards issued by arbitrators if any of the following occur:

a the party that requests the nullity proves:

• one of the parties to the arbitration agreement is affected by some legal incapacity, or the arbitration agreement is invalid by virtue of the law to which the parties have submitted it, or Mexican law;
• it was not duly notified of the appointment of an arbitrator or of the arbitration proceedings, or has not been able, for whatever reason, to assert its rights;
• the award refers to a dispute not contemplated in the arbitration agreement or contains decisions that exceed the terms of the arbitration agreement;
• the composition of the arbitral award or the arbitral proceeding does not comply with the agreement executed by the parties; or
the judge verifies that under Mexican law the subject matter of the dispute cannot be agreed through arbitration or that the award is contrary to public policy.

The statute of limitations for filing the nullification of an award is three months counted from the date the award was notified to the parties. The time frame for a nullity action is around one year.

Enforcement of arbitral awards can be denied in Mexico if the party against whom the award will be enforced demonstrates any of the causes for nullifying an award.

The general trend is that arbitral awards are enforced in Mexico.

Mediation

In recent years, mediation has played a very important role in resolving conflicts in Mexico. Along with the Mexico City National Chamber of Commerce and the Mexican Mediation Institute, local courts encourage mediation through their Centres for Alternative Justice.

Other forms of alternative dispute resolution

There are several other forms of ADR, which may at some point have an involvement with judicial proceedings.

During judicial proceedings, the court encourages the parties to reconcile their differences in hearings. Conciliators try to get parties to finalise litigation amicably and enter into an agreement.

The law also accepts that the parties to a dispute may appoint one expert, so that the expert renders his or her expert opinion and his or her decision is binding for the parties.

OUTLOOK AND CONCLUSIONS

The evolving Mexican legal system aims to be considered one of the most modern legal systems in the 21st century, and to achieve this legislators have been working hard to approve up-to-date laws.
Chapter 25

NETHERLANDS

Eelco Meerdink¹

I  INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

The Dutch judiciary comprises 11 district courts, four courts of appeal and the Supreme Court. District courts have jurisdiction over most civil matters in first instance. The cantonal division of the district courts handles employment, tenant, consumer and small claims. Parties can appeal from most district court decisions to the courts of appeal, which can review the case de novo, subject only to the grounds of appeal. The Supreme Court rules on appeals against decisions of courts of appeal, but does not assess facts. The Supreme Court also has special competence to decide on lower courts’ preliminary questions of law.

Bigger cases are usually handled by district court panels of three judges, while a single judge typically resides over smaller cases and cases in summary proceedings. The Dutch judiciary consists mostly of trained judges and, to some extent, former practitioners. It is renowned for its competence, integrity, independence and impartiality. The Dutch court system does not feature any juries, nor does it provide for any discovery or disclosure phase prior to initiation of the proceedings on the merits.

Specialised divisions of the courts deal with specific types of disputes. Most corporate disputes are handled by the Enterprise Chamber of the Amsterdam Court of Appeal (e.g., inquiry proceedings and squeeze-out proceedings). The district and appeal courts in The Hague have exclusive competence to deal with certain patent and trademark cases. The Amsterdam Court of Appeal has exclusive jurisdiction to declare class action settlements binding. The Netherlands Commercial Court (NCC), a specialised chamber of the Amsterdam District Court and Amsterdam Court of Appeal, deals with international disputes. The NCC allows parties to conduct proceedings entirely in English and in an efficient manner and state-of-the-art court, thus bolstering the status of the Netherlands as a venue for resolving international disputes, even where such disputes are between non-Dutch parties and are not governed by Dutch law.

The Netherlands has a long and stable tradition as a venue for international arbitration – for both commercial arbitration and investor-state and state-to-state arbitration (The Hague, with its Permanent Court of Arbitration, often being a venue of choice). Legislation and case law repeatedly reiterate the policy of supporting arbitration. The arbitration act, which is part of the Code of Civil Procedure (CCP), is modelled on the UNCITRAL model law and has been recently updated.

Mediation is frequently used to resolve disputes as well, although not as frequently as in the United States or United Kingdom (although recent initiatives seek to broaden the

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interest in mediation as a method of commercial dispute resolution). In keeping with its voluntary nature, there are very few mandatory rules that apply to mediations conducted in the Netherlands.

II THE YEAR IN REVIEW

The Netherlands seeks to become a more attractive place for resolving international disputes. On 11 December 2018, the bill that introduces the NCC has been approved by parliament and became law on 1 January 2019. The NCC aims to become a court of preference for international commercial matters. The government recognises that in the globalised economy, English has become the primary business language, and that there is an increasing demand for dispute resolution in English also in jurisdictions that do not have English as the primary language. This is particularly true for the Netherlands, which has one of the most open economies in the world – with many multinational companies having substantial business presence in the Netherlands and a growing expat community working there. The ability to conduct proceedings in English will add to the Netherlands’ favourable international business climate. The NCC also seeks to compete with London, noting that litigation costs are significantly higher in London, which, moreover, may become a less attractive venue post-Brexit. The government also expects that the NCC is a viable alternative for parties who find international arbitration too expensive. It is expected that proceedings before the NCC are cost-effective, since court costs are fixed at a relatively low amount and Dutch courts generally do not award actual costs against the losing party (but rather use low standardised fixed-cost awards). In addition, Dutch civil proceedings are generally less costly because they do not feature a burdensome discovery or disclosure phase that typically makes proceedings in certain common law jurisdictions more expensive.

The jurisdiction of the NCC will be based on a forum choice by the parties to a contract or by parties selecting the court on an ad hoc basis (which also may be for alleged tort claims). The NCC and Netherlands Commercial Court of Appeal are special chambers of the Amsterdam District Court and the Amsterdam Court of Appeal. The rules of the Dutch Code of Civil Procedure also apply to NCC proceedings. The NCC has its own procedural court regulations, which are tailored to the complex, international disputes it aims to resolve. The NCC envisages active case management by the court, digital submissions, use of a state-of-the-art hearing facility, and judges selected specifically for their fluency in English and competence in complex international commercial cases.

Class actions are another area of Dutch law drawing international attention. Particularly since global resolution of securities class actions through US courts was seriously curtailed by the Morrison judgment in 2000, non-US investors that suffered losses from purchases on non-US securities exchanges sought out different venues to settle class actions with foreign issuers. The Netherlands proved a suitable jurisdiction. Ever since, various global class action settlements have been declared binding by the Amsterdam Court of Appeal, and, also recently, litigation funders and US plaintiff firms have set up several vehicles that seek to bring global litigation to the Dutch jurisdiction (e.g., regarding Dieselgate and BP Deepwater Horizon) with an aim to ultimately reach binding class actions settlements (see, on the legal framework for class actions generally, Section III.iii). In 2018, one of the biggest class action settlements in Europe to date was finally resolved. Ageas, the successor of the Belgian-Dutch

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2 US Supreme Court, 24 June 2010, No. 08-1191, Morrison v. National Australia Bank Ltd.
financial institution Fortis, which was bailed out during the financial crisis, had reached a settlement with various claim organisations that represented Fortis shareholders. An initial settlement made a distinction between active and non-active claimants, which distinction the Amsterdam Court of Appeal did not find reasonable. Having adjusted the settlement, the parties again requested the court to declare their settlement binding on the class, on an opt-out basis. The Amsterdam Court of Appeal did so in its judgment of 13 July 2018.3 An amount in excess of €1.3 billion was made available for shareholders of Fortis who held shares between 28 February 2007 and 14 October 2008. Ageas had the option to terminate the settlement if the compensation amount represented by opt-out notices exceeded 5 per cent of the total settlement amount, but decided not to invoke that option given the very limited number of opt-out notices received, thus finally ending a decade-long legal battle arising out of alleged misleading statements surrounding the takeover by Fortis of ABN AMRO Bank in 2007.

New class actions were allowed to proceed last year as well. Some of those highlight the liberal approach Dutch courts adopt in assuming jurisdiction over class action suits by international investors. In two recent rulings, two Dutch district courts have assumed jurisdiction to review class actions of international investors against multinationals, despite similar proceedings in other countries.

The Rotterdam District Court declared that it has jurisdiction over a claim submitted by investors from different countries against Brazilian oil company Petrobras and its Dutch affiliates, where claimants claimed to have suffered losses owing to corruption within Petrobras.4 Investors who were excluded from a prior US class action settlement of almost US$3 billion joined forces in a Dutch stichting5 and started legal proceedings against Petrobras and several Dutch subsidiaries that had issued Petrobras-secured bonds. The Court ruled that the allegations against Petrobras and the allegations against its Dutch affiliates involved the same fact pattern and same claims, and therefore also assumed jurisdiction regarding the Brazilian company. Petrobras argued that proceedings in the Netherlands should be stayed because of pending litigation in both the United States (for investors that had opted out of the class action settlement) and Brazil, regarding almost identical claims. The court rejected that argument on the basis that there was too much uncertainty about the further course and timing of those proceedings.

The Amsterdam District Court ruled that it was competent to hear claims against Steinhoff by a group of investors that had allegedly suffered losses owing to accounting fraud by Steinhoff.6 Steinhoff argued that the Dutch court lacked jurisdiction in view of pending litigation in Germany, and (alternatively) that the legal proceedings in the Netherlands should be stayed pending the decision of the German court. An investor had started prior litigation against Steinhoff in Germany, and an application had been made to the German Higher Regional Court to have the case considered under the Capital Markets Model Case Act (KapMug). Steinhoff argued that as the KapMug could lead to the setting of a precedent that would also apply to the claimants in the Dutch case, so the Dutch court should give precedence to the German proceedings. The Amsterdam District Court considered that the proceedings in Germany did not involve the same claimant, since the investor who started

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5 A Dutch legal entity with no members or share capital, that exists for a specific purpose.
the proceedings in Germany was not represented in the Dutch proceedings, and that in view of various limitations inherent to KapMug proceedings a stay in favour of those proceedings was not appropriate.

III COURT PROCEDURE

i Overview of court procedure

The CCP contains most rules of civil procedure, though several important procedural rules have been developed or further defined in case law. The courts’ procedural regulations set out rules and guidelines of a more practical nature (e.g., rules for filing submissions, deadlines and extensions). Rules applicable to court of appeal proceedings are fairly similar to those for district court proceedings.

A Dutch court may only base its decision on facts or rights that are undisputed by the parties, or which are proven during the proceedings. Statements made by a party that are not sufficiently disputed by the other party will be considered as undisputed facts. In general, the burden of proof will be on the party that invokes the legal consequences of the facts or rights alleged by it. Evidence may be presented by all possible means such as deeds, documents, judgments, witnesses, expert reports or a court inspection of certain premises. The court is generally free in its assessment of the evidence introduced by the parties.

Historically, civil proceedings in the Netherlands have been focused on documentary evidence, rather than on presentation of evidence during a hearing and witness examinations before the court. Today, there is still no discovery or disclosure phase at the onset of litigation; however, there is an increased emphasis on early case management by the court. In addition, the use of the motion to seize evidence and the motion for disclosure has proliferated, with courts progressively supporting a wider use of those.

Moreover, pretrial witness and expert hearings have always been important tools for evidence gathering. A party may request that the court holds a preliminary witness hearing concerning certain matters if proceedings on the merits have not yet been initiated, or if such proceedings are already pending. The reason for a preliminary witness hearing may be (1) to preserve the testimony of a witness who might be unavailable later; (2) to preserve the quality of a testimony (memories tend to fade); or (3) to assess the chances of success of the proceedings. The court may refuse to allow a preliminary witness hearing in the event that it holds that the request for such hearing or report is a misuse of procedural rights. This ground is rather narrow. Generally, a person who has been called as a witness must testify. The court itself will examine the witnesses. Parties as well as counsel may pose questions after the court has examined the witnesses, but there is no system of cross-examination. The procedure for expert hearings is similar.

The government has drafted a proposal for modernisation of the rules of evidence, proposing *inter alia* a stronger focus of evidence gathering at the beginning of litigation. It is not expected that the proposal will become law any time soon, if at all (see also Section VII).

ii Procedures and time frames

*Standard procedure*

Under Dutch law, the standard procedure is initiated by a writ of summons. After service of the writ, it is sent to the court. The writ contains information on the parties, the claim and its legal grounds, evidence supporting the legal grounds and offer of witness evidence, the basis for the court’s jurisdiction, and known defences against the claim and rebuttal of
those. Subsequently, the court sets a time limit for the defendant to submit a statement of defence, including all defences, motions and counterclaims (usually six weeks). After the statement of defence (or after the statement of defence in counterclaim, if a counterclaim is filed), the court usually orders a personal appearance of the parties – to provide information or to attempt to reach a settlement. The court may also provide the parties, upon request, with an opportunity to plead the case during such a hearing. Timing of the hearing primarily depends on how busy the court docket is. It usually takes at least several months after the last submission for a case on the merits, but hearing dates can be set more efficiently by reserving dates up front (using active early case management). In a standard procedure the hearing is followed by a final judgment or an interim judgment. An interim judgment may deal with a part of the claim or instruct a party to prove certain points and produce certain evidence. It generally takes between three and six months for the final judgement to be rendered, even though most courts strive to render judgment faster.

The completion of proceedings on the merits in a district court usually takes a year, but may take substantially longer depending on the procedural complexities, such as the number of submissions, motions and extensions of time limits. The losing party will be ordered to reimburse the winning party for its court costs and legal fees. The order for reimbursement is not for actual costs but for a fixed amount, dependent only on the interest at stake and the complexity of the litigation. The fixed amount is usually a small percentage of the actual costs incurred by the winning party.

Appeal
A party can lodge an appeal against a final judgment within three months of the date of the challenged judgment (four weeks, if against a judgment in summary proceedings). The court of appeal may assess the case based on both the facts and the applicable law. An appeal in cassation can be brought before the Supreme Court within three months of the judgment in appeal. A Supreme Court appeal may only be based on misapplication of the law or non-compliance with essential procedural requirements. An appeal suspends the enforceability of the challenged judgment, unless the judgment was declared provisionally enforceable.

Motion practice
Certain motions are expressly mentioned in the CCP, such as the motion to dismiss for lack of jurisdiction, the motion for the production of evidence, the motion for security and the motion to summon a third party to appear in the proceedings (e.g., for indemnification). Parties may also lodge motions that have no specific basis in the CCP. There are no general motions to dismiss a case for lack of stating sufficient facts to support the legal grounds, or for not passing the statute of limitations, or on any summary basis. However, the court may decide on its own initiative or on the application of a party to deal with certain issues first, in the interests of procedural efficiency (e.g., it deals first with the defence that the claim is time-barred).

Motions can be made by parties in the writ of summons or in a written statement, depending on the stage of the proceedings. Motions usually suspend the case on the merits. However, the court may determine otherwise – for instance, when it deems that a motion is apparently used to unduly delay the proceedings on the merits.
**Urgent or interim relief**

A plaintiff may apply to the summary proceedings section of the district court to obtain provisional measures against another party. The plaintiff will have to demonstrate an urgent interest in obtaining such provisional measure. Designated procedural rules ensure that proceedings can lead to a decision fast. Summary proceedings may be initiated regardless of whether proceedings on the merits have been or will be opened. The court hearing the main proceedings is not prejudiced by the summary judgment. Summary proceedings are initiated by service of a writ of summons. A hearing, normally supported by written briefs, can take place within a few days or a few weeks after service of the writ. The decision of the court is normally rendered one to two weeks after the hearing. As a result, the entire proceedings normally take only a few weeks. In exceptional circumstances, a decision may be obtained within a few days or even within a few hours.

Summary proceedings can be used for a wide variety of provisional measures. They are often used to order a party to act or stop acting in a certain way (usually reinforced by penalties). For example, to obtain an order forcing the defendant to resume performance of a continuing contractual obligation, or to obtain an injunction against infringement on an intellectual property right. Summary proceedings may also be used to obtain payment, when the obligation to pay is not in dispute (but the debtor simply cannot pay) or there is no reasonable defence against the claim for payment (there should be a high probability that the claim would be awarded in a case on the merits). Summary proceedings are popular and widely used, as they enable a party to quickly get resolution of the dispute. All injunctions are normally immediately enforceable notwithstanding appeal.

**Conservatory or pre-judgment attachments**

An effective means to secure and preserve assets until a final resolution of a dispute is the pre-judgment attachment. It prevents the debtor from frustrating recovery and ensures that, at the end of the proceedings, there are at least still assets to secure (partial) payment. If substantial assets are frozen, this may sometimes be sufficient commercial leverage to settle the dispute. A pre-judgment attachment is made by first requesting the district court, *ex parte*, to grant leave for a pre-judgment attachment. Usually this means the claimant will have to show a draft writ of summons, which sets out the reasons for the claim. Any party who appears to have a justified claim may request a pre-judgment attachment, and in practice this is nearly always granted. A debtor can object to an attachment in summary proceedings or proceedings on the merits. The court will typically allow the debtor’s objections and lift the attachment if the claim for which the attachment is made appears to be unjustified or the debtor provides sufficient security for the claim. If assets are successfully located and frozen in the Netherlands, this may create jurisdiction for the district court in which the assets are located (unless there are other means to secure an enforceable title, e.g., on the basis of the Brussels I bis Regulation, or of a treaty). A pre-judgment attachment on intellectual property rights is possible in case of alleged infringement of intellectual property rights, in order to preserve relevant evidence.

After assets are frozen, the party who has successfully done so must start litigation or arbitration proceedings on the merits within the period ordered by the court, unless court proceedings have been already initiated. The party lodging the attachment is liable for damages caused by the attachment, if its claim is ultimately rejected. However, if the claimant
is successful and obtains a final enforceable judgment, then the pre-judgment attachment is converted into an executory attachment. That enables the plaintiff to finally execute against the assets of the defendant.

As of January 2017, a European cross-border pre-judgment attachment can also be used, based on the European account preservation order (EAPO). The EAPO allows a creditor located in an EU Member State to attach funds in a bank account of its debtor located in another Member State using leave provided by the courts of the Member State that will have jurisdiction to rule on proceedings on the merits. To protect the debtor, the court can require the creditor to provide security. An EAPO can be executed within the EU without any special procedure or declaration of enforceability.

Inquiry proceedings

Inquiry proceedings are an effective (quick and relatively cheap) tool for shareholders to address perceived mismanagement in a Dutch company (BV or NV). The proceedings are frequently used, often by shareholder activists who seek to influence the policy of a listed company. Also, it is typically the venue where takeover battles are adjudicated, especially since Dutch companies can deploy various protective measures against hostile takeovers, which can be scrutinised by the Enterprise Chamber. The right of inquiry entitles shareholders (provided they meet statutory threshold requirements) to request the Enterprise Chamber of the Amsterdam Court of Appeal to investigate the affairs of a Dutch company (BV or NV). The court will order an investigation if there are well-founded reasons to doubt the correctness of the policy or course of action of a company (e.g., not respecting shareholders’ legal rights, conflict of interests, deadlock situations, inadequate or incorrect provision of information). The Enterprise Chamber can also order immediate temporary measures (e.g., prohibition on taking certain actions, suspension of directors, appointment of a temporary director or supervisory director with exceptional powers, suspension of a corporate resolution, suspension of voting powers, change of authorities of the company’s bodies, transfer of shares). Immediate relief requests are popular and may be very effective, and the court often handles them before the inquiry request itself. If the court has ordered an investigation and the investigators’ report has been made, the shareholders can request the Enterprise Chamber to determine that mismanagement has taken place and ask to take definitive measures (e.g., dismissal of directors, suspension or annulment of a corporate resolution). The Enterprise Chamber does not deal with liability of directors against the company or against shareholders. If mismanagement is established, shareholders usually file a civil liability suit in the district court to seek to obtain damages.

iii Class actions

As briefly mentioned above (see Section II), the Netherlands is well known for facilitating both class actions and the settlement of mass claims on an opt-out basis. It is important to distinguish the rules on class actions (also referred to as ‘collective actions’) and those on the settlement of mass claims (Act on the Collective Settlement of Mass Claims).

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8 Governed by Article 3:305a Civil Code.
9 Articles 7:907-7:910 Civil Code and Articles 1013-1018a CCP.
Class actions
A class action can be filed (starting in the district court) to protect common or similar interests of prejudiced parties. A foundation or association (not an individual claimant) that has as its stated purpose the protection of common or similar interests of prejudiced parties may seek declaratory relief on behalf such persons. Typically, the declaratory relief sought is a judgment holding the defendant liable for certain acts or omissions. Damages cannot be awarded in class action litigation. But a judgment holding the defendant liable for damages (without actually awarding damages) may be used by individual claimants to sue for damages (as liability has already been determined) and is usually a powerful tool to force a defendant to accept a settlement using the collective settlement provisions. Currently, a bill is being debated in parliament that proposes to abolish the existing ban on recovering monetary damages through class action. The bill also increases eligibility requirements for interest groups that wish to start a class action. To prevent an unnecessary burden or jeopardy for the party being sued when multiple interest groups wish to start a class action on the same subject, the bill allows the court to designate one group to act as principal in the procedure. The judgment rendered in a class action suit on monetary damages can be declared binding once the draft bill comes into force.

Collective settlements
A mass claim settlement is a settlement between a foundation (not an individual claimant) representing persons who suffered a loss (akin to a ‘class’), and a party that allegedly caused the damages, who agrees to compensate the class. Prior court litigation is not a prerequisite for such a settlement. At the joint request of the parties to the settlement agreement, the Amsterdam Court of Appeal can declare the settlement binding on all potential claimants who have not opted out. The agreement must be concluded between potentially liable parties, and one or more foundations or associations representing groups of persons for whose benefit the settlement agreement was concluded (‘interested persons’). The court will test, inter alia, the reasonableness of the settlement, whether the foundation or association adequately represents the interested persons and whether the interested persons have been properly notified and thus have had an opportunity to object and to opt out. If the court declares the settlement agreement binding, the agreement binds all persons covered by its terms, unless they have opted out within a certain time period after the binding declaration. The opt-out period is determined by the court, but is at least three months. Case law shows that the court – when deciding whether to declare a settlement binding – takes into account the rules promulgated in the Claim Code, which is a self-regulation initiative that aims to improve class settlement procedures and the governance structure of the entities acting for plaintiffs.

Whether foreign courts will recognise and enforce a binding declaration by the court depends ultimately on the local procedural rules of such courts. Courts within the EU most likely must do so because the decision to declare a settlement binding is a ‘judgment’ as referred to in Article 2(a) Brussels I bis Regulation.10

Particularly since the US Supreme Court, in the Morrison judgment, rejected ‘foreign cubed’ class actions – meaning that class action judgments or settlements in the United States were typically limited to purchases and sales of securities in the United States – the

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10 Regulation (EU) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Brussels I bis Regulation)
Netherlands is often used for settlement of all other shareholders’ claims not covered by the US settlement. Several class actions settlements, which were declared binding by the Amsterdam court for non-US claimants, also had a parallel US settlement for US claimants. Examples are the Shell Reserves case\(^\text{11}\) and the Converium case.\(^\text{12}\) Both cases also illustrate the international scope of Dutch mass claims settlements. In its decision of 29 May 2009, the Amsterdam Court of Appeal declared the settlement in the Shell Reserves case binding (shareholders had argued they suffered damages because of misleading statements of oil reserves in Shell’s accounts). The settlement was made between the Dutch and English Shell entities and a Dutch foundation representing mostly non-Dutch shareholders residing in dozens of jurisdictions all over the world. In the Converium case (also involving shareholders that alleged damages due to misleading statements), none of the potentially liable parties were Dutch and only a very limited number of potential claimants were domiciled in the Netherlands. Yet the court nevertheless assumed jurisdiction, showing that it will do so even if only a few interested persons are domiciled in the Netherlands and provided one of the parties to the settlement agreement is a Dutch entity (like a Dutch stichting (foundation) representing the interests of the interested persons).

The jurisdictional basis for approving mass claims settlements should be distinguished from the jurisdictional basis of the Dutch court in class action suits. For class action suits (collective actions), the common basis for jurisdiction is typically the domicile of the defendant or place where the harmful event occurred. The Petrobras and Steinhoff cases described above (Section II) show how the Netherlands can be used as a venue for cross-border class actions by including Dutch companies as defendants or co-defendants, which is significant as many multinationals use Dutch companies as holding or finance companies within their group, thus creating potential class action jurisdiction in the Netherlands. The judgments further illustrate how Dutch courts are willing to take on cases even when similar proceedings are pending in other jurisdictions. The BP Deepwater Horizon case is an example of a Dutch court refusing to assert jurisdiction in a class action suit. The Amsterdam Court of Appeal dismissed a collective action lodged by the Dutch shareholders’ association VEB, which had sought a declaratory judgment for liability against BP on behalf of a certain group of shareholders relating to the Deepwater Horizon accident in the Gulf of Mexico.\(^\text{13}\) The Court ruled that the fact that shareholders might have held securities in the Netherlands was insufficient to confer jurisdiction on the Dutch courts. The judgments further illustrate how Dutch courts are willing to take on cases even when similar proceedings are pending in other jurisdictions. The BP Deepwater Horizon case is an example of a Dutch court refusing to assert jurisdiction in a class action suit. The Amsterdam Court of Appeal dismissed a collective action lodged by the Dutch shareholders’ association VEB, which had sought a declaratory judgment for liability against BP on behalf of a certain group of shareholders relating to the Deepwater Horizon accident in the Gulf of Mexico.\(^\text{13}\) The Court ruled that the fact that shareholders might have held securities in the Netherlands was insufficient to confer jurisdiction on the Dutch court. The court referred to the Universal Music judgment of the European Court of Justice.\(^\text{14}\) Applying that ruling to the facts, the court denied jurisdiction because the damages suffered were merely financial damages on a securities account in the Netherlands, while no other relevant factors justified jurisdiction of the Dutch courts.


\(^{14}\) European Court of Justice, 16 June 2016, Case C-12/15, ECLI:EU:C:2016:449, holding that ‘Article 5(3) of Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that, in a situation such as that in the main proceedings, the “place where the harmful event occurred” may not be construed as being, failing any other connecting factors, the place in a Member State where the damage occurred, when that damage consists exclusively of financial damage which materialises directly in the applicant’s bank account and is the direct result of an unlawful act committed in another Member State.’
The jurisdiction of the Dutch court, when declaring a class action settlement binding, is structured differently. The parties to the settlement ask the Amsterdam Court of Appeal to declare the settlement binding on the entire class – i.e., all of the allegedly injured persons. For jurisdictional purposes, those persons are defendants, because the parties that settled effectively file a claim against them to settle their potential claims in consideration for the proposed settlement amount. The contracting parties send notice of the proposed settlement to the class, and class members may object to it and appear before the court. So, since the class members are considered defendants, if some of those are domiciled in the Netherlands, that provides a basis for jurisdiction, and others can then also be sued in the Netherlands based on close connection of the claim against them with the claim against the defendants domiciled in the Netherlands.15

**Representation in proceedings**

Representation by a lawyer admitted to the Dutch Bar Association is mandatory in Dutch civil litigation procedures. Parties to litigation before the cantonal division of the district court and the defendant in summary proceedings are exempt from mandatory representation. The same rules apply to both natural and legal persons.

**Service out of the jurisdiction**

The EU Service Regulation applies in the Netherlands.16 To serve a legal document on someone in another EU Member State, the sender submits the document to the Dutch transmitting agency. The agency will send the document to the receiving agency of the EU Member State. The receiving agency will, in turn, serve the document on the recipient. Furthermore, the Netherlands is a party to the Hague Service Convention, which applies to the service of judicial and extrajudicial documents in civil or commercial matters.17 Under this Convention, the sender can submit a legal document to the competent Dutch authority, which will then forward the document to the designated central authority in the other contracting state. The central authority ensures that the documents are served on the recipient. With regard to the service of documents in EU Member States, the EU Regulation prevails over the Hague Service Convention. When neither the EU Service Regulation nor the Hague Service Convention applies, common service rules of the Code of Civil Procedure provide roughly for the same procedure as under the Convention. However, instead of sending the document to a central authority, the Dutch authorities send it to a diplomatic or consular official in the receiving state.

15 Based on Article 8(1) Regulation (EU) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Brussels 1 bis Regulation), Article 6(1) Lugano Convention of 30 October 2007, or, for parties in countries that are not member of EU/Lugano Convention: Article 107 CCP. Usually the settlement will be structured in such a way that it will be executed in the Netherlands, which provides a separate jurisdictional ground based on Article 7(1) Brussels 1 bis Regulation. The Convertium decision also mentioned additional factors that the court used to assume jurisdiction, see Amsterdam Court of Appeal, 17 January 2012, ECLI:NL:GHAMS:2012:BV1026.


Enforcement of foreign judgments

Foreign judgments can be enforced in the Netherlands after being declared enforceable by a Dutch court in an *exequatur* procedure, save that no *exequatur* is required for the enforcement of decisions concerning civil and commercial matters originating from EU Member States.\(^\text{18}\) If an *exequatur* is required to enforce a foreign judgment, the Dutch court may recognise and essentially copy the foreign judgment, without reviewing it on the merits, if four conditions are met: (1) the foreign court’s jurisdiction was based on an internationally generally accepted ground; (2) due process was observed in the foreign proceedings; (3) recognition does not violate Dutch public policy; and (4) the judgment is not inconsistent with any other judgment that is capable of recognition in the Netherlands.\(^\text{19}\) Ground (3) of this test has increasingly become a ground for litigation on refusal of recognition and enforcement, particularly where the circumstances surrounding the foreign court’s judgment are suspicious.\(^\text{20}\)

Assistance to foreign courts

Courts within the EU can either request to take evidence directly in the Netherlands or request that a Dutch district court takes the evidence.\(^\text{21}\) In the latter case, a foreign court can approach the competent Dutch court directly. Another basis for assistance to foreign courts is the Hague Evidence Convention, which provides that foreign judicial authorities may request the competent Dutch authority to obtain evidence or to perform some other judicial act.\(^\text{22}\) It also allows for the taking of evidence by foreign diplomatic or consular officials in the Netherlands. Requests for the purpose of obtaining pretrial discovery for use in proceedings in common law countries will be denied, however, as the Netherlands has declared, on the basis of Article 23 of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, that it will not execute letters of request issued for that purpose.

\(^\text{19}\) Supreme Court, 26 September 2014, ECLI:NL:HR:2014:2838 (*Gazprombank*).
\(^\text{20}\) For instance, the Amsterdam Court of Appeal refused recognition of the Russian judgment in which Yukos Oil Company was declared bankrupt (Amsterdam Court of Appeal, 9 May 2017, ECLI:NL:GHAMS:2017:1695 (Supreme Court appeal is pending). The Court found that the Russian authorities did not levy and enforce tax claims in an orderly and legitimate manner, but rather unlawfully aimed to bankrupt Yukos Oil Company. The Court ruled that the Russian authorities’ actions were both procedurally and substantively contrary to Dutch public policy, and therefore refused recognition of the bankruptcy judgment. Two other Russian court judgments surrounding the bankruptcy of Yukos Oil were also denied recognition as those decisions were not reached in independent procedures covered by adequate safeguards (Amsterdam District Court, 5 December 2018, ECLI:NL:RBAMS:2018:8618 and ECLI:NL:RBAMS:2018:8653). Similarly, the Amsterdam Court of Appeal ruled that an Albanian court judgment was substantively arbitrary and manifestly unreasonable and therefore could not be recognised in the Netherlands, as this would violate Dutch public order (Amsterdam Court of Appeal, 17 July 2018, ECLI:NL:GHAMS:2018:3008).
Access to court files

Dutch law does not provide for public access to court files. Court sessions are open to the public (apart from cases regarding family law or regarding minors). Exceptional circumstances may lead to closed hearings – for example, for reasons of public policy or state security. A copy of a court decision (of which the operative part has been declared in public) can be requested from the court, irrespective of whether the proceedings are completed or ongoing. Many court decisions are published on the website of the judiciary on which party names are anonymised if they involve natural persons.

Litigation funding

Third-party litigation funding is allowed under Dutch law, and is not bound by specific legislative or regulatory provisions, but a pending legislative proposal on class action reform contains restrictions on funding of interest groups (see Section VII). Parties are under no obligation to disclose their source of funding. As class actions are specifically suitable for litigation funding, the aforementioned Claim Code stipulates that associations and foundations acting as a representative should be non-profit based. However, that only applies to the association or foundation itself. Discussions on the proper reimbursement of litigation funders are particularly prevalent in mass claim settlements. For instance, in the Converium case, the Amsterdam Court of Appeal held that lawyers’ fees amounting to 20 per cent of the total amount of the settlement were not unreasonable, also in view of standards developed in US case law on what is common and reasonable. According to their professional rules of conduct, Dutch lawyers may not agree to a ‘no win-no fee’ arrangement or similar arrangements.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

Conflicts of interest are governed by the professional rules of conduct that apply to all lawyers admitted to the Dutch Bar Association. Lawyers must refrain from representing the interests of more than one party, if such interests are in conflict or are likely to conflict. If clients share a common or similar interest, lawyers are allowed to represent more than one party. A lawyer who represents parties with conflicting interests is required to withdraw from the case as soon as the conflict arises, unless they are capable of immediate resolution. An exception to this rule applies where parties are well-informed by their lawyer or law firm about a (potential) conflict of interest and they have given consent to that lawyer or firm to act for both parties. It is also in this context of mutual consent that firms in practice sometimes act for parties that may have conflicts of interest, but are in agreement with the firm acting for both clients subject to using Chinese walls.

ii Money laundering, proceeds of crime and funds related to terrorism

The Dutch Criminal Code prohibits acts of money laundering and has a broad scope. Most intentional acts with reference to assets that are directly or indirectly derived from a criminal act can be qualified as money laundering. The Anti-Money Laundering and

23 www.rechtspraak.nl.
Anti-Terrorist Financing Act obliges lawyers under certain circumstances to perform stringent client due diligence and to report unusual financial transactions, including those by clients, to the Financial Intelligence Unit-Netherlands. The implementation of the Fourth Money Laundering Directive (Directive 2015/849) into Dutch legislation has limited the circumstances under which mere simplified client due diligence is permissible. Conversely, enhanced client due diligence will apply in more situations. In practice, these changes will mean that companies will be required to give more and more detailed information about the company and its ultimate beneficial owners to law firms who act for those clients.

iii Data protection

The General Data Protection Regulation (EU Regulation 2016/679; the GDPR) that entered into effect on 25 May 2018 introduced a stricter legal regime for the protection of personal data throughout the EU. The GDPR applies directly in all EU Member States, including the Netherlands. In the Netherlands, it is implemented by the GDPR Implementation Act, which supersedes the Dutch Act on the Protection of Personal Data. The GDPR is similar in some ways to the previous legal framework on data protection, but adds a number of stricter rules and provides more powers to regulators and higher sanctions (up to €20 million or 4 per cent of annual worldwide turnover, whichever is higher).

The GDPR applies to the processing of personal data (meaning data relating to an identified or identifiable natural person). ‘Processing’ is a broad term; it refers to the act of performing any operation or group of operations on personal data, including collection, recording, storage, transfer and use. The GDPR has a broad extraterritorial reach. It covers not only personal data processing in the context of activities of a company’s establishment in the EU, but also processing taking place outside the EU by companies not established in the EU if they (1) offer goods or service to individuals in the EU, or (2) monitor the behaviour of individuals in the EU.

Processing of personal data is only permissible based on a valid legal ground and for a clearly defined purpose. There may be a valid legal ground if processing is necessary, for example, for the performance of a contract, for compliance with a legal obligation, or for the purposes of the legitimate interests pursued by the controller or by a third party (except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject that require protection of personal data). Data processing is also permissible if the data subject has given consent to use data for a specific purpose. The GDPR sets strict rules for such consent, which must be explicit and is only valid if sufficient information is provided to the data subject prior to his or her consent.

Processing of sensitive data (e.g., regarding health, religion, political affiliation, sexual preference, trade union membership and ethnicity)

25 Rules of the GDPR not discussed here, but which may also be relevant for data processing in the context of dispute resolution, include rules regarding the information to be provided by the controller to the data subject (Articles 13 and 14), regarding rights of the data subject to access (Article 15), rectification (Article 16), erasure (Article 17), restriction of processing (Article 18), data portability (Article 20), object to processing of personal data (Article 21), regarding actions to be taken in case of data breaches (Article 33ff) and regarding the appointment and duties of data protection officers (Article 37ff).

26 As consent should be sufficiently specific, freely given, based on information and can be revoked at any time, it is not generally advisable to base processing on consent (solely). Other valid legal grounds are that the processing is necessary in order to protect the vital interests of the data subject; or that the processing is necessary for the proper performance of a task carried out in the public interest by an administrative body to which the data is provided.
is prohibited – save for some limited exceptions (including if processing is necessary for the establishment, exercise or defence of legal claims, or whenever courts are acting in their judicial capacity).

When it comes to the use of personal data in litigation, it is important to keep in mind who wishes to access what type of data. Consider the following: a company wishes to start a litigation against an employee who has committed unlawful behaviour. After deliberation with their lawyer, they start to gather evidence on the unlawful behaviour by reviewing the employee’s emails. Such gathering of evidence entails processing personal data. These data can generally be processed based on the legitimate interests of the company. It is hardly ever based on consent, as this might not be appropriate or given, and moreover employee consent is generally not considered ‘freely given’ owing to the fact there is a relationship of authority. When processing data, the processing methods must be proportional to the purposes of the gathering of evidence and the least privacy-invasive methods must be used (e.g., when performing email review, searching with key words – rather than looking at each email individually – is better in terms of proportionality and subsidiarity).

When evidence containing personal data is used for purposes of establishing facts in the context of a dispute, the client who has such data is generally responsible for the processing of personal data (the data controller). In the event that lawyers gather evidence for the company, they are likely to be considered as joint controllers. The GDPR requires that joint controllers determine their mutual responsibilities for compliance with the GDPR in a special arrangement, such as contractual provisions. Such responsibilities include obligations of joint controllers in relation to individuals, security, data breach notifications and confidentiality. The GDPR introduces various requirements on maintaining internal records of data processing. In practice, this means law firms that use personal data will have to keep and update records of processing activities, just as their clients will have to do. Shortly after the GDPR took effect, the Dutch Data Protection Authority (DPA) checked data processing registers of 30 big companies from 10 sectors, including some law firms. The Dutch DPA sees the data processing register as a first point of reference for a company’s compliance with the GDPR. In court proceedings, the court may grant a request for disclosure of evidence that contains personal data. Such a request for access to personal data may be admissible based on the parties’ legitimate interests. If processing or giving access to the information in a litigation involves transfers of personal data to countries outside the European Economic Area (EEA), this is only allowed under specific circumstances. The GDPR generally prohibits transfers of personal data to recipients located in a country that has not been deemed by the

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27  Legitimate interests can include alleged wrongdoing by an employee, preparation for litigation or compliance with foreign legal obligations.

28  In a recent judgment, the Court of Justice of the European Union has interpreted the notion of ‘controller’ broadly. A company may qualify as a joint controller if it contributes to determining the purposes and means of processing of personal data, irrespective of whether it actually has access to such data (ECJ, 5 June 2018, ECLI:EU:C:2018:388, Paragraphs 28, 29 and 38).

29  According to Article 843a CCP a party can request (access to) certain documents in order to prepare its litigation. In the case Den Bosch Court of Appeal, 14 October 2013 (ECLI:NL:GHSHE:2003:AM7927) it was decided that a request for documents containing personal data under Article 843a CCP should be judged as a request to process data under the then prevailing Act on the Protection of Personal Data (similar reasoning would apply under the GDPR). The court ruled that such a request can be complied with based on legitimate interests of that party, namely the finding of the truth, which were not outweighed by the privacy interest of the data subjects.

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European Commission to provide an adequate level of data protection. The GDPR provides for an exemption from this rule for litigation purposes. This exemption is available for single transfer of personal data necessary for litigation purposes; this means that it cannot be relied on for transfers of personal data for the purpose of conducting data selection activities. To transfer personal data for such purpose to a non-EEA recipient a company must agree on EC model contract clauses with such a recipient and implement additional data protection safeguards.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

Privilege

Lawyers admitted to the Dutch Bar (as well as civil law notaries) have legal privilege, which means they have the right to refuse to give testimony in front of a judge or to provide information that has been entrusted to them by the client in their professional capacity. Notable: under Dutch law, it is the lawyer who holds the privilege, not the client. This means that the lawyer can invoke the privilege, even if the client would want to waive it. The client only has a derived legal privilege so he or she can object to any disclosure of privileged communication with his lawyer. The lawyer, having a duty of confidentiality, cannot waive the privilege without the client's consent. Case law has extended derived legal privilege also to the staff of lawyers or law firms.

In-house legal counsel do not have legal privilege, unless they are lawyers admitted to the Dutch Bar. Dutch lawyers can retain the registration as a lawyer with the Bar when employed as in-house legal counsel. Under Dutch national rules, in-house counsel admitted to the Bar have legal privilege to the same extent as external lawyers. The European Court of Justice confirmed in its Akzo ruling of 14 September 2010 that communications between a company and its in-house lawyer are not protected by professional legal privilege in EU competition investigations. In 2012, the Dutch Supreme Court ruled that – apart from the EU competition investigations – in-house lawyers do have legal privilege. The court held that in view of Dutch practice and the safeguards applicable to the professional practice of Dutch in-house lawyers by virtue of the Dutch Bar regulations, an in-house lawyer cannot be denied professional legal privilege solely because of the fact that he practises in employment by the company.

Foreign lawyers who are admitted to the Dutch Bar have legal privilege. This will mostly concern lawyers from other EU Member States whose professional qualifications have to be recognised in the Netherlands pursuant to the implementation of Directive 2005/36/EC on the recognition of professional qualifications. Legal privilege should also be upheld if invoked by foreign lawyers who are not admitted to the Dutch Bar, but who are requested to give evidence in Dutch courts.

30 Countries that have been deemed by the European Commission to provide an ‘adequate level’ of data protection include Andorra, Argentina, Canada, Faroe Islands, Guernsey, Israel, the Isle of Man, Jersey, New Zealand, Switzerland, Uruguay, and the United States of America (limited to the Privacy Shield framework).

31 Supreme Court 15 March 2013, ECLI:NL:HR:2013:BY6101.
ii Production of documents

Dutch law provides for certain disclosure obligations, although a general discovery of documents is not part of the legal framework. In fact, the legislature’s wish is not to entertain anything akin to US-style discovery. Article 843a CCP provides that a party with a legitimate interest may request from another party access to or a copy of specific records relating to a legal relationship to which the applicant or its predecessor is a party. A legal relationship can be a contract, but it can also be an (alleged) tort. Disclosure can be requested from the opposing party, but it can also be requested from a third party, including parties related to the opposing party. The requesting party must state a direct and concrete interest by indicating to which extent the requested documents can support its legal position or claims. Parties can only request specific records, which prevents them from engaging in fishing expeditions: the records must be specified sufficiently to determine whether a legitimate interest exists specifically in those records. The request may pertain to information stored on any sort of device, including electronic devices or cloud storage. Courts generally find it sufficient if a party identifies a specific category of documents (e.g., ‘all correspondence between parties A and B pertaining to topic X in the years Y through Z’). A request can be made in separate summary proceedings, or as a motion in ongoing litigation. When the request meets the criteria of Article 843a CCP, it can be denied only on limited grounds, such as the existence of a duty of confidentiality relating to the requested documents, or for certain compelling reasons that outweigh the interests of the requesting party.32 Prior to a discovery request, and on the basis of the same criteria set out in Article 843a CCP, a pre-judgment attachment can be levied to prevent the disappearance or destruction of evidence.33

Courts also have wide-ranging means to order disclosure of evidence. In civil proceedings, a court can order a party to submit all documents, which the court deems relevant to the case. A party can only refuse this order for compelling reasons. The court will decide whether those reasons are justified, and, if not, it may draw any conclusion from the refusal as it deems fit. However, courts generally do not use their wide-ranging powers to order disclosure of evidence, and rules allowing the court to order evidence do not confer on a party the right to demand that the court use such powers (save for the request based on Article 843a CCP).

A more specific rule applies to the books and records that a party is required to keep in accordance with the law (such as a company’s accounts). A court may order, at the request of a party or ex officio, that a party submits its books and records. If the party refuses to do so, the court may again draw conclusions from this refusal as it deems fit.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

In the Netherlands, the most frequently used forms of alternative dispute resolution are arbitration, mediation and binding advice.

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32 For instance, because records encompass confidential personal or corporate material, or medical, financial or national security information.

33 Supreme Court 13 September 2013, ECLI:NL:HR:2013:BZ9958.
Arbitration

The Dutch Arbitration Act (incorporated in Articles 1022 to 1077 CCP) is modelled on the UNCITRAL Model Law. The provisions of the Arbitration Act are mostly of an optional nature. The legislature has explicitly stressed, time and again, the importance of party autonomy in arbitration.

The most well-known arbitration institution in the Netherlands is the Netherlands Arbitration Institute (NAI). The NAI administers both national and international arbitral proceedings in a wide range of fields. In addition, there are a number of specialised arbitration institutions, which focus on arbitrations related to specific industries. For example, the Board of Arbitration for the Construction Industry is often chosen as the preferred arbitration institution for (national) construction disputes.

International arbitrations – with a seat of arbitration in the Netherlands – are mostly conducted under the arbitration rules of the ICC, UNCITRAL or the NAI. The Permanent Court of Arbitration, with its seat in the Peace Palace in The Hague, administers quite a number of arbitrations each year – both public international law and commercial arbitrations.

The general legal climate in the Netherlands is characterised as arbitration-friendly and benefits from the consistent support of the Dutch government. Also, the Supreme Court is reluctant to approve or condone intervention in arbitral proceedings and awards. Recourse against a final arbitral award is only possible in proceedings to set aside the arbitral award (provided for in Articles 1064-1067 CCP) or to revoke the award (Article 1068 CCP). To increase the efficient and timely resolution of the dispute, the proceedings for the setting aside and enforcement of arbitral awards are limited to one fact-finding instance: the Court of Appeal (and subsequently only subject to Supreme Court appeal, which by its nature is limited to errors of law).

Parties to an arbitration agreement may obtain interim relief from the arbitral tribunal on the merits, if it has already been constituted. It is also possible that parties agree that a separate arbitral tribunal has the power to award interim relief (e.g., by selecting arbitration rules that provide for such a separate tribunal, such as the ICC Arbitration Rules or the NAI Arbitration Rules). Interim measures can also be obtained through state court proceedings, if the requested measure cannot be obtained in arbitration, or at least not sufficiently fast. Pre-judgment attachments of assets can only be granted by the state court. As is the case for summary proceedings before the district court, parties may use stand-alone arbitral summary proceedings as only means of dispute resolution and are not required to follow up with arbitral proceedings on the merits.

The request to set aside an arbitral award must be made within three months after the award was sent, or within three months after leave for enforcement has been served on the award debtor (in which case only the debtor can make the request). An arbitral award can only be set aside on a limited number of grounds. The Supreme Court has, time and again, ruled that the courts should act with restraint in setting aside arbitral awards. It has explicitly held that proceedings to set aside an award may not be used as an appeal in disguise and that the public interest in the effectiveness of arbitration requires that a court only sets aside an arbitral award in clear-cut cases. Grounds for setting aside are: (1) there was no valid arbitration agreement; (2) the arbitral tribunal was constituted in violation of the applicable rules; (3) the arbitral tribunal has not complied with its mandate; (4) the award is not signed or does not contain any reasons whatsoever; or (5) the award, or the manner in which it was
made, violates public policy. The court may, at the request of a party or of its own motion, suspend the setting aside proceedings to enable the arbitral tribunal to reverse the ground for setting aside; no appeal is possible against such a decision.

An arbitral award only becomes enforceable after a leave for enforcement (exequatur) is granted, which for foreign arbitral awards must be granted by the court of appeal. Once the leave for enforcement has been granted, the arbitral award may be enforced in the Netherlands against assets of the award debtor. The Netherlands is party to the UNCITRAL Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). An arbitral award made in a foreign country that is part of the New York Convention, must be recognised and enforced in the Netherlands, unless one of the exceptions of Article V New York Convention applies. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, if that party furnishes proof that: (1) the arbitration agreement was not valid or not validly entered into; (2) the award debtor was not properly notified of the arbitral proceedings or not able to present his case; (3) the award deals with issues not submitted to arbitration; (4) the composition of the arbitral authority or the arbitral procedure was contrary to the parties' agreement or to the law of the arbitration venue; or (5) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. Recognition and enforcement of an arbitral award may also be refused if the court in the country in which enforcement is sought finds that (1) the subject matter of the difference is not capable of settlement by arbitration under the law of that country, or (2) the recognition or enforcement of the award would be contrary to the public policy of that country. If there is no applicable treaty concerning recognition and enforcement of the award, the award made in a foreign state may be enforced in the Netherlands on the basis of the CCP, which contains similar grounds for refusal to grant leave for enforcement as the New York Convention.

iii Mediation

Mediation – the structured process in which a third party is asked to help parties reach agreement – is well established as one of the standard forms of alternative dispute resolution in the Netherlands. Dutch law has no statutory provisions requiring parties to mediate or determining how mediations must be conducted. The perception is often that mediation is used primarily in family and employer–employee relationships, and less frequently for the resolution of commercial disputes. While it is certainly true that mediation is often used in those types of cases, and although business mediation may not be as frequently used as in certain common law jurisdictions, it is nonetheless regularly used in high-stakes disputes between large corporates, both national and international, with often favourable outcomes. Because of its confidential nature, there is limited public information available about these mediations. A recent example of the successful use of mediation in a major corporate dispute is the Fortis class action settlement, mentioned above (see Section II), in which agreement had been reached through the use of mediation (both in regard to the first settlement, rejected by the Amsterdam Court of Appeal, as in regard to the amended settlement, that was approved by the Amsterdam Court of Appeal).

In keeping with its voluntary nature, there are very few mandatory rules that apply to mediations conducted in the Netherlands. In business mediation, parties often prefer
not to have to negotiate mediation terms on an *ad hoc* basis and therefore opt for a set of predetermined rules – such as the mediation rules of the ICC, of the Netherlands Arbitration Institute, or of the Netherlands Mediation Institute (NMI).

Directive 2008/52/EC of 21 May 2008 (on certain aspects of mediation in civil and commercial matters, which applies to cross-border disputes within the EU) is implemented into Dutch law almost verbatim, and is restricted to EU cross-border mediations. Parties to an EU cross-border mediation can request the court to make the content of a written agreement resulting from mediation enforceable. Also, the mediator and persons involved in the mediation can recuse themselves from having to testify in court about what occurred in the mediation, provided confidentiality of the mediation has explicitly been agreed upon. Since there is no Dutch statutory rule compelling mediators and parties involved in a mediation to maintain confidentiality, it is important that parties explicitly agree on confidentiality. To promote mediation, Dutch substantive law provides that a mediation interrupts limitation periods.

### iv Other forms of alternative dispute resolution

Parties can agree to solve their dispute by a decision given by one or more third parties appointed as binding advisers. The advice rendered is considered to be an agreement between the parties. Consequently, a party failing to comply with the advice is in breach of contract. In view of its aim of providing certainty and finality, an agreement on binding advice can be vacated only on limited grounds (such as mistake, undue influence, duress or misrepresentation). A binding advice agreement does not preclude the possibility of requesting relief in summary proceedings. Except for general due process and contractual requirements, there are no specific procedural rules concerning binding advice.

The Financial Services Complaints Tribunal (Kifid) is the most well-known institute that resolves disputes on the basis of binding advice and has been explicitly recognised by the Minister of Finance for that purpose. Consumers who are dissatisfied with services of a bank, insurer or another financial institution can turn to Kifid to have their claim resolved. The Act on Financial Supervision requires financial institutions to submit to dispute resolution by Kifid.

### VII OUTLOOK AND CONCLUSIONS

Events to look out for in 2019 will be the first cases reading the Netherlands Commercial Court, amendments of the class actions legal framework, potential reform of the law of evidence, and the government initiative for an overhaul of the Dutch bilateral investment treaty network.

The legislation establishing the NCC has entered into force on 1 January 2019. As mentioned before (see Section II), the NCC is designed as a forum for international commercial disputes, with proceedings conducted in English. The NCC may become an alternative for international arbitration and also for court proceedings in the United Kingdom, in view of their relatively high costs and of Brexit. Considering the efficiency, pragmatism and low costs of Dutch proceedings, the NCC may develop into a coveted venue for resolving international disputes. However, as the NCC will only attract its first cases in 2019, it is fair to assume that it will take some time for the NCC to rise in the ranks of global dispute resolution venues.

A proposal for amendment of the current legal framework for class actions is pending in parliament. Proposed amendments include the availability of monetary damage claims
in a class actions, the possibility for the court to appoint a principle claimant to represent all interest groups relating to the same subject of a class action, the tightening of eligibility requirements (governance, representativeness and funding) for interest groups wishing to start a class action, and the introduction of the court’s authority to declare the resolution of a class action law suit binding on all prejudiced parties, subject to an opt-out system. These amendments would increase the efficiency and effectiveness of litigating class actions in the Netherlands.

The government has drafted a proposal amending the law of evidence that includes, for example, provisions on furnishing evidence relevant to the dispute at an earlier stage, on increased involvement of the court in establishing facts and on the use of written witness testimony. The proposal may be submitted to parliament in 2019, but in view of the substantial criticism it received from practitioners and academics, it is uncertain what the proposal will look like and whether it indeed will be proposed to parliament.

The Netherlands has played a significant role in the field of resolution of international investment disputes and is likely to continue doing so over the next few years through an initiative aimed at modernising its investment treaty network. The Netherlands has an extensive network of 79 bilateral investment treaties (BITs) with countries outside the EU, that protect investments made into those countries by companies incorporated in the Netherlands (and vice versa). The Dutch treaty network is internationally particularly relevant as many investors have structured investments through Dutch companies. Dutch BITs are the second most frequently-invoked BITs in the world, second only to the United States, and they are renowned for the protection they offer. The Dutch government intends to renegotiate and modernise its BITs and has drafted a Model BIT that is intended to serve as the basis for those negotiations. It is likely to take at least one or two years before the first renegotiated BITs, based on the new Model BIT, take effect, and existing BITs will continue to be in effect for existing investments for a certain period, depending on the transitional regime. Dutch BITs are well known for offering robust protections for investors. Following the global debate about alleged disparities in investment treaties, the Model BIT aims for the rebalancing of rights and duties of states and investors. The new draft Model BIT introduces stricter eligibility requirements for investors to qualify for protection, and also contains some other restrictions on investment protection. However, improvements that are beneficial to investors are included too, for instance on the efficiency of arbitration proceedings and on the standards of state behaviour. Developments in investment treaty renegotiations will be closely followed by businesses structured through the Netherlands that wish to rely on the protection offered by the Dutch BITs, and they are advised to monitor negotiations regarding the BIT relevant to their investment.
I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

In accordance with the rules governing the civil court proceedings system, all civil and commercial law disputes in Poland (as well as commercial, land and mortgage registry, family law, labour law and social insurance, and bankruptcy and restructuring cases) are resolved before the state courts of two instances.

These rules are primarily set out in the Code of Civil Procedure of 17 November 1964, as well as in several other statutory provisions and regulations, such as:

a  the Act on Courts Costs in Civil Cases 28 July 2005;

b  the Act of on Court Bailiffs and Enforcement 29 August 1997; and


The first instance courts are the district and regional courts, whereas the second instance courts are the regional courts and courts of appeal. There are 11 courts of appeal, 45 regional courts and over 300 district courts.

The courts are structured in divisions. There are specialist divisions of district and regional courts and courts of appeal that hear civil law, labour law and social insurance cases. Civil law divisions in the courts of appeal also hear commercial cases, and the district and regional courts also have family law divisions. Although commercial courts are established under separate legislation, they are specialist commercial divisions in the district and regional courts. Selected divisions of the district courts maintain commercial registers and land and mortgage registers, and selected commercial divisions of the district courts hear bankruptcy and restructuring cases. Separate divisions of the Regional Court of Warsaw are constituted by the Court of Competition and Consumer Protection (hearing appeals from administrative decisions of certain regulatory authorities and certain cases in first instance) and the European Union Trademarks and Designs Court.

District courts are the first instance court for most property rights cases up to an overall value of 75,000 zlotys, whereas the regional courts are the first instance court for most personal rights and property rights cases where the overall value exceeds 75,000 zlotys, as well as intellectual and industrial property rights claims, press law disputes, unfair completion cases and disputes over the resolutions of corporate bodies.

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id., Item 300, as amended.
id., Item 1309, as amended.
A cassation complaint challenging an award in second instance (an extraordinary measure against final, binding and enforceable awards) can be lodged with the Supreme Court in certain personal rights cases, as well as in property rights cases with an overall value exceeding 50,000 zlotys (and 10,000 zlotys in labour law cases, as well as in certain social insurance cases). The Supreme Court also hears complaints on determining the illegal nature of a final and binding award that, owing to certain statutory limitations, could not have been challenged with a cassation complaint.

As an alternative to state courts, parties may bring disputes involving property rights, or disputes involving non-property rights that can be resolved by court settlement, except for maintenance allowances cases, before an arbitration court. This can be done by mutual agreement after a dispute arises, or in advance through submission to arbitration.

For criminal matters, claims from victims of criminal offences can be heard by the criminal divisions of district and regional courts, and in the courts of appeal.

Complaints against administrative decisions in the second instance can be made before the administrative courts of two instances (which constitutes the third pillar of the Polish court system, along with civil courts and criminal courts).

Constitutional complaints and other issues of constitutional law are examined by the Constitutional Tribunal.

II THE YEAR IN REVIEW

Over the past five years, the civil court proceedings system has undergone 14 major reforms (including abolishing the previous distinct procedure for commercial matters and introducing the principle that the parties’ submissions following the initial lawsuit and the response to the lawsuit, can only be filed upon the court's demand or with its consent) and more than 50 minor amendments to the Code of Civil Procedure and related laws.

The year 2018 also saw the entry into force or adoption of multiple new additions to the Code of Civil Procedure, marking the constant evolution of civil court proceedings in Poland. These involved, among other things, the following modifications:

a introducing the possibility that a curator ad litem be appointed for a party to the proceedings whose legal representatives are not appointed, not only by the registry court but also by the court hearing the case, in such case with a scope of powers limited to that case;

b non-enforcement of an attachment of a bank account pending temporary seizure of that bank account by the competent treasury administration authorities in accordance with newly adopted legislation to counteract money fraud in the financial sector;

c clarifying that the validity of injunction relief granted pending the proceedings ceases after two months from the date on which the decision sustaining the claims secured becomes final, unless the party that requested the injunction proceeds with the enforcement before the lapse of this period;

d introducing an additional formal requirement of a lawsuit – the indication of the date on which a claim became due and eligible. The amendment is further to the general overhaul of the Civil Code provisions in respect of limitation periods, involving:

• a reduction in the general limitation period of claims not related to business activity, as well as claims adjudicated by the court or arbitration tribunal, from 10 to six years (the three-year limitation period of periodical claims has been maintained);
• the introduction of a rule whereby a limitation period ends with the end of calendar year (i.e., becomes effectively extended from the date on which it would normally lapse until the end of the year) unless the period is shorter than two years;

• a prohibition on pursuing time-barred claims against a consumer;

• a clarification that a claim to remove a defect in a thing sold, or a claim to replace it, becomes time-barred one year after the defect has been revealed (within the regime of statutory warranty for physical defects in a thing sold two years ago or five years ago in the case of immovable property following the delivery), whereas such claims by a consumer against the seller do not become time-barred before the end of the term of a given statutory warranty;

e delaying the bank’s obligation to transfer the funds attached by a court bailiff on a bank account of a debtor to seven days following notification of an attachment (in order to permit the debtor to institute counter-enforcement proceedings and obtain injunctive relief in the form of the suspension of an enforcement);

f granting third parties affected by the enforcement of injunction relief the right to satisfy their claims arising from a security deposit paid by a party that applied for an injunction (in the past, such a security deposit served to satisfy the defendant’s prevailing claims only);

g introducing a new rule whereby the court may, after hearing the parties, transform an injunction relief consisting of enjoining a specific performance or attachment of movables, issued to secure claims arising from an infringement of business secrets, to the payment of a security deposit in an amount that satisfies the claimant’s claims as a result of the further use of its business secrets by the defendant; and

h multiple additions throughout the entire Code of Civil Procedure reflecting procedural aspects of newly adopted legalisation in respect of the temporary administration of a deceased’s sole-trader enterprise.

The year 2018 also brought some interesting awards addressing important procedural issues in civil and commercial matters:

a In a judgment of 26 January 2018, the Supreme Court (Case No. II CSK 702/17) ruled that if a party was represented throughout the first and second instance proceedings by an attorney ad litem who was not validly appointed by that party’s legal representative, then the entire proceedings are null and void, and that this irregularity could only be remedied through a confirmation a posteriori of the powers before the decision in second instance (with no possibility of curing this irregularity at the stage of cassation proceedings).

b In a judgment of 7 February 2018, the Supreme Court (Case No. V CSK 301/17) explained that an arbitration tribunal must also comprehensively consider a case (and the evidence material) and that it is equally obliged to explain in the justification of the arbitration award why the tribunal based its decision on certain evidence, but decided not to refer to the other evidence offered. If this is not done, then, in the view of the Supreme Court, it constitutes a violation of public policy and justifies a claim to set aside the arbitration award, as such a situation means that it is not possible understand whether the resolution of a dispute was well founded.

c In a decision of 15 February 2018, the Supreme Court (Case No. IV CZ 9/18) pointed out that if a party to proceedings who has failed to act within a court deadline applies to
be permitted to act despite missing the deadline, then a requirement to demonstrate that a failure was not due to its fault does not constitute a formal requirement of a request that might eventually be completed upon the court’s request, but is a prerequisite to sustain or dismiss the request on the merits (without inviting a party to additionally justify not being defaulted if it has omitted to do so in the request).

d In a sequence of two rulings – a judgment of 16 March 2018 (Case No. IV CSK 106/17) and a decision of 29 May 2018 (Case No. II CSK 42/18) – the Supreme Court summarised the developments of jurisprudence in respect of interpretation of statements of intent made by parties upon the execution of a contract. In the former judgment, the Supreme Court recalled that the process of interpretation always involves two steps: first, to determine what the parties really commonly intended and, in the event of disagreement; second, how either declaration should reasonably have been understood by the other party. In the latter decision, the court stated that, in order to understand the real intent of the parties, the entire contract must be reviewed, and not just the selected interpreted provision, in order to capture the logic of the contract. Further, the Supreme Court confirmed that the larger scope, involving the parties’ actions in advance of and after the execution of the contract, is also relevant for this purpose.

e In a landmark resolution of 25 May 2018, a panel of seven judges of the Supreme Court (Case No. III CZP 108/17) resolved that claims to redress a damage caused by a crime or a criminal offence being committed become time-barred 20 years after the crime or criminal offence was committed, irrespective of when an injured party became aware of the same or of the culprit, even if the criminal proceedings were discontinued owing to the insanity of the culprit. In other words, the civil law court is free to determine in such case the existence of a crime or criminal offence despite the discontinuation of the criminal proceedings. Further the Supreme Court clarified that an act of a tortfeasor might be qualified as a crime or criminal offence within the meaning of Civil Code proceedings in respect of tort liability, even if it could not constitute a crime or criminal offence under the criminal law owing to there being no fault (insanity precludes fault).

f In a decision of 10 August 2018, the Supreme Court (Case No. I CSK 388/18) pointed out that the existing framework of ‘full’ appellate proceedings entitles the court of second instance to make its own determinations on the basis of the collected evidence material, even if contradictory to the arguments raised by the appellant, and that, as long as these determinations are made within the scope of what can be derived from the case files, then the court of second instance does not rule beyond the scope of appeal (which is the general limitation of the court of second instance’s jurisdiction).

According to the official statistics published by the Ministry of Justice, in the first half of 2018:

a there were over 1.853 million new civil law claims (excluding land and mortgage, labour law, social insurance and family law claims) and almost 320,000 new commercial claims (excluding registry, consumer and competition protection and EU trademark and design cases) brought before the Polish courts (jointly over 33 per cent of all cases brought to the courts, excluding cases handled electronic reminder proceedings);
over 1.8 million civil law cases (excluding the cases mentioned above) and almost 300,000 commercial cases (excluding the cases mentioned above) were concluded before the Polish courts (around 33 per cent of all cases concluded);

over 1.167 million civil law cases (excluding the cases mentioned above) and over 238,000 commercial cases (excluding the cases mentioned above) remained unsettled before the Polish courts (over 50 per cent of all cases concluded);

the average length of first instance civil court proceedings in civil law cases, until settlement on the merits (excluding the cases mentioned above), was almost 90 days before the district courts (land and mortgage cases included) and 205 before the regional courts, whereas the average length of first instance civil court proceedings in commercial cases was over 115 days (electronic reminder proceedings and insolvency and restructuring proceedings cases included) before the district courts and 188 days before the regional courts;

however, the average length of first instance civil court proceedings in purely contentious (litigious) matters (exclusive, in particular, of all kinds of summary proceedings terminating with the issue of an order for payment on an ex parte hearing) until settlement on the merits was essentially longer: in civil law cases it ran to over 431 days before the district courts and over 371 days before the regional courts, and in commercial cases it was over 480 days before the district courts and over 640 days before the regional courts, which gives a better general idea of how fast an ordinary case (not necessarily involving expert opinions, etc.) is likely to be resolved at first instance; and

on average, awards in first instance civil court proceedings were sustained in slightly over 60 per cent of appeals (i.e., the appellants succeeded in fewer than 40 per cent of their appeals).

All the above figures, which are slightly higher than in 2017 (confirming the increasing tendency in the growth and length of cases), were expected to double by the end of 2018.

In general terms, the 2018 statistics show a further decrease in all the above parameters (i.e., in particular, proceedings are taking longer) with respect to 2017, and it is likely that the situation will worsen by the end of 2019.

### III COURT PROCEDURE

As a general rule, civil court proceedings are either contentious (litigious) proceedings or non-contentious (non-litigious) proceedings. Commercial claims, or similar claims between non-undertakings, are typically settled in contentious proceedings, while non-contentious proceedings are generally dedicated to different sorts of cases that vary in legal nature (such as registry cases, certain family law and matrimonial status cases, personal status and tutelage cases, certain cases pertaining to rights in rem, inheritance matters, etc.) that require court intervention and, owing to the choice of the legislator, are resolved in non-contentious proceedings. Often, the interests of participants to ‘non-contentious proceedings’ are very contentious (such as divisions of property or easement cases), and these cases could be heard in contentious proceedings as well, as long as the legislator decided it should be so.

The main difference between the contentious and non-contentious proceedings is that in the former the adversarial principle applies widely, whereas in the latter the court should a priori establish what the objective truth is even if the parties are lacking initiative.
The Code of Civil Procedure also provides for subsidiary proceedings supporting contentious or non-contentious proceedings on the merits, such as injunction proceedings, proceedings for the restitution of lost or damaged court files, proceedings securing evidence, settlement proceedings or cross-border jurisdictional aid proceedings.

Awards concluding contentious proceedings and resolving disputes take the form of judgments, while other measures pending the proceedings, as well as any decisions prematurely discontinuing these proceedings, take the form of court decisions or resolutions of the presiding judge. In non-contentious proceedings, all measures, whether concluding the case or not, take the form of court decisions.

After a final award is issued, and in the event that it is not performed voluntarily, an interested party might initiate enforcement proceedings carried out by the court bailiff or the court, after first obtaining an enforcement clause to the award that constitutes an enforcement title.

i Overview of court procedure

A judgment concluding contentious proceedings at first instance can be challenged with an appeal within two weeks of the pronunciation of the judgment and the issue of written grounds (which need to be additionally requested within seven days following the public pronunciation of the judgment, unless it is issued in a non-public hearing and is then served on the parties along with the written grounds). Final awards in non-contentious proceedings can also be challenged with an appeal, whereas other court decisions taken during contentious or non-contentious proceedings are challengeable with an ordinary complaint, and only when the statutory proceedings provide for such a measure.

In the civil court proceedings system, the proceedings in second instance are structured as ‘full appeal’ proceedings. In other words, they constitute a direct continuation of the proceedings at first instance, where the court of second instance hears the case again (though within the limits of the appeal, in each case taking into consideration the potential invalidity of the proceedings in first instance, whether it has been raised in the appeal or not). This is done on the basis of the evidence gathered in first instance, but also includes any additional evidence that is gathered and examined in the second instance. The court of second instance cannot issue a less favourable award to the appellant unless the other party also appealed the award in first instance. The objective of the second instance proceedings is to sustain or reverse the final award in first instance, while cases where the final award is overturned and the case requires re-examination in first instance are limited to those cases where the essence of the case was not heard, or if reversing the decision would require full evidentiary proceedings to be carried out. The appeal directed to the judgment in first instance prevents it from becoming binding and enforceable unless provisional enforcement is ordered.

A final award in second instance might be subject to a cassation complaint if the nature or value of the claim qualifies it to be challenged before the Supreme Court. Cassation complaints can be made within two months of the final award in appeal being given, along with written reasons. A cassation complaint directed to a judgment in second instance does not affect the possibility of having it enforced, unless the enforceability is suspended at the complainant’s request. Exceptionally, a judgment ordering the re-examination of the case in first instance might be challenged with an ordinary complaint.

The Supreme Court will only allow a cassation complaint to be heard on merits where it is shown that the case involves an important legal issue, or requires the interpretation of ambiguous statutory provisions or provisions that raise controversies in the court.
jurisprudence, or if the proceedings are invalid or the complaint is manifestly justified. A cassation complaint, as an extraordinary measure, must not question the facts as determined in the first and second instances, or reassess any evidence.

Contentious proceedings provide for certain distinct procedures, with specific rules derogating from the generally applicable rules in certain situations. This applies, for example, to:

- matrimonial matters (in particular to divorces);
- certain relations between parents and their children;
- labour law and social insurance cases;
- infringement of possession claims;
- expedited summary proceedings in the form of order for payment proceedings and reminder proceedings;
- simplified proceedings (for minor contractual claims with a value less than 20,000 zlotys, statutory warranty or quality guarantee claims, as well as apartment lease rents);
- proceedings in certain regulatory matters;
- electronic reminder proceedings; and
- European cross-border proceedings. 7

ii Procedures and time frames

The reforms to the civil court proceedings system over the past few years have offered some useful case-management tools that, if applied properly, might expedite proceedings and make them more user friendly. These tools include innovations such as:

- the possibility to order the parties to make a sequence of submissions within specified deadlines;
- the obligation to discuss with the parties the legal grounds that the court considers to constitute the legal framework of the prospective judgment; and
- the obligation to fix deadlines of consecutive court hearings within a set time frame, with the objective of concluding the proceedings within these hearings.

Where claimants pursue monetary claims that are not manifestly unjustified or do not raise major concerns, the court can, at its discretion, issue an ex parte order for payment in the reminder proceedings, and deliver it to the respondent while serving him or her with a copy of the lawsuit. If the respondent objects to the order issued in the reminder proceedings within two weeks, then the order becomes repealed by law and the case is heard further on the merits, applying the general provisions of contentious proceedings. If the order is not objected to, then it becomes final and binding and has the force of a judgment.

Where claimants’ claims are evidenced with written recognition of the claim by the respondent or an invoice countersigned by the adverse party, and are being pursued on the basis of a promissory note or a cheque, or with a contract, proof of delivery of an invoice to the adverse party accompanied by proof from the claimant of covering its own costs, then the court will, at the claimant’s request, issue an ex parte order for payment in order proceedings and will deliver it to the respondent along with a copy of the lawsuit. If the respondent does not object to the order within two weeks, then it becomes final and binding and has the force of a judgment.

force of a judgment. If an objection is submitted then the case is heard further on the merits, applying the general provisions of the contentious proceedings. The order remains in force, however, as injunction relief and the claims sustained in the order might be secured on the respondent’s assets for the duration of the proceedings. The respondent can, however, request that the effects of the injunction be limited or modified.

If the respondent fails to respond to a lawsuit and fails to appear at a court hearing, then the court can issue an award *in absentia* under the circumstances provided by the claimant in the lawsuit or its further submissions, unless they give rise to doubts. The respondent can object to the award *in absentia* within two weeks from its notification, if there are no grounds to hear the case *in absentia*.

As a general rule, the initial submission to court, whether it be the claimant’s statement of claim, the respondent’s response to the statement of claim, the objection against an order for payment in the reminder proceedings or against an order for payment in order proceedings, or an objection against an award *in absentia*, must provide for all the arguments justifying the case or defence. The initial submission should also offer all evidence in support of its claims or defence. The court can dismiss late arguments or evidence unless it is shown that they could not have been brought or raised earlier, or that their late introduction will not delay the proceedings in any way.

In every case that can be pursued before the courts, a party can request that its claims be secured by the court before or after instituting proceedings (at their every stage) and for the duration of the proceedings. For this to happen, the party must substantiate its claim and prove a legal interest in having its claims secured. A claim is substantiated if it is plausible and the evidence provided in support of the request for interim relief gives a *prima facie* good chance that the claims will be sustained. The legal interest in obtaining interim relief exists when, in its absence, a petitioner might suffer irreparable harm – for example, if the claims sustained in the final award would no longer be able to be enforced or the objectives of the proceedings otherwise satisfied. Although the interim relief should not result in the claim becoming satisfied, in the case of some non-pecuniary claims (such as prohibition claims) the interim relief might, in practice, satisfy the claim. The court hears the request for interim relief within seven days of it being filed and issues an *ex parte* decision. If the interim relief is granted before the proceedings commence, then the statement of claim must be filed within two weeks or the interim relief will be repealed by law. The courts can also grant interim relief where the case is or will be heard by the arbitration tribunal. Pecuniary claims can be satisfied through the attachment of assets, rights or receivables, compulsory mortgage or compulsory receivership on the respondent’s business, whereas non-pecuniary claims can be secured in any way the court deems necessary.

### iii Class actions

Class actions were introduced to the Polish legal system by the Act on Pursuing Claims in Group Proceedings dated 17 December 2009, which entered into force on 19 July 2010. The class action proceedings have been modified with the effect from 1 June 2017. Pursuant to Article 1 Section 1, the Act sets out the legal framework for civil proceedings in cases where a single type of claim is sought by at least 10 individuals, based on the same or similar facts. This Act applies to proceedings in respect of liability for damage caused by a hazardous

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product and tort, personal injury (in order to determine the liability of the defendant only, claims on quantum should be pursued separately), as well as the non-performance or improper performance of obligations and unjust enrichment, and in consumer protection cases, also in respect of other claims. The 2017 amendment act also clarified that legal entities can also pursue class action claims.

It is admissible to seek both non-pecuniary and pecuniary claims. However, class actions are only really admissible for pecuniary claims when the claim amounts of all group members have been made uniform, taking into consideration the common facts in the case.

A class action claim can only be filed by a group representative who, apart from initiating proceedings, is also obliged to gather the group, to appoint a legal representative or to set out the legal representative's remuneration. The group representative conducts the proceedings in his or her own name, but on behalf of all the members of the group. To secure the interests of the members of the group, the provisions of law provide for changing the representative and controlling their activities undertaken on behalf of the group.

There are three phases to class actions. The first concerns the admissibility of the case for class actions (at a non-public hearing). The claimant must prove that claims of the members of the group can be subject to the procedure specified in the Act. During the second phase, the composition of the group is finally determined and one of the stages to that is a press announcement on initiating group proceedings. Any individual with a claim fulfilling the set criteria may join the group at a given time, and the respondent may challenge the membership of particular individuals in the group or subgroups, though this would not affect the pace of the proceedings and the possibility of the case being heard on the merits in the meantime. The third phase of class actions is carried out in accordance with the general provisions for court proceedings in civil and commercial matters as set out in the Code of Civil Procedure. It should conclude with an evidence-based verdict on the case subject.

The judgment in first instance is subject to appeal, and the judgment in appeal may be challenged with the cassation complaint.

Class actions are becoming increasingly common (with the first case having already been heard by the Supreme Court), in particular in cases against banks and insurance companies for the use of unfair contractual terms.

iv Representation in proceedings
With the exception of group proceedings and proceedings before the Supreme Court, where a party must be represented by a legal practitioner – an advocate or a legal adviser (with state entity being represented by state treasury solicitors) – any individual or business entity is entitled to represent itself in civil court proceedings. Legal entities or other entities can be represented by members of their executive bodies or commercial representatives.

v Service out of the jurisdiction
As a general rule, a foreign individual is required to mandate a local representative ad litem for the purposes of being served with court correspondence. In the absence of such a representative, all court correspondence addressed to such a person after the proceedings have been duly instituted will be left in the case files and considered duly served.

This rule, however, does not apply to foreign individuals staying or residing in other EU countries. In this case, if the foreign individual does not have a local representative, all documents must be served directly to this person pursuant to Regulation (EC) No. 1393/2007

The documents initiating proceedings must be duly served on the respondent, along with information about the obligation to mandate a local representative ad litem and the consequences of failing to do so. If the respondent resides in the EU then Regulation No. 1393/2007 applies (service of court correspondence through local transmitting agencies appointed in each Member State), whereas if not, the relevant international agreements governing the delivery of the court correspondence, if any, might also apply. If there are no such specific international agreements, the courts would apply the provisions of the Code of Civil Procedure, namely deliver court correspondence through local courts or other competent entities, with the intermediation of the Polish embassies or consulates, as the case may be. The court might also serve court correspondence directly with the litigant by registered mail, as long as the laws of the host state authorise this.

The above rules apply equally to individuals and legal entities.

vi Enforcement of foreign judgments

The rules on enforcing foreign judgments in Poland vary, depending on whether the judgment is issued by an EU court or a country that is not an EU member.

In the first case, pursuant to Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, an enforceable judgment given in one Member State is enforceable in other Member States without any declaration of enforceability being required. However, it must be noted that the above rule applies to proceedings initiated on or after 10 January 2015. An obligation to receive a declaration of enforceability remains in place for judgments issued in proceedings initiated before that date. An interested party might apply for the refusal of recognition or enforcement of the foreign judgments on the grounds set out in Article 45 et seq. of Regulation (EU) No. 1215/2012 (gross procedural errors or contrary to public policy).

Different rules apply to judgments issued by non-EU courts, whereby enforceable foreign judgments have to be confirmed by Polish courts. The creditor has to file a petition for a writ of execution for the foreign judgment to the regional court for the place of the debtor's residence (registered office). If the debtor has no such residence in Poland, then the court in whose area the enforcement is to be conducted is competent to hear the petition. The debtor has two weeks to present his or her stance on the petition. The court issues a decision, which may be appealed against in regular appellate proceedings. The decision of the appellate court may be challenged in a cassation complaint heard by the Supreme Court.

The Polish Court will refuse to enforce or recognise a foreign judgment in cases similar to those set out in Article 45 et seq. of Regulation (EU) No. 1215/2012 (i.e., if gross errors in the proceedings were found to exist or if recognition or enforcement would be contrary to public policy).

vii Assistance to foreign courts

General provisions on assistance to foreign courts are contained in the Polish Code of Civil Procedure, though other regulations that regulate certain issues in detail might also apply.
before the Polish statutory provisions: namely European legislation (Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States when taking evidence in civil or commercial matters) and international agreements.

Polish courts may take evidence and serve writs at the request of courts and other authorities of a foreign state. District courts are competent in such cases.

If the assistance may involve costs related to the work of expert witnesses, translators, witnesses and other persons, the competent Polish court may only execute the petition of a foreign court if the latter makes an adequate advance payment. Polish courts may also refuse to perform the requested actions if:

- performing those actions would be contrary to the basic principles of the legal order of Poland (the public policy clause);
- performing those actions is beyond the scope of the activities of Polish courts;
- the petitioning country refuses to perform such actions when petitioned by Polish courts; or
- the case is regarded as falling under exclusive domestic jurisdiction in Poland.

viii Access to court files

There are no general rules authorising members of the public or the press to access the court files of ongoing or already concluded court proceedings.

Members of the public have access to civil proceedings in progress by virtue of the non-confidentiality of proceedings principle expressed in Article 45 of the Constitution of the Republic of Poland. Exceptions to the public nature of hearings may be made for reasons of morality, state security, public order or protection of the private life of a party, or for any other important public interest. Judgments will be announced publicly. This principle is upheld by Article 9 of the Code of Civil Procedure, according to which hearings are held publicly unless specific provisions stipulate otherwise. This non-confidentiality principle is manifested, in particular, by the fact that parties and participants to the proceedings, summoned individuals and the public have the right to take part in hearings. Apart from the parties and the summoned individuals, public hearings can only be attended by adults. Non-public hearings can only be attended by the summoned individuals (Article 152 of the Code of Civil Procedure). As a result, any person of legal age has access to a public hearing and can follow the course of the proceedings.

However, only the parties and participants to the proceedings (e.g., a secondary intervenor) are able to submit pleadings, receive copies of these pleadings and obtain evidence. Pursuant to Article 9 of the Code of Civil Procedure, parties and participants to proceedings have the right to review court files and receive excerpts, copies or extracts from these files. Contents of records and letters may also be made available in electronic form via the IT system for court proceedings, or any other IT system providing access to these records or letters. For non-litigious proceedings, court files are available only to the participants to the proceedings and, with the consent of the director of the court division, to anyone who justifies the need to review them. The same principle applies to:

- drafting and receiving copies and excerpts from case files; and
- receiving audiovisual records from case files.
Pursuant to Section 103 of Regulation of the Minister of Justice of 23 February 2007, rules of procedure of the common courts, parties and participants to non-litigious proceedings can be granted access to case files and the documents included therein, whether for review or making their own copies. They can receive items or documents submitted in the course of proceedings, or documents issued on the basis of the court files, upon confirming their identity. Other individuals requesting such access or documents must confirm their identity and also demonstrate the existence of a relevant right under the provisions of law. Access to court files is granted with the consent of the director of the court division. Therefore, an individual interested in obtaining access to case files of proceedings (whether pending or concluded) should apply to the relevant divisional director, demonstrating that they have a legal interest in accessing the files.

Access to files from civil proceedings (whether pending or concluded) cannot be granted under the provisions of the Act on Access to Public Information of 6 September 2001. Court files are not public information, but a set of documents, to which access is granted pursuant to separate provisions (Article 9 of the Code of Civil Procedure). However, this does not exclude the possibility of requesting access to specific public information included in the files pursuant to the Act on Access to Public Information (Article 5, Section 3). In such a case, the requesting party should specify the precise information they seek.

Records and files of registry cases are open to the public, especially concerning the National Court Register. Any individual has the right to access the data included in the Register via the Central Information System, and may also demand certified copies, excerpts and certificates on the data included in the Register. Registry cases files are made available to the interested persons under the supervision of an authorised court employee.

ix Litigation funding

There are no statutory provisions governing a third party funding civil court proceedings, and such funding would not be very common in practice.

In Poland, the prevailing party will recoup its attorney’s fees from the defeated party only within the limits set out in the Regulations of the Minister of Justice of 22 October 2015 on advocates’ fees and legal advisers’ fees respectively, which introduce minimum and maximum attorneys’ fees that the adverse party can be ordered to pay in case it fails in its case.

Therefore, in practice, in complex lengthy and expensive commercial cases, the costs incurred on attorneys’ fees will be recouped only in small portions.

For this reason, an out-of-court agreement with a party to the proceedings, with a third party providing external funding for the costs of the proceedings, including attorneys’ fees, is of no relevance for the decision on the costs of the proceedings contained in the final award.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

Conflicts of interests are regulated in the respective codes of ethics of the legal practitioners – advocates and legal advisers.

The relevant provisions of the code of ethics of advocates apply to advocates individually, whatever the legal form of exercising the profession. If, however, an advocate is a partner in a partnership that provides legal assistance to a client, then it must be assumed that the following provisions applicable to advocates individually also apply to partnerships. An advocate must not take a case when he or she has already advised the adverse party in the same case, or in a related case. An advocate must not take a case if the adverse party is already his or her client, even if on a different case. Finally, an advocate must not represent clients whose interests are contradictory, even with their consent. When the contradictory interests of a client are revealed only while the legal assistance is already being provided, then an advocate can withdraw from advising all the clients involved.

There are no Chinese wall provisions applicable to advocates that would allow for circumventing the above restrictions.

It is not uncommon, however, for advocates to be associated at law firms operating in the form of partnerships, operating on the basis of service agreements (without being partners in the partnership). If the conflict-of-interest provisions were applied to such advocates individually, then it would be possible for them to represent the adverse parties, as long, of course, as full confidentiality is ensured.

In addition to the above deontological rules, the code of ethics of legal advisers distinguishes between representing the client and advising the client. Although the rules on conflicts of interests in cases of representation are as strict as those applicable to advocates, legal advisers can advise clients with contradictory interests, but only as long as they expressly agree to being advised by the same legal adviser.

ii Money laundering, proceeds of crime and funds related to terrorism

Obligations in relation to anti-money laundering, or protecting against dealing in the proceeds of crime or funds related to terrorism under Polish jurisdiction stem from the Act on Counteracting Money-laundering and the Financing of Terrorism of 1 March 2018, 12 which implements into the Polish legal system EU Directives 2015/849 (Fourth Anti-Money Laundering Directive) and 2018/843 (Fifth Anti-Money Laundering Directive), among other things.

Article 2(1) of the Act sets out the ‘relevant persons’, namely, the entities responsible for performing duties under this Act. The definition includes, in particular, the following professionals: advocates, legal advisers, foreign lawyers and tax advisers to the extent that they provide legal assistance or tax advisory services to the client regarding:

- buying or selling immovable properties or enterprises;
- managing money, securities, or other assets;
- opening or managing accounts;
- organising payments or additional payments to share capital, organising contributions into the companies; or
- establishing operating or managing the companies or trusts.

In addition, tax advisers, are also considered ‘relevant persons’ in the remaining scope of their business activity. The same rule applies to statutory auditors.

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Poland

Notaries are considered relevant persons within the scope of notarial activity regarding transactions on real property-related assets and shares, as well as restructuring transactions concerning companies or their businesses (e.g., mergers, transformations, in-kind contributions; transfer of shares and businesses).

The obligations of the relevant persons are set out mainly in Chapters 5 and 7 of the Act. The most important duties imposed on legal professionals being relevant persons are, in particular, the obligation to:

a) identify and assess the risks associated with suspected money laundering or terrorist financing;

b) apply financial security measures;

c) develop and implement an internal procedure in the field of counteracting money laundering and terrorism financing in the structures of the relevant person; and

d) the obligation to conduct regular training in the structures of the ‘relevant person’.

According to Articles 33 and 34 of the Act, the relevant persons (including legal professionals) must apply financial security measures to their clients, in the following areas:

a) identifying and verifying the client and his or her identity;

b) identifying the beneficial owner;

c) assessing the economic relations and obtaining information on their purpose and intended nature; and

d) ongoing monitoring of client’s economic relations.

If a legal professional cannot perform at least one of these obligations related with financial security measures, then he or she does not establish business relations; does not conclude occasional transactions; does not make transactions via a bank account; terminates economic relations and is also obliged to notify the inability to apply financial security measures to the right authority (Article 41 of the Act). These requirements do not apply to legal professionals who are relevant persons (advocates, legal advisers, foreign lawyers) to the extent that these institutions determine the legal situation of the client in connection with court proceedings, performing duties of defending, representing or substituting the client in court proceedings, or giving the client legal advice regarding the initiation of court proceedings or avoiding such proceedings (Article 41(3) of the Act).

Under Article 72(1) of the Act, legal professionals practising one of the professions mentioned above (with the exception of notaries) are excluded from the general rule set out in Article 72, which provides that a relevant person who carries out a transaction with a value exceeding €15,000 must report it to the General Inspector of Financial Information.

In this context, due consideration should be given, in particular, to Articles 74(1) and 86(1) of the Act, which set out that a relevant person (covering all the types of professionals mentioned above, including legal practitioners) must immediately notify the General Inspector of Financial Information if a transaction appears to be linked with money laundering or financing terrorism, along with information concerning the circumstances of the transaction, irrespective of its value or nature. Moreover, according to Article 89(1) of the Act, the above-mentioned legal professionals are obliged to notify the relevant prosecutor if there is a justified suspicion that the property values being the subject of the transaction or accumulated on the account come from offences other than money laundering or terrorist financing, or fiscal offences, or if they are related to a crime other than the crime of money laundering or terrorist financing or a fiscal offence.
The obligation to provide the information and notifications referred to in Articles 74(1), 86(1) and 89(1) of the Act does not apply to legal professionals being relevant persons (i.e., advocates, legal advisers and foreign lawyers) in the scope of information obtained while determining the client’s legal situation in connection with court proceedings, performing duties of defending, representing or substituting clients in court proceedings, or providing legal advice to the client regarding the initiation of court proceedings or avoiding such proceedings, regardless of the time of obtaining this information (pursuant to Article 75(1) of the Act).

Article 6 Section 4 of the Law on Advocacy of 26 May 1982 and Article 3 Section 6 of the Law on legal advisers of 6 July 1982 both expressly preclude the provisions relating to professional privilege in the case of information disclosed under the Act on Counteracting Money Laundering and Financing of Terrorism of 16 November 2000.

### iii Data protection

The legal framework governing the processing of personal data is set out by the Polish Act on Personal Data Protection of 10 May 2018, which had to be adopted further to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, repealing Directive 95/46/EC (General Data Protection Regulation), which applies from 25 May 2018 (it entered into force on 24 May 2016) and modified the rules for personal data processing – also from the legal practitioners’ perspective.

The Polish Act on Personal Data Protection of 10 May 2018, unlike the previous Act on Personal Data Protection of 29 August 1997, includes provisions setting out grounds for personal data processing as it is done by the General Data Protection Regulation.

According to Article 6 Section 1(f) of the General Data Protection Regulation, the personal data controller is entitled to process personal data within the scope necessary to perform the controller’s legitimate interest.

This entitlement constitutes independent grounds for processing personal data and, as long as the legally justified purposes requirement is met, the requirement to obtain consent for processing personal data does not apply.

Although the regulation does not explicitly indicate that pursuing claims related to business activity conducted by a personal data controller constitutes a legitimate interest, the possibility to process personal data for this purpose without having to obtain consent from the potential defendant to the claim is widely acknowledged as a legitimate interest. This possibility is derived from Recital 47 of the Regulation, which states that the legitimate interests of a controller, including those of a controller to which the personal data may be disclosed, or of a third party, may provide a legal basis for processing, provided that the interests or the fundamental rights and freedoms of the data subject are not overriding, taking into consideration the reasonable expectations of data subjects based on their relationship with the controller. In other words, if the data subject’s actions or omissions led to a situation in which the data controller is entitled to address certain claims against such data subject, he or she should be aware that pursuing claims often involves legal practitioners to whom the personal data may be disclosed.

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14 id., Item 2115.
15 id., Item 1000.
Legal professionals that are provided with access to personal data of their clients (or personal data of individuals against whom claims are pursued at the commission of the client) are acting as a separate data controller with respect to the data disclosed to them by the client. The legal grounds for such processing will be a legitimate interest, and, to a certain extent, the ‘necessity to comply with legal obligations’ encumbering legal professionals under the Polish Advocate’s Act of 26 May 1982\(^{16}\) and the Legal Advisers Act of 6 July 1982.\(^{17}\)

Prior to the Regulation, Polish legal professionals conducting a case for the client were acting as personal data processors and were bound by the scope of the personal data processing agreement (a written authorisation to process personal data granted by the client). This approach has since been changed, as legal professionals are not bound by the client’s recommendations as for specific legal actions that should be taken against the data subject (and under Article 28 Section 3 (a) of the Regulation, the data processor should process personal data ‘only on documented instructions from the controller’). Additionally, a data subject’s (e.g., a claim defendant’s) personal data will be often processed by legal professionals after they cease their cooperation with a certain client (for example, for the purposes of obtaining court costs) and the client cannot effectively demand from the legal professional the deletion of those personal data (and under Article 28 Section 3(g) of the regulation, the data processor, at the request of the controller, deletes or returns all the personal data to the controller after the end of the provision of services relating to processing).

Personal data processing covers processing personal data for the purposes of pursuing claims, including access to case files, evidence, etc.

The rules on sharing personal data with other law firms, or legal processing outsourcers, both nationally and internationally, depends on the data that is transferred, as well as the purposes of the transfer.

The rules on the transfer of personal data within the European Economic Area are the same as transfers at a national level. Therefore, the disclosure of personal data to an entity with its registered office within this area is treated in the same way as the disclosure of personal data to a Polish entity.

The transfer of personal data internationally (to third countries, i.e., outside of the European Economic Area), if a receiving country is not a safe-harbour state, is generally a subject to numerous restrictions. However, according to Article 49 Section 1(e) of the Regulation, the transfer of personal data to a third country is allowed where the transfer is necessary to establish, exercise or defend legal claims. It is, however, up to the data controller to decide whether (and to what extent) the transfer was necessary to establish, exercise or defend against legal claims. If such a transfer is not deemed necessary, legal professionals may face the requirement to obtain the consent of the data subject for the transfer.

**iv Other areas of interest**

Legal professionals – advocates and legal advisers – are generally prohibited from advertising themselves, meaning that their marketing activity must generally be limited to the simple disclosure of selected information identifying their identity, areas of specialisation, etc. Deontological rules applicable to legal advisers are a little less severe than those applied to advocates.

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\(^{16}\) id., Item 1184, as amended.

\(^{17}\) id., Item 2115.
Neither form of legal professionals can carry out activities that restrict their independence, are harmful to the dignity of or confidence in their profession, or that endanger professional secrecy and privilege. In addition, advocates are expressly prohibited from becoming a member of the board of directors or a commercial representative in a commercial company, administering another person’s business and from intermediation in commercial transactions.

Unlike legal advisers, advocates cannot be employed under employment contracts.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

The protection of lawyers’ privilege in civil court proceedings results from the interplay of the relevant provisions of the Code of Civil Procedure, the codes of ethics and the statutory provisions relating to the professions of advocates and legal advisers.

Polish procedural law does not have any measures akin to disclosure or discovery of evidence, and authorises requests for the production of specific documents (or material objects) only.

i Privilege

According to Article 6 Sections 1–3 of the Law on Advocacy and, respectively, to Article 3 Sections 3–5 the Law on Legal Advisers, anything that the legal professional learned when providing the legal assistance is covered by full professional privilege that is unlimited in time. The legal professionals must not be released from the professional privilege in any way (even with the client’s consent and in its favour). Although the statutory provisions applicable to criminal proceedings provide for some exceptions to the above rules, the official position (not shared by criminal courts) of the Bars of both legal professions is that the respective provisions of the Law on Advocacy and the Law on Legal Advisers constitute leges speciales to the rules of criminal procedure.

According to Article 261 Section 1 of the Code of Civil Procedure, a witness can refuse to answer a question if answering it would violate professional secrecy. The same rule applies to production of a document containing professional secrets. The Code of Civil Procedure does not provide for any release from the obligation to maintain professional secrecy, and the above rules would apply to legal professionals and their professional privilege.

Additionally, the deontological rules of both legal professions prohibit calling on witness testimony of another legal professional in respect of facts covered by professional privilege.

The problem arises when a legal practitioner, in violation of the deontological rules (not of statutory origin), submits evidence containing privileged information of another legal practitioner, or if a self-representing party submitted such evidence that it obtained legally (e.g., received in copy although as ‘privileged’). The provisions of the Code of Civil Procedure do not preclude such evidence, but it could be argued that relying upon such evidence would be manifestly contrary to the rules of social co-existence.

The above rules also apply to in-house lawyers, as legal professionals (save that in practice only legal advisers employed under an employment contract could be considered as to be in-house lawyers), whereas there are no particular rules on secrecy for non-practising lawyers. Legal professionals working with non-practising lawyers (who are their personnel) must ensure that they will respect the professional privilege of legal professionals.

Foreign lawyers practising in Poland are entered on the lists of foreign lawyers held by the local Bars of advocates or legal advisers. They apply the rules of secrecy and professional privilege of their own foreign legal professions.
Production of documents

Virtually the only provision concerning the production of documents in civil court proceedings is contained in Article 248 of the Code of Civil Procedure. (Although the Civil Code now defines a document as any carrier of information that enables its contents to be examined, the Code of Civil Procedure refers in this respect to only text documents that identify their issuer.) According to its provisions, everyone, including a party to the proceedings, is obliged to submit, upon the court’s order, a document that is in his or her possession and that constitutes proof of a fact of vital importance for the adjudication of a case, unless that document contains confidential information. The above duty may be avoided if a person is entitled to refuse to testify as a witness on the facts covered by a document, or if a person holds a document on behalf of a third party who could, for the same reasons, object to the submission of such document. However, if this is the case, the order to submit a document may not be denied if the holder of that document, or a third party, is obliged to do the same at least with respect to one of the parties, or if a document was issued in the interest of the party requesting the taking of evidence. Moreover, a party may not refuse to present a document if the loss he or she would suffer thereby would be the loss of the case.

The above provisions apply to specifically determined documents and not to the general category of documents. There are no provisions or corresponding obligations to review records for the purpose of litigation. The duty to produce a document upon the court’s demand applies regardless of where the document is actually stored. The document might, however, always be produced in a copy certified as true to the original by the party’s attorney ad litem.

Additionally, in accordance with Article 233 Section 2 of the Code of Civil Procedure, the court will assess, at its discretion, the significance of a party’s refusal to present evidence or a party’s interference with the taking of evidence despite the court’s decision. In practice, the most contentious issue in this respect is substantiating that the other party, or a third party, possesses a given document, or that it does not possess the document, despite reasonable expectations that it should have.

The above provisions apply accordingly to any objects that need to be inspected in the proceedings and to audiovisual records.

VI  ALTERNATIVES TO LITIGATION

i  Overview of alternatives to litigation

The most common alternative to litigation in Poland is arbitration, which constitutes the other (private) method of adjudication.

Of the alternative dispute resolution methods that, unlike arbitration, have no adjudicative character, the most common are mediation, settlement proceedings and expert determination, although these are still not used very frequently.

ii  Arbitration

The Code of Civil Procedure implements the UNCITRAL Model Law on International Commercial Arbitration (1985) and introduces a set of provisions that apply to arbitration proceedings between the parties if they have not agreed on the rules for the proceedings themselves or, more frequently, they have not submitted the resolution dispute to a permanent arbitration institution or have not agreed on non-institutional arbitration rules.
Only some provisions of the Code of Civil Procedure relating to arbitration are considered as matters of public policy – for instance, the principle of equality between the parties, which applies also to the arbitration clause itself (e.g., the submission of only one party to arbitration would not be effective under Polish law).

The two major arbitration institutions in Poland are the Court of Arbitration at the Polish Chamber of Commerce and the Court of Arbitration at the Polish Confederation Lewiatan. Both have adopted their own, quite modern, rules for arbitration, and regularly conduct reviews, but they are also in charge of administering disputes under the ICC, UNCITRAL or other arbitration rules. They hear several hundred cases a year. The arbitration rules of the Court of Arbitration at the Polish Confederation Lewiatan introduce an optional second instance in arbitration.

Arbitration has become increasingly popular and it is quite standard to include arbitration clauses in commercial agreements. However, in particular when the other party to the agreement is a non-Polish entity, the seat of arbitration is often outside of Poland.

Arbitration awards issued in Poland can only be challenged with an appeal to set aside the arbitration award, substantially on the same grounds as those that justify a refusal of enforcement or recognition of foreign arbitration awards under the Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) that Poland adheres to. A complaint to set aside the arbitration award must be submitted directly to the competent court of appeal within two months following the service of the award. A decision of the court of appeal can be challenged with a cassation complaint.

The enforcement of a foreign arbitration award in Poland must be ordered by the court (the relevant court of appeal) at the request of the interested party. The court orders the enforcement after hearing the case in a public hearing, unless, at the request of the adverse party (the respondent in these proceedings), it determines the existence of grounds for a refusal of enforcement or the recognition of foreign arbitration awards under the New York Convention (or, if the award was issued in a state that has not adhered to the New York Convention, on substantially the same grounds as repeated in the Code of Civil Procedure). The decision can be challenged with a cassation complaint.

Poland is becoming increasingly accepting of arbitration, particularly because it reduces the number of instances of application for the enforcement, recognition or setting aside of arbitration awards (to one instance only, with the right to challenge the decision with a cassation complaint).

Polish courts generally respect the autonomy of arbitration and agree that even errors in applying substantive law would not suffice to set the award aside or justify a refusal to enforce it. However, some decisions on setting aside or refusing the enforcement of awards on the grounds of being contrary to public policy are not positively viewed by the legal doctrine and are only issued sporadically.

iii  Mediation

Mediation proceedings in civil cases were introduced to the Polish legal system in July 2005, by amendment to the Code of Civil Procedure and certain other acts. The relevant provisions were further amended in order to implement Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.
The main principle of mediation proceedings is its voluntary character. The mediation is instituted through the execution of a mediation agreement. The mediator is served with a mediation petition before any court proceedings are commenced, or upon the court’s decision at any time during the proceedings. In the latter case, however, either party can refuse to mediate within seven days. Another quality of such proceedings is the impartiality and neutrality of the mediator. Lists of mediators are kept by mediation centres and reported to regional courts. The parties can also choose their mediators from outside of the lists. Mediation is confidential, and the mediator and all the parties to it are obliged to keep the information obtained in its course confidential. Any settlement proposals made during the mediation cannot be validly invoked in further court proceedings. Mediation conducted upon the court’s decision should not last longer than three months, but this deadline can be extended by the court at the parties’ request (or for other important reasons). A settlement agreement concluded before the mediator needs to be validated by the court. The court will refuse to validate the settlement if it is contrary to the law or to the rules of social co-existence or was concluded by circumvent the law.

In Poland, mediation proceedings are not common as a method of dispute resolution. They constitute just a fraction of the general number of proceedings in courts of all instances. The mediation proceedings initiated before any court proceedings on merits are commenced interrupts the limitation period of the claims covered by the mediation proceedings even if the request for mediation is not directly aimed at obtaining satisfaction of a claim, which might potentially be the reason for its increasing popularity.

On 1 January 2016, the Act Amending Certain Acts in Respect of Supporting the Amicable Resolution of Disputes of 10 September 2015 entered into force. This Act is meant to encourage parties to settle disputes amicably before filing a claim with the court, or during the court proceedings. Lawsuits must, from this date, include information on whether the parties made an attempt at mediation or another extrajudicial method of dispute resolution and if they did not, they must provide reasons as to why not. In addition, in justified cases, the court will be authorised to charge the party with court fees in the event of an unjustified refusal to mediate. Although mediation is, in principle, voluntary, the courts will often force the parties to mediate by simply deciding that they should attempt to settle the dispute before a mediator named by the court. Either party can refuse to mediate, but the obligation to justify a failure to attempt to settle is likely to encourage the parties to at least go through the motions of mediation, although hardly any mediation concludes with a settlement.

iv Other forms of alternative dispute resolution

The Code of Civil Procedure allows parties to settle their dispute before a judge prior to any court proceedings on the merits being initiated, upon a settlement petition from either party. Although settlement proceedings are aimed at encouraging the parties to settle the disputes with the assistance of the judge, and to obtain a court settlement confirmed by the court (which can be enforced if not performed voluntarily), this procedure is only really used as a means of interrupting the limitation period of the claims in order to gain more time and to better prepare for the inevitable court proceedings.

In complex transactions documents, in particular where it is necessary to apply a price adjustment mechanism, or under complex construction contracts where certain technical matters need to be resolved swiftly while the works are in progress, the parties often agree on such issues being determined by a third-party expert.
VII OUTLOOK AND CONCLUSIONS

The Polish civil court procedure system is undergoing a constant process of digitalisation aimed at, among other things:

- the full digitalisation of court files and the right to access them online;
- uniformity of the cases' numeration at a national level;
- the service of court correspondence and the parties' submissions through IT systems;
- the fast-tracking of enforcement proceedings by taking more measures electronically (such as online auctions); and
- attendance of court hearings by videoconference from local courtrooms.

Most of the statutory framework is already in place and can be ‘activated’ as soon as the technical measures allow it to happen, and the relevant technical regulations are issued.

On 8 November 2018, a proposal for an act amending the Code of Civil Procedure was adopted by the Permanent Committee of the Council of Ministers and was passed on 9 November 2018 to the Government Legislation Centre in order to convene the Committee of Lawyers to discuss the proposal. On 19 December 2018 a final proposal was adopted by the Council of Ministers and further submitted to the Parliament on 8 January 2019. Various provisions of the proposed act are to enter into force within deadlines ranging from 14 days, through three and six months until one year after official promulgation. If adopted, it would certainly constitute the most significant reform of the civil court proceedings since 2005, partially undoing the reform that entered into force in 2012. The main proposed changes are the following:

- reinstating distinct commercial disputes procedure containing much more restrictive provisions for the parties than in ‘normal’ contentious proceedings (e.g., precluding counterclaims), as well as introducing the binding force of evidentiary agreements concluded by the parties before instituting the proceedings or in court (precluding the right to examine certain categories of evidence in the dispute between the parties);
- introducing a pretrial organisational hearing and the mandatory adoption of the procedural plan, containing not only a timeline of the proceedings and the deadline for issuing the judgment, but also a detailed summary of the parties' claims and defences, with the evidence brought in support;
- introducing the right to dismiss the claims manifestly and apparently undue at an ex parte hearing, without serving the defendant with a copy of the lawsuit and without asking the claimant to clarify, justify or complete its claims;
- setting out the right of the parties and their attorneys ad litem to record the course of the proceedings without the court’s authorisation (upon a simple notification of the intent to do so);
- dismissing appeals filed by a party represented by an attorney ad litem for which the court fee was not paid (or where the amount paid was irregular), without a prior summons to regulate the default;
- authorising the court of second instance to hear the appeal in camera unless a party unless the appellant or the other party requested to be heard;
- establishing that conciliation petitions must be accompanied by a draft settlement agreement;
- setting out general limitations on bringing set-off defences (claims under the same legal relationship that the claimant’s claims result from, save for undisputed claims or claims proven by documents issued by third parties);
introducing the admissibility of written statements at the court’s discretion; and
introducing the definition of an ‘abuse of process’ and multiple provisions throughout the entire Code of Civil Procedure exemplifying different dilatory measures qualified as abusive.
I  INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

In Portugal, judicial litigation is the most widely used type of dispute resolution. In fact, the majority of conflicts are resolved by the national judicial system, through its large court network, subject to specific and complex procedural rules. However, owing to the lack of efficiency of the Portuguese judicial system, the importance of arbitration and other alternative dispute resolution methods has been increasing significantly.

There are three levels of judicial jurisdiction in Portugal: first and second instance courts and the Supreme Court. Within the first instance there are specialised courts for specific matters, such as civil, criminal, commercial, labour, family, competition and intellectual property rights courts.

Since the length and duration of judicial proceedings are still the main problem of dispute resolution in Portugal, during recent years the state has been actively amending the legal system. In order to address the growth of judicial litigation and to improve the effectiveness and the level of specialisation of the courts and judges, the state has not only implemented procedural rules but also improved its infrastructures (building new courts, implementing new technologies) and modified the structure of the judicial organisation. In 2018, no major judicial reform was carried out. As was the case in 2017, this was a year of stabilisation and consolidation of the legislation that has been in force since 2013 and 2014. This change in legislation has not yet proved to be as effective in reducing the length of proceedings as expected, with the exception of procedures in the appeal courts.

II  THE YEAR IN REVIEW

In the past year, a huge improvement in the digital access to courts and their pending proceedings has taken place. Previously, only the parties had digital access and they could only electronically submit the pleadings regarding civil proceedings pending in the first instance courts. However, since 2018 all the judicial proceedings, including those pending in appeal courts, are digitally available, except for the pretrial stage of the criminal proceedings. These new technological developments are expected to generate a decrease in costs and to promote the more efficient and expedited resolution of conflicts.
The resolution measures applied by the Bank of Portugal to Banco Espírito Santo (which was one of the biggest Portuguese private banks) in 2014 and to Banif (a Portuguese private bank) in 2015, respectively, are still contributing to an increase in the number of client, shareholder and bondholder disputes.

Litigation costs have continuously increased in recent years. According to the Litigation Costs Regulation, parties involved in court proceedings are obliged to pay court fees. The exact amount to be paid depends on the value of the claim, which means that the higher the value of the claim, the more court fees will be charged. However, in cases where the value of the claim is above €275,000, the losing parties may request the court to relieve them of the payment of a large percentage of the court fees. The high cost of litigation has been under discussion and the government will probably take some measures to make the cost more reasonable and fair.

Although this trend has slowed down slightly in recent years, the economic crisis is still influencing the upsurge in lawsuits and insolvency proceedings of a heightened level of complexity and value. The Insolvency Law was amended (and came into force on 20 May 2012) to introduce fast-track court approval procedures for restructuring plans, which have proved to be successful. In particular, the Special Recovery Procedure seeks to provide borrowers with some leeway in negotiating recovery plans with their creditors in the event of imminent insolvency.

The Special Recovery Procedure was recently amended and the major change is that it is no longer applicable to any debtor facing a situation of insolvency. It is now only applicable to companies. That being said, a new special procedure was also created, which is applicable to natural persons, with the difference of being much more simplified than the Special Recovery Process.

Another legislative novelty was the implementation of extrajudicial regulation for the recovery of companies (RERE), which replaced the extrajudicial system of company rehabilitation (SIREVE). This new regulation allows a debtor facing economic and financial struggles to negotiate with its creditors in order to reach a free and confidential restructuring agreement. This is an extrajudicial process, which means that it takes place without the intervention of the courts.

Along with the implementation of RERE, other legislative changes included the creation of a regulation for the conversion of credits into capital, a regulation regarding the mediator of the companies’ recovery and a regulation on the appropriation of a pledged asset in the context of commercial pledges.

III COURT PROCEDURE

i Overview of court procedure
Both civil and criminal proceedings include different stages. Generally, proceedings are initiated by the parties submitting pleadings, followed by a stage in which evidence is provided. The Civil Procedure Code establishes that all witnesses must be indicated in the claim at the time it is submitted. Subsequently, the trial takes place and the court issues its decision. Finally, provided that specific conditions are met, the parties can appeal the judgment.

ii Proceedings and time frames
There are two kinds of civil proceedings: declarative and enforcement. Through the former, the court’s decision has res judicata effect. According to the Civil Procedure Code currently
in force, the court decides on issues raised by the parties. The court may only take decisions on facts that were not raised by the parties if those facts are instrumental, complementary or noticeable. The court can only convict the defendant to the extent required by the claimant.

Enforcement proceedings may serve three purposes:

a. the payment of an amount;
b. the delivery of a specific object; or
c. forcing the counterparty to carry out a certain action.

Said enforcement proceedings are filed based on an enforcement title that can be a previous court decision or certain documents established at law (for instance, some contracts, mortgages or deeds provided that the documents are signed before a notary public\(^2\) or certified by the same, and also cheques).

Usually it takes one to three years for a final court decision to be issued in ordinary declaratory proceedings, while enforcement proceedings tend to take from one to two years.

To avoid damages resulting from the delay in court decisions and to ensure the effectiveness of the final decision, a claimant may request that the court issues an adequate preliminary injunction, which are urgent proceedings that can take from three to six months.

The above-mentioned time frames are indicative, as the proceedings may be longer or shorter, depending on the workload of the court before which the claim is filed and the particular circumstances of the case, as well as the arguments put forward.

Since 2014, it has been possible to launch a pre-enforcement extrajudicial proceeding\(^3\) that allows the claimant to verify whether the defendant has any attachable assets before filing a claim.

Unlike civil proceedings, where the parties play a major role (although courts play an increasingly important role under the new Civil Procedure Code), in criminal proceedings the court has total control of the case and the duty to seek the truth. In this respect, the court may order the execution of any proceedings required to uncover the truth. Generally, ordinary criminal proceedings in Portugal take two years, but in specific cases, such as white-collar crimes, proceedings tend to take longer. Once again, the duration of the proceedings provided here is also merely indicative.

As an attempt to reduce the length of criminal proceedings, the amendment to the Criminal Procedure Code\(^4\) of 2016 expanded the range of crimes that can be prosecuted under a summary procedure.

### Class actions

Class actions are allowed under Portuguese law using a specific procedure to deal with groups of related claims. This is based on the Portuguese Constitution and on specific regulations

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2 Before the new Civil Procedure Code entered into force (on 1 September 2013), private documents signed by the debtor were considered to be an enforceable title. Under the new provisions of the Civil Procedure Code, this was deemed no longer to be the case. On 23 September 2015, the Constitutional Court held that it was unconstitutional for such provisions to operate retroactively regarding private documents. Thus, private documents signed before 1 September 2013 still constitute an enforceable title (Judgment No. 340/2015).

3 Law No. 32/2014 of 30 May and Ministerial Order No. 233/2014 of 14 November.

4 Law No. 1/2016 of 25 February.
that grant all citizens, individually or through relevant organisations, the right to initiate
class actions, within the terms established therein. It includes the rights of injured parties to
request compensation to:

\( a \) promote the prevention, termination or judicial persecution of infringements against
public health, consumer rights, quality of life and the preservation of the environment
and cultural heritage; and

\( b \) guarantee the defence of state property, the property of the autonomous regions or of
the local authorities (e.g., municipalities).

Class or group proceedings can be brought by individuals, associations and foundations
created for the defence of relevant interests (regardless of their direct interest in the case), and
local authorities regarding the interests of their residents, within their respective areas.

iv Representation in proceedings

In civil proceedings, parties must be represented by a lawyer whenever the value at stake
exceeds €5,000, or when the proceedings are taking place before the higher courts.

In criminal proceedings, individuals considered formal suspects must be assisted and
represented by a lawyer at several stages. Therefore, the assistance of lawyers is mandatory,
among other matters, during interrogation, trial and appeal. As regards the representation of
victims, specific acts must also be carried out together with the assistance of lawyers, such as
filing personal claims or appeals. Conversely, witnesses may also be assisted by lawyers, but
only to ensure that they know their rights.

v Service out of the jurisdiction

Pursuant to the Civil Procedure Code, when a defendant’s domicile is located outside the
Portuguese jurisdiction, the initial summons or other notices requesting attendance to court
will be served by post, by means of a registered letter with acknowledgement of receipt, unless
applicable international treaties or conventions provide otherwise.

Other notices will be served to the lawyer appointed by the party. Service of judicial
and extrajudicial documents in civil and commercial matters within the European Union is
governed by Council Regulation No. 1393/2007 of 13 November,\(^5\) in which the particular
formalities are set out, especially concerning the obligation to serve notice through the public
authorities of the addressed state and to comply with specific rules of the relevant jurisdiction.

In criminal proceedings, notices for parties whose domicile is outside the Portuguese
jurisdiction will be served according to the rules set out in international treaties and
conventions. Portugal is a party to the Convention on Mutual Assistance in Criminal Matters
established between Member States of the European Union of 29 May 2000. Pursuant to
this Convention, as general rule, each Member State sends procedural documents directly
to the persons who are in the territory of another Member State, by post.\(^6\) In certain cases,
however (e.g., if the procedural law of the state requires proof of service of the document
on the addressee other than the proof that an ordinary letter can provide), the documents
will be sent through the competent authorities of the requested Member State. Portugal

\(^5\) As amended by Council Regulation No. 17/2013, 13 May.

\(^6\) Article 5.
is also a party to the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959. Pursuant to this Convention, documents will be served by means of letters rogatory sent to the competent entities of the state concerned.

vi Enforcement of foreign judgments

Within the EU, Council Regulation No. 44/2001, 22 December 2000⁷ sets out the conditions under which a judgment (concerning civil and commercial matters) issued in a Member State can be enforceable in another Member State.

Therefore, pursuant to this Regulation, a judgment issued in a Member State and enforceable in that Member State may be enforceable in Portugal when, upon filing of a judicial application by the interested party, the court has recognised the enforceability of the judgment. The application of enforceability is filed before the competent superior court.

Without prejudice to the international conventions and treaties in force (for instance, the Lugano Convention), under Portuguese law, it is generally possible to enforce foreign civil judicial judgments upon a prior confirmation procedure before a Portuguese court. This confirmation will be granted whenever:

a) there are no well-grounded doubts concerning either the authenticity of the submitted documents or the fairness of the decision;

b) the decision is final according to the law of the country where the judgment was rendered;

c) the object of the decision does not fall within the exclusive international jurisdiction of Portuguese courts and the jurisdiction of the foreign court has not been determined fraudulently;

d) there are no other pending proceedings between the same parties, based on the same facts and having the same purpose, and no ruling on the same case has been issued by a Portuguese court;

e) the defendant was duly notified of all the proceedings according to the law of the country where the judgment was rendered;

f) the foreign court proceedings complied with the procedural law requirements and each party received an adequate opportunity to present their case fairly; and

g) the acknowledgement of the decision is not patently incompatible with the public policy of the Portuguese state.

vii Assistance to foreign courts

Portuguese courts can provide assistance to foreign courts when required by means of letters rogatory, unless the execution of the requested proceedings violates Portuguese public policy, the letter rogatory is not duly legalised, the execution of the requested proceedings compromises national sovereignty or security, or the execution of the requested proceedings leads to the execution of a foreign court decision subject to confirmation by the Portuguese courts.

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Portugal

viii  Access to court files

The Civil Procedure Code, as a general rule, provides that court files may be accessed by the parties, lawyers or any person with a relevant interest in the proceedings; however, the examination of court records is more restricted when the disclosure of information may cause damage to a person's dignity or privacy, is contrary to public values (e.g., adoption or divorce proceedings) or may harm the effectiveness of the decision to be issued by the court, such as, for instance, in interim application proceedings.

In addition, the Criminal Procedure Code, as a general rule, provides that parties and lawyers are allowed to access the court records. Nevertheless, the examination of court records at the investigation stage always requires the public prosecutor's or the judge's authorisation. Third parties who have relevant interests in the proceedings may also request authorisation to access court files, unless the proceedings are confidential. This occurs whenever the public prosecutor or judge forbids the parties and their respective lawyers from accessing such records during the investigation stage, since their disclosure could interfere with the investigation or cause damage to any of the parties.

ix  Litigation funding

In Portugal, disinterested third parties cannot fund litigation.

IV  LEGAL PRACTICE

i  Conflicts of interest and Chinese walls

Conflicts of interest are currently a central issue in the Portuguese legal system, which promotes the prevention or prohibition of any conduct that may lead to such a conflict by a lawyer or law firm.

The regime seeks both to protect and to promote the dignity and independence of a lawyer in his or her role as an active participant in the administration of justice and to ensure the relationship of trust that must be established between a lawyer and his or her client.

The main sources of law regarding conflicts of interests for lawyers are the Regulations of the Portuguese Bar Association (the Regulations), the regulations of law firms and the Criminal Code. These sources are complemented by the opinions and decisions of the Portuguese Bar Association. Finally, the provision of legal services in Portugal by lawyers from the European Economic Area is also subject to the Code of Conduct for Lawyers in the European Union, as approved by the Council of the Bars and Law Societies of Europe.

The Portuguese Bar Association is primarily responsible for supervising and ensuring compliance and enforcement of the law, and it has disciplinary power over its members. The decisions of the Bar Association can be appealed before the administrative courts. Furthermore, the courts are responsible for the enforcement of the law in any proceedings other than disciplinary proceedings.

Article 370.2 of the Criminal Code establishes that specific acts of misconduct related to conflicts of interest by lawyers are criminal offences. Thus, a lawyer who acts under a conflict of interests, with the intention of harming his or her client, will either be penalised with up to three years of imprisonment or with a fine.

The Regulations establish the duties that lawyers are obliged to comply with in their relationships with clients. Article 99 deals specifically with possible causes of conflicts of interest, establishing several duties upon lawyers to prevent them.
The lawyer's wilful or negligent violation of the foregoing rules may give rise to disciplinary liability, which is independent of any potential civil or criminal liability.

It is particularly worth noting that Portuguese law is moving towards the exclusion of Chinese walls or ‘firewalls’ as valid mechanisms to overcome limitations imposed upon law firms, but the practical application of the law has yet to be fleshed out by case law, opinions or decisions of the Portuguese Bar Association. While it is unlikely that new legislation on this subject will be approved, it is foreseeable that future decisions will detail and clarify the limits that ought to be respected by lawyers and law firms.

ii Money laundering, proceeds of crime and funds related to terrorism

The European Parliament and the Council decided to create special rules to prevent and punish money laundering within EU territory. For that purpose, the relevant EU bodies passed two important directives: Directives Nos. 2005/60 and 2006/70.

The aforementioned Directives were transposed into the Portuguese legal system through Law No. 25/2008 of 5 July. From this date on, financial institutions and a large number of service providers, such as notaries and civil servants, are bound, among other matters, not to participate in any suspicious or criminal activities relating to money laundering and to report such activities to the public prosecutor and the Unit of Financial Information.

The EU bodies have continued to produce new legislation regarding this matter, in the form of Directives Nos. 2015/849 and 2016/2258, which were partially transposed into Portuguese law by Law No. 83/2017, which revoked Law No. 25/2008 of 5 July. The new law is more extensive than its predecessor, as it is applicable to a larger number of entities. Lawyers, among others, are now bound by the same duties to not participate in any suspicious or criminal activities relating to money laundering.

Obviously, confidentiality issues arise when legislators decide to extend such obligations to service providers like lawyers who are bound by the rules of secrecy.

iii Data protection

On 25 May 2018, the General Data Protection Regulations (EU) 2016/679 entered into force and superseded Data Protection Directive 95/46/EC. Overall, the General Data Protection Regulation is applicable if the data controller (the organisation that collects data from EU residents) or processor (an organisation that processes data on behalf of the controller) or the data subject (the person) is established in the EU. For the lawful and fair processing of personal data, unless the data subject has provided informed consent, the data can only be processed if one of the following grounds is met:

a the data subject gives consent to the processing of its data;
b the fulfilment of contractual obligations with the data subject or tasks requested by the data subject who is in the process of entering into a contract, require the processing of its data;
c compliance of the controller’s legal obligations requires the processing of data;
d the protection of the vital interests of a data subject or another individual requires the processing of data;
e the performance of a task in the public interest or by a public authority requires the processing of data; or
f the protection of the legitimate interests of a data controller or a third party, unless these interests are overridden by the interests of the data subject, requires the processing of data.
These general rules also apply to the activities of law firms that involve the processing, access or transfer of personal data.

iv Actions for damages regarding infringements of the provisions of competition law

On 5 August 2018, Law 23/2018 of 5 June entered into force, which sets out the rules governing actions for damages for infringements of the competition law provisions, and that transposed Directive 2014/104/EU into the Portuguese legal system.

According to this Law, the infringements that may give rise to an action for damages for infringements to the competition law provisions are:

a) the prohibition of agreements and conduct that restricts competition;
b) the prohibition of the abuse of a dominant position; or
c) the prohibition of the abuse of economic dependence.

This Law provides special rules for the compensation for competition law infringements that facilitate the application of competition law for disputes arising between individuals (private enforcement). This source of enforcement of competition law is independent from the enforcement promoted by public entities such as the Competition Authority or the European Commission, with a sanctioning purpose (public enforcement).

Other relevant provisions of this Law include:

a) the joint liability of co-infringers (with some limitations regarding small and medium-sized companies or leniency applicants);
b) the joint liability of infringers and the parent companies;
c) the wide access to evidence to support a possible compensation request (except for cases involving leniency applications or transactions);
d) the implementation of a new period of limitation of five years for these compensation actions;
e) the establishment of a specialised court to decide on disputes regarding action exclusively based on claims for damages arising under the infringement of competition law;
f) the possibility to resort to class action; and
g) the incentive to resort to extrajudicial forms of alternative dispute resolution.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

The Portuguese legal system acknowledges that some professions of social importance cannot exist without confidentiality, as people only feel comfortable disclosing personal or troubling facts if they are certain that those facts will remain secret.

In light of the above, lawyers, priests, doctors, journalists, chartered accountants, civil servants, public officials and corporate bodies of financial institutions, among others, have, in broad terms and as established by law, the right not to testify in court or not to comply with orders issued by any private or public entities to disclose or provide information or documentation, whenever the disclosure regards facts or documents relating to their professional activity.

In some cases, this prerogative also entails special protection against searches and seizures. For instance, searches inside law firms must be conducted by a judge, unlike most
other cases where the presence of the district attorney suffices. Evidence obtained in criminal matters pursuant to illegal searches or seizures will be considered void and illegitimate in court.

Notwithstanding this, the scope of protection granted under Portuguese law differs according to the professional's particular practice. Priests and lawyers, for instance, benefit from a broader and stricter protection, while employees and corporate bodies of financial institutions do not. In fact, while financial secrecy can easily be waived with the consent of the interested client, the disclosure of facts by lawyers always depends on the intervention of the Portuguese Bar Association.

However, privilege is not an absolute right and, in most cases, excluding religious matters, it is possible to break it, albeit through a complex procedure. The key rule on this issue is found in Article 135 of the Portuguese Criminal Procedure Code, which establishes that only superior courts may decide whether privilege should be broken and thus consequently force the disclosure of protected facts.

The existence of this rule does not jeopardise the general protection granted to professional privilege in Portugal, as the superior court’s decision must always be taken according to the principle of the most important prevailing interest, which binds the court, among other matters, to consider the seriousness of the crime and the interests pursued in the criminal procedure.

The application of this principle has driven courts to decide that, for instance, it is not permissible to break privilege to investigate minor offences.

Although Portuguese law widely respects this privilege, in recent years there have been some troubling court decisions limiting the scope of the privileged protection of lawyers.

Finally, under Portuguese law, the scope of rights and duties granted to Portuguese lawyers applies to any foreign lawyers as long as they comply with the Portuguese Bar Association's procedures. Under these conditions, foreign lawyers are also subject to the rules of privilege.

ii Production of documents

When a party intends to gain access to a document held by the other party, it may request the court to order the production of the document within a particular term. If the order is ignored, the court may consider the party's refusal for probative value and impose the reversal of the burden of proof.

There are, however, some documents that parties do not have to produce in litigation, such as correspondence between the lawyer and the counterparty or between the parties' lawyers themselves. Furthermore, in relation to the latter, this cannot be considered as evidence by the courts. In relation to correspondence between the lawyer and the counterparty, it is also considered to be privileged and a protected professional secret. In such cases the party can claim a lawful excuse. The court may only deny the lawful excuse if it decides that the document is indispensable for the statement of facts and if the importance of the case overrides the requirement for the protection of professional secrecy. This statutory regime is also applicable to state secrets and to civil servants.

When a relevant document is held by a third party (e.g., a parent company), a party may request that the court order the third party to produce it.

Foreign deeds have the same legal value as those executed in Portugal, provided that some legal conditions are duly complied with. We note that the public official's signature of the official deed has to be recognised by a Portuguese diplomatic or consular agent in
the relevant state, and this signature has to be certified with the relevant consular seal. In addition, in judicial acts, documents must be written in Portuguese. Therefore, when the document required is stored overseas it must be translated and duly certified.

The rules applicable to electronic documents are substantially the same as those applicable to any other document. In all cases, the law sets out several restrictions on the production of documents in relation to general correspondence, letters or any other type of mail, which are protected by law, based on the principles of the protection of privacy. Furthermore, the Portuguese Constitution expressly forbids any intrusion into correspondence from the authorities. In conclusion, if a party is notified to produce correspondence in court that is not related to the case in question, it can claim this legal protection. There is, however, an exception in the Portuguese Constitution and in the Criminal Procedure Code related to authorised police searches.

If a party is asked to produce electronic documents that are no longer accessible, that party can argue that it is unable to do so. Nevertheless, in criminal proceedings the judges may order a search of the home or other premises of the defendant and in such cases evidence may be found through the reconstruction, or backup, of deleted documents.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

The greatest flaw of the Portuguese legal system is the length of time that proceedings take. According to the latest data from the Portuguese National Institute of Statistics, the average duration of a civil action at trial is 16 months (this represents a positive development compared to past statistics).

In light of the foregoing, both the wider civil society and the government have been encouraging the promotion of alternative dispute resolution (ADR), namely, arbitration, mediation, conciliation and resolution by justices of the peace. In 2001, the government created the Cabinet for Alternative Dispute Resolution, a department of the Ministry of Justice exclusively dedicated to ADR.

ii Arbitration

In recent years, arbitration has been flourishing in Portugal. Parties have progressively added arbitral clauses to contracts and there is a general sense that Portugal may become a privileged forum for arbitrations between companies based in Portuguese-speaking countries such as Brazil, Angola and Mozambique.

On 15 March 2012, a new Law on Arbitration entered into force, replacing the former Portuguese Arbitration Law.

The Arbitration Law is rather innovative, drawing inspiration from the 2006 version of the UNCITRAL Model Law, and introduces provisions intended to grant more flexibility with regard to the formal validity of an arbitration agreement, making it simpler to comply with the written form requirement.

It is now legitimate to state that the Law has increased flexibility in Portuguese arbitration and facilitated the increasing number of arbitral clauses included in contracts.

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8 Law No. 63/2011 of 14 December.
9 Law No. 31/86 of 29 August 1986.
Among its most important innovations, the Arbitration Law:

- contains a major change in the analysis of arbitrability;
- expressly sets out that independence and impartiality are not only required for the appointment of arbitrators, but that the arbitrators must comply with those requirements throughout the proceedings;
- regulates the most important aspects of the application of interim measures, closely following the Model Law;
- includes the regulation of multiparty arbitration and third-party intervention; and
- provides that an award will not be subject to appeal, unless otherwise expressly established by the parties in the arbitration agreement (without prejudice to the applicable procedures to set aside the award, which cannot be waived in advance).

The leading Portuguese arbitral centre is the Arbitration Centre of the Portuguese Commercial Association. Law No. 74/2013 of 3 September created the Sports Arbitration Court, which became operative in October 2015.

As regards foreign arbitration, Portugal is party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; however – and although Portuguese jurisprudence is arbitration-friendly, narrowly interpreting the grounds for refusal of recognition or enforcement of foreign arbitral awards – the interested party may also appeal against the decision of the first instance court that recognises or declares the foreign arbitral award enforceable before the Supreme Court, provided that the aforementioned requirements as to the value of the action are met. Thus, parties should always seek adequate guarantees to secure fulfilment of the contracts they enter into, or to secure compensation for the breach of such contracts.

Tax arbitration is becoming increasingly common and some decisions have already been handed down.

Also, consumer arbitration has increased following the transposition of EU Directive 2013/11UE (Law 144/2015 of 8 September).

### Mediation

Law 29/2013 of 19 April establishes general principles applicable to mediation in Portugal, as well as measures on civil and commercial mediation, mediators and public mediation regimes. The Law filled a lacuna where there was previously no specific law or act governing mediation and conciliation.

The Law introduced important provisions establishing that any dispute regarding property issues or any rights that may be the subject of transactions by the parties may be submitted to mediation.

Another important provision establishes that private mediation settlement agreements are, under specific circumstances, enforceable directly, without the need to obtain from a court or the obligation to execute extrajudicial settlements in mediation centres supervised by the Ministry of Homologation Justice.

The specific circumstances are as follows:

- the settlement’s object must be able to be mediated and not subject to a mandatory court decision;
- parties must have capacity to execute the settlement;
- the settlement must have been reached through mediation and according to law;
- the content of the settlement must not violate Portuguese public policy; and
the settlement must be reached with the intervention of a mediator included on the
Ministry of Justice’s public list of mediators.

The Mediation Law also includes provisions on the training, duties and rights of mediators,
as well as the rules applicable to public mediation frameworks.

Despite the Mediation Law, in Portugal, mediation and conciliation settlement
agreements are traditionally negotiated between the parties’ attorneys; in the majority of
the cases, during pending lawsuits. Parties are usually very reluctant to use mediation and
conciliation.

iv Other forms of alternative dispute resolution

Besides arbitration, mediation and conciliation, the most popular form of ADR is conducted
by a justice of the peace, which is governed by Law No. 78/2001 of 13 July 2001 (as amended
by Law 54/2013 of 31 July, which broadened the scope and jurisdiction of justices of the
peace) and numerous centres have been created under the supervision of a special commission.
Justices of the peace are only available to settle disputes between individuals and they have
jurisdiction on civil matters concerning small claims (up to €15,000). Under the new legal
framework on justices of the peace, legal persons may now resort to mediation (except in class
actions), and preliminary injunctions are now available.

Between 2001 and 2014, approximately 82,500 claims were heard (with a success rate
around 95 per cent). Justices of the peace must have a law degree, but need have no further
legal education.

The Portuguese Supreme Court has held that the jurisdiction of the justices of the peace
is concurrent with that of the courts. 10 While justices of the peace are proving useful in simple
disputes, strong suspicion still remains about the quality of their decisions on the merits of
the cases concerned.

VII OUTLOOK AND CONCLUSIONS

All in all, the current year, much like the previous one, has not seen many legislative reforms
to the judicial system.

Although the filing of financial and banking litigation proceedings has decreased, it is
still one of the most significant areas of litigation and one of the subjects that is keeping the
Portuguese courts occupied.

During 2018, there was a reduction of 13.2 per cent in the number of the pending
actions before the Portuguese civil courts, which means that the number of proceedings that
were concluded was higher than the number of actions filed.

The average length of civil actions at trial has also decreased. No direct correlation
can be established between this decrease and the recent reinstatement of the first instance
courtrooms and the improvement of the digital access to court proceedings, since this decrease
has taken place over the past few years. The reduction of pending judicial proceedings and of
their duration may be due to a number of factors, including the increasing resort to ADR,
the high costs of litigation and also the country’s economic stabilisation.

SAUDI ARABIA

Mohammed Al-Ghamdi and Paul J Neufeld

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

Saudi Arabia is an Islamic monarchy ruled by King Salman bin Abdulaziz Al-Saud. Its legal system is unique, and might be described as a modified civil code system founded in Islamic shariah. This system has its origins in the Holy Koran, the teachings of the Prophet Mohammed and the texts of the Islamic religious scholars commenting on and explaining such teachings. Scholarly opinion rather than the authority of precedent in court decisions or legislation is therefore foundational to the Saudi legal system. Each case before a Saudi Arabian court will be considered by reference to the totality of circumstances interpreted in accordance with scholarly sources.

More generally, the concept of ‘law’ in Saudi Arabia is synonymous with shariah, which is the basic and primary law of the country, as defined in Article 7 of the Basic Law of 1992 (the Basic Law). As stated in this text: ‘The powers of ruling the Kingdom of Saudi Arabia originate from the Book of God and the Sunna of his Apostle, both of which reign supreme over this and all other laws of the state.’ Article 23 of the Basic Law further provides that: ‘The state shall protect the Islamic Creed and shall cater to the application of shariah. The state shall enjoin good and forbid evil, and shall undertake the duties of the call to Islam.’

What might be referred to as ‘laws’ in most civil or common law systems would be referred to as ‘regulations’ in Saudi Arabia. Unlike shariah, which is founded in Islam itself, Saudi regulations are usually enacted or promulgated as royal decrees or ministerial resolutions. Saudi regulations consist of specific rules promulgated by the government authorities to supplement and elaborate on the shariah in respect of the conduct of day-to-day activities in Saudi Arabia. For example, regulations have been adopted to address specific subjects such as foreign investment, the formation and operation of companies, capital markets, banking activity and cybercrime.

No regulation is deemed lawful if it violates a tenet of the shariah. Similarly, if an agreement or individual provision in a contract violates the shariah, it would be unenforceable (e.g., a provision that calls for the payment of interest, which is prohibited under the shariah

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as applied in Saudi Arabia). Accordingly, no court in Saudi Arabia would issue a decision in violation of those principles, regardless of what the parties have agreed to in their contract or otherwise.\(^3\)

Generally, the decisions of Saudi Arabian courts are not considered to establish a binding precedent for the resolution of later cases, and the principle of *stare decisis* is not recognised in Saudi Arabia. Nevertheless, court decisions including decisions of the Board of Grievances have gradually become available for review online with the parties’ names redacted pursuant to Article 71 of the Board of Grievances Law issued by Royal Decree No. 78/M.\(^4\)

### i The new judicial and court system

On 1 October 2007, King Abdullah issued a Royal Decree that set the wheels in motion for material reforms to the judiciary and courts of Saudi Arabia. The Law of the Judiciary\(^5\) has been slow to take effect, but significant reorganisation of the court system is well under way.

A new high court, the Supreme Court, has been established, as have new courts of appeal and first instance courts in the country’s various provinces. As a part of the judiciary’s reorganisation, a new Board of Grievances Law\(^6\) has also taken effect and resulted in a narrower jurisdiction for the Board of Grievances.

The shariah courts, also known as general courts, are courts of general jurisdiction. These courts preside over commercial cases and also have exclusive jurisdiction over certain matters, such as family law and inheritance.

### ii The general courts\(^7\)

**Supreme Court**

The Supreme Court in Riyadh is the highest judicial authority within Saudi Arabia and carries out a review of judgments and decisions issued or endorsed by the courts of appeal. The president of the Court, as well the Court’s other judges, are appointed by Royal Decree. The Supreme Court’s obligation is to monitor and safeguard the application of Islamic shariah within the judicial system.

**Courts of appeal**

The courts of appeal review the decisions and judgments handed down by the courts of first instance. The courts of appeal operate through specialised circuits, are comprised of three judges (or five in certain cases) and handle disputes within their designated region. The various circuits deal with labour, criminal, commercial and other areas of law. The appeals courts have recently started to hold their own hearings and issue judgments. Previously, the

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\(^3\) Article 48 of the Basic Law states that ‘[c]ourts shall apply the provisions of Islamic shariah to cases brought before them, according to the teachings of the Holy Koran and the Prophet as well as other regulations issued by the head of state in strict conformity with the Holy Koran and the Prophet’.

\(^4\) www.bog.gov.sa.

\(^5\) Issued by Royal Decree No. M/78, dated 1 October 2007.

\(^6\) id.

\(^7\) Royal Decree No. M/78, dated 1 October 2007; see also Article 5 of the Law of the Judiciary, Royal Decree No. M/64, 14 Rajab 1395 (23 July 1975), Umm al-Qura No. 2592 – 29 Sha’ban 1395 (5 September 1975).
appellate courts did not typically hold hearings. Rather, they would review the appeal request and decide whether to uphold the lower court judgment or return the case to the lower courts with comments.

First instance courts

Saudi Arabia’s first instance courts have jurisdiction over all cases, without prejudice to the jurisdiction of the Board of Grievances, and are subdivided into five types: general courts, criminal courts, personal affairs courts, commercial courts and labour courts.

General courts have jurisdiction over a range of matters, from property disputes to suits arising out of traffic accidents. General courts are established in all provinces of Saudi Arabia and may consist of a single judge or three judges. Criminal courts have jurisdiction over all criminal cases and are typically comprised of three judges. Personal affairs courts are comprised of one or more judges and have jurisdiction to decide matters concerning proof of marriage, divorce, custody, appointment of guardians and other family matters. Labour courts are comprised of one or more judges and have jurisdiction over disputes related to labour contracts, wages, work-related injuries and termination, among other matters.

The commercial courts were set up by a Council of Ministers Royal Decree in 2007. However, the reforms and transfer of the commercial courts outside of the Board of Grievances was not fully implemented until 2017. The commercial courts are comprised of one or more judges and have jurisdiction over commercial disputes, including disputes arising between merchants or in respect of partnerships, as well as bankruptcies. There are three commercial courts – located in Riyadh, Jeddah and Dammam.

On 25 February 2018, the Minister of Justice issued a decision adding an Article to the implementing regulations of the Civil Procedure Law affecting commercial courts. The Article stipulates the following:

- the first hearing date for a commercial case shall not be later than 20 days from the date the lawsuit was registered;
- the maximum number of hearings for commercial cases, after the defendant has been notified, must be no more than three; further adjournment is not allowed except for cases of necessity, such as the illness of one of the parties or their representatives, or the inability of a witness to attend;
- in the first hearing, the judicial panel must determine the preliminary issues pertaining to jurisdiction and admissibility conditions;
- the court may, in commercial proceedings, enable the parties – via a duly recorded decision – to exchange memos and documents with the court administration; the decision must include the number of memos, the date of filing for each of them, and the date of the next hearing; and
- the expert appointed by the court must submit his or her report to the court within 60 days from his or her appointment to the case. If the expert is unable to submit his or her report to the court within the 60-day time limit, he or she must clarify the reason for the delay and the court may extend this period for a maximum of 30 days.

iii Board of Grievances

The Board of Grievances was originally set up to hear cases involving the government or government bodies and historically had jurisdiction over government contract and administrative disputes. In 1982, Royal Decree No. M/51 established the Board of Grievances
as an ‘independent administrative judicial commission’ directly responsible to the King. Among other things, the Decree authorised the Board of Grievances to assume jurisdiction over certain criminal cases, some disputes involving the government and requests to enforce foreign judgments. Subsequently, the Board of Grievances was also given jurisdiction over certain commercial matters. The Board is based in Riyadh and has branches in Jeddah, Dammam and Abha.

The Board of Grievances has now undergone reform in line with the Board of Grievances Law. The reforms include the establishment of specialised administrative tribunals to hear administrative disputes relating to employees, administrative decisions, contracts, disciplinary actions and requests to implement foreign rules. The ‘new’ Board of Grievances has jurisdiction to determine matters involving the government, whereas the general courts take jurisdiction over the various commercial matters previously heard by the Board of Grievances. The procedures followed by the general courts are similar to those of the Board of Grievances. In 2017, the Board of Grievances launched an electronic system for the Supreme Administrative Court. This system enables the electronic transfer, registration, and receipt of objections by the Administrative Appeal Courts both to and from the Supreme Administrative Court.

iv Other tribunals

In addition to the general courts and the Board of Grievances, there are other specialised tribunals that have subject matter-specific or participant-specific jurisdiction. Examples are the Insurance Dispute Committee under the Saudi Arabian Monetary Agency (SAMA), the SAMA Committee for the Resolution of Banking Disputes and the Committee for the Resolution of Securities Disputes.

Framework for alternative dispute resolution (ADR) procedures

Disputes in Saudi Arabia can generally be submitted to arbitration. The judicial (or quasi-judicial) body that would have had original jurisdiction to hear the dispute has historically retained a large measure of control over arbitration. As discussed below, however, a new arbitration law came into effect in 2012 which provides considerable procedural guidance. The implementing regulations for that law went into effect in June 2017. These regulations provide additional clarity regarding, among other things, the courts competent to settle disputes related to arbitration.

Except in respect of family disputes, labour disputes and disputes between a Saudi distributor and its principal, there are no laws, rules or regulations in Saudi Arabia dealing with the resolution of disputes through mediation.

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9 Article 8 of Royal Decree No. M/51 (superseded).
10 In 1987, the power to settle certain commercial disputes was transferred to the Board of Grievances pursuant to a resolution of the Council of Ministers No. 241, dated 26/10/1407 AH.
12 Royal Decree No. M/34, dated 16 April 2012.
II THE YEAR IN REVIEW

In recent years, Saudi Arabia has sought to instil confidence in its judicial system by, among other things, authorising the creation of new commercial courts and appellate bodies, including a Supreme Court, to establish a clear and reliable appeals process.\(^{13}\)

To complement reform efforts focused on the legal system and profession, the Ministry of Justice has also embarked on infrastructure projects, including new court houses and information technology, with the aim of linking courts in the Kingdom together and standardising court procedures.

Saudi Arabia has also implemented judicial reforms through legislation. A new Enforcement Law came into effect in March 2013. The Enforcement Law transfers jurisdiction over the enforcement of foreign judgments from the Board of Grievances to a specialised enforcement judge.

In 2014, the Ministry of Justice also announced the launch of new traffic courts located primarily in Riyadh, Mecca, Medina and the Eastern Province. Further, the Ministry of Justice issued an order allocating certain powers of the notaries public to eligible attorneys, including the power to issue powers of attorney, authenticate contracts and handle real estate sales.

In 2015, practitioners saw significant changes to substantive law alongside continued court reform. For example, on 7 April 2015 a press conference was held by the Saudi Arabian Minister of Labour, confirming a number of amendments to the Saudi Arabian Labour Regulations, including an increase in the probation period for new employees from 90 to 180 days. Meanwhile, the Labour Commission established five new circuits in different regions of the Kingdom to improve efficiency. (More recently, the labour courts have been put under the umbrella of the Ministry of Justice instead of the Labour Commission). The much-anticipated Companies Law 2015 was published in the Umm Al-Qura gazette on 4 December 2015 and came into operation on 2 May 2016.

2016 also saw several significant procedural developments. Perhaps the most important of these was a decision by the Enforcement Court in Riyadh to confirm an ICC award against a Saudi party. The significance of this case stems from the perception that the arbitration and enforcement regimes in Saudi Arabia – which foreign parties had been sceptical of – are beginning to show progress in streamlining the dispute resolution process.

For example, the enforcement circuit now has a direct online connection to other government entities such as SAMA. Meanwhile, the Supreme Judicial Council issued an announcement in 2016 stating that court hearings should not be postponed if a judge is undergoing training, on vacation or has been sent on a mission; doing so would be a violation of a judge’s judicial duty. In the event that a judge is unable to meet the date of a hearing, an acting judge should fulfil the responsibilities of the original judge on the hearing’s scheduled date.\(^{14}\)

While 2017 did not see as many procedural developments, the issuance of the Implementing Regulations of the Arbitration Law was significant. The Implementing Regulations further supplement and clarify the 2012 Arbitration Law. The regulations went into effect on 9 June 2017. Another development in 2017 was the full implementation of

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\(^{13}\) Royal Decree No. M/78, dated 1 October 2007.

three commercial courts in Riyadh, Jeddah and Dammam. Finally, the Board of Grievances introduced an electronic system for the Supreme Administrative Court relating to interdepartmental and court objections.

The year 2018 has seen substantial efforts to raise the profile of international arbitration in Saudi Arabia, while also bolstering the courts. In particular, the Saudi Center for Commercial Arbitration (SCCA) hosted its first international conference, SCCA18, which was held in Riyadh in October in partnership with the International Centre for Dispute Resolution under the auspices of the Ministry of Justice and the Ministry of Commerce and Investment. Dozens of arbitration experts and government representatives were in attendance. The SCCA aims to facilitate business and attract foreign investment by providing an alternative and flexible form of dispute resolution familiar to many investors abroad.

Meanwhile, the court system continues to undergo developments of its own: the labour courts have been brought under the umbrella of the Ministry of Justice instead of the Labor Commission; various forms of electronic summons have been approved; the Ministry of Justice has begun publishing all judgments on its website; the appellate courts have begun issuing judgments rather than returning cases to the lower courts with comments; and the Ministry of Justice has introduced a new article to the implementing regulations to the Civil Procedural Law. The latter law introduces amendments to procedure regarding deadlines as well as evidentiary and jurisdictional issues.

III COURT PROCEDURE

i Overview of court procedure

The Law of Procedure before shariah courts contains articles dealing with various aspects of procedure in Saudi Arabia.

Procedure in the Board of Grievances is set out in the Procedural Rules before the Board of Grievances. These Rules contain guidance on issues such as jurisdiction, the filing of cases, the hearing of cases and judgments, ways of objecting to judgments and various other matters.

ii Procedures and time frames

Litigation in Saudi Arabia is often slow-paced. However, recent amendments to the implementing regulations of the Civil Procedure Law, including a limitation on the maximum number of hearings in commercial cases (to three), may quicken the pace.

The litigation process is commenced by filing a statement of claim and serving notice of the claim and of the first hearing date on the defendant. The defendant is expected to attend the first hearing. However, absence of the defendant at the first hearing results in an automatic postponement of the matter to a subsequent hearing, about which the defendant must be notified. If the defendant is absent from the second hearing or any other hearing

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15 Royal Decree No. M/21, dated 19 August 2000. Articles 96 to 232 have been superseded by the new Enforcement Law described below.


17 The Procedural Rules before the Board of Grievances, issued by Royal Decree No. M/3, 22/1/1435.

without an excuse acceptable to the court, the court in its discretion may award a default judgment in favour of the plaintiff. Likewise, if the plaintiff is absent from any hearing without an acceptable excuse, a default judgment may be awarded in favour of the defendant. Historically, Saudi courts have been very reluctant to issue default judgments even when the delay tactics of a party are extreme. More recently, however, this trend has begun to reverse.

Assuming a default judgment is not awarded, the litigation process continues through a series of hearings where the parties submit and respond to pleadings. When the parties have had the opportunity to respond to each other’s pleadings to their satisfaction and the satisfaction of the court, the court will close the case for judgment. Saudi courts do not typically award legal costs to the successful litigant.

Interim relief in Saudi Arabia is available only in extremely limited circumstances. Parties may request interim relief if the matter is urgent and there is a risk that a delay in receiving relief will be damaging. For example, a creditor may obtain a protective attachment of a debtor’s assets where there is a risk that the assets may be hidden or smuggled out of the country. It is important to note, however, that while injunctive relief is available in theory on an interim or permanent basis, in practice it is very rare.

### iii Class actions

Class actions are not permissible in Saudi Arabia. However, multiparty litigation has become more prevalent, particularly in cases filed by government agencies against multiple defendants.

### iv Representation in proceedings

In general, a litigant may either be self-represented or represented by a lawyer who appears on the list of practising lawyers in Saudi Arabia. Although self-representation is permitted, in practice it is uncommon and rarely seen outside labour disputes and minor criminal proceedings. A major practical limitation to self-representation for most foreign parties is that court proceedings in Saudi Arabia are conducted in Arabic. All oral testimony and argument, as well as documentary evidence, must be submitted in Arabic. It is permissible to use a private or court-appointed translator. A legal entity other than a natural person may represent itself through an in-house lawyer or a non-lawyer legal representative. As a matter of practice, this in-house or legal representative must be a Saudi national.

In any circumstance where a representative appears on behalf of a party, including where a party is represented by an in-house lawyer or a non-lawyer in its employ, the court will require a power of attorney evidencing that representative’s authority to appear on behalf of the party. A power of attorney executed outside Saudi Arabia will need to be authenticated in the country where it is signed. Where a litigant fails to produce a power

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19 ibid.
20 ibid.
21 See Articles 205 to 210 of the Law of Procedure before Shariah Courts, in respect of injunctions.
22 Articles 1, 3 and 18 of the Code of Law Practice, issued by Royal Decree No. (M/38) 28 Rajab 1422 (15 October 2001), Umm al-Qura No. (3867) 17 – Sha’ban 1422 – 2 November 2001 (the Code of Law Practice).
23 id. at Article 18(c).
24 Articles 49 to 50 of the Law of Procedure before Shariah Courts.
of attorney, the court may, at its discretion, issue judgment in favour of the opposing party, although in most cases the court will allow the party at least one additional opportunity to comply with this requirement.

v Service out of the jurisdiction

Article 20 of the Law of Procedure before shariah courts sets out the mechanism by which parties may serve legal process outside Saudi Arabia in cases heard by the shariah courts. This Article states: ‘If the place of residence of the person to be served is in a foreign country, a copy of the process shall be sent to the Ministry of Foreign Affairs, for communication by diplomatic means. A reply stating that the copy has reached the person to be served shall be sufficient.’

In Board of Grievances cases, the procedure to be followed for service out of jurisdiction is almost identical to that followed in the shariah courts. Article 43(f) of the Board of Grievances’ Rules and Procedures\(^\text{25}\) states: ‘As regards persons who are resident outside the Kingdom service shall be effected through the Ministry of Foreign Affairs; in this case it would be adequate to receive a reply purporting to have served the summons.’

The requirements of the shariah courts and the Board of Grievances are not altered when the documents to be served are those that initiate proceedings, nor is there any distinction made between natural and corporate persons.

IV ENFORCEMENT OF FOREIGN JUDGMENTS

i Procedures for enforcing foreign judgments

In Saudi Arabia, the authority competent to enforce foreign court judgments is the special circuit created by the enforcement regulations.\(^\text{26}\) A foreign court judgment is enforceable upon issuance of an enforcement order by the judge of the circuit. Such an order has the same status as a court judgment.

There are two main procedures by which a party may seek to enforce a foreign court judgment. The first procedure involves requesting enforcement of a foreign judgment pursuant to Royal Decree No. M/53.\(^\text{27}\) The second procedure involves requesting enforcement of the foreign judgment pursuant to a reciprocal enforcement treaty.

ii Enforcement under Royal Decree No. M/53

A new Enforcement Law has been in effect since March 2013 under Royal Decree No. M/53. The new Enforcement Law supersedes Articles 96 to 232 of the Law of Procedure before Shariah Courts (as enacted by Royal Decree No. M/21 dated 20/5/1421 H), Article 13(g) in the Board of Grievances Law (as enacted by Royal Decree No. M/78 dated 19/9/1428) and all other statutory provisions that are inconsistent with the Enforcement Law.

Under Article 1 of the Enforcement Law, enforcement is the jurisdiction of a specialised enforcement judge defined as ‘the chairman of the enforcement circuit, the judge of the enforcement circuit or the court judge who handles the tasks of the enforcement judge, according to the case’. Article 2 grants the enforcement judge power to enforce judgments

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25 The Procedural Rules before the Board of Grievances, issued by Royal Decree No. M/3, 22/1/1435.
27 ibid.
and decisions handed down in administrative and criminal actions and in arbitration. The enforcement judge has broad authority to enforce judgments, including foreign judgments and foreign arbitral awards, and to make orders for the disclosure and attachment of assets. Decisions of the enforcement judge may be appealed.

Article 11 provides requirements for the enforcement of foreign orders, judgments and arbitral awards. Among other things, the enforcement must not be contrary to the public policy of Saudi Arabia and there must be enforcement reciprocity with Saudi Arabia in the jurisdiction where the order, judgment or award was rendered. Historically, the reciprocity requirement has been difficult but not impossible hurdle to overcome. Successful litigants in this regard include a party who obtained a sworn statement from an American judge confirming reciprocity of enforcement for Saudi court judgments.28

Practitioners have generally welcomed the Enforcement Law and hope it will reduce delay and the likelihood that a judgment or award will be reopened and reconsidered on the merits. An enforcement judge would enforce a foreign arbitral award without questioning the award, provided the arbitration award meets the requirements of Article 11 of the Enforcement Law. However, since Article 11 is subject to the 'requirements of international treaties and conventions', grounds for overturning a foreign arbitral award in such treaties and conventions would presumably still apply. Article 50 of the new Arbitration Law also contains such grounds and may likewise come into play.

### iii Enforcement under regional treaties

A judgment creditor may seek enforcement under two regional treaties: the 1983 Riyadh Arab Agreement for Judicial Cooperation (the Riyadh Convention) and the 1995 Protocol on the Enforcement of Judgments, Letters Rogatory, and Judicial Notices issued by the Courts of the Member States of the Arab Gulf Cooperation Council (the GCC Protocol). These two treaties apply to judgments rendered in their respective Member States (GCC members consist of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates). These states are also part of the larger group of Riyadh Convention members.

The Riyadh Convention and the GCC Protocol provide that court judgments of a signatory state may be enforced in any other signatory state, if the court rendering the judgment had proper jurisdiction and the dispute has been finally adjudged. These treaties also allow the court where enforcement is sought to refuse enforcement if, among other reasons, the judgment is contrary to shariah law or the Constitution, or the public order of the jurisdiction where enforcement is sought.29 Both the Riyadh Convention and the GCC Protocol provide that judgments issued by one Member State’s courts may be executed in any of the Member States, provided such judgments would be executed in the state where the court that rendered the judgment is located.30

### iv Assistance to foreign courts

Parties or courts outside Saudi Arabia may seek the assistance of Saudi courts via a number of international and regional agreements.

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29 Article 30 of the Riyadh Convention; Article 2 of the GCC Protocol.
30 Article 31 of the Riyadh Convention; Article 3 of the GCC Protocol.
Articles 16 to 21 of the Riyadh Convention address requests for assistance from judicial authorities in Member States, including for the purpose of obtaining witness testimony. Under Article 17 of the Convention, a request for a rogatory commission may be refused for a limited set of reasons: if the recipient court lacks competence to implement the request; if the request would prejudice the sovereignty of the contracting party; or if the request concerns a crime that the contracting party considers to be of a ‘political nature’.

Article 13 of the GCC Protocol provides that authorities in Member States may request ‘any judicial procedure in connection with an existing suit, including hearing the statements of the witnesses, receiving and discussing the experts’ reports, conducting surveys or requesting to put to oath in all civil, commercial, administrative, penal and personal affairs cases’. The limited grounds for refusing such requests are set out in Article 15 and reflect those in the Riyadh Convention.

Saudi Arabia has also entered into judicial cooperation agreements. For example, under Article 5 of the 2005 Judicial Cooperation Agreement between the Kingdom of Saudi Arabia and the Syrian Arab Republic, ‘[t]he subjects of either state party residing within the borders of the other shall have the right to judicial assistance in line with that provided for its nationals in accordance with its laws’. The Ministry of Justice in Saudi Arabia is to receive requests for assistance and determine the appropriate authority to respond.

Notwithstanding the provisions of these treaties, such assistance by a Saudi court is very rare in practice.

v Access to court files
There is generally no public access to court files in Saudi Arabia. Court files do not become available to the public even after the proceedings have ended. While there is no established, comprehensive case reporting system in Saudi Arabia, pursuant to the Law of the Judiciary, the Ministry of Justice has begun publishing all the judgments to their website on a no-name basis. While past decisions of Saudi Arabian courts are influential, they are not considered to establish a binding precedent for deciding later cases.

vi Litigation funding
There is no provision or established practice for third-party litigation funding in Saudi Arabia. More generally, under Saudi Arabian law a claim or defence will not be accepted where the proponent has no existing legitimate interest.31

V LEGAL PRACTICE
i Conflicts of interest and information barriers
In Saudi Arabia, the Code of Law Practice prohibits a lawyer from undertaking representation of a client in circumstances where a conflict of interest is deemed to exist.32 In such circumstances, a lawyer is prevented from undertaking the representation personally or through another lawyer. The Code of Law Practice does not provide an exception or permissible method for obtaining a waiver of a conflict.

31 Article 3 of the Law of Procedure before Shariah Courts.
The Code of Law Practice contains an outright prohibition on a lawyer accepting a case or rendering advice against his or her employer or a former employer within five years of termination of the relationship with that employer. A lawyer also may not represent an adversary in connection with a previously handled case or in connection with any other related matter. Further, a lawyer who has been retained for periodic representation cannot accept a case or render advice against the client within three years of the termination of the retainer agreement.

In Saudi Arabia, the ability to eliminate a conflict through screening or an information barrier is uncertain. There is no express prohibition against information barriers. On the other hand, there are also no express procedures regarding the proper application of an information barrier. Historically, in Saudi Arabia the practice of law has been performed on an individual basis. The practice of law within a professional firm is a relatively recent development.

ii Money laundering, proceeds of crime and funds related to terrorism

Saudi Arabia has taken significant steps towards combating money laundering and the funding of terrorism. In 2003, Saudi Arabia introduced the Anti-Money Laundering Law (AML). Under the AML, lawyers are subject to certain obligations designed to prevent money laundering and the financing of terrorism. Among these obligations are strict requirements that a lawyer verify the identity of the client and put in place certain internal measures designed to detect and combat money laundering and the financing of terrorism.

Lawyers are also under an obligation to report unusually large, complex or suspicious transactions to the Financial Intelligence Unit (FIU). A lawyer's reporting obligation includes the turning over of documents and information requested by the FIU, judiciary or concerned authorities without regard to any legal privilege that may apply. The AML also imposes an obligation on lawyers to maintain records and documents that identify the client and explain and relate to conducting, concluding or closing a client account for at least 10 years from the date the account is closed. Failure to comply with the obligations imposed by the AML may result in a fine or imprisonment. However, an exception to liability under the AML exists for violations that occur while acting in good faith.

iii Data protection

The Basic Law of Governance, Decree No. A/90 creates a right of privacy concerning personal communications except as otherwise provided by law. While there is no specific cause of action for breach of privacy in this context, a tort claim may lie where an individual has wrongfully disclosed private personal information without consent. In this regard, where it...
is foreseeable that personal information may need to be collected and transmitted, it may be advisable to obtain such consent in advance (e.g., by including a provision to this effect in an employment contract). Where information is being gathered through information networks or computers, the Anti-Cyber Crime Law (2007), Decree No. M/17 may also be applicable. For example, the Anti-Cyber Crime Law imposes criminal and civil penalties for unlawfully accessing computers for the purpose of modifying, deleting or redistributing private data. Likewise, intercepting data transmitted through an information network or computer without legitimate authorisation is prohibited. The Telecommunications Act sets out penalties for breaches of privacy in the telecommunications sector at large. Where no specific provisions are applicable courts will apply general principles of shariah law.

VI DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

The concept of privilege as a right of the client does not exist in Saudi Arabia. Instead, the protection afforded to confidential client information arises from an obligation on the lawyer. Under the Code of Law Practice, any confidential information communicated to or learned in the course of practice by a lawyer is prohibited from being disclosed by the lawyer even after expiry of the power of attorney. This obligation, however, does not apply where non-disclosure would violate a shariah requirement.

Although Saudi Arabia does not provide a right of privilege as is common in other legal systems, Saudi Arabian law does protect privacy. The Basic Law expressly safeguards an individual’s communications from confiscation, delay, reading or listening except where provided by statute. Moreover, during the course of a dispute the ability to compel any testimony or documents is extremely limited. The combination of a right to privacy and the inability to compel information makes it difficult for an opposing party to discover a client’s confidential information.

As a practical matter, however, it is important to note that where client confidences are disclosed, they may be freely used against a party. For example, in negotiating the settlement of a dispute, there is no ‘without prejudice’ privilege under Saudi law and anything disclosed during settlement negotiations can be used against the disclosing party in proceedings.

ii Production of documents

Litigation in Saudi Arabia is document-driven. Oral testimony and argument is rare and is considered to be of little probative value. Notwithstanding the focus on documents in Saudi Arabian litigation, a litigant’s ability to discover documents from the opposing party is extremely limited.

44 Issued under the Council of Ministers Resolution No. 74, 2001.
45 Article 23 of the Code of Law Practice.
46 id.
47 Article 40 of the Basic Law of Saudi Arabia, Royal Decree No. A/90 Shaban 1412 H, corresponding to 1 March 1992 G.
There are no specific rules in Saudi Arabia governing the discovery of documents.\(^{48}\) In practice, however, parties are permitted to submit a request to the court seeking to compel production of specifically identified documents that can be shown to exist. For example, a party may request the court to compel production of a document that is specifically referenced in another document already before the court. Specifically identified documents can be compelled from a counterparty and third party alike. Parties are not permitted to make broad or general requests for information. During the course of the litigation, a court can, of its own motion, compel the production of documents from either party.

VII ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

The alternatives to court litigation in Saudi Arabia are primarily direct negotiation between the disputing parties to resolve the dispute or arbitration. Mediation is also available (and sometimes mandated as a condition to seeking judicial review).

ii Arbitration

The old Arbitration Law

Prior to July 2012, arbitration in Saudi Arabia was governed by Royal Decree No. M/46, the old Arbitration Law,\(^{49}\) which subjected arbitration to substantial judicial oversight by the Saudi courts (generally the Board of Grievances for matters involving non-Saudi parties). The old Arbitration Law required all arbitration proceedings in Saudi Arabia to be conducted in Arabic and awards could be rejected and reformed at the discretion of the court. The court was responsible for approving the parties’ agreement to arbitrate and appointing arbitrators if the parties failed to do so. The court also supervised and ruled on disputes arising during the arbitration, including procedural objections, arbitrator recusals and requests for interim relief.

In addition, under the old Arbitration Law the relevant court was responsible for enforcement of arbitral awards (foreign and domestic) and conducted whatever level of review it deemed necessary to ensure that the arbitration award was compliant with shariah. In practice this typically amounted to what appeared to be a de novo review of the entire matter. In at least one instance, the Board of Grievances has reversed and rewritten an award (e.g., vacated the arbitral award and awarded new damages to the party who lost on the merits in the arbitration).

The new Arbitration Law

On 8 June 2012, Saudi Arabia published its long-awaited arbitration reform law. The new Arbitration Regulation, Royal Decree No. M/34 dated 24/05/1433 H (the new Arbitration Law) replaced the previous Arbitration Regulation, Royal Decree No. M/46 (the old Arbitration Law) and the Rules for the Implementation of the Arbitration Regulation

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\(^{48}\) However, Article 149 of the Law of Procedure before shariah courts permits the court, of its own motion or at the request of a litigant, to ‘decide to introduce documents or papers from government agencies of the Kingdom if the litigants are unable to do so’.

\(^{49}\) Royal Decree No. M/46.
The new Arbitration Law applies to arbitral proceedings in Saudi Arabia (except those related to personal affairs). It also applies to international arbitration abroad if the parties have agreed to apply the new Arbitration Law. Importantly, the new law does not alter the requirement that arbitral awards be shariah compliant and expressly recognises the court’s authority to review arbitral awards for shariah compliance. However, in other respects, the new Arbitration Law borrows from the 1985 UNCITRAL Model Law on International Commercial Arbitration, as amended in 2006 and, accordingly, more closely aligns Saudi law with international arbitration norms (e.g., regarding competence-competence and separability). The new Arbitration Law also grants more control to the parties and provides greater clarity on several issues.

The new Implementing Regulations to the Saudi Arbitration Law

In May of 2017, the Council of Ministers issued Implementing Regulations to supplement the Saudi Arbitration Law. These came into effect on 9 June 2017. The Implementing Regulations provide clarifications to the 2012 Arbitration Law. Key provisions of the Implementing Regulations include the following:

a. Article 2 provides the Court of Appeals with original jurisdiction to hear issues relating to an arbitral dispute including challenges to arbitration awards;

b. Article 3 provides that electronic service of notices is now permissible;

c. Article 8 establishes that in the event the parties have failed to agree on the procedural rules to be followed by the arbitral tribunal and the tribunal chooses to then follow specific rules, the tribunal must give notice to the parties at least 10 days prior to implementing them; and

d. Article 17 clarifies that the Supreme Court is the court that shall hear appeals following a decision by the Court of Appeals to set aside an award.

Arbitration agreements

Prior to the new Arbitration Law, there were no written guidelines regulating arbitration agreements (except the requirement that the arbitration agreement be made by a person with full legal capacity). By contrast, the new Arbitration Law provides guidelines for determining whether an agreement to arbitrate may be enforced and how. This change provides parties with some additional clarity when forming agreements.

50 Royal Decree No. M/34.
51 New Arbitration Law, Article 2.
52 id., Article 50(2).
53 id., Article 20.
54 id., Article 21.
55 The Saudi Ministry of Council recently issued a Royal Decree allowing courts to serve summons by email, mobile messages or any account registered at the Ministry of Interior.
56 New Arbitration Law, Articles 9–12.
57 id., Article 1: ‘Arbitration Agreement: is an agreement between two or more parties, providing that they resort to arbitration all or some specific disputes that have arisen or that may arise between the parties.
Jurisdiction of the arbitral tribunal
Under Article 11 of the new Arbitration Law, a court should decline jurisdiction in cases where there is an arbitration agreement, if the defendant requests referral of the case to arbitration prior to making any claim or defence. The new law also provides that arbitrators shall settle pleas of non-jurisdiction, including alleged defects in the arbitration agreement, thus adopting the principle of competence-competence. In this regard, the arbitration agreement is also treated as separable from the underlying agreement (i.e., the annulment, cancellation or termination of the underlying contract ‘shall not result in the annulment of the arbitration condition if such condition is valid by itself’).

Arbitrator appointments and language requirements
With respect to the appointment or recusal of arbitrators, the new Arbitration Law provides detailed procedures (e.g., in the event the parties fail to agree on the appointment of a sole arbitrator, the competent court will make the appointment unless the parties have agreed otherwise). Also, whereas the old Arbitration Law required arbitration to be conducted in Arabic, the new law allows arbitral proceedings to be conducted in a language other than Arabic if ordered by the arbitration panel or the parties so agree. However, awards must be translated into Arabic prior to enforcement.

Time limits
In addition to easing language requirements, the new Arbitration Law provides more flexibility regarding time limits. Under the old Arbitration Law, the arbitral tribunal was required to issue an award within 90 days of the date of the decision approving the arbitration agreement (unless the parties otherwise agreed), although this requirement was not typically observed in practice. Under the new Arbitration Law, in the absence of agreement by the parties, awards shall be issued within 12 months of the commencement date of the arbitral proceedings. This period can be extended by up to six months by the arbitral tribunal (or more, if the parties agree).

Choice of rules
The new Arbitration Law allows parties the freedom to choose which arbitration rules will apply and provides guidance on choice of law issues. The old Arbitration Law was silent in this regard other than requiring that arbitral awards must abide by the provisions of Islamic shariah and the ‘laws in force’ (i.e., applicable Saudi law).

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58 id., Article 20.
59 id., Article 21.
60 id., Articles 13–24.
61 id., Article 29.
62 id., Article 40.
63 See new Arbitration Law, Article 25 (regarding arbitration rules) and Article 38 (regarding the permissibility of party agreements on applicable law, subject to the provisions of shariah law).
iii Practical considerations

The new Arbitration Law provides increased flexibility with respect to selecting the venue of the arbitration, the governing law, the language, the arbitrators and other matters. However, this flexibility is still clearly subject to the Saudi courts’ oversight and mandate to ensure shariah compliance. For example, while the new Arbitration Law does not require that all arbitrators in a three-member tribunal be competent in shariah (e.g., arbitrators may have a civil law degree), parties should take the arbitrators’ familiarity with shariah law into consideration when selecting arbitrators so as to protect the enforceability of the award before Saudi courts.

During the arbitration process, the new Arbitration Law requires Saudi courts to act within certain time limits when performing supervisory functions. For example, if a party fails to appoint a wing arbitrator within 15 days of a petition to this effect by the other party, the court must do so (according to the procedures set out in the new Arbitration Law) within 15 days of a party’s application.64 These time limits should help to move the arbitration process along more quickly. However, it is still unclear whether the courts will consistently enforce time limits in practice.

Interestingly, the new Arbitration Law permits the arbitration panel to issue temporary or injunctive relief if the parties agree that the arbitration panel may do so.65 A second provision provides that a ‘competent court’ may order temporary or preventive measures upon application from a party.66 It is unclear whether such measures, which are extremely rare in Saudi Arabia, will be enforced or applied by Saudi courts.

Although many of the provisions in the new Arbitration Law will be familiar to parties who opt for arbitration in other jurisdictions, for the reasons noted above, parties must still consider Saudi-specific practice issues in deciding what dispute resolution mechanism to choose. For many contracts, choosing Saudi courts as the forum for dispute resolution may remain a better alternative than choosing arbitration in Saudi Arabia.

iv Arbitral institutions

Historically, the Saudi Chamber of Commerce and Industry facilitated arbitration with the agreement of the parties. In 2014, the Council of Ministers established the SCCA. The Arbitration Rules for the SCCA were finally completed in 2016 and came into effect on 31 July 2016.67 The Rules were formulated with the UNCITRAL Arbitration Rules as an initial template, but contain several significant differences. For instance, the SCCA’s rules on pleadings and the appointment of the arbitral tribunal depart from the UNCITRAL rules. In addition to the development of its rules, the SCCA plans to expand beyond Riyadh and to establish a branch in Jeddah.

v The popularity of arbitration as a dispute resolution mechanism

Courts remain the most popular forum for disputes involving local commercial transactions. Under the old Arbitration Law, an arbitration clause did not necessarily affect the right of the

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64 New Arbitration Law, Article 15.
65 id., Article 23.
66 id., Article 22.
parties to pursue court litigation. In such cases, arbitration could end up adding additional steps to the dispute resolution process. This is not the case under the new Arbitration Law. However, at least for domestic disputes, continued court supervision may ensure compliance with shariah law and thus increase the likelihood of enforcement.

Notwithstanding its limitations, arbitration has been a familiar form of dispute resolution in Saudi Arabia for centuries. Both the Koran and the Sunnah of the Prophet refer to arbitration as a dispute resolution mechanism. Arbitration has historically served as method of resolving certain tribal disputes. It has also evolved into a valid method of resolving commercial disputes, including those concerning oil concessions.

Significant limitations remain on arbitration for some disputes, especially those involving government agencies. The limitations involving government agencies continue under the new Arbitration Law. The new Arbitration Law expressly prohibits government bodies from entering into arbitration agreements, unless approved by the Prime Minister. In part, these limitations are deemed to stem from a landmark case, *Saudi Arabia v. Arabian American Oil Co (Aramco)*, in which the arbitral tribunal rendered an award against the Saudi Arabian government. In the Aramco decision, the tribunal concluded that since Saudi law contained ‘no particular rules which define mining concessions in general and petroleum concessions in particular’, Saudi law had to be ‘interpreted or supplemented by general principles of law, by the custom and practice in the oil business and by notions of pure jurisprudence’. In response to this award, a Council of Ministers resolution barred government agencies from entering into arbitration without approval of the President of the Council of Ministers, and required that contracts with Saudi government agencies be subject to Saudi law. In a similar vein, although Saudi Arabia is a member of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), Royal Decree No. M/8 precludes investment disputes involving oil or acts of sovereignty from being adjudicated under the terms of the ICSID Convention. These restrictions have limited the popularity of arbitration for major transactions, as many such transactions continue to involve government agencies.

vi Rights of enforcement and appeal in arbitral proceedings

A duly issued arbitral award in Saudi Arabia has *res judicata* status and may be executed as such under Article 52 of the new Arbitration Law. A party may seek to enforce an award after 60 days of its issuance. Arbitral awards issued in accordance with the new Arbitration Law

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68 For example, in one instance the Review Committee for the Board of Grievances considered an arbitration clause nullified because the defendant only appealed to the arbitration clause after the dispute was already being litigated. *Diwan al-Mazalim*, Decision No. 72/T/4 of 1411 AH (1991).

69 In particular, see Article 11 of the new Arbitration Law, regarding courts’ obligation to decline jurisdiction where there is an arbitration agreement and the defendant has invoked it prior to making a claim or defence.

70 Verses 4:35 and 49:9 of the Koran are sometimes cited as examples.

71 New Arbitration Law, Article 10.


73 Council of Ministers Resolution No. 58, dated 03/02/1383 AH (25 June 1963); see also Article 8 of the Implementing Regulations.

74 The ICSID Convention came into force on 14 October 1966 when it had been ratified by 20 countries.

are generally not appealable, but may be subject to annulment actions.\(^{76}\) Under Article 50, a party may petition for the annulment of an arbitral award within 60 days of notification of the award (i.e., before enforcement proceedings can begin). In principle, it is thus possible that enforcement proceedings could run concurrent to annulment proceedings unless stayed.

Article 8 states that jurisdiction over petitions relating to international commercial arbitration will be heard by the competent Riyadh court of appeal unless the parties agree on another Saudi court. Importantly, and unlike the old Arbitration Law, Article 50(4) of the new Arbitration Law explicitly provides that, during any set-aside proceeding, the court may not review the merits of the case: ‘The Competent Court shall consider the annulment claim in the cases aforementioned in this Article without having the right to examine the facts and subject of the dispute.’

ivii The New York Convention and other options for enforcing foreign arbitral awards

Awards from the states of the Arab League and the Gulf Cooperation Council may be enforced under the reciprocal enforcement arrangements in the 1995 GCC Protocol and the 1983 Riyadh Convention. Awards may also be enforced in Saudi Arabia under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention), which Saudi Arabia acceded to in 1994, with a reciprocity reservation pursuant to Article 1(3) of the New York Convention.\(^{77}\) The reciprocity reservation means that the New York Convention will be applied only to arbitral awards made in states that are signatory states to the New York Convention.

Along with the other grounds for refusal of enforcement under the New York Convention, Saudi courts may also refuse to enforce awards under the public policy exception in Article V(2)(b) of the New York Convention. The most common violation of public policy is failure to comply with shariah law.

viii Recent developments and trends in arbitration

Current examples of arbitration involving Saudi state entities are limited, as such disputes do not often reach arbitration.\(^{78}\) Arbitration of commercial disputes involving private parties is more common, though enforcing a resulting award has historically been difficult. This is well illustrated by the ICC case Jadawel International (Saudi Arabia) v. Emaar Property PJSC (UAE). The arbitration proceeded under court supervision in Saudi Arabia and a final award was issued in September of 2008 dismissing Jadawel’s claims. However, the award was subsequently challenged and the Second Commercial Court of the Board of Grievances re-examined the merits. In April 2009, the Board of Grievances declined to enforce the award and, moreover, reversed it. In reversing the award, the Board of Grievances reportedly ordered Emaar to pay damages and make other reparations to Jadawel.

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\(^{76}\) New Arbitration Law, Article 49.

\(^{77}\) Royal Decree No. 11, dated 16 Rajab 1414 (30 December 1993).

\(^{78}\) One example is Ed Züblin AG v. Kingdom of Saudi Arabia, ICSID Case No. ARB/03/1 (regarding the construction of university facilities, discontinued in 2003 at the request of the claimant following a settlement agreement between the parties).
The *Jadawel* case highlights the obstacles parties face in reaching a final resolution. These may include the initial jurisdictional proceedings, the arbitral proceedings, the judicial review of the award, and a subsequent appeal. It is hoped that the new Enforcement Law will streamline this process.

In contrast to *Jadawel*, a recent case has signalled that the era of arbitral enforcement difficulty in Saudi Arabia might be coming to a close. The case – between a UAE telecommunications company and a Saudi data communications provider – involved an ICC award which was rendered in London in 2011. In the midst of the enforcement proceedings in Saudi Arabia, the new Arbitration Law and Enforcement Law were both passed. As a result of a procedural change under the Enforcement Law, the claimant transferred the enforcement proceedings from the Board of Grievances to an enforcement court. The Enforcement Court in Riyadh ruled that the US$18.5 million award should be enforced against the Saudi respondent. This decision was in compliance with the new Enforcement Law, which permits a foreign award or judgment to be enforced provided that it meets the requirements of Article 11 of the Law.

The Enforcement Court's decision has been viewed as evidence of progress under the new arbitration and enforcement regime in Saudi Arabia. It is yet to be seen, however, how the enforcement courts will decide in the case of awards that might be deemed contrary to public policy. It is important to note that the ICC award did not contain an award of interest, which is incompatible with shariah as applied in Saudi Arabia.

**ix Mediation**

In Saudi Arabia, formal non-binding mediation is generally only available in family disputes, labour disputes and disputes between a Saudi Arabian distributor and its principal. Mediation is offered by the court judge or by a special committee.

The Saudi Arabian Labour Law requires mediation as a first step in the filing of a labour dispute. At the time the labour dispute is filed with the competent Labour Office, the parties are required to attend one or more mediation sessions in an effort to settle the dispute amicably. The first step in the process is to file the complaint at the Amicable Settlement Department of the Labour Office. This department will have 21 days to settle the claim between the two parties amicably. Otherwise, the case will be moved to a Labour Court. The Labour Courts are divided into a Lower and Appellate Level. The Appellate Level issues the final and enforceable judgment, which cannot be appealed.

In the event that a dispute arises between a distributor and its principal, if the distribution agreement has been registered with the MCI, the Saudi Arabian Commercial Agency Regulations afford the terminated distributor the opportunity to submit a claim to the Commercial Agents Disputes Reconciliation Committee. The Committee consists of a Deputy Minister of Commerce and two officials from the Chamber of Commerce. If the dispute cannot be settled through the mediation efforts of this Committee, it is submitted to the Saudi courts (or Saudi arbitration) for formal adjudication.

Outside the context of family disputes, labour disputes and disputes between a distributor and its principal, mediation is informal and there is no pressure from the Saudi

Arabian courts to mediate. There are also no specific rules governing how mediation is to be conducted or concluded, providing the parties complete freedom to agree between themselves all aspects of the mediation.

**x Other forms of alternative dispute resolution**

The Saudi Arabian courts have discretion to assign one or more experts to prepare a written or oral opinion to assist the court in deciding a matter. The expert’s opinion is non-binding but guides the court’s determination. Experts may be appointed by agreement of the parties, with the approval of the court. Where the parties cannot agree, however, the experts may be court-appointed. The cost of the experts is borne by the parties. In practice, the use of experts is becoming more common in disputes concerning technical matters, which require specialised training and experience.

**VIII OUTLOOK AND CONCLUSIONS**

In 2007, Saudi Arabia embarked on a sweeping restructuring of its judicial system. Progress has been slow but significant. Perhaps the most significant development is the reorganisation of the Board of Grievances to include a Supreme Administrative Court, administrative courts of appeal and administrative courts.

The jurisdiction of the administrative courts is set forth in Article 13 of the new Law of the Board of Grievances. In sum, the jurisdiction of the Board of Grievances has been significantly narrowed and no longer includes commercial disputes and criminal offences over which it had jurisdiction pursuant to Decree No. M/51. The Board of Grievances retains jurisdiction over disputes involving government parties, including ‘contract-related disputes’. However, jurisdiction over private-sector commercial disputes now resides with the commercial courts.

The prospering economy and an increase in foreign investment has prompted Saudi Arabia to take steps towards modernising the way disputes are resolved, both in court litigation and in alternative dispute resolution. These steps include, among other things, introducing a new court system, a new arbitration law and a new enforcement law. While these developments have, in some cases, resulted in greater harmony with practices in other jurisdictions, Saudi Arabia remains a unique and complex jurisdiction for dispute resolution.

81 Article 120 of the Law of Procedure before shariah courts.
82 id. at Article 138.
83 id. at Article 130.
84 id.
85 id. at Article 119.
87 Article 8 of Royal Decree No. M/51, dated 17/7/1402 AH (11 May 1982), to be superseded by Article 13 of Royal Decree No. M/78, dated 19/9/1428 AH (1 October 2007).
88 Article 13(d) of Royal Decree No. M/78, dated 19/9/1428 AH (1 October 2007).
89 Article 9 of the new Law of the Judiciary, Decree No. M/78 (1 October 2007).
INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

Singapore law is based on the principles of common law, similar to the legal systems of other commonwealth jurisdictions. In the more than 50 years since Singapore achieved full self-rule and government from Great Britain, its legal system has undergone substantial legislative and procedural changes. The objective behind these changes were to streamline the legal system so that fair, efficient and cost-effective legal processes could be achieved. To date, this objective has been realised to a very large extent. The fine tuning of the legal system and processes in Singapore is a continuous process intended to keep the system abreast and in line with modern technological advances and an ever-changing legal landscape. At the time of writing, further legislative proposals to streamline legal processes in Singapore are presently afoot and are at the public consultation stage.

The Singapore court system consists of state courts, the Supreme Court and family justice courts. State courts comprise magistrates’ and district courts, which deal with civil claims where the quantum of the claim does not exceed S$60,000 and S$250,000 respectively. These courts also deal with criminal cases, for which offences carry a maximum of five years’ imprisonment or a fine in magistrates’ courts, and a maximum of 10 years’ imprisonment or a fine in district courts.

Where the quantum of the claim does not exceed S$10,000, the dispute may be tried before a small claims tribunal, which provides a quick and inexpensive forum for the resolution of small claims commonly arising between consumers and suppliers. Such claims must be filed within one year of the date of the claim arising. Lawyers are not permitted to represent parties in proceedings before small claims tribunals.

The Supreme Court consists of the High Court and the Court of Appeal. The High Court hears civil cases where the claim sum exceeds S$250,000, and appeals from the state courts. In addition, probate matters where the value of the estate exceeds S$5 million and ancillary matters in family proceedings where the value of assets are above S$1.5 million will be heard by the High Court. The High Court also hears capital criminal cases, such as prosecutions against murder and drug trafficking. The Court of Appeal hears appeals of both civil and criminal matters from the High Court.

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The family justice courts hear the full suite of family-related matters, including divorce, family violence, youth court cases, adoption and guardianship, applications for deputyship under the Mental Capacity Act and probate and succession matters.

II THE YEAR IN REVIEW

i Arbitration in Singapore

The year 2018 saw significant developments in the field of arbitration in Singapore. Early in the year, Parliament passed several bills that paved the way for third-party funding in arbitration-related proceedings in Singapore. This legislation brings Singapore on par with other jurisdictions such as England and Australia, which already allow for third-party funding in arbitration. It is noteworthy that there have already been instances of third-party funding in arbitration-related proceedings in Singapore. The first reported case was funded by leading global finance firm, Burford Capital, in an arbitration in Singapore.

The year 2018 also saw the establishment of the new case management office of the International Court of Arbitration of the International Chamber of Commerce (ICC) in Singapore. The Singapore case management office extends the ICC’s global footprint beyond Paris.

Ahead of its impending revamp, Maxwell Chambers has also taken steps to implement the world’s first smart hearing facility in Singapore through the use of technology. The Singapore Ministry of Law has stated that ‘the smart technology will improve the ease of administration and logistics and allow disputing parties to better focus on their cases that are heard at Maxwell Chambers’.

ii Reforms to several areas of Singapore Law

Significant steps have also been taken to amend current laws to take into account several changes, both in terms of technological advances and the need to provide fast, fair and expeditious resolution of disputes.

One such example involved Parliament setting up the Select Committee on Deliberate Online Falsehoods. The Committee was tasked to examine and report on the use of digital technology and social media to deliberately spread falsehoods online, and report on specific measures, including passing relevant legislation, that should be taken.

There were several amendments to the Criminal Procedure Code. The Code now allows police officers to conduct video recordings of interviews with suspects of certain crimes and in certain situations. There is also greater protection afforded in sexual and child abuse cases. For example, the Code now allows for vulnerable witnesses to testify in court behind a physical screen.

The Ministry of Law also launched a public consultation in late October 2018 aiming to modernise the litigation process and enhancing the efficiency and speed of adjudication.

Significantly, there are proposals to simplify court rules to eliminate time-consuming or cost-wasting procedural steps and ensure fairness to all litigants. These proposals will likely result in significant changes to the adjudication of any civil disputes that pass through the Singapore courts.

iii Significant decisions in court

In 2018, the Singapore Court of Appeal decided on several contentious areas of the law and made significant departures from the positions taken in other jurisdictions. For example, in the case of *Ochroid Trading Ltd and another v. Chua Siok Lui (Trading as VIE Import and Export) and another*, the Singapore Court of Appeal dealt with the recovery of moneys pursuant to an illegal contract and considered the decision of the UK Supreme Court in *Patel v. Mirza*. The Court of Appeal decided that the principle of stultification would serve to act as a defence to a restitution claim in Singapore.

The Court of Appeal decision in *Turf Club Auto Emporium Pte Ltd and others v. Yeo Boong Hua and others and another appeal* set out important principles relating to the nature and the availability of *Wrotham Park* damages in Singapore. The Court of Appeal has also, in a long-running case, *Lee Tat Development Pte Ltd v. Management Corporation Strata Title Plan No 301*, decided that the tort of malicious prosecution generally should not be extended to civil proceedings.

Notably, even after the Singapore Court of Appeal delivered its landmark decision in the arbitration sphere in *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v. Astro Nusantara International BV and another appeal*, there nevertheless remains room for argument on the active and passive remedies in international arbitration in Singapore. This is best reflected by the case of *Rakna Arakshaka Lanka Ltd v. Avant Garde Maritime Services (Private) Limited*.

III COURT PROCEDURE

Civil procedure in Singapore is governed by the Rules of Court, together with the Supreme Court Practice Directions (Cap. 322) and the State Courts Practice Directions (Cap. 321).

i Procedures and time frames

Apart from commencing an action in court, in a limited number of cases, the claimants may find recourse at the Small Claims Tribunal (SCT). The SCT has jurisdiction to hear and determine claims relating to a dispute arising from any contract for the sale of goods or the provision of services, claims in tort in respect of damage caused to any property other than the tort of interference with enjoyment or use of place of residence, and claims relating to a
dispute arising from any contract for the lease of residential premises not exceeding two years. Claims must be filed at the SCT within one year of the date on which the cause of action accrued. Parties are not legally represented before the SCT.

Most civil claims are commenced by either writ of summons or by originating summons, in the magistrates’ court, district court or High Court, depending on the value of the claim. Proceedings are begun by writ of summons when there are likely to be substantial disputes of fact. A writ of summons must be endorsed with either a statement of claim or a concise statement of the nature of the claim made, or the relief or remedy required. The writ of summons must give sufficient information to enable the defendant to identify when the cause of action occurred. Within eight days of the writ being served, the plaintiff must file its memorandum of service.

The defendant has eight days from the date of service of the writ to make an appearance (21 days if service of the writ is out of jurisdiction), failing which the plaintiff may apply for judgment to be entered in default of appearance. The defendant then has 14 days after the expiration of the time to enter an appearance or 14 days after the date of service of the statement of claim, whichever is later, to file their defence and counterclaim (if any).

If the plaintiff is of the view that the defendant has no defence to the claim, they may decide at this point to make an application for summary judgment. An application for summary judgment must be accompanied by an affidavit containing all necessary evidence in support of the claim. The defendant has 14 days to file an affidavit opposing the summary judgment application, and the plaintiff has a final right of reply by way of an affidavit. The court may enter judgment for the whole or part of the claim to which the application relates, or grant the defendant conditional or unconditional leave to defend.

If the matter is to proceed to trial, the plaintiff will file its summons for directions. At the hearing for the summons for directions, the court will consider and make appropriate orders or directions to simplify and expedite proceedings, including setting timelines for the filing and exchanging of witness’ affidavits of evidence-in-chief (AEICs), the period to set down the action for trial and an estimate of the length of the trial.

Not less than five days before the trial, the following must be filed: the originals of the AEICs, the bundle of documents that will be relied on and referred to by the parties, and the parties’ opening statements (if the trial is in the High Court).

ii Class actions

Strictly speaking, the Singapore courts do not expressly recognise class actions. However, under Order 15 Rule 12 of the Rules of Court (O 15 R 12), where numerous persons have the same interest in any proceedings, proceedings may be begun by one or more person representing the others. A judgment or order in such a proceeding shall be binding on all persons being represented.

The Singapore Court of Appeal dealt with O 15 R 12 in the case of *Koh Chong Chiah and others v. Treasure Resort Pte Ltd*. In this case, the Court stated that O 15 R 12 operates in two stages: there must first be satisfaction of the jurisdictional stage, whereby it must be proven that the claimants have the same interest in the proceedings; then the court will turn to the second stage, which is discretionary, to determine whether the proceedings should continue as a representative action.

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14 [2013] 4 SLR 1204.
Whether an action should be commenced as a representative action under O 15 R 12 or as an ordinary action under O 15 R 4 of the Rules of Court largely depends on how similar the claims are as a matter of fact or law. The Court normally decides whether to proceed an action as a representative action as a matter of case management and whether proceeding as such will prejudice the defendant’s defence. In a representative action under O 15 R 12, the represented persons are not obliged to discover documents related to the claim and the defendant will not be able to cross-examine or seek costs against the represented persons in the event that the defence is successful.

### iii Representation in proceedings

Any natural person may begin and carry on legal proceedings in person. 15 The general rule for a body corporate is that it may not begin or carry on legal proceedings other than by a solicitor. 16 Likewise, a defendant to an action begun by writ that is a body corporate may not enter an appearance in the action or defend it other than by a solicitor. 17

The court may, on an application by a company or limited liability partnership, give leave for an officer of the company or limited liability partnership to act on its behalf in any relevant matter or proceeding to which it is a party, if the court is satisfied that the officer has been duly authorised by the company or limited liability partnership to do so, and if it is appropriate to give such leave in the circumstances of the case. 18

### iv Service out of the jurisdiction

Documents can be served on persons outside Singapore, with the leave of court. Three major requirements must be met before leave will be granted for service out of the jurisdiction:

* the claim must come within the scope of at least one of the paragraphs of Order 11 Rule 1 of the Rules of Court;
* the claim must have a sufficient degree of merit; and
* Singapore must be the forum conveniens.

Service of an originating process out of Singapore should be by way of personal service as long as it does not contravene the law of the country in which service is effected. Where an originating process is to be served in Malaysia or Brunei, service by a private agent is valid.

### v Enforcement of foreign judgments

A foreign judgment may be enforced at common law or by statutory enforcement.

Under common law, a foreign judgment will be recognised if it is the final and conclusive judgment of a court that, according to the private international law of Singapore, had jurisdiction to grant the judgment, and if there is no defence to its recognition. A defence to recognition may be where the foreign judgment would conflict with an earlier judgment in the forum, or where the foreign judgment had been obtained by fraud or in breach of principles of natural justice.

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15 Rules of Court Order 5 Rule 6(1).
16 Rules of Court Order 5 Rule 6(2).
17 Rules of Court Order 12 Rule 1(2).
18 Rules of Court Order 1 Rule 9(2).
Two statutory regimes under which foreign judgments may be enforced are the Reciprocal Enforcement of Commonwealth Judgments Act (Cap. 264) (RECJA) and the Reciprocal Enforcement of Foreign Judgments Act (REFJA). A foreign judgment to which the RECJA or REFJA applies can be recognised and enforced in Singapore upon its registration, without the need for the underlying dispute to be re-litigated. The RECJA applies to judgments obtained from the superior courts in the United Kingdom and a number of Commonwealth countries. The REFJA applies to judgments given in foreign countries that afford reciprocal treatment to judgments given in Singapore. Non-monetary judgments cannot be enforced under the RECJA and REFJA.

In addition, the Choice of Courts Agreements Act 2016 (CCAA) was enacted in April 2016 to implement the Hague Convention on Choice of Court Agreements (the Hague Convention). The RECJA and REFJA will not apply to a foreign judgment that ‘may be recognised or enforced’ under the CCAA.

The CCAA applies where parties have entered into an exclusive choice of court agreement that designates a contracting state (i.e., a state that is a party to the Convention) to hear their dispute, to the exclusion of the jurisdiction of any other courts. A party seeking to have a foreign judgment recognised and enforced in Singapore may apply for an order under Section 13(1) of the CCAA. Generally, a foreign judgment will be recognised and enforced if it has effect and is enforceable in the state in which the judgment originated, subject to mandatory and discretionary grounds for refusal.

vi Assistance to foreign courts
Singapore is a contracting state to the Hague Convention. Where parties have agreed upon a court of a contracting state as the exclusive choice of court for their dispute, the chosen court must hear the case when proceedings are brought before it. Any other court, including the Singapore courts, before which proceedings are brought must refuse to hear them. After the judgment is given, the successful party may apply to a court of a contracting state for its recognition and enforcement. The merits of the judgment may not be reviewed by another court of a contracting state and such other court will be bound by the findings of fact of the chosen court. In fact, the court may not refuse to recognise or enforce the judgment except in limited circumstances as set out in Article 9 of the Hague Convention.

vii Access to court files
Members of the public can search for information maintained by the Supreme Court Registry without leave of court upon payment. To search, inspect or copy any document filed in the Registry, a request to inspect documents can be made by way of an application to court stating the reasons for the request. Upon approval from the court and payment of the prescribed fee, members of the public can inspect the documents and may retain a soft copy if they so wish.

viii Litigation funding
Singapore currently does not provide for third-party funding in litigation. However, the Civil Law (Amendment) Act 2017 has been passed, providing for third-party funding in arbitration-related proceedings. The Civil Law (Amendment) Act 2017 declared that no person is, under the law of Singapore, liable for any conduct of it being maintenance or champerty, except when it is contrary to public policy or otherwise illegal.
Despite the apparent flexibility now afforded to litigation parties for third-party funding, they are to be done within the ambit of the provisions provided under Singapore law. Section 5B of the Civil Law Act (Cap 43, Rev Ed 1999), read with the Civil Law (Third-Party Funding) Regulations 2017, provides that only prescribed dispute resolution proceedings, being those related to international arbitration proceedings, may be funded by a qualifying third-party funder. The Civil Law (Third-Party Funding) Regulations 2017 even provide for the qualifications for being a ‘qualifying Third-Party Funder’. In addition to the above, those who are interested in third-party funding should also bear in mind the guidelines issued by the Singapore Institute of Arbitrators, Singapore International Arbitration Centre and the Law Society of Singapore.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls
Legal practitioners are subject to the Legal Profession Act (Cap. 161) and the Legal Profession (Professional Conduct) Rules 2015. Duties of loyalty and confidentiality are owed to each of the solicitor’s clients before, during and after his or her engagement.

Where a solicitor intends to act for two or more parties and a diversity of interests exists or may reasonably be expected to exist between them, he or she must communicate to the parties how their interests diverge or may diverge. Where one party may be disadvantaged in the transaction, the solicitor must explain that party’s position before the transaction. Solicitors must advise each party to obtain independent legal advice. Otherwise, written confirmation or a record detailing that the party had declined independent legal advice must be sought and obtained.

Throughout the course of the retainer for the matter, the solicitor must be vigilant and inform each party of a conflict or potential conflict that arises. If the solicitor has difficulty dealing with a party’s diverging interests, he or she must cease to act, unless he or she ceases to act for all other relevant parties and all other relevant parties have given their informed consent in writing for the solicitor to continue to act in the matter.

ii Money laundering, proceeds of crime and funds related to terrorism
There are several statutory provisions that impose an obligation on legal practitioners to protect against money laundering and financing of terrorism. Generally, where a legal practitioner knows or has reasonable grounds to suspect that any property may be directly or indirectly connected to a criminal activity, or a client may be engaged in money laundering or the financing of terrorism, the legal practitioner is required to file a suspicious transaction report to the Suspicious Transaction Reporting Office as soon as reasonably practicable. The failure to make a suspicious transaction report may constitute an offence and disciplinary proceedings may be taken against the legal practitioner.

Legal practitioners are also required to perform customer due diligence measures as prescribed in the Legal Profession (Prevention of Money Laundering and Financing of Terrorism) Rules, such as identifying and verifying the identity of the client. Additionally, all documents relating to each matter and material obtained from customer due diligence measures must be kept for at least five years after the completion of the matter. The Council of the Law Society of Singapore has the powers to carry out an inspection either on its own motion or upon receiving a complaint, to ensure that the rules for prevention of money laundering and financing of terrorism are being complied with.

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### Data protection

The Personal Data Protection Act 2012 (PDPA) is the main source of data protection law in Singapore. The PDPA establishes rules governing the collection, use and disclosure of individuals’ personal data by organisations. The main authority administering and enforcing the PDPA is the Personal Data Protection Commission (PDPC), which issues advisory guidelines to supplement and aid the interpretation of the PDPA.

The scope of the PDPA is wide – it governs the collection, use and disclosure of personal data by organisations, including storage and processing of data. Personal data is defined as any data, whether accurate or not, about an individual who can be identified from that data, or from that data and other information to which the organisation has or is likely to have access, whether stored electronically or non-electronically.

Organisations are required to develop and implement policies and processes to meet the following obligations of the PDPA:

- **Under the Consent Obligation,** an organisation may only collect, use or disclose personal data for purposes for which an individual has given his or her consent. The individual may withdraw his or her consent at any time with reasonable notice.
- **Under the Purpose Limitation Obligation,** an organisation may collect, use or disclose personal data about an individual, only for the purposes that a reasonable person would consider appropriate in the circumstances, and for which the individual has given consent.
- **Under the Notification Obligation,** organisations are required to inform individuals of the purposes for which they are intending to collect, use or disclose their personal data on or before such collection, use or disclosure of personal data.
- **Under the Access and Correction Obligation,** organisations are required to provide upon request by an individual the personal data of that individual, and information about the ways in which his or her personal data has been or may have been used or disclosed by the organisation within a year of the date of the request.
- **Under the Accuracy Obligation,** organisations are required to make a reasonable effort to ensure that personal data collected by them or on their behalf is accurate and complete, if it is likely to be used by the organisation to make a decision that affects the individual to whom the personal data relates, or if it is likely to be disclosed to another organisation.
- **Under the Protection Obligation,** organisations must protect personal data in their possession or under their control, by making reasonable security arrangements to prevent unauthorised access, collection, use, disclosure, copying, modification, disposal or similar risks. Many breaches of the PDPA have involved organisations’ ignorance of the Protection Obligation and the failure to take adequate or proactive steps to protect personal data.
- **Under the Retention Limitation Obligation,** organisations are required to cease to retain their documents containing personal data, when it is reasonable to assume that the purpose for which that personal data was collected is no longer being served by retention of the personal data and retention is no longer necessary for legal or business purposes.
- **Under the Transfer Limitation Obligation,** if organisations are transferring personal data to a country or territory outside Singapore, they must do so in accordance with the requirements under the PDPA to ensure the standard of protection of the personal data will be comparable to that under the PDPA.
Under the Openness Obligation, organisations are to make information about their data protection policies, practices and complaints process available on request. The PDPA also requires that every organisation designate an individual (known as the data protection officer) to oversee the practices and policies of the organisation, and who is responsible for ensuring that the organisation complies with the PDPA. The importance of the role of the data protection officer has been stressed by the PDPC; failure to appoint one is a breach of the PDPA.

Individuals have a right of private action against organisations that are in breach of the obligations in the PDPA, but enforcement of the PDPA is largely a complaint-based regime involving the PDPC’s exercise of its powers conferred by the PDPA. If an organisation is found in breach of the PDPA, it may be fined up to S$1 million. The PDPC also has the power to make directions, give warnings, make advisory notices and accept undertakings from organisations to take a certain course of action.

The PDPA establishes the national Do Not Call Registry. Individuals may register their local telephone numbers to opt out of receiving telemarketing calls or text messages.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

Generally, between solicitor and client, there are two kinds of privilege in Singapore: legal advice privilege and litigation privilege.

Legal advice privilege is generally governed by Section 128 of the Evidence Act, which provides that nothing shall be disclosed that was given to the advocate and solicitor in the course of his or her employment. The rules that apply with regard to legal advice privilege extend to in-house lawyers by virtue of the recent amendments to the Evidence Act. It must be noted that there are circumstances by which privilege does not operate, where the communications are made in furtherance of an illegal purpose and where the solicitor becomes aware of a crime or fraud after engagement.

Litigation privilege is relied upon to protect information provided for the purpose of pending or anticipated court proceedings.

ii Production of documents

Under Singapore Law, a party to a court proceeding is under an obligation to make and serve on the other party a list of the documents that are or have been in their possession, custody or power. The list of documents has to be verified by an affidavit. The documents that may be ordered to be discovered are documents on which the other party relies or will rely, documents that could affect his or her own case, adversely affect another party’s case or support another party’s case. This obligation to continue to give discovery remains until the conclusion of proceedings. Parties must also be aware that it is the duty of a litigant to preserve documents relevant to proceedings. Destroying documents could result in detrimental circumstances, such as dismissal of the action or striking out the defence.

If a party is not satisfied with the documents provided in discovery, it may make an application under the Rules of Court for a document that the other party has or has not had in his or her possession, custody or power. This is often referred to as a request or application for specific discovery. In this regard, this could be broader than the general discovery obligations referred to in the preceding paragraph given that a party can seek a document that may lead
to a line of inquiry, which provides information that adversely affects its own case or the other party's case, or support the other party's case. Even so, the court may find that the discovery is not necessary for disposing fairly of the cause or matter, or for saving costs.

The rules governing e-discovery are not set out in the Rules of Court, but are set out in the practice directions produced by the Singapore courts. The practice directions provide for parties to consider using e-discovery when the claim or counterclaim exceeds S$1 million, where the documents discoverable exceed 2,000 pages, or where the documents discoverable substantially comprise electronic mail or electronic documents.

VI ALTERNATIVES TO LITIGATION

i Arbitration

A common alternative to litigation is arbitration, because it is a private method of dispute resolution, thus allowing for procedural flexibility and confidentiality of proceedings. However, there has recently been concern that arbitration is getting increasingly expensive.

The Singapore International Arbitration Centre (SIAC) is the main arbitration institution in Singapore and administers most cases under the SIAC Rules adopted by the parties in their arbitration agreement, or the UNCITRAL arbitration rules. The costs of the arbitration operate on an ad valorem system, where it is calculated based on the value of the claim.

Depending on whether the arbitration is international or domestic, the International Arbitration Act or the Arbitration Act will apply. Domestic arbitrations refer to arbitrations between local parties that do not have any international elements. One of the main distinctions between the two regimes lies in the degree of court intervention in the arbitral process. The general rule is that there can be no appeal against an award issued in an international arbitration. The only recourse is an application to set aside the arbitral award. On the other hand, where domestic arbitrations are concerned, a party may appeal an award on a question of law arising out of the award by agreement of the parties or leave of court. An application to appeal an arbitral award must be brought within 28 days of the date of the award. On appeal, the court may confirm, vary or remit the award to the tribunal in whole or in part, for reconsideration in light of the court's determination, or set aside the award in whole or in part. Notwithstanding that, parties may agree to exclude their rights to appeal.

The arbitral award may, by leave of the High Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect and, where leave is so given, a judgment may be entered in terms of the award. Being a contracting state to the New York Convention allows for ease of enforcement of arbitral awards internationally. Foreign arbitral awards are recognised in the same way as domestic awards, as long as the award was made in a country that is also a party to the New York Convention.

In early 2017, Singapore passed the Civil Law (Amendment) Act and the Civil Law (Third-Party Funding) Regulations (the Regulations) to abolish the tort of maintenance and champerty, thus allowing for third-party funding in Singapore-seated international arbitrations. When negotiating a third-party funding contract (the Contract), the funder should take reasonable steps to ensure that it has met the requirements as a qualifying third-party funder as set out in the Regulations, advised the party interested in funding to obtain independent legal advice on the terms of the Contract and has satisfied itself that there are no circumstances arising from the funding that might give rise to any foreseeable conflict.
of interest. Third-party funding is an evolving development for international arbitration in Singapore, and we look forward to its expansion to other areas such as litigation, domestic arbitration and insolvency proceedings.

ii Mediation

Mediation is an integral part of the legal system in Singapore. The use of mediation is fast gaining traction at a time when parties are increasingly looking beyond the traditional adversarial (and expensive) court-based model to resolve their disputes.

The courts encourage parties to consider alternative dispute resolution, including mediation, at the earliest possible stage. Mediation services are provided for free at the state courts, the process of which is stipulated by the State Courts Practice Directions.

The Singapore Mediation Centre, which was set up in 2014, provides commercial mediation services, dealing with most types of disputes, including cross-border commercial disputes.

The recent push for mediation as a dispute resolution mechanism of choice is evident by the introduction of the Mediation Act 2017. The Mediation Act seeks to promote, encourage and facilitate the resolution of disputes by mediation. One way it purports to do so is by strengthening the enforceability of settlement agreements arising out of mediation. Prior to the Mediation Act, a party seeking to enforce a mediated settlement agreement had to do so by instituting court proceedings, incurring costs and losing time in the process. Now, the party may apply to the court to record the settlement agreement as an order of court.

iii Other forms of dispute resolution

Neutral evaluation and neutral determination are private processes where parties can refer their dispute to a 'neutral', who will provide a summary evaluation of the dispute or a temporary determination for the matter. The ‘neutral’ will be a neutral third party appointed by the President of the Law Society of Singapore from the panel of neutrals, which consists of experienced lawyers. The benefits of neutral evaluation and neutral determination are that they are speedier and more cost-efficient than litigation or arbitration. In addition, the result is not permanent, thus parties can subsequently assert their rights through formal dispute resolution methods. An evaluation is the opinion of the neutral and is not binding on parties except for a costs decision, while a determination will be binding on parties until the dispute is finally determined by an arbitrator, or a court or other body of competent jurisdiction.

VII OUTLOOK AND CONCLUSIONS

Singapore is striving towards becoming a leading hub for the resolution of cross-border dispute resolution and the provider of legal solutions to international parties in South East Asia. Parties seeking to resolve their disputes in Singapore are presented with a choice of the local courts, the Singapore International Court, the Singapore International Arbitration Centre and the Singapore International Mediation Centre.

Singapore is a party to the New York Convention and Hague Convention on Choice of Court Agreements. It seeks to be a centre where legal solutions not only have to be quick and efficient but also effective in terms of result.

Users of Singapore’s legal framework should strive to be well advised, not only of the procedures in the local court system but also of the wide variety of solutions that are on offer.
INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

Spain is a non-denominational, social, democratic and sovereign state governed by the rule of law, which advocates freedom, justice, equality and political pluralism as higher values of its legal system.

Spain’s government is a parliamentary monarchy. It has been a Member State of the European Union since 1986. Its territory is divided into 17 autonomous regions and two autonomous cities. Some of these regions have significant legal peculiarities.

The Spanish system is a civil law system. Its guiding principles are the principle of the rule of law, the normative order, the publication of regulations, the non-retroactivity of punitive provisions that are unfavourable to or restrictive of individual rights, legal certainty and accountability, and prohibition of bias for public powers.

Sources of law

The Spanish legal system is hierarchical. The sources of law are classified as follows.

Legal and regulatory provisions

Constitution

The Constitution provides the basic regulations on fundamental rights and duties, the Crown, Parliament, the government, the relationships among the main institutions, the judiciary, territorial division, the distribution of powers between the state and the autonomous regions, the Constitutional Court and the procedure to amend the Constitution.

International provisions and European Union law

Validly concluded international treaties constitute part of the internal legal order once officially published in Spain. In the event of a contradiction between the provisions of an international treaty and national law, the former will prevail.

European Union law is also part of the Spanish legal system, and is hierarchically above national laws.

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Laws
Parliament, composed of two chambers, the Congress and the Senate, passes legislation on matters reserved by the Constitution to the state. When a law affects fundamental civil rights and liberties, it is denominated a ‘basic law’ and is enacted through a special procedure requiring an absolute majority in Congress. Ordinary laws require simple majorities.

Each of Spain’s 17 autonomous regions has its own parliament, which may pass legislation on delegated matters.

The relationship between laws (national or regional) is not based on a hierarchical principle but on a material one: different matters or different territorial scopes require different laws.

Decree laws and legislative decrees
Decree laws are approved by the government. They regulate exceptionally urgent matters and must be ratified by Congress.

Parliament may occasionally authorise the government to make and enact legislative decrees, which have the same rank as law. Legislative decrees are generally used to consolidate and redraft existing laws.

Decrees, ministerial orders and resolutions
Legislation, both national and regional, is developed through these three types of provisions. Decrees are issued by the government, ministerial orders by the relevant minister and resolutions by administrative bodies or authorities. In the event of conflict, laws prevail.

Custom
In the absence of applicable law, custom has the force of law, provided that it is substantiated and is not contrary to moral standards or public policy. Custom is considered as the primary source of law under the special civil legal framework in the region of Navarre.

General principles of law
In the absence of legislation and custom, general principles of law apply. They are unwritten principles underlying the legal system based on concepts such as fairness and logic.

Case law
Law is never created by court decisions, but case law issued by the Supreme Court is highly valued as a source of interpretation and application of the law.

ii Court system
The Spanish court system is an independent power within the state. The courts forming the judicial system are structured in five jurisdictions: civil and commercial, criminal, administrative, labour and military. At the top is the Supreme Court, featuring five chambers, one for each jurisdiction.

Civil and commercial courts
The civil and commercial jurisdiction deals with contractual claims, tort law, family law, inheritance and, in general, any matter that does not fall under the other jurisdictions. The courts of first instance are the core of this jurisdiction.
Specialised commercial courts were created in some of the largest Spanish cities. They deal with claims lodged in relation to insolvency of companies and businesspersons; unfair competition; antitrust, industrial property, intellectual property (IP) and advertising matters; corporate law; international or national regulations on transport matters; maritime law; collective actions regarding general contracting conditions; and appeals against specific decisions issued by the Directorate General for Registries and Notaries. If a commercial court does not exist in a particular judicial district, the corresponding matters remain under the jurisdiction of the courts of first instance.

Decisions of courts of first instance (or commercial courts) are subject to appeal before the civil chambers of the provincial courts. A provincial court’s decision can, in certain cases, be appealed to the Supreme Court (see Section III.i).

Criminal courts

Criminal cases are investigated by a judge, assisted by the police. The public prosecutor is a party to the criminal proceedings. Victims (including the state – e.g., in a tax fraud case) may also be a party to the proceedings as private accusers. Any person or legal entity can also become a party to criminal proceedings, even if they have not been a victim of the crime, by exercising a ‘popular action’.2

Except for minor offences, cases are always heard by a court other than that in charge of the investigation. Offences punished with penalties of up to five years’ imprisonment are heard by criminal courts (one judge), whereas cases involving more severe offences are heard by the criminal chamber of the corresponding provincial court (each chamber being formed by three judges).

The decision can always be appealed before a higher court: if the case is heard by a criminal court, the appeal must be filed before the corresponding provincial court; if the case is heard by the latter, the appeal must be filed directly with the Supreme Court.

Labour courts

A wide range of employment disputes are heard in this area of law, including claims regarding work shifts, holiday entitlement, discrimination in the workplace, the right to strike or challenge disciplinary measures and, more usually, claims for unfair dismissal. In addition to the individual exercise of labour-related actions by employees, trade unions can also act on behalf of their members.

2 Basic Law 13/2015 on Procedural Rights and Technology Investigation Measures and Law 41/2015 on Acceleration of Criminal Proceedings and Strengthening of Procedural Rights amended certain aspects of the Procedural Criminal Law aimed at (1) accelerating criminal proceedings; (2) regulating the use of new technologies during the criminal investigation; and (3) transposing Directive 2013/48/EU on the Right of Access to a Lawyer in Criminal Proceedings and Directive 2014/42/UE on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union. Some of the main innovations introduced relate to the amendment of the connection rules (governing the accumulation of criminal proceedings), attempting to avoid proceedings with a very broad purpose; the enactment of maximum periods for the criminal investigation; and the establishment of new rules on the performance of undercover officers.
At first instance, claims are heard by labour courts. Subject to statutory requirements, judgments issued by labour courts can be appealed before the High Court of Justice of the corresponding autonomous region. Likewise, under certain circumstances, judgments issued by a High Court of Justice can be appealed to the Supreme Court.

**Administrative courts**
Cases related to resolutions issued by public authorities, the challenge of general provisions with lower hierarchical standing than a law or legislative decrees, appeals against a public authority’s failure to act, and claims linked to the liability of the public authorities and their staff are heard by administrative courts.

This jurisdiction is the legal channel through which companies can challenge, *inter alia*, decisions of the regulators of the financial, telecommunications or utilities sectors, and competition decisions.

Contentious administrative courts are the equivalent to the civil courts of first instance in administrative law. Their decisions may be appealed to the High Court of Justice of the relevant autonomous region and, under certain circumstances, to the Supreme Court.

**Territorial organisation**
The whole territory is divided into judicial districts covering one or more municipalities. There is always at least one court of first instance and one criminal investigation court in the ‘capital’ of each judicial district (although in small judicial districts there may only be one judge with dual responsibility).

Labour courts, criminal courts and contentious-administrative courts are located in the capital of each of Spain’s 50 provinces and in certain larger cities.

Courts of appeal are distributed regionally and include the provincial courts, the High Court of Justice of each autonomous region and the Supreme Court.

There is also a central court, the National Court, which combines various levels of jurisdiction. The National Court is based in Madrid but has nationwide jurisdiction on matters regarding offences with considerable implications (e.g., terrorism and organised crime), and labour and administrative matters of special importance.

**The Constitutional Court**
The Constitutional Court is not part of the court system, but rather an independent national institution that resolves disputes between the state and autonomous regions, disputes related to the constitutionality of laws and violations of constitutional rights.

**The General Council of the Judiciary**
The General Council of the Judiciary is in charge of the organisation and inspection of Spanish courts. Its functions are supervising judges and courts, selecting and training judges and magistrates and assigning them to a court, and electing its own president and the president of the Supreme Court from among its members. It also names two judges to the Constitutional Court.
II THE YEAR IN REVIEW

i Legislation

Among others, the following legislative developments are noteworthy.

**General Data Protection Regulation (EU Regulation 2016/679) and Basic Law 3/2018 on Data Protection and Digital Rights**

In May 2018, the two-year transitory period established in the General Data Protection Regulation ended; as from that time, its provisions became directly applicable in Spain. Some of the main novelties introduced are the following:

- **a** it has a broad territorial scope, being applicable not only to data-processing carried out in the context of the activities of data controllers and data administrators established in the EU, but also to non-European institutions processing the data of subjects established in the EU in connection with (1) offering goods and services, or (2) control of behaviour (e.g., tracking cookies);

- **b** the Regulation reinforces the information right and the requirements and conditions to obtain consent from data subjects (which must be given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject’s agreement to the processing of personal data);

- **c** in addition to the traditional rights of access, rectification, cancellation and opposition, the Regulation recognises and regulates other rights, such as the right to data portability, the right to be forgotten and the right to oppose profiling activities;

- **d** the Regulation recognises the accountability principle, which imposes a proactive responsibility obligation that obliges organisations to establish measures guaranteeing and enabling the demonstration of compliance with the Regulation (data protection policies must be adapted to the organisational circumstances, implemented and put into practice);

- **e** whereas the previous normative framework required the registration of organisations’ databases with the Spanish Data Protection Authority, the Regulation focuses on internal recording obligations. Thus, unless one of the exceptions laid out in the Regulation applies, companies must keep an internal, written record of the processing activities carried out; and

- **f** the Regulation introduces the role of data protection officer, which is mandatory when the data processing is carried out by a public authority (except for courts acting in their judicial capacity) and in some cases of large-scale data processing.

Following the Regulation’s direct applicability, the new Basic Law 3/2018 on Data Protection and Digital Rights was enacted on 6 December 2018. Basic Law 3/2018 harmonises Spanish law with the provisions of the Regulation and provides specific data-protection regulations in fields that are not expressly included in the Regulation or that are addressed in the Regulation but with scope for more detailed regulation to be introduced by the Member States (i.e., it widens the cases in which the appointment of a data protection officer is mandatory and governs activities that are not expressly regulated in the Regulation such as data processing activities for video-surveillance purposes, whistle-blowing channels and creditworthiness data files). Moreover, Basic Law 3/2018 incorporates 17 new digital rights into the Spanish legal
system that are aimed at resolving issues arising from the use of new technologies (e.g., right to net neutrality, right to universal access to the internet, right to be forgotten from internet searches, social networks or equivalent).

**Law 3/2018 on the European Investigation Order in Criminal Matters**


The EIO may be issued for the purpose of obtaining one or more specific investigative measures to be carried out in a third executing Member State with a view to obtaining evidence or collecting evidence already in the possession of the executing authority.

The EIO creates a unique framework for obtaining evidence, although it establishes additional rules for specific types of measures (e.g., temporary transfers of detainees, telephone or videoconference appearances, obtaining information related to accounts or banking transactions, undercover investigations and telecommunications intervention). The request and practice of an investigation measure can be carried out in any of the phases of the criminal procedure, including the hearing. The competent authorities in Spain to issue and execute an EIO will be, according to the type of investigation measure, the competent court or the public prosecutor.


Law 11/2018 modifies, restrictively, the right of separation of the partner of limited companies in the case of non-distribution of benefits:3

- **a** the possibility of modifying or suppressing this right through the articles of association is expressly established;
- **b** the minimum percentage of benefits to be distributed is reduced (from 33 per cent to 25 per cent);
- **c** it is allowed to comply with that percentage based on the average of the preceding five years (that is, the right of separation will not arise if the total dividends distributed during the preceding five years is equivalent to 25 per cent of the profits generated in that period); and
- **d** the right will only exist if benefits have been obtained continuously during the preceding three years.

Moreover, Law 11/2018 transposes Directive 2014/95/EU of 22 October 2014 on disclosure of non-financial and diversity information by certain large undertakings and groups, expanding the companies obliged to annually file non-financial information, along with their accounts (including information relating to environmental, social and personal issues, respect for human rights and the fight against corruption).

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3 These provisions are not applicable to listed companies or those that fall under the scope of other circumstances (e.g., those that are in a situation of insolvency).
New regulatory framework on markets in financial instruments: MiFID II and MiFIR

In January 2018, the application of the new regulatory framework on markets and financial instruments began. This framework is based on Directive 2014/65/EU of 15 May 2014 on markets in financial instruments (MiFID II) and Regulation (EU) No. 600/2014 of 15 May 2014 on markets in financial instruments (MiFIR).

These new rules modify the MiFID framework with the goal of improving the efficiency, safety and resilience of financial markets. The new framework strengthens the protections afforded to investors (by introducing requirements on the organisation and conduct of the actors in these markets), adapts the regulations to technological and market developments, increases transparency, and reinforces and harmonises the supervision of financial markets.

The new framework has been incorporated into the Spanish legal system through Royal Decree Law 21/2017 of 29 December; Royal Decree Law 14/2018 of 28 September; Royal Decree 1464/2018 of 21 December and other development rules.

ii Court practice

Among others, the following noteworthy decisions were handed down in 2018.

The Supreme Court’s judgment of 1 October 2018 on the transfer of treasury shares and the effects of the violation of the prohibition of financial assistance for the acquisition of own shares

The Supreme Court held that the transfer of shares of a limited company held as treasury shares, once the three-year legal limit established to end this situation has been exceeded, does not imply the nullity of the transfer itself. The Supreme Court held that the violation of the time limit to amortise or alienate treasury shares allows the remedy of this situation through judicial enforcement, but does not affect the validity of the transfer of those shares made once the three-year term has elapsed.

In the same judgment, the Supreme Court analysed the consequences of the infraction of the prohibition foreseen for limited companies to provide financial assistance for the acquisition of own shares. The Supreme Court maintains that this infraction implies the nullity of the operation of financial assistance – but not of the acquisition of the affected shares – as this measure itself allows safeguarding the purpose of the rule (to resolve the pernicious effects that this type of transaction has for the solvency of the company and the integrity of the company’s equity).

The Supreme Court’s judgment of 26 February 2018 on the remuneration of the directors of limited companies

Article 217 of the Spanish Corporations Law establishes, following the amendment introduced by Law 31/2014, that directors’ positions are unremunerated, unless the articles of association establish otherwise (in that case, the articles of association must specify the remuneration system, and the maximum amount of remuneration of all directors must be approved at the general meeting). Article 249 establishes that, when executive functions are assigned to a member of the board of directors, a contract with the company must be formalised, with the approval of the board of directors, in which the remuneration must be detailed.

Prior to this judgment, the generalised interpretation of these provisions (defended by Directorate General for Registries and Notaries and the majority of legal scholars) was
the existence of two exclusive regulatory systems composed of a general rule (Article 217) applicable to all directors (including executives) and a lex specialis (Article 249) applicable only to determine the remuneration of executive functions attributed to a director (there would be two relationships between an executive director and the company and, therefore, two independent remuneration regimes, both of which apply to the executive director).

However, the systematic interpretation of the rules and the principle of transparency and control led the Supreme Court to conclude that the regimes laid out in these articles are complementary and that both must be applied cumulatively when deciding on the remuneration of a director holding executive powers. In this way, the remuneration received by a director for his or her executive functions must not only be recorded in a contract approved by the board of directors, but must be expressly regulated by the articles of association and will be subject to the maximum amount approved at the general meeting.4

The Supreme Court’s judgments on the tax on documented legal acts
Although the tax sphere falls outside the scope of this work, reference is made to these Supreme Court resolutions owing to their media impact.

On 16 October, the second section of the administrative chamber of the Supreme Court issued a judgment establishing that the taxpayer in connection with the tax on documented legal acts, when the document subject to the tax is the public deed of a mortgage-secured loan, is the mortgage creditor (usually a financial institution). This resolution represented a radical change in the case law that had until that time interpreted that the taxpayer was the borrower (and the partial annulment of an article of the regulation of development of the Tax on Documented Legal Acts Law).

The economic and social repercussions of the judgment led the president of the administrative chamber of the Supreme Court to decide to convene a plenary session to decide a cassation appeal with the same object and, therefore, to confirm or overturn that jurisprudential shift.

On 5 November, the plenary meeting of the chamber was held, where it was decided to maintain the interpretation applied prior to the 16 October ruling (thus limiting the effects of the judgment to the case in which it was issued).

The entirety of the controversy was settled when the government, through Royal Decree Law 17/2018 of 8 November, modified the Tax on Documented Legal Acts Law to expressly establish that, in these cases, the tax must be paid by the mortgage creditor.

III COURT PROCEDURE

i Overview of court procedure
All civil, criminal and labour proceedings may have written and oral phases. Administrative proceedings are mainly conducted in writing.5

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4 The doctrine of this judgment is not applicable to listed companies.
5 As from 1 January 2016, all legal professionals, judicial bodies and public prosecutors must use existing electronic systems – mainly, the Lexnet system – for filing briefs and documents and making judicial communications (Law 42/2015 amending the Spanish Civil Procedure Law).
The oral principle is linked to the immediacy principle. Immediacy requires that the judge who renders the judgment be the same as that who heard the oral trial and has therefore had direct contact with the parties, the witnesses, the experts and the subject of the trial, enabling the judge to form an opinion on the case.

**Principles inherent to civil proceedings**

**Principle of controversy or dual parties**
The parties must provide the court with all the relevant facts, which must be duly evidenced. The court's task is to consider the allegations and means of evidence provided by each party.

**Principle of equality of arms**
Parties acting in a process must have access to the same resources in preparing their respective claims and defences. This includes the right to access all evidence produced or observations made.

**Principles inherent to the object of the proceedings**

**Principle of initiative**
Only the parties to an action may initiate civil proceedings and may determine the matter under dispute through the initial claim and counterclaim. This principle entails that once the action has been brought before the court, only the parties to the claim may have any bearing on the action. Therefore, in general terms, the claimant is free to continue or withdraw the claim.

**The right of the defendant to be heard**
This right establishes that no judgment may be rendered against anybody without the party having had the opportunity to be heard. This practice entails notifying the defendant of the initiation of proceedings and the main procedural acts. A breach of this principle would render the proceedings void.

**ii Procedures and time frames**
Civil and commercial claims must be resolved through either ordinary or oral proceedings.

**Ordinary proceedings**
Economic claims exceeding €6,000 and some specific matters set out in the Civil Procedure Law regardless of their economic value (most significantly, challenge of corporate resolutions and protection of honour, personal image and privacy) are resolved through ordinary proceedings.

Once the defendant has answered the complaint and, as the case may be, the claimant does the same with the counterclaim, or the corresponding terms to answer have elapsed, the court will summon both parties to a preliminary hearing to try to settle the dispute by agreement or, if not possible, preparations for trial will begin, allowing both the claimant and the defendant to specify, clarify or rectify their allegations, raise procedural objections and propose evidence.

In the preliminary hearing, the court will decide on the procedural objections raised, accept the corresponding means of evidence and set a trial date.
In the trial, the evidence will be produced (examination of the parties, the witnesses and the experts) and the parties will orally present their closing statements summarising the facts in dispute and the evidence supporting their allegations.

Following the trial, the court will render its judgment.

**Oral proceedings**

Oral proceedings are used to resolve complaints with a value or economic interest not exceeding €6,000, as well as other actions such as specific injunctive relief actions for the protection of collective and diffuse interests of consumers, some disputes over lease agreements, vacant possession actions, maintenance claims, actions for the rectification of inaccurate harmful data and those related to matters not included among those reserved for ordinary proceedings.

As in the case of ordinary proceedings, oral proceedings are initiated by filing a complaint with the court. Claims must be answered in writing and may be followed by a hearing when so requested by either party and accepted by the court. Counterclaims in oral proceedings are only accepted in limited cases. If the hearing does not take place, the court will render its judgment directly. If the hearing does take place, it will include the submission and production of evidence and eventually the presentation of oral conclusions if so requested by the parties.

**Summary proceedings**

Monitory proceedings are a special type of proceeding available for the repayment of economic debts of any amount. It is a fast-track procedure through which parties seek to obtain an enforceable resolution quickly.

If the debtor does not submit a challenge and fails to pay, the court will issue an order declaring the termination of the summary proceedings, allowing the creditor to seek enforcement and payment of the amount owed. If the debtor submits a challenge, proceedings will continue as ordinary proceedings, except if the amount does not exceed €6,000, in which case they will continue as oral proceedings and the parties will be summoned to a hearing before the court.

EC Regulation 1896/2006 provides for monitory proceedings at the European level. This fast-track procedure is applicable to civil and commercial matters in cross-border cases in which at least one of the parties is domiciled or habitually resident in a Member State (except Denmark) other than the country hearing the action.

Law 15/2015 provides for notarial monitory proceedings for claims of specific economic debts involving any amount (not applicable for claims involving debts arising from a contract between a consumer and a businessperson or professional). At the creditor’s request, the corresponding notary public will order the debtor to pay the amount due within 20 working days. If the debtor cannot be located or the debt is challenged, the notarial proceedings will end without prejudice to the creditor’s right to claim the debt through judicial proceedings. If the order is made and the debtor fails to pay without challenging the debt, the notarial proceedings will be terminated and the notarial act obtained will constitute an enforceable instrument.
Interim relief

The Civil Procedure Law regulates interim relief, allowing Spanish courts to admit any kind of interim measure in order to ensure the enforcement of a potential judicial ruling in favour of the petitioner.

The court may allow the requested interim measure provided that (1) the claimant is able to show that there is a reasonable probability of success on the merits of the case; (2) in its absence there is a real risk that a judgment in favour of the claimant might not be executed (for instance, the assets might be taken abroad or otherwise removed); (3) the measure is appropriate for securing the effectiveness of the resolution; and (4) there are no less harmful measures that may be equally effective in securing the pending final determination of the proceedings.

If the court ultimately allows the measures, the petitioner must provide a bond in order to cover any potential damage that the adoption of the interim measure may cause to the defendant. The Spanish system on interim measures establishes a strict liability regime, meaning that if the petitioner loses on the merits, he or she will be liable for any damages arising as a result of harm suffered by the defendant because of the measures adopted.

The Spanish Civil Procedure Law does not contain an exhaustive list of these measures, so the petitioner may call for the adoption of any interim measure that will be useful to secure the future judgment.

The request for interim measures is usually submitted to the court together with the complaint, but they may also be requested prior to the filing of a lawsuit. In this case, the petition for interim measures must be filed within 20 working days of the granting of the measures with the court with jurisdiction to render a judgment in the main proceedings. Nevertheless, petitions for interim measures may be admitted after the filing of the lawsuit under exceptional circumstances. If the interim measure is revoked, the petitioner will be ordered to make restitution for any harm caused to the defendant by implementing the measure. The court may allow the defendant to substitute the interim measure for alternative security.

The parties may appeal the court order accepting or rejecting the interim measure. If the order accepts the measure, filing the appeal will not prevent the measure from being enforced.

Appeals on civil matters

Appeals on civil matters are as follows:

A. Appeal for reversal: allows parties to challenge interlocutory decisions issued by judges or court registrars (formerly referred to as ‘judicial secretaries’), lodging an appeal heard by the authority that issued the decision.

B. Appeal for review: allows parties to challenge decisions issued by court registrars that state the termination of the proceedings or prevent its continuation, lodging an appeal heard by the judge of the court in charge of the proceedings.

C. Remedy of appeal: final rulings (on the merits of the case, in whole or in part) may be challenged by the party whose claims have been rejected by lodging a remedy of appeal. The appeal will be heard by the provincial court with territorial jurisdiction, which is the court immediately above the first instance court that issued the decision. If both parties are unsatisfied, each may appeal the decision.
Extraordinary appeal owing to procedural infringements: this appeal allows parties to file an appeal to the Supreme Court challenging final rulings issued by provincial courts owing to an infringement of procedural formalities based on one of the following grounds:

- breach of rules relating to the court’s jurisdiction;
- breach of procedural rules regulating the form and content of judicial decisions;
- breach of rules regulating procedural guarantees if the breach implies the invalidity of the judicial act or has caused a lack of a defence; or
- a violation of the fundamental rights contained in Article 24 of the Spanish Constitution.

Cassation appeal: by lodging this appeal with the Supreme Court, parties challenge final rulings issued by provincial courts when:

- the value or economic interest at stake exceeds €600,000;
- the proceedings concern fundamental rights other than those established in Article 24 of the Spanish Constitution; or
- the appellate decision has reversal interest. 6

Extraordinary appeals in the interest of law: these may be lodged with the Supreme Court by the Public Prosecutor, the Ombudsman and other public authorities with respect to the interpretation of procedural rules in which the holdings of the civil and criminal chambers of the High Courts of Justice diverge.

Complaint: this allows parties to challenge a court’s decision to reject admission of a remedy of appeals, an extraordinary appeal owing to procedural infringements or a cassation appeal. The complaint is heard by the court with jurisdiction to hear the rejected appeal.

Judicial fee

The payment of a fixed fee is required from legal persons in order to initiate specific proceedings in civil or commercial courts.

Class actions

Class actions in Spain are reserved for consumer associations, certain authorised legal entities and other affected groups seeking damages arising from the same matter.

It is understood that only those actions where the issues of fact that underlie each of the actions are sufficiently common could be considered class actions. In any event, there is no express regulation on the requisites with which class actions must comply such as numerosity, commonality, typicality or adequacy of representation, nor the existence of a certification of class that certifies the fulfilment of such requisites.

The Civil Procedure Law establishes several publicity requirements regarding class actions with the aim of ensuring sufficient protection of the corresponding private interests. The decision could have res judicata effects. Likewise, any action filed while the class action is litigated could not be admitted in application of the lis pendens rule.

6 The decision contradicts the Supreme Court’s case law, the case relates to a matter on which there is conflicting case law among the provincial courts or it applies laws that have been in force for less than five years and there is no relevant case law from the Supreme Court in relation to previous laws of identical or similar content.
There is no ‘opt-out’ procedure for consumers who wish to initiate proceedings independently.

iv Representation in proceedings

Spain has a peculiar representation system. The general rule is that litigants must be represented in the proceedings by a court representative, who is an independent legal professional acting as an intermediary between the party and the court, filing the briefs that the party’s lawyer prepares and notifying the party of the resolutions issued by the court.

In criminal proceedings, representation by a court representative is optional at the investigation stage, but mandatory as from the trial stage.

v Service out of the jurisdiction

Within the European Union, service of process between Member States is governed by EC Regulation 1393/2007. The system established by this regulation allows the service of judicial and extrajudicial documents in civil or commercial matters through direct communication between the agencies designated by the Member States (rather than the usual method of transmitting notifications through central authorities).

The applicant who forwards documents to the transmitting agency must translate the document into a language that the addressee understands or into the official language of the Member State where service is to be effected. The documents are exempt from legalisation or any equivalent formality. The receiving agency should either serve the document itself or have it served within one month, according to the law of the receiving Member State, or by a particular method if this is requested by the transmitting agency and it conforms to the national law.

Beyond the European Union, the first serving of an initial claim to a person or company domiciled in one of the countries that has ratified the Hague Service Convention will be dealt in accordance with the legal system established in that Convention, to which Spain is a party. The Spanish central authority, pursuant to the Convention, would deliver the claim and attached documents to the other country’s central authority, which is responsible for passing them on to the defendant together with a translation of both the claim and the attached documents into the official language of the country.

Law 29/2015 on international legal cooperation in civil matters applies in the absence of European regulations or international conventions. It provides for the application of the general principle in favour of international cooperation, according to which Spanish authorities must cooperate with foreign authorities even in the absence of reciprocity (the Spanish government may allow non-cooperation with authorities of states that have repeatedly denied cooperation, or in which there is a legal prohibition to cooperate). Judicial documents may be served through central authorities or by direct communication between the corresponding courts or Spanish authorities may serve documents to the final recipient by certified mail or an equivalent means of communication with acknowledgment of receipt or any other guarantee of proof of receipt. Extrajudicial documents may be served through central authorities or a notary. The documents must be translated into a language that the addressee understands or into the official language of the recipient state. Parties may request that the recipient state issue a certificate of completion of service of process and how it has been carried out.
vi Enforcement of foreign judgments

The recognition and enforcement of foreign judgments is regulated by international treaties, Regulation 1215/2012 in the European Union and Law 29/2015.

European Union Regulation 1215/2012

The recognition and enforcement of judgments in civil and commercial matters issued in European Union countries was governed by Council Regulation (EC) No. 44/2001. The Regulation was applicable to enforce any judgment given by a court or tribunal of a Member State. The enforcement under the regulation included a two-stage process: first, declaration of enforceability through exequatur proceedings and, second, enforcement under the applicable lex fori. This international enforcement model was amended through Council Regulation (EC) No. 1215/2012, which replaced Council Regulation (EC) No. 44/2001 from 10 January 2015. The exequatur proceedings prior to the enforcement of judgments, court settlements and public documents are abolished by the new regulation. Mutual trust in the administration of justice in the European Union and the aim of making cross-border litigation less time-consuming and costly justifies the abolition of the declaration of enforceability prior to enforcement in the Member State addressed.

Law 29/2015 on international legal cooperation in civil matters

Law 29/2015 regulates the recognition and enforcement of foreign judgments. It amends exequatur proceedings previously governed under the Spanish Civil Procedure Law of 1881, which are applicable for the recognition and enforcement of foreign judgments in the absence of a treaty or special regulation. According to Law 29/2015, recognition and enforcement will be granted when the following requirements are met:

- exclusive domestic jurisdiction is respected;
- foreign judgments are not contrary to domestic public policy;
- the parties’ rights of defence have been respected;
- the foreign resolution is not incompatible with a domestic resolution or a previous foreign resolution that is recognised in Spain; and
- no national proceedings involving the same subject matter and parties were initiated prior to the foreign proceedings.

Law 29/2015 also regulates:

- the partial and incidental recognition of foreign judgments (in the latter case, the judge conducting the proceedings in which incidental recognition is sought must only rule on the matter for those proceedings);
- the possibility of amending foreign judgments concerning matters that, by their own nature, can be modified (e.g., resolutions establishing child support payments or protective measures for minors and legally incapacitated adults);
- the recognition, enforcement and registration of foreign judgments and public documents containing measures not recognised in the Spanish legal system through adaptation to other measures recognised in domestic legislation with equivalent effects and for a similar purpose; and
d. the recognition and enforcement of foreign judgments issued in class action proceedings.7

vii Assistance to foreign courts

Assistance to foreign courts is governed by several different sets of rules, including the following:

a. EC Regulation 1206/2001 of 28 May 2001 on Cooperation between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters. The Regulation provides a swift procedure for the transmission of requests for the taking of evidence directly between the courts of all the Member States of the European Union, with the exception of Denmark.

b. The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. The system provided in this Convention differs essentially from that outlined in Regulation (EC) No. 1206/2001 in that such requests are not transmitted directly from the requesting court to the required court, but to the central authority of the state where the evidence is sought. In Spain, that central authority is the Ministry of Justice’s General Subdirectorate for International Legal Cooperation.

c. Spain is also party to many bilateral and multilateral treaties, including the Inter-American Convention on Letters Rogatory.

d. When no convention or treaty applies, assistance to foreign courts is governed by Law 29/2015 on international legal cooperation in civil matters. Cooperation will be granted pursuant to this framework under the following conditions: the request is not contrary to Spanish public policy; the request is addressed to the Spanish court with authority to perform the taking of evidence; Spanish courts do not have exclusive jurisdiction over the proceedings where evidence sought is intended to be used; the request meets certain content and information requirements established by law; and the Spanish government has not ordered non-cooperation with the requesting country (because it may have repeatedly refused to cooperate or this is expressly prohibited in its legal system; see Section III.v).

viii Access to court files

In principle, access to court files is restricted to the parties, their lawyers and their court representatives. As a general rule, attendance at trial and access to the judgments is public, except if there are reasons to protect privacy.

In the investigation stage of criminal proceedings, under certain special circumstances (risk of destruction of evidence or of compromising the investigation) a court may keep a file (or a part of it) secret from the parties. The court’s decision must be grounded and the secrecy period cannot exceed one month, extendable for additional monthly periods by subsequent court orders. Additionally, secrecy must be automatically applied if the judge orders the interception of communications.

7 The resolution will not be applicable to those affected in Spain who have not expressly adhered to the foreign class action if (1) it has not been communicated or published in Spain by means equivalent to those provided for in the Spanish Civil Procedure Law; or (2) those affected in Spain have not had the same opportunities to participate in or to opt out of the proceedings in the foreign state.
Spain

ix Litigation funding
There are no specific legal limits on the funding of litigation by third parties. Although this practice has historically been uncommon in Spain, it is usually reported in international arbitration involving foreign parties and appears in certain litigation cases.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls
There are certain Spanish regulations on the protection of information subject to conflicts of interest; however, there are no express regulations on the implementation of Chinese walls in law firms.

In practice, information barriers are a reality in most legal services providers. Chinese walls are allowed and in some cases even an obligation (including for professional legal services) in accordance with professional codes of practice.

In certain cases, especially in large mergers or acquisitions where both parties wish to be advised by the same law firm, the consent of both parties in writing is requested.

ii Money laundering, proceeds of crime and funds related to terrorism
Law 10/2010 of 28 April provides unified regulations on the prevention of money laundering and of terrorist financing, which were traditionally regulated separately.

A range of non-financial businesses and professions are subject to Law 10/2010 for the prevention of money laundering, including lawyers and court representatives, when:

a they take part in the preparation or assessment of any transaction on behalf of their clients for the acquisition of real property or companies; the management of funds, securities or any other assets; the opening or management of current accounts, savings accounts or securities accounts; or the creation or management of a company, a trust or any analogous structure; or

b they act on behalf of their clients in any financial or real estate transaction.

Money laundering is deemed to exist regarding any goods derived from any criminal activity, regardless of the punishment foreseen for such activity.

There are three levels of due diligence measures to be adopted depending on the type of client, business relationship, product or transaction, as well as certain other obligations that must be fulfilled.

Law 10/2010 was developed by Royal Decree 304/2014 (which establishes stronger due diligence measures and expands the information duties imposed on lawyers and other professionals) and has recently been amended by Royal Decree 11/2018 (which transposes Directive 2015/849/EU of 20 May 2015, establishing additional duties and measures to improve supervision and sanction of infractions, such as the obligation to the private parties subject to the law to create internal procedures so that their employees, managers and agents can communicate – including anonymously – relevant information on potential breaches of this legislation).

From a criminal law standpoint, it is a criminal offence to acquire, process or transfer property in the knowledge that it was obtained as a consequence of a crime, or to commit any other act to conceal its unlawful origin, or to assist any person involved in the acts with the aim of avoiding the corresponding legal consequences. It is also a criminal offence to carry out these actions recklessly. Law 10/2010 also makes express reference to evaded tax debts as
likely to be used for money laundering. This implies that tax fraud can constitute the illegal origin of money laundering offences and, consequently, the benefits of said tax fraud can constitute the object of a money laundering offence.

iii  Data protection

Data protection in Spain is regulated by the General Data Protection Regulation (EU Regulation 2016/679) and Basic Law 3/2018 on Data Protection and Digital Rights (see Section II.i).

It is necessary to provide information to data subjects before the implementation of personal data processing and to base the processing on a legal basis recognised by the applicable regulations (such as prior consent or the existence of a legitimate interest). When personal data is to be transferred to a country outside the European Economic Area in which regulations have not been identified by the EU authorities as ensuring an adequate level of protection, the controller must adopt additional safeguards (such as the use of EU Standard Contractual Clauses for data transfers or to obtain the data subjects’ specific consent for the transfer).

For legal professionals, it is important to fulfil the obligations under data protection regulations since the provision of legal services implies the processing of personal data.

V  DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i  Privilege

Confidentiality of information exchanged between lawyers and clients is established in the Judiciary Law and in the General Regulation of the Law Profession.

All lawyers must keep confidential all the facts or information acquired as a result of their professional activity and cannot be required to testify with regard to such facts or information. There are, however, no express regulations governing ‘privileged’ or ‘without prejudice’ documents or communications, as may be the case in common law jurisdictions.

Confidentiality is therefore both a privilege and a legal obligation, encompassing all facts and documents known or received in the exercise of the legal profession. A breach of this obligation could lead to criminal liability as well as sanctions from the Bar Association.

According to the ECJ’s decision in Akzo Nobel Chemicals Ltd v. Commission, the confidentiality and secrecy of communications for in-house counsel is not applicable, at least in relation to antitrust investigations initiated by the European Commission.

ii  Production of documents

Under Spanish law, parties may be required to produce any document considered relevant or useful by the court. The Civil Procedure Law establishes that a party may require the counterparty to produce documents unavailable to the former and related to the subject matter of the dispute or to the effectiveness of the means of evidence.

The test performed by Spanish courts is usually rigorous and the requested document must be directly connected with the dispute. Spanish courts expect the document requested to be specific; in other words, the requesting party must be certain of its existence and it must refer to that specific, identifiable document and to no other document that relates to the general issue.

Naturally, criminal investigation courts operate under different standards and often request the parties or third parties (banks, telecommunications companies, airlines, etc.)
to provide information and documents. This can be done either at the initiative of the investigating judge or following a request by the public prosecutor, the police or any party to the proceedings.

Decree Law 9/2017 specifically regulates the production of documents only applicable to procedures of claims for damages derived from antitrust infringements. It entitles claimants to request that the judge order the counterparty or third parties to grant access to specific sources of evidence necessary to substantiate the claim. This regulation is governed by the principle of proportionality and does not permit indiscriminate searches of information. The production of documents may be requested before the proceedings commence, at the time of the submission of the claim or while the proceedings are underway. In all cases, production will only be ordered after the claimant has presented sufficient facts and evidence to justify the viability of the claim for damages. The claimant will bear all expenses derived from the proceedings and damages that may rise from an inappropriate use of the sources of evidence obtained by this means or if no claim is filed following the completion of the disclosure.

**Pretrial proceedings**

The Spanish Civil Procedure Law allows parties to obtain the information necessary to file an action through pretrial proceedings. The basis for these proceedings is that in some cases the future claimant may find it impossible to obtain all the information necessary to file an action without the assistance of judicial authorities. According to the Civil Procedure Law, pretrial proceedings are limited to the following issues:

a. the production of documents or evidence of facts regarding capacity;
b. representation and legal standing;
c. the disclosure of items in possession of the respondent, and upon which the trial will be based;
d. the disclosure of wills and other testamentary documentation;
e. the disclosure of accounting documentation of companies and owners associations;
f. the disclosure of insurance policies;
g. the disclosure of medical records;
h. the determination of the members of the group that initiate legal actions for the defence of the collective interest of consumers; and
i. the disclosure of information regarding the origin and distribution of merchandising networks pertaining to disputes involving industrial and IP matters.

In any event, the petitioner must lodge a sufficient guarantee to cover any hypothetical damage that may occur if no action or claim is filed following the completion of pretrial proceedings.

**Taking of evidence in advance**

The Civil Procedure Law also allows the parties to request that evidence be taken in advance (even before the initiation of legal proceedings) when there is justifiable fear that, owing to the activity of persons or owing to the circumstances, the evidentiary acts may not be carried out at the usual procedural moment.
VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

Arbitration and other alternative dispute resolution means are increasingly becoming a real and effective channel for settling commercial disputes in Spain. This section provides a brief outline of the current status of extrajudicial mechanisms in Spain, focusing on arbitration, mediation and expert determination.

ii Arbitration

The Spanish Arbitration Law passed in 2003 established a very favourable legal framework for arbitration. Its main goal was to provide economic agents with an efficient and flexible dispute resolution mechanism, both in the domestic and the international arena. It was hoped that this would have two positive effects for the legal system: from a domestic perspective, it should relieve the courts of a significant number of cases for which the flexibility of the procedure and the specialisation of the arbitrators proves to be a more appropriate alternative; and from an international perspective, it should promote Spain as a seat of international arbitrations. In general, it can be said that the Arbitration Law has fulfilled those expectations.

Spanish awards are immediately enforceable, even if a request to set aside the award has been filed. The Arbitration Law provides that Spanish awards may only be set aside on the following grounds: the arbitration agreement does not exist or is void; the party challenging the award has not been given proper notice or opportunity to present its case; the arbitrators have ruled on questions not submitted for their consideration; the composition of the arbitral tribunal or the arbitration proceedings have been irregular; the arbitrators have decided on questions that cannot be settled by arbitration; or the award is contrary to public policy. The action to set aside the award is not an appeal and therefore does not entail a review of the merits of the case. Spanish case law is consistent with this approach, making clear that the scope of review in proceedings to set aside an award is strictly limited to verifying that the essential principles of due process have been observed during the arbitration.

The enforcement of foreign awards in Spain is governed by the New York Convention. Since Spain made no reservation as to its scope of application, the New York Convention governs the enforcement of any foreign arbitration award, even if the place of arbitration is located in a non-signatory state. Spanish courts favour simplicity and expeditiousness when enforcing foreign awards.

The Arbitration Law represents a real breakthrough in developing Spanish arbitration as an efficient alternative to litigation and promoting Spain as an attractive seat for international arbitrations, especially in connection with investments and transactions relating to Spanish-speaking countries. Spanish arbitration institutions and practitioners are fully committed to this active arbitration process, leading initiatives to encourage recourse to arbitration in Spain.

Law 11/2011 was passed to amend the Arbitration Law. Two features of the amendment stand out. First, the amended Law retains the fundamental pillar of arbitration, that of party autonomy. Second, in order to unify case law and guarantee greater legal certainty, the – limited – competence for judicial control of arbitration was concentrated in the High Courts of Justice. It falls within their authority to hear actions for annulment of arbitral awards rendered in arbitrations where Spain is the seat of arbitration and to hear the requests
for recognition of foreign awards. The role of supporting arbitration (except the judicial appointment of arbitrators) falls to first instance courts: they continue to assist in the taking of evidence, the judicial granting of interim measures and the enforcement of awards.

### iii Mediation


It is applicable to civil and commercial matters, including cross-border disputes, except as regards rights and obligations that are not at the parties’ disposal under the relevant applicable law. This regulation is not applicable to criminal mediation, mediation with public authorities, labour mediation or mediation in consumer matters.

The final agreement or settlement ultimately reached by means of mediation is binding on the parties. It can cover all or only part of the matters subject to mediation. If the parties wish it to be enforceable, the agreement must be converted into a public deed.

On 13 December 2013, Royal Decree 980/2013 was approved, developing specific aspects of Law 5/2012.

### iv Other forms of alternative dispute resolution

Apart from arbitration and mediation, expert determination is considered a valid alternative to litigation in Spain. Expert determination is a flexible procedure for the resolution of disputes based on the decision of an independent third party: the expert. Expert determination is regarded as especially suitable for factual disputes.

Recourse to expert determination is also common in disputes in which a high degree of technical knowledge is required, such as those resulting from construction contracts.

### VII OUTLOOK AND CONCLUSIONS

The year 2018 has been marked by the change of government that took place in June (after the approval of the no-confidence motion put forward by the socialist group). That event, and the lack of a stable parliamentary majority supporting the new socialist government, led to a reduction in legislative activity. In any case, this initial slowdown was partly counteracted in the final months of the year by the government through the approval of multiple Decree Laws (which, in the case of urgent matters, allow the government to approve regulatory changes in an accelerated manner without previously obtaining the support of the legislative chambers although they must subsequently be ratified by the Congress).

The Supreme Court has continued to review an array of doctrines and legal concepts. European Union law continues to have more influence on national law, mainly through decisions of the European courts issued in the context of preliminary rulings. Judicial activity has been steady, although less active than in the early years of the crisis, when they reached historic levels (there has nevertheless been an increase in civil proceedings, for instance in procedures related to ‘floor clauses’ included in mortgage loan contracts and other issues related to these contracts, which has led to the temporary specialisation of 54 courts of first instance to hear those disputes).
International arbitration’s growth marches on (in both commercial and investment arbitrations), making Spain a reference in the field, especially in disputes involving Latin American parties. During the past year, the Spanish Court of Arbitration, Madrid Court of Arbitration and the Civil and Mercantile Court of Arbitration (three of the most important arbitration courts in Spain) have continued to work on the development of the memorandum of understanding signed in December 2017 to unify their arbitral activities and create a unified arbitration court to administer international arbitrations. The agreement aims to continue promoting arbitration in Spain and strengthen its position as an international centre for the resolution of commercial disputes.
SWEDEN

Jakob Ragnwaldh and Aron Skogman

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

The Swedish legal system is a civil law system. The most important source of law is statutes. Case law, preparatory works and legal doctrine constitute secondary sources of law. Precedents of higher courts are, almost without exception, followed by lower courts.

The Swedish court system consists of general courts, specialist courts and administrative courts.

The general courts have jurisdiction to try matters not expressly excluded from their jurisdiction. They therefore have jurisdiction over all civil and criminal matters. The general courts are the district courts, the courts of appeal and the Supreme Court.

The jurisdiction of the specialist courts is confined to certain types of disputes. Examples of such courts include the Labour Court; the Market Court, which has jurisdiction over market-related disputes, such as competition matters, marketing of commercial products and certain consumer issues; and the land and environmental courts, which have jurisdiction over environmental and real estate-related issues, such as environmental damage, land parcelling, expropriation and site leasehold rights.

The administrative courts have jurisdiction over administrative matters mainly between public authorities and private parties. For example, the administrative courts hear all tax matters. As with the general courts, there are three levels of administrative courts, namely the administrative courts of first instance, the administrative courts of appeal and the Supreme Administrative Court.

Generally, commercial disputes are either brought before the general courts or referred to arbitration. Swedish arbitration is governed by the Arbitration Act of 1999, which conforms closely to the UNCITRAL Model Law. The leading Swedish arbitration body is the Arbitration Institute of the Stockholm Chamber of Commerce (the SCC Institute), which is widely used for both domestic and international disputes.

Although mediation and other forms of alternative dispute resolution are not as widely employed in Sweden as in some other European countries, such as the United Kingdom, mediation is to a certain extent used in both domestic and international disputes. New legislation on mediation in civil disputes was introduced on 1 August 2011. The SCC Institute has its own set of mediation rules, which the parties may adopt for their mediation.

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2 A revised version of the Arbitration Act will enter into force on 1 March 2019.
II THE YEAR IN REVIEW

i Modernisation of the Swedish Arbitration Act
In November 2018, the Swedish parliament approved a proposal\(^3\) to revise and modernise the Swedish Arbitration Act. The amendments serve, among other things, to enhance efficiency and increase accessibility for foreign users. The amendments include, *inter alia*, the following:

- \(a\) a possibility to consolidate proceedings under certain conditions;
- \(b\) a more extended possibility to use English for the hearing of evidence in challenge proceedings;
- \(c\) a possibility to challenge an arbitral tribunal’s decision that it has jurisdiction before the Svea Court of Appeal during ongoing arbitral proceedings and within a period of 30 days following the issuing of the decision;\(^4\)
- \(d\) the Svea Court of Appeal as exclusive forum for challenges of arbitral awards; and\(^5\)
- \(e\) the time limit for challenging an arbitral award to be shortened from three to two months.

The revised Act will enter into force on 1 March 2019. The amendments will further improve the legal framework for international arbitration proceedings in Sweden and ensure that such disputes can be resolved even more efficiently than today.

ii The General Data Protection Regulation and its effects on dispute resolution
As of 25 May 2018, the General Data Protection Regulation is enforced as directly applicable law in the European Union, including in Sweden. The regulation provides stricter requirements for the storing of personal data and strengthens the data protection for individuals within the European Union. According to the regulation, processing of personal data is generally prohibited unless the concerned individual has given his or her consent to the processing or, *inter alia*, if the processing is necessary to comply with a legal obligation or for the purposes of safeguarding a legitimate interest.

In the field of dispute resolution, the privacy legislation affects, among other things, the possibility to store evidence containing personal data. The data controller must ensure that the processing complies with all requirements of the privacy legislation. It is generally prohibited to transfer any personal data, such as evidence that contains personal data, to any country outside the EU or EEA. However, when the transfer of personal data is necessary to establish, exercise or defend a legal claim, the transfer may be allowed. In such case, it is generally required that the transfer is made in close connection with the relevant legal proceedings and that the amount of transferred data is limited to the most necessary information.

\(^3\) Government Bill 2017/18:257.
\(^4\) Under the current version of the Act, a party cannot appeal an arbitral tribunal's decision on jurisdiction while the proceedings are ongoing, but a party may separately request that a district court declare the arbitral tribunal to lack jurisdiction. The revision serves to avoid parallel proceedings concerning the same matter.
\(^5\) Currently, an arbitral award may be challenged before the court of appeal 'within the jurisdiction where the arbitral proceedings were held'.
iii Enforcement of British judgments and arbitral awards after ‘hard Brexit’

The United Kingdom’s exit from the European Union will affect the possibility to enforce and recognise British court judgments in Sweden. In the event of a ‘hard Brexit’, and absent an agreement concerning the enforcement of court judgments between Sweden and the United Kingdom or between EU27 and the United Kingdom, British judgments will neither be recognised nor enforceable in Sweden. In such a scenario, it will be necessary to bring a new action in a local district court in Sweden, where the British judgment can be used as evidence of the outcome of the dispute to which it relates. However, the Swedish court has full discretion to rehear the dispute ab initio.6

British arbitral awards, however, continue to be enforceable in Sweden (according to the 1958 New York Convention) regardless of what form Brexit takes.

iv Enforceability of an international arbitral award where a respondent has been denied the opportunity to present its case

The Supreme Court recently examined the extent to which enforcement of an international arbitral award shall be refused if the respondent has not been given a sufficient opportunity to present its case in the arbitration proceedings.7

After the claimant in the arbitration had submitted its statement of claim, the respondent was ordered to submit a statement of defence and appoint an arbitrator. The respondent appointed an arbitrator but failed to submit a statement of defence. In connection with the scheduled hearing, the parties jointly informed the arbitral tribunal that settlement negotiations had been initiated, which prompted the tribunal to postpone the hearing. Subsequently, the parties jointly informed the arbitral tribunal that no settlement had been reached and the respondent requested additional time to prepare its statement of defence. The claimant objected to the time extension sought, and requested that the tribunal render an award based on the submissions and the evidence already presented. The tribunal rejected the respondent’s request for a time extension and rendered an award in favour of the claimant.

The Supreme Court found that the arbitral tribunal should have given the respondent reasonable time to prepare a statement of defence after the attempts to settle the case had failed. Although the respondent had failed to comply with the tribunal’s initial order to submit a statement of defence, the Supreme Court expressed the view that the respondent had no reason to prepare its defence while the settlement negotiations were ongoing. By failing to give the respondent reasonable time to prepare its defence once the settlement negotiations had been (unsuccessfully) concluded, the arbitral tribunal was found to have disregarded a fundamental procedural principle of international arbitration, rendering the award unenforceable.

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6 Notably, there is an older precedent from the Swedish Supreme Court to the effect that a Swedish court should normally not retry the case on the merits if the parties have agreed that the foreign court has exclusive jurisdiction. There is no similar guidance, however, with regard to situations where the foreign court did not have exclusive jurisdiction.

7 NJA 2018 p. 291.
III COURT PROCEDURE

i Overview of court procedure

Court proceedings in the general courts are governed by the Code of Judicial Procedure. The Code came into force in 1948 and is based on three fundamental principles that are predominant in Swedish judicial procedure, namely the principles of immediacy, orality and concentration. According to the principle of immediacy, the court may only base its judgment on what has been said and argued at the main hearing. The principle of orality means, inter alia, that the parties have to present their full case at the main hearing and that witnesses must appear before the court to give their testimony in person. According to the principle of concentration, the case must be heard and concluded at the main hearing without interruption.

Although these principles continue to influence the proceedings before the general courts, they have become somewhat less predominant following the revision of the Code of Judicial Procedure in November 2008. The changes, which were implemented to increase the efficiency and speed of the proceedings, provide possibilities for the parties to agree that witnesses may give their testimony through written witness statements and that the parties (as part of their opening statements at the main hearing) may, if appropriate, refer to the case file rather than having to present all the facts and circumstances on which they rely. Other changes are that leave to appeal is required to appeal all judgments rendered by the district courts in civil actions and that a party’s right to rehear witnesses in the courts of appeal has been limited.

Another fundamental principle in Swedish judicial procedure is the principle of free evaluation of evidence. Swedish law is quite liberal in the sense that there are few formal rules of evidence. As part of its assessment of the case, a Swedish court may freely evaluate all events in the course of the proceeding, such as the evidence relied upon by the parties, the demeanour of witnesses, the general deportment of the parties and their compliance with court orders.

The parties are responsible for presenting the evidence on which they rely. In civil cases, the court may not, with some minor exceptions (such as in family-related cases), sua sponte order production of evidence. Swedish judicial procedure also requires the parties to identify all the written and oral evidence on which they intend to rely at the main hearing and what they intend to prove with each and every piece of evidence. As a matter of principle, no new evidence may be introduced during the main hearing. There are no specific rules on the inadmissibility of evidence in Sweden. Even unlawfully obtained, or privileged, evidence is admissible, even if it could be argued that the European Convention on Human Rights limits admissibility in certain very specific situations.

ii Procedures and time frames

A civil action in a general court is commenced when the plaintiff files an application for summons. If the application complies with the formal requirements of the Code of Judicial Procedure, the court will issue a summons against the respondent. The respondent is requested to submit an answer within a certain period (normally within three to four weeks) of being served. Failure to respond in due time may result in a default judgment. Following the respondent’s answer, there may be further exchanges of submissions.
Following the revision of the Code of Judicial Procedure in 2008, courts must produce a timetable for the entire proceedings. The parties are under an obligation to notify the court if the timetable cannot be complied with.

In most civil cases, a preparatory hearing is held after the initial exchanges of submissions. The purpose of such a hearing is to clarify the matters in dispute, identify any common ground between the parties and discuss case management. The court also has a statutory obligation to investigate and facilitate the possibility of an amicable settlement of the dispute.

The time frame for a case depends to a large extent on the court’s caseload. In general, a dispute of some complexity will normally take 12 to 18 months before the district court and the court of appeal, respectively.

As from 1 January 2010, a court may, at the request of a party, declare that the proceedings will be given priority if the proceedings until then have been unreasonably delayed (declaration of priority). In its assessment, the court may take into consideration:

- the complexity of the case;
- how the party has managed its case throughout the proceedings;
- how the court and other relevant authorities have managed the proceedings; and
- how important priority is for the requesting party.

In general, the parties can expect to receive a judgment within two to four weeks following the main hearing. In more complex cases, the time for the court to issue its judgment may be longer.

Interim measures are available under Swedish law. This includes sequestration and such other measures that may be necessary to preserve the rights of the plaintiff. Sequestration may be granted to secure execution of a future judgment for payment or a superior right to a specific property. A court order for sequestration is enforced by the Enforcement Authority upon a party’s application. Aside from sequestration, a court may order such interim measures as it deems necessary to preserve the plaintiff’s rights, such as preliminary injunctions to enjoin a respondent from taking a certain action. Such interim measures may be ordered under penalty of a fine.

For interim measures to be granted, the plaintiff must show that it is likely that the respondent’s activities compromise the plaintiff’s rights and that the plaintiff will be successful on the merits of the case. The plaintiff must also post security (such as a bank guarantee) sufficient to cover the damage that the respondent could incur as a result of the interim relief (should the plaintiff ultimately not be successful on the merits). If the plaintiff can show that it is likely that the interim measure sought would be undermined by the respondent if notified of the application, a court may order interim measures ex parte.

Interim measures may be sought prior to initiating court or arbitration proceedings. If no legal proceedings are pending, the plaintiff must initiate such proceedings within one month from the court’s order on interim measures, failing which the order will be annulled.

### Class actions

In 2003, Sweden enacted the Class Actions Act. In short, this provides that one plaintiff can litigate on behalf of a passive group of class members, who – although not formally parties to the proceedings – are bound by the court’s judgment. Provided that all other conditions for the use of class actions are met, any claim that can be commenced before a court as a civil action may also be raised under the Class Actions Act.
The Class Actions Act allows for three forms of class actions to be brought. Any person or entity belonging to a class can initiate a private class action to pursue a claim. Moreover, in disputes between consumers and goods or service providers, an organisational class action can be pursued by certain organisations even though they do not have claims of their own. Finally, the Class Actions Act provides for public class actions whereby certain authorities appointed by the government may act as the plaintiff on behalf of a group of class members. Public class actions are intended to permit authorities to pursue claims of public interest.

A condition for bringing a class action before a Swedish court is that the relevant facts must be common or similar to the entire class. Accordingly, a class action will not be permitted if there are substantial individual differences between the claims within the class. Another condition is that a class action must be the best alternative compared with other forms of procedure such as consolidated claims or the pilot case model. Also, the class must be suitably defined and the plaintiff must be suitable to represent the class. The Class Actions Act is based on an ‘opt-in’ solution. Class members must thus actively choose to be included as a member of the class. Only class members who have given written consent to the court will be allowed to participate in the proceedings as passive class members. Hence, a judgment under the Class Actions Act will not have res judicata effect in respect of class members who have not provided such written consent to the court.

The enactment of the Class Actions Act was preceded by considerable debate, with some commentators suggesting that the Act would pave the way for excessive class action litigation in Sweden. However, it is fair to say that those fears have not materialised; the number of class actions have been fairly limited since its introduction in 2003. In 2012, the Supreme Court upheld the court of appeal’s judgment rendered in favour of a class of plaintiffs in the first class action court proceedings in Sweden.

iv Representation in proceedings

There is no monopoly on legal services in Sweden. No formal qualifications, such as a law degree or membership of the Swedish Bar Association, are required to appear before courts in civil cases. However, the person representing a party must be deemed by the court to be suitable as counsel in the case, master of the Swedish language and be resident in Sweden or another state within the European Economic Area. Persons not residing within the European Economic Area may represent a party at the court’s discretion. Generally, however, parties in civil cases rarely represent themselves. Instead, they normally choose to retain members of the Swedish Bar Association as counsel.

In criminal cases, the court usually appoints counsel to defend the accused. Only members of the Swedish Bar Association are eligible for such assignment. In rare cases, however, the defendant chooses to retain his or her own defender. Beyond the requirements applicable to counsel in civil cases (see above), no formal qualifications apply to defenders privately retained by the accused.

v Service out of the jurisdiction

Documents in civil matters may be served outside the jurisdiction both within and outside the framework of treaties and conventions.

For service of documents within the European Union, EU Regulation No. 1393/2007 provides that Swedish courts and other authorities may forward an application directly to the competent authority in the Member State where service is required. For service of documents within the Nordic countries, the 1974 Treaty between Sweden, Denmark, Finland, Iceland
of Evidence applies. According to the Treaty, letters of request for service of documents may be exchanged directly between the competent authorities within the Nordic countries. Also private applicants may request service of documents. Such requests should be submitted to the Swedish Ministry of Justice, which will forward the request to the competent court in the relevant Nordic country.

The Swedish Ministry of Justice provides assistance for Swedish courts and private applicants wanting to serve documents outside the Nordic area and the European Union, such as in the countries having ratified the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

vi Enforcement of foreign judgments

For a foreign court judgment to be enforced in Sweden, a treaty on enforcement between Sweden and the foreign state is normally required. Sweden has concluded such reciprocal treaties with the Nordic countries, Switzerland and Austria as well as other countries within certain specific areas of law.

Where the judgment has been issued by a court of a state in respect of which the EU Regulation No. 1215/2012 or the Lugano Convention applies, the judgment will be enforceable in Sweden upon a formal decision of the Svea Court of Appeal (by way of an exequatur procedure). The Svea Court of Appeal’s examination of the foreign judgment only relates to matters of form, procedure and public policy. A slightly different regime applies to enforcement of judgments under the treaties concluded with other Nordic countries. Revisions and amendments were enacted in 2015 in light of the new Brussels I Regulation as well as the general transfer of the exequatur procedure from the Svea Court of Appeal to district courts.

Judgments from non-Convention countries are as a matter of principle not enforceable in Sweden unless there is a bilateral treaty on enforcement. However, according to case law and legal doctrine, a judgment from a foreign court may be ‘indirectly’ recognised in Sweden. Depending on the circumstances of the case, such as the basis for the jurisdiction of the foreign court that issued the judgment, the Swedish court may after a rather summary examination of the foreign judgment render a Swedish judgment based on the foreign judgment and without retrying the case on the merits.

vii Assistance to foreign courts

EU Regulation No. 1206/2001 sets out the legal framework for the procedure for courts situated in another Member State of the EU (other than Denmark) to make requests for the taking of evidence in Sweden. The foreign courts can either ask the Swedish court to take evidence on their behalf or ask for permission to take evidence themselves. The request should be made in the form annexed to the Regulation and should include information on the case and (where relevant) a list of questions or matters to be put to the witness.

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8 The new Brussels I Regulation, which entered into force on 10 January 2013 and thereby replaced the old Brussels I Regulation, No. 44/2001.

9 See Section II.iii (including footnote).

viii Access to court files
The main rule is that court hearings and court files are open to the public. Certain information, such as trade secrets, may be kept secret (the parties to the proceedings must still have unrestricted access to the case file). A court may also order that the entire hearing, or part thereof, should be held in private to the extent that protected information will be disclosed during the course of the hearing.

ix Litigation funding
Litigants generally fund their litigation by themselves or by means of insurance. There is no established practice or developed market for third-party funding in Swedish court proceedings.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls
By law, no person may act as counsel for a party in court proceedings in which he or she has previously represented the other party.

Conflicts of interest are managed within the framework of the Swedish Bar Association. The overriding principle is that a member of the Swedish Bar Association should be independent and not represent conflicting interests. In principle, Chinese walls are not accepted.

Lawyers that are not members of the Bar Association must adhere to general contractual principles of loyalty and general principles of law.

ii Money laundering, proceeds of crime and funds related to terrorism
On 1 August 2017 a new act on money laundering and financing of terrorism, which implements the fourth European Union money laundering directive, was implemented in Sweden.10 The matter has previously been regulated in Swedish law. However, the new act extends the requirements further to prevent, detect and avert money laundering and financing of terrorism.

Members of the Bar Association and their associates are under an obligation to confirm the identity of new clients and conduct a client due diligence review before taking on a matter within certain specified practice areas. However, matters such as disputes are generally excluded from these obligations. Nevertheless, members of the Bar Association have a duty to report suspected money laundering, as well as suspected funding of terrorism, to the police.

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V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege
The relationship between members of the Bar Association and their clients is privileged; correspondence and other documents of a lawyer’s file may not be the subject of an order for production of documents. In addition, a lawyer (and his or her associates) may, with some minor exceptions, refuse to testify on issues relating to the client–attorney relationship. The privilege further entails that a lawyer’s office may not be subject to certain searches and seizures by authorities.

Communications with and information specifically entrusted to someone acting as counsel in court proceedings are privileged.

There are no specific rules that apply to in-house counsel, and communications with in-house counsel are not privileged as such under Swedish law.

ii Production of documents
At the request of a party, a Swedish court may order production of documents. The party seeking production must identify the documents to be produced with reasonable specificity and explain what the documents are intended to prove; documents must be of evidentiary value in the case. A party may also request production of a certain defined category of documents. Certain types of documents are (with some exceptions) exempted from the obligation to produce, such as notes prepared exclusively for private use and documents containing trade secrets.

The court may order private individuals or legal entities not party to the proceeding to produce documents.

An order for production of documents may be made under penalty of a fine and can be enforced by the Enforcement Agency.

The obligation to produce documents applies also to electronic documents. So far, however, the Supreme Court has only ordered the production of paper printouts of electronic documents and has not yet taken a position as to whether this obligation extends to the production of documents electronically, including metadata.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation
In general, larger commercial disputes in Sweden are settled by arbitration rather than litigation.

Mediation and other alternative forms of dispute resolution are not widely used.

ii Arbitration
Arbitration is the preferred method of settling commercial disputes in Sweden. The SCC Institute is one of the world’s leading arbitration institutions, registering 200 new cases in 2017.

Although the Code of Judicial Procedure is not applicable to arbitral proceedings, most Swedish lawyers are imbued with the legal culture and the principles underlying the Code. Therefore, as a matter of practice the Code influences the conduct of arbitration in Sweden.
As with any modern arbitration law, the overriding principle in any arbitration conducted in Sweden is that of party autonomy. The control of the conduct of the arbitration very much lies with the parties.

An arbitration in Sweden is initiated by the claimant filing a request for arbitration, which, among other things, should include a summary of the dispute, a preliminary statement of the relief sought and the claimant's choice of arbitrator (in the case of a three-member tribunal). The respondent will then submit a reply and appoint an arbitrator. After further exchanges of briefs and possibly a preparatory hearing, a main hearing will be held.

In international arbitration conducted in Sweden, it has in recent years become quite common to submit written witness statements. Another trend relates to document production, where it is becoming more common to allow more extensive document production in international arbitration than in the Swedish courts.

Effective as from 1 January 2010, the SCC Institute has adopted rules on emergency arbitrators. According to the rules, parties may request interim measures even before the arbitration has been referred to an arbitral tribunal. Following an application for interim measures, an emergency arbitrator should be appointed within 24 hours and make its decision within five days of the appointment. Within that time, both parties must be heard. The SCC Board may extend this period if it proves insufficient or the respondent has not been notified. The emergency arbitrator may not act as arbitrator in the arbitration proceedings between the parties unless otherwise agreed.

An arbitral award rendered in Sweden cannot be appealed or set aside on the merits. Thus, the Swedish Arbitration Act contains no provision similar to Section 69 of the English Arbitration Act, allowing parties to appeal an arbitral award on a point of law. An arbitral award may, however, be declared invalid wholly or in part if the matter in dispute was not arbitrable; the award or the manner in which the award was rendered violates Swedish public policy; or the award has not been made in writing or has not been signed by the majority of the arbitrators. The right to seek nullification of the award on these three grounds cannot be waived by agreement of the parties.

An arbitral award rendered in Sweden may also be challenged if:

a. the arbitration agreement is invalid;
b. the arbitrators have exceeded their mandate;\footnote{Notably, it has been clarified in the revised Arbitration Act that the appellant must show probable cause that the arbitrators' excess of mandate impacted the outcome of the case.}
c. the arbitral proceedings should not have taken place in Sweden;
d. irregularities exist as to the appointment of an arbitrator;
e. an arbitrator lacks capacity or impartiality; or
f. there otherwise occurred an irregularity in the course of the arbitration that probably influenced the outcome of the case.

If none of the parties is domiciled or has its place of business in Sweden, they may agree in writing to exclude or limit the application of these grounds for setting aside an award. A challenge action must be brought within three months from the service of the award (as noted above, the time limit will be shortened to two months as of the entry into force of the revised Arbitration Act on 1 March 2019).

A party seeking enforcement or recognition in Sweden of a foreign arbitral award must first file an application for recognition and enforcement of the award with the Svea Court of
Appeal in Stockholm. Sweden is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the grounds for refusing recognition and enforcement of a foreign arbitral award set out in Article V of the New York Convention have been implemented in the Swedish Arbitration Act. In this respect, Sweden did not exercise either the reciprocity reservation or the commercial nature reservation available to the signatories to the New York Convention.


iii  Mediation

Mediation is sometimes used by the courts as a means to try to settle a dispute. Mediation can also be used by agreement of the parties and without any involvement of the court. As from 1 August 2011, new legislation on mediation in civil disputes has been introduced to implement Directive 2008/52/EC of the European Parliament and of the Council, providing rules on mediation outside of court proceedings. The law, which applies to party-initiated mediation (as opposed to mediation initiated within the framework of court proceedings), contains several new features to promote mediation as a dispute resolution mechanism, such as an extension of potential statutory limitations, a confidentiality obligation for the mediator and the option to enforce agreements concluded through mediation. Presently, there are no data available to tell whether the law has had any effect on the number of mediations.

In addition to the law, the general district courts’ obligation to facilitate an amicable settlement has been re-emphasised; the courts are relieved from their duty to facilitate a settlement of the dispute only where it would be inappropriate to do so. As of 1 August 2011, the courts of appeal also have an obligation to facilitate settlement when appropriate.

The SCC Institute has adopted its own set of Mediation Rules.

iv  Other forms of alternative dispute resolution

Expert determination is not frequently used for resolving disputes in Sweden; even disputes involving technical or financial issues tend to be settled by arbitration. In certain contracts, such as major construction contracts or share purchase agreements, it is frequently provided that an issue in dispute is first to be brought before an expert panel in accordance with an expedited procedure agreed upon by the parties.

VII  OUTLOOK AND CONCLUSIONS

The main focus of the past few years has been to find ways of expediting court proceedings. The Code of Civil Procedure was revised accordingly in November 2008. The law on priority for lengthy proceedings is a further expression of the determination on the part of the legislator to make court proceedings quicker. It is fair to say that courts now have ample tools to manage and expedite proceedings, but as practitioners, we have not yet noted any significant changes when it comes to the speed of court proceedings in Sweden. Case management differs from court to court and even from judge to judge. Even after the statutory reforms, efficient case management still very much depends on the willingness of the judge and counsel to contribute to speedy and efficient proceedings. However, according to a survey by the Swedish Courts Administration, a majority of the courts of appeal note
a positive change with regard to the length of the proceedings. Since leave to appeal is now required for all civil cases, the courts of appeal have experienced a reduced caseload. More resources can be allocated to cases that are granted leave to appeal.

Early case law from the Swedish Supreme Court following the revision of the Code of Civil Procedure indicated that the courts of appeal initially applied the rules too restrictively and, thus, leave to appeal was denied in too many cases. Of the appealed decisions in 2012 not to grant leave to appeal, the Supreme Court only upheld one. A comprehensive government survey conducted in 2013 also found that initially, following the 2008 reform, the rules on leave to appeal were applied too restrictively. Notably, however, a survey conducted by the Svea Court of Appeal in 2015 found that the number of granted appeals have since increased and stabilised at a high level. The number of granted appeals is higher as regards commercial disputes than other civil law disputes, which is consistent with the Supreme Court’s view that it is important that commercial disputes brought before general courts are processed in a manner not jeopardising the possibility of legal education.

Although the application of the leave to appeal rules has become more generous, it still varies between the different courts and is not yet considered to correspond to the level envisaged by the reform. Further, the survey from 2013 concluded that the 2008 revision of the Code of Civil Procedure has had a positive effect on the parties involved and for the judicial system as a whole. One important factor is that the new procedural rules in the courts of appeal (particularly the new procedure to use audiovisual recordings from the district courts to take evidence) emphasise that the administration of justice primarily lies with the court of first instance. Still, it is clear that there will be a continued focus on the efficiency of the court system and the courts’ core judiciary tasks.

As noted above, the new and revised SCC Arbitration Rules and the SCC Expedited Arbitration Rules entered into force on 1 January 2017 and a revised version of the Swedish Arbitration Act will enter into force on 1 March 2019. The focus of the revisions is to further establish Sweden's position as a preferred venue for arbitration. The revised Arbitration Act will further improve the legal framework for international arbitration proceedings in Sweden and ensure that such disputes can be resolved even more efficiently than today. The Swedish government works actively to maintain and improve Sweden's attractiveness for foreign investment, and in connection with this, the Swedish government acknowledges that it is important to ensure that commercial disputes can be resolved efficiently. The revisions of the SCC Arbitration Rules, the SCC Expedited Arbitration Rules and the Arbitration Act represent significant steps forward in this regard.

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12 NJA 2012 N 19.
13 Lina Nestor, Svea hovrätts överprövning i tvistemål - en uppföljning av 2012 års undersökning.
14 Report published as Swedish government official reports, SOU 2012:93.
INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

The substantive civil law of Switzerland and its law on civil procedure is regulated at federal law level, whereas the judiciary in Switzerland’s 26 cantons is organised by each individual canton on its own. Even though a civil law country, court precedent is of utmost practical significance in Switzerland, mostly in terms of interpretation, but occasionally also in terms of development of the law.

The Swiss Code of Civil Procedure \(^2\) (CCP) prescribes the principle of double instance for the judiciary of the cantons, which means that each canton must, besides a court of first instance, establish an appeal instance with full power of review. Decisions of the appeal court may then be appealed to the Swiss Federal Tribunal – the highest court in Switzerland – where the grounds for appeal are ordinarily limited to violations of federal and constitutional law. The proceedings before the Swiss Federal Tribunal are governed by the Federal Act on the Swiss Federal Tribunal.\(^3\)

As an exception to the aforementioned principle of double instance at the cantonal level and deriving from the cantonal power to organise its judiciary (e.g., the functional and subject matter jurisdiction of the courts), the cantons are given the right to establish a specialised court as the sole cantonal instance to hear commercial disputes, whose decision may only be appealed to the Swiss Federal Tribunal. So far only four cantons (Zurich, Berne, St Gallen and Aargau) have made use of this right and have established a specialised commercial court.

In certain specialised fields of law such as intellectual property, competition and antitrust law, claims against the Swiss government and disputes relating to collective investment schemes, federal law requires the cantons to designate a court of exclusive first instance jurisdiction. Moreover, for disputes relating to patents the Federal Patent Court is competent to hear the case and the proceedings are governed by the Federal Act on the Federal Patent Court.

The principle of double instance furthermore does not apply in arbitration matters, be it domestic or international. The sole instance of appeal in domestic arbitration proceedings is the Swiss Federal Tribunal, unless the arbitrating parties explicitly agree on a cantonal court as sole appeals instance. Similarly, in international arbitration proceedings the Swiss Federal

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Tribunal acts as the sole appeals instance for arbitral awards, unless the possibility to appeal has been excluded by the arbitrating parties, which is, however, only admissible if none of the arbitrating parties is domiciled in Switzerland.

II THE YEAR IN REVIEW

In the past year, the Swiss Federal Tribunal has rendered a number of notable decisions. Namely, in a landmark decision the Swiss Federal Tribunal overturned its previous longstanding practice concerning the required legitimate interest for negative declaratory actions in international relations and henceforth allows forum running in Switzerland (see Section II.i). The Swiss Federal Tribunal also found that a waiver of the right to appeal against an arbitral award may also exclude a party from requesting a review of such arbitral award by means of the extraordinary legal remedy of revision as such request could constitute a violation of the principle of bona fide (see Section II.ii). The Swiss Federal Tribunal further rendered a decision elaborating on the question of immunity of foreign states in enforcement proceedings in Switzerland (see Section II.iii). Finally, the Swiss Federal Tribunal changed its longstanding case law with regard to the prerequisites for the objective accumulation of claims in a partial action (see Section II.iv).

i Legal interest to request negative declaratory relief: change of case law regarding forum running

The most common method for forum running is an action for negative declaratory relief; in other words, a party threatened with an action for performance pre-empts such action by filing a request for declaratory relief at a court of jurisdiction such party deems advantageous and requests that the claim at issue be declared non-existent. Though a legitimate interest in a proceeding is generally an indispensable prerequisite for litigation in Switzerland, longstanding case law of the Swiss Federal Tribunal required that a particular interest of the requesting party be shown for the admissibility of a request for negative declaratory relief, namely a current, material and legitimate interest in the immediate determination of the legal position. This generally requires that:

a the legal relationship between the parties is uncertain;
b such uncertainty can only be resolved by a court’s decision; and
c the requesting party cannot be expected to tolerate such uncertainty any longer as it impedes such party’s economic freedom.

In addition, the interests of the counterparty to such request should be taken into account, as such request for declaratory relief may force the counterparty to litigate its case prematurely. In this context, the Swiss Federal Tribunal consistently held that the mere interest of the requesting party to choose a court in a suitable jurisdiction does not qualify as a sufficient legitimate interest to file an action for declaratory relief. In consequence, such restrictive case law largely excluded forum running in Switzerland thus far.

With its landmark decision of 14 March 2018, the Swiss Federal Tribunal took the opportunity to overturn its previous case law with regard to the necessary requirements applicable to actions for negative declaratory relief in international relations. The case decided by the Swiss Federal Tribunal pertained to a dispute between a Swiss group of companies manufacturing watches and a UK-based spare parts wholesaler that distributed spare parts of watches of the Swiss group of companies. Owing to the introduction of a selective
distribution system, the Swiss group of companies terminated the contractual relationship with the UK entity. In response, the UK entity requested that three subsidiaries of the Swiss group of companies confirm the resumption of delivery, otherwise it would bring an action with the High Court of Justice in London without further notice. The Swiss subsidiaries pre-empted such action by the UK entity and filed an action for declaratory relief with the Commercial Court of the Canton of Berne requesting the court to declare that no obligation to deliver existed. However, in line with the previous consistent case law in Switzerland, the Commercial Court of the Canton of Berne found that the Swiss subsidiaries did not have a sufficient legitimate interest in a declaratory judgment and dismissed their action.

On appeal, the decision of the Commercial Court of the Canton of Berne was overturned by the Swiss Federal Tribunal. It found that in international relations securing a preferential place of jurisdiction in Switzerland qualifies as a legitimate interest in an action seeking negative declaratory relief. In particular, the Swiss Federal Tribunal acknowledged that the factual interest of conducting a proceeding in one, rather than in another, jurisdiction may be substantial owing to the differences in the applicable procedural rules, the language and the duration of the proceedings as well as the costs thereof. The Swiss Federal Tribunal particularly acknowledged that its restrictive approach with regard to the legal interest in bringing an action for declaratory relief merely prevented forum running within Switzerland, whereas it had no effect on forum running in other jurisdictions. It concluded that in such circumstances parties willing to litigate in Switzerland in international disputes are directly discriminated.

As regards the interests of an alleged creditor not to be forced into legal proceedings prematurely, the Swiss Federal Tribunal found that such interest does not need to be given equal importance in international circumstances where a party is seeking to secure a favourable place of jurisdiction by filing a request for negative declaratory relief. Additionally, the Swiss Federal Tribunal considered that the UK entity itself had threatened to take legal action in the case at hand, and thus indicated that it was prepared to litigate its claims.

In its considerations, the Swiss Federal Tribunal further confirmed that the Lugano Convention does not provide an autonomous definition of the legal interest required to take legal action but that such question is governed by the applicable national law. In this regard, the Swiss Federal Tribunal determined that the procedural *lex fori* is applicable for the determination of the legitimate interest in a negative declaratory judgment, thereby closing a loophole intensely debated in legal doctrine up to such point.

Finally, the Swiss Federal Tribunal considered the concern of abuse of law by means of torpedo actions, namely the filing of a request for negative declaratory relief in a country known for its time consuming court proceedings in order to prevent the submission of an action for performance in another jurisdiction. In this regard, the Swiss Federal Tribunal held that the problem of torpedo actions is caused by the highly differing efficiency of the judicial systems within the scope of the Lugano Convention. It considered that it is, however, not for one country to solve such issue by imposing stricter rules with regard to the required legitimate interests in actions seeking negative declaratory relief. In addition, as the Swiss judicial system is not known for its overly lengthy proceedings, the Swiss Federal Tribunal concluded that there was no substantial risk of Swiss courts being abused for purposes of torpedo actions.

The Swiss Federal Tribunal’s change in case law, which aims at preventing the discrimination against parties wishing to litigate in Switzerland and thus creates a level playing field in the international context, is to be welcomed. Considering that in other jurisdictions
the filing of a request for negative declaratory relief is often granted on more generous terms, parties domiciled in Switzerland particularly, are now given equal procedural opportunities as their foreign counterparties.

ii Valid waiver of right to appeal against an arbitral award may also exclude a party from requesting a review of such arbitral award by means of the extraordinary remedy of revision

In its much-noticed decision of 17 October 2017, the Swiss Federal Tribunal demonstrated the far-reaching consequences of a waiver of the right to appeal against an arbitral award rendered in an international context. Such decision concerned a dispute between Croatia and the largest oil company of Hungary. The parties entered into two agreements resulting in the Hungarian entity assuming control over a formerly state-owned Croatian energy company in 2009. Five years later, Croatia initiated an arbitration proceeding against the Hungarian entity alleging that the two agreements had been procured by payments of bribes to Croatia’s former prime minister and were thus null and void. Croatia's claim was dismissed by the arbitral tribunal.

Croatia filed an appeal against the arbitral award with the Swiss Federal Tribunal and requested that the arbitral award be set aside. In the alternative, Croatia requested that the arbitral award be reviewed by the Swiss Federal Tribunal based on the extraordinary legal remedy of revision (as opposed to the ordinary legal remedy of appeal). Both applications were based on the ground that, after the issuance of the arbitral award, Croatia discovered that the arbitrator appointed by Croatia had failed to disclose an alleged conflict of interest. The Hungarian entity requested the dismissal of Croatia’s applications owing to waivers of the right to appeal against the arbitral award included in the agreements, which stated that ‘there shall be no appeal to any court from awards rendered hereunder’.

To start with, the Swiss Federal Tribunal held that an appeal against an arbitral award is not admissible if the parties to the arbitration agreement have validly waived the right to appeal against such arbitral award. As per Article 192, Paragraph 1 PILA, a waiver of the right to appeal against an arbitral award is admissible if none of the parties to the arbitration agreement have their domicile, habitual residence or a business establishment in Switzerland. The Swiss Federal Tribunal found that Croatia and the Hungarian entity had validly waived their right to appeal against the arbitral award, and that such waiver, in the absence of any explicit limitation thereto, applies to all grounds for appeal stipulated in Article 190, Paragraph 2 PILA, namely also to the arbitrators’ alleged lack of independence and impartiality. In consequence, the Swiss Federal Tribunal declared Croatia’s appeal against the arbitral award inadmissible.

The Swiss Federal Tribunal then considered Croatia’s request for review of the arbitral award based on the extraordinary legal remedy of revision. In this regard, Croatia argued that Article 192 PILA was not applicable to such extraordinary legal remedy and that according to its wording the waiver of the right to appeal against the arbitral award did not exclude a party’s right to request the review of the arbitral award based on the extraordinary remedy of revision. However, emphasising the subsidiary nature of a request for review based on the extraordinary remedy of revision compared to the ordinary appeal against an arbitral award, the Swiss Federal Tribunal expressed reservations as to whether a party that had expressly waived its right to appeal against an arbitral award, including on the ground of the arbitrators’ lack of independence and impartiality, could nevertheless request the review of such arbitral award based on the very same ground discovered within the deadline to appeal against the
arbitral award, albeit by means of the extraordinary remedy of revision. It found that such approach, which would ultimately result in Article 192 PILA becoming a paper rule, would constitute a clear violation of the principle of *bona fide*. In consequence, the Swiss Federal Tribunal declared Croatia's request for review based on the extraordinary remedy of revision inadmissible.

By basing its decision to render the request for review inadmissible on the principle of *bona fide*, the Swiss Federal Tribunal did not expressly address the still unresolved question of whether parties to an arbitration agreement may in general validly waive the right to request a review of an arbitral award based on the extraordinary remedy of revision. However, the decision of the Swiss Federal Tribunal clarifies that a waiver of the right to appeal against an arbitral award will, at least in certain circumstances, also exclude a party from requesting a review of such arbitral award by means of the extraordinary remedy of revision. Whether parties to an arbitration agreement may generally waive the right to request a review of an arbitral award will in all likelihood be determined as part of the partial revision of the PILA. Contrary to the Swiss Federal Tribunal’s decision, according to which any form of judicial review of the arbitral award may be excluded under certain circumstances, in the final legislative proposal for the partial revision of Chapter 12 of the PILA (see Section V), the revised Article 192, Paragraph 1 PILA explicitly stipulates that the right to request a review of an arbitral award based on the ground that a criminal proceeding has established that the arbitral award was influenced by criminal conduct may not be waived by the parties to an arbitration agreement.

### iii Immunity of foreign states in enforcement proceedings

On 7 September 2018, the Swiss Federal Tribunal rendered a landmark decision with regard to the immunity of foreign states in enforcement proceedings of arbitral awards against state-owned assets located in Switzerland, as well as with regard to the relationship between Swiss procedural law and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1985 (the New York Convention), which governs the enforcement of foreign arbitral awards in Switzerland. The case decided by the Swiss Federal Tribunal concerned the enforcement of an arbitral award rendered by an arbitral tribunal with its seat in Paris and particularly the request of a Guernsey entity for an attachment order (freezing order) of real estate property in Switzerland owned by Uzbekistan.

According to consistent case law, the enforceability of a claim against a foreign state requires that the claim derives from such foreign state’s conduct as a holder of private rights (*acta iure gestionis*) as opposed to conduct deriving from the foreign state’s sovereign authority (*acta iure imperii*). In addition, the claim to be enforced must have a sufficient domestic nexus to the territory of Switzerland. Such nexus is affirmed if:

- a. the legal relationship from which the claim is derived was established in Switzerland;
- b. the place of performance is in Switzerland; or
- c. if the foreign state has at least taken action that would establish a place of performance in Switzerland.

The mere fact that a foreign state owns assets in Switzerland does not, however, suffice to affirm the enforceability against assets of foreign states located in Switzerland.

Given that in the case at hand the claim to be enforced was based on an arbitral award, the Swiss Federal Tribunal had to examine whether the aforementioned prerequisites, and particularly the requirement of a sufficient domestic nexus of the claim to be enforced,
also apply within the area of application of the New York Convention. In its appeal, the Guernsey entity particularly argued that the New York Convention in its Article V contains an exhaustive list of grounds based on which the recognition and enforcement of an arbitral award may be refused and that state sovereignty, and thus the requirements with regard to the enforceability of a claim against a foreign state as set forth by the case law of the Swiss Federal Tribunal, is not included in such list. The Swiss Federal Tribunal, however, found that the New York Convention does not prevent Swiss procedural law from applying restrictions in terms of enforcement proceedings against foreign states’ assets located in Switzerland, and held that the prerequisites in this regard also apply in Swiss enforcement proceedings governed by the New York Convention.

In consequence, the Swiss Federal Tribunal considered whether or not in the present case the claim to be enforced against Uzbekistan was based on a non-sovereign act and whether or not such claim has a sufficient nexus to Switzerland. In summary, the Swiss Federal Tribunal found that in the present case the claim for which enforcement was being sought did not have a sufficient link to Switzerland and that, thus, no enforcement against such assets of Uzbekistan in Switzerland was possible.

iv Objective accumulation of claims in case of partial actions – change of practice

In a recent decision rendered on 17 September 2018, the Swiss Federal Tribunal changed its current practice with regard to the procedural requirements for partial claims in case of objective accumulation of claims.

The case decided by the Swiss Federal Tribunal concerned a liability action brought against three directors of a company limited by shares before the Commercial Court of the Canton of Aargau. By means of a partial claim and subject to the submission of subsequent claims, the plaintiff requested that the directors be ordered to pay damages in the amount of 3 million Swiss francs. However, the Commercial Court of the Canton of Aargau held that the plaintiff brought six claims for damages based on various separate breaches of duty on the part of the directors. It concluded that the total damages amounted to approximately 6 million Swiss francs. The Commercial Court of Aargau determined that such partial claims that are based on various factual circumstances are to be qualified as an objective accumulation of claims. In consequence, and in line with the then relevant case law of the Swiss Federal Tribunal, the Commercial Court of the Canton of Aargau held that such objective accumulation of partial claims requires that the statement of claim explicitly states in what order or to what extent the court must examine such each claim. Given that the plaintiff did not comply with this obligation, the Commercial Court of the Canton of Aargau dismissed the claim. The plaintiff lodged an appeal against the decision of the Commercial Court of the Canton of Aargau with the Swiss Federal Tribunal.

The Swiss Federal Tribunal elaborated on its previous case law regarding the distinction between claims based on single as opposed to multiple facts, as well as the difficulties this involves and particularly acknowledged the criticism raised in the legal doctrine pertaining to its current practice. It admitted that the determination as to whether claims submitted are based on one or more factual circumstances was highly problematic as it requires a legal assessment and thus entails considerable uncertainty in particular for the plaintiff.

Consequently, the Swiss Federal Tribunal stated that such obligation imposed on the plaintiff to specify in what order or to what extent each individual claim must be examined was not sustainable. Henceforth, a plaintiff is thus only required to present its individual (partial) claims conclusively and in accordance with the general requirements of substantiation.

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allowing the court to assess the merits of each (partial) claim. If these requirements are met, the action is deemed admissible and it is in principle at the discretion of the court to determine in which order it examines the various claims.

III	COURT PROCEDURE

i	Overview of court procedure

The main statute governing civil procedure in Switzerland is the CCP. Besides civil procedure, the CCP equally governs debt collection proceedings in relation to non-monetary matters as well as domestic arbitration proceedings, unless the arbitrating parties opt out of its application.

Monetary debt collection matters are governed by the Federal Debt Enforcement and Bankruptcy Act (DEBA), whereas the recognition and enforcement of foreign judgments and foreign arbitral awards is predominantly regulated by the PILA as well as all relevant bilateral and multilateral agreements to which Switzerland is a party; the most important of these are the Lugano Convention and the New York Convention, respectively.

Predominantly, civil proceedings in Switzerland are governed by the principle that it is up to the parties to decide how, when, for how long and to what extent they wish to submit claims as plaintiffs, whether they wish to accept or contest such claims as defendants, or whether they wish to lodge or withdraw appeals. In the same vein, it is generally up to the parties to submit the factual allegations relevant to decide the dispute, and the court when assessing the matter may not take into account facts that have not been argued by the parties. In contrast thereto, certain proceedings – in particular (but not limited to) family law matters – are governed by the principle that the court has a certain obligation to collect and determine relevant facts to resolve the dispute.

Irrespective of any principle that may apply, Swiss civil proceedings are governed by the principle of iura novit curia (i.e., it is up to the court to apply the substantive law ex officio regardless of whether or not a party has invoked certain provisions of law). Put differently, when rendering a decision, a court may base its decision on legal provisions that the parties did not invoke at all. Of course, it goes without saying that the court would do so only after having heard the parties.

In proceedings before the Swiss Federal Tribunal acting as the last instance of appeal to review violations of, among others, fundamental rights, federal and cantonal or inter-cantonal law, and acting as sole instance of appeal in domestic and international arbitration proceedings, the principle of iura novit curia does not apply. Rather, these proceedings are governed by a principle requiring the parties to point out explicitly and demonstrate what provisions of law are violated by the decision they appeal.

In terms of duration, a period of between three and seven years may be taken as a benchmark for a full litigation appealed through all instances up to the Swiss Federal Tribunal, depending on the court seized, the nature of the proceedings and whether or not an extensive procedure of taking of evidence is required.

ii	Procedures and time frames

The three principal types of proceedings foreseen by the CCP are the ordinary, simplified and summary proceedings. Claims must be submitted under an ordinary proceeding unless the law expressly provides otherwise.
Ordinary proceedings can generally be split up into three phases:

a the pleading phase, where the parties must present and substantiate the factual basis of their claims and defences, and offer evidence for them;

b the evidentiary phase, where the courts hear and review the evidence presented by the parties; and

c the post-hearing phase where the parties may comment on the outcome of the evidence proceedings and the court renders its decision.

Generally, and subject to a number of exceptions, state court civil proceedings in Switzerland are commenced by lodging a request for a conciliatory hearing, which is ordinarily a prerequisite for the filing of legal action in civil matters before state courts. In practice, the settlement rate for such conciliatory hearings can exceed 50 per cent (e.g., in the city of Zurich the conciliation authorities settled 64.5 per cent of the cases in 2017). However, in particular if the value in dispute is high, conciliatory hearings only rarely lead to a settlement of the dispute. Consequently, in cases where the value in dispute exceeds 100,000 Swiss francs, the CCP foresees a possibility for the parties to consensually waive the holding of such a conciliatory hearing. A plaintiff may furthermore waive the holding of a conciliatory hearing if, among other things, the defendant is domiciled outside Switzerland or if its whereabouts are unknown. The parties can agree to revert to mediation in lieu of holding a conciliatory hearing. However, should the mediation process fail, the plaintiff will have to request the issuance of a writ permitting them to file the claim from the body that would have held the conciliatory hearing had it not been replaced by the mediation process. In this respect, for multiple reasons not many parties have in the past opted for mediation instead of a conciliatory hearing. Nonetheless, it appears that mediation as such is gaining more and more attention including in commercial disputes.

Simplified proceedings govern disputes with a value in dispute not in excess of 30,000 Swiss francs. Additionally, certain actions relating to very specific issues such as gender equality, aspects of tenancy law or data protection law are also to be brought under simplified proceedings irrespective of their value in dispute.

Simplified proceedings, like ordinary proceedings, are commenced by lodging a request to hold a conciliatory hearing as elaborated above. In the same way as ordinary proceedings, simplified proceedings are complete proceedings (i.e., there is no reduced scope of court review nor do any limitations as to adducing evidence apply). Rather, simplified proceedings generally provide for a facilitation of the pleading phase, where, for instance, the court supports the parties in their substantiation of the claim based on extended interrogation duties and with a view to supplement any incomplete facts of the case or to adduce adequate evidence. In addition, certain matters to be decided by means of the simplified procedure, such as certain tenancy and employment matters, require the court to collect the relevant facts of the dispute. Lastly, in terms of the duration of the proceedings, the court will work towards resolving the dispute during or following the first hearing of the case.

Summary proceedings are fast-track proceedings. No holding of a conciliatory hearing is necessary. The main characteristics of summary proceedings are that the parties may not avail themselves of all otherwise available means of claim and defence. In particular, the means of evidence admitted are, in principle, significantly restricted, while the standard of proof is reduced (generally to a standard of 'reasonable certainty').

Legal actions such as motions for interim relief (preliminary measures or injunctions) and claims where the facts are undisputed or immediately provable, and where the law is clear,
are to be brought in summary proceedings. Furthermore, the CCP foresees the applicability of summary proceedings to certain specific proceedings, such as particular debt collection and bankruptcy proceedings or proceedings under Swiss company law (e.g., proceedings regarding special audits).

The DEBA fast-track proceedings for monetary debt collection matters addressed above also apply to the enforcement of monetary debts certified by domestic and foreign state court judgments as well as to domestic and foreign arbitral awards (where, with regard to foreign judgments and arbitral awards, the provisions of international agreements and treaties, such as the Lugano Convention or the New York Convention, are additionally taken into account).

iii Class actions

Swiss civil law procedure does not permit class actions. Thus, typically, claims must be brought by individual plaintiffs. However, a number of procedural tools under the CCP allow for multiple parties in civil law proceedings to act jointly, be it on the plaintiffs’ or the defendants’ side.

Under certain circumstances, a group of plaintiffs must lodge their claims or be sued jointly (a ‘mandatory joinder of parties’). Generally, this will be the case if the relationship between the members of the group is of a kind that does not allow for differing decisions as to the individual members of the group. Also, if rights or duties of multiple parties stem from similar circumstances or legal grounds, Swiss law allows for such multiple parties to lodge their claims jointly. However, and in contrast to a mandatory joinder of parties set up, the joint action is made available as an option rather than as a mandatory requirement (‘simple [or voluntary] joinder of parties’).

Depending on whether or not the plaintiffs are required by law to proceed together, the effect of the plaintiffs’ legal actions on the other joint parties varies. In the case of a mandatory joinder of parties, all procedural measures taken by one of the parties are, as a rule, effective for all other joint parties. Furthermore, if in the case of a mandatory joinder of parties not all parties are made part of the legal action, the plaintiffs or the defendants may lack standing, which will lead to the dismissal of a claim. In contrast, in the case of a voluntary joinder of parties, each of the joint parties may act independently, and a judgment rendered will only bind the parties having joined the proceedings as voluntary joint parties and the judgment may vary as to each individual of the joint parties.

As a further kind of group action, Swiss law permits associations and organisations of national or regional importance to file claims on behalf of their members, if their statutes authorise them to protect the interests of their members, which is predominantly limited to remedial action for violations of their members’ personality rights. Actions seeking monetary relief are, however, excluded and need to be pursued individually by the person or persons concerned.

Although the above reflects the current situation in Switzerland with respect to class actions, political efforts are under way to improve the tools for collective legal protection; in particular, in the areas of consumer protection, personality rights and data protection. However, the Federal Council, Switzerland’s executive branch, decided not to include a previously discussed Swiss-style class action in the new Financial Services Act, which would have facilitated investors’ access to courts in financial matters. Instead, the Federal Council
indicated that the introduction of general group settlement proceedings, as well as the extension of the above-mentioned group action, will be suggested as part of future revisions of the CCP in the coming years.

In March 2018, the Federal Council initiated the consultation process for the revision of the CCP and particularly suggested two major amendments with regard to collective legal protection aiming at facilitating actions for damages for large groups through the existing mechanism of group actions through associations or other organisations that protect collective interests as well as by introducing a new group settlement procedure. Though, as per the current legislation, associations and other organisations protecting collective interests may solely bring non-monetary actions, the suggested amendment proposes to also allow for reparatory actions, such as actions for damages and restitution of profits. In addition, the new settlement procedure proposed by the Federal Council allows for associations and organisations that protect collective interests to enter into settlement with a damaging party, which, following the approval of such settlement by the competent court, will be declared binding for all injured persons. The legislative procedure was initiated by the Federal Council by means of these proposed amendments and it is not yet foreseeable if and to what extent these proposals will ultimately be adopted. The amendment procedure of the CCP is expected to take several years.

iv Representation in proceedings

As a rule, a representation in proceedings is always permitted in Switzerland. Exceptions to this rule may apply in conciliatory hearings and certain family law proceedings where the parties must appear in person. That said, Swiss law does not require a party to be represented in court proceedings, unless such a party is deemed incapable of acting in the proceedings, in which case the court will require such a party to arrange for legal representation.

Other than in civil and criminal matters before the Swiss Federal Tribunal, legal representation of a party in court proceedings needs not be, but ordinarily is, taken over by a lawyer. However, a person wishing to professionally represent parties in court proceedings must be qualified to practise in Switzerland.

Apart from the duty to protect their clients’ interests and their duty of care, Swiss attorneys are subject to confidentiality and professional secrecy obligations, a violation of which constitutes a criminal law offence.

v Service out of the jurisdiction

Summons, orders and decisions from Swiss courts are served to parties domiciled in Switzerland by registered mail or by other means against confirmation of receipt.

Barring any bilateral or multilateral agreement ratified by Switzerland providing otherwise, service of court documents out of Switzerland must occur by way of judicial assistance only.

Apart from bilateral agreements, Switzerland is party to two international treaties on this matter. Switzerland is a signatory state of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters of 15 November 1965, pursuant to which service of legal documents occurs via a central authority appointed in each Member State, which in Switzerland is the responsibility of the respective cantonal high courts. The legality of service is then assessed based on the law of the jurisdiction where service is effected.
Furthermore, Switzerland is party to the Hague Convention on Civil Procedure of 1 March 1954, pursuant to which a foreign court wishing to serve documents out of the jurisdiction must use diplomatic channels (i.e., the documents must be served to the consular representation in Switzerland, which then approaches the Swiss Federal Department of Justice to ensure service on the party domiciled in Switzerland). Complaints to foreign courts against persons domiciled in Switzerland must also be translated into one of the official languages of Switzerland.

A Swiss court may require a party domiciled abroad to appoint a process agent in Switzerland for the purposes of civil proceedings. If the foreign party fails to do so, service may be effected by the court by way of public announcement, generally by way of publication in the cantonal official gazette.

vi Enforcement of foreign judgments

Barring any bilateral or multilateral agreement that may apply, the general rules regarding the enforcement of foreign judgments in Switzerland are regulated in the PILA. To enforce a foreign judgment under the PILA, a party must submit to the enforcing court a complete and authenticated copy of the decision; a confirmation that no further ordinary appeal is available against the decision; and in the case of a default judgment, official documentation evidencing that the defendant has been duly summoned and has been given the chance to enter a defence.

For a foreign judgment to be recognised under the PILA, the party seeking enforcement must, in particular, demonstrate the competence of the foreign court having rendered the decision. The party objecting to the recognition and enforcement is entitled to a hearing and to adduce evidence. This notwithstanding, interim relief, such as freezing orders or attachments, is available in the enforcement proceedings for the party seeking recognition and enforcement to protect its legitimate interests.

With regard to European judgments, Switzerland is a signatory state of the Lugano Convention, whose provisions apply to the recognition and enforcement of judgments in civil and commercial matters rendered in another signatory state of the Lugano Convention.

Compared with the enforcement regime foreseen by the PILA, the Lugano Convention provides facilitations both in terms of the conditions for recognition and enforcement and in terms of the applicable procedure. As regards the conditions to be met for recognition and enforcement of a foreign judgment, under the Lugano Convention the enforcing court is, in particular, not permitted to verify whether the foreign court, having rendered the decision, was competent to do so in the first place. A party seeking to enforce a foreign judgment must provide the court with the original or an authenticated copy of the judgment and a certificate rendered in accordance with the provision of the Lugano Convention confirming the enforceability of the decision. Notably, no evidence as to due process standards having been met must be adduced. In addition, provisional measures issued by a signatory state of the Lugano Convention (other than ex parte decisions) may be enforceable in Switzerland (in contrast to provisional measures issued by another state, which pursuant to the PILA are not enforceable in Switzerland). In terms of procedure, the enforcing court must decide on the enforcement request in an ex parte procedure (i.e., without hearing the party against which enforcement is sought). The latter will only be heard in the appeals stage should it appeal the ex parte enforcement decision.
Civil assistance to foreign courts

In recent years, assistance to foreign courts has shifted more and more into public view, not least because of certain attempts of foreign courts to order parties domiciled in Switzerland to directly collect and surrender information and documentation to the foreign court other than via the official channels foreseen by international law.

In Switzerland, it may be a criminal offence pursuant to Articles 271 (unlawful activities on behalf of a foreign state) and 273 (industrial espionage) of the Swiss Criminal Code – and possibly also a violation of further obligations relating to professional secrecy and data protection laws – to collect or surrender (or assist in doing so) information and documentation to a foreign court pursuant to a foreign order not effected via the requisite judicial assistance channels as foreseen by international law. Thus, compliance by a party with such a foreign court order (or for that matter with any order of a foreign authority) may lead to criminal sanctions. Barring any bilateral or multilateral agreement to the contrary, any information, documentation or other kind of assistance pertaining to matters located within Switzerland that a foreign court may require must be obtained by way of judicial assistance only.


Under the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters of 18 March 1970, the requesting state must transmit its request to the central authority of Switzerland (at cantonal level), which will forward such a request to the Swiss Federal Department of Justice and Police together with its recommendation about whether or not it supports such a request. However, the request may also be sent to the Swiss Federal Department of Justice and Police, which will then forward such request to the central authority (at cantonal level). The taking of evidence will be effected by the cantonal authorities at the domicile of the person. It is, however, noteworthy that Switzerland has made a reservation under this treaty as regards common law pretrial discovery of document requests.

The procedure for the taking of evidence required under the Hague Convention on Civil Procedure of 1 March 1954, although not identical, is fairly similar to the procedure required under the Hague Convention on the Taking of Evidence Abroad in Civil And Commercial Matters of 18 March 1970. Since the latter replaces the former, a requesting state being signatory to both treaties will have to submit its request under the procedure foreseen by the Hague Convention on the Taking of Evidence Abroad in Civil And Commercial Matters of 18 March 1970.

Generally, the Swiss authorities have in recent years proven to be very amenable to judicial assistance requests from foreign authorities.

Access to court files

As a rule, civil law court proceedings in Switzerland are public. However, public interest in commercial cases is normally very limited. If the public interest or the protected interests of a person are directly affected, a court may exclude the public from proceedings. Since
commercial disputes, in particular those with an international component, tend to be complex, the parties generally submit their pleas in writing. Although written submissions in civil proceedings are not made available to the public, copies of judgments may be requested by anyone. In such cases, the judgments are generally made available in anonymised form only. Additionally, many higher cantonal and federal courts have, in recent years, started to publish most of their judgments in anonymised form on their websites.

ix  Litigation funding

Litigation in Switzerland is usually funded by the litigating party itself. Ordinarily, the prevailing party may recover its legal costs. However, depending on the canton where litigation is conducted, the cost amount that may be recovered does not equal the actual legal fees paid (the difference, depending on the canton, may be quite substantial).

If a party cannot afford the costs of the proceedings or legal representation in such proceedings, a party may apply for free proceedings and to be provided with legal representation, the costs of which will be covered by the state.

The funding of litigation by third parties is, in principle, admissible, albeit not very popular. Nevertheless, the Swiss Federal Supreme Court confirmed said admissibility and even held that an attorney might have a duty to inform his or her client about the possibility of litigation funding. However, as with all contractual relationships, the contractual terms of a funding agreement must be in line with Swiss mores and must in particular not constitute profiteering in accordance with Article 157 of the Swiss Criminal Code (sanctioning, inter alia, the exploitation of a person in need). Furthermore, the funding by a third party must not cause any conflict of interest on the level of the attorney–client relationship (i.e., notwithstanding any third-party funding, the lawyer must still be instructed by the litigating party and will owe its contractual duties (including its duty of care) in relation to the litigant only). The attorney, therefore, cannot at the same time represent the client and be an employee of such third party.

Although the client and its attorney are generally free to agree on the remuneration for the legal services rendered, in contentious matters the professional rules of attorney conduct do not allow for pure contingency fees. In contentious matters, legal services are, therefore, generally charged on an hourly basis. It is, however, in principle, admissible to agree on reduced hourly rates and provide for an additional success fee. The inadmissibility of pure contingency fee arrangements in litigation may be a major reason why litigation funding in Switzerland has not gained popularity thus far.

IV  LEGAL PRACTICE

i  Conflicts of interest

Pursuant to the Freedom of Movement for Lawyers Act, Swiss attorneys are subject to a special fiduciary duty in relation to their clients, pursuant to which any real conflict of interest – as opposed to the mere appearance of a conflict of interest – must be avoided between the lawyer’s clients and persons with whom the lawyer has private or professional contact. If a conflict of interest arises in the course of the provision of legal services, the attorney affected must, in principle, terminate its involvement. In certain instances, the professional rules of conduct even prohibit a lawyer from accepting a mandate in the first place.
Conflicts of interest may in particular arise in three instances:

a. if an attorney has personal interests contradicting the client’s interests;
b. if an attorney represents two or more clients with contradicting interests; or
c. if an attorney acts against a former client.

The latter case is particularly likely to cause a conflict of interest if the matter in relation to which the lawyer is to act against the former client concerns matters and knowledge the lawyer was exposed to during his or her past representation of the former client.

The obligation to avoid conflicts of interests applies equally to different attorneys of the same law firm. In this respect, the different attorneys of a law firm are regarded as one and the same lawyer.

In contentious matters, it is thus prohibited for different lawyers of the same firm to represent clients with conflicting interests, notwithstanding any Chinese walls that may be in place. In non-contentious matters, however, the representation of clients with conflicting interests is admissible if all parties involved consent. In practice, this can be observed for instance where a law firm represents multiple clients in auctions related to acquisitions or also when multiple clients (as creditors) are represented by one and the same law firm in bankruptcy proceedings.

A representation of several clients with aligned interests is admissible, be it in contentious or non-contentious matters.

ii Money laundering

For financial intermediaries, there are verification obligations as to the identity of the contracting counterparty, the ultimate beneficial owner and the reasons behind the commercial transactions such a contractual counterparty engages in pursuant to the Federal Act on Combating Money Laundering and Terrorist Financing in the Financial Sector.4 The same Act furthermore subjects financial intermediaries to reporting duties in relation to funds reasonably suspected to be linked to acts of a criminal organisation or money laundering; a crime sanctioned with imprisonment in excess of three years; funds at the disposal of a criminal organisation; or funds financing terrorism.

Lawyers are exempted from the above reporting duty to the extent that their activity is subject to professional secrecy, which will generally apply to legal advice; however, they are not exempt in relation to services as board directors or escrow agents (unless linked to the provision of legal services).

iii Data protection

The Swiss Data Protection Act (DPA) applies to and restricts the processing of personal data. Provided that it allows for identification, data relating to both private persons and legal entities (data subjects) are covered by the term personal data.

Various general principles must always be adhered to when processing personal data. For instance, in some cases, the data subject must at least implicitly agree to such processing and therefore be informed or otherwise be aware of the data being collected and processed.

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as well as of such activities’ purpose. Any processing must ensure data accuracy, be made in
good faith and not be excessive. In addition, adequate technical and organisational protection
measures are required to prevent unauthorised access to the data.

Particular restrictions apply to the international transfer of personal data. A transfer
from Switzerland to countries with a level of data protection that is deemed inadequate such
as, for example, the United States, is only possible if criteria for one of the exceptions provided
for in the DPA are met. An exception may include the specific consent of the data subject, the
implementation of contractual clauses ensuring that data protection is safeguarded, overriding
public interest or the necessity with regard to the exercise or enforcement of legal claims
before courts. Data transfers within the same group of companies (i.e., from a Swiss affiliate
to a foreign affiliate) are correspondingly restricted in that they require implementation of
specific data protection rules. EU countries are considered to have an adequate level of data
protection, so disclosure is not further limited than data transferred within Switzerland.

Sensitive data (i.e., relating to religion, political views, health, race, criminal records)
and personality profiles are also subject to enhanced legal protection under the DPA, which
may, for example, include the requirement of an explicit consent to the collection and the
processing where such consent is required and certain duties of registration with the Federal
Data Protection and Information Commissioner (FDPIC).

A person whose data is processed in a way that unlawfully infringes its privacy can sue
for correction or deletion of the data, prohibition of disclosure and damages. Accordingly, for
most claims based on DPA breaches, civil judges are competent. There are, however, a few
exceptional circumstances constituting criminal liability, such as failure to fulfil registration
duties.

Many very helpful summaries, sample contracts and guidelines, including various
topics like international data transfer, lists of countries with adequate and inadequate levels
of data protection, processing of employee data, outsourcing of operations and pertaining
personal data to service providers, etc. may be found on the FDPIC’s website.5

In practice, although not Swiss law, compliance with the GDPR in data protection
matters will be important for Swiss domiciled entities with a nexus to Europe.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

Pursuant to Article 321 of the Swiss Criminal Code and Article 13 of the Federal Lawyer’s
Act any lawyer admitted to the Bar (or otherwise authorised by law to represent clients before
the courts) and who works in independent practice is subject to a duty of professional secrecy.
A lawyer subject to professional secrecy obligations may (or normally must) invoke legal
privilege when it comes to the giving of testimony or the production of documents falling
within the scope of the professional secrecy obligations.

The scope of such secrecy obligations is rather broad and includes everything conveyed
to a lawyer in connection with the (prospective) attorney–client relationship. Most notably,
this also includes the attorney’s own assessments, proposals, memoranda and information
gathered, learned or that otherwise comes to his or her attention in the course of performing
his or her mandate. Although it is of no relevance from whom the lawyer learned the


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information, only information in the lawyer’s possession as part of his or her core business is protected. This notably excludes any information a lawyer learns as a private person or in a non-legal capacity, such as business advice.

No protection is granted where the business aspects prevail over the legal aspects, such as in the case of a lawyer serving as a board member or asset manager.

Corporate in-house counsel are not subject to a duty of professional secrecy, since they are in particular thought to lack the ‘independent practice’ characteristics required for the applicability of the professional secrecy obligations pursuant to Article 321 of the Swiss Criminal Code. Consequently, to date no legal privilege applies to corporate in-house counsel.

From a procedural perspective, the CCP duly defers to the legal privilege of attorneys. Neither must lawyers’ correspondence be produced in civil proceedings, irrespective of whether or not such correspondence is in the possession of the lawyer, the litigating party or any third party, nor can a lawyer be compelled to testify, as he or she may legitimately invoke legal privilege, if the testimony would violate secrecy obligations under Article 321 of the Swiss Criminal Code. However, legal privilege may not be invoked as a blanket defence. Rather, it must be claimed for each specific piece of information in question and will be considered on a case-by-case basis.

Production of documents
Contrary to other – predominantly common law – jurisdictions, the CCP does not, basically, impose any obligations on the litigating parties in terms of pre-action conduct. Hence, litigating parties in Switzerland are not subject to a litigation hold. This should, however, not be misunderstood as permission to destroy evidence. Such conduct could result in adverse inferences by a court assessing the case. Moreover, the CCP provides for specific rules based on which a party may request the court to take evidence before initiating ordinary court proceedings (precautionary taking of evidence), in particular if such party shows that the evidence is at risk.

In state court litigation, a court may during the procedure order the parties of the dispute or third parties to produce documents and may even enforce such orders with coercive means. Refusal to obey a court’s production order is only possible on the basis of a statutory refusal right (i.e., legal privilege, incrimination of a party of close proximity).

In practice, the production of documents in state court litigation has been shown to be of limited value. In particular, parties engaging in ‘fishing expeditions’ in an attempt to extract a wide array of unspecified or only very vaguely specified information will generally not be entertained by Swiss courts. Based on case law, the documents to be produced must be described with sufficient specificity and their significance and appropriateness to prove factual allegations being in dispute must be shown. Furthermore, the information requested must be shown to be in the possession or under the control of the party to whom the production request is directed.

Given such rather stringent prerequisites, in practice it is not an easy task to obtain an order for the production of documents. A request for the production of documents will ordinarily require the requesting party to have concrete knowledge about the existence of a specific document (not necessarily, however, about its content), which in many instances proves to be the main obstacle for successful production requests.

If the type of information one seeks to obtain relates to own personal data or information connected therewith, the owner of such data may be able to obtain such data on the basis
of data protection regulations. In international arbitration proceedings in Switzerland the
standard adopted for the production of documents will generally be in line with the IBA
Guidelines for the Taking of Evidence in International Arbitration.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

In Switzerland, arbitration is seen as the main alternative dispute resolution mechanism to
ordinary state court litigation. Mediation proceedings have gained some popularity, but are
yet to have a major practical impact.

ii Arbitration

Switzerland is seen as one of the traditional and most popular places for international
arbitration proceedings. Thanks to the arbitration-friendly and very liberal approach adopted
in Swiss legislation and the extensive court practice when it comes to international arbitration,
Switzerland is one of the preferred countries for institutional arbitration proceedings
conducted under the auspices of the International Chamber of Commerce.

The procedural rules – the lex arbitri – applicable to international arbitration proceedings
seated in Switzerland are set out in the PILA (in particular Chapter 12). These rules together
with the case law of the Swiss Federal Tribunal in particular ensure the following.

The rules contain a broad definition of what matters are deemed arbitrable. They extend
to proprietary matters, which notably include proprietary matters pertaining to disputes in
employment, antitrust and non-competition, family law, shareholder and real estate matters,
as well as intellectual property law.

The procedural rules ensure a wide party discretion to agree on procedural rules
to govern the arbitral proceedings, such a discretion being limited by the core principles
pertaining to fair proceedings and public policy only.

The rules give protection from unwarranted interference by both domestic state courts
and foreign courts. This supports the efficiency and independence of arbitration proceedings
seated in Switzerland; on the one hand, Swiss legislation expressly excludes the application
of rules on lis pendens to Swiss arbitration proceedings, as a result of which any parallel
proceedings initiated outside Switzerland will not be able to interfere with Swiss arbitration
proceedings. On the other hand, protection from unwarranted interference is also ensured by
settled case law granting arbitral tribunals seated in Switzerland a preference over domestic
state courts to review the validity of an arbitration agreement and thus the arbitral tribunal’s
competence to hear a case (also referred to as the negative effect of competence-competence).

Furthermore, the rules ensure a readily available support for arbitration proceedings by
domestic state courts when it comes to the ordering of interim relief requested by arbitrating
parties or when it comes to the enforcement of interim relief ordered by arbitral tribunals.

The rules provide a straightforward and rather expedient appeals procedure, where
arbitral awards in international arbitration can be appealed to one instance only, the Swiss
Federal Tribunal. The grounds for appeal are restricted to:

a the arbitral tribunal having been constituted improperly or an arbitrator lacking
   impartiality and independence;
b questions of jurisdiction;
c the arbitral tribunal deciding ultra or extra petita (i.e., beyond a matter, on a request
   not made by the parties or failing to decide on a request made by the parties);
matters pertaining to due process, the right to be heard and equal treatment; and
grounds of public policy.

In hearing appeals, the Swiss Federal Tribunal has shown great reluctance to interfere with arbitral awards. Statistically, the chances of success vary from around 10 per cent for appeals relating to jurisdiction to around 7 per cent for appeals on all other grounds. In particular, since the entering into force of the PILA in 1989, only two awards have been set aside on the grounds of public policy: once because of a violation of the *res judicata* principle (formal public policy) and once in a case where a professional footballer was banned from football for life, *inter alia*, as a means to enforce a monetary debt owed to his former club (substantive public policy). Ordinarily, appeals decisions can be expected to be rendered within six to eight months from lodging the appeal.

In arbitration proceedings where all arbitrating parties are domiciled outside Switzerland, the parties are given the option to altogether waive the possibility of appeal to the Swiss Federal Tribunal. Parties may also replace the PILA and agree that the rules for domestic arbitration set forth in the CCP shall apply. In such a case, the grounds for appeal to the Swiss Federal Tribunal (unless the parties have agreed on a cantonal court to act as sole appeals instance in lieu of the Swiss Federal Tribunal) are slightly broadened and in particular include the arbitrariness of a decision, an apparent wrongful application of the law or a wrongful determination of the facts.

Most institutional arbitration proceedings seated in Switzerland are governed by the Swiss Rules of International Arbitration of the Swiss Chambers’ Arbitration Institution and the Rules of Arbitration of the International Chambers of Commerce. In sports matters, the majority of arbitration proceedings are conducted under the rules of the Court of Arbitration for Sport (CAS) in Lausanne, whereas many intellectual property disputes are conducted under the arbitration rules of the World Intellectual Property Organization (WIPO) in Geneva.

Compared to the extensive international arbitration practice, domestic arbitration in Switzerland is of less relevance. The procedural rules applicable to it are set forth in the CCP; the parties are given the opportunity to opt out and choose their arbitral proceedings to be governed by the PILA instead.

### Mediation

As already mentioned above, the CCP provides for a set of rules based on which the parties can opt for mediation instead of the often mandatory conciliatory hearing. Various institutions have issued mediation rules such as the Swiss Chamber of Commercial Mediation, the WIPO domiciled in Geneva and the CAS. Among other providers, the Swiss Chamber of Commercial Mediation also offers a wide variety of mediation courses and, hence, there is a considerable number of Swiss practitioners with special expertise in mediation techniques. In practice, mediation procedures are nevertheless of minor importance in Switzerland mainly because of the fact that Swiss counsel normally attempt to bilaterally settle a case (without the involvement of a mediator) before formal proceedings are initiated.

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6 www.swiss-arbitration.ch.
iv Other forms of alternative dispute resolution

Other forms of dispute resolution used in Switzerland are expert determinations, which are often contractually agreed; for instance with regard to purchase price determinations in M&A transactions or in relation to real estate matters. The local chambers of commerce or industry institutions readily offer their services to appoint experts in various fields of expertise if so desired by the parties.

Furthermore, within civil court proceedings the CCP permits the parties to agree on an expert report to determine certain disputed facts. In such a case the competent court is generally bound by the factual findings contained in the expert report, unless such findings prove to be incomplete, incomprehensible or incoherent.

VII OUTLOOK AND CONCLUSIONS

A partial revision of Chapter 12 of the PILA regulating international arbitration in Switzerland is in preparation. The partial revision is directed at:

a implementing and converting into law the developments in international arbitration since the PILA entered into force back in 1989 driven by the case law of the Swiss Federal Tribunal;

b strengthening the party autonomy; and

c making the provisions of Chapter 12 of the PILA more user-friendly.

The revised draft Chapter 12 of the PILA includes, *inter alia*, new codified provisions on the revision, rectification, explanation and correction of awards, the possibility to make submissions to the Swiss Federal Tribunal in English and a relaxation of the form requirements regarding the conclusion of the arbitration agreement. The consultation on the preliminary draft bill of the revised Chapter 12 of the PILA was concluded in May 2017. On 24 October 2018, after having taken into account the comments submitted in the course of the consultation process, the Swiss Federal Council submitted the official message on the revision of Chapter 12 of the PILA, together with the final legislative proposal to the Swiss parliament for approval.

A consultation on the complete revision of the DPA was initiated at the end of December 2016. The objective of such revision is to strengthen the protection of personal data, as well as to adapt Swiss data protection legislation to the revised Convention 108 for the Protection of Individuals with Regard to the Processing of Personal Data of the European Council and Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016. On 15 September 2017, the Swiss Federal Council approved the proposal concerning the complete revision of the DPA. In September 2018, the Swiss parliament took the decision to, in a first step, adapt certain data protection rules in criminal law to the EU Directive 2016/680, which is part of the Schengen acquis, whereas the complete revision of the DPA will be addressed on a separate basis, in a second step. The Swiss parliament intends to conclude the parliamentary debate on the complete revision by the end of the year 2019.

In addition, after the completion of the consultation of the partial revision of the Federal Act on the Swiss Federal Tribunal in February 2016, the Swiss Federal Council mandated the Swiss Federal Department of Justice and Police in September 2017 to formulate the proposal concerning such partial revision. In summary, the partial revision aims to strengthen the Swiss Federal Tribunal by expanding the possibility of admissible appeals to the Swiss Federal Tribunal in connection with disputes that relate to a legal issue of fundamental importance,
while at the same time unburden the Swiss Federal Tribunal of less important cases. At its meeting in June 2018, the Swiss Federal Council adopted an official message on the partial revision of the Federal Act on the Swiss Federal Tribunal and submitted the final legislative proposal to the Swiss parliament for approval.

Other than that, no major procedural changes in the field of state court litigation or arbitration are expected in Switzerland in the next few years. Benefiting from a long-standing, liberal free-market tradition, Swiss law continues to remain highly attractive as governing law for both Swiss-related and purely foreign business transactions. Because of the strong international nexus of Swiss law, Switzerland will continue to be a thriving jurisdiction and a central place for international arbitration on a worldwide scale.
Chapter 33

TAIWAN

Simon Hsiao

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

i Sources of law

Taiwan is a civil law country. The legal system is hierarchical. The Constitution provides the basic rules of fundamental rights and duties, government organisation (including President, executive yuan, legislative yuan, judicial yuan, examination yuan and control yuan), powers between the central and local governments, system of local government, procedure to amend the Constitution and fundamental national policies.

The civil law system is characterised by codified legal provisions. Although in theory court precedents are not binding, they play a predominant role over the court’s judgments.

The procedures of litigation are governed by the Code of Civil Procedure (CCP) while the procedures of arbitration are governed by the Arbitration Law. The procedures of mediation are provided in the CCP and other laws, depending on the nature of the dispute.

ii Litigation

Taiwan is a country with 21 prefectures and one judicial system, which has three tiers. The Taiwanese judicial system comprises five types of courts: the Supreme Court, one High Court with five branches, 22 district courts, one Juvenile and Family Court, and one Intellectual Property Court.

The Supreme Court is the highest appellate court in Taiwan. All the judgments rendered by the High Court, except for claims worth less than NT$1.5 million, can be appealed to the Supreme Court. Nevertheless, the Supreme Court decides only the issue of law, and does not examine the issue of facts.

The High Court has jurisdiction over appeals from district courts as well as the Juvenile and Family Court. The High Court decides both legal and factual issues.

The district courts are generally the courts of first instance, except for cases within the exclusive jurisdiction of other courts as stated below. They also perform as appellate courts for rulings and decisions under summary proceeding (for cases where the claim is worth less than NT$500,000 or other types of case specifically provided by the CCP)2 and small-claim proceedings (for cases where the claim is worth less than NT$100,000).3

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1 Simon Hsiao is a partner at Wu & Partners, Attorneys-at-Law.
2 Article 427 of the CCP.
3 Article 436-8 of the CCP.
The Juvenile and Family Court acts as the court of first instance for cases involving juvenile delinquency and family affairs. This court is located in Kaohsiung, southern Taiwan. Cases of juvenile delinquency and family affairs not within the area of Kaohsiung shall fall under the jurisdiction of a regular district court.

The Intellectual Property Court is a special court that, as the court of first instance and second instance, presides over disputes concerning IP infringement and, as the court of second instance, presides over criminal cases of IP infringement. This court also performs as the first instance of administrative actions related to disputes concerning IP validity.

Unlike common law countries, there are no jury trials and lay judges in the civil litigation cases.

iii Alternative dispute resolution

Arbitration and mediation are commonly used in Taiwan. The Arbitration Law provides the procedures of arbitration. There are some arbitration institutions established under the laws, among which the ‘Chinese Arbitration Association, Taipei’ is the most used.

The CCP provides for mediation procedures held by the court. The Township and County-Administered City Mediation Act provides for other mediation procedures held by the city hall of each town and county. In addition to the foregoing mediation schemes, there are other laws outlining mediation procedures for specific disputes.

II THE YEAR IN REVIEW

Ways of making the court notice known to the public

The CCP provides that, for the purpose of informing the persons with common interests to initiate class actions, posting the constructive notice and effectuating the public summons, a court notice for such purpose shall be posted on the court’s bulletin board and published in official gazettes or newspapers. On 13 June 2018, the CCP was amended to let such court notice, in addition to the above posting methods, be posted on the court’s website.

III COURT PROCEDURE

i Overview of court procedure

The main law governing civil court procedure is the CCP. In terms of types of action, it governs the proceedings for both general commercial disputes and disputes regarding ‘personal affairs’ (i.e., marriage, parent–child relationship, interdiction and declaration of death). In terms of types of procedure, in addition to the general court proceedings, it also provides the basic requirements and rules for provisional remedies and judgment enforcement, and the details of execution are provided in the Law of Compulsory Enforcement.

Other supplemental regulations (e.g., the Enforcement Rules of the Code of Civil Procedure, the Notes for Civil Procedure, and the Guidelines for Handling Civil Actions) are applicable to civil court procedure.

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4 Articles 44-2, 151, 152, 542, 543 and 562 of the CCP.
**Procedures and time frames**

There are three types of proceedings provided for in the CCP: ordinary proceedings, summary proceedings and small-claim proceedings. All of the proceedings are commenced by the filing of a complaint with the competent district court. Electronic filing is acceptable.

**Ordinary proceedings**

Upon receiving the complaint, the presiding judge may either send (1) a copy of the complaint to the defendant and a summons indicating the date of the first hearing to the plaintiff and defendant respectively or (2) a copy of the complaint to the defendant along with a letter instructing the defendant to file a reply within a specified period. If the latter procedure is adopted, the judge, upon receiving the defendant’s reply, will either designate the date of the first hearing or instruct the plaintiff to respond to such reply. In the latter case, the judge will not designate the date of the first hearing until he or she is satisfied with both parties’ arguments and defences.

Following the first hearing, there might be several preparatory hearings depending on the intricacy of the case. The purpose of the preparatory hearing is for the judge to hear both parties’ arguments and defences, collect evidence, harmonise and simplify issues and examine witnesses. During the preparatory proceedings, both parties may occasionally submit to the court their briefs, stating and providing the facts, arguments, contentions and supporting evidence. When all the preparatory work is done, the judge will set a date for an oral hearing. Although in theory the oral hearing is for the judge to hear the parties’ oral argument, usually it goes quickly because the parties have substantively debated on all issues in each preparatory hearing. Should the parties have no further evidence to submit and the judge feel comfortable with the collection of the facts, evidence and issues, the judge will set a date for announcing his or her judgment. Normally, the announcement date is three weeks after the oral hearing.

The losing party may file an appeal with the High Court. If the district court renders a judgment partially favourable to the plaintiff, both parties may appeal against the unfavourable part respectively. The proceedings in the High Court are similar to those in the district court. When rendering a judgment, the High Court may either sustain the district court’s judgment (i.e., dismissing the appeal) or revoke the district court’s judgment and render its own judgment.

Except for cases where the amount in dispute is less than NT$1.5 million, the losing party in the High Court proceedings may file an appeal with the Supreme Court. The Supreme Court does not look into the facts of the case but only reviews the legality of the High Court’s judgment (i.e., whether the High Court’s judgment is in contravention of the laws and regulations). Both parties may occasionally submit briefs to the Supreme Court. In practice, the Supreme Court only reviews the parties' briefs without holding any hearing. However, recently the Supreme Court is inclined to hold oral hearings.

The Supreme Court may either sustain the High Court’s judgment (i.e., dismiss the appeal) or revoke the High Court’s judgment and remand the case to the High Court. Receiving the remanded files, the High Court reopens proceedings.

5 Article 467 of the CCP
Summary proceedings
Some types of cases specified by the CCP (e.g., a labour dispute arising from an employment contract with an employment term of less than one year; a dispute over fixing of the boundaries or the demarcation of a real property; a dispute arising from claims in a negotiable instrument) are subject to the summary proceedings. Summary proceedings are almost the same as ordinary proceedings but with simplified procedures and documentation and the appeal against the district court’s judgment must be filed with the same district court. The appeal against the judgment of the second instance to the Supreme Court is more restrictive than that in ordinary proceedings.

Small-claim proceedings
Where the action is for the payment of money, other replaceable objects or securities, and the price or claim value is not more than NT$100,000, such action is subject to the small-claim proceedings. Compared with ordinary proceedings and summary proceedings, small-claim proceedings are much more simplified. The appeal against the district court’s judgment must be filed with the same district court and the grounds for appeal are limited to the issue of the contravention of the laws and regulations by the district court’s judgment. The judgment of the second instance is not appealable.

Interim measures
The CCP provides three categories of interim measures: provisional attachment (PA), provisional injunction (PI) and injunction maintaining a temporary status quo (TI).

The purpose of PA is to secure the enforcement of a judgment on monetary claims (e.g., claim for a sum of money) or on claims exchangeable for monetary claims (e.g., claim for delivery of a car, which can be changed to a claim for a sum of damages if delivery is unavailable). In other words, PA is to seize the defendant’s assets provisionally so that the plaintiff’s claims for money as later upheld by a final judgment may be satisfied through the auction of the seized assets.

The purpose of PI is to secure the enforcement of a judgment on non-monetary claims (e.g., claim for delivery of goods or claim for actions to be taken). In other words, PI is to ensure the plaintiff’s non-monetary claims remain intact so that such claims as later upheld by a final judgment may be satisfied through the enforcement of the judgment.

Where there is a legal relation in dispute and where it is necessary to prevent material harm or imminent danger, an application for TI may be made. Obtaining a TI, the plaintiff’s rights can be temporarily realised and the defendant shall temporarily perform its obligations.

Time frame
No law governs the time limit for the court to complete a case of litigation, interim measures or appeal. In practice, it takes six to 12 months for the district court to render a judgment, six to 12 months for the High Court and one to two years for the Supreme Court. However, the duration for completion varies, depending on the complexity of a case, and in some cases may take longer.

As for the interim measures, the normal time frame of obtaining the interim measures is three weeks for PA and two months for PI and TI.

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6 Article 427 of the CCP.
iii Class actions

No typical class action is provided in the CCP but it outlines similar actions. Multiple parties, who have common interests, may appoint one or more persons from among themselves to sue or to be sued on behalf of all of the parties. Multiple parties who have common interests and are members of the same incorporated charitable association may appoint the association to sue on behalf of them. An incorporated charitable association or a foundation may initiate, subject to some requirements, an action for injunctive relief prohibiting specific acts of a person who has infringed the interests of multiple persons.

In addition to the CCP, other laws provide class actions. Under the Securities Investor and Futures Trader Protection Act, the Consumer Protection Act (CPA) and the Personal Information Protection Act (PIPA), a protection institution may, empowered by 20 or more investors, consumers and individuals who are damaged owing to a single cause, initiate arbitration or an action on their behalf.

iv Representation in proceedings

In all levels of courts, natural persons and legal entities may represent themselves in the proceedings. If the litigant is a legal entity, its legal representative is entitled to represent the entity without further authorisation from the entity. Besides this, unincorporated associations can be a party to the litigation so long as they have a representative or an administrator.

Unless prohibited by the presiding judge, any person who is not a licensed lawyer may act as an advocate. However, in the following two proceedings, a licensed lawyer is required to be the advocate:

a under the CCP, only a licensed lawyer can file the appeal with the Supreme Court on behalf of the appellant; and

b under the CPA and PIPA, class actions must be filed by a licensed lawyer.

v Service out of the jurisdiction

Article 145 of the CCP provides that (1) where service is to be made in a foreign country, it shall be effectuated by the competent authorities of such country by letters rogatory or the relevant Taiwan ambassador, minister envoy or consul, or other authorised institutes or organisations in that country, and (2) if such service is not available, the service may also be effectuated by registered and receipt-requested mail through the post office. If the place where service shall be made is unknown or the service to be effectuated in accordance with the above Article 145 is likely to prove futile, according to Article 149 of the CCP the court may, on motion, permit service to be effectuated by ‘constructive notice’.

The above rules of service are applicable to both a natural person and a legal entity. However, there are alternatives for service on a legal entity outside the jurisdiction. If the manager of a legal entity is in Taiwan and if the action is related to the legal entity’s business,
service may be effectuated upon the manager.\textsuperscript{11} If a foreign legal entity has set up an office or a place of business in Taiwan, service may be effectuated upon its representative or administrator who is in Taiwan.\textsuperscript{12}

All of the above rules of service are applicable to both the documents initiating proceedings and the subsequent documents.

\textbf{vi  Enforcement of foreign judgments}

Pursuant to Article 4-1 of the Law of Compulsory Enforcement, a party wishing to enforce a foreign judgment must first file a motion for recognition with the court. Article 402 of the CCP provides that a foreign judgment shall be recognised in Taiwan except in any of the following situations:

\begin{enumerate}
  \item where the foreign court lacks jurisdiction pursuant to Taiwanese laws;
  \item where a default judgment is rendered against the losing defendant who failed to respond to the suit, except in the case 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 laws;
  \item where the performance ordered by the judgment or its litigation procedure is contrary to Taiwanese public policy or morals; and
  \item where there exists no mutual recognition between the foreign country and Taiwan.
\end{enumerate}

For the last requirement, ‘mutual recognition’, Taiwanese courts take a lenient attitude towards it. In practice, as long as the foreign courts do not explicitly decline to recognise the judgments of Taiwanese courts, the Taiwanese courts would recognise the judgments of such foreign courts. Precedents reveal that the Taiwanese courts have recognised the judgments of the courts in Australia, China, Hong Kong, Japan, Korea, Singapore, South Africa, the United Kingdom, the United States and Vietnam.

\textbf{vii  Assistance to foreign courts}

The Law in Supporting Foreign Courts on Consigned Cases (the Supporting Law) governs judicial assistance. Under the Supporting Law, the Taiwanese courts can provide service of documents and examination of evidence to the foreign courts.

A request for service to individuals and entities in Taiwan through Taiwanese courts shall conform to the following requirements:

\begin{enumerate}
  \item the country of the requesting foreign court shall declare reciprocal support to Taiwan in a similar case; and
  \item the letter rogatory issued by the foreign court shall expressly indicate the name, nationality, domicile, address or office of the party to be served.
\end{enumerate}

Service by Taiwanese courts will be effectuated in accordance with the CCP and the Code of Criminal Procedure, respectively.

For judicial assistance in the examination of evidence for civil or criminal proceedings, the above foreign country’s declaration and letter rogatory are needed as well. The letter

\textsuperscript{11} Article 131 of the CCP.
\textsuperscript{12} Article 128 of the CCP.
rogatory shall indicate the names of the involved parties, methods and categories of evidence, the name, nationality, domicile, address or office of the parties to be investigated, and the subjects of investigation.

The service and investigation costs shall be duly handled according to the relevant regulations of Taiwan in civil cases, and shall be counted at actual spending and reimbursed by the country of the requesting foreign court in criminal cases.

viii Access to court files

According to Article 242 of the CCP, only a party to the suit may apply to the court for inspection, copying or photographing of the documents filed in the court's dossier with expenses advanced. A third party, however, may have access to the court's dossier provided that he or she obtains the consent of the parties to the suit or provides a preliminary showing of his or her legal interests and the court grants his or her application for such access.

Article 242 of the CCP also protects privacy and trade secrets: where the documents in the dossier involve the privacy or business secret of the party or a third person and a grant of the application for access to the dossier is likely to result in material harm to the person, the court may deny the application or restrict access.

Although, with very few exceptions, court hearings are open to the public, the progress of court proceedings is not available in the public domain. And, as stated above, the third party has very limited opportunity to have access to the court's dossier. As a result, any third party would have no information about the progress of court proceedings until the judgment is announced. All judgments, apart from a very limited number of cases that are exempted for some reason, will be published on the court's bulletin board and official website.

ix Litigation funding

Basically, the parties bear the litigation costs. The party who initiates an action or relevant proceedings shall first advance the fees as provided under the laws. However, ‘legal aid’ through the court and a foundation is possible.

Legal aid through the court

Articles 107–115 of the CCP provide for legal aid through the court, which denotes temporary exemption from paying the court costs or any other litigation expenses, providing security bonds and paying attorneys’ fees. If a party lacks the financial means to pay the litigation expenses, the court may, on motion, grant legal aid on the condition that there is no manifest likelihood that the party will fail in the action. Legal aid will be granted to a foreign national on the condition that a Taiwanese national may receive the same aid in the foreign national’s country in accordance with a treaty, agreement, or the laws or customs of that country.

Legal aid through a foundation

The Legal Aid Act provides legal aid to people who are indigent or are unable to receive proper legal protection. For such purpose, a foundation called the Legal Aid Foundation (the Foundation) was established.

People who are indigent may apply to the Foundation for legal aid. The Legal Aid Act provides the definition of ‘indigent people’. Where the application for legal aid is granted, the Foundation may assign a licensed lawyer (the aiding lawyer), paid by the Foundation,
to act as a representative, advocate or assistant for the litigation, arbitration, mediation and settlements. The legal aid provided by the Foundation is applicable to foreigners under some conditions.

Where the Foundation has granted legal aid to a person and where the court costs are needed in the court proceedings, the aiding lawyer shall apply for legal aid with the court on behalf of such person and the court shall not dismiss such application unless there is manifestly no prospect of the party prevailing in the action. If the Foundation considers the legal aid recipient's case will probably prevail, and it is necessary to apply to the court for interim measures, the Foundation may submit a letter of guarantee to substitute for the security bonds to be deposited with the court.

IV  LEGAL PRACTICE

i  Conflicts of interest and Chinese walls

Conflicts of interest

The Attorney Regulation Act governs the attorneys’ goals of promoting social justice, protecting human rights and contributing to democratic government and the rule of law. It also provides guidelines for conflicts of interest in that an attorney is prohibited from accepting representation in the following situations:

a instances where a matter had been previously handled by the attorney while he or she was acting as a judge, prosecutor, judicial officer or judicial police; and

b a case that had once been handled by the attorney in the capacity of arbitrator in arbitration proceedings.

As a matter of fact, the issue of conflicts of interest is more a self-governing matter, dealt with by the Bar association. As a result, the Code of Ethics for Lawyers passed by the Taiwan Bar Association provides further restrictions on attorneys’ representation. Article 30 of the Code provides that a lawyer may not accept the following matters:

a a matter that has a conflict of interest or a substantial connection with another matter on which he or she has provided consultation in accordance with a trust relationship or a general legal counsel relationship;

b a matter that has a conflict of interest or a substantial connection with another matter that he or she has accepted. This also applies in the case of a matter that has already been concluded by the lawyer and the former client;

c other matters in which the parties are adversaries of the client in a current matter that he or she has accepted;

d other matters that are commissioned by an adversary in a current matter that he or she has accepted;

e where he or she has previously served as a government officer or an arbitrator, he or she may not accept the same matter or a matter having a substantial connection with a matter that he or she had handled by virtue of his or her office;

f a matter that is related to his or her property, business or personal interests, and is likely to have an effect on his or her independent professional judgment;

g the same matter or a matter having a substantial connection with a matter in which the adversary's appointed lawyer is his or her spouse or a blood relative within the second degree or a relative by marriage;
a matter that is commissioned by several clients having a conflict of interest among themselves;

other matters that are in conflict with his or her current, existing obligations to other clients, former clients or third persons;

a litigious matter where he or she concurrently accepts appointment from both parties or from several persons who are a party in the matter but who have a conflict of interest among themselves; or

a matter in which he or she has served as a witness and now he or she wants to act as an agent or pleader.

**Chinese walls**

The Attorney Regulation Act provides a simple rule regarding Chinese walls: an attorney is prohibited from accepting representation where he or she or another attorney in his or her firm has previously accepted employment from a party which is a respondent party to his or her or their potential client, or else he or she or they had given counsel to or otherwise rendered assistance to said respondent party.

Again, Article 32 of the Code of Ethics for Lawyers provides further restrictions: where an attorney is subject to a conflict of interest restriction in accordance with Article 30, other attorneys who are in the same law firm as him or her shall also be subject to the same restriction.

**Money laundering, proceeds of crime and funds related to terrorism**

Money laundering is governed by the Money Laundering Control Act (MLCA). In addition to the financial institutions such as banks, trusts and investment corporations, insurance companies, securities brokers, futures brokers, etc., which are required by the MLCA to submit the financial transaction, the customer’s identity and the transaction records to the Investigation Bureau, the newly amended MLCA also requires attorneys to do so. However, Article 33(2) of the Code of Ethics for Lawyers provides that a lawyer shall strictly keep confidential the matter he or she has accepted to handle for his or her client, except where there is a need to prevent or mitigate serious damage that may be caused to the property of another person by the client’s criminal intent, plan or criminal act. Given the above, should a matter be related to money laundering or terrorism, the attorney shall be under no obligation to keep it confidential.

**Data protection**

The PIPA has comprehensive protection of personal data. Generally, the collection, processing and use of personal data are prohibited unless otherwise permitted by this Act. As the attorney can be the ‘non-government agency’ collecting, processing and using personal data as set forth in this Act, the attorney, when dealing with personal data, is subject to this Act. No specific laws govern the collection, processing and use of personal data for the purpose of court proceedings.
V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

Attorney–client privilege is protected under Taiwanese laws. Article 33 of the Code of Ethics for Lawyers provides that an attorney shall strictly keep confidential the contents of an accepted matter and may not, with very limited exceptions, disclose the same to any third party without having obtained the client's consent. However, Article 307 of the CCP provides that a witness may refuse to testify if (1) the witness is to be examined with regard to a matter which he or she is obliged to keep confidential in the course of performing his or her official duties or conducting business, or (2) the witness cannot testify without divulging his or her technical or professional secrets. Article 348 of the CCP provides that the foregoing Article 307 is applicable to a third party’s duty to produce documents. Together with the above provisions of the CCP and the Code of Ethics for Lawyers, an attorney is obligated to keep his or her client's cases confidential and may refuse to provide testimony and produce documents in connection with such cases.

The above attorney–client privilege is applicable to a foreign lawyer.

No rules regarding the attorney–client privilege are provided to an in-house lawyer. And, so far, there has been no precedent in this regard. However, the majority are of the opinion that attorney–client privilege is applicable to an in-house lawyer as well.

ii Production of documents

Documents required to be produced

In addition to a document voluntarily produced by one party, other documents held by such party may be required to be produced. Any party may move the court to order the opposing party to produce a document held by such opposing party. The motion shall specify, among others, the reason why the opposing party has a duty to produce such document. Where the court considers that the disputed fact is material and that the motion is just, it shall order the opposing party to produce such document.13

Norwithstanding the foregoing, a party has the duty to produce the following:14

- documents to which such party has made reference in the course of the litigation proceedings;
- documents which the opposing party may require the delivery or inspection thereof pursuant to the applicable laws;
- documents that are created in the interests of the opposing party;
- commercial accounting books; and
- documents that are created regarding matters relating to the action.

All of the above rules apply to all documents whether they are stored in Taiwan or overseas.

Documents held by a third party

Where a document identified to be introduced as documentary evidence is in a third party’s possession, a party may move the court to order such third party to produce the document. The motion shall also specify, among others, the reason why the third party has a duty to

13 Articles 342 and 343 of the CCP.
14 Article 344 of the CCP.
produce such document. Where the court considers that the disputed fact is material and that the motion is just, it may order the third party to produce the document.\textsuperscript{15} With limited exceptions,\textsuperscript{16} the third party has the duty to produce the document as ordered by the court.

The above rules apply to the third party who is holding the document at issue under the control of a party, who is the subsidiary or parent company of a party, or who is an adviser of a party.

\textit{Documents stored electronically}

The position of documents stored electronically is not governed by the CCP. Depending on the type of such electronic evidence, the court takes a different attitude towards it. If it is an email, the court is inclined to accept it unless the opposing party objects to the email. If it is a tape, some courts may refuse to accept it. However, if the opposing party listens to the tape and feels comfortable with it, the court may accept it.

\textit{Failure to produce documents}

Where a party disobeys an order to produce documents without giving a justifiable reason, the court may, in its discretion, take as the truth the opposing party’s allegation with regard to such document or the fact to be proved by such document.\textsuperscript{17} If it is the third party who disobeys the court’s order to produce documents without giving a justifiable reason, the court may impose a fine not exceeding NT$30,000; where necessary, the court may also order compulsory measures to be taken.\textsuperscript{18}

\section*{VI ALTERNATIVES TO LITIGATION}

\textbf{i Overview of alternatives to litigation}

Alternative dispute resolution in Taiwan comes mainly in two forms: arbitration and mediation. Both, if successful, have the same effect as a court’s final and binding judgment.

\textbf{ii Arbitration}

The Arbitration Law governs arbitration. Only if the parties to a dispute come to an agreement on arbitration shall such dispute be submitted to arbitration.

Established under the Arbitration Law, there are five arbitration institutions: the Chinese Arbitration Association, Taipei; the Taiwan Construction Arbitration Association; the Labour Dispute Arbitration Association; the Chinese Construction Industry Arbitration Association; and the Chinese Real Estate Arbitration Association. The Chinese Arbitration Association, Taipei is the most used arbitration association.

Arbitration is becoming more and more common in Taiwan in particular in construction contracts.

Once an arbitral award is rendered, it becomes final, irrevocable and unappealable. However, in the event of limited procedural irregularities it can be set aside by the court.\textsuperscript{19}

\textsuperscript{15} Articles 346, 347 and 343 of the CCP.
\textsuperscript{16} Articles 306–310, 344I(2)–(5) and 344II of the CCP.
\textsuperscript{17} Articles 345 of the CCP.
\textsuperscript{18} Articles 349 of the CCP.
\textsuperscript{19} Article 40 of the Arbitration Law.
Furthermore, an award may be enforceable after an application for enforcement has been granted by the court. Again, only with very limited irregularities shall such an application be dismissed.\(^{20}\)

A foreign arbitral award is an arbitral award rendered outside Taiwan or rendered pursuant to foreign laws within Taiwan. A foreign arbitral award, after an application for recognition has been granted by the court, shall be enforceable.

The court shall dismiss the application for recognition of a foreign arbitral award if such award contains one of the following elements:\(^{21}\)

\(a\) where the recognition or enforcement of the arbitral award is contrary to the public order or good morals of Taiwan;

\(b\) where the dispute is not arbitrable under the laws of Taiwan; or

\(c\) where the country where the arbitral award is made or whose laws govern the arbitral award does not recognise the arbitral awards of Taiwan.

In addition, if a foreign arbitral award concerns any of the following circumstances, the respondent may request the court to dismiss the application for recognition within 20 days from the date of receipt of the notice of such application:\(^{22}\)

\(a\) the arbitration agreement is invalid as a result of the incapacity of a party according to the law chosen by the parties to govern the arbitration agreement;

\(b\) the arbitration agreement is null and void according to the law chosen to govern said agreement or, in the absence of choice of law, the law of the country where the arbitral award was made;

\(c\) a party is not given proper notice of the appointment of an arbitrator or of any other matter required in the arbitral proceedings, or any other situations that give rise to lack of due process;

\(d\) the arbitral award is not relevant to the subject matter of the dispute covered by the arbitral agreement or exceeds the scope of the arbitration agreement, unless the offending portion can be severed from and not affect the remainder of the arbitral award;

\(e\) the composition of the arbitral tribunal or the arbitration procedure contravenes the arbitration agreement or, in the absence of an arbitration agreement, the law of the place of the arbitration; or

\(f\) the arbitral award is not yet binding upon the parties or has been suspended or revoked by a competent court.

Taiwan is not a signatory to the New York Convention and therefore the Convention does not apply to arbitrations in Taiwan.

**iii Mediation**

Mediation is provided in the CCP to be held by the court and in other laws to be held by other institutions.

\(^{20}\) Articles 37 and 38 of the Arbitration Law.

\(^{21}\) Article 49 of the Arbitration Law.

\(^{22}\) Article 50 of the Arbitration Law.
Mediation in the court

Under the CCP, mediation may be compulsory or optional. Except in cases where the court shall dismiss the application for mediation forthwith, the following matters shall be subject to mediation by the court before the relevant action is initiated:

a) disputes arising from a relationship of adjacency between real property owners or superficiaries, or other persons using the real property;
b) disputes arising from the determination of boundaries or demarcation of real property;
c) disputes among co-owners of real property arising from the management, disposition or partition of a real property held in undivided condition;
d) disputes arising from the management of a building or of a common part thereof among the owners of the shared, divided title or persons using the building;
e) disputes arising from an increment or reduction or exemption of the rental of real property;
f) disputes arising from the determination of the term, scope and rental of a superficies;
g) disputes arising from a traffic accident or medical treatment;
h) disputes arising from an employment contract between an employer and an employee;
i) disputes arising from a partnership between the partners, or between the undisclosed partners and the nominal business operator;
j) disputes arising from proprietary rights between spouses, lineal relatives by blood, collateral relatives by blood within the fourth degree of relationship, collateral relatives by marriage within the third degree of relationship, or head of the house or members of the house; and
k) other disputes arising from proprietary rights where the price or value of the object in dispute is less than NT$500,000.

Nevertheless, in practice a regular lawsuit may be filed with the court although the matter at issue is one of the above compulsory mediation matters. Receiving the complaint, the court would conduct the mediation proceedings first. Should the mediation fail, the regular litigation proceedings will commence.

If the matter at issue is not subject to the compulsory mediation, any party may also apply for mediation before initiating the relevant action.

The court would seek mediation at any time irrespective of the phase of the proceedings and irrespective of compulsory or optional mediation.

The settlement in the mediation is at will. A successful mediation is reached upon the agreement of the parties. A successful mediation shall take the same effect as a settlement in litigation, meaning that a mediation transcript made based on the parties’ settlement agreement may be enforceable. When an action has been filed and the mediation succeeds during the litigation proceedings, the plaintiff may move for the return of two-thirds of the court costs already paid when the action was filed.

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23. Article 406 of the CCP.
24. Article 403 of the CCP.
Mediation outside the court

Some other laws provide for mediation:

- the Family Act, for family matters;
- the Township and County-Administered City Mediation Act, for general civil disputes. This is the most commonly used mediation because townships and county-administered cities all over Taiwan establish their own mediation committees, which are convenient for people for settling disputes, and such mediation covers all civil cases and the type of criminal cases instituted only upon complaint;
- the Regulations for Consumer Dispute Mediation, for consumer disputes;
- the Act for Settlement of Labour Management Disputes and the Regulations for the Mediation of Labour Management Disputes, for labour disputes;
- the Regulations for Mediation on Disputes of Contract Performance of Government Procurement, for government procurement;
- the Regulations of Copyright Dispute Mediation, for copyright disputes;
- the 37.5% Arable Rent Reduction Act, for disputes involving farm land leasing; and
- the Public Nuisance Dispute Mediation Act, for public nuisance disputes.

iv Other forms of alternative dispute resolution

Besides arbitration and mediation, there are no other formal alternative dispute resolution procedures. The parties may resolve the dispute by voluntary agreement. Such settlement agreement is not enforceable unless a party files a regular lawsuit with the court and obtains a final and irrevocable judgment based on such settlement agreement. However, if the parties have reached a settlement agreement, the dispute would have been settled and the court would not look into the original dispute but plainly make a decision on the settlement agreement itself.

No expert determination is available in Taiwan.

VII OUTLOOK AND CONCLUSIONS

In order to adequately protect the rights and interests of the parties, save judicial resources and facilitate the proceedings of the litigation, the Judicial Yuan has proposed a draft amendment to the CCP to provide the mandatory legal representation for more types of actions and add penalties for the vexatious litigations. The forgoing amendment is expected to be completed in 2019.
I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

Turkey is a unitary republic with a single nationwide legal system. It is a civil law country, as this term is generally understood in Continental Europe. Codified law, as the main source of law, adheres to a hierarchical system. The Constitution is naturally at the very top, with which no law can be at odds. International treaties that are duly ratified and put into effect carry the force of law, pursuant to Article 90 of the Turkish Constitution. Moreover, such international treaties are immune to a constitutionality review by the Constitutional Court. International treaties in the field of fundamental rights and freedoms enjoy even higher degrees of deference as Article 90 stipulates that provisions of human rights treaties shall prevail over any conflicting domestic laws. Statutes (i.e., laws) enacted by the National Assembly and decree-laws passed by the President come next in the ranking. These are followed by regulations, by-laws and communiqués passed by various public authorities.

From a historical perspective, enactment of major statutes was largely an exercise of translating some of the leading European laws of the era, with necessary adaptations in view of the society’s traditions and customs. Specifically, present day Turkish law finds its roots in the Swiss civil, German commercial and Italian criminal codes. These European systems continue to influence Turkish law despite enormous legal reforms that have taken place in Turkey, especially in the past decade.

Though an overwhelming majority of disputes that cannot be resolved through amicable negotiations are adjudicated in the courts, mediation continues to gain prominence in Turkish law. Almost six years after the enactment of the Code on Mediation, the Law on Labour Courts has made it mandatory for parties to conduct mediation proceedings before applying to a court for certain types of lawsuits, such as employment receivable claims and reinstatement cases. Similarly, Law No. 7155 on the Procedures to Initiate Debt Collection Proceedings for Receivables Arising out of Subscription Agreements, which was enacted in December 2018, will make it mandatory to apply to mediation before filing commercial lawsuits for receivable or compensation claims from 1 January 2019 onwards. An exception to the mandatory mediation requirement is that parties who choose to settle their disputes via arbitration do not have to undergo the mandatory mediation process.

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The Turkish court system is structured horizontally by subject matter jurisdiction into two sets of general divisions and one set of specialised divisions:

a. the civil and criminal judiciary;
b. the administrative judiciary; and
c. other specialised high courts, which include:
   • the Constitutional Court;
   • the Court of Jurisdictional Disputes;
   • the Court of Accounts; and
   • the Supreme Electoral Council.

Under the horizontal structure, the civil and criminal judiciary and the administrative judiciary are also structured vertically into three tiers, which include from lowest to highest: courts of first instance, regional courts, and high courts known as the Court of Cassation and the Council of State, depending on the subject matter. However, the specialised high courts are stand-alone courts, empowered only to hear cases on specific matters, and they contain no vertical structure.

The civil and criminal judiciary is organised into three vertical tiers. These vertical tiers are the civil and criminal courts of first instance, the civil and criminal regional courts, and the Court of Cassation. Under the three-tier court structure, the type and the amount of the subject matter of a lawsuit or criminal complaint determines whether judgments rendered by the civil and criminal courts of first instance are appealable, and if so, which court will be the final body of appeal.

All civil law disputes are heard by civil courts, guided by the Civil Procedure Code. For civil disputes, the Turkish courts of first instance are organised according to subject matter jurisdiction. In this respect, there are the general courts of first instance and specialised courts. The Civil Court of First Instance and the Civil Court of Peace hear all civil law disputes that do not fall into the subject matter jurisdiction of specialised courts. The specialised courts of first instance, however, have their own founding legislation based on unique subject matter, such as the commercial courts, consumer courts and labour courts.

In a similar vertical structure, all criminal disputes are heard by criminal courts and guided by the Code of Criminal Procedure. In criminal disputes, the courts of first instance are also organised according to subject matter jurisdiction. In this respect, the criminal court of first instance is the general court for criminal cases and the High Criminal Court hears cases related to crimes carrying sentences and sanctions in excess of certain benchmarks regulated under the law. Furthermore, the Criminal Peace Judicature, which is responsible for making judicial decisions during ongoing investigations, undertakes the necessary steps to implement such decisions and evaluate objections to such decisions. In addition, there are specialised criminal courts of first instance, such as the Juvenile Court, the Juvenile High Criminal Court, the Criminal Court for Intellectual and Industrial Property Rights, and the Criminal Execution Court.

Organised by region, civil and criminal regional courts function as courts of second instance. They contain both civil and criminal chambers, and have only been operational since 20 July 2016, following a period of 12 years in which they existed on paper but not in reality.

Civil and criminal regional courts expedite adjudication by functioning as appeals courts that also offer truly de novo review. They not only have the authority to reverse decisions of the civil and criminal courts of first instance and resolve cases by rendering partial or full
and final decisions on matters of law, but also to examine new evidence or re-examine old evidence at their discretion in order to rule on matters of fact. For this purpose, they are empowered to conduct hearings, appoint expert witnesses for examination of evidence and hear direct witness testimony when necessary. Their authority to hear cases on questions of both fact and law allows them to act as a buffer between the civil and criminal courts of first instance as the first trier of fact, and the Court of Cassation, hearing appeals on matters of law only.

The highest court in the civil and criminal system is the Court of Cassation, which serves as the final appellate body and is further divided into two sets of chambers, plus an assembly for harmonising conflicting decisions. The Court of Cassation has the authority for legal review only, meaning that it does not hear evidence and does not perform factual re-examination. However, the Court of Cassation had previously discharged both appellate and cassation functions until the civil and criminal regional courts became operational. The Court of Cassation has been operating exclusively as a body for legal review since 20 July 2016, as provided by law. Strictly speaking, decisions rendered by the chambers of the Court of Cassation do not create binding precedents for each other, the courts of first instance or the regional courts. However, decisions rendered by the Plenary Assembly of the Court of Cassation are binding on all chambers of the Court of Cassation, as well as all lower courts.

Similar to the civil and criminal judiciary, the administrative judiciary is also organised into three vertical tiers, which are the administrative courts of first instance, the administrative regional courts and the Council of State.

All disputes arising out of administrative actions, as well as acts between public authorities, and between a private party and a public authority acting with public power are heard by administrative courts of first instance, under the Code of Administrative Procedure. As with the civil and criminal regional courts, administrative regional courts also hear cases on questions of fact and law and are empowered to conduct de novo judicial review under certain circumstances. They can also render three types of decisions: upholding the judgment of the administrative court of first instance, remanding the case to the administrative court of first instance for further examination or hearing the case anew as if it were itself a court of first instance. The Council of State operates as the final body of appeal in the administrative court system. In its role as an appellate body, the Council of State primarily conducts re-examination on issues of law, similar to the Court of Cassation. However, with regard to administrative disputes subject to emergency procedures, the Council of State can also re-examine facts and grant final decisions without remanding the disputes to the administrative courts of first instance or the regional administrative courts. In addition, as the Plenary Assembly of the Court of Cassation does, the Plenary Session of the Council of State harmonises opinions of its chambers and issues decisions that are binding on all chambers and lower courts of the administrative system.

There are other specialised courts such as the Constitutional Court, the Court of Jurisdictional Disputes and the Supreme Electoral Council. On 23 September 2012, the Constitutional Court became, for the first time in its modern history, a further level above the Court of Cassation and the Council of State available to the parties through the ‘right of individual application’. This new level is considered separately in Section III.
II THE YEAR IN REVIEW

This year, Turkey amended multiple codes to improve the investment climate. Perhaps most significant among these developments was the passage of the Law Amending the Enforcement and Bankruptcy Law and Certain Other Laws No. 7101, which was published in Official Gazette No. 30361 on 15 March 2018. It abolished the device of the deferral of bankruptcy, which had not been providing the benefits expected of it. In addition, amendments were made to the provisions on composition with creditors to make this process more functional.

Following the effective date of these amendments, there has been a significant increase in requests for composition with creditors by companies unable to pay their debts. Composition with creditors is now a popular option for financially troubled debtors as it allows them to sustain their business activity while spreading their repayments to lenders over longer terms.

In that the past year, Turkey has also prohibited prices in certain agreements from being denominated in foreign currency, with Presidential Decree No. 85 amending Decree No. 32 on the Protection of the Value of Turkish Currency (the Decree), which went into effect on 13 September 2018. The Decree prohibited the agreement price and any other payment obligation arising from sale and purchase agreements and lease agreements for movable and immovable assets executed by and between persons residing in Turkey from being denominated in or indexed to foreign currency, with certain limited exceptions. Details regarding how the Decree would be enforced, and certain exemptions from the rule established in the Decree, were clarified in the Communiqué Amending the Communiqué Regarding Decree No. 32 on the Protection of the Value of Turkish Currency (the Communiqué), which was published in the Official Gazette on 6 October 2018. A subsequent amending communiqué was issued on 16 November 2018 to provide further clarity on the subject, and ended up eliminating most of the restrictions. The Ministry of Treasury and Finance also published a question and answer chart on its website regarding the most common issues involved in the enforcement of the Communiqué, in order to clarify how this new regime will be imposed.²

Other than these amendments, the conditions for application to Turkish citizenship by way of real estate ownership were recently softened by a number of amendments to the Regulation on the Implementation of Law of Turkish Citizenship, which were published on 19 September 2018. These amendments lowered the threshold purchase price for eligibility from US$1 million to US$250,000. The threshold required to acquire Turkish citizenship by way of investment was also reduced. As for acquiring Turkish citizenship by creating employment opportunities, the minimum number of employees that need to be employed was lowered from 100 to 50. With a new amendment to the same regulation, which was published on 7 December 2018, it will now be possible to apply for Turkish citizenship on the basis of a mere promise to sell agreement, rather than having acquired ownership of the real estate in question, so long as at least US$250,000 or its equivalent is paid in advance, and the agreement is recorded at the land registry with the undertaking not to assign or deregister it for a period of three years.

In the past year, Turkey has also amended multiple codes for the facilitation of investment. The Code Amending Certain Codes for the Purpose of Ameliorating the Investment Environment No. 7099 was published on 10 March 2018. All of its provisions

² This section was based, with the necessary modifications and updates, on publications of Hergüner Bilgen Özeke Attorney Partnership.
entered into force as of 10 September 2018 at the latest. This new legislation has amended provisions of several codes, most notably certain provisions of Turkish Commercial Code No. 6102 (TCC) and Code on Pledges over Movables by Commercial Operations No. 6750 (the Movable Pledge Code). According to these amendments, privately held companies will no longer be required to have a corporate representative present at their general assembly meetings. Also, when founding new limited liability companies, incorporators will no longer be required to pay 25 per cent of the share capital prior to registration with the local trade registry. Finally, company incorporation will be simplified by removing some formalities.

In the same vein, amendments to the Movable Pledge Code have softened the procedure for deregistering pledges. The term granted to pledgees to deregister movable pledges once the secured receivables have ceased to exist has been increased from three business days to 15 business days for Turkish pledgees and to 30 business days for foreign pledgees. The administrative fine for non-compliance remains the same, but the relevant registries will only consider cases of non-compliance if a complaint is filed against a pledgee by a pledger or a borrower. There have also been changes in the law that were aimed to facilitate small and medium-sized enterprises’ access to financing opportunities.

The past year has also witnessed the simplification of title deed transactions. Land Registry Code No. 2644 has been amended to permit registration of mortgage transactions involving real estate that has been supplied as collateral in credit arrangements, without the need to execute official mortgage deeds. This amendment not only impacts banks but clearly applies to all credit institutions.3

Code on the Organization and Functions of the General Directorate of Land Registry and Cadastre No. 6083 was amended to allow registration, cancellation and annotation to be made electronically upon the request of the related judicial authority or the competent institution and organisation.4

Condominium Code No. 634 was amended to permit registrable notarised condominium ownership and construction servitude agreements to be registered with the land registry upon consignment of contracts by a notary.5

Finally, in order to minimise temporary storage costs in international trade, Customs Code No. 4458 was amended as follows: a maximum price limit was set for shipment, warehousing, clearance and other expenses that can be collected by the customs authority, and a fine was introduced to sanction violations of this rule.6

Finally, there have been several procedural amendments to Civil Procedure Code (CPC) No. 6100 and to other laws that have collectively aimed to accelerate dispute resolution. These amendments will be explained below in related sections.

Overall, as these recent amendments have lowered the thresholds for acquiring Turkish citizenship and generally improved the investment climate, it can be expected that there will be more interactions and foreign investment demand in the near future.

3 id.
4 id.
5 id.
6 id.
III COURT PROCEDURE

i Overview of court procedure

Turkish court procedures used to look peculiar, cumbersome and frustratingly slow under the old litigation system established under the 1927 Civil Procedure Code. The new CPC, which entered into force on 1 October 2011, marked the beginning of a new era in Turkish litigation. The new procedure regime was intended to eradicate outdated and archaic methods of the old procedure, and the CPC introduced many fresh concepts and mechanisms. Among the many changes, drafters of the CPC addressed two of the most problematic aspects of civil litigation in Turkey: the length of proceedings and the partial outsourcing of judicial duties to court-appointed experts.

The CPC endeavours to turn civil litigation into a time-efficient, practical and simple process. For instance, plaintiffs are now required to pay, at the outset, not only court fees but an estimated ‘advance for costs’. In the past, they could avoid depositing even insignificant fees earmarked for official notifications, court-appointed experts or on-site fact-finding until specifically ordered to do so by the judge at a hearing, which, in turn, meant that a full hearing or two would simply be wasted.

Another issue was the parties’ reluctance to submit their full case together with documentary evidence. They would procrastinate, sometimes as a tactic but often owing simply to disorganisation, until the judge set a final deadline for submission of evidence. This of course would occur long after full rounds of written pleadings had been exchanged. Both parties would then make additional submissions – a practice that actually had no place in the legislation – once they had received the other’s exhibits. Parties would also delay submitting briefs until the next hearing, again costing valuable time. It is now mandatory to submit full claims, counterclaims and defences at the outset, together with all documentary evidence available. A trial will not be set in motion until the full sequence of written pleadings is complete.

Once all pleadings are exchanged, the judge will schedule a preliminary examination hearing. This procedural stage is new in Turkish litigation, and is most welcome. With a complete understanding of factual and legal questions at issue, courts will now address preliminary objections early on in the process. The nightmare scenario of a case being fully tried on its merits only to be ultimately dismissed for being time-barred should no longer happen. Also, judges are now specifically authorised to urge the parties to settle or resort to ADR mechanisms as early as during this preliminary examination stage.

A very significant change that the CPC of 2011 introduced is with regard to court-appointed legal experts. The CPC aims to put an end to an anomaly in Turkish civil litigation whereby courts would appoint legal experts who practically decided the fate of a dispute. Until the new CPC was enacted, review and analysis of the merits of a case were virtually subcontracted to third-party experts, including practising lawyers, as courts had little time or resources to do review and analysis themselves. Astonishingly, this review went beyond technical matters to factual and legal issues. Although the old Civil Procedure Code itself prohibited the use of legal experts, most judges were too overwhelmed with

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7 This section was based, with the necessary modifications and updates, on publications of Hergüner Bilgen Özeke Attorney Partnership; see ‘Civil Procedure Reform in Turkey: Gone Are the Archaic Practices, Now Embracing the All-New Code’, originally published in The American Lawyer, October 2011 issue.
their caseloads to observe that rule. These ‘legal experts’ would draft an analytical report, suggesting a fully reasoned outcome that judges would pass into judgment unless manifestly erroneous or unreasonable.

This practice withstood intense criticism as the Court of Cassation and the Justice Ministry turned a blind eye, acknowledging the sheer volume of cases before the understaffed judiciary.

Although the new CPC re-emphasises the prohibition of appointing legal experts, this prohibition is also supported by the provisions that entered into force under the Expert Law enacted in 2016.

In addition, the CPC limits the roster of experts to those enlisted with the Justice Ministry. Presumably, the Ministry will reserve the list for persons with technical or scientific expertise, thereby excluding lawyers. As trials are now structured so as to be finalised much faster, backlogs are expected to be reduced, giving judges more time to deal with legal issues themselves.

The CPC has introduced dozens of other changes. Though some of them are novel, most are in the form of clarification, refinement and fine-tuning, rather than major reforms. We have addressed only the most significant changes.

ii Procedures and time frames

Contrary to popular belief in Turkey, there used to be six, and not three, types of case management procedures in civil proceedings, although three to four of them were largely unused in practice. The new CPC simplifies these down to two: written procedure and simple procedure. Simple procedure relies on oral proceedings and is akin to Anglo-American summary proceedings where a fast-track resolution is sought; commercial lawsuits with values of less than 100,000 Turkish lira must follow the simple procedure in order to ensure timely resolution.

Written procedure is the more commonly used method in civil litigation. A case is initiated by the plaintiff filing a statement of claim with the relevant court. The clerk’s office then serves it to the defendant. Before the entry into force of the new CPC, various procedural deadlines were set as a given number of days. The new CPC discards the ‘day’ basis in favour of weeks, which is much easier to commit to memory. For instance, the defendant’s period to make defence submissions (and counterclaims, if any) used to be 10 days and is now two weeks. Then the claimant gets two weeks to reply and the defendant gets another two weeks to rejoinder. As discussed above, once all pleadings are exchanged, a preliminary examination hearing will be held to deal with preliminary issues such as jurisdiction, prescription periods, etc.

Until the new CPC, oral hearings were not exactly fruitful exercises. Most hearings would be spent with the judge flipping through the case file – with which he or she hardly found the time to familiarise himself or herself – to see if documentary evidence summoned from third parties had arrived, whether court-appointed experts had submitted their reports, etc. Counsel, in turn, had the luxury of showing up at hearings without much preparation, uttering perhaps a few words as they watched the judge wrap things up hastily and set a new hearing date a few months in the future. Counsel would have very limited time, if any at all, to examine factual witnesses. Cross-examination existed on paper, but was dispensed with in practice as courts had little patience in waiting for the truth to unfold slowly through witness testimony. In fact, hijacking counsel’s role, judges themselves would often question witnesses directly, unless counsel was overly assertive, at the cost of irritating the judge. The
new CPC specifically provides for fact and expert witness examination and cross-examination by counsel. Expert witness examination, in particular, is novel in Turkish procedure. In the past, expert witnesses did not have to appear in hearings for examination by counsel.

A set of amendments made to the CPC in 2018 will require expert witness opinions to be submitted to the court within a two-month period in a simple procedure, which courts may extend by two months, for a total that must not exceed four months. The shortening of the total period from six months to four months was made in an effort to ensure that legal proceedings are completed within a reasonable time.

iii  Class actions
In Turkish law, class action litigation does not exist as it does in the Anglo-American tradition. There has always been a mechanism by which parties could join other parties in a case as co-plaintiffs or co-defendants. But this mechanism is technically ‘multiparty litigation’, and should be distinguished from class action.

For the first time in Turkish civil procedure, the new CPC introduced a mechanism referred to as ‘collective action’, which is perhaps the closest concept to class action available in Turkey. Pursuant to Article 113 of the CPC, associations and other legal entities can now file a case on behalf of their members or the persons that they represent or act for the benefit of. Hence, there is still no mechanism whereby an individual can be certified by a court to define, invite and act on behalf of a large number of fellow litigants who would otherwise take action individually. The other difference from a US class action remedy is that Article 113 does not lend itself to compensation claims. It is merely a plea for the determination of certain rights, prevention of unlawful acts and future damages in relation to the relevant persons. It is expected to serve a large number of customers who, for instance, challenge a unilateral action of their service provider. They will not be able to claim a cumulative sum of compensation to be shared among them eventually, but at least they will not have to sue the same defendant individually.

iv  Representation in proceedings
In civil litigation, parties can represent themselves or freely hire one or more attorneys. In criminal cases, however, an attorney will be appointed to persons who are considered particularly vulnerable, such as minors.

Legal entities can self-represent through their authorised bodies, such as their board members. They may also appoint attorneys. The attorney must be a member of a Turkish Bar to appear at trial.

v  Service out of the jurisdiction
Service of process outside Turkey can be either straightforward or very cumbersome, depending on the domicile of the recipient. As Turkey is a party to the Hague Convention on Civil Procedure of 1954, any service to a person domiciled in one of the Member States is subject to the well-established procedures of the Convention. The Convention specifically reserves the validity and applicability of bilateral (and multilateral) treaties on service of process.

For instance, Turkey is party to such a bilateral treaty with the United Kingdom: the Convention Regarding Legal Proceedings in Civil and Commercial Matters, signed
Turkey

in 1931 and ratified in 1933.\(^8\) Turkey has also ratified treaties for service of process with other countries, including Algeria, Austria, Bulgaria, Egypt, Germany, India, Iraq, Jordan, Macedonia, Pakistan, Poland, Romania, Switzerland, Tunisia and Ukraine.

For countries that are not party to the Hague Convention, the principle of reciprocity applies. Generally, this entails service through the local authorities on the basis of a request by the Turkish diplomatic corps at the place of domicile of the addressee.

Turkish law does not distinguish natural persons from legal entities in international service procedures.

vi Enforcement of foreign judgments

The Code on Private International Law and Law of Civil Procedure (Law No. 5718) regulates the procedure for the recognition and enforcement of foreign civil or commercial judgments.

An enforcement decision rendered by a competent Turkish court is required for the execution of a foreign court judgment in Turkey. The enforcement decision gives the foreign judgment legal effect, as if rendered by a Turkish court.

Law No. 5718 provides that a foreign judgment must fulfil certain requirements for a Turkish court to render an enforcement decision without a review of its merits. Under Article 54 of this Code, a judgment rendered by a foreign court would be enforced by Turkish courts without re-examination of the merits, if the following conditions are satisfied:

\( a \) the judgment must have become ‘final and binding’ with no recourse to appeal or similar review process under the laws of the relevant foreign country. In this regard, interim judgments and preliminary injunction orders do not qualify for enforcement;

\( b \) there must be de facto or de jure reciprocity between Turkey and relevant country;

\( c \) the subject matter of the judgment must not fall under the exclusive jurisdiction of Turkish courts. For instance, under Articles 12 and 13 of the CPC, Turkish courts enjoy exclusive jurisdiction over disputes regarding real estate matters;

\( d \) due process must have been observed. As such, the party against whom the enforcement is sought must have been ‘duly served’ or made fully aware of the proceedings, and given the full opportunity to represent or defend himself or herself;

\( e \) the judgment must not be incompatible with a judgment of a Turkish court in a lawsuit between the same parties and relating to the same subject matter, or, in certain circumstances, with an earlier foreign judgment that satisfies the same criteria and is enforceable in Turkey; and

\( f \) the judgment must not be clearly contrary to Turkish public policy.

The public policy rule, in particular, is quite vague and difficult to clearly define. Turkish courts tend to interpret foreign judgments by considering the possible effects of their enforcement in Turkey. In our experience, while evaluating a foreign court judgment, the courts take into account all legal, economic and social implications. Both the legal grounds and the factual grounds of the foreign judgment are of significance. Although Turkish courts cannot re-evaluate the legal and factual grounds, they seek a clear connection between the foreign judgment and the facts on which such judgment is based.

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\(^8\) The Convention was later supplemented by a Supplementary Convention Regarding Legal Proceedings in Civil and Commercial Matters, signed in 1939 and ratified in 1941, with regard to territorial applicability.
vii Assistance to foreign courts

Turkey is a party to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 October 1970, which is the main multiparty treaty that provides for rules and procedures in this area. Turkey signed the Convention in 2000 and ratified it in 2004 and incorporated it into Turkish domestic law.

The Convention allows for collection of evidence in Turkey by local courts and authorities in aid of foreign legal proceedings, pending or future, before a court of another signatory to the treaty.

viii Access to court files

In principle, court hearings and court files are open to the public. Although the parties to the proceeding have full access to the case file, the judge may order that certain information be kept confidential, such as trade secrets. The judge may also order that a certain hearing, or all hearings of a specific case, be held in private to protect confidences or public policy.

Any Turkish Bar member can access court files physically and review them. However, only the actual parties to the case and their counsel can take copies thereof.

ix Litigation funding

There is no statutory regulation that governs litigation funded by disinterested third parties. In the absence of a specific regulation, there should be no concern about the validity and enforceability of third-party funding agreements, unless a given agreement is against Turkish public policy or is otherwise invalid.

Though it is debatable whether it is technically a form of disinterested party funding, a similar practice can be found in attorneys taking a financial risk tied to the outcome of a case. Article 164 of the Attorneys Code authorises attorneys to take on a case on a contingency fee basis, which can go up to 25 per cent of the monetary value of what is at stake. The 25 per cent rule operates as a ceiling by disregarding any percentage that exceeds it. A 40 per cent success fee arrangement, for instance, would not be void entirely. The court would enforce it as 25 per cent instead.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

Turkish law’s approach to and understanding of conflicts of interest in the legal profession is not as extensively regulated or fine-tuned by courts as one would find in the Anglo-American tradition, among others. In fact, statutory regulation of conflicts for attorneys hinges around one not-so-clearly drafted provision: Article 38/b of the Attorneys Code. According to this provision, attorneys must refuse to take on (or drop) any work if they have represented or advised a party with opposing interests in the same work.

The operative part of the provision seems to be ‘in the same work’. Evidently, this qualification is restrictive, at least on the face of it. It would be helpful to consider a typical scenario in which an attorney represents a claimant in a lawsuit and completes the brief. Two years later the defendant approaches the attorney for a separate lawsuit. This would not constitute any conflict of interest because the earlier client’s work is long finished. But if the attorney is approached by an unrelated party asking to sue that previous client in a separate matter, would this be a conflict of interest? That would arguably be problematic in
an Anglo-American setting and the attorney would feel ethically obliged to disqualify himself or herself or, at a minimum, seek the previous client’s consent. On the contrary, this latter scenario would not pose a legal problem in Turkish law, to the extent that Article 38/b is interpreted literally. What would certainly be prohibited is when the attorney represents a client at the trial court level but switches sides on appeal, for instance. This would squarely fit in the ‘in the same work’ criterion.

Fortunately for both attorneys and their clients, Turkish court precedents as well as Bar ethics committees interpret Article 38/b more broadly. Engagement in work not exactly the same but ‘related’ is also deemed to trigger a conflict of interest.

In addition, Article 38/c stipulates that a person who has previously been involved as a judge, prosecutor, expert witness, fact witness or civil servant in a proceeding, cannot be engaged with it as an attorney at a later stage.

According to the High Court of Cassation, courts must consider and apply Article 38/b *sua sponte* since conflicts of interest in the Attorneys Code is a matter of Turkish public policy.

Finally, attorneys cannot represent any party if they are relatives of the relevant judge or prosecutor (see Article 13 of the Attorneys Code).

We will now turn to information barriers as a means to deal with conflicts of interest. With the rise of global law firms with dozens of offices worldwide and thousands of lawyers on board, an intriguing working method has emerged in the form of information barriers being placed within the firm so as to enable attorneys under the same corporate roof to advise or represent conflicting interests without jeopardising any of them.

These procedures, commonly known as ‘Chinese walls’, are maintained to restrict the flow of information and provide legal services in a proper manner. However, Article 38, referenced above, makes it clear that conflict-of-interest rules contained therein are equally applicable to partners as well as associates of a firm subordinate to them. As this provision is understood in the Turkish legal profession today, it does not seem possible for a law firm’s litigators to sue a company that their M&A colleagues have already been advising in a transaction, for instance. Having said that, this presumption is yet to be tested as court precedents and Bar disciplinary rulings on the issue are virtually non-existent. A relatively liberal interpretation allowing for Chinese walls procedures in the legal profession should not be ruled out categorically. In fact, we are aware that these types of procedures are in practice among stock traders and investment banks in Turkey and the relevant regulator, the Capital Markets Board, allows them a certain leeway. Similarly, our verbal contacts with the Turkish Competition Authority as well as the Energy Market Supervisory Authority revealed that these authorities implement Chinese wall procedures within their respective bodies.

### ii Money laundering, proceeds of crime and funds related to terrorism

In recent years, Turkey has continued to empower its legal framework for the prevention of the laundering of criminal proceeds.

The first money laundering legislation was passed in 1996: Law No. 4208 on the Prevention of Money Laundering. This law established the Financial Crimes Investigation Board (MASAK) as the main administrative body monitoring compliance with anti-money laundering requirements.

However, things became somewhat confusing in 2005 with the entry into force of the new Turkish Criminal Code. This Code penalised for the first time ‘laundering of crime proceeds’ as a separate type of crime. This resulted in two separate laws defining and regulating money laundering: Law No. 4208 and the Turkish Criminal Code.
To overhaul existing legislation and to put an end to this duality, Law No. 5549 on the Prevention of Laundering of Crime Proceeds (the AML Code) was enacted in 2006, as a coherent anti-money laundering legislation.

The year 2008 saw the enactment of the Regulation on Measures to Prevent the Laundering of Criminal Proceeds and the Financing of Terrorism (the Regulation on Measures) and the Regulation on the Programme on Compliance with the Obligations to Combat Money Laundering and Terrorism Financing.

Although the two regulations explain the process for dealing with money laundering and financing of terrorism, certain difficulties still occur in implementing the procedures they describe. MASAK thus periodically issues and revises certain other regulations for clarification.

The AML Code and the Regulation on Measures encompass a group of ‘liable persons’. Liable persons, and not any random person, are required to whistle-blow and cooperate with the authorities if they notice any suspicious transactions. Liable persons include real persons, legal entities and even unincorporated entities acting as intermediaries to certain types of businesses. This includes, in particular, persons who operate in regulated fields such as banks, brokerage companies, insurance and private pension companies, persons engaged in the purchase and sale of precious metals, stones, antiques, works of art, etc. In addition, (1) sole-practitioner attorneys whose activities are limited to the ‘sale and purchase of real property’ or ‘incorporation, management and acquisition of companies, foundations and associations’; (2) sole-practitioner certified general accountants and certified public accountants; (3) independent audit institutions; and (4) sports clubs. In January 2010, the list was made more comprehensive to include branches, agencies, representatives and similar units affiliated with a liable person.

Liable persons must report suspicious transactions – deposits, withdrawals, transfers, and so on – of large monetary sums with no plausible explanation. Simply, if there is any reason to suspect that a transaction (conducted or attempted by or through a liable person) stems from illegal or terrorist activity, or is used for illegal or terrorist activity or by terrorist organisations, this must be reported to MASAK. Liable persons must not disclose suspicious transactions to anyone other than authorised bodies or the court. Violation of such confidentiality duty may result in imprisonment and criminal fines. On 29 July 2016, a new regulation entered into force regulating the procedures and principles for the suspension and prevention of suspicious transactions.

There is also a periodic reporting requirement. The AML Code requires a liable person to report transactions of which it is a part, or in which it acts as an intermediary, exceeding an amount determined by the Ministry of Finance. However, until the Ministry of Finance determines such amount, liable persons are obliged to report only suspicious transactions.

Liable persons are also required to establish risk management systems, together with training, internal audit and control systems that will help achieve full conformity with the obligations under the AML legislation. The AML Code also requires liable persons to appoint a compliance officer, obliging liable persons whose internal regulations do not feature such a requirement (e.g., brokerage houses).

As regards sanctions, the AML Code refers solely to administrative and judicial sanctions for failure to comply with AML legislation, but defers to the Turkish Criminal Code in criminal activities. Although the AML Code provides for imprisonment of persons who violate its provisions on keeping suspicious-transaction reporting confidential, and
providing, retaining and submitting information and documents, the Turkish Criminal Code essentially regulates the money laundering offence and the sanction of imprisonment for these violators.

iii Data protection

Constitutional principles and court precedents were the only source of law on data protection in general prior to passage of Data Protection Code No. 6698 (DPC) on 24 March 2016, which has become the main piece of legislation in Turkish law on the processing of personal data. The DPC became fully effective on 7 October 2016 following the end of a grace period in relation to the enforcement of certain provisions. The DPC follows the general structure of the European Union Data Protection Directive on processing of personal data.

Subsequently, the Regulation on the Registry of Data Controllers (the Registry Regulation) was published in the Official Gazette on 30 December 2017 and entered into force on 1 January 2018. The Registry Regulation sets forth the principles and procedures for the establishment and management of the official registry information system of data controllers (VERBIS), and for the registry records. According to the Registry Regulation, data controllers are legal or real persons who are responsible for determining the purposes and means of processing personal data, and are responsible for establishing and managing the personal data retention system at their organisation. The Registry Regulation requires data controllers to be registered with VERBIS. As per the decision of the Personal Data Protection Board (the Board) dated 18 August 2018, the registration period started on 1 October 2018 through VERBİS. Data controllers who reside abroad are also required to be registered with VERBIS by way of a representative before processing personal data.

The Board has exempted certain groups of people and entities from the registration requirement through decisions adopted this year. In this respect, notaries public; attorneys; associations; certain types of foundations and unions; political parties; certified public accountants; customs brokers; mediators; and data controllers with fewer than 50 employees and with an annual balance sheet of less than 25 million Turkish lira, whose field of operation is not the processing of sensitive data, are exempted from this obligation.9 Data controllers who fail to register with VERBIS or who fail to comply with the contents of the Registry Regulation may be subject to administrative fines of 20,000–1 million Turkish lira, at the Board’s discretion.

Additionally, the Regulation on the Deletion, Disposal, or Anonymization of Personal Data (the Destruction Regulation), which establishes the procedures and principles governing the destruction of personal data through deletion, disposal, or anonymisation, and the preparation of internal policies regarding the preservation and destruction of personal data, entered into force on 1 January 2018.10

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9 The Attorneys Code imposes a general duty of confidentiality on lawyers as explained below. Although this general duty does not specifically address processing of personal data, it is the first and foremost guide for lawyers to share personal data with other law firms or legal processing outsourcers both nationally and internationally.

10 This section was based, with the necessary modifications and updates, on publications of Hergüner Bilgen Özke Attorney Partnership.
Apart from the above, a few other resolutions were rendered by the Data Protection Board. For instance, on 16 May 2018, the Data Protection board addressed the transfer of data overseas, and announced a number of guidelines that must be followed in international data transfers.

Again, on 31 May 2018, another resolution of the Data Protection Board was published in relation to personal data being processed by employees of data controllers. In this respect, data controllers need to take all the necessary precautions to assure the proper level of security of the personal data being processed. The data controllers are required to take technical and administrative measures in order to prevent any violations caused by their employees.

iv Other areas of interest

In a major break with past procedural practice, Turkey has recently overhauled its rules on how notices can be served. A new Electronic Notification Regulation took effect as of 1 January 2019 (the Electronic Notification Regulation), which calls for the establishment of a National Electronic Notification System, which will be operated and secured by the national postal service (PTT).

The Electronic Notification Regulation will require joint stock companies and limited liability companies, along with certain other public and private persons, to use electronic notifications. These persons will need to apply to the PTT within one month from the effective date of the Electronic Notification Regulation and obtain an electronic notification address, which will then be made available for proper authorities to serve notifications.11

An additional amendment is expected to be made in the structure of execution offices in the near future. There are signs that the Ministry of Justice is currently working on the privatisation of the execution offices. Pilot execution offices are being dedicated to service in order to increase the work efficiency and improvement of execution proceedings. According to the statements of Ministry of Justice officers, amendments will be made to related legislation to decrease the workload of execution offices and attorneys.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

The legal framework governing privilege as regards lawyers is contained in the Attorneys Code. Article 36 of the Code provides for a duty of professional secrecy and confidentiality. According to this provision:

a it is prohibited for an attorney to disclose information communicated in the course of his or her representation (unless expressly permitted by the client);

b even when the client grants permission, the attorney may still decline to disclose any such information;

c an attorney cannot be forced to be a witness involving his or her client’s confidences; and

d an attorney cannot be subjected to any legal or criminal liability for refusing to be a witness.

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11 id.
Articles 37(a)–(b) of the Professional Rules of the Turkish Bar Association stipulate a parallel duty of professional secrecy and confidentiality. The law does not distinguish between outside and in-house counsel. Hence, rules of privilege should normally apply to in-house counsel equally. However, this issue is being debated and court precedents have not yet provided an authoritative answer.

Despite a long-running misconception among – at least a small minority of – lawyers in Turkey, foreign lawyers are not entirely prohibited from practising law in Turkey. This was made possible by an amendment to the Attorneys Code in 2001, which states that, subject to certain conditions such as reciprocity, foreign lawyers may advise on international law and foreign law matters. Hence, it must be accepted that, by analogy, the rules governing privilege and client confidentiality are applicable to foreign lawyers as well.

**Production of documents**

As a follower of the European continental civil law tradition, Turkish law does not allow for extensive document production or discovery. The basic principle of civil procedure is that each party is obliged to impart the facts on which his or her claim is based and propose evidence to establish those facts. This being said, document production is possible, subject to certain conditions.

The revised CPC slightly broadened document production in civil litigation. Article 326 of the old CPC listed the types of documents that needed to be produced. The new Article 219, however, uses broader language: ‘all documents that are relied on as evidence by either party must be submitted to court.’ The same article also stipulates that digital documents be submitted as printouts and conserved electronically to be examined at a further stage.

For document production to be possible, the following conditions must be met:

- the judge must be convinced that the particular document production request is lawful and the relevant document must be necessary to prove a certain fact; and
- the other party (from whom document production is sought) must either admit to having that document in his or her possession or remain silent on the issue, or the existence of the document must be gleaned from official documents or records, or acknowledged in other documents.\(^{12}\)

If the party fails to produce that document within the time limit granted by the judge or to show some rational cause as to his or her inability to do so, the judge may draw negative inferences in favour of the party that requested the document production.

Third parties can also be subject to document production requests issued by a competent court. The same criterion applies here (i.e., the document must be necessary for the proof of a certain fact). The third party must comply with the request unless he or she can explain, with some evidence, why he or she is unable to do so. If the judge is not satisfied with that explanation, he or she can summon the third party as a witness.

\(^{12}\) Or that this fact is evident from official documents or that he or she admitted in another document that it is in his or her possession.
VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation
Considering the heavy workload of the Turkish courts and long-lasting adjudication processes, there is an increasing tendency for both natural and legal persons to resolve their disputes through alternative dispute resolution (ADR) methods. The two most preferred methods are arbitration and mediation.

Upon going into effect, the International Arbitration Code and the Code on Mediation have collectively caused a significant increase in the number of disputes that are subject to ADR methods. It is expected that the number of arbitration proceedings and mediation processes will continue to rise as both mechanisms are periodically refined.

ii Arbitration

International arbitration

The main piece of legislation governing international arbitration in Turkey is the International Arbitration Code No. 4686 (the International Arbitration Code). This Code entered into force in 2001 and was modelled on the UNCITRAL Model Law (1985) and the international arbitration section of the Swiss Federal Private International Law of 1987.

The International Arbitration Code governs arbitrations seated in Turkey that involve a foreign element. Even if the seat of arbitration is not Turkey, the parties can contractually subject the arbitration to the International Arbitration Code, to the extent that the ‘foreign element’ condition is present.

The following circumstances are considered to constitute a foreign element under Article 2 of the Code:

a the usual residences, domiciles or places of business of the parties to the arbitration agreement are located in different countries;

b the usual residence, domicile or place of business of any party to the arbitration agreement is located in a country not the place of arbitration designated in the arbitration agreement or determined on the basis of this agreement;

c the usual residence, domicile or place of business of any party to the arbitration agreement is located in a country not the place where the majority of the obligations under the main agreement will be performed or the place to which the subject of the dispute is primarily connected;

d at least one of the shareholders of a company that is a party to the main agreement containing the arbitration clause has injected foreign capital into the company under applicable foreign investment legislation, or it is required to execute a loan or a guarantee agreement in order to bring foreign investment to Turkey for performance of the relevant agreement; and

e the main agreement or legal relationship constituting the basis of the arbitration agreement calls for the flow of capital or goods from one country to another.

13 This section is partially based on the submissions of Hergüner Bilgen Özeke Attorney Partnership to the CMS Guide to Arbitration (Turkey chapter) published in 2012.
Domestic arbitration

Domestic arbitration among local parties that does not involve any foreign element is addressed within the scope of the CPC. The arbitration section of the CPC resolved long-standing conflicts between the International Arbitration Code and the arbitration section of the now defunct Civil Procedure Code of 1927. The current CPC aligned itself with the International Arbitration Code and, in turn, the UNCITRAL Model Law. Its arbitration section regulates domestic arbitral procedures and the enforcement of domestic arbitral awards in an attempt to encourage domestic arbitration in Turkey.

Foreign arbitration and enforcement of foreign arbitral awards

The recognition and enforcement of foreign arbitral awards is regulated separately, under the Code on International Private Law and Procedure (Law No. 5718). It entered into force in 2007 and replaced the old International Private Law and Procedure No. 2675, which had been in force since 1982.

The main difficulty associated with arbitration in Turkey has long stemmed from the fact that international and domestic arbitration and the enforcement of international and domestic arbitral awards are all addressed under separate legal frameworks with conflicting regulations. This problem has recently been addressed by the legislature through drafting domestic arbitral procedures and enforcement mechanisms in line with the provisions of the International Arbitration Code and the Law No. 5718.

Arbitral institutions

The Istanbul Chamber of Commerce Arbitration Centre (ITOTAM) and the Istanbul Arbitration Centre (ISTAC) are the major arbitral institutions in Turkey.


ITOTAM announced the Arbitration Rules for Emergency Arbitration and Arbitration Rules for Small Claims (expedited arbitration) as of 14 April 2016. Despite the existence of an institutional arbitration mechanism before ITOTAM, the government decided to adopt a new approach towards arbitration in 2014 and attributed great importance to the establishment of a new international arbitration institution, known as ISTAC.

In line with the approach adopted by the government, the Code on the ISTAC was passed into law on 20 November 2014, published in the Official Gazette on 29 November 2014 and entered into force on 1 January 2015. The general assembly of ISTAC consists of 25 members from 14 various governmental organisations such as the Capital Markets Board, the Union of Chambers and Commodity Exchanges of Turkey, the Union of Turkish Bar Associations and non-governmental organisations.

ISTAC introduced the ISTAC Arbitration and Mediation Rules on 26 October 2015, which is also based on several international arbitration rules such as the ICC, AAA and LCIA Rules. ISTAC arbitration also provides emergency arbitration and fast-track arbitration.
Arbitral tribunals’ jurisdiction and courts’ interference

Arbitral tribunals may rule on their own jurisdiction, including any objections regarding the existence or validity of the arbitration agreement. A plea that the arbitral tribunal does not have jurisdiction must be raised in, or prior to the submission of, the statement of defence. A party is not precluded from raising such plea by the fact that he or she has appointed, or participated in the appointment of, an arbitrator. The arbitral tribunal will rule on the above-mentioned plea as a preliminary question and, if it should decide that it has jurisdiction, it will resume the arbitral proceedings. Such a decision by the arbitral tribunal cannot be appealed to the courts.

Court interference with the arbitral process is very limited. A court may only intervene in any dispute referred to arbitration to the extent permitted by the provisions of the International Arbitration Code (to the extent it is an international arbitration subject to that Code). If the parties agree to refer the dispute to arbitration pending a court case on the same subject matter, the court would stay the adjudication proceedings and send the file to the related arbitrator or arbitral tribunal. If court proceedings in a dispute that is subject to arbitration are initiated, the other party may raise an arbitration objection with the court. If the arbitration objection is accepted, the court will dismiss the lawsuit on procedural grounds. If any of the parties requests the court to impose a preliminary injunction or provisional attachment prior to, or during the arbitral proceedings, this will not constitute a breach of the arbitration agreement.

If any of the parties fail to abide by a preliminary injunction or provisional attachment rendered by the arbitrator or arbitral tribunal, the other party may request the competent court to issue an order for preliminary injunction or provisional attachment.

The parties may file a request for interim protective measures in accordance with the CPC and the Turkish Execution and Bankruptcy Code at any stage of the proceedings. The arbitrator or arbitral tribunal may seek assistance of the court of first instance to collect evidence.

Challenging and appealing an award through the courts

The Turkish arbitration legislation (be it international arbitration as governed by the International Arbitration Code or domestic arbitration as governed by the CPC) excludes the possibility of any appeal on the merits of the dispute. It only provides for the setting aside of an award under the limited grounds of procedure, arbitrability and public policy.

Per a recent amendment put into place by the Law Amending the Enforcement and Bankruptcy Law and Certain Other Laws No. 7101 on 15 March 2018, the civil regional courts in the seat of arbitration have been authorised to hear applications for the setting aside

14 Article 7 of the International Arbitration Code.  
15 id.  
16 id.  
17 Article 5 of the International Arbitration Code.  
18 id.  
19 Article 6 of the International Arbitration Code.  
20 id.  
21 id.  
22 See, for example, Article 15 of the International Arbitration Code, which is based on the same principles as Article 5 of the New York Convention.
of awards, rather than the courts of first instance, which had previously held this authority. Further, depending on the subject of a dispute, the civil courts or commercial courts of first instance in the place of the arbitration will be the competent courts to undertake any actions to be taken by courts during the course of arbitration until the final award is granted, rather than the civil regional courts, which previously held this jurisdiction.\textsuperscript{23} If the defendant’s usual residence, domicile or place of business is located outside Turkey, the Istanbul Civil Court of First Instance will have jurisdiction to hear such an application.

An arbitral award may be set aside by the court if:

\begin{itemize}
\item[a] a party to the arbitration agreement lacks the necessary competence;
\item[b] the arbitration agreement is invalid under the applicable law or, if the applicable law is not agreed by the parties, under the law of Turkey;
\item[c] the arbitrator or the arbitral tribunal was not appointed in accordance with the procedure agreed between the parties or in accordance with the International Arbitration Code;
\item[d] the award was not rendered within the agreed or statutory term for arbitration;
\item[e] the arbitrator or the arbitral tribunal did not have jurisdiction to hear the dispute;
\item[f] the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, the award contains decisions on matters beyond the scope of the submission to arbitration, or the arbitrator or the arbitral tribunal has exceeded its competence;
\item[g] the arbitral proceedings were not carried out in accordance with the procedures agreed between the parties or, failing such agreement, in accordance with the procedures of the International Arbitration Code, and this failure had an impact on the merits of the award;
\item[h] the principle of equality of the parties was not respected;
\item[i] the subject matter of the dispute is not capable of settlement by arbitration under Turkish law; or
\item[j] the award is in conflict with Turkish public policy.\textsuperscript{24}
\end{itemize}

An action for setting aside the award should be filed before the regional court within 30 days from delivery of the award or, as case may be, of the correction or interpretation of a complementary award.\textsuperscript{25} The court will give priority to this action and conclude it urgently.

In addition to that, pursuant to the International Arbitration Code, the parties may partially or fully waive their right to file an action to set aside the award.\textsuperscript{26} However, parties residing abroad may only fully waive their right to file a setting-aside action by an express declaration in writing or as provided by the arbitration agreement.\textsuperscript{27}

**Power to order interim measures**

Upon request by one of the parties, the arbitral tribunal may issue a preliminary injunction or attachment during the arbitral proceedings. Since the possible damages that the other party might incur because of a preliminary injunction or attachment should be secured,

\textsuperscript{23} Article 15 of the International Arbitration Code.

\textsuperscript{24} id.

\textsuperscript{25} id.

\textsuperscript{26} id.

\textsuperscript{27} id.
the International Arbitration Act permits the arbitral tribunal to demand an appropriate
guarantee or security from the requesting party prior to rendering a preliminary injunction
or attachment.28

The International Arbitration Act limits the arbitral tribunal’s authority to order a
preliminary injunction or attachment by prohibiting it from issuing preliminary injunctions
or attachments that are solely enforceable by governmental authorities. For example, real
property owned by the defendant may not be seized based on a preliminary attachment
ordered by an arbitral tribunal because the seizure of real property requires the involvement
of execution officers. Similarly, the arbitral tribunal may not order the customs authority to
prevent the defendant from taking its assets out of the country.

The arbitral tribunal is prohibited from issuing preliminary injunctions or attachments
that are binding on third parties because a third party may not participate in the arbitral
proceedings and could not properly object to the decision rendered by the arbitral tribunal.29

If one of the parties refuses to comply with a preliminary injunction or attachment
rendered by the arbitral tribunal, the other party may request the assistance of the competent
court, which may enforce the arbitral tribunal’s decision by issuing a preliminary injunction
or attachment. If necessary, the competent court may authorise another court to issue the
injunction or attachment as rogatory, when geographical concerns justify it.30

Recognition and enforcement of awards
As to the recognition and enforcement of arbitral awards in Turkey, the definition of ‘foreign
arbitral award’ is vital, because foreign and domestic arbitral awards are subject to different
regimes under Turkish law.

Domestic awards
Domestic awards are awards issued in Turkey in arbitral proceedings conducted in accordance
with applicable provisions of the CPC. These awards are also subject solely to the setting-aside
procedures.31

A review of the request will be carried out on file and will not suspend the execution of
the award unless the claimant pays a security deposit.

Foreign awards
The provisions of the New York Convention of 1958 have the same force in Turkey as
Turkish statutory provisions, and are treated as part of the domestic legal system. In terms of
enforcing foreign arbitral awards, Turkish law gives precedence to the application of the New
York Convention over Law No. 5718. If the award is rendered in the territory of a state other
than the Turkish Republic and if the award is not deemed a domestic award under Turkish
law, the New York Convention applies.

Turkey enacted the New York Convention with two reservations, which means that the
enforcement of foreign awards will be subject to the New York Convention if the award was

28 Article 6 of the International Arbitration Code.
29 id.
30 Article 6 of the International Arbitration Code.
31 Article 439 of the CPC.
rendered in another signatory state and the relevant dispute is defined as commercial under the TCC.\textsuperscript{32} If these requirements are not fulfilled, the recognition and enforcement of foreign arbitral awards will be governed by Law No. 5718.

Law No. 5718 and the New York Convention provide similar grounds for refusal of recognition and enforcement of an arbitral award, but there is one distinction. Pursuant to Article VI of the New York Convention, enforcement of an award may be refused if the party against whom the award is invoked proves the existence of any grounds for refusal of enforcement. By contrast, Law No. 5718 provides that enforcement of an award must be refused if the party against whom the award is invoked proves the existence of any grounds for such refusal. Therefore, though under the New York Convention it is at the discretion of the enforcing court to decide whether the award will be enforced, under Law No. 5718, the enforcing court is obliged to refuse enforcement if one of the refusal grounds is proven. Under both the New York Convention and Law No. 5718, the burden of proof lies with the party arguing for refusal of enforcement. However, there are two grounds for exemption from the burden of proof requirement: violation of public policy and inarbitrability. The enforcing court may consider these two grounds on its own volition.

The grounds for refusal of enforcement of foreign arbitral awards under Law No. 5718 are as follows:

\begin{itemize}
  \item[a] the award is not yet binding, or has been set aside or suspended by a court;
  \item[b] the subject matter of the dispute is not arbitrable; or
  \item[c] the award is a violation of public policy.\textsuperscript{33}
\end{itemize}

Violation of public policy is a ground for refusing recognition or enforcement of foreign arbitral awards.\textsuperscript{34} The New York Convention stipulates that recognition or enforcement of an award will be refused if recognition or enforcement of the award would be contrary to the public policy of the country where recognition and enforcement are sought. Law No. 5718 stipulates that recognition or enforcement shall be refused if the award is contrary to public policy or public morality.

Public policy is often regarded as a vague concept. It is interpreted by Turkish courts on a case-by-case basis. Turkish courts face a dilemma between the goal of protecting the state’s authority to refuse enforcement of awards that contravene domestic values in terms of public policy and the desire to respect the finality of foreign arbitral awards (révision au fond prohibition). In this respect, Law No. 5718 stipulates that only explicit violations of public policy can be considered grounds for refusing enforcement, including:

\begin{itemize}
  \item[a] lack of due process;
  \item[b] invalidity of the arbitration agreement under the law of the country to which the parties have subjected it;
  \item[c] improper arbitral procedure or composition of the arbitral tribunal;
  \item[d] inarbitrability of the subject matter; and
  \item[e] lack of reciprocity.\textsuperscript{35}
\end{itemize}

\textsuperscript{32} Turkey limited the enforcement of foreign arbitral awards to those of a commercial nature by reserving its rights under Article 1(3) of the New York Convention.

\textsuperscript{33} Article 61 of Law No. 5718.

\textsuperscript{34} See Law No. 5718, Article 62.1(b); and the New York Convention, Article V.1 and 2.

\textsuperscript{35} Article 61 of Law No. 5718.
Law No. 5718 refers to the principle of reciprocity in the recognition and enforcement of foreign arbitral awards, meaning that the enforcement of awards will be recognised in Turkey if they were granted in a country:

\( a \) that is party to a reciprocity agreement, whereby it undertook to enforce and recognise arbitral awards made in Turkey; or

\( b \) that is obliged to recognise and enforce arbitral awards made in Turkey pursuant to its domestic laws or the established practice of its courts.\(^{36}\)

iii Mediation

Mediation is the second type of proceeding in which the dispute may be terminated by mutual agreement. Mediation for civil disputes was highly debated within the Turkish judiciary and was codified in the Code on Mediation.

The Code on Mediation was passed into law in June 2012, and its substantive provisions entered into effect a year later, in June 2013. The Law proved to be a divisive factor in the National Assembly as well as civil society. The government presented it as an effort to alleviate the burden on the courts already struggling under a massive docket backlog. Critics were concerned that communities from different cultural perspectives would distribute justice according to their own interpretations.

That mediation is now mandatory prior to filing suit in certain cases has resulted in mediation being sought considerably often in the past year. According to results generated by Ministry of Justice Mediation Department, 127,845 mediators were assigned between 2 January 2018 and 27 May 2018. A total of 65 per cent of mediation proceedings were resolved amicably, whereas 35 per cent of the proceedings ended up with disagreement of the parties. It appears that the provision on mandatory mediation in employment cases has indeed changed the way that these cases are litigated.\(^{37}\)

The scope of mediation is defined as civil law matters, including those with foreign elements, as long as the resolution thereof is subject to the parties’ discretion. The mediator does not render a decision on behalf of the parties, but encourages an amicable solution by facilitating communication between them. Litigants may agree to apply for a mediator prior to or during litigation; in the latter case, pending lawsuits will be adjourned for three months and can be extended by the parties’ agreement. The procedure is very flexible. The parties are free to appoint one or more mediators and to agree on the mediation method to be used.

Similarly to the provisions of Law on Labour Courts of 2017, which required mediation prior to filing suit in such cases as receivable claims and reinstatement demands, Law No. 7155 on the Procedures to Initiate Debt Collection Proceedings for Receivables Arising out of Subscription Agreements has made it mandatory, as of 1 January 2019, to seek mediation prior to filing commercial lawsuits for damages or to collect receivables. If a party files a lawsuit without fulfilling this requirement, the court will dismiss the case on procedural grounds. In these cases, mediators must conclude the mediation process within six weeks of their assignment; the mediators may extend this period for no more than two weeks where exigencies require an extension.

Another issue that must be highlighted is the focus of the Code on Mediation on confidentiality and its imposition of a strict confidentiality requirement on both the

\(^{36}\) Turkey brought the requirement of reciprocity by reserving its right under Article 1(3) of the New York Convention.

\(^{37}\) This section was based on the results generated by Ministry of Justice Mediation Department.
mediators and the parties, unless the parties agree otherwise. The Code on Mediation restricts the presentation of the following documents and statements as evidence before a court or arbitral tribunal on the same dispute:

- the invitation to mediate by one party, or either party’s willingness to participate in the mediation process;
- comments and proposals made by either party to resolve the dispute through mediation;
- proposals made by a party, or acceptance of a claim or factual matter during the mediation process; and
- documents drafted solely for the mediation process.

Even if the above-mentioned documents are submitted to the court as evidence, the court will not consider this when rendering its judgment. However, such information may be disclosed where it is required by law, or to the extent that it may be necessary to implement or enforce the agreement reached at the end of the mediation.

The Law, fortunately, did not leave mediation without teeth. The Code on Mediation provides the structure for execution of a settlement through mediation. After a settlement at the end of mediation proceedings, the parties and the mediators must sign a minutes of settlement. The parties may request the court to endorse the executed minutes of settlement. The court provides an ‘execution endorsement’ for the minutes of the settlement in order for the settlement to be officially enforceable. However, as per the Law on Labour Courts and the amendments made to the TCC with the Law on the Procedures to Initiate Debt Collection Proceedings for Receivables Arising out of Subscription Agreements, settlements will not require a court endorsement to be directly enforceable.

For mediations commenced after filing of a lawsuit, the settlement minutes are filed with the court hearing the principal claim. If the mediation is commenced before the lawsuit, endorsement may be requested from the court that would hear the dispute if a lawsuit was initiated. The court will conduct a limited examination as to whether the dispute is sufficient for mediation and execution. Mediation settlement minutes having an execution endorsement are deemed to have equal effect as a court judgment.

The Law foresees specific training for prospective mediators and registration with the Ministry of Justice. It stipulates that only law degree holders with a minimum of five years of legal experience can become mediators.

The CPC also encourages ADR mechanisms. According to the CPC, once all pleadings are exchanged, the judge will schedule a preliminary examination hearing at which he or she is specifically authorised to urge the parties to settle the dispute or resort to ADR mechanisms before continuing with litigation.

### iv Other forms of alternative dispute resolution

Mediation and arbitration are the only dispute resolution methods that are embraced in the Turkish practice as alternatives to court adjudication. All other methods of ADR (such as negotiation, conciliation, mini-trial, referee, expert determination, etc.) are rare. Mediation looks to take centre stage in the coming year following the enactment of the Law on Labour Courts provisions mentioned above.

The Attorneys’ Code Article 35/a provides conciliation as an ADR procedure that can only be performed by attorneys admitted to the Bar. However, it is not frequent in law practice in Turkey. Although there are plans to make further regulations on conciliation, the content and timing of the plans are unknown for now.
These other forms of ADR are used more often when contained in a larger scheme of dispute resolution method as an early step. Modern International Federation of Consulting Engineers forms of construction contracts, for instance, provide for a dispute adjudication board (DAB) process, which can later be challenged before arbitrators (or, rarely, courts). Contractors and employers active in Turkey are gaining more familiarity with the fast-track procedures of DABs.

The DAB process may be popularly perceived as ‘rough justice’, but that qualification does not do justice to the legitimacy of DAB findings. Unofficial statistics that world-renowned construction experts cite at international conferences indicate that, when challenged before arbitrators, DAB findings are confirmed overwhelmingly more often than not.

VII OUTLOOK AND CONCLUSIONS

Many significant changes were made in Turkish law in the past year. The procedural amendments for dispute resolution have begun to show their effect already, with the workload of the courts being distributed more equally and helping them to function faster. With the amendments on composition of creditors, commercial life in some sectors can reasonably be expected to regain vitality. It can be expected that parties will be required to seek mediation before filing suit in other types of disputes, just like they must now do in employment and commercial disputes. The cumulative effect of the past year’s changes in Turkish law, whether procedural or substantive, will likely be to reduce the number of disputes litigated in court, to ease the path of investors and to provide economic stability.
I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

i The legal system

The United Arab Emirates (UAE) is a federation of seven emirates: Abu Dhabi (the capital), Ajman, Dubai, Fujairah, Ras Al Khaimah, Sharjah and Umm Al Quwain. The UAE adopts a dual civil and Islamic shariah legal system, influenced by French, Egyptian and Roman principles. The primary source of law in the UAE is the UAE Constitution (as amended), which provides that the official religion of the federal union is Islam. In practice, however, like other civil law jurisdictions, legislation in the UAE is codified in federal codes that have been promulgated pursuant to Article 121 of the UAE Constitution.

The principal federal codes currently in force are the Civil Transactions Law, the Commercial Transactions Law, the Companies Law, the Labour Law and the Civil Procedure Law. Where there is no provision in the codified statutes dealing with a particular issue, judges are to have regard to shariah law, and specifically the Islamic shariah schools of Imam Malik and Imam Ahmed Bin Hanbal and, as a last resort, from the schools of Imam Al-Shafie and Imam Abu Hanifa.

Each of the seven emirates can elect to join the federal judicial system or to maintain its own local judicial system. The emirates of Sharjah, Ajman, Fujairah and Umm Al Quwain follow the federal judicial system. The emirates of Abu Dhabi, Dubai and Ras Al Khaimah have elected to retain their own local judicial system over matters that are not assigned to the federal judiciary under the UAE Constitution. Federal laws still apply to the emirates that are not part of the federal judiciary system.

There is no doctrine of stare decisis in the UAE and therefore there is no system of binding precedent that the courts are bound to follow. Principles of law established by the

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1 Nassif BouMalhab is a partner and John Lewis is a senior associate at Clyde & Co LLP.
2 Constitution of the United Arab Emirates, 2 December 1971 (as amended) (the UAE Constitution).
3 Article 7 of the UAE Constitution.
6 Federal Law 2 of 2015 on Commercial Companies (the Companies Law).
7 Federal Law 8 of 1980 regulating Labour Relations (as amended) (the Labour Law).
9 Article 1 of the Civil Transactions Law.
higher courts, the Federal Supreme Court (which covers Ajman, Fujairah, Sharjah and Umm Al Quwain), the Dubai Court of Cassation, the Ras Al Khaimah Court of Cassation and the Abu Dhabi Court of Cassation, have persuasive effect on the lower courts.

ii  The court system

The UAE court system

The UAE court system can be broken down into two categories. The first is the federal court system, which applies to the emirates that have elected to join the federal judicial system. The second is the local courts of Dubai, Ras Al Khaimah and Abu Dhabi that have jurisdiction in those individual emirates only.

There are three tiers of courts within the federal court system and the local court system. The first is the court of first instance, which is where proceedings are commenced. The second is the court of appeal, which allows for appeals on issues of fact or law. The third is the Supreme Court, which provides a further right of appeal albeit limited to points of law only.

There are special divisions within each of these courts that are established to hear specific types of matters. For example, the Dubai courts consist of the civil courts, commercial courts, criminal courts, labour courts, real estate courts and personal status courts.

The personal status or shariah courts are largely limited to hearing personal status and family matters and follow shariah principles for marriage and divorce, succession, personal status and inheritance.

Financial Free Trade Zones

There are various financial free trade zones that have been established in the UAE that allow for, inter alia, 100 per cent foreign ownership of companies incorporated within the free zone. These free zones are governed by their own framework of regulations and laws, subject only to the UAE Constitution, UAE Penal Code10 and international treaties entered into by the UAE.

Some of the most common free zones in the UAE include the Ras Al Khaimah Free Zone, the Jebel Ali Free Zone, Dubai Media City, the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM).

The DIFC and ADGM have a unique set-up as these free zones operate as autonomous common law jurisdictions with an independent judiciary within the emirate in which they are geographically situated.

The DIFC was established in 2004 by Federal Decree No. 35 of 2004. The DIFC has a number of independent bodies, including a DIFC Judicial Authority and Dubai Financial Services Regulatory Authority (DFSA), which was established by Dubai Law No. 9 of 2004. A DIFC Court of First Instance and DIFC Court of Appeal have been established11 to have jurisdiction in civil and commercial matters in the DIFC, relating to contracts fulfilled or transactions carried out there (in whole or in part) or where parties have opted for the jurisdiction of the DIFC Courts. The DIFC Court of First Instance includes a Technology and Construction Division and Small Claims Tribunal.

10 Federal Law 3 of 1987 promulgating the Penal Code (as amended) (the Penal Code).
11 Dubai Law No. 12 of 2004: The Law of the Judicial Authority at Dubai International Financial Centre (as amended).
The ADGM was established in 2013 by Federal Decree No. 15 of 2013 and Cabinet Resolution No. 4 of 2013. Similarly, the ADGM has its own Financial Services Regulatory Authority and Judicial Authority, which were established under Abu Dhabi Law No. 4 of 2013. There are two levels of courts in the ADGM: the ADGM Court of First Instance and the ADGM Court of Appeal. The Court of First Instance consists of a Civil Division, Employment Division and Small Claims Division.

### ii The framework for alternative dispute resolution procedures

The increasing number of international companies operating within the UAE, legal reforms in the region and the heavy caseload of the onshore UAE courts are the driving forces behind alternative dispute resolution (ADR) mechanisms becoming more prevalent and accepted in the UAE. These ADR mechanisms range from arbitration, mediation and other adjudicative services offered by different federal authorities and ministries.

Arbitration is a recognised method of dispute resolution that has grown in popularity since the UAE’s accession to the New York Convention in 2006. In June 2018, Federal Law 6 of 2018 (the Federal Arbitration Law) came into effect. The Federal Arbitration Law is based on the UNCITRAL Model Law and repealed the previous provisions of the UAE Civil Procedure Law, which governed arbitrations seated in the UAE (outside the DIFC and ADGM).

There is no formal legislation that governs the enforcement of decisions of conciliation boards or mediators and ADR procedures are considered contractual arrangements entered into between parties. Mediation and conciliatory services are becoming more prevalent in the UAE with these services being promoted by government authorities and ministries to assist with pre-litigation resolution of disputes.

### II THE YEAR IN REVIEW

Since 2014 there has been an influx of cases in the DIFC Courts for the enforcement and recognition of both foreign and domestic arbitral awards and foreign judgments. The catalyst for this movement was a line of judgments rendered by the DIFC Courts that held that the DIFC Courts could be used as a conduit jurisdiction to enforce foreign judgments and awards.

In (1) Egan (2) Eggert v. (1) Eava (2) Efa, the DIFC Courts enforced a foreign arbitral award without evidence of any connection to the DIFC. In Banyan Tree Pte Ltd v. Meydan Group LLC, the conduit jurisdiction of the DIFC Courts was confirmed when the DIFC Courts held that they had jurisdiction to enforce a domestic onshore Dubai award without any evidence of a connection to the DIFC. The enforcement of foreign judgments through the conduit jurisdiction of the DIFC Courts was confirmed in DNB Bank ASA v. Gulf Eyadah.

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13 Articles 203–218 of the UAE Civil Procedure Law.
14 [2013] DIFC ARB 002.
In June 2016 a Judicial Tribunal for the Dubai Courts and DIFC Courts\(^\text{17}\) (the Judicial Tribunal) was established to resolve conflicts in jurisdiction and judgments between the DIFC Courts and the onshore Dubai Courts.

The first decision rendered by the Judicial Tribunal was in *Daman Real Capital Partners Company LLC v. Oger Dubai LLC.*\(^\text{18}\) The case concerned a dispute that arose in connection with a real estate development project located within the DIFC. Oger sought to enforce a domestic award against Daman in the DIFC Courts. Proceedings seeking to annul the award were commenced by Daman before the Dubai Courts. The Judicial Tribunal concluded that the Dubai onshore courts were the competent courts to determine the validity of the arbitral award despite the fact that the project was in the DIFC. In the meantime, the DIFC Courts were directed not to deal with Oger’s request to enforce the award.

Subsequently, a series of decisions have been published by the Judicial Tribunal\(^\text{19}\) which confirm that, for the purposes of the enforcement of Dubai seated awards, the DIFC Courts shall be preferred to the Dubai Courts only where the arbitration is seated in the DIFC. Conversely, the Dubai Courts are preferred where the arbitration is seated in Dubai (outside the DIFC). Exceptionally, in *Sinbad Marine In. LLC v. Essam Abdulameer Hamadi Alsfadi Al Tamimi,*\(^\text{20}\) the Judicial Tribunal determined that the DIFC Courts had jurisdiction over the enforcement of an award rendered in Dubai (outside the DIFC), where the arbitration had been conducted pursuant to the DIFC-LCIA Arbitration Rules.

The Judicial Tribunal has also determined a number of jurisdictional challenges that do not relate to the enforcement of arbitral awards. For example, in *Point Ventures FZ Co and Others v. Tavira Securities Limited,*\(^\text{21}\) the Judicial Tribunal concluded that the DIFC Courts have exclusive jurisdiction over claims involving establishments licensed in the DIFC whether or not the establishment was in fact licensed in the DIFC at the time that the claim in dispute arose.

### III COURT PROCEDURE

#### i Overview of court procedure

The Civil Procedure Law is the key code that governs civil procedure and the litigation process in the UAE. The Civil Procedure Law applies not only to disputes brought before the onshore UAE Courts, but for the time being, also applies to domestic arbitrations, such as arbitrations with a Dubai or Abu Dhabi seat.

The DIFC Courts and ADGM Courts are governed by their own set of procedural rules. The DIFC Courts Law of 2004 and the Rules of the DIFC Courts 2014 govern procedure in the DIFC Courts. The ADGM Court Procedure Rules 2016 apply to all proceedings in the ADGM. Both the DIFC Courts and ADGM Courts have also issued a series of practice directions that supplement the rules of the courts.

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17 Decree No. (19) of 2016 establishing the Dubai-DIFC Judicial Tribunal.
18 Cassation No. 1 of 2016 (JT).
20 Cassation No. 1 of 2018 (JT).
21 Cassation No. 2 of 2018 (JT).
Procedures and time frames

Onshore UAE courts

A claim is commenced in the court of first instance by filing a statement of claim and paying the court filing fee. Following service of the summons on the defendant by an officer of the court, a first hearing is held where the defendant will usually request an adjournment to submit a statement of defence.

Provided service of process has been effected by a method permitted by the law, a case will proceed against a defendant in absentia. The plaintiff will still be required to prove its case.

During the hearings, written pleadings are submitted by advocates (typically UAE nationals) appearing on behalf of the parties. There is no set number of written pleadings prescribed in any given case. Submissions will be exchanged by the parties in turn until such time as it adjourns the case for judgment and declares the hearing closed. While a form of examination of witnesses and oral advocacy are technically permitted, in practice there is no oral advocacy or witnesses heard at hearings. Cases are determined with reliance on documentary evidence (including expert reports as referred to below) and the parties' respective legal submission.

It is common for certain aspects of a dispute to be referred to an 'expert' for assistance. The court often delegates analysis of liability and quantum issues to an expert, who is appointed from among experts listed on a court-maintained register. The court will in most cases adopt the expert's findings.

A judgment in the court of first instance is usually issued within nine to 12 months from when the proceeding was commenced. Complex cases can take up to 18 months. The appeal stages typically take less time, with the court of appeal stage taking about six to nine months to render judgment and the Court of Cassation taking about three to six months. Overall, it can take in excess of 24 months to reach a final unappealable judgment in the Court of Cassation.

DIFC Courts

Proceedings are commenced in the DIFC Courts by filing a claim form. There are three types of claim forms:

a The Small Claims Tribunal (SCT) Claim Form (Form P53/01) for claims that fall under the jurisdiction of the SCT (where the amount of the claim does not exceed 500,000 dirhams, the claim relates to employment and all parties elect that it be heard by the SCT, or the amount of the claim does not exceed 1 million dirhams and all parties elect in writing that the case be heard by the SCT).

b The Part 8 claim form (form P8/01) for claims where the claim is unlikely to involve a substantial dispute of fact or where there is a rule or practice direction that permits or requires the use of a Part 8 claim form.

c The Part 7 claim form (form P7/01), the most common method for commencing a claim, for claims that do not fall under the jurisdiction of the SCT and do not require the use of a Part 8 claim form.

The Part 7 procedure, being the most common procedure, requires the claim form to be served within four months of the claim being filed. Thereafter, the claimant is required to file an acknowledgement of service and particulars of claim. The defendant is required to file a defence within 28 days of the particulars of the claim being served. The reply to defence is
served by the claimant within 21 days of the service of the defence. Following the exchange of pleadings, the court registry will schedule a case management conference where the remaining timetable will be agreed. The timetable will usually provide for document production, witness statements, expert reports and the exchange of skeleton arguments. A hearing is ordinarily scheduled within six to nine months after the Claim Form is filed with the judgment issued within one to three months after the hearing. If the judgment of the court of first instance is appealed, it can take a further 12 months for a judgment of the court of appeal.

ADGM Courts

As with the DIFC Courts, proceedings before the ADGM Courts are also commenced by filing a claim form. The ADGM Courts have six types of claim forms.

Form CFI-1 is the standard claim form required for most claims filed before the Civil Division of the Court of First Instance. Upon filing, the claim form must include the particulars of the claim. Service of the claim form is required to be completed within four months of the claim being filed. The defendant is then required to file an acknowledgement of service within 14 days of receiving service of the claim form, and such acknowledgement must also be served on the claimant. The defendant is required to file a defence within 28 days of service of the claim. The reply to the defence is required to be filed by the claimant within 21 days of service of the defence.

Separate claim forms are required for claims filed (1) before the Small Claims Division (Form CFI-2), where the value of the claim does not exceed US$100,000 or an employment claim that both parties agree should be treated as a small claim; (2) where the claim is unlikely to involve a substantial dispute of fact, known as the ‘Rule 30 Procedure’ (Form CFI-2); (3) in which the claimant is seeking judicial review of an ADGM decision or enactment (Form CFI-4); (4) for the enforcement of an arbitration award (Form CFI-5); and (5) in respect of derivatives claims.

Urgent or interim remedies

In the onshore UAE courts, the DIFC Courts and the ADGM Courts there are a range of interim remedies available to claimants to preserve assets and prevent defendants from fleeing the country. There is also a mechanism by which a claimant can seek summary judgment.

Onshore UAE courts: travel bans

A claimant can apply for a travel ban against an individual defendant before filing a substantive claim if three conditions are satisfied. First, there must be serious reasons to believe that the defendant will flee the country. Second, the debt must be known, due for payment and unconditional. Third, the debt must not be less than 1,000 dirhams where the substantive claim has been filed or 10,000 dirhams where the substantive case has not yet been filed.

If a travel ban is issued, the court will notify all ports of exit and entry into the state, and may order that the debtor’s passport be deposited with the Treasury Department of the court. Travel bans are generally granted when there are pending criminal proceedings. They are also available where a judgment debtor does not comply with a final and enforceable judgment. The usual time frame to obtain a travel ban is in the range of three to five working days.
Onshore UAE courts: precautionary attachments

A claimant can seek a precautionary attachment order (essentially a freezing order) to prevent any disposition or dissipation of assets while the attachment remains in place.

The process for obtaining a precautionary attachment is to apply to the court without notice to the defendant (ex parte) setting out the nature and basis of the substantive claim. The court must be persuaded that there is a real risk of the defendant dissipating its assets before judgment, or that the claimant’s rights against those assets may otherwise be prejudiced if the attachment is not granted.

The application must also specifically identify the assets against which the claimant is seeking attachment. A signed undertaking to indemnify the opposing party in the event that the order is obtained on fraudulent grounds must accompany the application.

It can take three to five days to obtain a precautionary attachment order. If the order is granted, the claimant must commence substantive proceedings within eight days of the order to confirm the order. If substantive proceedings are not commenced within the prescribed time limit, the precautionary order expires.

DIFC and ADGM Courts

Both the DIFC and ADGM Courts have power to grant interim orders prior to the commencement of proceedings and without notice to the respondent (ex parte). The types of interim remedies that can be granted by the DIFC Courts are listed at Rule 25 of the Rules of the DIFC Courts and Rule 71 of the ADGM Court Procedures Rules. In both cases, the interim remedies include: interim injunctions (DIFC Rule 25.1(1)) and ADGM Rule 71(1)(a); freezing orders (DIFC Rule 25.1(6)) and ADGM Rule 71(1)(f); disclosure orders (DIFC Rule 25.1(7) and ADGM Rule 71(1)(g)); and search orders (DIFC Rule 25.1(8) and ADGM Rule 71(1)(h)).

The procedure for seeking an interim order before either the DIFC Courts or the ADGM Courts is to make an application by filing an application notice with the court (DIFC Rule 23.2 and ADGM Rule 64(3)). An application for an interim order can be made at any time, including before a claim has been commenced. The application can be made without notice if there are good reasons for doing so, such as urgency, secrecy or tipping off or an increased risk of dissipation of assets. If an application is made without notice the evidence in support of the application must state why it is being made without notice.

Class actions

There is no provision under UAE federal law for class actions or collective actions. Each claim must therefore be filed separately, although it is possible to join additional defendants to a claim. With respect to actions within the DIFC\(^{22}\) and ADGM,\(^{23}\) it is possible to obtain a Group Litigation Order (GLO) on application in circumstances where there are, or are likely to be, a number of claims giving rise to GLO issues.

\(^{22}\) See, inter alia, Rule 20.72.

\(^{23}\) See, inter alia, Rule 63.
Representation in proceedings

Onshore UAE courts

Only advocates licensed by the Ministry of Justice have rights of audience before the onshore UAE courts. The advocate must, however, be authorised by a notarised power of attorney to appear before the courts on behalf of the party he or she represents.

In practice, international law firms and foreign legal consultants licensed to advise on UAE law are actively involved in the litigation. They will instruct the advocate and work with the advocate to prepare pleadings for the advocate to submit.

Any party can represent itself in court.

A company can be represented by the chairman of the board unless the articles of association of the company provide that the general manager shall represent the company before the courts. If the proceedings reach the Court of Cassation or the Federal Supreme Court stage, an advocate licensed by the Ministry of Justice must represent the company as it is a requirement that the cassation appeal is accompanied by a declaration that is signed by that advocate.

DIFC Courts

In the DIFC Courts, only practitioners who are authorised by their firm and listed under Part I of the Academy of Law’s Register of Practitioners can issue and conduct proceedings by signing statements of truth; corresponding with the Registry regarding a case or the progression of a case; and corresponding with opposing counsel. Only practitioners who are admitted to Part II can appear and plead before a judge at hearings.

ADGM Courts

Individuals who have been practising or employed as a lawyer for a continuous period of five years immediately prior to appearing before the Court have the right to appear at hearings and plead before a judge. The exception to this is appearances before the Small Claims Division, where any person may appear subject to compliance with the ADGM Rules of Conduct.

Enforcement of foreign judgments

Foreign judgments can be enforced in the UAE in three ways: under a bilateral treaty; under the provisions of the Civil Procedure Law; or through the DIFC Courts or ADGM Courts.

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24 See: https://registrations.draacademy.ae/.
25 Rule 219 of the ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015.
Bilateral treaties

The UAE is party to a number of bilateral and multilateral conventions that provide for the reciprocal enforcement of judgments. Examples include the Paris Convention,\(^{26}\) the China Convention,\(^{27}\) the India Convention,\(^{28}\) the UK Convention,\(^{29}\) the GCC Convention\(^ {30}\) and the Riyadh Convention.\(^ {31}\)

The terms of the treaty govern the enforcement of a judgment originating from a foreign country where there is a treaty between the UAE and that foreign country. In this respect, Article 238 of the Civil Procedure Law provides that the articles relating to the enforcement of foreign judgments (i.e., Articles 235 to 237) shall be without prejudice to the provisions of any treaties between the UAE and other countries. Treaty terms prevail.

To enforce a foreign judgment, a claim for ratification of the foreign judgment must be filed in the court of first instance of the emirate where enforcement is sought. The application should state that enforcement is being sought under the relevant treaty and should be accompanied by any documents referred to in the treaty.

Civil Procedure Law

Where the UAE does not have a treaty in place with the country whose judgment is being enforced, the provisions of the Civil Procedure Law must be satisfied. Article 235 of the Civil Procedure Law applies to the enforcement of foreign judgments in the UAE (i.e., onshore).

The first hurdle for enforcing a foreign judgment is that there must be reciprocity between the foreign country and the UAE as to enforcement of judgments. If there is reciprocity, the additional conditions set out at Article 235(2)(a) to (e) must be complied with. Of these additional conditions, Article 235(2)(a) is often the most problematic as the UAE courts will not recognise a foreign judgment in circumstances where the UAE courts would have had jurisdiction over the original matter. The general jurisdiction of the UAE courts is rather broad and provides at Article 20 of the Civil Procedure Law that the courts have jurisdiction to hear actions brought against individuals or companies domiciled (or having a place of residence) in the UAE.

To enforce a foreign judgment, a claim for ratification of the foreign judgment must be filed in the court of first instance of the emirate where enforcement is sought. The application must be in Arabic and supported by evidence that demonstrates that the foreign court had jurisdiction to hear the claim, the judgment is final, the defendant was duly summoned and appeared in the proceedings and the judgment is not inconsistent with morals and public policy in the UAE.

\(^{28}\) The Agreement on Juridical Cooperation in Civil and Commercial Matters with India (2000).
DIFC and ADGM

It is possible to enforce foreign judgments by utilising the conduit jurisdiction of the ADGM or DIFC Courts even where the defendant has no assets in the ADGM or DIFC (as applicable). With respect to the DIFC, there is, however, a risk that a conflict of jurisdiction argument will be raised if the judgment debtor initiates parallel proceedings in the Dubai courts. In such cases, it is likely that a decision with respect to the court retaining jurisdiction to enforce the foreign judgment will be decided by the Judicial Tribunal.

With respect to the ADGM, no such judicial tribunal exists and the memorandum of understanding between the Abu Dhabi Judicial Department and the ADGM Courts should, in theory, govern any issues arising from conflict of jurisdiction arguments.

To enforce a foreign judgment in the DIFC Courts a claim must be filed either under Part 7 of the Rules of the DIFC Courts or under Part 8 of the Rules of the DIFC Courts if the claim is unlikely to involve a substantial dispute of fact. The judgment creditor would be seeking a declaration that the foreign court’s order is enforceable.

Once a foreign judgment is recognised and declared enforceable by a DIFC judgment, it is possible to have it executed by the Dubai Courts onshore through a summary process based upon the Judicial Authority Law.

In a similar manner to the DIFC Courts, in order to enforce a foreign judgment in the ADGM Courts, a claim must be filed before the ADGM Courts seeking a declaration of enforceability. Once the ADGM Courts have issued such declaration, the judgment may then be enforced onshore through the Abu Dhabi Courts, without a further review of the merits of the claim, in accordance with the memorandum of understanding with the Abu Dhabi Judicial Department.

Assistance to foreign courts

While the UAE is not a party to the Hague Convention on Civil Procedure 1954 or the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965, which facilitate judicial cooperation between member states, the UAE has treaties with various countries for judicial cooperation and legal assistance.

The UAE has signed treaties for various degrees of legal and judicial cooperation in civil and criminal matters including with the following countries: Afghanistan, Algeria, Argentina, Armenia, Australia, Azerbaijan, China, France, India, Indonesia, Iran, Kazakhstan, Maldives, Morocco, the Netherlands, Pakistan, Russia, South Korea, Tunisia, Ukraine, the United Kingdom and Uzbekistan. The UAE is also party to the Riyadh Convention and the GCC Convention, as discussed above.

The Civil Procedure Law does not explicitly address inward service of foreign proceedings in the UAE. Requests for legal assistance would therefore be required to comply with the treaty under which they are made.

Generally speaking, requests for legal assistance, such as relating to service of process, are made through diplomatic channels. These requests are generally required to be officially signed and authenticated by the Ministry of Justice of the requesting country, translated
into Arabic and sent to the Ministry of Justice in the UAE. Once the request is received, the UAE court will summon the party to be served and send confirmation of service through the appropriate diplomatic channels.

For example, the commonly used method of effecting service in the UAE of proceedings issued in England under the treaty\(^\text{33}\) is as follows:

\(a\) documents are submitted to the Foreign Process Section of the Royal Courts of Justice;

\(b\) the documents will be forwarded to the Foreign and Commonwealth Office in London;

\(c\) the documents will be sent to the British Embassy in the UAE;

\(d\) the documents will be passed to the UAE Ministry of Foreign Affairs;

\(e\) the UAE Ministry of Foreign Affairs will pass the documents to the UAE Ministry of Justice for the purposes of arranging service by the court bailiff or courier company.

### Access to court files

In the onshore UAE courts, the public cannot access the court file or obtain copies of the pleadings or evidence filed during the proceedings. These records are only accessible by the parties to the proceedings and their authorised legal representatives.

DIFC and ADGM Court proceedings on the other hand are public and pleadings are accessible from the Registry or the e-Registry. The exception to this is arbitration claims, which are confidential.

### Litigation funding

Third party funding of litigation or arbitration is not prohibited under UAE law and the UAE is becoming a more attractive jurisdiction for litigation funders, particularly in view of opportunities to fund claims in the ADGM and DIFC Courts.

Legal professionals cannot however offer contingency fee arrangements that are on a 'no win, no fee' basis.\(^\text{34}\)

In March 2017, the DIFC Courts issued Practice Direction No. 2 of 2017 on Third Party Funding in the DIFC Courts, which sets out the requirements to be observed by funded parties.\(^\text{35}\)

On 7 November 2018, the ADGM circulated Consultation Paper No. 6 of 2018: Litigation Funding Rules inviting public comments on proposed litigation funding rules applicable to litigation funding agreements.\(^\text{36}\)

### IV LEGAL PRACTICE

#### i Conflicts of interest and Chinese walls

**Onshore UAE**

The legal profession in the UAE is regulated by Federal Law No. 23 of 1991 (the Legal Profession Law). Each emirate also has its own independent body which governs the legal

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\(^{33}\) Footnote 23.

\(^{34}\) UAE Federal Law No. 23 of 1991 regarding the Regulation of the Legal Profession.


profession. For example, in Dubai, firms must be licensed by the Dubai Legal Affairs Department (DLAD) and in Abu Dhabi firms must be licensed with the Executive Affairs Authority.

Article 40 of the Legal Profession Law prevents a local advocate from acting against a client in a dispute in which he or she has already provided advice. Advocates are also prohibited from disclosing information they have obtained in the course of acting for a client. There is no express prohibition against an advocate acting against a client for whom he or she has previously acted, provided the advocate does not breach confidentiality and he or she has not acted for the same client in a dispute.

The DLAD is in the process of implementing the Charter for the Conduct of Advocates and Legal Consultants in the Emirate of Dubai. The current draft of this Charter prohibits lawyers from accepting instructions on a new matter or continuing to act on a matter in the event that a conflict of interest arises. Certain exceptions to this rule are provided.

Most international law firms operating in the UAE are subject to regulations in their country of origin, such as the Solicitors Regulatory Authority in England and Wales. Complaints regarding the conduct of a local advocate or legal consultant can also be made to the regulating body in each emirate, such as the DLAD, or the Public Prosecutor in the event of a breach of the Legal Profession Law.

**DIFC and ADGM**

The DIFC has in place the Mandatory Code of Conduct for Legal Practitioners in the DIFC Courts (the DIFC Code). The DIFC Code provides for practitioners in the DIFC with a benchmark for best practice and professional standards.

The DIFC Code regulates situations whereby there may be the potential of a client conflict. The Code prohibits lawyers from acting for another client where there may be a conflict and comprehensively sets out the circumstances where a lawyer must cease to act in the event of a conflict of interest.

Complaints in the event of a breach of the Code are to be made in writing to the Director of the DRA Academy of Law.

The ADGM Court Rules of Conduct 2016 (the ADGM Rules) apply to lawyers appearing before the ADGM Courts. The ADGM Rules contain mandatory provisions governing the duties owed by lawyers to the courts and clients and the ADGM Courts are able to order costs sanctions in circumstances of breach.37

**ii Money laundering, proceeds of crime and funds related to terrorism**

Lawyers are subject to the UAE’s federal anti-money laundering (AML) and combating the financing of terrorism (CFT) regime,38 which was last materially amended in 2014. Lawyers in some of the UAE’s financial free zones, such as the DIFC or ADGM, may be subject to additional AML/CFT regulation by the relevant free zone authorities.

Among other things, the AML/CFT regime imposes obligations on lawyers to conduct client due diligence to specified standards, confirm the source of wealth of politically exposed foreigners and report suspicious transactions to the Financial Information Unit of the Central

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37 Rule 203.
38 Federal Law No. 4 of 2002 concerning Combating Money Laundering and Terrorism Financing Crimes (as amended) and Federal Law No. 7 of 2014 concerning Combating Terrorism Crimes.
Bank. Criminal and regulatory sanctions, including jail sentences and fines, may be imposed on firms and lawyers who commit any of the primary AML/CFT offences, or secondary offences such as failure to report suspicious activity or ‘tipping off’.

iii Data protection

Onshore UAE

There are currently no specific privacy laws which apply ‘onshore’ in the UAE. Similarly, there is no clear definition of what will constitute ‘personal information’ under UAE law. The provisions that do exist under UAE law in relation to privacy and data protection are very general in their nature. These are rights enshrined in the UAE Constitution and the Penal Code.

The UAE is in the process of establishing a federal data privacy commission and assessing the need for a specific UAE data protection law. Any such law, if enacted, is likely to include provisions relating to storage, transfer and permitted use of personal data. It is not currently clear when the data protection law will be enacted.

In 2012, the UAE enacted a Cyber Crime Law. The law criminalises the use of information technology to commit a wide range of offences including breach of privacy and disclosure of confidential information. These offences are punishable by a fine or imprisonment or both.

DIFC and ADGM

The DIFC Data Protection Law and the ADGM Data Protection Regulations 2015 (as amended) apply to entities registered in the DIFC and ADGM (respectively), including law firms. Law firms must implement systems and safeguards to ensure that the personal data of the individual to whom the personal data relates is secure.

Law firms should obtain written consent prior to transferring any personal data outside of the DIFC or ADGM (as applicable). Personal data should not be retained for longer than necessary or for the purposes for which the personal data was collected. Policies and procedures should be put in place to ensure that personal data is reviewed regularly and, where necessary and when lawful, deleted.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

Onshore UAE

The concept of privilege as understood in common law jurisdictions does not exist in the UAE. Rather, communications between a lawyer and client are to be treated as confidential pursuant to the professional codes of conduct and laws governing the legal profession, as discussed earlier in this chapter. Any information between a client and lawyer will be confidential and there is no distinction between legal and non-legal advice.

39 UAE Cybercrime Law No. 5 of 2012.
The requirement for confidentiality applies to lawyers only and in-house counsel are not subject to privilege rules. In-house counsels will be subject to the customary duty of keeping the secrets of their employers.

**DIFC and ADGM**

There is no specific legislation in the DIFC or ADGM that deals with privilege although the concept is referred to in a number of laws and regulations applicable to both DIFC and ADGM Courts. For example, under the Rules of the DIFC Courts, privilege is recognised as a ground to withhold production of disclosable documents where it is available under the legal or ethical rules determined by the court to be applicable (a similar provision exists in the ADGM Rules). It would therefore be an issue for the DIFC Court to determine the rules of privilege that apply and whether they apply to in-house counsel.

**ii Production of documents**

**Onshore UAE**

There is only limited scope to request disclosure of inter party documents in the exhaustive circumstances listed in Article 18 of the Law of Evidence. There is no discovery in the onshore UAE courts. Parties are only required to file documents on which they wish to rely and are not required to disclose documents that may be adverse to their case.

If an expert is appointed by the court, the expert can request certain documents such as accounts and ledgers. The expert cannot, however, compel a party to comply with such a request, but failure to disclose a requested document may result in an adverse inference or finding.

**DIFC Courts**

In DIFC Court proceedings, a party is similarly only required to disclose documents on which it relies, provided the DIFC Courts are not misled. Parties may request disclosure of specific documents or categories of documents by way of a request to produce. There is an obligation to make full and frank disclosure in *ex parte* cases.

The request to produce must contain: (1) a description of the requested documents or category of documents; (2) a description of how the documents are relevant and material; and (3) a statement that the requested documents are not within the custody, control or possession of the party seeking them and are believed to be in the custody, control or possession of the other party.

A party may therefore be required to produce documents stored overseas, held by a third party or by a subsidiary or parent company, if such documents are considered to be within that party’s ‘control’.

A party may object to the disclosure of documents on the basis of the grounds listed in Rule 28.28 of the Rules of the DIFC Courts if, among other things:

- the requested documents are not relevant or material;
- the documents are privileged;
- it would be unreasonably burdensome to produce the documents or other consideration of procedural economy, fairness etc.;

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41 Article 18 of the Law of Evidence limits disclosure to material documents such as joint documents between the parties or documents relied on by the other party.
United Arab Emirates

The court can then issue a disclosure order for the production of all or some of the requested documents.

The Rules of the DIFC Courts make provision for electronic data searches and provide a list of factors that may be relevant in deciding the reasonableness of a search for electronic documents. This includes the accessibility of documents or data including servers, backup systems and other devices.

**ADGM Courts**

Proceedings before the ADGM Courts require disclosure of all documents to be relied upon during the hearing, referred to as ‘standard disclosure’. The exceptions to standard disclosure are claims before the Small Claims Division, Rule 30 proceedings and judicial review, where the obligation does not apply.

A party may apply for further or specific disclosure by virtue of an application notice. The application notice must identify the documents sought and provide an explanation as to why they would assist in the determination of the proceedings. Disclosure of documents may be objected to if a party can justify its failure to disclose. However, the ADGM Rules are not prescriptive as to the grounds upon which a party may rely.

The court retains discretion to make orders for disclosure or inspection of documents if it considers it appropriate to do so. The duty to disclose is limited to documents that are or have been in the control of the party being requested to produce.

Parties are required to cooperate at an early stage in relation to electronic documents and, in circumstances in which the volume of documents is particularly large, parties are encouraged to exchange preliminary production requests to facilitate electronic data searches.

**VI ALTERNATIVES TO LITIGATION**

i **Overview of alternatives to litigation**

Arbitration is the most commonly used method of ADR and has increased in popularity following the UAE’s accession to the New York Convention and a number of arbitration friendly developments in the region, including the establishment of international arbitration centres.

ii **Arbitration**

*The rules governing arbitration*

The recent implementation of the Federal Arbitration Law,42 based on the UNCITRAL Model Law, provides a framework pursuant to which arbitrations seated ‘onshore’ in the UAE (i.e., outside the DIFC or ADGM) are conducted.

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42 Federal Law No. 6 of 2018.
Major arbitral institutions

The major arbitral institutions in the UAE are the Dubai International Arbitration Centre (DIAC), Abu Dhabi Conciliation and Arbitration Centre, Sharjah International Commercial Arbitration Centre (Tahkeem) and Dubai International Financial Centre-London Court of International Arbitration (DIFC-LCIA). The rules of the DIFC-LCIA closely mirror the rules of the London Court of International Arbitration.

International arbitral institutions are also commonly used by parties in the region particularly in construction disputes. The International Chamber of Commerce (ICC) is the institution of preference in the majority of construction disputes. The ICC has recently opened a representative office in the ADGM to facilitate ICC-administered arbitration proceedings in the region.

Popularity

The growth in the number of arbitration institutions has contributed to the popularity of arbitration in the region. The UAE’s accession to the New York Convention and the developments with the DIFC Courts have been positive contributing factors. The popularity of arbitration can be seen from the increase in disputes which are registered with the various arbitration institutions. The DIAC, for example, reported a steady increase in cases from 77 in 2007 to 440 in 2011. While the total cases registered with DIAC declined to 169 in 2017, the trend remains positive. The decline measured against the number of DIAC arbitration cases reported in 2011 is largely due to the global financial crises and in particular a peak in real estate disputes from 2010–2012.

In 2016, 19 disputes were referred to the DIFC-LCIA Arbitration Centre, whereas the total number of cases in 2017 was reported as 58 disputes comprising 51 arbitrations, six mediations and one application to the DFSA Financial Markets Tribunal.43

Diversity in the types of matters that are being submitted to arbitration, which includes maritime, telecommunication, finance and banking, media and general commercial44 also demonstrates an increasing acceptance of arbitration across a variety of business sectors.

Certain disputes, however, are not capable of resolution by arbitration. Article 203(4) of the Civil Procedure Law provides that arbitration shall not be permissible where the subject matter of the dispute is not capable of conciliation. This includes family matters, employment matters, criminal matters, matters of public policy and any other matters that must be referred to the UAE courts as provided for in the applicable law (e.g., agency disputes in the automotive sector).

Rights of appeal

The most significant reforms brought about by the new Federal Arbitration Law address the enforceability of arbitration awards seated in the UAE (outside the DIFC or ADGM).

A UAE arbitration award is binding upon the parties to the award enforceable as a judgment of the UAE courts. An arbitration award should be executed voluntarily by the parties. Failing voluntary execution of an award by the parties, forced execution of an award against a party requires an order of a UAE court of appeal.

Enforcement proceedings commence directly before the UAE federal or local court of appeal, not before the courts of first instance (i.e., the previous position under the Civil Procedure Code). Under the Federal Arbitration Law, an application to a court of appeal seeking ratification and enforcement of an award shall be determined within 60 days of the date of the application.46

The Federal Arbitration Law sets out an exhaustive list of grounds to challenge an arbitral award inspired by Article 34 of the UNCITRAL Model Law and consistent with international standards, supplemented by additional grounds that include, for example, lack of capacity to enter into or exercise rights pursuant to the arbitration agreement as determined under the law governing his or her capacity; or procedural irregularities affecting the ability of parties to present their cases; or the award.49

Article 54 of the Federal Arbitration Law provides a 30-day time limit for a party to challenge the validity of a final arbitration award before the relevant UAE Court of Appeal.

It is possible to appeal against an order of the Court of Appeal ratifying an award and declaring it enforceable. The appeal must be made within 30 days of the Court of Appeal’s notification of the order.

Similarly, DIFC and ADGM seated arbitral awards cannot be appealed to the DIFC and ADGM Courts (respectively), but they can be set aside on the limited grounds which are set out in the DIFC Arbitration Law and the ADGM Arbitration Regulations 2015, which mirror the UNCITRAL Model Law. Any application to set aside an award before the DIFC Courts must be made within three months of the date the award was received by the party making the application.

Article 41(2)(a)(i) to (iv) of the DIFC Arbitration Law provides that the DIFC Court can set aside an award where the party seeking to set aside the award demonstrates that: (1) there was lack of capacity of parties to conclude the arbitration agreement or the arbitration agreement is not valid; (2) there was lack of notice of appointment of an arbitrator or of the arbitral proceedings or inability of a party to present his case; (3) the award deals with matters not contemplated by submission to arbitration; and (4) the composition of the arbitral tribunal or conduct of arbitral proceedings was not in accordance with the agreement of the parties.

These grounds for setting aside an award are mirrored in Article 51(1)(a) of the ADGM Arbitration Regulations.

Article 41(2)(b)(ii) of the DIFC Arbitration Law and Article 51(1)(b) of the ADGM Arbitration Regulations provides that the DIFC and ADGM Courts respectively can set aside the award where it finds that the subject matter of the dispute is not capable of settlement

45 Article 52.
46 Article 55(2).
47 Article 53(c).
48 Article 53(d).
49 Article 53(g).
by arbitration under DIFC or ADGM Law (as applicable), or the award conflicts with the public policy of the UAE. The DIFC Court may also set aside the award where the dispute is expressly referred to the jurisdiction of another tribunal or body under the applicable law.

iii Enforcement of arbitration awards

Domestic awards

An arbitral award must be ratified by the relevant supervisory court before it can be enforced in the UAE. The process to ratify an award is identical to the procedure for commencing a regular claim in the onshore UAE courts (i.e., outside the DIFC and ADGM) albeit the application should be filed before the relevant court of appeal pursuant to the Federal Arbitration Law.

The application will then be served on the defendant and the claim will proceed pursuant to the Federal Arbitration Law, which requires the Court of Appeal to order the ratification and enforcement of the award within 50 days of the date of the application, unless there was a proven reason to annul the award.50

Foreign awards

The UAE acceded to the New York Convention in 2006. The Convention provides a regime for the enforcement and recognition of arbitral awards within contracting states and sets out limited grounds on which another contracting state can rely to refuse recognition and enforcement of an arbitral award. These exceptions are similar to those listed at Article 41(2)(b) of the DIFC Arbitration Law addressed previously in the present section.

Despite the UAE’s accession to the New York Convention, in the past there have been occasional challenges with enforcing foreign arbitral awards under the provisions of the New York Convention. For example, in 2013 the Dubai Court of Cassation (erroneously in our view) refused to recognise and enforce an ICC foreign arbitral award on the basis that the award debtor did not have any assets, and was not domiciled in the UAE.51

In a number of subsequent cases, the Dubai Court of Cassation has held that the Federal Procedure Law has no application to foreign arbitral awards and has ratified and enforced foreign awards on the basis of the New York Convention.52

Recent developments and trends

The recent coming into force of the long awaited Federal Arbitration Law and subsequent reforms to the arbitration landscape, including the additional certainty provided by the decisions of the Judicial Tribunal concerning the limitations to the conduit jurisdiction of the DIFC Courts with respect to the enforcement of domestic (i.e., non-DIFC or ADGM) and foreign awards, modernises the regulatory framework underpinning UAE arbitration to bring it in line with international commercial arbitration norms globally.

50 Article 55(2).
52 See for example: Dubai Court of Cassation Case No. 132/2012.
iv Mediation

While mediation is not recognised as a formal process as it is in other jurisdictions, the UAE court system is facilitating mediation through a range of committees that are available to parties prior to formally litigating a matter.

The Dubai courts, for example, have established a Centre for the Amicable Settlement of Disputes. The Centre considers certain disputes, including disputes relating to commonly owned property or where a debt does not exceed 50,000 dirhams. If a settlement is reached, a settlement agreement is entered into by the parties that is a legally enforceable agreement and attested by a judge.

Alternative dispute resolution is also provided for in the DIFC Court Rules. A judge can invite parties to consider resolution at any stage in proceedings, where appropriate. Where disputes fall under the jurisdiction of the Small Claims Tribunal of the DIFC Courts, the parties will be invited to attend a consultation at the court for the purposes of attempting settlement.

The lack of recognition of the ‘without prejudice’ principle, however, often tempers the willingness of parties to mediate disputes prior to commencing formal litigation.

v Other forms of alternative dispute resolution

Cost pressures and the need for greater efficiencies in the resolution of disputes have led to the innovation of other ADR processes in the UAE.

The Chambers of Commerce of each of the emirates offers an arbitration and conciliation service to its members. For example, the Dubai Chamber of Commerce and Industry offers a mediation service for the amicable resolution of disputes provided that at least one of the disputing parties is a member of Dubai Chamber. The Dubai Chamber of Commerce and Industry also has the ability to conduct such mediations in English. There is, however, no specific mechanism to enforce these decisions.

VII OUTLOOK AND CONCLUSIONS

The UAE continues to take steps in the right direction with a number of reforms to the ADR arena resulting in parties employing alternative means of dispute resolution. It is also investing in the establishment and development of independent courts within financial free zones set in a regulatory framework based on international best practice.

The Federal Arbitration Law enacted in 2018 is the most significant reform to the UAE's dispute resolution landscape in over a decade. It provides a modern framework to support arbitration subject to the supervision of the UAE Courts (i.e., outside the DIFC and ADGM) and provides strict time limits and limited grounds on which parties are able to seek to frustrate arbitration proceedings by filing, for example, challenges to the appointment of the Tribunal;53 challenges to the jurisdiction of the Tribunal;54 challenges to the enforcement of interim awards;55 and challenges to the enforcement of any final award.56

53 Articles 14 and 15.
54 Articles 19 and 20.
55 Article 39.
56 Articles 53–55.
As with all new legislation, consistency in the interpretative approach taken when applying the Federal Arbitration Law will be fundamental to achieving its intended purpose, particularly in the absence of the doctrine of *stare decisis* in the UAE. However, it is expected that the reform introduced by the Federal Arbitration Law will result in increased confidence in the UAE’s legal system and thus strengthen the UAE’s position as a hub for international arbitration in the Middle East.
I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

The United States court system comprises a federal system and 50 state systems. Within each of these systems, the courts are generally divided into three levels: trial courts, intermediate appellate courts and courts of last resort.

i The federal court system

Article III of the US Constitution allows only certain kinds of cases to be heard by the federal courts. In general, these courts are limited to cases that involve issues of US constitutional law, certain disputes or suits between citizens of different states, disputes or suits between US citizens and non-US citizens, and issues that involve federal law.

The trial court level comprises 94 district courts. There is at least one federal district court in each state. Some less populous states, such as Alaska, have only one district court. More populous states, such as California and New York, have multiple district courts within the state. Within each district court there are multiple district court judges. Bankruptcy courts are separate units of the district courts. There are also two special trial courts that have nationwide jurisdiction over certain types of cases: the Court of International Trade, which hears cases involving international trade and customs issues; and the Court of Federal Claims, which hears cases involving claims for money damages against the United States, disputes over federal contracts, unlawful ‘takings’ of private property by the federal government and a variety of other claims against the United States.

Decisions of the federal district courts are appealed to a federal circuit court of appeals. There are 13 circuit courts of appeal. Each federal circuit court of appeals hears appeals from multiple district courts. For the most part, courts of appeal comprise districts that are.
geographically close to one another. The exception is the Federal Circuit Court of Appeals, whose jurisdiction is based wholly on subject matter rather than geographical location. The Federal Circuit Court of Appeals hears all appeals from any of the federal district courts in which the action included a complaint arising under the patent laws. The Federal Circuit Court of Appeals also hears all appeals from the Court of International Trade and the Court of Federal Claims.

The US Supreme Court, which consists of nine justices, is the court of last resort in the federal system. The Supreme Court is primarily an appellate court but has original jurisdiction over a very limited number of cases. In most cases, there is no automatic right of appeal to the Supreme Court. However, a party may file a petition for a writ of certiorari requesting that the Supreme Court review the ruling of the circuit court of appeals, and the Supreme Court may, at its discretion, grant the petition and review the ruling from the court below. The Supreme Court typically grants less than one per cent of certiorari petitions filed each year, most of which involve important questions about the Constitution or federal law.

District court judges, courts of appeal judges and Supreme Court justices are nominated by the President of the United States and, after hearings by the Senate Judiciary Committee, confirmed by the United States Senate.

ii State courts
Each state has its own court systems, governed by its state Constitution and its own set of procedural rules. As a result, it is very important, in practice, to check each state’s rules and procedures, as they may vary from state to state in significant respects.

As in the federal system, cases in state court begin at the trial court level. Many states have specialised trial courts that hear cases related to a very specific area of the law. These courts can include probate courts, family law courts, juvenile courts and small claims courts.

In many states, the next level in the court system is the intermediate court of appeals, which hears appeals from the trial courts. Some states have a Supreme Court that provides the final review of the decisions of the trial court.

Unlike federal judges, who are appointed, many state court judges are elected for a set term by the voters of the district in which the court resides. Thus, state court judges, in an election year, must campaign for re-election and win the election to retain their judgeship.

The state of Delaware is notable in the area of corporate law. Delaware is the favoured state of incorporation for US businesses, with over half of the Fortune 500 companies claiming

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6 For example, the Court of Appeals for the Ninth Circuit generally encompasses districts in the western portion of the United States.
7 For example, the Supreme Court has original jurisdiction over disputes between two or more states.
8 During the 2016 term, for example, the Supreme Court heard argument in 71 cases. https://www.supremecourt.gov/publicinfo/year-end/2017year-endreport.pdf.
9 Even the nomenclature varies from state to state. New York, for example, has a three-tier court system. But the lowest level, the trial court level, is called the Supreme Court, the intermediate appellate level is called the Appellate Division and the court of last resort is the New York Court of Appeals.
10 In 2009, the Supreme Court held, in Caperton v. Massey, 129 S Ct 2252 (2009), that the due process clause of the US Constitution may require a judge to recuse himself or herself under certain circumstances, including in the context of an election campaign. The Court found ‘that there is a serious risk of actual bias – based on objective and reasonable perceptions – when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent’. id. at 2263 and 2264.
Delaware as their legal ‘home’. Delaware has a special court, the Court of Chancery, devoted
to hearing cases involving corporate law disputes. These cases are heard by judges (called
chancellors or vice chancellors) who specialise in corporate law. As a result, the Delaware
courts are viewed as having particular expertise in the area of corporate law, and the decisions
of the Delaware courts are closely watched, both in the United States and overseas.

iii Alternative dispute resolution procedures
Alternative dispute resolution (ADR) mechanisms include arbitration and mediation. ADR
mechanisms are used by mutual agreement of the parties. They are discussed in more detail
in Section VI.

II THE YEAR IN REVIEW
Notable decisions of 2018 include the following cases.

i South Dakota v. Wayfair
In Wayfair, the US Supreme Court considered whether a state can require an out-of-state
seller to collect and remit taxes on sales to in-state customers when the seller has no physical
presence in the state.15

The state of South Dakota passed a law requiring out-of-state sellers to collect and remit
sales taxes if they have conducted sufficient business in the state. The case involved online
retailers that did not have a physical presence in South Dakota, but that had conducted
sufficient business in the state to be subject to its sales tax requirements. South Dakota filed
an action against these online retailers in state court, seeking a declaration that the state’s
sales tax requirements were valid and an order requiring the retailers to register for licences to
collect and remit sales taxes.

The South Dakota Supreme Court held the sales tax requirements unconstitutional
under a prior US Supreme Court case, which held that a state must have a ‘substantial
nexus’ with any activity it taxes, and that a state could only have a ‘substantial nexus’ with a
merchant’s sales if the merchant has a physical presence in that state.15

The US Supreme Court reversed and overruled its prior decision. The Court
reasoned that the physical presence requirement disadvantages local businesses, incentivises
avoidance of physical presence and imposes an arbitrary distinction that is incompatible with
the expansion of e-commerce in the modern national economy. Accordingly, the Court
concluded that South Dakota could require out-of-state sellers to collect and remit sales taxes
to in-state customers.18

11 Many commercial contracts, for example, contain express provisions to submit any claims arising from the
contract to arbitration, rather than court litigation.
13 id. at 2087.
14 id. at 2089.
15 id.
16 id. at 2099, 2100.
17 id. at 2094–97.
18 id. at 2099.
ii WesternGeco LLC v. ION Geophysical Corporation

In WesternGeco, the US Supreme Court addressed whether a damages award under the Patent Act for profits lost abroad conflicted with the presumption that federal statutes apply only within the territorial jurisdiction of the United States. The defendant had manufactured within the United States components of a technology patented by the plaintiff.

The defendant then shipped the components to companies abroad. The overseas companies combined the components to create a technology that had infringed on the plaintiff’s patent, and the plaintiff lost overseas contracts as a result. A jury found that the defendant had violated Section 271(f)(2) of the Patent Act, which prohibits the supply of components overseas with the intent that they be combined into a combination that infringes a patent, and awarded the plaintiff US$93.4 million in lost profits under the Patent Act’s damages provision, Section 284.

The defendant attempted to set aside the verdict on the basis that the court had applied Sections 271(f)(2) and 284 extraterritorially in awarding damages for profits lost abroad, thus violating the presumption ‘that federal statutes apply only within the territorial jurisdiction of the United States’.

The Supreme Court disagreed and found that the case involved a domestic, as opposed to an extraterritorial, application of the statute. The Court noted that a domestic application is found where the conduct relevant to a statute’s focus occurs in the United States. The focus of Section 284 was the act of ‘infringement’, and the act that constituted ‘infringement’ under Section 271(f)(2) was the domestic act of exporting components from the United States. The defendant’s infringing act of supplying the components to overseas companies was therefore a domestic act, and the application of Section 284 to award damages for lost foreign profits was a domestic application of the statute.

iii Epic Systems Corporation v. Lewis

In Epic Systems, the US Supreme Court considered whether arbitration agreements between employees and employers that provide only for individualised proceedings, as opposed to collective or class actions, are enforceable under the Federal Arbitration Act (FAA) in light of the protections of the National Labor Relations Act (NLRA) for employees to engage in ‘concerted activities for the purpose of collective bargaining or other mutual aid or protection’.

The case involved employees who sought to litigate their employment claims through class actions in federal court, despite having agreed with their employers to resolve any disputes between the parties through individual arbitration proceedings. The employees argued that the FAA’s saving clause, which grants courts discretion to refuse to enforce arbitration agreements ‘upon such grounds as exist in law for the revocation of any contract’, removed the courts’ obligation under the FAA to enforce their arbitration agreements as

20 id. at 2135–2136.
21 id. at 2135.
22 id. at 2136–38.
23 id. at 2137, 2138.
25 id. at 1619, 1624.
written, because the contractual provision for individualised proceedings violated the NLRA by barring employees from engaging in the ‘concerted activit[y]’ of pursuing claims as a class action.26

The Supreme Court disagreed and stated that the FAA requires ‘courts to enforce arbitration agreements according to their terms—including terms providing for individualised proceedings’.27 The Court held that the NLRA’s protections for ‘concerted activities’ should not be interpreted so broadly as to limit the application of the FAA here, and emphasised the FAA’s ‘liberal federal policy’ favouring arbitration.28 The ‘grounds’ in the FAA’s saving clause allowing courts to refuse enforcement should be interpreted to refer only to generally applicable contract defences, such as fraud and duress, and not defences attacking the ‘fundamental attributes’ of arbitration.29 Because the employees had not contested the arbitration agreements on the basis of generally applicable contract defences, the saving clause was not implicated.30

iv Janus v. American Federation of State, County, and Municipal Employees, Council

In Janus,31 the US Supreme Court re-examined whether the First Amendment to the US Constitution prohibits public employers from requiring non-union employees to pay a fee to help subsidise the union’s collective bargaining costs, where the union negotiates contracts that would apply to all public employees regardless of union membership.

Under Illinois state law, state employees are permitted to elect a union to serve as the exclusive representative of all employees within a bargaining unit. State employees within a bargaining unit are not required to join a union. However, Illinois state law permitted public-sector unions to exact ‘agency fees’ from non-member employees to pay for certain activities, such as collective bargaining.32

The petitioner in Janus argued that the compulsory agency fees violated the First Amendment, which, among other things, prohibits states from abridging the freedom of speech.33 Under a prior US Supreme Court case, public-sector agency fees did not violate the First Amendment so long as the fees only paid for activities related to the union’s ‘duties as collective-bargaining representative’ and not ‘the union’s political and ideological projects’.34 The petitioner in Janus, however, asked the US Supreme Court to overturn its prior decision, arguing that by requiring non-members to pay any fees at all to a union with which they disagreed, the state of Illinois was effectively coercing them to subsidise the political speech of a private group.35

The Supreme Court ruled in favour of the petitioner. The Court based its decision in part on the argument that a union’s collective bargaining activities with a government

26 id. at 1622 1624.
27 id. at 1619.
28 id. at 1621, 1631.
29 id. at 1622.
30 id. at 1623.
32 id. at 2460.
33 id. at 2463.
34 id. at 2460, 2461.
35 id. at 2462.
employer are ‘inherently political’. Accordingly, the Court concluded that public-sector unions cannot exact any agency fees from non-members unless the non-members affirmatively consent to pay.37

III COURT PROCEDURE

This section focuses on the procedures applicable in federal courts.38

i Overview of court procedure


ii Procedures and time frames

A lawsuit is commenced by the filing of a complaint with the court,41 a copy of which must be served, along with a summons, on the defendant.42 The defendant responds to the complaint by serving a responsive pleading, called an answer, which may include defences and counterclaims.43 Alternatively, the defendant may, rather than directly responding to the allegations in the complaint, move to dismiss the action on a variety of grounds, including lack of jurisdiction, improper venue or insufficient service of process.44

Following this initial pleading phase, the parties usually engage in ‘discovery’ (including document production and depositions). The FRCP provide for depositions,45 production of documents, including electronically stored information,46 and written discovery.47 The

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36 id. at 2480.
37 id. at 2486.
38 State court procedures are similar in many respects, but each of the 50 states has its own set of procedural rules.
39 In addition, each individual federal district may promulgate rules to supplement, and in some instances to modify, the Federal Rules of Civil Procedure (FRCP), and each individual judge within each district may promulgate rules governing proceedings in his or her courtroom.
40 Each Circuit Court of Appeals may promulgate its own rules to supplement the Federal Rules of Appellate Procedure.
41 See FRCP 3.
42 See FRCP 4.
43 See FRCP 12. The time within which to serve the answer is provided in Rule 12(a) and varies from 21 days to 90 days (in the case of a defendant who was served outside the United States) (FRCP 12(a)). In practice, extensions of these periods are often obtained.
44 See FRCP 12(b).
45 Depositions typically involve live testimony given under oath. See FRCP 30. Under limited circumstances, depositions may be conducted by submitting questions to the deponent in writing in advance of the deposition. See FRCP 31.
46 See FRCP 34.
47 See FRCP 33 (providing that a party may serve written ‘interrogatories’ (i.e., questions) on any party, and requiring the party upon whom the interrogatories are served to answer them); FRCP 36 (providing that a party may, in writing, request the other party to admit, among other things, ‘facts, the application of law to fact, or opinions about either’).
discovery phase can be an extremely time-consuming and expensive process, depending upon the complexity of the issues, the amount of potentially responsive documents and the number of potential witnesses.\footnote{48}{Recently adopted amendments to the FRCP attempt to reduce the burden of discovery by, among other things, scaling back the scope of permissible discovery by adopting the ‘proportionality rule’, pursuant to which the scope of discovery sought must be proportional to the needs of the case, considering the amount in controversy, the importance of the issues at stake in the action, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. The amendments also limit the use of depositions (FRCP 30) to reflect the ‘proportionality rule’ of FRCP 26.}

There is a special procedure for multidistrict (MDL) cases (i.e., cases involving common issues of law and fact but pending in multiple federal districts). Under 28 USC Section 1407, cases pending in multiple judicial districts are consolidated in one court for pretrial proceedings only, and then remanded to the originating court for trial. There is a judicial panel on multidistrict litigation, which decides whether cases should be consolidated under MDL and where to transfer the cases.\footnote{49}{28 USC Section 1407(c).}

Following the completion of discovery, including discovery related to expert witnesses, if any, a case proceeds to trial. Depending upon the type of claims involved, the trial may be conducted before a judge or jury. The right to a jury in civil cases is provided by the Seventh Amendment to the US Constitution, which preserves the right to a jury for ‘suits at common law’. Generally speaking, suits at common law involve claims for monetary damages, as opposed to claims for equitable, non-monetary damages, such as injunctions.

The length of any given lawsuit from time of filing to start of trial varies widely depending on a number of factors, including type of action (civil or criminal), complexity of the issues in the action and the judge to whom the action is assigned. In federal court, the median time from filing to disposition of a civil case was 9.2 months in 2017–2018.\footnote{50}{See www.uscourts.gov/file/24850/download.} For civil cases that proceed to trial, however, the median time from filing to trial was 27.3 months in 2017–2018.\footnote{51}{id.}

Prior to a trial, the FRCP provide for forms of interim relief upon a proper showing by the moving party. Under FRCP 65, a court may issue a preliminary injunction, prior to a full trial on the merits, where a plaintiff shows that it will sustain irreparable harm (i.e., harm that cannot be remedied by monetary compensation) if an injunction does not issue.

\section*{Class actions}

Class actions are permitted in the United States and are expressly authorised under FRCP 23 and various state law analogues. Class actions may be permitted ‘only if’ the case involves plaintiffs so numerous that it would be impractical to bring them all before the court; there are questions of law or fact common to the class; the claims or defences of the representative parties are typical of the claims or defences of the class; and the representative parties will fairly and adequately protect the interests of the class.\footnote{52}{See FRCP 23.} In addition, even assuming that the foregoing prerequisites to maintaining a class action are satisfied, FRCP 23(b) imposes additional requirements regarding the permissible types of class actions.
iv  **Representation in proceedings**

The right of self-representation is long-standing.\(^{53}\) The US Judiciary Act, the Code of Conduct for United States Judges, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence and the Federal Rules of Appellate Procedure address the rights of the self-represented litigant in several places. In some situations, self-represented appearances are not allowed. For example, although an owner may represent a solely owned business or partnership, only a licensed attorney may represent a corporation.

v  **Service out of the jurisdiction**

FRCP 4 governs the service of a complaint upon a defendant, including service upon defendants located outside the United States. FRCP 4(f) sets forth that:

> Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed may be served at a place not within any judicial district of the United States:

1. by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

2. if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:
   - (A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;
   - (B) as the foreign authority directs in response to a letter rogatory or letter of request; or
   - (C) unless prohibited by the foreign country's law, by:
     - (i) delivering a copy of the summons and of the complaint to the individual personally, or
     - (ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or

3. by other means not prohibited by international agreement, as the court orders.

Rule 4 of the FRCP applies to natural persons as well as corporations.

The Hague Convention typically provides the exclusive means for service of US process in signatory states. Article 1 of the Convention states that it ‘shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad’.\(^{54}\)

vi  **Enforcement of foreign judgments**

The United States is not a signatory to any treaty that requires the recognition or enforcement of foreign judgments.\(^{55}\) Nor is there any constitutional basis or federal statute requiring a foreign court judgment to be given full faith and credit by US federal courts.

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\(^{53}\) See *Faretta v. California*, 422 US 806, 812 (1975) (‘In the federal courts, the right of self-representation has been protected by statute since the beginnings of our Nation.’).


\(^{55}\) However, many of the individual 50 states in the United States have adopted the Uniform Foreign Money-Judgments Recognition Act.
Generally, however, US courts follow the principle of international comity. As announced by the Supreme Court over a century ago, international comity should be followed in those cases where:

\[T]here has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow its full effect.\[56\]

Procedurally, the holder of a foreign judgment or decree may file suit before a competent US court, which will determine, in accordance with the principles of international comity, whether to recognise and enforce the judgment.

vii Assistance to foreign courts

Litigants in foreign countries that are parties to the Hague Convention may obtain evidence in the United States pursuant to the procedures contained in the Convention. Federal courts provide international assistance to foreign courts pursuant to 28 USC Section 1782, under which parties or other interested persons involved in international proceedings can make a request to a federal district court for an order compelling discovery from a person or entity that resides or is found in the district in which the court sits. District courts have broad discretion in determining whether to grant discovery requests under Section 1782.\[57\]

viii Access to court files

There is a presumption of public access to court records.\[58\] This presumption is broad and enforcement of the right does not require a proprietary interest in the document or a showing of need for it (e.g., a need to use it as evidence in a lawsuit). The philosophy underlying the presumption of public access to court records (as well as public access to court proceedings) is that transparency promotes accountability and public confidence in the judicial system.\[59\]

Issues have arisen over whether this presumption extends to documents and other material produced in discovery. The US Supreme Court has held that, because non-filed discovery documents do not shed light on the performance of the judicial function (on which the right of public access is based), such documents are not subject to common law access rights.\[60\] In contrast, access to filed discovery material is generally held to be subject to the common law right, but limitations apply. Most notably, judges have broad discretion under the FRCP, as well as analogous state procedural rules, to issue orders that protect case-related information.

\[58\] Nixon v. Warner Communications Inc, 435 US 589, 597–99 (1978). Some states have 'sunshine laws' that recognise, and in some instances expand, this right.
from unauthorised disclosure.\textsuperscript{61} Protective orders are commonly used in litigation to protect commercially sensitive or other sensitive information from public disclosure. Many courts have procedures for filing court papers under seal under certain circumstances.\textsuperscript{62}

ix Litigation funding

Centuries ago, litigation funding by third parties was forbidden. Champerty (providing a party to litigation money in exchange for a share of the proceeds) and maintenance (providing a party money to continue the litigation) were offences at common law. Today, rules governing third-party funding of litigation are more flexible.\textsuperscript{63} Although still not common, third-party litigation financing – the practice of providing money to a party to pursue a potential or filed lawsuit in return for a share of any damages award or settlement – is becoming more prevalent in the United States. Under these arrangements, litigation-financing companies may provide financing for a variety of litigation costs, including attorneys’ fees, court fees and expert-witness fees. The rules governing these financial arrangements vary from state to state, with some states still strictly prohibiting such arrangements.

IV LEGAL PRACTICE

i Conflicts of interest and ethical walls

No single code of professional conduct or other set of rules applies to the conduct of attorneys in the United States. Rather, the ethical rules applicable to practising attorneys are determined by the individual states in which the lawyer is practising. However, the American Bar Association’s Model Rules of Professional Conduct (MRPC) provides the model on which most states base their ethical rules. The MRPC covers a broad range of conduct, including attorney competence,\textsuperscript{64} diligence,\textsuperscript{65} duty of confidentiality\textsuperscript{66} and conflicts of interest.\textsuperscript{67}

Generally, a conflict of interest is present if ‘(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer’.\textsuperscript{68}

\begin{itemize}
  \item \textsuperscript{61} See FRCP 26(c) (protective orders).
  \item \textsuperscript{62} Many courts that permit filing to be made under seal require that a ‘public’ version of the document be filed with the court. These public versions redact information that is protected from disclosure, such as financially or commercially sensitive information.
  \item \textsuperscript{63} The issue of litigation funding was addressed by the Supreme Court in 2008 in\textit{Sprint Communications Co v. APCC Services Inc}, 128 S Ct 2531 (2008). There, the Court held that an assignee of a legal claim for money had standing to pursue that claim in federal court, even when the assignee had promised to remit the proceeds of the litigation to the assignor, id. Noting that, prior to the 17th century, a suit like the one before the Court would not have been allowed, id. at 2536, the Court went on to trace the history of assignment of legal claims and concluded that ‘history and precedents . . . make clear that courts have long found ways to allow assignees to bring suit’. id. at 2541. The Court held that ‘lawsuits by assignees, including assignees for collection only’, are ‘cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process’. id. at 2542.
  \item \textsuperscript{64} MRPC 1.1.
  \item \textsuperscript{65} MRPC 1.3.
  \item \textsuperscript{66} MRPC 1.6.
  \item \textsuperscript{67} MRPC 1.7–1.11.
  \item \textsuperscript{68} MRPC 1.7.
\end{itemize}
the foregoing, MRPC 1.7(b) does allow an attorney to represent a client despite the existence of a conflict of interest if certain conditions are met. Both clients must consent to the conflict after full disclosure.69 Under what is sometimes called the ‘firm unit rule’, all lawyers of a firm are typically disqualified because of a current client conflict if any lawyer is disqualified.70 In some jurisdictions, ‘ethical walls’ allow firms to avoid disqualification if the conflict is a result of work done by a laterally hired lawyer before he or she joined his or her present firm.

ii Money laundering, proceeds of crime and funds related to terrorism

Title III of the USA Patriot Act, International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001, is intended to facilitate the prevention, detection and prosecution of international money laundering and the financing of terrorism. It amends portions of the Money Laundering Control Act of 1986 and the Bank Secrecy Act of 1970 (BSA).71 The BSA and the USA Patriot Act cover ‘financial institutions’ and require such entities to have anti-money laundering programmes and customer identification programmes.

Lawyers are not expressly covered by the USA Patriot Act or the BSA. However, criminal laws prohibiting the laundering of money apply to all individuals, including lawyers. A lawyer or law firm (like any other business) may be required to report large payments of cash or currency (i.e., payments in excess of US$10,000) made by clients.72

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

Certain communications between a lawyer and client are protected by the attorney–client privilege. “The attorney–client privilege is the oldest of the privileges for confidential communications known to common law.”73 The policy underlying this privilege is encouragement of open and honest communication between lawyers and their clients, ‘thereby promot[ing] broader public interests in the observance of law and administration of justice’.74 The privilege applies to (1) a communication, (2) made between a lawyer and a client, (3) in confidence, (4) for the purpose of seeking, obtaining or providing legal assistance to the client.75 The privilege extends only to communications, not to the underlying facts.76 When the client is a corporation, the privilege is commonly viewed as a matter of corporate

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69 MRPC 1.7(b)(4).
70 MRPC 1.8, which addresses specific rules related to conflicts of interest, provides that ‘While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.’
71 31 USC Section 5311 et seq.
72 26 USC Section 6050I.
74 id.
75 See McCormick on Evidence Section 87, n.19 (7th ed, June 2016).
76 id. at Section 89. Thus, a party cannot conceal a fact from disclosure merely by communicating it to his or her lawyer. ‘A fact is one thing and a communication concerning that fact is an entirely different thing.’ Upjohn Co, 449 US at 395, 396.
control.77 In other words, corporate management or the ‘control group’, including the officers and directors, decide whether to assert or waive the privilege. However, the attorney–client privilege does extend to mid-level and lower-level employees of a company.78

There are some exceptions to the application of the attorney–client privilege. For example, communications in furtherance of a crime or fraud, or the post-commission concealment of the crime or fraud, are not privileged. A corporation’s right to assert the attorney–client privilege is not absolute; an exception to the privilege applies when the corporation’s shareholders wish to pierce the corporation’s attorney–client privilege. In addition, if two parties are represented by the same attorney in a single legal matter, neither client may assert the attorney–client privilege against the other in subsequent litigation if the subsequent litigation pertains to the subject matter of the previous joint representation. This latter exception is known as the ‘common interest’ exception. Another important consideration is that of waiver: privileged communications that are disclosed to third parties are often deemed ‘waived’ and no longer protected from disclosure to others.

In addition, certain other communications between an attorney and a client may not fall within the privilege because they do not pertain to legal advice. For example, the general nature of the services performed by the lawyer, including the length of the retention, are generally not immune from disclosure.

Complications may arise with respect to communications with in-house counsel. A communication relating to corporate legal matters between a corporation’s in-house counsel and the corporation’s outside counsel is normally protected by the attorney–client privilege.79 However, when the communication is between a representative of the corporation and the in-house lawyer, the privilege extends only to any legal advice sought or rendered; it does not protect communications that are strictly business-related.

Separate and distinct from the attorney–client privilege, materials prepared by an attorney in anticipation of litigation or trial may be immune from discovery under what is known as the ‘work product doctrine’. The work product doctrine protects materials prepared by an attorney in anticipation of litigation or trial, regardless of whether those materials or their contents are provided or communicated to the client. The doctrine also covers materials prepared in anticipation of litigation or trial by agents (e.g., accountants or other third-party advisers) acting under the direction of an attorney. The rationale underlying the work product doctrine, as articulated by the US Supreme Court, is based upon the need for ‘a lawyer [to] work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel’.80 The Supreme Court further observed: ‘Proper preparation of a client’s case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.’81

Disclosure of work product materials to a third party (other than the client) may not waive the protection afforded under this doctrine, as long as the receiving party shares a ‘common interest’ with the disclosing party (e.g., both parties are defendants in pending

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78 id.
81 id. at 511 (‘This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs and countless other tangible and intangible ways.’).
litigation). However, materials protected from disclosure by the work product doctrine may be subject to disclosure under certain circumstances. Under Rule 26(b)(3)(a) of the FRCP, materials protected by the work product doctrine may be discoverable if the opposing party shows a 'substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means'.

ii Production of documents

FRCP 26(b)(1) permits discovery of ‘any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit’. The FRCP provide a full range of pretrial discovery devices, including discovery of expert opinions, depositions, interrogatories, production of documents, inspections and requests for admissions. Parallel state codes of civil procedure provide for similar discovery devices, generally on liberal grounds of relevance.

A party must produce all documents responsive to a document request that are in the party’s ‘possession, custody, or control’. That documents are located in a foreign country does not bar their discovery. Rather, it is the determination of the ‘control’ issue that dictates the outcome. If a domestic parent corporation, for example, is deemed to control its foreign subsidiary (because, for example, the parent controls the board of directors of its subsidiary), then the domestic parent may be compelled to produce documents located at its foreign subsidiary’s offices.

FRCP 34 expressly applies to electronically stored information. Limits on discovery (and e-discovery in particular) generally turn on whether ‘the information is not reasonably accessible because of undue burden or cost’. In the context of e-discovery, courts have articulated various formulations of this standard.

Litigants in the United States are subject to an affirmative obligation to preserve relevant evidence, including electronically stored information, once a lawsuit is commenced or the prospect of litigation becomes reasonably imminent. In the civil litigation context, once litigation is commenced, or reasonably contemplated, a corporation must suspend its routine document retention and destruction policies and put in place a ‘litigation hold’ to

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82 See FRCP 26–36.
83 FRCP 34.
84 FRCP 34(a)(1)(A).
85 FRCP 26(b)(2)(B).
86 See, for example, Zubulake v. UBS Warburg LLC, 217 FRD 309, 318 (SDNY 2003) (‘undue burden’ should turn on whether the information sought is kept in ‘accessible’ form); see generally The Sedona Principles: Best Practices Recommendations & Principles For Addressing Electronic Document Production (June 2007), Principle 2 (‘cost, burden, and need’ for electronic data must be balanced); Principle 8 (‘primary source’ of electronic data should be ‘active’ data; resort to disaster recovery backup tapes should be required only upon a showing of need and relevance that outweigh the cost and burdens of retrieval).
ensure the preservation of relevant documents.\textsuperscript{87} One recent case articulated certain acts that may support a finding of gross negligence in the context of e-discovery obligations, including ‘failure to adopt good preservation practices’.\textsuperscript{88}

Failure of a party to produce relevant documents, or failure to preserve relevant evidence once a lawsuit is commenced or litigation becomes reasonably imminent, may result in severe sanctions for the party and the party’s counsel.\textsuperscript{89} Recent court decisions have imposed harsh penalties on parties, as well as their lawyers, for failing to preserve and produce relevant documents.

Complications sometimes arise where the documents sought are located in a country whose laws protect the documents from disclosure. US courts generally balance the following factors in deciding whether a requesting party is entitled to information sought in discovery where that information is subject to the conflicting laws in a foreign jurisdiction:

\begin{enumerate}
\item the significance of the discovery and disclosure to issues in the case;
\item the degree of specificity of the request;
\item whether the information originated in the jurisdiction from which it is being requested;
\item the availability of alternative means of securing the information sought in the discovery request; and
\item the extent to which non-compliance would undermine the foreign sovereign’s interest in the information requested.\textsuperscript{90}
\end{enumerate}

\section*{VI ALTERNATIVES TO LITIGATION}

\subsection*{Overview}

Given the time, disruption and expense associated with litigation, some parties opt to settle their disputes out of court through ADR procedures. Arbitration and mediation are the most common alternatives.

\subsection*{Arbitration}

Arbitration is the submission of a dispute to one or more impartial persons for a final and binding decision. Through contractual provisions or other agreement, the parties may control the range of issues to be resolved, the scope of relief to be awarded and many procedural aspects of the process, including the location of the arbitration, the language in which the hearing will be conducted and the length of the hearing. In the United States, agreements to arbitrate are enforced (in the absence of special circumstances, such as showing of fraud) under the Federal Arbitration Act. Parties may elect to arbitrate their claims with the assistance of recognised arbitral instructions, such as those of the International Chamber of Commerce or the American Arbitration Association, or the parties may devise their own set of rules for how the arbitration will be conducted.

\textsuperscript{87} See \textit{Zubulake v. UBS Wärzburg LLC}, 220 FRD 212 (SDNY 2003); see also The Sedona Guidelines: Best Practice Guidelines & Commentary For Managing Information & Records in the Electronic Age (November 2007), Guideline 5 (‘An organization’s policies and procedures must mandate the suspension of ordinary destruction practices and procedures as necessary to comply with preservation obligations related to actual or reasonably anticipated litigation, government investigation or audit.’).


\textsuperscript{89} See FRCP 37.

\textsuperscript{90} See Restatement (Third) of Foreign Relations Law Section 442(1)(c) (1987).
The arbitration process generally offers parties cost-effectiveness owing to its speed relative to a traditional lawsuit. Parties, in a contractual arbitration provision, may predetermine the qualifications and experience of an arbitrator. Many arbitration provisions specify that the parties shall agree upon a mutually acceptable arbitrator. Unlike judges, who are randomly assigned cases without regard to background or expertise, arbitrators are often designated or chosen precisely because they have particular expertise in the matters to be arbitrated. In addition, unlike court proceedings, arbitration proceedings are confidential, with no right of public access.

Arbitration proceedings may be completed in a matter of months, resulting in lower attorneys’ fees and other expenses, through a reduced emphasis on evidentiary processes. In particular, arbitration procedures typically provide less opportunity for discovery, including a more limited exchange of documents, fewer (if any) depositions and little or no written discovery (such as interrogatories and requests for admission).

Arbitration awards are binding and are vacated only under limited circumstances, as outlined in state and federal arbitration laws. Once an award is entered by an arbitrator or arbitration panel, it must be ‘confirmed’ in a court of law. Once confirmed, the award is then reduced to an enforceable judgment, which may be enforced by the winning party in court like any other judgment. In the international context, enforcement of foreign arbitral awards is governed by the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the New York Convention. US courts will not enforce foreign arbitral awards under the Convention where the award is made in a state that is not a party to the Convention or does not reciprocally enforce US awards. Generally speaking, however, arbitration awards are more easily enforced than judgments of foreign courts.

There are some drawbacks to arbitration. Most notably, there generally is no right of appeal of an arbitrator’s award. In addition, the truncated discovery mechanism that is often used in arbitration may limit a party’s ability to discover evidence in the possession of an adversary that would be important in litigating the case.

iii Mediation

Mediation is a voluntary process in which parties to a dispute work together with a neutral facilitator – the mediator – who helps them reach a settlement. Unlike litigation or arbitration, mediation is not an adversarial process. The mediator does not decide the case. The results of mediation are binding if and when parties enter into a settlement contract.

A mediation process can be scheduled at any time during arbitration or litigation. Parties generally save money through reduced legal costs and less staff time. Like arbitrators, mediators are often selected on the basis of their specialised expertise in the issues subject to mediation. Generally, information disclosed at a mediation may not be divulged as evidence in any subsequent arbitral, judicial or other proceeding.

VII OUTLOOK AND CONCLUSIONS

The Supreme Court has several interesting cases on its docket for the upcoming year. For example, in Tennessee Wine and Spirits Retailers Association v. Byrd, the Supreme Court will
decide whether the Commerce Clause of the US Constitution, which prohibits states from discriminating against interstate commerce, permits a state to condition the granting of liquor licences upon periods of residency in the state. In *Timbs v. Indiana*, the Supreme Court will determine whether the Eighth Amendment’s excessive fines clause, which prohibits the government from imposing fines disproportionate to an offence, applies to fines imposed by state governments or solely to fines imposed by the federal government. In *Fourth Estate Public Benefit Corporation v. Wall-Street.com*, the Court will determine whether the Copyright Act, which requires a claimant to register a copyright before bringing an infringement lawsuit, permits a claimant to bring suit as soon as the claimant has delivered all required registration documents and fees to the Copyright Office.
I  INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

Delaware courts resolve many of the United States' highest-profile commercial and corporate disputes, which often involve foreign individuals or entities. Businesses and legal practitioners throughout the United States and abroad hold Delaware state and federal courts in high regard, based on the sophistication of the judges and the ability of the courts to move as quickly as necessary to grant meaningful relief.

Delaware is the site of one federal district court, the US District Court for the District of Delaware. A disproportionate number of the patent cases in the United States are heard in the US District Court for the District of Delaware. Appeals from the US District Court are heard by the US Court of Appeals for the Third Circuit and, if warranted, by the US Supreme Court. There is also a US Bankruptcy Court in the District of Delaware.

The Delaware state court system is a two-tier system, meaning that decisions of the state’s trial courts – the Superior Court and the Court of Chancery – are appealed directly to the Delaware Supreme Court. In contrast, many of the states in the United States have an intermediate appellate court between the trial courts and the highest state court of appeal.

The Court of Chancery is a court of equity, conferred with statutory jurisdiction to hear and determine all matters and causes in equity. It also has jurisdiction to interpret, apply, enforce or determine the validity of corporate instruments and to hear actions relating to limited liability companies (LLCs) and partnerships, including limited partnerships. Seven judges – one chancellor and six vice chancellors – sit on the Court of Chancery. Two Masters in Chancery assist the chancellor and vice chancellors in adjudicating and managing disputes before the Court of Chancery. There are no juries in Court of Chancery proceedings, and the Court does not hear criminal cases.

Based on the Court of Chancery's statutory jurisdiction to hear corporate disputes, and the fact that Delaware is the domicile of many major corporations, the Court of Chancery hears numerous business and corporate disputes of wide significance. Over the past decade, with the increased popularity of LLCs and other 'alternative entities', the Court of Chancery has heard a growing number of cases relating to such entities. In addition, because it is a court

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1 Elena C Norman is a partner, Lakshmi A Muthu is a senior associate, and James M Deal is an associate at Young Conaway Stargatt & Taylor, LLP.
2 10 Del. C. Section 341.
3 8 Del. C. Section 111.
4 6 Del. C. Section 18-111.
5 6 Del. C. Section 15-122.
6 6 Del. C. Section 17-111.
of equity, litigants frequently apply to the Court of Chancery for preliminary injunctions and status quo orders pending final resolution of a matter. Many cases in the Court of Chancery are tried on an expedited schedule, particularly when the parties seek preliminary equitable relief.

The Superior Court is a court of law where litigants have the right to elect trial by jury. The Superior Court has original jurisdiction over criminal cases meeting a threshold level of seriousness and civil cases involving amounts in excess of US$50,000—other than equity matters and domestic relations matters (which are heard by the Delaware Family Court). Absent certain exceptions, where such a civil case involves an amount in controversy of US$1 million or more, it will generally be assigned to the Superior Court’s Complex Commercial Litigation Division (CCLD). CCLD litigants may receive priority in setting trial dates and, if requested, expedited case schedules. Since its establishment in May 2010, the CCLD has become an increasingly popular forum for filing business disputes where legal remedies are sought.

II THE YEAR IN REVIEW

The past 12 months witnessed several Delaware decisions regarding the ability of litigants to pursue claims in Delaware against foreign defendants. These decisions provided insight into the Delaware courts’ application of the doctrine of forum non conveniens (a common law doctrine that gives courts discretion to decline jurisdiction over an action when a defendant demonstrates that it would face overwhelming hardship); their exercise of personal jurisdiction over foreign defendants under the ‘conspiracy theory’ of personal jurisdiction; and the courts’ ability to compel foreign parties’ compliance with court orders through sanctions, findings of contempt, and even, in the case of individuals found in contempt, through orders of arrest.

In *Aranda v. Philip Morris USA Inc*, the Delaware Supreme Court addressed the narrow issue of whether, before dismissing a case under the doctrine of forum non conveniens, ‘the trial court must first determine that an available alternative forum exists’. Although most other American jurisdictions, including United States federal courts, do consider availability of an alternative forum to be a threshold requirement for dismissal under this doctrine, the Delaware Supreme Court held in *Aranda* that ‘an available alternative forum should be considered as part of the forum non conveniens analysis, but is not a threshold requirement’, thereby joining the minority of American jurisdictions.

The dispute in *Aranda* arose from an Argentine tobacco brokerage company requiring its tobacco-growing clients to use a particular company’s herbicide in their Argentine farming operations. These clients, the owners and operators of small family farms, brought suit in

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7 Delaware also has a Court of Common Pleas, which has jurisdiction over, among other things, misdemeanours and civil disputes where the amount in controversy does not exceed US$50,000, and a Justice of the Peace Court, which has jurisdiction over civil cases involving debt, trespass and replevin where the amount in controversy does not exceed US$15,000.


10 183 A.3d 1245 (Del. 2018).

11 Id. at 1247.
the Delaware Superior Court against numerous United States and foreign entities, including the tobacco brokerage, its parent entities, and the maker of the herbicide, alleging that they ‘willfully and recklessly ignored knowledge . . . of the health hazards’ related to the use of these herbicides.\(^\text{12}\) Two of the defendant entities – one incorporated in Delaware and headquarted in Virginia, and the other incorporated and headquartered in Delaware – brought a motion to dismiss based on *forum non conveniens*. The Superior Court granted the motion, ‘finding that those defendants would face overwhelming hardship if forced to litigate in Delaware’.\(^\text{13}\) After the Superior Court denied a motion for clarification or, alternatively, for reargument, holding in relevant part that the finding of an available alternative forum is just one consideration, but not a requirement, under the doctrine of *forum non conveniens*, and that the Superior Court had considered that factor regardless, the plaintiff appealed the Superior Court’s ruling, and the Delaware Supreme Court affirmed.

In affirming the ruling, the Delaware Supreme Court acknowledged that ‘the federal courts and most state courts require an available alternative forum before dismissing for *forum non conveniens*’.\(^\text{14}\) Nonetheless, the Court, with one of its five justices disagreeing in a concurrence, found that ‘treating the issue as a factor to be considered, rather than as a requirement, gives the issue the weight it deserves in the *forum non conveniens* analysis’, given that ‘[m]uch has changed in the *forum non conveniens* landscape’ since its recognition by the US Supreme Court in 1947, and that ‘[i]t is not unfair to suggest that, rather than requiring cases to proceed in Delaware in the absence of an alternative forum, the Superior Court should consider, on a case-by-case basis, whether the court’s resources should be deployed to resolve cases with little connection to Delaware – as the court did here’.\(^\text{15}\) The Court added that, ‘[a]lthough we are in the minority on the issue, we are not alone in our concern over the court’s use of limited judicial resources by litigants who, along with their disputes, have no meaningful contact with the forum state’, citing as an example the New York Court of Appeals.\(^\text{16}\) Although there remains the concern that ‘plaintiffs who have been injured by Delaware corporations might not be able to bring cases in Delaware against those defendants’, the Delaware Supreme Court stated that the concern ‘has not been ignored’ as the availability of an alternative forum does remain a factor in the *forum non conveniens* analysis, and as ‘[t]he degree of the Delaware corporate defendant’s connection to the alleged wrong will still be considered’.\(^\text{17}\)

In *Reid v. Siniscalchi*,\(^\text{18}\) the Delaware Court of Chancery granted a motion for summary judgment based on lack of personal jurisdiction over a necessary party, even though the plaintiff had overcome a much earlier motion to dismiss brought on the same basis. The dispute arose from a single agreement relating to a commercial satellite venture entered between nominal defendant US Russian Telecommunications LLC (USRT), an entity formed under Delaware

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\(^\text{12}\) id. at 1248.

\(^\text{13}\) id. at 1248.

\(^\text{14}\) id. at 1251.

\(^\text{15}\) id. at 1252 and 1253. While the Delaware Supreme Court referenced only the Superior Court in this opinion (given the Superior Court’s involvement in this action), the holding applies equally to the doctrine of *forum non conveniens* as applied in the Court of Chancery.

\(^\text{16}\) id. at 1253 (citing *Islamic Republic of Iran v. Pahlavi*, 467 N.E.2d 245 (N.Y. 1984)).

\(^\text{17}\) id. at 1254.

\(^\text{18}\) 2018 Del. Ch. LEXIS 37, C.A. No. 2874-VCS (Del. Ch. Jan. 30, 2018). A previous ruling in this case, relating to Delaware courts’ strict construal of choice-of-law provisions, was summarised in last year’s Delaware chapter of *The Dispute Resolution Review*.  

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law, and defendant Finmeccanica, SpA (FIN), an Italian state-controlled entity. USRT had engaged the plaintiff, Dennis Reid, to assist in obtaining financing, and USRT thereafter pursued financing from the Italian government through the services of defendants Vincenzo Davide Siniscalchi and Giorgio Capra. The upshot of these negotiations was the agreement at issue, which was expressly governed by the laws of the United Kingdom and provided for dispute resolution through binding arbitration under the International Chamber of Commerce’s Rules of Conciliation and Arbitration, with venue in London. Despite these express choice-of-law and venue provisions, the plaintiff initiated suit in Delaware, alleging, *inter alia*, a civil conspiracy among Capra, Siniscalchi and FIN to misappropriate the subject satellite development programme for FIN’s benefit.

The plaintiff’s earlier success in defeating a motion to dismiss was based on his alleging a ‘conspiracy theory’ of personal jurisdiction. Under such a theory, as recognised in Delaware courts, ‘a substantial Delaware act by a conspirator in furtherance of the conspiracy may be attributed to non-resident co-conspirators if the co-conspirators knew or had reason to know of that act and the act in [Delaware] was a direct and foreseeable result of the conduct in furtherance of the conspiracy. In turn, if a conspirator’s conduct in furtherance of the conspiracy subjects him to the jurisdiction of Delaware’s courts, then the attribution of that conduct to non-resident co-conspirators will subject all of the conspirators to the jurisdiction of the Delaware courts’.19 Although, at that earlier stage, the Court had found that the evidence of a conspiracy was ‘not especially strong’, the Court had nonetheless held that the plaintiff’s factual allegations, taken as true at that stage of the proceedings, were sufficient to survive the motion to dismiss.20

That was not the case on summary judgment review. ‘As if to reveal the shocking twist in the final pages of a lengthy thriller novel’, the Court explained, ‘the now-developed evidence demonstrates that Plaintiff has managed . . . to misdirect the Court by projecting onto FIN his own scheme to exclude the former members of USRT from the satellite project’s benefits.’21 Because ‘the only jurisdictional hook proffered by Plaintiff . . . ha[d] been revealed in the competent undisputed evidence to be a fiction’, the Court granted the motion for summary judgment based on lack of personal jurisdiction over necessary party FIN.

In *Deutsch v. ZST Digital Networks, Inc.*,22 the Delaware Court of Chancery addressed whether to hold in contempt and order the arrest of two foreign executives of a Delaware corporation, both citizens of the People’s Republic of China, for failure to comply with directions of a receiver appointed to enforce the corporation’s compliance with a default judgment entered in the underlying action. Although the Court ultimately determined that, based on due process concerns, further proceedings were required before issuing arrest warrants, this decision underscores that, by becoming an executive in a Delaware corporation – no matter one’s citizenship, a lengthy chain of holding companies, or any attempt to avoid litigation relating to corporate conduct – an individual may be subject to personal jurisdiction in Delaware and therefore could be disciplined, even arrested, for failure to obey a Delaware court’s orders, within the confines of due process.

19 id. at *29–30 (emphasis and alteration in original) (quoting *Istituto Bancario Italiano SpA v. Hunter Eng’g Co.*, 449 A.2d 210, 225 (Del. 1982)).
20 id. at *6.
21 id. at *6–7.
ZST Digital Networks, Inc (ZST), the defendant in this action, was incorporated in Delaware and served as the ultimate parent entity in an extensive holding company structure, with a father and son, both citizens of the People's Republic of China, serving as its principal directors and officers. At the base of the tower of corporate ownership was Zhenzhou Shenyang Technology Company, an entity organised under the laws of China that served as the various holding companies’ operating entity. The plaintiff was one of the chief investors in ZST and brought suit against ZST, seeking inspection of books and records under Delaware law (8 Del. C. Section 220), after the company allegedly went ‘dark’ and stopped disclosing financial information.\(^\text{23}\) ZST, however, did not respond to the litigation, and default judgment was entered. After ZST failed to comply with the default judgment, the Court of Chancery held the company in contempt, and, among other forms of relief, appointed a receiver with broad powers to compel the company’s compliance. Ultimately, despite extensive efforts by the receiver, the executives did not comply with the receiver’s directions, and the receiver filed a motion to hold the executives in contempt and to issue a bench warrant for their arrest.

As the Court of Chancery explained, ‘[t]he senior officers previously ignored this action’, but ‘[f]aced with the current motion, they hastily appeared and raised a slew of objections, which this decision rejects’.\(^\text{24}\) The Court noted that ‘[a]n order issued to a corporation is identical to an order issued to its officers, for incorporeal abstractions act through agents’,\(^\text{25}\) and that ‘the [executives] have continued to exercise actual, real-world control over the Company’s property and have used that control to resist the authority of the receiver’, which is ‘sufficient to make them subject to a potential finding of contempt’.\(^\text{26}\) The Court also stated that it was ‘not even a close call’ that the executives were subject to personal jurisdiction in Delaware,\(^\text{27}\) for ‘by becoming a director and officer of a Delaware corporation” each of [them] “purposefully availed himself of certain duties and protections under our law”,’ and ‘[t]his action and the potential imposition of contempt sanctions arises from [their] acceptance of those position[s]’.\(^\text{28}\) Nonetheless, the Court held that ‘the facts of the case call for additional proceedings before issuing arrest warrants’.\(^\text{29}\) That was because ‘the Constitution sets a floor, not a ceiling’ when it comes to the requirements of due process,\(^\text{30}\) and while these executives’ opportunity to brief and argue the receiver’s motion satisfied their due process rights, additional steps were warranted because ‘the receiver’s request for a coercive sanction requires careful scrutiny’ and could require elaborate factfinding.\(^\text{31}\) For these

\(^{23}\) For ease of reference, this summary recites the facts as stated in the opinion, but notes that such facts are based solely on the plaintiff’s allegations, which the Court of Chancery treated as true for purposes of this decision based on the default judgment entered against the defendant. See id. at *3 (citing Whitwell v. Archmere Acad., Inc, 2008 Del. Super. LEXIS 141 (Del. Super. Apr. 16, 2008)).

\(^{24}\) id. at *2.

\(^{25}\) id. at *24–25 (quoting Reich v. Sea Sprite Boat Co., Inc, 50 F.3d 413, 417 (7th Cir. 1995) (Easterbrook, J.)).

\(^{26}\) id. at *25.

\(^{27}\) id. at *29.

\(^{28}\) id. (quoting Hazout v. Tsang Mun Ting, 134 A.3d 274, 292 (Del. 2016)).

\(^{29}\) id.

\(^{30}\) id. at *35 (quoting Robinson v. Govt. of the Dist. of Columbia, 234 F. Supp. 3d 14, 24 (D.D.C. 2017)).

\(^{31}\) id.
reasons, the Court of Chancery provided the executives 60 days to comply with the Court’s order, meaning ‘the [executives] will be able to purge the sanction of coercive imprisonment’ through such compliance.\textsuperscript{32}

As shown in the above described cases, over the past year, Delaware courts have refined the doctrine of \textit{forum non conveniens} to permit flexibility in balancing the overwhelming hardship faced by a defendant with the availability of an alternative forum and have iterated that the ‘conspiracy theory’ of personal jurisdiction will be narrowly interpreted and will not be upheld on falsehoods. Further, it remains true that foreign individuals who agree to serve as directors or officers of a Delaware entity may be subjecting themselves to personal jurisdiction for entity-related litigation and, when under such jurisdiction, must comply with court orders or face the risk of contempt, including the potential for arrest, as long as such measures fall within the confines of constitutionally guaranteed due process.

\section*{III \hspace{2mm} COURT PROCEDURE}

\hspace{1em} \textbf{i \hspace{2mm} Overview of court procedure}

Every court in Delaware has its own rules governing procedure. The Federal Rules of Civil Procedure and the Federal Rules of Evidence govern civil practice and procedure in the US District Court for the District of Delaware, and are supplemented by the Court’s Local Rules of Civil Practice and Procedure. The rules governing civil practice and procedure in Delaware’s state courts are largely based on the Federal Rules of Civil Procedure\textsuperscript{33} and the Federal Rules of Evidence.\textsuperscript{34}

Of particular importance to business and commercial law practitioners are the rules of the Superior Court and the rules of the Court of Chancery. Both courts regularly update their procedures to address the needs of practitioners.

\hspace{1em} \textbf{ii \hspace{2mm} Procedures and time frames}

In all Delaware state courts, there are generally four phases of litigation: pleadings, discovery, trial and judgment.

\textit{Pleadings}

Litigation in Delaware is typically commenced by filing a complaint electronically.\textsuperscript{35} A complaint must contain ‘(1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which the party deems itself entitled’.\textsuperscript{36} After filing the complaint, service of the complaint and a summons must be made on the defendant.\textsuperscript{37} The defendant must generally respond to the complaint within

\hspace{1em} \textsuperscript{32} id. at *36–37.


\hspace{1em} \textsuperscript{34} See D.R.E. 101-1103. The Delaware Uniform Rules of Evidence govern proceedings in all Delaware state courts. See D.R.E. 101, 1101.

\hspace{1em} \textsuperscript{35} See Super. Ct. Civ. R. 3(a); Ct. Ch. R. 3(a).

\hspace{1em} \textsuperscript{36} Super. Ct. Civ. R. 8(a); Ct. Ch. R. 8(a). However, when pleading fraud, negligence, or mistake, the pleader must state the circumstances constituting such claims with particularity. Super. Ct. Civ. R. 9(b); Ct. Ch. R. 9(b).

\hspace{1em} \textsuperscript{37} Super. Ct. Civ. R. 4(j); Ct. Ch. R. 4(d).
20 days of service.\textsuperscript{38} In the Superior Court, civil cases are subject to compulsory alternative dispute resolution.\textsuperscript{39} This means that before a civil case can go to trial in the Superior Court, the parties must attempt to resolve their dispute through arbitration, mediation or neutral assessment.\textsuperscript{40}

**Discovery**

As under the Federal Rules, the scope of permissible discovery in Delaware state courts is broad; parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to a claim or defence.\textsuperscript{41} Many types of discovery are authorised: depositions, written interrogatories, production of documents or electronically stored information, permission to enter upon land for inspection, physical and mental examinations, and requests for admission.\textsuperscript{42} Delaware state courts have discretion to limit the scope of discovery if, for example, it is unreasonably burdensome.\textsuperscript{43}

Delaware state courts have recognised the importance of electronic discovery. Effective 1 January 2013, the Court of Chancery amended its discovery rules to specifically address electronically stored information (ESI).\textsuperscript{44} Opposing parties and their counsel should confer regarding the preservation of ESI early in the litigation and attorney oversight of the identification and preservation processes is very important. In *EORHB, Inc v. HOA Holdings, LLC*, the Court of Chancery directed parties to use technologies such as ‘predictive coding’ to select documents for production when a large quantity of electronically stored documents is involved.\textsuperscript{45}

**Trial**

Delaware has an adversarial system of trial in which the opposing parties have the responsibility and initiative to find and present proof.\textsuperscript{46} Lawyers are expected to act as zealous advocates for

\begin{itemize}
  \item Super. Ct. Civ. R. 12(a); Ct. Ch. R. 12(a).
  \item Super. Ct. Civ. R. 16(b)/(a).
  \item The Superior Court rules do not mandate that compulsory alternative dispute resolution occur at any particular stage of litigation. Instead, litigants typically negotiate a date by which they will conduct alternative dispute resolution and include such date in proposed scheduling orders presented to the Superior Court.
  \item Super. Ct. Civ. R. 26(b)(1); Ct. Ch. R. 26(b)(1).
  \item Super. Ct. Civ. R. 26(a); Ct. Ch. R. 26(a).
  \item Super. Ct. Civ. R. 26(b)(1); Ct. Ch. R. 26(b)(1).
  \item See, e.g., *Sokol Hldg, Inc v. Dorsey & Whitney LLP*, 2009 Del. Ch. LEXIS 142, at *38–42 (Del. Ch. 5 August 2009) (limiting discovery in a fee dispute case to particularly relevant individuals and reasonable time periods, because, inter alia, ‘discovery into compensation structure [of attorneys] is somewhat duplicative of knowledge that is already available to the court, namely that any attorney billing by the hour has some incentive to increase the hours billed’); *Spanish Tiles Ltd v. Henney*, 2007 Del. Super. LEXIS 105, at *8–9 (Del. Super. 13 April 2007) (limiting discovery to make it ‘reasonable and without undue burden’).
  \item Press Release, Court of Chancery Announces Rule Changes and New Discovery Guidelines (4 December 2012), available at https://courts.delaware.gov/Forms/Download.aspx?id=65878. These changes are consistent with similar amendments to the Federal Rules of Civil Procedure, and they became effective on 1 January 2013, id.
  \item See *EORHB Inc v. HOA Hldgs LLC*, C.A. No. 7409-VCL, at 66–67 (Del. Ch. 15 October 2012) (TRANSCRIPT).
  \item In *re Appraisal of Shell Oil Co*, 1990 Del. Ch. LEXIS 199, at *14 (Del. Ch. 11 December 1990), aff’d, 607 A.2d 1213 (Del. 1992).
\end{itemize}
their clients’ positions. In particular, courts view adequate cross-examination as critical. Trials are presided over by a single judge and, in some instances, may be before a jury in addition to a judge. In the Superior Court, any party may demand a trial by jury of either six or 12 jurors. In the Court of Chancery, however, there are no juries, and a party therefore does not have a right to a trial by jury. In jury trials, jurors make findings of fact while judges make findings of law. In non-jury trials, judges make findings of both fact and law.

**Judgment**

There are numerous ways to obtain a judgment in Delaware state courts. One is a judgment entered after a trial. In addition, a party can seek judgment from the court by making a motion for judgment on the pleadings after the pleadings are closed but within such time as not to delay the trial. Alternatively, a party can move for summary judgment. The court will grant summary judgment if the pleadings, discovery and affidavits show that there is ‘no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law’. In the Superior Court a party can move for a directed verdict, which is also known as a judgment as a matter of law. Specifically, ‘if during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the Court may determine the issue against the party.’

If a party receives an adverse final determination in a civil action in Superior Court or the Court of Chancery, that party has an absolute right to appeal the determination to the Delaware Supreme Court. Subject to certain rules, a party may seek an interlocutory appeal to the Delaware Supreme Court, which has discretion over whether to accept such appeal.

**iii Class actions**

Delaware courts allow class actions. In considering a motion for class certification, the court first considers whether the moving plaintiff has demonstrated numerosity of the potential class, commonality of claims, typicality of claims, and adequacy of the class representative. The moving plaintiff must also show one of the following factors:

- that separate actions by or against individual class members would create a risk of inconsistent adjudications or would have an impact on class members not part of the adjudications by impairing their ability to protect their interests;

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47 Del. Lawyers’ R. Prof’l Conduct pmbl.
50 See Ct. Ch. R. 38.
53 Super. Ct. Civ. R. 12(c); Ct. Ch. R. 12(c).
54 Super. Ct. Civ. R. 56; Ct. Ch. R. 56. When deciding whether to grant a motion for summary judgment, a Delaware court can consider matters outside of the pleadings. See Super Ct. Civ. R. 12(c); Ch. Ct. R. 12(c).
55 Super. Ct. R. 56(c); Ct. Ch. R. 56(c).
57 Reid v. Spazio, 970 A.2d 176, 181 (Del. 2009).
58 Supr. Ct. R. 42(a).
that the party opposing the class has acted or refused to act on grounds generally applicable to the class; or

c. that common questions of law or fact predominate over any questions affecting only individual members, and a class action is superior to other methods for adjudication of the controversy.\textsuperscript{60}

Class action settlements require the approval of the court.\textsuperscript{61} Notably, the Court of Chancery, in a number of disputes between plaintiff shareholders and corporate defendants, has approved class action settlements and fee awards to plaintiff attorneys based solely on therapeutic benefits, as opposed to monetary benefits.\textsuperscript{62} But the Court of Chancery has questioned such settlements. Though, in \textit{BVF Partners LP v. New Orleans Employees' Retirement System},\textsuperscript{63} the Delaware Supreme Court held that it was an abuse of discretion not to permit a significant shareholder with a claim for monetary damages to opt out of a class action settlement that was based solely on non-monetary consideration.\textsuperscript{64}

\textbf{iv. Representation in proceedings}

Litigants who are natural persons may represent themselves in civil proceedings in Delaware state courts. Delaware courts have stated that they will provide \textit{pro se} litigants with some leniency regarding compliance with court procedures.\textsuperscript{65} Legal entities cannot represent themselves.\textsuperscript{66} 

\begin{itemize}
\item \textsuperscript{60} \textit{Super. Ct. Civ. R. 23(b); Ct. Ch. R. 23(b).}
\item \textsuperscript{61} \textit{Super. Ct. Civ. R. 23(e); Ct. Ch. R. 23(b).}
\item \textsuperscript{62} See, e.g., \textit{In re Celera Corp Shareholder Litig}, 2012 Del. Ch. LEXIS 66, at *2–6 (Del. Ch. 23 March 2012) (approving a settlement of a class’s claims in connection to a merger based solely on therapeutic benefits), rev’d in part on other grounds by \textit{BVF P’s LP v. New Orleans Empls Ret Sys}, 59 A.3d 418 (Del. 2012); \textit{In re Sauer-Danfoss Inc Shareholders Litig}, 65 A.3d 1116, 1136, 1141–42 (Del. Ch. 2011) (awarding attorney’s fees for efforts in obtaining a class action settlement based purely on supplemental disclosures, but noting that ‘[a]ll supplemental disclosures are not equal’); \textit{In re Countrywide Corp Shareholders Litig}, 2009 Del. Ch. LEXIS 155, at *15, *26 (Del. Ch. 24 August 2009) (approving a proposed settlement and finding that ‘settlement for only therapeutic disclosures is neither unfair nor unreasonable’ because the party’s ‘potential federal securities law claims possess no obvious value’).
\item \textsuperscript{63} 59 A.3d 418 (Del. 2012).
\item \textsuperscript{64} id. at 436–37.
\item \textsuperscript{65} See, e.g., \textit{Sloan v. Segal}, 2008 Del. Ch. LEXIS 3, at *26 (Del. Ch. 3 January 2008) (‘Delaware courts, at their discretion, look to the underlying substance of a pro se litigant’s filings rather than rejecting filings for formal defects and hold those pro se filings to ‘a somewhat less stringent technical standard’ than those drafted by lawyers’ (footnote omitted) (quoting \textit{Vick v. Haller}, 522 A.2d 865, 1987 Del. LEXIS 1046, at *3 (Del. 1987))).
\item \textsuperscript{66} See \textit{Harris v. RHH P’s LP}, 2009 Del. Ch. LEXIS 42, at *6 (Del. Ch. 3 April 2009) (reminding ‘the parties of the general rule that artificial business entities may appear in Delaware courts only through an attorney admitted to practic[e] law in Delaware’); \textit{Caldwell Staffing Servs v. Ramnattan}, 2003 Del. Super. LEXIS 23, at *12 (Del. Super. 29 January 2003) (noting that ‘corporations must be represented by an attorney in court proceedings’) (citation omitted).
\end{itemize}
Service out of the jurisdiction

Natural persons and legal entities may be served with legal process outside Delaware. Delaware's primary vehicle for service of process outside the state is its long-arm statute. This statute authorises service of process outside Delaware on any individual or entity that:

- transacts any business or performs any work or service in Delaware;
- contracts to supply services or things in Delaware;
- causes tortious injury in Delaware by an act or omission in Delaware;
- causes tortious injury in or outside of Delaware by an act or omission outside Delaware if the person or entity engages in a persistent course of conduct in Delaware or derives substantial revenue from services or things used or consumed in Delaware;
- has an interest in, uses or possesses real property in Delaware; or
- contracts to insure or act as surety for, or on, any person, property, risk, contract, obligation or agreement located, executed or to be performed within Delaware at the time the contract is made.

Enforcement of foreign judgments

Parties seeking to enforce a foreign judgment in Delaware have two options. First, a party can bring an action requesting a Delaware court to recognise and enforce the foreign judgment. A Delaware court will recognise a foreign judgment 'if it concludes that a foreign court with jurisdiction rendered the judgment after a full and fair trial'.

Second, a party can utilise Delaware's Uniform Foreign-Country Money Judgments Recognition Act. This Act applies to foreign judgments that grant or deny recovery of money and are final, conclusive and enforceable under the law of the country where rendered. To seek enforcement of a foreign-country judgment under this Act, a party must file an action seeking recognition of the foreign-country judgment. If a court finds that the foreign-country judgment is entitled to recognition, then, to the extent that the foreign-country judgment grants or denies recovery of a sum of money, the foreign-country judgment is conclusive between the parties and enforceable in the same manner and to the same extent as a judgment rendered in Delaware.

Assistance to foreign courts

The rules of the Delaware state courts do not include specific provisions on assisting foreign courts. However, Delaware courts have acknowledged that 28 USC Section 1782, a federal statute, exists to provide foreign tribunals with assistance from American federal courts in
obtaining discovery in the United States. Under 28 USC Section 1782(a), "The district court of the district in which a person resides or is found may order [that person] to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal".

viii Access to court files

Members of the public have the general right of access to ongoing judicial proceedings and to records thereof. Delaware courts, however, will sometimes limit access to judicial proceedings and records regarding sensitive information. The Court of Chancery emphasised the importance of the public's right of access to information about judicial proceedings by adopting Court of Chancery Rule 5.1. Court of Chancery Rule 5.1 makes clear that most information presented to the Court should be available to the public. Rule 5.1 accomplishes this by, among other things, reducing the categories of information that are entitled to protection and making it clear that if a public version of a confidential document is not filed in a timely manner, the confidential document will lose its confidential status.

ix Litigation funding

The law on third-party litigation funding is sparse, but evolving, in Delaware. Questions have arisen as to whether any protection from discovery may apply to communications between a party to litigation and litigation-funding companies that the party is considering retaining. For example, in Leader Technologies Inc v. Facebook Inc the US District Court for the District of Delaware held that attorney–client and work-product privileged information will lose its protection from discovery if it is shared with litigation-funding companies that have not yet been retained.

IV LEGAL PRACTICE

i Conflicts of interest and ethical walls

Under the Delaware Lawyers' Rules of Professional Conduct, a lawyer generally cannot represent a potential client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more

74 Diedenhofen-Lennartz v. Diedenhofen, 931 A.2d 439, 441, 449, 452 (Del. Ch. 2007) (granting defendant's motion to stay the Delaware action in favour of earlier-filed actions pending in Germany, Canada and California).
75 See, e.g., NewRadio Gp LLC v. NRG Media LLC, 2010 Del. Ch. LEXIS 49, at *1 (Del. Ch. 27 January 2010) (noting that there is 'a presumption that the press and public have a common law right of access to judicial proceedings and court records') (citing Cantor Fitzgerald Inc v. Cantor, 2001 Del. Ch. LEXIS 48, at *2–3 (Del. Ch. 17 April 2001)); Kronenberg v. Katz, 872 A.2d 568, 608 (Del. Ch. 2004) (noting that the Court of Chancery has a legal duty to honour 'the legitimate interest of the public and the press in access to judicial proceedings').
76 See Kronenberg, 872 A.2d at 605.
78 719 F. Supp. 2d 373 (D. Del. 2010).
79 See id. at 376.
80 Del. Lawyers' R. Prof'l Conduct 1.7(a).
clients will be materially limited by the lawyer’s responsibilities to another client, a former
client or a third person or by a personal interest of the lawyer'. 81 In certain circumstances, a
lawyer can represent a client in spite of a concurrent interest if the clients or former clients
give the lawyer informed consent to do so.82

Where a lawyer is associated with a firm, a lawyer’s conflicts of interest are generally
imputed to the other members of that firm.83 Members of a firm can avoid imputation of a
new colleague’s conflicts of interests arising from surviving duties to former clients if the
personally disqualified lawyer is timely screened from any participation in the matter and
is apportioned no part of the fee therefrom; and (2) written notice is promptly given to the
affected former client’.84 Also, subject to certain conditions, a member of a firm can avoid
such an imputation by obtaining the informed consent of the former client.85

ii Money laundering, proceeds of crime and funds related to terrorism

Where a lawyer learns that a ‘client has used the lawyer’s services to perpetrate a crime’, such
as money laundering, the lawyer may withdraw from representing the client.86 Furthermore,
where a client has used a lawyer’s services to further the client’s criminal conduct, the lawyer
‘may reveal information relating to the representation of [the] client to the extent the lawyer
reasonably believes necessary’ to (1) prevent the client from committing a crime that is
reasonably certain to result in substantial financial injury to another or (2) prevent, mitigate,
or rectify substantial financial injury to another that is reasonably certain to result.87

iii Data protection

The United States does not possess a legal or regulatory framework governing the processing
of personal data that is comparable to the framework in the European Union.88 Nevertheless,
in Delaware, parties and their lawyers have a variety of methods for ensuring that personal
data processed and produced during discovery is protected. Notably, a party can move for a
protective order from a Delaware court. Where good cause is shown, a Delaware court may
order, among other things, that discovery only take place at a certain time and place, that
discovery only be conducted by certain persons, and that confidential information, such
as social security numbers, not be disclosed.89 Additionally, parties can redact confidential
information from public court documents.90

81 Del. Lawyers’ R. Prof’n Conduct 1.7(a)(1) and (2). Other types of conflicts of interest are outlined in Rule
1.8 of the Delaware Lawyers’ Rules of Professional Conduct.
82 Del. Lawyers’ R. Prof’n Conduct 1.7(b)(1)-(4), 1.9(a)-(b)(2).
83 Del. Lawyers’ R. Prof’n Conduct 1.10.
84 Del. Lawyers’ R. Prof’n Conduct 1.10(c)(1) and (2).
85 Del. Lawyers’ R. Prof’n Conduct 1.10(d).
86 Del. Lawyers’ R. Prof’n Conduct 1.16(b)(3).
87 Del. Lawyers’ R. Prof’n Conduct 1.6(b)(2) and (3).
regulatory framework, known as the General Data Protection Regulation . . . stands in stark contrast to the way data is protected in the United States’); N Singer, ‘Data Protection Laws, an Ocean Apart’, NY Times,
89 Super Ct. Civ. R. 26(c); Ct. Ch. R. 26(c).
iv Other areas of interest

Delaware court procedure requires lawyers from outside Delaware who want to practise in Delaware courts to associate with lawyers admitted to the Delaware Bar.\(^91\) Specifically, in order for a non-Delaware attorney to temporarily practise in a Delaware court, a member of the Delaware Bar must file a motion to admit the non-Delaware attorney \textit{pro hac vice}.\(^92\) In connection with the motion, the attorney seeking admission must certify, \textit{inter alia}, that he or she will be bound by all rules of the court.\(^93\) Furthermore, after a member of the Delaware Bar makes a \textit{pro hac vice} motion on behalf of a non-Delaware attorney, he or she remains responsible to the court for the positions taken in the case and the presentation of the case,\(^94\) and must continue to make all filings with the court. These requirements for ‘local’ counsel are stricter than those of many other jurisdictions within the United States.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

The attorney–client privilege is a common-law protection for communications between an attorney and his or her client made for the purpose of rendering legal advice. Delaware law codifies the attorney–client privilege in Delaware Rule of Evidence 502. Under this privilege rule, an attorney ‘is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation’.\(^95\) The Delaware Supreme Court amended Rule 502 to clarify that it ‘shall include persons who are employed or engaged by a business entity, to serve as “in house” counsel to that entity and/or to any of its wholly owned or controlled affiliates’.\(^96\) Therefore, the privilege applies regardless of whether the attorney involved in the communications is outside counsel to a client or in-house counsel to a client.\(^97\) The privilege is not, however, accorded to communications that render business advice as opposed to legal advice.\(^98\)

The attorney–client privilege belongs to the client, not the attorney, and can be waived only by the client. Corporate officers or directors who receive legal advice on behalf of the corporation they serve are deemed to be joint clients with the corporation for purposes of the

\(^{91}\) See Super Ct. Civ. R. 90.1(a); Ct. Ch. R. 170(b).

\(^{92}\) Super Ct. Civ. R. 90.1(a); Ct. Ch. R. 170(b).

\(^{93}\) Super Ct. Civ. R. 90.1(b); Ct. Ch. R. 170(c).


\(^{95}\) DRE 502(a)(3).


\(^{97}\) See also \textit{Grimes v. LCC Int'l Inc}, 1999 Del. Ch. LEXIS 64, at *5 (Del. Ch. 23 April 1999) (applying attorney–client privilege to communications between a company's general counsel and the company, its directors and/or its officers).

In Kalisman v. Friedman, the Court of Chancery held that a corporation ‘cannot pick and choose which directors get information by asserting the attorney–client privilege against [one director] but not against the [other] directors’. 100

In many circumstances, litigants will be required to provide opposing counsel with a privilege log, which must contain sufficient information to enable the adverse party to test the privilege asserted. The log must set out basic information about withheld communications and the nature of the legal advice that was being provided. To ensure that the privilege is invoked properly, Delaware courts have required the senior Delaware lawyers on both sides of litigation to certify entries on privilege logs. 101

Delaware courts also recognise the attorney work product doctrine (protecting information prepared in anticipation of litigation) 102 and ‘business strategy immunity’ (protecting confidential business information where there is risk that the information ‘may not be used for proper legal purposes, but rather for practical business advantages’). 103

ii Production of documents

During the course of discovery, parties may obtain non-privileged documents and electronically stored information that are ‘relevant to the subject matter involved in the pending action, whether it relates to the claim or defense’. 104 The standard of relevance is whether the evidence has ‘any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence’. 105

Under these liberal discovery policies, a party may serve on any other party a request to produce the following types of documents or electronically stored information: ‘books, papers, writings, drawings, graphs, charts, photographs, sound recordings, images, electronic documents, electronic mail, and other data or data compilations from which information can be obtained, either directly or, if necessary, after conversion by the responding party into a reasonably usable form’. 106 The request must specify where, when and how the documents should be produced. 107

99 See Kirby v. Kirby, 1987 Del. Ch. LEXIS 463, at *19 (Del. Ch. 29 July 1987) (‘The directors are all responsible for the proper management of the corporation, and it seems consistent with their joint obligations that they be treated as the ‘joint client’ when legal advice is rendered to the corporation through one of its officers or directors.’).

100 2013 Del. Ch. LEXIS 100, at *10–11 (Del. Ch. 17 April 2013). However, the Court of Chancery recognised that there were limitations to a director’s ability to access privileged information, including, among other things, a showing of ‘sufficient adversity between the director and the corporation such that the director could no longer have a reasonable expectation that he was a client of the board [of directors’] counsel’. id. at *14.


105 DRE 401.

106 Ct. Ch. R. 34(a); see also Super. Ct. Civ. R. 34(a).

107 Ct. Ch. R. 34(b) & (d); Super. Ct. Civ. R. 34(b).
When a document request seems oppressive or unduly burdensome to a party, the party can object to that request. A Delaware court will limit or narrow the document request if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.108

Delaware courts often adjudicate disputes where the evidence is located outside Delaware and require parties to produce documents located in foreign jurisdictions.109 The United States’ status as a party to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters helps facilitate the collection of evidence from foreign jurisdictions.110 Indeed, the Supreme Court of Delaware has held that requiring a party to litigation in Delaware to produce documents that in large part would need to be obtained from the United Kingdom through the Hague Convention, does not present that party with an overwhelming hardship.111 Further, one Delaware court has noted that “[w]here litigants are large national or international corporations which … have both the knowledge and means to locate and transport … evidence across state lines, particularly “in an age where air travel, express mail, electronic data transmissions and videotaped depositions are part of the normal course of business for [such] companies”, the burden created by the fact that ‘evidence [is] located far from Delaware is “substantially attenuated”.’112

A party must produce all documents that are responsive to a proper document request and in its ‘possession, custody or control’.113 Consequently, a party must only produce documents held by a subsidiary, parent or other third party if the party can be deemed to be in control of such documents.114

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108 Ct. Ch. R. 26(b)(1).
112 In re Asbestos Litig, 929 A.2d 373, 384 (Del. Super. 2006).
114 See Dawson v. Pittco Capital P’s LP, 2010 Del. Ch. LEXIS 28, at *3 (Del. Ch. 15 February 2010) (holding that defendants must produce documents of the wholly owned subsidiary, which was not a party to the litigation, where the documents were ‘deemed controlled by [the subsidiary’s] defendant parent’); see also Boxer v. Husky Oil Co, 1981 Del. Ch. LEXIS 611, at *3 (Del. Ch. 9 November 1981) (finding that plaintiffs had not offered evidence to justify compelling a defendant-subsidiary to produce documents of its non-party parent where defendants claimed that plaintiffs, to discover such documents, were required to show that the boards of directors of the subsidiary and the parent are ‘identical or that the respective business operations of the two are so intertwined as to render their separate corporate identities meaningless’); Hoechst Celanese Corp v. Nat’l Union Fire Ins Co, 1995 Del. Super. LEXIS 319, at *6–7 (Del. Super. 31 March 1995) (denying plaintiffs’ request for documents relating to and held by the parent of defendant-subsidiary where the court found that the facts did not establish the necessary level of corporate closeness between the subsidiary and the parent and, therefore, did not show that the defendant-subsidiary had the ‘requisite level of control over the documents’ plaintiffs sought).
VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

Parties seeking to resolve a dispute outside the courtroom may do so through arbitration and mediation. As noted above, the Superior Court has a compulsory alternative dispute resolution (compulsory ADR) programme.\(^{115}\) Every civil case filed in the Superior Court is subject to this compulsory ADR programme.\(^{116}\) The programme permits parties to choose the format of the ADR, which may include one of the following options: arbitration, mediation and neutral assessment. If parties cannot agree upon a format, the default format is mediation. In addition, in the Court of Chancery, judges are authorised to sit as mediators in disputes that are pending in the Court of Chancery or have been filed for the purpose of court mediation.\(^{117}\) Finally, the Delaware Rapid Arbitration Act provides Delaware business entities with a streamlined and cost-effective process by which to resolve business disputes through voluntary arbitration.\(^{118}\) These programmes allow parties to resolve their disputes efficiently while maintaining a greater level of confidentiality than litigation typically affords.

ii Arbitration

In 2015, Delaware’s legislature enacted the Delaware Rapid Arbitration Act (DRAA) to provide ‘businesses around the world a fast-track arbitration option’.\(^{119}\) The DRAA requires arbitrators to issue final awards within 120 days of the arbitrator’s acceptance of his or her appointment or within a time agreed upon by the parties prior to the arbitrator’s acceptance of his or her appointment; neither deadline can be extended by more than 60 days.\(^{120}\) To utilise the DRAA, parties to a dispute must meet the following requirements: (1) the parties must have a written agreement to submit their controversy to arbitration; (2) the agreement to arbitrate must expressly reference the DRAA; (3) the agreement to arbitrate must be governed by Delaware law; (4) at least one of the parties must be an entity formed in Delaware or have its principal place of business in Delaware; and (5) no party may be a consumer or

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115 The following civil actions are generally not subject to the Superior Court’s compulsory alternative dispute resolution programme: class actions; special proceedings such as those involving name changes, eminent domain and contested elections; replevin; foreign or domestic attachment; statutory penalty and mortgage foreclosure actions; and in forma pauperis actions. Super. Ct. Civ. R. 16(b)(4)(g) & 81(a).


117 10 Del. C. Section 349.

118 10 Del. C. Section 5802.


120 10 Del. C. Section 5808.
an organisation that maintains public areas within a residential community. Parties to a DRAA arbitration may select their arbitrator by agreement or petition the Court of Chancery to appoint one or more arbitrators. The arbitration ‘can be held anywhere in the world’ and is a confidential proceeding in the absence of any agreement to the contrary. Further, with the exception of a narrow appeal from the issuance of a final award, the arbitrator’s determinations may not be challenged or appealed. This aspect of the DRAA limits parties’ ability to delay arbitration by raising challenges in the courts. For example, parties to a DRAA arbitration ‘may not seek a determination in the courts about the scope of the disputes that may be arbitrated; only the arbitrator may make that determination’.

If a party wishes to challenge a final award issued in a DRAA arbitration, the challenging party must do so within 15 days of the award’s issuance before the Supreme Court of Delaware. The Supreme Court ‘may only vacate, modify, or correct the final award in conformity with the Federal Arbitration Act’, which sets forth extremely narrow grounds for appeal, essentially limited to fraud or other misconduct. And, under the DRAA, when executing an agreement to arbitrate, parties can eliminate potential review by the Supreme Court by either agreeing that there shall be no review of a final award or that review of a final award shall be conducted by one or more arbitrators. If the parties do not seek review of a final award, the award will be deemed to have been confirmed by the Court of Chancery on the fifth business day following the expiry of the challenge period. After a final award has been confirmed, the parties can apply to the Court of Chancery or the Superior Court depending on the nature of the award for a final judgment in conformity with the award.

In addition to the DRAA, the Superior Court’s compulsory ADR programme continues to offer parties to a Superior Court action an opportunity to agree to undergo arbitration. The parties may select the arbitrator by agreement or, if no such agreement can be reached, the Superior Court will appoint an arbitrator. Further, the parties can agree to make the arbitrator’s decision binding. If the parties agree to binding arbitration, the matter will be removed from the Superior Court’s docket. The arbitration process itself consists of the

121 See 10 Del. C. Section 5803(a).
122 10 Del. C. Section 5805.
124 See Delaware Rapid Arbitration Rule 5.
125 See 10 Del. C. Section 5804.
127 10 Del. C. Section 5809(b).
128 10 Del. C. Section 5809(c).
129 10 Del. C. Section 5809(d).
130 10 Del. C. Section 5810(a).
131 10 Del. C. Section 5810(b)-(c). Final awards for solely monetary damages may only be entered by the Superior Court and all other final awards may be entered by the Court of Chancery. id.
arbitrator reviewing evidence, hearing arguments from the parties, and rendering a decision based on the facts and the law.\textsuperscript{135} ‘Every party has trial \textit{de novo} appeal rights if they are not satisfied with the arbitrator’s decision.’\textsuperscript{136}

The rules of the Delaware courts do not contain specific provisions regarding the enforcement of foreign arbitral awards. However, the United States District Court for the District of Delaware has heard and granted motions to confirm foreign arbitral awards pursuant to the Federal Arbitration Act\textsuperscript{137} and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)\textsuperscript{138}.\textsuperscript{139}

iii Mediation

Mediation is available as an alternative to litigation in both the Superior Court and the Court of Chancery. In the Superior Court, under the compulsory ADR programme, mediation is the default format for ADR. The parties may select the mediator by agreement from the Superior Court’s approved Mediator Directory, which ‘consist[s] of members of the Delaware Bar and others who have completed [the] Superior Court’s 20-hour mediation training’,\textsuperscript{140} or, if no such agreement can be reached, the Superior Court will appoint a mediator from its Mediator Directory.\textsuperscript{141} The mediator’s role in the mediation process is to help the parties reach ‘a mutually acceptable resolution of a controversy’.\textsuperscript{142} If the mediation is unsuccessful, ‘no party may use statements made during the mediation or memoranda, materials or other tangible evidence prepared for the mediation at any point in the litigation in any way, including, without limitation, to impeach the testimony of any witness’.\textsuperscript{143}

The Court of Chancery offers two types of non-mandatory mediation: ‘(i) mediation pursuant to Court of Chancery Rule 174, which provides for mediation in an ongoing case pending in the Court of Chancery (“Rule 174 Mediations”), and (ii) mediation pursuant to 10 Del. C. § 347 and [Court of Chancery] Rules 93 to 95, which . . . provide for ‘mediation only’ dispute resolution for certain types of business disputes where there is no pre-existing pending action’.\textsuperscript{144} To participate in either of these mediation programmes, the parties to a dispute must agree to undergo mediation and have Delaware counsel. Furthermore, to participate in the mediation-only programme, the following requirements, among other

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{135} id.
\item \textsuperscript{137} 9 USC Section 1, et seq.
\item \textsuperscript{138} The United States has been a party to the New York Convention since 1970. NY Convention, Contracting States, available at www.newyorkconvention.org/countries.
\item \textsuperscript{140} Superior Court Alternative Dispute Resolution: Mediator Directory, available at https://courts.delaware.gov/superior/adr/adr_mediator_all.aspx.
\item \textsuperscript{141} Super. Ct. Civ. R. 16(b)(4)(a).
\item \textsuperscript{142} Super. Ct. Civ. R. 16(b)(4)(f)(ii).
\item \textsuperscript{143} Super. Ct. Civ. R. 16(b)(4)(e).
\item \textsuperscript{144} Court of Chancery of the State of Delaware: Mediation Guideline Pamphlet, at 2, available at https://courts.delaware.gov/forms/download.aspx?id=15478. In addition to voluntary mediation programmes in the Court of Chancery, ‘mandatory mediation is required in certain guardianship and estate cases’. id. at 2 n.2.
\end{itemize}
\end{footnotesize}
things, must be met: at least one party is a business entity; at least one party is a business entity formed in Delaware or having its principal place of business in Delaware; no party is a consumer with respect to the business dispute; and in disputes involving solely a claim for monetary damages, the amount in controversy is no less than US$1 million.145

In a Rule 174 mediation, the chancellor or vice chancellor presiding over the filed case will refer the case to another judge or master sitting on the Court of Chancery. In a mediation where a case has not been filed in the Court of Chancery, the parties to the dispute may request a particular member of the Court of Chancery to serve as a mediator. These mediation programmes are highly regarded as they provide parties with the assistance of current members of the Court of Chancery at a fraction of the cost of litigation and with the added benefit of confidentiality.148

iv Other forms of alternative dispute resolution

In addition to arbitration and mediation, parties with disputes in the Superior Court can, under the compulsory ADR programme, agree to undergo neutral case assessment. Neutral case assessment is a process by which an experienced neutral assessor gives a non-binding, reasoned oral or written evaluation of a controversy, on its merits, to the parties. The neutral assessment process consists of the parties providing the neutral assessor with confidential statements and participating in a confidential neutral assessment hearing. The neutral assessor may use mediation and/or arbitration techniques to aid the parties in reaching a settlement. Moreover, the parties can agree to make the neutral assessment outcome binding.

VII OUTLOOK AND CONCLUSIONS

Delaware courts are at the forefront of complex litigation in the United States, including overseeing complex litigation involving foreign individuals and entities. In the coming year, one can expect increasing numbers of decisions involving foreign litigants and cross-border issues, as well as more cases from the Court of Chancery, the Superior Court and the Delaware Supreme Court involving alternative entities.

145 10 Del. C. Section 347(a)(1)–(5).
147 id.
148 See id. at 4.
150 ibid.
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Henning Bälz, born in 1968, studied law in Tübingen, Berlin and Bayreuth. After his studies he worked as a law apprentice with the Higher Regional Court of Berlin and as a university assistant. He received his doctorate in law from the Freie Universität Berlin in 2001 with a thesis on information rights of shareholders in a stock corporation. Mr Bälz joined the Berlin office of Hengeler Mueller in 1999, and worked for one year as a foreign associate at Simpson Thacher & Bartlett in New York (2000 to 2001) and for almost one year in the Frankfurt office of Hengeler Mueller (2001 to 2002). Mr Bälz became a partner in 2004 and is a member of the dispute resolution group of Hengeler Mueller dealing with both litigation and arbitration cases for national and international clients. The focus of his work is on post-M&A matters and general contract cases as well as matters regarding infrastructure projects or involving technical expertise in general.

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Nassif practises corporate and commercial litigation and arbitration with an emphasis on shareholder, agency, management, distribution, banking, finance and real estate disputes, and financial crimes.

Nassif represents a wide range of businesses, including financial institutions and leading multinational companies in the leisure and hospitality, energy, transport and defence logistics sectors.

In 2017, Nassif was one of 12 members of the task force that advised the Sharjah International Commercial Arbitration Centre (Tahkeem) on the reform of its arbitration rules. In November 2017, Nassif was named to the executive committee of the Tahkeem.

Nassif has appeared as party counsel in over 35 international arbitration proceedings administered under a wide range of rules, including the AAA, DIAC, DIFC-LCIA, ICC, LCIA and UNCITRAL. He has been appointed as sole arbitrator or chairman of the tribunal in a number of DIAC and DIFC-LCIA proceedings.

The Legal 500 ranked Nassif among eight leading individuals for dispute resolution in the United Arab Emirates and reported that he is ‘detail-oriented and extremely proactive’.

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Nassif was listed among Asian-MENA Counsel's External Counsel of the Year 2013 for the United Arab Emirates as voted by the in-house community, where in-house counsel is reported to have said '[Nassif] is the best arbitration lawyer'.

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Over the years, he has been known as a leading lawyer and entrusted to lead the firm’s legal team in managing many high-profile cases involving international corporations, including the firm’s recent success in defending a Japanese major contractor in a joint venture dispute worth US$1.4 billion, which is recorded as one of the biggest civil claims ever brought against a Japanese investor before Indonesian courts.

In addition to his professional activities, he is also active as a speaker in various seminars and training events held by a number of Indonesian law schools, government agencies and international organisations.

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Recent practice includes, in particular, cases in the construction, commodity, real estate, sports, finance and pharmaceutical industries. *Chambers Global* and *Chambers Europe* both rank Tamir as a leading lawyer for dispute resolution in Switzerland. In addition, Tamir is listed as one out of three next generation litigation lawyers in Switzerland by *The Legal 500* and *Who’s Who Legal: Arbitration* lists Tamir as a future leader in arbitration.

Before joining Niederer Kraft Frey, Tamir practised at one of the leading law firms in Tel Aviv, Israel. Tamir is fluent in six languages and is admitted to practise in Switzerland, Israel and in the State of New York. He has a master’s degree in law from the New York University School of Law as well as an advanced professional certificate in law and business from the NYU Leonard N Stern School of Business.

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