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The Dispute Resolution Review provides an indispensable overview of the civil court systems of 37 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.

In my home jurisdiction, all eyes have been fixed firmly on the progress of Brexit negotiations with the EU. This edition includes an updated Brexit chapter that charts the progress (or lack thereof) made over the past year. Hopefully we will be able to write in the next edition with more certainty about the future laws and procedures that will apply to cross-border litigation in the UK and across the EU, much of which will be affected by the outcome of the ongoing negotiations.

Attention has also focused on more common issues. The rules of disclosure tend to have a habit of coming under periodic review and proposed new rules are out for consultation in England and Wales once again. This raises questions that are relevant to all jurisdictions that strive towards the common goal of justice at a reasonable price. Has litigation become too document heavy and expensive? Is technology a help or a hindrance? How can its power be harnessed, without adding to the parties’ burdens? Is full disclosure suitable for all cases; should a lighter-touch regime be available, with liberty to apply for specific documents – a solution which this book shows has been adopted in many other jurisdictions and in arbitrations?

This tenth 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 585 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 2018
Chapter 1

BREXIT

*Damian Taylor and Robert Brittain*¹

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). On 29 March 2017, acting with the authority of Parliament, the Prime Minister gave the European Council formal notice of the UK’s intention to withdraw from the EU. The UK will leave the EU upon the earlier of a withdrawal agreement entering into force or the second anniversary of the notification. The departure date could only be extended with the unanimous agreement of all the Member States (including the UK). The practical effect is that the UK is likely to remain a member of the EU until at least March 2019.

Much of the law that underpins the UK’s dispute resolution architecture is, directly or indirectly, European in origin. In theory, all of that law will cease to apply in and to the UK when it leaves the EU. In practice, a combination of unilateral action by the UK, transitional arrangements (agreed or unilateral), and, in due course, a new relationship agreement between the UK and the EU is likely to mitigate substantially the legal effects of Brexit in this area.

In this special chapter, we consider the likely practical consequences of Brexit as regards:

- the determination of governing law;
- the jurisdiction of the courts over disputes;
- the cross-border enforcement of judgments; and
- arbitration.

We begin, however, by assessing some of the broader legal implications of Brexit that cut across each of these areas.

II    RELEVANT LEGAL CONSEQUENCES OF BREXIT

The source and basis of EU law are the various treaties entered into by the Member States. On the international plane, 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

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¹ Damian Taylor is a partner and Robert Brittain is a professional support lawyer at Slaughter and May.
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 a party to 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. In July 2017, the government introduced the European Union (Withdrawal) Bill in the House of Commons. If enacted in broadly its current form, this legislation would repeal the European Communities Act (cutting the pipe, so to speak) while also preserving and converting into domestic law, to the extent practicable, all EU law as it applied to the UK at the moment of exit.

The Withdrawal Bill, if enacted, will assure legal continuity in some areas, but not all. This is because, while the UK Parliament can legislate to domesticate all EU law, it cannot make all EU law work outside the context of EU membership. 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. The effects of Brexit and the operation of a Withdrawal Act will, therefore, differ according to the nature of each EU law instrument.

ii  **Consequences for civil justice cooperation**

What does this mean for the future of EU law in the field of civil justice cooperation? The UK government position is that the current regime, or at least its effects, should be continued, by agreement with the EU27 where necessary, post-Brexit. Broadly, and as discussed in more detail in the following sections:

- The EU rules for the determination of governing law are of a kind which can easily be domesticated (via a Withdrawal Act or otherwise) and will continue to produce the same effects in the UK and in the EU27 as they do today. 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.

- The 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 and continue to produce the same effects. Alternatives are therefore required. The UK has said it will accede to the Hague Convention on Choice of Court Agreements, which is similar (though less comprehensive) than the current European regime but does at least cover 26 of the 27 remaining Member States2 (as well as Singapore and Mexico). The UK has also said it wishes to negotiate with the EU27 a new agreement that replicates to the fullest extent possible the current European regime.

iii  **A transitional regime?**

Much of the discussion of Brexit has assumed its legal effects will come about on the day of the UK’s withdrawal. In fact, it is increasingly likely that the UK will enter into a transitional (or ‘implementation’) period in March 2019, perhaps lasting up to two years. At the time of writing, the UK and EU27 are negotiating the terms of such a transition and the EU’s position

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2 Denmark is not bound by the Hague Convention.
is that EU law should continue to apply to and in respect of the UK during the transition. In addition, and still in the context of a negotiated transitional period, the parties have in principle agreed that the existing EU civil justice regime should continue to apply post-exit (or indeed after the end of a transition period) in respect of contracts, legal proceedings and judgments entered into, begun, or handed down (as the case may be) pre-exit.

Even in the absence of a transition deal, the need to avoid a cliff-edge would likely require both the EU and the UK to implement separate savings provisions in respect of matters ongoing at the date of exit. Given the principled agreement in this area to date, it is likely that any unilateral provisions enacted by the two sides would mirror each other.

iv Some conclusions
The net effect of all this is that important elements of the current regime (on governing law) can and will be preserved. In the field of jurisdiction and enforcement, one pillar of the current regime (the Hague Convention) can and will be preserved, but continuance of the remaining parts of the system will require agreement between the EU27 and the UK. In those areas where continuity of the current regime is a matter for negotiation, the date on which Brexit will produce hard legal effects is likely to be later than the current predicted exit day (29 March 2019), perhaps by as much as two years. Even then, transitional arrangements are likely to ensure that agreements and proceedings pre-dating exit will continue post-exit – in the UK and the EU27 – in accordance with the law as it stands now.

III GOVERNING LAW
i The present position
The governing law of a contract or a dispute relating to a non-contractual obligation is determined according to two different EU rules, as explained below.

Contract
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’; that 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: the parties 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) and to respect public policy imperatives in the law of the forum (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 to the overriding rules described 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 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 (known as 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**

As explained in section II, supra, the nature of the Rome Regulations means they can be transposed into UK law and, post-exit, will continue to produce the same effects in the courts of the UK and the EU27. This is because, as noted at Section III.i, supra, the regulations are of ‘universal application’: a court uses the rules to determine which country’s laws apply in a given situation and then proceeds to apply that law; whether that law is one of a Member State is wholly irrelevant. Transposition would be commercially advantageous – in that it would provide continuity of a regime which is familiar, robust and prioritises party autonomy – as well as legally straightforward.

The UK government confirmed, in a paper published in August 2017, that ‘[a]s we legislate for our withdrawal from the EU, it is also our intention to incorporate into domestic law the Rome I and II instruments on choice of law and applicable law in contractual and non-contractual matters’. The legislative mechanism for this would be the European Union (Withdrawal) Bill (progressing through Parliament at the time of writing).

However, transposition is not without potential problems. Most notably, it will be necessary to specify how the English courts should construe Rome I and Rome II in their transposed form. As EU instruments, the CJEU is the final arbiter for Member States of their meaning and interpretation. The CJEU’s rulings are made in response to references from the courts of Member States, which are then bound to apply its jurisprudence. This cross-border uniformity of application is one of the Rome regime’s attractions for commercial parties. Of course, when the UK leaves the EU, it will (absent any special arrangement) lose its right to refer questions to the CJEU and, by the same taken, no longer be bound by its decisions. The UK’s response to these issues, as set out in the European Union (Withdrawal) Bill, is to
require English courts to construe transposed law in accordance with relevant pre-exit case law of the CJEU. Relevant decisions of the CJEU that post-date the UK’s withdrawal will not bind an English court, but the court may have regard to such decisions ‘if it considers it appropriate to do so’. On its face, this provision allows English courts considerable latitude; it may be that Parliament provides additional guidance in the legislation that reaches the statute book.

### 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 EU states will continue to apply Rome I, which, as already noted, generally respects the choice of law made by the parties. Even where other 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

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, called the Lugano Convention, 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 court (or courts), only that court (or 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, jurisdiction is conferred on the English court 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.
ii Post-Brexit options

Continuation of the current regime

This could only happen by agreement between the EU and the UK (and, separately, between the UK and the parties to the Lugano Convention). Of course, the UK could unilaterally domesticate the current European regime by transposing its text into UK law, but this would be of limited effect: while the English courts would continue to accept and decline jurisdiction (and enforce judgments) as they do now, the courts of other European states would no longer be bound to respect and uphold English jurisdiction and judgments. This is because the regime is built on reciprocity that extends only to other members of the club.

The UK government, in a paper published in August 2017, said that it would ‘seek an agreement with the EU that allows for close and comprehensive cross-border civil judicial cooperation on a reciprocal basis, which reflects closely the substantive principles of cooperation under the current EU framework’. The feasibility and timing of such an agreement are predominantly political questions. While the UK has said it wants a seamless transition from the current regime to a new arrangement, it appears (at the time of writing) that the EU27 consider that any new agreement will be a matter for formal agreement only once the UK has left the Union.

From a more practical perspective, there is a precedent of sorts for such an agreement. Denmark has, since the Treaty of Maastricht, enjoyed an opt-out from EU measures in the field of justice and home affairs; where it wishes to participate in those measures, it enters into freestanding agreements with the EU. In 2005, Denmark and the EU entered into such an agreement in order to extend the effect of Brussels I to Denmark; by operation of the same agreement, Brussels Recast now also applies to Denmark. The 2005 agreement is in the nature of an international agreement, not an EU instrument. To that extent, it could provide a template for a future international agreement between the UK and the EU.

Accede to the 2005 Hague Convention on Choice of Court Agreements

The Hague Convention is a multilateral instrument pursuant to which the courts of contracting states agree to: (1) uphold exclusive jurisdiction agreements made by parties, provided the nominated court is in one of the contracting states and the agreement otherwise complies with prescribed requirements; and (2) reciprocally enforce judgments given in disputes resulting from qualifying exclusive jurisdiction agreements.

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 confirmed that it will accede to the Hague Convention in its own right. That process is relatively straightforward and does not require the consent of the other contracting parties.

Continued participation in the Hague Convention will provide a valuable element of continuity in this area. But it is important to note that the Convention is very different from the current European regime, and much more limited in its scope. It does not impose a comprehensive framework for the determination of jurisdiction and the enforcement of judgments: it applies only where parties have entered into a qualifying exclusive jurisdiction agreement (which probably excludes hybrid arbitration clauses and other one-sided jurisdiction clauses). It also does not extend to ‘interim measures of protection’. That means that, for example, emergency steps taken in the court of one contracting state to freeze a defendant’s assets in another contracting state pending a final judgment would not, at least under the Hague Convention, be enforceable in the state where the assets are located. Finally, it should be noted that the Hague Convention provides a defendant with more
potential grounds for resisting overseas enforcement than are available under the current European regime; that could introduce an additional layer of cost and delay into cross-border enforcement proceedings.

The Convention’s geographical and temporal coverage is also limited. At present, it applies only in the Member States of the EU (excluding Denmark), Mexico and Singapore and only in respect of exclusive jurisdiction agreements entered into from 1 October 2015 (1 October 2016 for Singapore). It is not clear whether accession by the UK in its own right would give rise to a coverage ‘gap’; that might lead to different treatment of agreements relating to the UK depending on whether they were entered into during the period when the UK was a Member State or after its individual accession to the Convention.

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 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 ADR and early settlement.

i

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.

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3 The People’s Republic of China signed the Hague Convention in September 2017. It is possible that China will formally ratify the Convention in 2018 allowing it to enter into force in and with respect to China.
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 which 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:

- relevant only to the extent parties have a potential nexus with other EU countries;
- 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
- 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 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:

- 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.
- 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).
- 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 to enforce the resulting judgment outside England. That is because non-exclusive jurisdiction clauses fall outside the scope of the Hague Convention. Signatories to the Hague Convention
(which include the EU and which the UK could easily and unilaterally accede to post-Brexit) agree to permit mutual enforcement of in-scope judgments. It is likely that the UK will wish to accede to the Hague Convention, if only to provide litigants with a jurisdictional safety net pending a fuller cooperation agreement with the EU.

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, supra.

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 pre-existing position.

ii Post-Brexit options

Preserve the effect of Brussels Recast and/or accede to the Lugano Convention and/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, supra, apply equally to enforcement.

Revert to reliance on pre-existing network of bilateral treaties

The UK has 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 which is not a civil and 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.

### iii Practical implications

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

For the moment, of course, the UK is a full member of the EU and will remain so until March 2019 at least. Judgments obtained during that period will be fully enforceable in accordance with the current European regime. There is also considerable incentive for EU Member States to maintain the current regime post-Brexit so that their local judgments continue to be easily enforceable in the UK.

Further and in any event, the Hague Convention, should the UK become a party to it, would provide another post-Brexit means by which English judgments in disputes arising from qualifying exclusive jurisdiction agreements would 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:

- 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. (Note that the Rome I Regulation – although it might dictate the same result as the close connection test – does not apply to arbitration.)
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.

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, 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 is a statutory enactment of the same principle. It states that where the parties have not made a choice, 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 which 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.

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.

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 EU state (or signatory to the Lugano Convention) have been prohibited since 2004, when the ECJ ruled that they were inconsistent with the scheme and provisions of the Brussels Convention. Under the Convention, the ECJ 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
an EU 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 confirmed its intention
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 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, then, 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_¹

## 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,² 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 (ADR) 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. On the other hand, the concept of arbitration was introduced to legal system of Bangladesh from the beginning of the country’s existence.

The first Act which has tried to tackle the issue was enacted in 1940 by the name of the Arbitration Act 1940,³ 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 2001.⁴ The 2001 Act was heavily influenced by the UNCITRAL Model Law.⁵ 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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² The Independent BD.
³ Came into force on 1 July 1940.
⁴ Came into force on 24 January 2001.

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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 recognise 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 a document signed by the parties;

b an exchange of letters, telex, telegrams, fax, e-mail or other means of telecommunication which provide a record of the agreement; or

c 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 Hosain Bhuiyan.\(^6\) 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 as an enforceable term of a contract.

Two important aspects of the Arbitration Act 2001 that are of vital importance when 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.

\(^6\) 6 ALR (2015)-HCD-20.

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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, till 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 regards to a dispute regarding an agreement where an arbitration clause has been mentioned then 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 then 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.

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 then the decision will rest upon the arbitral tribunal which 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 then there will be three arbitrators. If the number of arbitrators decided by the parties is an even number then 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 then 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 then 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 then each party will appoint one arbitrator each and the third arbitrator will be appointed jointly by the other two arbitrators. Moreover, if two arbitrators fail to mutually appoint the third arbitrator 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 chairman 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

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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 1872.12 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. In the instance where there is no agreement as to the procedural requirements of the arbitration then it will be 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, submission or presentation of oral or documentary evidence 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 of time 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 of time the respondent has to state his 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 regards 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

12 Act No. I of 1872.
the proper and expeditious conduct of the arbitration. However, the tribunal may terminate 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 final arbitral award is made;
- the claimant withdraws his or her claim;
- the parties agree to terminate the proceedings or the arbitral tribunal; or
- 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 regards 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 2001, the tribunal or a party with the permission of the tribunal may apply to the Court 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

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 regards 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) 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 (1) when a party to the arbitration agreement was under some incapacity, (2) the arbitration agreement is not valid, (3) proper notice was not given of the appointment of an arbitrator or of the arbitral proceedings, (4) was otherwise unable due to reasonable causes to present his or her case, (5) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration,
(6) the arbitral award contains decision on matters beyond the scope of the submission to arbitration, and (7) 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 can 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 due to the fact that the High Court can easily throw out a foreign arbitral award if it goes against the public policy of Bangladesh. It should be noted that 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)*, 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.

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 regards 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 expected soon.

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Chapter 3

BERMUDA

Jan Woloniecki and Peter Dunlop

I  INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

Overview of Bermudian legal system and the sources of Bermuda law

Bermuda is a self-governing dependent territory of the United Kingdom. The court of first instance in civil matters, where the sum in dispute is in excess of 25,000 Bermudian dollars, is the Supreme Court of Bermuda. In 2006, a Commercial Court (an administrative subdivision of the Supreme Court of Bermuda) was established, in which specialist commercial judges sit. The Court of Appeal for Bermuda, comprising three judges who sit in periodic sessions, hears appeals from the Supreme Court. Appeals lie as of right to the Judicial Committee of the Privy Council in London from any final judgment of the Court of Appeal for Bermuda where the sum in dispute is 12,000 Bermudian dollars or more; and at the discretion of the Court of Appeal for Bermuda in cases of ‘great general or public importance’. Section 15 of the Supreme Court Act 1905 provides:

Subject to the provisions of any Acts which have been passed in any way altering, amending or modifying the same, and of this Act, the common law, the doctrines of equity and the Acts of the Parliament of England of general description which were in force in England at the date when these Islands were settled [July 11, 1612] shall be, and are hereby declared to be, in force within Bermuda.

Bermuda Courts are technically bound by decisions of the Privy Council. Decisions of the UK Supreme Court and House of Lords that are declaratory of the common law, while not technically binding, are invariably followed by Bermuda courts. Decisions of the English Court of Appeal are also regarded as highly persuasive authority in Bermuda.

II  THE YEAR IN REVIEW

The most recent session of the Court of Appeal for Bermuda (November 2017) did not give rise to any decisions of interest to international practitioners. Two cases argued in the March 2017 session are worthy of note.

The only petition brought under Section 111 of the Companies Act 1981 ever to have succeeded at trial in Bermuda, In the matter of Kingboard Copper Foil Holdings Limited

1 Jan Woloniecki is head of litigation and Peter Dunlop is a senior counsel at ASW Law Limited.
2 Appeals Act 1911 s.2.
Kingboard Copper Foil Holdings Limited (the Company) was incorporated in Bermuda and listed on the Singapore Stock Exchange (SGX). The Company’s minority shareholders had exercised their right under the SGX Listing Rules to veto a mandate for the company to enter into transactions with other companies in the Kingboard Group that were owned by the majority shareholders. The Company’s management proceeded to effectively ‘nullify the only real right – the veto – which minority had’ by entering into a licensing agreement with a company called Harvest which was controlled by a ‘friend’ of the Kingboard Group, Mr Lin. Under the Harvest licence agreement, the Company’s manufacturing plant in China was used to produce copper foil which was then sold to another company in the Kingboard Group, Laminates. The Company misrepresented in an announcement to its shareholders that the shareholders and directors of Harvest were independent third parties who did not have any prior connection with the Kingboard group and that the Company ‘had no means of knowing who Harvest’s customers would be …’. The Court of Appeal for Bermuda concluded as follows:

"This attempt to conceal the position in respect of Harvest until the trial does not reflect well on the Company or the Kingboard Group. The Chief Justice acquitted the majority shareholders of outright dishonesty; but said that they had caused the Company to ‘flirt with deception’ … Mr. Woloniecki submits with some force, that, if there was not something fishy about the arrangements, why did those concerned attempt to paint this ‘alternative reality’ and cover up the connection with Mr. Lin. The Company, for which, after the Licence Agreement, there was no incentive to change the status quo, should have attempted constructively to engage with all the minority shareholders and addressed their concerns. There was no easy solution but the knee jerk reaction was oppressive … I see the force of those submissions. But they face a number of obstacles. First, as I have said, there were in fact without prejudice discussions. Second it was not suggested that the unfairness or oppression was constituted by a failure to negotiate. Third, given that the Harvest Licence Agreement was not a sham, the fact that Mr. Lin had links with Kingboard and was its ‘friend’ loses much of its significance. If an arrangement was to be made which enabled the Company to have some earnings and Laminates to obtain supplies of copper foil the likelihood is that some ‘friend’ would be required for that purpose."  

In Bermuda Bar Council v. Walkers Bermuda Ltd the Court of Appeal for Bermuda held, reversing the decision of the Chief Justice, that the Bermuda Bar Council was entitled to withhold a certificate of recognition pursuant to Section 16C(2) of the Bermuda Bar Act 1974 to an incorporated law firm on the grounds that the firm had not satisfied Bar Council that the company was ‘controlled by Bermudians’ as required by Paragraph 1(1) of the Third Schedule of the Companies Act 1981. The central issue in this case is of fundamental importance in relation to the provision of legal services in Bermuda. The Court of Appeal applied the broad test of ‘control’ as stated by the Privy Council in Bermuda Cablevision Limited and Others v. Colica Trust.

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5 Per Sir Christopher Clarke JA at [79].
6 Per Sir Christopher Clarke JA at [79]-[80].
III COURT PROCEDURE

i Overview of court procedure
The Rules of the Supreme Court of Bermuda 1985 were originally derived from the English rules in the 1979 White Book and updated in 2006 to reflect the English rules in the 1999 White Book that were in force prior to the introduction of CPR.

ii Procedures and time frames
The amendment of the RSC 1985 in 2006 included the adoption of case management powers and the ‘overriding objective’ into Bermudian procedure. As a general rule the Commercial Court in Bermuda tends to be less proactive in relation to case management than in England, and relies upon counsel to agree sensible directions. Procedural time frames are, generally speaking, set by reference to dates mutually agreeable to local counsel. A time frame of 12 to 18 months from the issue of the writ to the trial of the action is not untypical. Where appropriate the Court will order a timetable for an expedited trial, and trials have been held within six months of the commencement of proceedings. In urgent cases, interlocutory injunctions may be obtained ex parte or ex parte on notice. Provided papers which make out a case of urgency are filed with the Supreme Court Registry as soon as practicable in the morning, it will usual be possible to get before at judge by 4.30 pm on the same. It is possible to get before a judge outside normal court hours, including at weekends, in cases of genuine urgency.

iii Class actions
There is no procedure for class actions in Bermuda. The population of the Island is only 60,000 and the circumstances that typically give rise to class actions in other jurisdictions are unlikely to occur in Bermuda.

iv Representation in proceedings
An individual has a constitutional right to appear in person in any proceedings. Corporations must be represented by a barrister and attorney licensed to practice in Bermuda.

v Service out of the jurisdiction
Service of proceedings out of the jurisdiction is governed by RSC Order 11. RSC Order 11 r.1(1)(d) confers jurisdiction on the Bermuda court in cases where: the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract being (in either case) a contract which:

a was made within the jurisdiction;
b was made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction;
c the contract is by its terms, or by implication, governed by the law of Bermuda; or
d contains a term to the effect that the court shall have jurisdiction to hear and determine any action in respect of the contract.
The Bermuda courts follow, in relation to application under Order 11, the principles set out by the House of Lords in *Seaconsar Far East Ltd v. Bank Markazi Jomhouri Islam Iran*⁹ to determine whether a claim under one of the grounds of Order 11 has been sufficiently made out; and, *Spiliada Maritime Corp v. Cansulex Ltd (The Spiliada)*¹⁰ in relation to *forum non conveniens*. The jurisdictional rules are the same for natural persons and corporations. Every company incorporated in Bermuda must have a registered office where it may be served. In cases where leave to serve process abroad is granted, the procedures of The Hague Convention are followed.

**vi Enforcement of foreign judgments**

The Judgment (Reciprocal Enforcement) Act 1958¹¹ provides for enforcement of courts in the United Kingdom and of the following countries or territories: Australia, the Bahamas, Barbados, British Guiana, Gibraltar, Grenada, Hong Kong, Leeward Islands, St Vincent, Jamaica, Nigeria, Dominica and St Lucia.¹² The effect of registration is that the foreign judgment is of the same force and effect as a judgment of the Supreme Court of Bermuda entered at the date of registration, and such steps may be taken to enforce it as if it were such a judgment.¹³ Section 6 of the 1958 Act prohibits the bringing of proceedings to enforce a judgment to which the 1958 Act other than proceedings under the 1958 Act.¹⁴ The leading case on the 1958 Act is *Consolidated Contractors International Company SAL v. Masri*.¹⁵

**vii Assistance to foreign courts**

Bermudian courts will make orders, in response to letters of request from foreign courts, for the taking of evidence on deposition in Bermuda for the purposes of trials in foreign jurisdictions but not for the purposes of discovery. However, it is not uncommon for US lawyers to take depositions as part of American discovery procedures in Bermuda by consent. The Bermudian courts have regularly given assistance to foreign liquidators and have, in the past, recognised the appointment of foreign liquidators at common law without the need to commence ancillary winding-up proceedings in Bermuda. However, the decision of the Privy Council in *Singularis Holdings Ltd v. Pricewaterhouse Coopers*¹⁶ has significantly reduced the scope of the common law powers of a Bermuda court to assist foreign liquidators.

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¹¹ Derived in part from the English Judgments and Administration Act 1920 and in part from the English Foreign Judgments (Reciprocal Enforcement) Act 1933.
¹² See: The Judgments Extension Order 1956; The Judgments (Reciprocal Enforcement) (Australia) Order 1998. At the time the 1956 Order was made most of the territories listed were dependencies of the United Kingdom. The territory formerly known as British Guiana is now an independent state called Guyana. The 1956 Order does not define ‘Leeward Islands’ but these are believed to include: the British Virgin Islands, Anguilla, Saint Kitts, Nevis, Antigua and Barbuda. It has been suggested that ‘Jamaica’ should be interpreted to include the Cayman Islands, as this jurisdiction was a dependency of Jamaica at the time the 1956 Order was made.
¹⁴ See: *Young v. GNI Fund Management (Bermuda) Ltd* [2001] Bda L.R. 70.
viii Access to court files
The Practice Direction on Access to Court Records in Civil Case (Circular No. 23 of 2015) applies to cases filed after 1 December 2015. The Practice Direction permits inspection by members of the public of writs and pleadings, it does not extend to affidavits. In the case of complete proceedings, unless the Court has ordered the file, or particular documents on the file, to be sealed, access is available pursuant to the Supreme Court (Records) Act 1955.

ix Litigation funding
The Commercial Court recognised the legitimacy of third-party funding of litigation in Bermuda in Stiftung Salle Modulable and Rutli Stiftung v. Butterfield Trust (Bermuda) Limited.17 There are, as yet, no judicial guidelines on what kinds of funding agreements are legitimate, and the question of their validity has yet to be considered by the Court of Appeal for Bermuda. Third party funding arrangements between liquidators of insolvent and creditors are not uncommon and are typically sanctioned by Bermuda Courts. The Salle Modulable case is believed to be the first example of a funding arrangement involving professional third-party funders in Bermuda litigation, we are not aware of other instances.

IV LEGAL PRACTICE
i Conflicts of interest and Chinese walls
The common law rule in Prince Jefri Bolkiah v. KPMG18 applies in Bermuda. It is therefore permissible, as matter of legal principle, for a Bermudian law firm to act against a former or even an existing client, provided that the firm is not in possession of confidential information regarding that client’s affairs which it acquired while acting for the client which would give it an unfair advantage. As a matter of practice Bermudian law firms tend approach question of conflicts of interest on a pragmatic and commercial basis rather than on narrow legalistic grounds.

Where there is a conflict of interest or a potential conflict of interest Chinese walls are theoretically possible with the informed consent of the clients involved and the permission of the Bermuda Bar Council. Such arrangements are, however, rarely if ever adopted. Given the relatively small size of most law firms in Bermuda, with lawyers in a particular department typically located in close proximity to one another, and sharing common administrative staff, it is not generally practicable to erect an effective Chinese wall within an office in Bermuda. The position may be different if the legal team on the other side of the ‘wall’ is located in another jurisdiction.

ii Money laundering, proceeds of crime and funds related to terrorism
Bermuda has a comprehensive AML/ATF regime. The key legislation includes the following:

a Proceeds of Crime Act 1997;
b Proceeds of Crime (Anti-Money Laundering and Anti-Terrorism Financing) Regulations 2008;
c Anti-Terrorism (Financial and Other Measures) Act 2004;
d Financial Intelligence Agency Act 2007;

The Proceeds of Crime Act 1997 establishes the offence of money laundering and creates penalties for committing such offences, gives investigative powers to the police and provides for the tracing and confiscation of the proceeds of criminal conduct. The Money Laundering offences are contained in Part V of the Proceeds of Crime Act 1997 and in summary include:

iii Concealing or transferring proceeds of criminal conduct
A person is guilty of an offence if, knowing or having reasonable grounds to suspect that any property is, or in whole or in part directly or indirectly represents another person's proceeds of criminal conduct he or she conceals or disguises that property or converts or transfers that property or removes it from Bermuda for the purpose of assisting any person to avoid prosecution for a drug trafficking or relevant offence or the making or enforcement of a confiscation order.

iv Assisting another to retain proceeds of criminal conduct
A person is guilty of an offence if he or she enters into or is otherwise concerned in an arrangement whereby the retention or control by or on behalf of another person (A) of (A's) proceeds of criminal conduct is facilitated (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise) or the 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 and he knows or suspects that A is a person who is or has been engaged in or has benefited from criminal conduct.

v Acquisition, possession or use of proceeds of criminal conduct
A person is guilty of an offence if, knowing that any property is, or in whole or in part directly or indirectly represents the proceeds of criminal conduct he or she acquires or uses that property or has possession of it.

vi Failure to disclose knowledge or suspicion of money laundering
A person is guilty of an offence if he or she knows or suspects that another person is engaged in money laundering that relates to any proceeds of criminal conduct; the information or other matter on which that knowledge or suspicion is based came to his attention in the course of his trade, profession, business or employment and he does not disclose the information or other matter to the MLRO or the Financial Intelligence Agency (FIA), as appropriate, as soon as is reasonably practicable after it comes to his or her attention.
vii Tipping off
A person is guilty of an offence if he knows or suspects that a police officer is acting or is proposing to act, in connection with an investigation which is being or is about to be conducted into money laundering or if he knows or suspects that a disclosure has been made to the FIA or an appropriate person in accordance with any procedure established by his employer and he discloses to any other person information or any other matter that is likely to prejudice that investigation or a proposed investigation that might be conducted following such a disclosure.

The Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008 specify arrangements that must be put in place by regulated financial institutions (RFIs) within the scope of the Regulations, in order to prevent operations relating to money laundering or terrorist financing. The Regulations apply to all RFIs as defined at Section 2(2) of the Regulations. Institutions within the scope of the Regulations are required to establish adequate and appropriate policies and procedures in order to prevent operations relating to money laundering or terrorist financing, covering:

a customer due diligence;
b internal and external reporting;
c record-keeping;
d internal control;
e risk assessment and management;
f compliance management; and
g communication.

The legislation specifically relating to the offence of financing terrorism is contained in the Anti-Terrorism (Financial and Other Measures) Act 2004. The Financing of Terrorism offences are contained in Chapter II of the Anti-Terrorism (Financial and Other Measures) Act 2004 and in summary include:

viii Fundraising
A person commits an offence if he or she provides, invites another to provide or receives money or other property and intends that it should be used or suspects that it may be used for the purposes of terrorism.

ix Use and possession
A person commits an offence if he or she uses or possesses money or other property for the purposes of terrorism.

ox Funding arrangements
A person commits an offence if he or she enters into or becomes concerned in an arrangement as a result of which money or other property is made available or is to be made available to another and he or she knows or suspects that it will or may be used for the purposes of terrorism.
xi  Money laundering
A person commits an offence if he or she enters into or becomes concerned in an arrangement which facilitates the retention or control by or on behalf of another person of terrorist property by concealment, removal from the jurisdiction, transfer to nominees or in any other way unless that person did not know or suspect that the arrangement related to terrorist property.

xii  Failure to disclose
A person commits an offence if he does not disclose to the FIA as soon as is reasonably practicable his belief or suspicion that another person has committed any of the above offences (fundraising, use and possession, funding arrangements or money laundering) and the information upon which it is based.

xiii  Tipping off
A person is guilty of an offence if he or she knows or suspects that a police officer is acting or proposing to act in connection with an investigation which is being or is about to be conducted into terrorist financing, or he or she knows or suspects that a disclosure has been made to the FIA and he or she discloses to any other person information or any other matter which is likely to prejudice that investigation or proposes investigation which might be conducted following such a disclosure.

xiv  Data protection
The Personal Information Protection Act (PIPA) received Royal Assent on 27 July 2016. An independent Privacy Commissioner will be appointed to ensure compliance and to assist in providing education and information on the terms of PIPA to the public. There is a two-year interim period before PIPA comes into force. Drawing from legislation in Canada, the United States, Europe and elsewhere, PIPA sets out how organisations, businesses and the Bermuda government may use personal information and emphasises meeting international best practices while promoting Bermuda’s economic interests, regulatory regime and unique characteristics. PIPA applies to all individuals, entities, or public authorities that use personal information in Bermuda, both online and offline (in a structured filing system). PIPA defines personal information as any information about an identified or identifiable individual and includes provisions for the protection of ‘sensitive personal information’ which includes, but is not limited to, any personal information relating to an individual’s place of origin, race, colour, national or ethnic origin, sex, sexual orientation and marital status. Under PIPA, data breaches that could adversely affect an individual must be reported to a Privacy Commissioner and to affected individuals. Requirements for international transfers of personal data mirror those in the European Union, with the Privacy Commissioner designating jurisdictions that have a comparable level of data protection. In many cases, companies have already adopted some of the practices included in PIPA. While PIPA will apply to all Bermuda organisations including Bermuda exempted companies, PIPA notably enables the limited use of personal information by organisations involved in corporate business transactions. During the period leading up to and including the completion of a business transaction, the organisation may use personal information about individuals without their consent provided certain conditions are satisfied.
V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

The Bermuda courts apply the English common law rules of privilege as restated by the House of Lords in *Three Rivers District Council v. Bank of England (No. 6)*, \textsuperscript{19} and recognise the two broad categories of privilege that exist under English law: ‘legal advice privilege’ and ‘litigation privilege’. The rules relating to ‘legal advice privilege’ apply to all legal advisers, including in-house lawyers and foreign lawyers. In a recent decision the Commercial Court has held that a bill of costs prepared for the purposes of taxation is privileged.\textsuperscript{20}

ii Production of documents

The production of documents in litigation in Bermuda – ‘discovery’ – is governed by R.S.C. Order 24. Order 24 r.2(1) provides for automatic discovery within 14 days after close of pleadings\textsuperscript{21} by the parties exchanging lists of documents in their ‘possession, custody or power relating to any matter in question between them in the action’. The expression ‘relating to’ is frequently, and inaccurately, paraphrased as ‘relevant’. The test is wider than direct relevance to issues in the pleadings, and covers the following categories of documents:

\begin{itemize}
  \item[a] which are direct evidence of facts in issue, or which are to be used at trial;
  \item[b] which contain information which may enable one’s opponent to advance his own case, or damage one’s own case; or
  \item[c] which ‘may fairly lead him to a train of inquiry which may have either of those consequences’.\textsuperscript{22}
\end{itemize}

Where documents are located overseas, whether electronically or otherwise, while the Court has the power to order that inspection of original documents take place at the offices of a party’s Bermudian attorneys, it is usually the case – especially where there is a large quantity of documents – for inspection of original documents to take place abroad.

A litigant must to disclose all documents within its ‘possession, custody or power’. Whether documents held by a subsidiary or parent company is subject to disclosure will depend on whether, in the ordinary course of business, the party has control over the documents. The existence of documents held by third-party advisers which are privileged must be disclosed in the list of documents. Such documents are typically described in general terms and a claim to privilege is asserted.

As a matter of principle a litigant must review electronic records and disclose them if they are ‘relevant’ for the purposes of R.S.C. Ord. 24. There is no reported case law in Bermuda on the extent of a party’s obligation to reconstruct back up tapes. Although the test of ‘relevance’ under R.S.C. Ord. 24 is wider than the scope of ‘standard disclosure’ under the English Civil Procedure Rules, following the *Peruvian Guano* case that formerly

\textsuperscript{19} [2005] 1 A.C. 610.
\textsuperscript{20} *Chubb (formerly known as ACE) Insurance Co v. Ford Motor Co* [2017] SC (Bda) 88 Civ (24 October 2017).
\textsuperscript{21} In practice almost invariably extended by agreement of the parties.
\textsuperscript{22} *Compagnie Financière et Commerciale du Pacifique v. The Peruvian Guano Co* (1882–83) L.R. 11 Q.B.D. 55 at 62–63, per Brett L.J. But see, *Wallace Smith Trust Co Ltd (in liquidation) v. Deloitte Haskins & Sells (a firm)* [1996] 4 All E.R. 403 at 412e–h, per Neil L.J.: ‘I anticipate . . . that these principles and the present practice may have to be re-examined in the near future. The scope of discovery in a complex action imposes obligations with regard to the examination and identification of documents which are often extremely expensive properly to fulfill.’
applied in England, we suspect that the Bermuda Commercial Court would be likely to follow the English decisions on the scope of discovery under the CPR and limit oppressive or disproportionate demands for discovery in appropriate cases. In arbitrations held in Bermuda where a tribunal is composed of three arbitrators who are English lawyers the scope of discovery, if it is not agreed by the parties, tends to be ordered in accordance with CPR.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

The two alternatives to litigation in Bermuda are arbitration and mediation, discussed below. Arbitration is more commonly used than mediation.

ii Arbitration

There are two separate legal frameworks for arbitration in Bermuda: The Arbitration Act 1986 (which is ultimately derived from the English Arbitration Acts of 1950 and 1979) applies to the domestic arbitrations the seat of which in Bermuda; the Bermuda International Conciliation and Arbitration Act 1993 (the 1993 Act) gives effect to the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) and applies to any ‘international commercial arbitration’ (as defined by Article 1 of the Model Law) the seat of which is in Bermuda. Parties may agree to opt out of the 1993 Act and provide for the 1986 Act to apply to an international commercial arbitration. The 1993 Act also provides a legal framework for mediation (referred to as ‘conciliation’) in Bermuda.

As noted below arbitration of insurance and reinsurance disputes is common in Bermuda. Such arbitrations are typically ad hoc. To the extent institutional rules are adopted in insurance and reinsurance disputes, ARIAS (UK) rules tend to be used. International commercial arbitrations not involving insurance or reinsurance disputes may use AAA, LCIA or ICC rules. Domestic arbitrations in Bermuda generally involve construction disputes or rent review arbitrations, and do not typically adopt institutional rules.

Arbitration is the typical form of dispute resolution procedure in the Bermudian insurance and reinsurance industry. Bermuda is the third-largest reinsurance market in the world (after London and New York) and arbitrations of reinsurance disputes in Bermuda are not uncommon. The so-called ‘Bermuda Form’ – which provides for direct liability insurance subject to New York law – provides for arbitration of disputes in either Bermuda or London.

Awards under the 1986 Act may be appealed on points of law to the Court of Appeal for Bermuda with the leave of the Commercial Court. However, parties may agree to exclude the right of appeal. Under the 1993 Act no appeals on points of law are possible, and arbitral awards may only be challenged in the Court of Appeal for Bermuda on the limited grounds that are available to resist enforcement of foreign awards under the New York Convention.

The New York Convention applies to Bermuda. In the case of an award made in an international commercial arbitration which is not within the scope of the New York Convention, it may be enforced under Chapter VIII of the Model Law. The Bermuda Courts have consistently enforced foreign arbitral awards. In the most recent decision, Sampoerna Strategic Holdings Ltd v. Huawei Tech Investments Co Ltd & Huawei International Pte Ltd involving a Singaporean award, a challenge on public policy grounds was rejected. Evans JA
said that, ‘a heavy burden lies upon a party seeking to set aside or prevent enforcement of an arbitral award on the ground of breach of natural justice’. He approved dicta stating that it was necessary to demonstrate that upholding an award would ‘shock the conscience’ or ‘be clearly injurious to the public good’ or ‘violate the forum’s most basic notions of morality and justice’.

The Bermuda courts have consistently enforced agreements to arbitrate, staying Bermudian proceedings brought in breach of an arbitration agreement, and granting anti-suit injunctions to restrain foreign proceedings brought in breach of an arbitration agreement.

### iii Mediation

Mediation is governed by Part II (‘Conciliation’) of the 1993 Act. Section 3 provides: ‘Parties to an international arbitration agreement are hereby encouraged to resolve any disputes between them through conciliation.’ Notwithstanding this statutory exhortation to conciliate, mediations in commercial disputes in Bermuda are relatively rare. This may, in large part, be due to a lack of suitably qualified mediators resident on the Island. Mediations of Bermudian disputes are more likely to be held in London.

### iv Other forms of alternative dispute resolution

There is no express statutory provision for ‘expert determination’ in Bermuda. English common law principles are likely to be applied.

### VII OUTLOOK AND CONCLUSIONS

Following the decision in *Bermuda Bar Council v. Walkers Bermuda Ltd*, the respondent company made an application to the Minister pursuant to Section 114B of the Companies Act 1981 for a licence permitting it to operate in Bermuda as a company that was not owned or controlled by Bermudians. It is understood that similar applications may be made by other foreign law firms wishing to set up offices in Bermuda. At the time of writing the issue of foreign law firms being permitted to practise in Bermuda is being considered by the Registrar of Companies in consultation with the Bermuda Bar Council.
Chapter 4

BRAZIL

Antonio Tavares Paes, Jr and Vamilson José Costa

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

In Brazil, the inspiration from Europe and the prestige of the 19th 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 one of them 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. On the other hand, specialised jurisdictions relate to disputes involving military justice, labour and electoral law.

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2 Similar to governmental decrees with a limited effective time, which must be confirmed by the legislature within 90 days, barring which the provisional measure loses its effectiveness.
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, 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 Federal Court of Appeals 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 Federal Court of Appeals, especially in circumstances of conflict of jurisdiction.

Other than an appeal to the Federal Court of Appeals, 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 Federal Court of Appeals 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 Federal Court of Appeals.

II THE YEAR IN REVIEW

A number of relevant legal developments occurred in 2017, concerning corruption and money laundering, immigration, and the confirmation of a general effort in cutting red-tape in in-court and out-of-court proceedings. For instance, in November 2017, the Department of Federal Revenue of Brazil has issued a rule, according to which, as of January 1 2018, all payments in cash amounting to 30,000 reais or more must be reported to the Revenue

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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.
Service. The new immigration law, enacted in May and in force since November 2017, was
designed to reduce the bureaucracy and ease the immigration for humanitarian reasons,
replacing the Foreigner Act, enacted during the military dictatorship period (1964–1985).

Nevertheless, the legal innovations that have buzzed the most concern the labour law
reform and the enactment of other labour-related laws. The cost with labour-related taxes, the
inflexibility and obsoleteness of the labour legal provisions, and the amounts paid in labour
litigation are among some of the most recurrent complaints of companies, especially foreign
ones. The labour law reform came into force in November 2017 and promises to allow more
flexibility in the negotiations between employer and employee, and to reduce litigation.

The scope for contractual negotiation between employee and employer has been
considerably expanded for graduated employees who receive a monthly compensation above
circa 11,000 reais. In such cases, the labour contract may contain an arbitration clause and
provide specific rules regarding annual leave, home office, profit sharing, and productivity
compensation, per example. Likewise, collective agreements have become stronger and, for
certain matters, may even prevail over legal provision.

Other than the possibility of tailored labour contracts, rights and obligations, the
number of proceedings ongoing before the labour courts is expected to decrease thanks to
two different provisions: the first allows the settlement of all labour claims on an annual basis
while the labour contract is still in force; the second aims to discourage frivolous litigation
by providing that the employee must attend all hearings and bear the cost of litigation
(court-mandated legal fees and court costs) when he or she loses the case.

The opinions on the reform of the Labour Law still vary and the efficiency of these
innovations will be tested within the coming years.

III COURT PROCEDURE
i 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.

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.
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 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 and oral deposition of the parties and witnesses in the context of court hearings. 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 Federal Court of Appeals, 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.

**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.

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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.
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:

- the defence is making use of delaying tactics;
- the facts are sufficiently evidenced by documents and the legal thesis is supported by mandatory precedents or a repetitive case decision; or
- 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.

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:

- the federal government, states, Federal District and municipalities;
- public companies, foundations and agencies, and private companies controlled by the government;
- the Public Prosecutor’s Office;
- the Public Defender’s Office; and
- a civil association of at least one year’s standing, the purpose of which is in connection with the class action’s purpose.

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

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9 The review of the decision should be requested within two years from the date when it was officially published.
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 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 practise 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. On the other hand, 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.

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

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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.
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, due 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 Brazilian Federal Court of Appeals (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 Federal Court of Appeals is limited and its intervention aims, mainly, to assure that the foreign decision:

- is effective and capable of producing effects in the state in which it was rendered;
- 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;
- does not conflict with a decision rendered by Brazilian courts; and
- does not violate Brazilian public order rules. Therefore, the Federal Court of Appeals 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).

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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, *infra*. © 2018 Law Business Research Ltd
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
referenced 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 Federal Court of Appeals. 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. It is relevant to note that 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 due 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.

ii 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. Such 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 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. 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.

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 e-mails. Should a post on the internet offend an individual’s intimacy, 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.

ii 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:
a. specify in detail the document that is required;
b. explain the document’s connection with the arguments to be evidenced or disproved;
and

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

If evidence needs to be produced from outwith 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 due 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. It is
important to mention that 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 when the 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 Federal Court of Appeals 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. On the other hand, 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 Federal Court of Appeals, 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 Federal Court of Appeals decided, in December 2015, that an award set aside at the seat cannot be recognised and enforced in Brazil.

iii Mediation

Over the past 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 of judicial proceedings in Brazil. Likewise, the extensive update of the Labour Law that came into force this year is expected to reduce the litigiousness related to labour contracts. However, their success is still to be confirmed. It is necessary to analyse its 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 the Labour Law. In any case, 2017 has already confirmed a general support for cutting red tape in litigation and pre-litigation procedures, a trend that should continue in the coming 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 improving 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 next 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, due to significant repercussions following Operation Carwash, the fight against corruption in all industries and all levels of the government has been widely discussed, and such trend is expected to be maintained over the next years.
Chapter 5

CANADA

Robert W Staley, Jonathan G Bell and Jessica M Starck

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 Quebec\(^2\) (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.

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Private arbitration and mediation as forms of dispute resolution are also available and becoming increasingly popular in Canada. There are many organisations specialised 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

This past year has 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 Deloitte & Touche v. Livent Inc (Receiver of)

In Deloitte & Touche v. Livent Inc (Receiver of), the Supreme Court clarified the proper analytical framework for establishing tort liability in cases of negligent misrepresentation or performance of services by an auditor. Applying this framework, the Supreme Court upheld the lower court’s decision finding Deloitte liable for the increase in Livent’s liquidation deficit following a statutory audit.

ii Wilson v. Alharayeri

In a unanimous decision, the Supreme Court in Wilson v. Alharayeri, clarified when directors should be held personally liable for oppressive conduct under the statutory oppression remedy. While an oppression claim must always be judged on its own unique facts, the Court held it is more appropriate to hold directors personally liable where they acted in bad faith, in breach of their duties, or in order to obtain a personal benefit.

iii Uniprix inc v. Gestion Goselin et Bérubé

In Uniprix inc v. Gestion Goselin et Bérubé, the Supreme Court considered the validity of an unlimited renewal clause giving only one party the power to terminate. The Court held that while the contract at issue was not indeterminate, there is nothing in the Civil Code that prohibits contracts from having effects that might be perpetual, and further there is no basis for finding perpetual contracts to be contrary to public policy.

iv R v. Peers; R v. Aitkens

In two recent decisions, R v. Peers, and R v. Aitkens, the Supreme Court held that those accused of securities law offences do not have the right to a trial by jury. Section 11(f) of the Charter only grants the right to a trial by jury ‘where the maximum punishment for the offence is imprisonment for five years or a more severe punishment’. Under securities law offences, where the maximum punishment is five years less one day, plus a US$5-million fine, the right to a jury trial is not triggered. In upholding the decision of the Court of Appeal of

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3 2017 SCC 63.
4 2017 SCC 39.
5 2017 SCC 43.

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Alberta, the Supreme Court confirmed that ‘more severe punishment’ should be interpreted as engaging the deprivation of liberty inherent in the maximum sentence of imprisonment, and is not triggered because of a collateral negative consequence, such as a fine.

v Yaiguaje v. Chevron Corporation

In Yaiguaje v. Chevron Corporation, the Ontario Court of Appeal clarified the test to be applied when security for costs are sought before an appeal is heard. The decision emphasises that courts must be vigilant to ensure that security for costs orders are not used as a litigation tactic to prevent a case from being heard on the merits. A holistic assessment must be made in determining whether the order should be granted, with reference to the circumstances of the case and the overriding interests of justice.

vi Google Inc v. Equustek Solutions Inc; AstraZeneca Canada Inc. v. Apotex Inc

In Google Inc v. Equustek Solutions Inc, and AstraZeneca Canada Inc. v. Apotex Inc, the Supreme Court issued two intellectual property (IP) decisions in a span of three days, both favouring IP rightsholders. In Google v. Equustek, the Court upheld an injunction with worldwide effect. In doing so, the Court recognized that an IP rightsholder may obtain an injunction against an innocent third party, if that party is unwittingly ‘facilitating’ a defendant’s breach of a court order designed to prevent irreparable harm to IP rights. In AstraZeneca v. Apotex, the Court extinguished what has become known as the ‘promise doctrine’, which has served as the basis of several successful patent challenges in Canada. A patent can no longer be held invalid because it failed to live up to the statements of an invention’s promise made in the patent specification. The consequences of these cases for IP rightsholders create stronger patents and long-arm injunctions in appropriate circumstances.

vii Asselin v. Desjardins Cabinet de services financiers Inc

In Asselin v. Desjardins Cabinet de services financiers Inc, the Quebec Court of Appeal overturned the lower court’s decision refusing the authorisation of the class action, reinforcing the ‘flexible, liberal, and generous’ approach to class action authorisation in Quebec.

viii Garcia v. Tahoe Resources Inc

In Garcia v. Tahoe Resources Inc, the British Columbia Court of Appeal provided further insight regarding the application of the forum non conveniens test. The case involved a claim for damages brought by Guatemalan plaintiffs against a Canadian parent mining company over the actions of mine security personnel at a subsidiary mine in Guatemala. In overturning a lower court’s decision granting a stay on grounds of forum non conveniens, the British Columbia Court of Appeal confirmed that the risk of an unfair trial process in a foreign court is a relevant factor in assessing whether an alternative jurisdiction is in fact a more appropriate forum. Leave to appeal the decision was subsequently refused by the Supreme Court of Canada.

7 2017 ONCA 827.
8 2017 SCC 34; 2017 SCC 36.
9 2017 QCCA 1673.
10 2017 BCCA 39, leave to appeal to SCC refused, 37492 (June 8, 2017).
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 were recently revised with regard to automatic dismissal. As of 1 January 2017, matters commenced on or after 1 January 2012 will be automatically dismissed five years after they were commenced if not yet 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 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 amount of time, 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

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12 Rule 48, ON Rules; See also Daniels v. Grizzell, 2016 ONSC 7351.

13 Code of Civil Procedure, CQLR c C-25.01.

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.¹⁵

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.¹⁶

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.¹⁷

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.¹⁸

Recently, in *Airia Brands Inc v. Air Canada*,¹⁹ 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.

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¹⁶ 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).

¹⁷ *Pro-Sys Consultants Ltd v. Microsoft Corporation*, 2013 SCC 57; *Sun-Rype Products Ltd v. Archer Daniels Midland Company*, 2013 SCC 58.

¹⁸ QC Rules, *supra* note 12, Article 574.

¹⁹ 2017 ONCA 792.
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(s) 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.\textsuperscript{20}

Class actions are unique in terms of the high level of judicial supervision and case management 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, a class action will be settled 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 a regular civil trial apply to a class action proceeding. 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.

\begin{enumerate}
\item \textbf{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.\textsuperscript{21}

\item \textbf{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 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

\textsuperscript{20} British Columbia, Newfoundland and New Brunswick have adopted a hybrid opt-in/out model that depends on the residence of the class member.

\textsuperscript{21} \textit{Halsbury’s Laws of Canada}, ‘Civil Procedure’ (Markham, Ont: Lexis Nexis Canada, 2012) at 324.
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.

The foreign judgment must be final and dispositive to be enforced in Canada. 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; or if not a monetary judgment, its terms must be sufficiently clear and limited in scope. If the 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, and 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 the judgments of those issued in another Canadian 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 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.

22 *Chevron Corp v. Yaiguaje*, 2015 SCC 42 at para. 27.
23 *Pro Swing Inc v. ELTA Golf Inc*, 2006 SCC 52.
24 CQLR c C-25.01.
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; for example, 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.26

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. The process continues to evolve, with the most recent expansion to commercial cases.27 Currently, litigation funding in Canada is more strictly regulated than in the United States and requires court approval prior to the advancement of funding. In a recent decision, the Federal Court opted not to provide approval for litigation funding in a patent infringement suit, holding that the Court’s jurisdiction does not extend to matters of contract and civil law.28 Litigation funding may also be available for fees, disbursements, and adverse costs in class actions, depending on particular circumstances.29

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.30 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.31 A court will, however, address claims of breach of fiduciary duty or conflicts if they are brought before it.

In Canadian National Railway Co v. McKercher LLP,32 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

31 See for example, Law Society of Upper Canada, Rules of Professional Conduct, Section 3.4.
32 2013 SCC 39 at para. 32.
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. Erecting ethical walls is a common practice in large Canadian law firms.

### 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.

### 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 during a commercial activity that takes place within a province. Certain provinces have enacted separate privacy statutes, which apply instead of PIPEDA.

In addition, 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.

### DOCUMENTS AND THE PROTECTION OF PRIVILEGE

#### 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 in which Canadian law recognises that the public interest in preserving and

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34 SC 2000, c 17.
36 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.
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.\(^{37}\) 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 of Canada recently released two decisions on privilege, both of which further demonstrate the court’s recognition of the fundamental role that both solicitor–client and litigation privilege play in ensuring access to justice.\(^{38}\)

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 \(\text{R v. Campbell}\), 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’.\(^{40}\) 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 \(\text{R v. National Post}\) 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 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.\(^{42}\)

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37 Blood Tribe Department of Health v. Canada (Privacy Commissioner), 2008 SCC 44.
40 This position was confirmed in Pritchard v. Ontario (Human Rights Commission), 2004 SCC 31 at para. 21.
41 2010 SCC 16.
42 For further discussion on this topic, see Brandon Kain, ‘Solicitor–Client Privilege and the Conflict of Laws’ (2011) 50 The Canadian Bar Review 243.
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.\textsuperscript{43} 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.\textsuperscript{44}

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.\textsuperscript{45}

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{itemize}
  \item[a]\ the importance of the documents in the litigation;
  \item[b]\ whether production at the discovery stage is necessary to avoid unfairness to the appellant; and
  \item[c]\ 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.\textsuperscript{46}
\end{itemize}

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.\textsuperscript{47}

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 like med-arb) and expert determination.

\textsuperscript{43} MB Rules, supra note 12, r. 30.02; NB Rules, supra note 12, r.31.02, NWT Rules, supra note 12, rr. 219 and 222; ON Rules, supra note 12, r. 30.02; PEI Rules, supra note 12, r. 30.02.

\textsuperscript{44} Federal Court Rules, SOR/98-106, Rule 222(2).

\textsuperscript{45} Siemens Canada Limited v. Sapient Canada Inc, 2014 ONSC 2314. See also: ‘The Sedona Canada Principles Addressing Electronic Discovery’.


\textsuperscript{47} ON Rules, supra note 12 r. 30.02(4) and MB Rules, supra note 12, r. 30.02(4).
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 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.48

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.49 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.

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).50 The CMA ensures that parties settling a commercial 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 basis51 or on application by the parties.52 In Quebec, the Code of Civil Procedure sets out a formal legislative scheme for judicial mediation.

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48 For a full list, see Department of Justice, ‘Dispute Prevention and Resolution’, online: www.justice.gc.ca/eng/abt-apd/dprs-sprd/index.html.
49 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.
50 2010, SO 2010, c 16, Sch 3.
51 As is the case in Alberta.
52 As is the case in Ontario.
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.53

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.54

VII OUTLOOK AND CONCLUSIONS

Cases currently under reserve or appeal will likely lead to developments in the areas of administrative law, civility in the legal profession, interprovincial trade, the duty of good faith in contract performance, and the duty to consult with aboriginal groups.

In *Delta Air Lines Inc v. Gábor Lukácis*,55 the Supreme Court heard an appeal from the Federal Court of Appeal on standing in administrative tribunals. The Supreme Court reserved judgment and will decide whether the Canadian Transportation Agency has the authority to decline to hear complaints on the basis of lack of standing.

In *Groia v. Law Society of Upper Canada*,56 the Supreme Court heard an appeal from the Ontario Court of Appeal, upholding the Law Society Appeal Panel’s decision that Mr Groia engaged in professional misconduct, ordering a suspension of his licence to practise law for one month. The Supreme Court reserved judgment and will rule on the ability of a regulatory body to bring proceedings for misconduct arising out of a lawyer’s submissions to a judge in open court.

In *R v. Comeau*,57 the Supreme Court considered whether the prohibition on transporting liquor between provinces violated the free trade guarantee in Section 121 of the Constitution Act 1867. The Supreme Court reserved judgment and will determine whether section 121 of the Constitution prohibits both non-tariff as well as tariff barriers to interprovincial trade.

In *Churchill Falls (Labrador) Corporation Limited v. Hydro-Québec*,58 the Supreme Court heard an appeal from the Québec Court of Appeal, dismissing an action alleging the duty

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55 SCC File No. 37276.
56 SCC File No. 37112.
57 SCC File No. 37398.
58 SCC File No. 37238.
of good faith in contract law required renegotiation of the contract at issue. The Supreme Court reserved judgment and will rule on the contents of the duty of good faith in contract performance as governed by the Civil Code.

In Chief Steve Courtoreille on behalf of himself and the members of the Mikisew Cree First Nation v. Governor General in Council, et al,59 the Supreme Court will consider whether the duty to consult in respect of the legislative processes is only triggered by legislation targeted specifically at First Nations and whether the separation of powers precludes the duty to consult arising as a justiciable legal duty on the executive in respect of development of legislation until its introduction in Parliament.

59 SCC File No. 37441.
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 (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 (JCPC).

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.
II THE YEAR IN REVIEW

2017 saw important decisions on redemptions and the negligence of fund service providers. It also produced key rulings on how to determine the fair value of shares to be purchased from dissenting minority shareholders in corporate mergers and the court’s common-law powers to assist in the insolvency and restructuring of foreign registered companies by sanctioning a scheme of arrangement. These decisions are summarised below.

Significant rulings were also made late in the year, with the Cayman court for the first time recognising the powers of a receiver of a Bermudan segregated account,2 as well as issuing a judgment that indicates when third-party funding of litigation in the Cayman Islands does not constitute champerty or maintenance, providing helpful clarity on the issue.3

In the Matter of Primeo Fund v. Bank of Bermuda (Cayman) Limited and HSBC Securities Services (Luxembourg) SA FSD30 of 2013

The Grand Court considered whether a custodian and an administrator had been negligent in regard to losses from Madoff investments, based on the lack of ability to verify the assets’ existence and value due to the unusual structure utilised.

Custodian

The custodian accepted the terms for investment of Bernard L Madoff Investment Services (BLMIS), which combined the roles of sub-custodian, broker and investment manager. The judge found that the custodian could have identified to their client the risks of that structure and suggested ways to protect their client. If their client insisted on continuing to invest, then a reasonably competent custodian would have either resigned or negotiated new terms to limit or avoid its liability.

Administrator

The administrator provided Primeo with investment information, maintenance of records, a monthly net asset value (NAV) calculation and checks on the existence of the assets underlying the investments. In doing so it relied on one source, BLMIS. That reliance was found to be negligent, but as Primeo had structured its investment in BLMIS through two sub-funds, the administrator had not breached any duty to Primeo. Provided there was no obvious error, the administrator had no obligation to look through the sub-funds’ NAVs when calculating Primeo’s NAV. The sub-funds could bring a claim against the administrator, but here Primeo was claiming for a loss suffered by funds in which it had invested. This is ‘reflective loss’ and there is a common law principle that prevents such claims.

Primeo’s contributory negligence

Primeo knew and accepted the risks in investing in BLMIS and would have continued to invest even if warned about them by the administrator or custodian. The judge made it clear that had those professionals been liable to pay Primeo damages, the amount would have been reduced by 75 per cent for contributory negligence.

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2 In the matter of Silk Road Funds Ltd et al and a Request for Recognition (FSD 234 of 2017) – Sealed Order dated 11 December 2017.
[2017] UKPC 19

The JCPC confirmed that redemption of shares occurs when a shareholder ceases to be a shareholder, even if they have not yet been paid for the shares they have redeemed, and then they become a creditor until such time as they are paid the amount due for the share redemption.

This has determined the interpretation of Section 37(7)(a) of the Companies Law (2016 Revision) (the Law), which addresses the situation where a shareholder has redeemed shares in a company that then becomes subject to winding-up (liquidation). Section 37(7)(a) sets out whether that shareholder has stopped being a shareholder and instead becomes a creditor. It also sets out what priority a creditor whose debt arises from share redemption has in regard to other types of creditors and those who are still shareholders. This matters, as in a liquidation, creditors are paid before shareholders.

The JCPC agreed with the Grand Court and the Cayman Islands Court of Appeal that: shares are redeemed when shareholders surrender the status of shareholder; and that payment is not an inherent element of either redemption or of repurchase by a company of its own shares. Primeo had properly redeemed its shares in Herald before redemptions were suspended and before the liquidation commenced. This meant it was no longer a shareholder at the start of Herald’s liquidation and as it was owed payment for the redeemed shares, accordingly, Primeo was a creditor.

The parties had agreed that redeemers judged to be creditors would be entitled to be paid before the shareholders, but after other creditors. This meant the JCPC did not need to decide if Primeo’s debt had priority over shareholders or other creditors and that this issue remains to be definitively resolved.

iii  DD Growth Premium 2X Fund (In Official Liquidation) v. RMF Market Neutral Strategies (Master) Limited  
[2017] UKPC 36

The JCPC found that redemption payments to RMF made by DD Growth from share premiums are within the definition of payments out of capital and as such are unlawful if made when a company is insolvent. Section 37(5)(a), (b) and (f) of the Law states that ‘capital’ for the purpose of Section 37(6) is any payment not made out either of profit or the proceeds of a fresh issue of new shares. Redemption payments made by DD Growth to RMF were not from either of these sources and so were payments from capital.

The JCPC confirmed that redemption payments are debts that fall due in the ordinary course of business and so if they cannot be paid in full then the company is insolvent. As DD Growth made the redemption payments to RMF at a time when it could not make full redemption payments to those entitled (including RMF) it was not able to pay its debts as they fell due in the ordinary course of business. Therefore the payments to RMF that had been made out of capital were unlawful under section 37(6)(a) of the Law.

The JCPC found that while the payments by DD Growth were unlawful the redemptions by RMF were lawful transactions. As RMF had not acted unlawfully and had simply received payments that were due to it, the payment was not recoverable under the common law principle of unjust enrichment. This is because a person cannot be unfairly enriched where they have given full value for the sums received. However, although payment had been received by RMF for lawful consideration, it had been authorised by the DD growth directors in breach of their duties to the company. Accordingly, the question arose
of whether RMF could be said to have known it received the money due to such breach of trust. If it did it would be a constructive trustee of the sums paid to it by DD Growth and would have to give them back if asked. As that point had not previously been decided in the lower courts, the JCPC directed the Grand Court to do so. It made the point that knowledge by RMF of the breach of duty by the DD Growth directors, in a situation where there was a routine redemption and any unlawfulness only arose out of the internal affairs of the company, may be hard to prove.

iv  Re Shanda Games Limited Unreported 25 April 2017, (Segal J)\(^4\)

Shanda is a Cayman Islands holding company involved in business as one of China’s largest online games companies. Many such companies have entered into mergers in recent years as part of ‘take private’ reorganisations.

The Law provides for statutory mergers and consolidations of companies. Approval of a plan of merger or consolidation prepared by the company must be obtained via a special resolution, passed by a majority of at least two-thirds of shareholders at a duly convened general meeting of the company. Section 238 of the Law allows shareholders who wish to dissent from the merger to obtain a court determination as to the company’s fair value on the date of the meeting in which the merger was approved and have their shares bought at a price reflecting the fair value of the company.

Fair value is not defined in the Law but a previous Grand Court decision had concluded that the court’s role was to determine the fair value of the company’s entire business as a going concern as at the valuation date, and that the fair value of a dissenter’s shares would be their proportionate share of that amount, with no minority discount or premium for the forcible taking of their shares. There is no presumption that the merger price constituted a minimum price.

This approach was adopted by Segal J in Shanda, who also confirmed the proposition that the court will approach disputed issues on the basis that it is for both parties to establish, on the balance of probabilities, that the valuations their experts have presented are reasonable and reliable. If only one is reasonable and reliable the court should generally follow that expert’s approach. If both appear to be reasonable and reliable then the court must decide which is to be preferred. If neither is reasonable nor reliable, the court must make its own determination.

In Shanda both experts had agreed that the most suitable valuation methodology was to solely use discounted cash flow (DCF) models. However, there were disputes on the DCF analysis that are likely to feature in similar future cases: (i) the discount rate and the inputs to its calculation; (ii) which of the three sets of projections produced by Shanda should be relied upon; (iii) whether a two-stage or three-stage growth model should be used; (iv) the treatment of expenditure on the take-private transaction; and (v) the treatment of restrictive stock units and share options triggered by the merger. The court’s ruling in resolving these questions and determining the fair value made a number of findings that will be of interest to participants in future merger cases.

\(^4\) In the Matter of the Companies Law (2013 Revision) and In the Matter of Shanda Games Limited.
Re Ocean Rig UDW Inc and others (Unreported, Grand Court, 18 September 2017)\(^5\)

Ocean Rig UDW Inc (UDW), a leading international contractor of offshore deep-water drilling services, and three of its subsidiaries successfully applied for the sanction of four schemes of arrangement.

As a result of the decline in oil and gas prices and other changes in the offshore drilling sector, the Ocean Rig group needed to take steps to restructure its financial indebtedness, to manage liquidity and to stabilise its business. The schemes restructured the core financial indebtedness of approximately US$3.7 billion, making use of the reorganisation provisions of the Law. These enable the court to sanction a compromise or arrangement between a company and its creditors or members, or any class of them, that is approved by 50 per cent in number and 75 per cent in value of those present and voting at a meeting called for that purpose. Once sanctioned by the court the provisions of the compromise are binding on all the creditors, even those who dissented.

The four scheme companies were all originally incorporated in the Republic of the Marshall Islands. The parent company, UDW, transferred to the Cayman Islands by way of continuation as an exempted company in April 2016. The subsidiary companies were registered as foreign companies in the Cayman Islands in October 2016. The Law gives the Cayman Islands Court the jurisdiction to sanction a scheme for any company liable to be wound up by the Cayman Islands Court and the Law provides that the Cayman Islands Court has jurisdiction to wind up a foreign company which: (1) has property located in the Cayman Islands; (2) is carrying on business in the Cayman Islands; (3) is the general partner of a limited partnership; or (4) is registered as a foreign company with the Cayman Islands Registrar of Companies. As a result of the transfer of UDW to the Cayman Islands and the registration of the subsidiaries as foreign companies all four companies were able to benefit from the Cayman Islands’ scheme of arrangement regime, the likes of which is not available in the Marshall Islands.

This was the first time the court sanctioned a scheme involving foreign companies.

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),\(^6\) subsequent amendments, sub-rules and practice directions. The GCR do not apply to disputes governed by Parts I to III of the Succession

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\(^5\) In The Matters Of Ocean Rig Udw Inc., et al.

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) (CWR).7

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).

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 from 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);\(^8\)
- **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);\(^9\)
- **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);\(^10\)
- **e** to enter and search premises to find documents or moveable property and prevent their destruction (an *Anton Piller* injunction);\(^11\)
- **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 standalone *Mareva* injunction).

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\(^9\) *Norwich Pharmacal Co. v. Customs and Excise Commissioners* [1974] AC 133.


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.

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 a 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.

Hague Convention

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

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14 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), Article III.
15 In The Matter Of China Agrotech Holdings Limited 17-Sep-19.
16 Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978.
17 Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.
18 Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.
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. Whilst 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, a recent decision of the Grand Court approved a funding agreement in a commercial dispute, which involved a Korean company seeking to enforce a judgment in the Cayman Islands. 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.

22 The Private Funding of Legal Services Bill, 2015 (Draft).
23 Code of Conduct for Cayman Islands Attorneys at Law.
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 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.

24 Criminal Justice (International Cooperation) Law (2015 Revision); Mutual Legal Assistance (United States of America) Law 2015 Revision; Misuse of Drugs Law (2017 Revision); Misuse of Drugs (Amendment) Law, 2016; Anti-Corruption Law (2016 Revision); Proceeds of Crime Law (2017 Revision); Proceeds of Crime (Amendment)(No. 2), 2016; The Proceeds of Crime (Amendment) Law, 2017; The Terrorism Law (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.
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 January 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 (CIDL) 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.

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.

Code of Conduct for Cayman Islands Attorneys at Law s4.
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 or can ask the court to limit the extent of discovery.

VI ALTERNATIVES TO LITIGATION

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.

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, 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 are significant decisions expected from the Cayman Islands courts related to redemption claw back claims during 2018 and the *Ocean Rig* decision is expected to generate more applications by foreign companies for sanction of a compromise or arrangement between a company and its creditors or members. There will undoubtedly be more ‘fair value’ cases brought by dissenting shareholders to mergers as well.

While generally company winding-up petitions are down in number, there are a number of significant liquidations in progress that will produce interesting decisions, including in regard to auditors’ liability and in-kind redemptions.

Legislation for new legal entities such as limited liability partnerships and foundation companies are likely to spawn litigation that will be watched with great interest.

The Cayman Islands courts are dedicated to providing a ‘best in class’ service and the appointment of a number of judges and acting judges in 2017 will continue to reap rewards in speedy listings and effective disposal of cases in 2018.
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 until today 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’.

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 geographic 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 courts

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1 Soteris Pittas is a managing director and Nada Starovlah is a barrister at law at Soteris Pittas & Co LLC.
2 Section 29(i)(c) of Law 14/1960.
that are situated in Nicosia and Limassol exercise jurisdiction in claims concerning disputes between employers and employees. Besides the above, there are also three rent control courts exercising jurisdiction in claims relating to evictions, rent issues and premises.

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 specially 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 regards 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 (i) bona fide mistake relating to the drafting of the pleadings or (ii) to new facts which 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 regards 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 regards to actions above the scale of €3,000, the parties

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 regards to the Courts of Justice Law 14/60 in particular with regards 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:

a. every final decision or order of the court which exercises civil jurisdiction;
b. prohibitory orders or orders for the issuance of receiver which are issued as per the provisions of any law; and
c. interim decisions which 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 regards 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 due to the fact that the jurat was not in one of Cyprus’s 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 that 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.

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, 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 from 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. 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 the 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 the 1 January 2017 and an individual is considered to be a tax resident in Cyprus provided he or she:

a remains in Cyprus for at least a period of 60 days during the tax calendar year;
b 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;
c maintains a permanent residence in Cyprus, which can either be owned or rented by him; and
d carries out business activities in Cyprus or have employment in Cyprus or is a director in 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 regards 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. The said Law states the limitation period for civil wrongs, contracts, secured loans and various other types of actions.

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. As regards 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 which demonstrates the appointment of the advocate whereas this is not a requirement with regards 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 5 B 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.15 As regards 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 which 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 has been amended, permitting for substitute service via email, fax and other electronic means, methods which had not been permitted previously.16

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 outside 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 such circumstances the plaintiff proves his case before the judge in the absence of the defendant on an ex parte basis. If,

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15 Order 5B of the Civil Procedure Rules, Cap 6.
however, the particular defendant disputes the jurisdiction of the court or wishes to apply to set aside of 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 has a good defence to the action. This procedure for summary judgment is normally used where it is obvious on the facts of the case and the evidence that the defendant has no real defence and has entered an appearance merely for purposes of delaying the matter (i.e., claims under promissory notes, cheques, bill of exchange etc.). In practice if the defendant shows that he has some reasonable defence, summary judgment will not be entered and he will be allowed to file his 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 intends to rely upon in order to prove his 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 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 its 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 is successful its action, he or she will need to take steps to enforce the judgment against the defendant, such as by the enforcement against moveable or immovable property and third party enforcement orders against banks which hold the funds or the assets which 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 regards to the power and duties of the bailiffs entrusted with execution and Order 45 with regards to receivers.
The issuance of interim orders before the Cyprus courts

The Courts of Justice Law 14/60 particularly Section 32 confers power to 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 which 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 (i) a serious question to be tried, (ii) that there is a likelihood that the plaintiff will succeed in its claim and that (iii) 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 weighting 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 since there is no matter of urgency or exceptional circumstances which can be proved by the plaintiff and which 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 since besides the above three conditions to be proved, it also needs to illustrate and provide evidence as regards 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.

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, since 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.

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v Service outside 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 outside of jurisdiction on 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 ( 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 the 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 and therefore 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 the 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 the 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 Members (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 (1) complete and certified copy of the foreign judgment, (2) 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, (3) 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 (4) 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.

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.

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18 Article 43 of the Brussels Recast Regulation 1215/2012.
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.

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and arbitral awards. With regards 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, 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 the 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 in which 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 as to 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 regards 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 practicing 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 firm 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 be 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 which 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.

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 the main body which cooperates with the 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 that has replaced the Prevention and Suppression of Money Laundering Activities Law 2007 No. 188 (I) 2007.

27 Article 21(1) of the Code of Conduct Regulations.
28 Article 21(2) of the Code of Conduct Regulations.
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 to 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 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 which are or have been in his possession or power. If a party ordered to make discovery of documents fails so to do, he shall not afterwards be at liberty to put in evidence on his behalf in the action any document he failed to discover or to allow to be inspected, unless the court is satisfied that he 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.

29 Order 28(1) of the Civil Procedure Rules.
30 Order 28(3) of the Civil Procedure Rules.
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.

The most prominent alternative dispute resolution centres in Cyprus are the Cyprus Eurasia Dispute Resolution Centre (CEDRAC), the Cyprus Chamber of Commerce and Industry (CCCI) and the Cyprus Arbitration and Mediation Centre (CAMC).

Cyprus courts have jurisdiction to issue interim measures of petition (i.e., 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 the 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 which is a non-binding procedure, similar to mediation which 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 Incoming 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 will take effect on 25 May 2018 being directly applicable
in all Member States without the need for implementing national legislation.\textsuperscript{31} The main amendments relating to personal data include (1) higher standards for obtaining the data subject’s consent; (2) profiling; (3) broadening the meaning of personal data; (4) significant sanctions; (5) the duty to designate a data protection officer and (6) the obligation to notify the supervisory authority in the event of a personal data security breach.

\textbf{ii Commercial Court to be established}

It is expected that by 2018 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 €5 million. The seat shall be in Limassol and Nicosia with consultations with the Supreme Court. 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.

\textbf{iii 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 among which is 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 (1) implementation of a remuneration policy; (2) risk management and (3) an independent internal audit and (4) actuarial functions.

\textbf{iv Cyprus arbitration forum}

A Cyprus arbitration forum – in the form of a limited by guarantee company – is in the process of being established whose 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 \textit{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 Cyprus educational work for use in arbitration and mediation as the best method and mechanism of dispute resolution.

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.

The main sources of law are statutes. Preparatory works, case law and legal doctrine constitute secondary sources of law. Danish law is characterised by extensive bodies of systematic and written 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 Danish 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 the 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 Christian Rasmussen 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:

a. the Supreme Court;
b. the High Courts;
c. the Maritime and Commercial High Court;
d. 24 district courts; and
e. 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 of 1985. Institutional arbitration is widely used, and the Danish Institute of Arbitration plays an important role in relation to commercial disputes in Denmark.

II THE YEAR IN REVIEW

Liability cases characterised the year 2017 in the Danish courts, one regarding product liability and one regarding professional liability. A new tax commission was also established.

i Liability for defective products

Product liability rules impose strict liability on both manufacturer and intermediate seller for products causing damage to persons or objects. However, there is no strict liability when a product damages itself, as these situations are covered by the Danish Sale of Goods Act, which does not include strict liability in these situations. Therefore, whether a product damages a person or an object, or damages itself, is an important consideration for product liability in Danish law.

On 13 September 2017, the Supreme Court delivered a clarifying judgment. It considered whether a lubrication system located inside the engine of a ship should be considered as part of – and therefore as an ingredient of – the engine, or if the lubrication system should be considered as a separate product to – and therefore as a component of – the engine. Pursuant to the preparatory works of the Danish Product Liability Act, the pertinent question was whether the product (the ship’s engine) was sold as one single unit. If so, any
damage to the product would be considered self-caused and therefore covered by the Danish Sale of Goods Act. The Supreme Court held that the ship’s engine was sold as one single unit to the plaintiff, and that the damage incurred should therefore be dealt with according to the law pertaining to the sale of goods (i.e., without consideration of strict liability).

ii Liability of directors, managers and auditors

In the wake of the financial crisis, 12 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 against the board of directors and management (and in some of the cases the auditors) in seven of the banks. The scope and grounds for professional liability and mismanagement were different in each case.

The hearing for the largest of the bank cases commenced in November 2015 against Roskilde Bank and ended at first instance in the summer of 2017. The Roskilde Bank case is the longest-running commercial case in the Danish courts.

On 7 November 2017, the Eastern High Court delivered its judgment. It found that the operation of Roskilde Bank gave rise to criticism in specific areas, such as granting loans on an expedited basis without the board’s involvement. In addition, the Court found that Roskilde Bank had large-scale exposure in the market-sensitive real estate sector. However, the Court did not find reckless management of the bank.

Financial Stability has appealed the judgment to the Supreme Court.

iii A new tax commission

In 2005, the Danish Ministry of Taxation was allocated the responsibility of collecting overdue tax debt, and commenced the development of a joint digital collection system (EFI is the Danish acronym) the same year. EFI was originally scheduled to be implemented in 2007 but there were several delays and in 2014 it was decommissioned due to a severe lack of performance. Principally, EFI was unable to identify overdue tax debt nor able to calculate total debt due. It is estimated that EFI’s failure has cost the Danish treasury approximately 100 billion kroner.

On 13 September 2017, the Danish Minister of Justice appointed a fact-finding commission to investigate the events relating to, inter alia, the planning, development and decommissioning of EFI, in order to identify where responsibility lies. The commission’s work is expected to last a minimum of two years.

III COURT PROCEDURE

Danish court proceedings are governed by the Danish Administration of Justice Act (No. 1101 of 22 September 2017), 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.

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. Thus, 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 of the documents and present all facts and circumstances 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.

Anyone can attend court proceedings; 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 free to evaluate the evidence on its merits. In principle, the courts are not 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. It should be mentioned that the courts are not bound by experts’ reports or other kinds of expert evidence.

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. However, the defendant may demand that a foreign plaintiff provides security for the payment of the cost of the proceedings. This does not apply to nationals of EU countries and 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 the Maritime and Commercial High Court, or the district court may refer the case on its own motion, if the case is important for the application or the development of the law, or is in the general public interest.

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 as the court of first instance may

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3 See Section 338 of the Administration of Justice Act.
4 See Section 297 of the Administration of Justice Act.
5 See Section 321(1) of the Administration of Justice Act.
be appealed to the Supreme Court. Cases may be brought before the Supreme Court as the court of third instance if the case concerns principles of general public interest. The Appeals Permission Board decides whether a case may be tried in three instances.

District courts comprise ordinary civil and criminal courts. In addition, district courts 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 or 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. 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 in the general public interest; 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 which have an international commercial dimension, or cases concerning sea, air or land transportation.

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<tr>
<th>Third instance/ second instance</th>
<th>Supreme Court</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 those requirements.6

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 prescribed deadline set by the court, the court may issue a judgment in accordance with the claim of the plaintiff. Following the first round of pleadings, the parties will normally be allowed to exchange further pleadings.

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 those questions.

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6 See Section 348(2) of the Administration of Justice Act.
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 and the potential appointment of a court-appointed expert.

Following the conclusion of the preparation phase, the parties will prepare a summary on the exchange of submissions and the court will set a date for the main hearing. 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 the following three phases:

a. the opening address;

b. the presentation of evidence and the hearing of witnesses; and

c. the closing arguments.

The first phase 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. Following the opening address, the defendant’s legal representative is invited to comment. The opening address must be objective.

The next phase constitutes the parties’ presentation of evidence and the hearing of witnesses. The witness is first examined by the party who called the witness, and then the opponent is allowed a cross-examination.

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

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 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 Danish 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.

**iii Class actions**

In 2008, provisions on class actions were included in the Danish 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. The class action scheme in Denmark

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7. See Chapter 23a of the Administration of Justice Act. This was implemented by Act No. 181 of 28 February 2008 on the amendment of the Administration of Justice Act and other acts.
is based on an opt-in system, which entails that 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 all class actions on their official website.

Class actions are brought before the courts. No special court or tribunal deals with class actions. As the class action scheme is fairly new, the case law is still scarce. The first class action case before the Supreme Court was the BankTrelleborg case in January 2012, regarding a collective shareholder action.8

iv  Representation in proceedings

Only Danish-qualified attorneys may represent parties in court. However, natural persons have procedural capacity and are competent to represent themselves in court,9 and legal persons may be represented by employees. The court may order the party to retain an attorney if, given the circumstances of the case, it is of the opinion that professional representation is required.10

v  Service out of the jurisdiction

Documents in civil matters may be served outside 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 by means of a parallel agreement between Denmark and the European Union. 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 1974 treaty between Finland, Denmark, Iceland, Norway and Sweden, the Nordic Convention on Mutual Legal Assistance in Service and Taking of Evidence, applies.11 Pursuant to Article 1 of the Convention, a contracting state may apply directly to the competent 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 (also by way of a parallel agreement as regards the Regulation).

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8  BankTrelleborg of 27 January 2012.
9  See Section 259(1) of the Administration of Justice Act.
10 See Section 259(2) of the Administration of Justice Act.
11 The Nordic Convention was ratified on 26 April 1974 by Executive Order No. 100 as of 15 September 1975.
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 very scarce.

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

As noted above, 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 shall be submitted directly to the relevant authority.

Finally, the Hague Convention of 18 March 1970, on the Taking of Evidence Abroad in Civil and 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 shall not pay court fees, is reimbursed for all 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.12

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.

iii Data protection

The Danish Act on Personal Data (No. 429 of 31 May 2000) applies to the processing of all personal data carried out by electronic data processing and to non-electronic processing of personal data contained in a file. Processing is generally prohibited, unless the person in question has given his or her consent. On 25 May 2018, a new personal data EU regulation will apply, tightening processing rules and increasing sanctions.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

The relationship between attorney and client is privileged; correspondence and other documents of 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.

ii 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.

VI ALTERNATIVES TO LITIGATION

i 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 use of arbitration is increasing and the figures of the Danish Institute of Arbitration illustrate that the trend is continuing. Further, as part of a general reform of the Danish courts, the courts offer mediation.

ii Arbitration

Arbitration is commonly used to settle commercial disputes in Denmark.

The Danish Arbitration Act is based on the UNCITRAL Model Law, and applies to national and international arbitration proceedings taking place in Denmark.\(^\text{13}\)

The overriding principle of the Danish 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

\(^{13}\) Section 1 of the Arbitration Act.
and enforce the award in special circumstances.\textsuperscript{14} 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 (public policy).\textsuperscript{15}

Arbitration proceedings commence when the respondent receives the written request for the dispute to be referred to arbitration, unless the parties agree otherwise.\textsuperscript{16} Generally, this request includes a summary of the dispute, a preliminary statement of the relief sought, and if three arbitrators, appointment of an arbitrator. The respondent will then generally submit a reply and, if three arbitrators, also appoint an arbitrator. The arbitration is normally concluded after an oral hearing.

\textbf{iii Mediation}

In 2008, rules on court-based mediation were introduced in the Administration of Justice Act.\textsuperscript{17} The parties to a civil dispute are, as a matter of routine, given the option to attempt mediation within the court system before starting the litigation proceedings. The court-based mediation scheme in Denmark is voluntary. Thus, 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 slowly 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 the matter to mediation before the case goes to arbitration.

\textbf{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.

In the area of arbitration, the Danish Institute of Arbitration has revised its rules on arbitration to further enhance Denmark’s position as a venue for arbitration. The institute has also adopted new rules on mediation to ensure alignment with international standards. In relation to maritime and offshore industry disputes, the Nordic Offshore and Maritime Arbitration Association is now established and starts work in January 2018.

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\textsuperscript{14} Section 37(2) of the Arbitration Act.
\textsuperscript{15} The Supreme Court judgment case 142/2014 of 28 January 2016.
\textsuperscript{16} Section 21 of the Arbitration Act.
\textsuperscript{17} See Chapter 27 of the Administration of Justice Act and Act No. 168 of 12 March 2008 on the amendment of the Administration of Justice Act, the Act on Court Fees and the Inheritance Act.
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Chapter 9

ECUADOR

Alejandro Ponce-Martínez and Cristina Ponce-Villacis

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

During the last 14 years, the judiciary has been subjected to permanent occurrences that have adversely affected access to fair and impartial proceedings. In 2004 the National Court of Justice was illegally removed from office and consequently came a period of serious deterioration, which was exacerbated with the release of a new Constitution, a new Code of the Judiciary, and new procedure codes, as well as the appointment of new judges, at all levels, frequently unprepared for the position. Furthermore, corruption became a common practice in courts, and interference with independent trials by the executive was frequent during Rafael Correa’s presidential term, who was in office from 15 January 2007 to 24 May 2017.

The Ecuadorian judicial system is ruled by statutory law, not by common law or judicial precedents, unless the National Court issues reiterative jurisprudence – three times – on a matter, or the Constitutional Court issues a general constitutional interpretation decision, or determines the constitutionality of a law.

The main bodies of the judiciary are first instance judges, or tribunals, for criminal, taxation, or administrative cases, provincial courts, which hear most appeals, and some special cases, and the National Court of Justice, which rules on extraordinary cassation recourses filed against decisions issued by the provincial courts, and decides on first and second instance in special cases, such as if the accused holds a privilege (e.g., is the vice-president of the country). The National Court of Justice has 23 judges and 21 admission (or associate) judges, and comprises six chambers, namely: (1) juvenile offenders and family matters; (2) labour; (3) civil and commercial; (4) criminal (includes police, military and traffic offences); (5) taxation; and (6) administrative.

The Constitutional Court also plays an important role. When constitutional rights – including the right to due process – have been violated during proceedings, either party can file an extraordinary action of protection if the decision is final. The action will be by a tribunal formed by three of the nine judges that make up the Constitutional Court. The Constitutional Court can also rule on the constitutionality of internal laws or international treaties, and hear cases regarding non-compliance with international human rights treaties or constitutional provisions.

While procedural internal laws strictly regulate all proceedings, international treaties and constitutional provisions establishing fundamental rights must be observed in any and all kinds of proceedings.

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II THE YEAR IN REVIEW

The most recent development on dispute resolution was the enactment of the General Organic Code of Procedures on 22 May 2015, which came completely into force on 22 May 2016, and instituted a new procedural system for all trial proceedings, except criminal and constitutional matters, which continue to be regulated by special laws.

The main development of this new law is that all trials must be conducted (almost exclusively) by a system of hearings, which replaces former partially written judicial procedures.

Another important development was the enactment of the Administrative Code, which will fully enter into force on July 2018. This Code regulates administrative procedures, including appeals and extraordinary challenges before all public entities.

While the Ecuadorian system is mainly ruled by statutory law, it is worth mentioning a couple of notorious cases:

In December 2017, vice-president of the Republic, Jorge Glas, was sentenced by the National Court of Justice to six years in prison and the payment of US$14.1 million after finding him guilty of receiving bribes from the Brazilian construction company Odebrecht.

In August 2016, the National Court of Justice ruled, for the third time (after the plaintiff had filed two extraordinary actions of protection against previous decisions), on the very controversial matter of Prophar SA v. Merck Sharp & Dohme (Interamerican) Corporation (MSD) and ordered to pay US$41,966,571 million for the damages allegedly caused to plaintiff due to the decision not to sell defendant its pharmaceutical plant, worth US$1.5 million. The plaintiff had argued in its complaint that the decision not to sale the factory, after several months of negotiations, caused it irreparable damages as it was unable to grow commercially and develop a business plan that would have implied the monopolisation of the generic pharmaceutical market in Ecuador. Among other inconsistencies in the decision – such as that monopolising the generic pharmaceutical market would have gone against free competence provisions, and that nor the feasibility of the business plan or damages were proven – it went against statutory law and reiterative National Court precedents establishing that no obligation arises between the parties of a real estate negotiation, unless a contract in the form of a public deed is signed between them, and that such document must be enacted with the intervention of a public notary.

The defendant filed a petition to the first instance judge requesting her not to enforce the National Court’s judgment, based on an order by the international arbitration tribunal, within proceedings instituted against the Republic of Ecuador, under the Treaty for Reciprocal Promotion and Protection of Investments Between the Republic of Ecuador and the United States of America. The tribunal had ordered Ecuador to ensure that all further proceedings and actions directed towards the enforcement of the National Court’s judgment be suspended pending delivery by the tribunal of its final award. The judge decided to suspend enforcement and the plaintiff filed a petition to revoke such decision, which was denied. Once all recourses were also rejected, the plaintiff filed an extraordinary action of protection.

In August 2017 the Constitution Court ruled against the decision not to enforce the National Court judgment, thus establishing that interim measures issued by an international arbitration tribunal, acting under an international treaty, are not mandatory nor enforceable. A second petition not to enforce the judgment is still pending with the judiciary.
III COURT PROCEDURE

i Overview of court procedure

Cases are always decided by judges, not by juries. Usually, in first instance only one judge decides while a tribunal (three judges) decide on appeals. This is not the case for disputes against the government (except for expropriation cases) where there is only one instance, and the court is formed by a tribunal of three judges. Since 2016 proceedings are mostly conducted verbally through a system of one or two hearings, depending on the subject matter of the case.

ii Procedures and time frames

The General Organic Code of Proceedings (which is applicable for all judicial proceedings except those of a criminal nature) establishes seven types of procedures: ordinary, administrative contentious, tax contentious, summary, voluntary, executive and enforcement.

Ordinary proceedings are applicable when a special procedure (any of the other six) is not established by law, based on the matter, the amount or the nature of the case. These procedures apply when a dispute arises between two private parties. Usually, a first instance civil judge has jurisdiction to solve this sort of case. When ordinary procedures apply, first parties are convened to a preliminary hearing (were all possible reasons for nullity are discussed) and then to a trial hearing, where evidence is produced, parties present their pleadings, and a verbal decision is issued. According to law, the first instance of the ordinary procedure should take around 106 working days,² from the date the defendant was last served with the complaint, if a defendant does not file a counterclaim. The defendant has 30 days to file his or her response. Three days after the term for the response has elapsed, the judge must issue a decree convening the parties to the preliminary hearing that must take place no later than 20 days after such court order is issued, which can only be deferred once, if the parties agree on such deferral. The trial hearing must take place within 30 working days after the preliminary hearing. The verbal decision can be suspended for 10 days at most. The written decision must be notified within 10 working days after the trial hearing. The parties can file requests for clarification or broadening of the judgment, or can appeal it, within three days after notice is served with the written decision. But in fact, this type of proceeding takes much more time than 106 days from the last date of serving, mainly due to a backlog.

Furthermore, additional delays occur before service. First, while the law provides that the judge must accept the complaint to proceedings within five working days upon filing, judges often take longer. Also, it is very usual for judges to request the plaintiff to clarify or broaden the complaint, and after that they tend to take more than five working days to decide if they admit the complaint to proceedings or not. And, in fact, many complaints are non-admitted, and the plaintiff must begin again the whole process.

The judgments issued within an ordinary procedure are subject to appeal. The Provincial Court may, under limited circumstances, accept the practice of new evidence. The appeal is decided in one hearing.

The appeal decision may be subject, under certain circumstances, to the extraordinary recourse of cassation, which is decided by the National Court. The cassation recourse must

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² Please take note that from now on, all terms and deadlines mentioned by the author refer only to working days, unless otherwise stated.
first be accepted by the admission chamber. Then, the case is assigned to a tribunal from one of the chambers of the National Court which will convene the parties to a hearing, prior to issuing its decision.

The first instance judge is the one who should enforce any final judgment.

Administrative and tax contentious proceedings may be summary or ordinary. Contentious tax tribunals have jurisdiction over taxation cases. The contentious administrative tribunals have jurisdiction over all other cases (except for expropriation cases) between private parties and public institutions. Ordinary tax or administrative contentious proceedings are similar, regarding terms and steps, to general ordinary procedures (see above). Summary tax or administrative proceedings are like general summary proceedings that will be described below. These decisions are not subject to appeal, but under certain conditions they may be subject to cassation recourse that is solved by the national court.

The summary procedure has only one hearing, which is divided in two parts: preliminary and trial hearing. Also, all terms are shorter than for ordinary proceedings, but the terms depend on the sort of case to be solved. Some of the cases that must be processed under a summary procedure are: child support, abrupt labour dismissal of pregnant women, possession claims, contentious divorce, interdiction, cases of opposition to voluntary proceedings, and eminent domain.

Voluntary proceedings are applicable when the procedural request is not of a contentious nature (will be decided without any dispute). Voluntary procedures are applicable: (1) when a debtor delivers the amount to the courts (e.g., when the creditor refuses to receive the payment); (2) in cases of accountability (when a person in charge of somebody else's funds or assets wishes to inform on how she has managed that property); (3) divorce or common-law marriage termination by mutual agreement, as long as the couple does not have dependent children; (4) inventory; (5) partition of property; and (6) authorisation of sale of assets pertaining children or people subject to custody. A voluntary procedure is solved in one hearing. If someone opposes to the procedure, then the summary proceeding applies.

Executive procedures are appropriate mainly based on: sworn statements; public deeds; private documents legally acknowledged or recognised by a judicial decision; bills of exchange; promissory notes; wills; and out-of-court settlements. Executive procedures are solved in only one hearing. Either party can appeal the decision.

Enforcement execution procedures are proper when there exists a debt that is liquid, payable, and due, which value does not exceed 50 basic unified salaries (basic wages). The basic wage in 2018 is US$386, thus currently, these procedures are appropriate if the debt is US$19,300 or less. These procedures are quite different from others, as the judge can order payment within the same decree in which he or she orders that the debtor be served with the complaint. Only if there is opposition to payment then the case will be solved according to summary proceedings.

Precautionary measures are available before or during trial. The General Organic Code of Proceedings provides for the following precautionary measures: seizure of property, withholding of funds or credits, and prohibiting defendants from disposing of property. For the ordering of seizure or withholding, the petitioner must establish the existence of the debt, and that the debtor’s assets may be insufficient to cover the debt or may disappear or be hidden or transferred. Once the petition for precautionary measures is filed, and if it complies with all established requisites, the judge must, within 48 hours, convene to a hearing and
decide on the petition. Precautionary measures can be ceased if the debtor provides a bond. Decisions granting precautionary measures can be appealed, but the filing of the appeal does not stay the decision.

Precautionary measures expire if the main complaint is not filed within 15 working days from the date of issuance or from the date the obligation became enforceable. In such case, the petitioner will assume damages.

iii Class actions

No class actions are established, except in environmental cases, in Ecuadorean legislation. Certainly several persons with the same interest in the case may act as plaintiffs, in which case they will have to appoint a common procurator and if they fail to do so the judge will appoint one among them.

iv Representation in proceedings

Litigants (natural persons or entities, when applicable) may represent themselves in:

a constitutional matters;
b procedures carried out before justices of the peace;
c if the value of the claim is less than that of three minimum wages (thus for actions whose value is less than US$1158 for 2018);
d child support cases; and
e criminal actions.

v Service out of the jurisdiction

A judge has territorial jurisdiction, among other cases:

a when the damage were caused within the area to which the judge is appointed;
b if the defendant is domiciled in such jurisdiction;
c if the real estate about which the parties are in dispute is in such region;
d if the obligation had to be complied with or carried out in such place;
e if the parties agreed upon such territorial jurisdiction;
f if either the child or the person who must pay child support is domiciled there; or
g if the law specifically establishes that they have jurisdiction (e.g., a divorce complaint filed against a spouse domiciled abroad must be filed before the judge of the last city where the couple was domiciled).

But any person domiciled outside of a specific territorial jurisdiction (including abroad) may be served with a complaint or notice of initiation of proceedings.

If service will be performed abroad, it must be carried out through the Ecuadorean diplomatic agents.

vi Enforcement of foreign judgments


Foreign judgments must be formally reviewed and approved by the provincial courts. The accreditation of foreign judgments must be carried out by the specialised chamber by reason of matter of the judicial district where the domicile of the defendant is located. The
person or company against whom the award will be enforced must be heard by the court, but the subject matter of the case cannot be subjected to review. A foreign judgment will be valid if: it fulfils all the formal requirements necessary for them to be deemed authentic in the state of origin; it is translated; it is legalised in accordance with Ecuadorian law; the tribunal rendering the decision is competent in the international sphere to try the matter and to pass judgment on it in accordance with Ecuadorian law; summons were properly carried out; the parties had an opportunity to present their defence; the judgment is final or, has the force of res judicata; and the judgment is not manifestly contrary to public policy. Once the judgment declaring the recognition and homologation of the judgment is enforceable (that is, three days after its issuance), an execution action must be initiated before a first instance judge. Enforcement of foreign judgments is carried out by first instance judges of the domicile of the defendant, and, if the domicile is not in Ecuador, the competent judge will be the one where the involved assets are, or where the award should have an effect.

vii Assistance to foreign courts

Assistance to foreign courts is ruled by international conventions and treaties, signed and ratified by Ecuador, thus directly enforceable under the Ecuadorian Constitution. 3

According to the Inter-American Convention on the Taking of Evidence Abroad, foreign courts can request and receive assistance thorough rogatory letters. Letters rogatory issued in conjunction with proceedings in civil or commercial matters for taking evidence or obtaining information and addressed by a judicial authority shall be executed provided: the procedure requested is not contrary to legal provisions in Ecuador that expressly prohibit it; and the interested party places at the disposal of the Ecuadorian authorities the financial and other means necessary to secure compliance with the request. Letters rogatory requesting the taking of evidence or the obtaining of information must include: (1) a clear and precise statement of the purpose of the evidence requested; (2) copies of the documents and decisions that serve as the basis and justification of the letter rogatory, and such interrogatories and documents as may be needed for its execution; (3) names and addresses of the parties to the proceeding, and of witnesses, expert witnesses, and other persons involved; and (4) a summary report on the proceeding and the facts giving rise to it, if needed for the taking of the evidence. Letters rogatory concerning the taking of evidence shall be executed in accordance with Ecuadorian laws and procedural rules. At the request of the authority issuing the letter rogatory, Ecuadorian judges may accept the observance of additional formalities or special procedures in performing the act requested, unless the observance of those procedures or of those formalities is contrary to the laws of Ecuador or impossible of performance. The costs and other expenses involved in the processing and execution of letters rogatory shall be borne by the interested parties. Ecuador may refuse execution of a letter rogatory whose purpose is the taking of evidence prior to judicial proceedings or ‘pretrial discovery of documents’. Letters rogatory shall be executed provided the letter rogatory is legalised (it shall be presumed to be duly legalised in the state of origin when legalised by the competent consular or diplomatic agent); and the letter rogatory and the appended documentation are

3 Such as: Inter-American Convention on the Taking of Evidence Abroad, Inter American Convention on Mutual Assistance in Criminal Matters, Rome Statute of the International Criminal Court, and United Nations Convention Against Corruption. Ecuador has also signed bilateral treaties, such as: Cooperation Agreement Between the Republic of Ecuador and Cuba About Mutual Judicial Assistance in Criminal Matters, and Convention on Mutual Assistance and Taxation Information between Argentina and Ecuador.
Ecuador

duly translated into Spanish. A person called to give evidence pursuant to a letter rogatory may refuse to do so when he invokes impediment, exception or duty to refuse to testify under Ecuadorian law. Ecuador may refuse to execute a letter rogatory that is manifestly contrary to public policy.

The Inter-American Convention on Mutual Assistance in Criminal Matters establishes an obligation among party states to render mutual assistance in investigations, prosecutions, and proceedings that pertain to crimes over which the requesting state has jurisdiction at the time the assistance is requested. (It does not create any right on the part of any private person to obtain or exclude any evidence or to impede execution of any request for assistance.) The assistance includes the following procedures: notification of rulings and judgments; taking of testimony or statements from persons; summoning of witnesses and expert witnesses to provide testimony; immobilisation and sequestration of property, freezing of assets, and assistance in procedures related to seizures; searches or seizures; examination of objects and places; service of judicial documents; transmittal of documents, reports, information, and evidence; and transfer of detained persons. Ecuador may refuse assistance when it determines that public policy sovereignty, security, or basic public interests are prejudiced. Requests for assistance issued shall contain: the crime to which the procedure refers; a summary description of the essential facts of the crime, investigation, or criminal proceeding in question; and a description of the facts to which the request refers; proceeding giving rise to the request for assistance, with a precise description of such proceeding; where pertinent, a description of any special requirement of the requesting state; a precise description of the assistance requested and any information necessary for the fulfilment of that request.

Likewise, the United Nations Convention Against Corruption establishes that States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by such Convention. Mutual legal assistance may be requested for: taking evidence or statements from persons; effecting service of judicial documents; executing searches and seizures, and freezing; examining objects and sites; providing information, evidentiary items and expert evaluations; providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records; identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes; facilitating the voluntary appearance of persons in the requesting state party; identifying, freezing and tracing proceeds of crime; and any other type of assistance that is not contrary to Ecuadorian law. Ecuador cannot decline to render mutual legal assistance on the ground of bank secrecy. Ecuador may decline to render assistance on the ground of absence of dual criminality. However, even then, it must render assistance (that does not involve coercive action), if consistent with the basic concepts of the Ecuadorian legal system. The Convention also includes provisions on transferring persons who are being detained or are serving a sentence whose presence in another state party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings. A request for mutual assistance shall comply with similar requisites as those provided by the Inter American Convention on Mutual Assistance in Criminal Matters (see above), including a description of the assistance sought and the identity, location and nationality of any person concerned; and the purpose for which the evidence, information or action is sought. Ecuador: (1) shall provide to the requesting state party copies of government records, documents or information in its possession that under its domestic law are available to the public; (2) may, at its discretion, provide to the requesting state party in whole, in
part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.

The obligation to cooperate with the International Criminal Court, as provided by the Rome Statute, determines that Ecuador must comply with requests by the Court to arrest or surrender persons to the court, and provide the following assistance in relation to investigations or prosecutions: the identification and whereabouts of persons or the location of items the taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court; the questioning of any person being investigated or prosecuted; the service of documents, including judicial documents; facilitating the voluntary appearance of persons as witnesses or experts before the Court; the temporary transfer of persons; the examination of places or sites, including the exhumation and examination of grave sites; the execution of searches and seizures; the provision of records and documents, including official records and documents; the protection of victims and witnesses and the preservation of evidence; the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and any other type of assistance that is not prohibited by the law of Ecuador, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.

When the assistance requested refers to criminal matters, the Unit of International Affairs of the Prosecutor’s Office is the competent authority.

viii Access to court files

Ongoing proceedings are public, unless they refer to children or victims of domestic or sexual violence. Also, public access (and access to the counterpart) is restricted with regards to preventive or interim measures until they have been granted and executed. Preliminary criminal investigations are confidential, and the last names of the accused must be kept secret until a certain point in the proceedings.

Leaving aside the above-mentioned cases, any person can request copies of all judicial records and court orders issued within proceedings normally appear in the webpage of the judiciary, as well as information (the date of the filing and whether it contained attachments) of petitions filed by any party. In practice, however, officers of the Council of the Judiciary prevent any person (even the parties) to review the filings before they are in the judge desk and the judge orders to be served to the litigating parties.

Hearings are also public (except in the cases previously referred to, e.g., cases referring to child rights). While any person can attend, the judge may prevent people from entering or staying in the courtroom if that could disrupt the normal development of the judicial diligence. Also, most courtrooms, especially in first instance courts, are small, hence people can be prevented from entering due to limited space. Videotaping and recording by private parties is forbidden, but the court records the hearings, and the parties can request copies of the recording (which they are prevented from disseminating).

ix Litigation funding

Funding by a disinterested third party is not common, but there is no ban against it.
IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

There are few provisions on conflicts of interest. The Organic Code of the Judiciary establishes the general obligations of counsels of acting to the service of justice and representing the client with loyalty, honesty and probity, which prevent them from acting on behalf and against clients in situations in which it would affect their rights. The Code also provides that a lawyer cannot represent a party after having represented the other, ‘in interrelated processes’. It also proscribes lawyers from acting as counsels if they had previously acted as judges within the case.

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

There are no specific rules for lawyers in relation to money laundering or protection against dealing in the proceeds of crime or funds related to terrorism.

But, the Organic Comprehensive Organic Criminal Code punishes terrorism and money laundering, and specific provisions of such Act establish criminal sanctions to deals with the proceeds of crime. The act also establishes that both the person who commits the crime as well as who facilitates the commission of a crime shall be subject to criminal punishment, and all proceeds of crime must be confiscated. Therefore, lawyers who facilitate money laundering, or dealings with the proceeds of crime or funds related to terrorism will be held criminally liable, as they would if they help in the commission of any crime. In the case of money laundering, a specific norm provides for criminal liability for any person who ‘advises’ on the commission of such crime, thus a lawyer can be held criminally responsible if she provided legal advice on how to commit or prevent criminal responsibility when laundering money. Lawyers can also be held criminally liable if they provide counsel to clients on how to prevent criminal responsibility when committing other crimes. (On a side note, if a lawyer commits any crime against a client, the professional relationship will be considered an aggravating circumstance.)

Nevertheless, the lawyer has no specific obligation to report criminal conduct that he or she learned about in the course of his or her professional activity. In fact, such information and knowledge may be protected by professional confidentiality. Instead, public officials, health professionals, and directors and staff of educational institutions have a legal duty to report the commission of crimes they learned of in the performance of their duties. Also, financial institutions have an obligation to report money laundering and other crimes. In fact, the Law for the Prevention of Money Laundering and the Financing of Crime provides that those obliged to inform cannot deny information based on professional secrecy. But, there is no express provision establishing such obligation to report by lawyers.

iii Data protection

The Constitution, among other normative bodies (such as the Telecommunications Act) protects personal data. Nevertheless, a judge can order the production of personal information if it is relevant for a case and does not infringe constitutional rights.

For example, how does any such framework affect: (1) the access to and analysis of data that may contain personal data by legal professionals for the purposes of locating relevant documents or evidence; and (2) the sharing of personal data with other law firms or legal processing outsourcers both nationally and internationally?
There are no rules preventing analysis of information by other people (lawyers, experts, etc.) working together with the defence. But only expert reports made by experts appointed by the judge will be valid in court.4

It is very unlikely, though, that a judge would allow and order a ‘general review of all records’ held by the counterparty. Professionals may not generally access data that may contain personal information. A party can only specifically request the production of a document believed to be held by the other party if she provides an appropriate description. (There is no discovery, thus evidence production is different.) But, a party may request a judicial inspection or an expert report on electronic or physical data containing relevant information. Electronic analysis (i.e., reviewing all emails or data exchanged within a company in order to establish ‘if there is something useful for a case’) is not used nor available in Ecuador. We doubt that a judge would authorise it within civil proceedings.

In the course of criminal investigations, a judge can, under certain circumstances and rules, order the interception of communications, upon a prosecutor’s request, based on reasonable grounds. The information obtained must be kept secret with regards to affairs outside the investigation. Communications protected by professional and religious secrecy cannot be intercepted, nor can communications be intercepted if such interference violates the rights of children or victims of domestic or sexual violence.

iv Other areas of interest

The Constitutional Court, that is not part of the judiciary, has the power to overturn final decisions in which constitutional rights have been affected or violated. In practice the Constitutional Court has extended its powers to non-constitutional violations, and to non-final decisions. It has also permitted Ecuador or the branches, agencies, institutions, provinces and municipalities of the state to challenge decisions in spite of the fact that the state does not have constitutional rights.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

The issues relating to documents, electronic discovery and privilege are similar everywhere. This provides an opportunity to discuss how each jurisdiction is dealing with these issues.

There is no discovery in Ecuador. During proceedings, both electronic and physical documents can be produced. A party can deny production if it is not relevant to the case or contains private or sensitive information, but normally the judge will order production of the evidence. The affected party can object to the evidence once it has been produced. The judge will decide if he or she considers such evidence or not when issuing his or her decision.

i Privilege

Privilege is not an area that has been thoroughly developed under Ecuadorian law.

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4 There are no specific rules regarding other law firms or thirds processing information from a client, but if damages are caused, or human rights infringed from unauthorised access to information, civil and constitutional actions may be possible. It is advisable that it be clear that thirds may review the client’s information, especially if it is sensitive.
In general, only documents and information that disclosure would entail grave violations to basis constitutional rights or professional secrecy, cannot be disclosed. Information regarding children and victims of sexual offences is especially protected.

Even though there are few provisions about lawyer–client privilege, both in-house and external lawyers are prevented from disclosing information provided by their clients in the course of the professional relationship.5

Similarly, a lawyer has no specific obligation to report criminal conduct that he or she learned about in the course of his or her professional activity. Such information is usually protected by privilege.

Furthermore, communications between lawyers and their clients cannot be intercepted, and if they are they have no probative value.

Thus, it is very unlikely that a judge would allow information that would imply a breach of lawyer–client confidentiality as evidence.

ii Production of documents

The new procedural code establishes as valid means of evidence: the testimonies, the statements made by one of the parties before the judge or tribunal, documentary evidence, judicial inspections, and expert reports.

There is no discovery under Ecuadorian law. Thus, a party is not required to disclose any documentary evidence that might be useful to the counterparty. However, a party can request the judge or tribunal to order the counterparty to disclose documents that might be in the counterparty’s possession, and if the counterparty does not produce such evidence and it is established that she had it in her power to do so there may be criminal consequences.

A party is prevented from introducing new documents if they were available to him or her at the beginning and he or she did not announce it but rather enclosed it in the complaint or the response to the complaint.6

It is very common for parties to file or request the production of public documents, such as certifications from public offices regarding acts or assets of the counterpart.

Documentary evidence is usually only admitted if it is the original or if the copy is properly certified by the issuing institution or by a public notary. Electronic documents or information (such as emails) must be certified by a public notary (or can alternatively be certified by an expert).

Expert reports must be filed in writing, (even though experts are also required to declare in court). The parties may request that expert reports be broadened or clarified.

If a private report or certification is filed (that is, if an expert report was not prepared by an expert appointed by court) the person who prepared such report will be called to court to acknowledge her signature. If a public document is filed, and the original or a certified copy is filed, such acknowledgment will not be required.

Neither Ecuadorian law nor jurisprudence provide for a specific test of relevance.

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5 The Law of the Federation of Lawyers establishes sanctions for lawyers who infringe professional secrecy. The Organic Code of the Judiciary establishes the counsel’s obligation is to abstain from disseminating information regarding confidential aspects of the proceedings before the trial ends. The same Code prevents counsels from revealing secrets about their clients, their documents, or their instructions.

6 Also, new evidence cannot be requested at a later point, unless new issues are brought up later in the proceedings, in which case it can be requested in the appeal, and the appeal tribunal will have discretionary powers upon such requests.
But, if a document, testimony, judicial inspection, or expert report does not refer to the subject matter of the case, it will not be considered. When the evidence is manifestly irrelevant, admission may be denied, and it will not be received in evidence nor produced.

Also, witnesses and the parties can only testify on issues that they have direct knowledge of, and not about statements made by third parties. Besides, witnesses cannot be questioned on issues not pertaining to the subject matter of the case.

Documents issued in a foreign state, must be duly authenticated by the diplomatic or consular agent of the state in which the document was issued. Foreign documents also usually need to be apostilled. If there is no diplomatic or consular agent from Ecuador in the territory, a diplomatic or consular agent from any state can certify the document which will be later authenticated by the Ministry of Foreign Affairs. Otherwise, a judicial authority from the territory may certify or authenticate the document. Judicial proceedings performed outside of Ecuador, according to the laws of the respective country, will be valid in Ecuador.

There are no specific rules regarding documents held by third parties or under the control of a litigant. If a party knows or has reasons to believe that the counterparty or a third party holds a document, it can request the judge to order such person or party to present, produce or disclose it.

The only documents that a party cannot be forced to produce are those that would imply a breach of lawyer–client confidentiality. Also, there may be cases in which the production of documents can be opposed to if it affects the right to privacy or other fundamental rights.

Electronically produced documents, and their attachments, are considered originals for legal purposes. Nonetheless, they must be printed and their authenticity must be certified by a public notary. Alternatively, they can be introduced into proceedings if an expert certifies their existence and contents.

Judges can order the extraction of electronic information held by any of the parties. There are no pre-established circumstances under which a litigant must review electronic records for the purpose of litigation. But the counterparty may ask a judicial inspection or expert report of the counterparty’s electronic records or its own, or may it request the judge to order the counterparty to produce or disclose emails or other electronic files, if they are properly described.

There are no specific provisions regarding reconstructions of back-up tapes or other electronic media. But, as with any electronic record, a judge can order – usually upon a party’s request – expert research, judicial inspection or production by the counterparty of evidence contained in hard drives or back-up tapes.

There are no provisions on oppressive or disproportionate obligations on the production of evidence. Certain costs (e.g., the expert’s fees) are paid by the party requesting the production of evidence. Other costs may be requested to be reimbursed by the prevailing party. (We are not aware of any case in which a judge or arbitrator has ordered the party against whom the judgment was issued to reimburse for expenses such as time consumed in the preparation of evidence requested by the other party.) A judge may use his or her common sense to deny the production of evidence which production will be difficult or expensive, if it is manifest that it is not very relevant, but if the party requesting the production of such evidence proves that it was relevant, there might be reasons for annulment of the decision.
VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

ii Arbitration

Domestic arbitration is governed by the Law on Arbitration and Mediation and the specific rules of each arbitration centre. The parties may agree on ad hoc arbitration which, unless the parties agree on a specific procedure, will also follow the rules of the Law on Arbitration.

According to the Law on Arbitration, the complaint must be filed before the director of the arbitration centre or before the arbitrators agreed by the parties. All evidence (documents) available to the plaintiff must be enclosed with the complaint. The plaintiff must also announce other evidence. The director of the centre or the arbitrators will review if the complaint conforms with all legal requirements and if so, she will order service on the defendant.

Arbitrators can issue interim measures to guarantee the enforcement of the final award which should be enforced by the courts, unless the parties have agreed that the arbitrators have the power to enforce them.

The defendant must file her response to the complaint within 10 working days from the date of service. If the defendant does not respond to the complaint, it will be assumed that she simply rejects all arguments contained within it. The defendant must also enclose all available evidence and announce and request other evidence. The defendant can counterclaim. The complaint, the response to the complaint, and the counterclaim can be amended within five days upon filing.

Once the complaint and counterclaim have been responded to, the parties will be called to mediation. If an agreement is not possible, arbitrator will be appointed according to the arbitration agreement or the rules of the Centre if the parties had not agreed on the way the arbitrators will be appointed.

After the arbitration tribunal is formed, the parties will be called to an initial hearing. The tribunal will then issue the appropriate orders for the production of evidence. The parties can verbally announce their claims during the hearing.

After the production of evidence, the parties will be called to a hearing in which they can present final arguments. The final award must be issued within 150 days after the hearing. The arbitrators shall issue an attendance notice for an oral hearing in which they will announce their decision and deliver a copy of the written decision to each of the parties.

According to the Law on Arbitration and Mediation, arbitration awards are not subjected to appeal, but they can be clarified or broadened. Also, under limited circumstances, nullity of the award may be claimed before the President of the Provincial Court of the seat of the arbitration.

Enforcement of arbitration awards is ruled by the procedural code. An arbitration award is considered an ‘enforceable title’, which means that it is subjected to special summary enforcement proceedings. The petition for enforcement must be admitted within three working days. Preventive measures may be ordered with the initial decree if requested and if certain conditions are met. If the person or company against whom the award was issued does not comply with the award or does not present any defence the judge will immediately issue his or her final judgment ordering compliance.

The only possible objections to enforcement are compliance or nullity of the award.

Possible bases for annulment are a lack of service with the complaint; a lack of notice with relevant court orders that meant that a party could not exercise his or her right to a
defence; if evidence requested by a party was not produced; if the award decides matters that were not subjected to the arbitration; or if the proceedings provided by law or by the parties regarding the appointment of the arbitrators were not complied with.

International arbitrations – based on investment agreements between Ecuador and other nations – are normally governed by the ICSID rules on arbitration.

The most-used institutions of arbitration are the centres of mediation and arbitration of the chambers of commerce organised in the capital city of the most important provinces of Ecuador. Also, the Ecuadorian American Chambers of Commerce of Quito and Guayaquil are relevant arbitration institutions, as well as the Centre of Mediation and Arbitration of the Construction Chamber of Ecuador.

Some commercial agreements are subject to arbitration. Therefore, there are some arbitration centres in the main Ecuadorian cities. Still, many individuals and companies prefer to go to the courts, because judicial procedures are free.

Regarding international arbitration against the state, Ecuador has been subject to 26 investment arbitrations. According to the Attorney General, arbitration awards against the Ecuador amount to US$1.828 billion.7

Internationally, arbitration between private parties is very seldom used.

There is no appeal in arbitration, but actions to nullify the awards may be filed, as well as actions for extraordinary protection before the Constitutional Court.

An arbitration award can be appealed if the parties have included the possibility of an appeal in their arbitration agreement.

Under certain circumstances, an arbitration award may be subjected to action of annulment which will be solved at the courts. The filing of an action of annulment does not stay the decision.


The New York Convention establishes that recognition and execution of an arbitral judgment can be denied if:

\[ a \] it is demonstrated that the parties who submitted the arbitration agreement were subject to a legal incapacity;
\[ b \] the party against whom the arbitral judgment is invoked was not notified of the appointment of the arbitrator or of the arbitration proceeding, or could not, for any other reason, avail himself or herself of a means of defence;
\[ c \] the decision refers to a dispute not contemplated in the contract or the arbitration agreement;
\[ d \] the appointment of the arbitration tribunal did not conform to the agreement celebrated between the parties or to the law of the country were the arbitration took place;
\[ e \] the arbitral judgment has been annulled or suspended by a competent authority were it was issued;

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the subject matter of the dispute is not subject to arbitration according to Ecuadorian law;
the execution of the sentence would go against public policy.

The Inter American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitration Awards\(^9\) establishes that foreign arbitral awards will be valid in the states party to it (therefore, in Ecuador) if:

\( a \) they fulfil all the formal requirements necessary for them to be deemed authentic in the state of origin;
\( b \) the award and the documents attached thereto are duly translated into the official language of the state where they are to take effect;
\( c \) they are presented duly legalised in accordance with the law of the state in which they are to take effect;
\( d \) the tribunal rendering the decision is competent in the international sphere to try the matter and to pass judgment on it in accordance with the law of the state in which the award is to take effect;
\( e \) the plaintiff has been summoned or subpoenaed in due legal form substantially equivalent to that accepted by the law of the state where the award is to take effect;
\( f \) the parties had an opportunity to present their defence;
\( g \) they are final or, where appropriate, have the force of res judicata; and

\( h \) they are not manifestly contrary to the principles and laws of the public policy of the state in which recognition or execution is sought.

The General Organic Code of Proceedings establishes similar requisites for approval of foreign arbitral awards, but if the award is against the state of Ecuador it must also be proved that it does not go against the law, the Constitution, or international treaties or conventions. The above-mentioned convention also establishes that the documents of proof required to request execution of awards are:

\( a \) a certified copy of the award;
\( b \) a certified copy of documents proving summons and that the parties had an opportunity to present their defence; and

\( c \) a certified copy of the document stating that the award is final.

The Inter American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitration Awards also establishes that the procedures for ensuring the validity of foreign awards, including the jurisdiction of the respective tribunals, shall be governed by the law of the state in which execution is sought.

The General Organic Code of Proceedings states that foreign awards must be approved by the provincial courts. The person or company against whom the award will be enforced must be heard by the court, but the subject matter of the case cannot be subjected to review. The enforcement of foreign arbitral awards is carried out by first instance judges of the domicile of the defendant, and, if the domicile is not in Ecuador, the competent judge will be the one where the involved assets are, or where the award should have effect.

Interim measures may be ordered by arbitral tribunals to ensure compliance with the award.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) must be applied in the Ecuadorian jurisdiction, since international treaties prevail upon local legislation, and Ecuador signed the New York Convention in 1958.

Also, Ecuador is party to several transnational investment agreements. According to such agreements, international arbitration is appropriate in case of investment disputes. The New York Convention is applicable with regards to enforcement of awards issued within such arbitration proceedings.

The New York Convention is randomly brought up by parties and judges, in part because other international treaties and national legislation (especially, the General Organic Code of Procedure, which was enacted in 2015) are also applicable to the enforcement of arbitral awards.

However, within a case brought to the Provincial Court of Pichincha, for the homologation of an arbitral award10 the plaintiff argued that the New York Convention is the only applicable law for the case, and the defendant objected to enforcement based on Article V Paragraph 2 of the New York Convention that establishes: ‘2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: …(b) The recognition or enforcement of the award would be contrary to the public policy of that country.’ The defendant argued that the decision was contrary to public policy as it established as valid the unilateral termination of a contract, which is not allowed under Ecuadorian law. However, the tribunal decided that they did not hold jurisdiction to decide on the matter, thus an ordinary proceeding will be initiated to establish if the New York Convention is applicable.

The New York Convention has not been invoked for the enforcement of international arbitration awards issued upon bilateral investment agreements, as Ecuador has enforced such decisions based on the pertaining bilateral treaties themselves. Nevertheless, below we discuss some recent awards that are issued within proceedings instituted under bilateral agreements that we believe may be of interest.

On February 2017, a final award was issued in the case of Burlington Resources Inc v. Republic of Ecuador. Burlington’s complaint was based on the application of Law 42, which provided for payment of an additional share to the government regarding extraordinary incomes due to unexpected increases in the international costs of oil, and for the expiration of contracts if companies failed to comply with the new Law. The compensation awarded was US$379,802,267 (22 per cent of the oil company’s initial claim), less US$41,776,493 for environmental damages.11

On May 2016, an arbitration tribunal decided on the complaint filed by Murphy Exploration & Production Company-International, also regarding the application of Law 42, by awarding US$19 million to the company (3 per cent of the claimed damages). Ecuador

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10 Carlson Wagonlit Travel Holdings NV v. Seitur Agencia de Viajes y Turismo Cía. Ltda.
Ecuador has requested a reduction and damages, claiming that all economic losses were removed when another company (Repsol) bought the plaintiff’s interests. Ecuador claims that the state should be compensated with US$1.8 million.12

On March 2016, a final award was issued in the Copper Mesa case, establishing that Ecuador breached the bilateral investment agreement with Canada because the termination of the companies’ mining concessions constituted illegal eminent domain as the plaintiff was prevented from challenging such decisions. While the tribunal concluded that Ecuador failed to provide just and equitable treatment to the company, it only awarded 15 per cent of the original amount demanded (around US$19 million from the US$69.7 million claimed), establishing that the company was liable of environmental damage. Ecuador filed a petition for annulment.13

The Law on Arbitration and Mediation was last modified in May 2015. Among other amendments, introduced by the legal reform, all arbitration centres are now subject to oversight by the Council of the Judiciary.

The Council of the Judiciary, some courts of Ecuador, the executive power and the Attorney General have been constantly contesting that arbitration that is slowly growing in Ecuador. There are lawyers devoted to arbitration that try to amend the law in force in order to have, according to them, broader regulation. It might conduct to actions of the Council of the Judiciary to increase their control over the arbitration.

Regarding international arbitration, in May 2017 the National Assembly decided that 12 bilateral investment agreements, namely with China, Venezuela, the Netherlands, Switzerland, Canada, Argentina, the United States, Spain, Peru, Bolivia and Italy be subject to denounce.14 Former President of the Republic, Rafael Correa, denounced these.15 As a consequence, disputes arising with companies who contract 10 years after the treaties have ceased to be in force, will not be subjected to international arbitration. Nevertheless, the National Assembly announced that negotiations will be carried out to sign new investment agreements.16 (bilateral investment agreements with other countries, such as Turkey and Iran, are still in force, but such agreements do not establish international arbitration as a means for the settlement of controversies).

Previously, in 2010, the Constitutional Court of Ecuador had declared the unconstitutionality of provisions from the treaty between Ecuador and the United States about reciprocal promotion and protection of investments that established that either party in a dispute can subject it to binding arbitration. However on 23 May 2017 such treaty was

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denounced, as explained. Other rulings, also issued in 2010, declared the unconstitutionality of similar provisions of the bilateral investment agreements with Argentina, France, Germany, Sweden, the United Kingdom and Northern Ireland, and the Netherlands.17

iii Mediation

The Law of Arbitration and Mediation and the specific rules of each mediation and arbitration centres govern mediation. The Law of Arbitration and Mediation provides that no arbitration can take place unless mediation has been first exhausted. Mediation can only be requested to authorised centres or mediators. Both natural persons and institutions can go to mediation. Public institutions can also mediate. A mediation petition should be filed in writing.

Mediation is possible when the parties have previously agreed to solve their conflicts through mediation; one or both of the parties request it; or a judge orders that the parties must attempt mediation, as long as the parties accept. Mediation ends with the signing of an act stating the total or partial agreement or that the parties were unable to agree. Both parties and the mediator must sign the act.

Mediators must be previously authorised by certified mediation centres. Mediators are certified based on courses or internships. Any person acting as a mediator is prevented from acting on behalf of either party or as an arbitrator in successive legal proceedings, nor can he or she declare in trial on the subject matter of the mediation.

Mediation is confidential unless the parties waive their right to confidentiality.

Since 2009, mediation centres must be registered with and are subject to overview by the Council of the Judiciary.

The regulations of each of the centres of mediation must establish:

a the way in which the list of mediators is established and the requirements for being a mediator;

b the rate of fees and administrative costs;

c the way in which the director of the centre is appointed and his or her duties and powers;

d the administrative aspects of the mediation; and

e the ethical code for mediators.

Mediations are not very common; however, the Council of the Judiciary has launched a campaign to promote mediation and has instituted publicly founded mediation centres.

iv Other forms of alternative dispute resolution

Expert determinations referees

Expert determination referees is not recognised as a formal method of alternative dispute resolution.

Judges should and can invite the parties to reach an agreement. Sometimes they even suggest the contents of possible agreements.

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17 Regarding other international agreements also providing for mandatory arbitration (namely with Chile, Italy, and other states) the Constitutional Court issued decisions urging the National Assembly to denounce the treaties under similar arguments (that the Constitution prevents Ecuador from renouncing national sovereignty by granting jurisdiction to international arbitration tribunals).
Since 2009, community mediation has been recognised by law as an alternative to resolving conflicts in indigenous communities and neighbourhoods.

VII OUTLOOK AND CONCLUSIONS

Since the new procedural system has been in force only since 22 May 2016 and new judges without experience or knowledge were appointed by the Council of the Judiciary, the quality of the services and decisions are very poor in Ecuador. Judges try to reject most of the complaints at the beginning not admitting without reasoning many complaints and deciding them in poorly texts.

Nevertheless, less interference in the judiciary by the executive has been seen during the first months of office of the new president, Lenin Moreno. Furthermore, a popular referendum will be conducted on 4 February 2018, which may eventually lead to new authorities being appointed and possibly incompetent or corrupted judges removed and replaced.
ENGLAND AND WALES

Damian Taylor and Smriti Sriram

I  INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

i England and Wales, the United Kingdom and the EU

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, infra.

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 scattered across 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 of 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 has jurisdiction to hear any civil case in England and Wales at first instance,

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.
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 split into seven lists according to the substance of the dispute.4 There are also Business and Property Courts in Birmingham, Manchester, Leeds, Bristol and in 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

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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 European Union 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 Willers v. Joyce [2016] UKSC 43**

In this case, the claimant commenced an action for breach of contractual and fiduciary duties, which was later discontinued. The defendant, Willers, claimed that the claims originally brought by the claimant were part of a campaign against him to do him harm and sought to sue the claimant (of the original action) for malicious prosecution. The question was whether a claim in malicious prosecution could be brought in civil proceedings by an individual against another individual. The equivalent action exists in relation to criminal proceedings. The Supreme Court considered this novel point and held, by a majority of five to four, that the tort of malicious prosecution in civil proceedings is available for instituting proceedings without reasonable or probable cause. This new cause of action imposes a heavy burden on the claimant, and a critical feature which has to be proved is that the proceedings instituted by the defendant were not a *bona fide* use of the court’s process. In allowing the appeal, the court found that it was instinctively unjust for a person to suffer injury as a result of the malicious prosecution of legal proceedings for which there is no reasonable ground, and yet not be entitled to compensation for the injury intentionally caused by the person responsible for instigating it.

**ii CGL Group Ltd v. The Royal Bank of Scotland plc [2017] EWCA Civ 1073**

The Court of Appeal has dismissed three linked judgments concerning hedging products that the appellants alleged they were required to buy as a condition of loans made to them by RBS, Barclays and National Westminster (the Banks). The Financial Conduct Authority (FCA) identified serious failings in the selling of the hedging products and required the Banks to undertake certain reviews into how those products had been sold to certain customers under the terms of an agreement with the FCA. The Banks were required to provide redress where misselling had occurred, and the Banks found that the appellants were not entitled to any redress. This appeal raised the question of whether the Banks owed a duty of care to the appellants (i.e., certain customers) to conduct the FCA directed reviews with reasonable care.
and skill. The court dismissed this appeal on the basis that the test for establishing whether a duty arose was: (1) whether the defendant had assumed voluntary responsibility to the claimant; (2) the threefold test in *Caparo Industries Plc v. Dickman*;6 and (3) whether the addition to existing categories of duties would be incremental rather than indefinable. The Court found that none of the elements were satisfied in this case, and that it was not just, fair and reasonable to impose a duty of care.

iii  **Ivey v. Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67**

The Supreme Court has said that there were serious problems with the two staged objective and subjective test for dishonesty which was being followed, applying *R v. Ghosh* [1982] Q.B. 1053, which was: (1) whether the conduct complained of was dishonest by the lay objective standards of ordinary reasonable and honest people; and, (2) if the answer was yes, secondly, whether the defendant must have realised that ordinary honest people would so regard the behaviour. To bring the test for dishonesty in civil and criminal cases in line, the court articulated the view (strictly speaking, obiter) that when dishonesty is in question, the fact-finding tribunal must ascertain the individual's actual state of mind as to the facts. Once this is established, the question for the court is objective, as to whether by applying the standards of ordinary decent people, his or her conduct was honest or dishonest.

iv  **Lungowe and others v. Vedanta Resources plc and another [2017] EWCA Civ 1528**

The Court of Appeal said it was possible that an English parent company could owe a duty of care to those harmed by the actions of a foreign subsidiary. The English court had jurisdiction over the resulting claims against both the parent (because it was domiciled in England, EU law meant there was no discretion to decline jurisdiction) and the subsidiary (which was a necessary and proper party to the claim). The case apparently had few connections with England: the events complained of took place overseas, the harm was suffered overseas, the relevant substantive law was foreign and all of the claimants and many of the witnesses were overseas. However, the effect of EU law on jurisdiction in combination with the theoretical possibility of a duty of care were enough to bring the case to England. The case, which will now proceed to trial, has been closely watched by English-headquartered corporates with foreign operations, particularly in the extractive industries.

v  **Zumax Nigeria Ltd v. First City Monument Bank plc [2017] EWHC 2804 (Ch)**

The claimant applied for summary judgment on its claim and on the counterclaim of the defendant, both of which included allegations of fraud. The hearing lasted for nine days and required detailed analysis of the documents and written evidence. The judge noted that while one might have been tempted to simply hold that it was not possible to hold a 'mini trial' on the issues, this was a case in which careful consideration of the issues resulted in summary judgment being granted in part, which saved the parties and the court many months of wasted time and costs.

6  [1990] 2 A.C. 605.
vi Persimmon Homes Ltd v. Ove Arup and Partners Ltd [2017] EWCA Civ 373
The Court of Appeal found that in relation to commercial contracts negotiated between sophisticated parties of equal bargaining power, the contractual interpretation rule of contra proferentum, requiring any ambiguity in an exemption clause to be resolved against the party seeking to rely on it, had a very limited role.

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 website7 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,8 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 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, infra). 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.

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8 See the Pre-Action Conduct and Protocols Practice Direction at www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct.
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. 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.

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9 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)).

10 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]
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.¹¹

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, infra). 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 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.

¹¹ Lewis v. Eliades (No. 1) [2002] EWHC 335.
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. The objective of the pilot schemes, which will run until 30 September 2018, 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.

As of November 2017, 21 cases had been placed on the Financial List, nine of which have been decided. 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:

a 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;
b 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; and
c 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 due to 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.

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:

a representative actions, where one person brings (or defends) a claim as a representative of others who share the same interest in the claim;\(^\text{12}\) and

b group litigation orders (GLOs),\(^\text{13}\) 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 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.\(^\text{14}\) 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

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\(^{12}\) CPR 19.6.

\(^{13}\) CPR 19.10–19.15.

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.\(^{15}\)

Although there have been some high-profile cases involving representative actions and GLOs,\(^{16}\) 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, infra).

**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 EEA multilateral interchange fees breached Article 101(1) of the Treaty on the Functioning...
of the EU. 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.

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.18

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

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18 See, for example, Nelson v. Halifax plc [2008] EWCA Civ 1016.
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 6BD.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 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.19 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.

x  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);20 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 2011.21 The Code contains provisions concerning effective capital adequacy

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19  CPR 5.4C(1).
21  See http://associationoflitigationfunders.com/code-of-conduct/.
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* [2016] EWCA Civ 1144. 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:

\[a\] 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.

\[b\] 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.

xi  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 a 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. It was originally intended for the new model form electronic bill of costs to be rolled out at the end of the six-month pilot scheme, in April 2016, by the introduction of a compulsory pilot. This was subsequently postponed and the extended voluntary pilot will continue to run until the use of the new bill of costs becomes mandatory across all courts in April 2018. The mandatory use of the new bill of costs will require amendments to CPR 47 and the associated PD.

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 is aware of and understands the relevant issues and gives informed consent; and
- 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*, 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.

**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 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 will enter into force on 25 May 2018 after a two-year transition period (see Section VIII.vi, infra). Until it enters into force, the DPA remains the regime in force in the UK.

The principal elements of the DPA can be summarised as follows:

a data controllers must give notification to the Information Commissioner in respect of their data processing activities before they can lawfully process data;

b data controllers must comply with the eight data protection principles (the Principles);

and

c data subjects have certain rights, including to access personal data held about them, to rectify erroneous personal data and to damages (and in some circumstances distress) caused by any contravention of the DPA.

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 in the DPA such that any electronic information (and some information held in structured hard-copy filing systems) that relates to an identified or identifiable living individual is likely to be personal data. Processing is also widely defined under the DPA 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.

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 DPA. This is because such data will usually contain the names, email 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 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 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 processing is necessary for the purposes of legitimate interests pursued by the data controller (in the case of non-sensitive personal data) and that the processing is necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings), for the purpose of obtaining legal advice or for the purposes of establishing, exercising or defending legal rights (in the case of sensitive personal data). Even when one of those conditions is met, the client and law firm (acting as data controller) will also need to ensure that the processing is otherwise fair and that the other Principles are complied with.
The same is true for the transfer of data to and processing of data by another law firm or a legal process outsourcer (LPO) for the purposes of legal proceedings or obtaining legal advice from that firm. If that other law firm or LPO is outside the EEA, the Eighth Principle requires that adequate data protection is ensured. This may be done by limiting transfers to countries or organisations that the EC has determined provide an adequate level of protection, making the transfer in accordance with model contracts published by the EC, or by carrying out an assessment of the adequacy of protection provided by the laws of the country and by the law firm or LPO who would be receiving the data and concluding that the protection is adequate.23

The subject access rights under the DPA 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 DPA.

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),25 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 Re the RBS Rights Issue Litigation,26 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

23 We understand that this option (of the data controller assessing adequacy of protection) is particular to the UK data protection regime and is not available elsewhere in Europe. The ICO has published guidance on assessing adequacy: Assessing Adequacy – International transfers of personal data, 28 February 2012.
26 [2016] EWHC 3161 (Ch).
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*[^27] 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.[^28] 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. The High Court considered the question of when, and whether, litigation privilege arises in the context of internal investigations in *Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation Limited*.[^29] A criminal prosecution must be reasonably in prospect for a party under investigation to claim litigation privilege successfully. This decision is currently under appeal.

### 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 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.[^30]

### 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.[^31] The procedures for claiming this immunity (which in most practical respects operates as another head of privilege) are set out in CPR 31.19.

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[^28]: It is unlikely that the privilege applies to non-adversarial situations; *Re L (A Minor)* [1997] AC 16.
vii 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)\(^ {32}\) or whether the agreement was procured by fraud, misrepresentation or undue influence.

The case of *Brown v. Rice*\(^ {33}\) 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)*\(^ {34}\) 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).\(^ {35}\) However, the European Court of First Instance and ECJ have ruled that such communications are not privileged in relation to Commission competition investigations.\(^ {36}\) Communications with qualified lawyers in other jurisdictions in relation to foreign or English law may also be privileged before the English courts.\(^ {37}\)

VI ALTERNATIVES TO LITIGATION

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.

An order for ‘standard disclosure’ requires parties to disclose documents they hold or held that both help and harm their case and, prior to the recent Jackson reforms, it was the default option for multi-track claims. The courts must now decide what order to make for disclosure (based on the menu of options in CPR 31.5(7)) bearing in mind the overriding objective and the need to limit disclosure to that which is necessary to deal with the case justly. However, since the new rules came into force in April 2013, there has been little evidence of judges moving away from standard disclosure and tailoring disclosure orders to


\(^{33}\) [2007] EWHC 625 (Ch).

\(^{34}\) [2009] EWHC 1102.

\(^{35}\) *Three Rivers (No. 4)* [2004] UKHL 48.

\(^{36}\) See joined cases of Cases T-125/03 and T-253/03 *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.


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the particular case in question. There have been extrajudicial comments expressing hope that
the menu-based approach can be used more effectively in order to reduce litigation costs in
accordance with the overriding objective.38

Further, the parties are now required to:

- file and serve a disclosure report, verified by a statement of truth, not less than 14 days
  before the first case management conference (CMC); and
- discuss and seek to agree with the other party or parties a proposal for the disclosure
  exercise that meets the overriding objective, not less than seven days before the first
  CMC.

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 Lonrho Ltd v. Shell Petroleum Co Ltd (No. 1),39 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.

Much of the remainder of Part 31 of the CPR remains focused on standard disclosure
being the default option. For example, where standard disclosure is ordered, each party is
under an obligation to conduct a ‘reasonable search’ for disclosable documents.40 Factors
relevant to whether a search is ‘reasonable’ are indicated at CPR 31.7, including the number
of documents involved; the nature and complexity of the proceedings; the ease and expense
of retrieval of any particular document; and the significance of any document that is likely to
be located during the search.

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

38 See for example comments made by Lord Justice Jackson in his lecture on disclosure at the Law Society’s
Commercial Litigation Conference (10 October 2016).
40 CPR 31.7.
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.

The Disclosure Working Group, chaired by Lady Justice Gloster has recently published a proposed PD, designed to overhaul and modernise the entire disclosure process. The new rules propose to place litigants under an obligation to cooperate and assist the court in any disclosure exercise, with sanctions stipulated for non-compliance. The proposed PD would also impose the following duties, including: (1) a duty to cooperate with each other and assist the court over disclosure, (2) a duty to refrain from providing irrelevant documents (document dumping) and (3) an express duty to consider the use of technology. In terms of the disclosure exercise itself, the proposed PD suggests that parties choose one of five models: ranging from a simple ‘no disclosure’ option, a basic option of disclosing only key documents necessary to understand the case, and standard disclosure to the more onerous train of enquiry approach from Peruvian Guano. The phrase ‘standard disclosure’ has been removed from the draft PD to avoid any assumption that it is the default option although it remains available. Members of the judiciary, professional associations and court users have been invited to participate in a consultation process which is open until 28 February 2018.

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,[42] 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.[43] Pyrrho was approved in Brown v. BCA Trading Ltd[44] 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). Even when a document is withheld from inspection, its existence must be disclosed in the relevant section of the disclosure list. Each document over which privilege is claimed should be described. In

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42 [2016] EWHC 256 (Ch).
44 [2016] EWHC 1464 (Ch).
**VI 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 such as 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

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45 [2016] EWHC 2759 (Ch).
46 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,47 the Court of Appeal held that the terms
of the 1996 Act and the New York Convention did not prevent a court, on an application
for enforcement of an arbitral award, from ordering partial enforcement of that award. The
Court stated that the purpose of the New York Convention was to ensure the effective and
speedy enforcement of foreign arbitral awards and, consequently, where an award comprised
challengeable and unchallengeable parts, it was possible for a court to order enforcement of
the unchallengeable part.

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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.\(^{48}\) 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*,\(^{49}\) 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*,\(^{50}\) 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*,\(^{51}\) 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
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.

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48 Available from Oxford University Press.
51 [2013] EWCA Civ 1288.
iv 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 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.

VII 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 European Union 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, as have initiatives aimed at digitising the courts system (see Section III.iii, infra). Reform has also been suggested by The Disclosure Working Group, chaired by Lady Justice Gloster, to address the excessive costs, scale and complexity of disclosure, in their proposal for a new PD to modernise and streamline the disclosure process (see Section VI, infra). Furthermore, in 2017–2018, HMCTS has proposed to host a number of roadshows to engage with and gain feedback from legal professionals on the courts and tribunals modernisation programme.

iii Failure to prevent facilitation of tax offence
On 30 September 2017, the Criminal Finance Act 2017 became law, introducing a new corporate offence of ‘failing to prevent’ the facilitation of tax evasion. The offence is analogous to the offence of ‘failing to prevent bribery’ under Section 7 of the Bribery Act 2010 and is targeted at corporates (and their advisers) that fail to prevent the facilitation of tax evasion by persons who act on their behalf. The new tax evasion offence is a strict liability offence,
which (1) gets round the difficulties of proving corporate criminal liability on the basis of the ‘directing mind and will’ test; and (2) does away with the fiction that only directors or senior level managers can be involved in economic crimes.

iv  Incoming EU General Data Protection Regulation

The General Data Protection Regulation (Regulation (EU) 2016/679) (GDPR) was adopted on 27 April 2016 and will enter into force on 25 May 2018 after a two-year transition period. It will replace the Data Protection Directive (95/46/EC) to become the centrepiece of EU data protection legislation, and seeks to harmonise data protection legislation across EU Member States. The GDPR will replace the regime currently in force in the UK regardless of the UK’s future relationship with the EU. The Article 29 Working Party published a guidance document entitled ‘Guidelines on Personal data breach notification under Regulation 2016/679’ on 3 October 2017. This guidance provides clarity on the boundaries and expectations of handling data breaches under the GDPR. The GDPR includes, among its more notable provisions:

a  a wider extraterritorial scope of application such that controllers outside the EU that offer goods and services to individuals within the EU are caught;

b  the introduction of new concepts and rights (e.g., accountability of data controllers, and the right of individuals to erasure of personal data) over and above the current principles;

c  provisions requiring consent to all data processing (as opposed to the processing only of sensitive data) to be ‘explicit’;

d  the introduction of a mandatory data breach notification procedure whereby controllers in breach must notify the data protection regulator of its breach without undue delay and where feasible within 72 hours; and

e  stronger sanctions for breach such as fines of up to 2 per cent of annual worldwide turnover or €20 million.
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 on the issue of constitutionality (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. Having reached its fifth anniversary in March 2015, 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, infra), 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 principal development in 2017 was the entry into force on 1 September 2017 of implementing decrees of the Law on the Modernisation of Justice in the 21st Century, which was promulgated on 17 November 2016. The reform aims to modernise 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 promote alternative methods of dispute resolution, to improve the organisation and functioning of the justice system and to extend the scope of class actions.

The May 2017 implementing decrees lay the foundation stones of the reform by, *inter alia*, simplifying civil procedure, implementing procedural rules applicable to class actions which have been extended to claims of discrimination, environmental disputes and disputes regarding data protection, and making considerable procedural changes before the courts of appeal. The procedural changes include modifications to the time frame for the exchange of written submissions, the revocation of special rules for jurisdictional appeals, the introduction of an obligation to concentrate all claims and demands in the first written briefs exchanged, etc. These changes increase the burden on the parties and their legal counsel as the time periods have been reduced and sanctions have been increased.

In line with this, the government announced in October 2017 the launch of five areas of work and consultation (digital transformation, criminal and civil improvement and simplification, adaptation of the judicial system, and meaning and effectiveness of punishments) in view of a future reform in 2018.
ii International disputes

Some major developments also concern international disputes.

The Sapin 2 Law established new rules in relation to state immunity from execution by clarifying which assets cannot in principle be subject to seizure, and by introducing a judicial authorisation procedure prior to any seizure measure, thus protecting foreign states from enforcement of judicial decisions and arbitral awards on the French territory.

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 submitted report, under Article 175 of the Code of Civil Procedure.
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, those parts of the appealed decision that are being challenged (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.

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 lawyers with rights of audience before the State Council and the Supreme Court 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, 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 imposed on the judgment debtor and the time period to file an appeal has elapsed. Enforcement will not be available in cases of ongoing insolvency proceedings, and special rules apply in respect of the property of states based on their immunity from enforcement measures. On this latter point the Sapin 2 Law of 9 December 2016 clarified which state assets are presumed unavailable for seizure. More strikingly the reform introduced a preliminary judicial authorisation procedure. Although the authorisation is obtained on an *ex parte* application, it is no longer possible to directly seek enforcement of a decision having recourse to a bailiff (as is in regular cases) against the assets of 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 to the use of this means of communication. The party is held responsible in case of modifications of an email address or phone number. Since 1st 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 the courts which ensures secure electronic transmission.

### 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, supra, 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 of 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
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 €1,007, and partial aid is available to persons with a monthly income of up to €1,510). 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 individually. 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 National Commission for Information Technology and Civil Liberties (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:

- 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);
- the transfer of data outside the European Economic Area to a country without adequate protection;
- automated processing consisting of a selection of people aimed at excluding some from the advantages of a right or the benefit of a contract;
- automated interconnection files; and
- 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).
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, provides that exchanges between foreign lawyers are not confidential 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 fully protect 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, supra). 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 Act No. 2016-1547 on the modernisation of the 21st century justice system (the Law on the Modernisation of the Justice System 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 object.

Certain types of dispute cannot, however, be submitted to arbitration:

a matters of civil status and capacity of individuals;
b matters relating to divorce or judicial separation of spouses;
c disputes concerning public communities and public establishments (i.e., municipalities);
d matters relating to domestic employment (except for arbitration agreements concluded after the termination of the employment agreement);
e bankruptcy proceedings (although arbitration is possible where provided for by the underlying contract for claims against the insolvent debtor); and
f 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).
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 implementing decree established an official list of mediators in October 2017.

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.

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.

OUTLOOK AND CONCLUSIONS

Today’s landscape is shaped by the necessity of the French judicial system to adapt to a scarcity of financial resources, which has led to intense debate regarding the funding of legal aid, the encouragement of alternative dispute resolution methods and the dematerialisation of part of the proceedings. The practical application of the procedural provisions of the Law
on the Modernisation of the Justice System in the 21st Century will be an interesting topic to follow in 2018. Now that this reform has been the subject of implementing decrees in all major areas, such as the appellate procedure and class actions, it will be possible to assess how this reform fares in terms of efficiency and justice for both litigants and other participants in the justice system.
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 of assigning 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 if applied for 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 are to submit all relevant facts in the proceedings of first instance, leaving them only limited means 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 is to bear 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 is to bear one-quarter of the costs, whereas B is to bear three-quarters of the costs. The total reimbursable amount is subject to, and limited by, statutory law.

II THE YEAR IN REVIEW

i Arbitrability of disputes among partners of a limited partnership

The Supreme Court ruled on 6 April 2017 that disputes regarding the validity of resolutions of the partners of a German limited partnership may be submitted to arbitration.\(^2\)

Previous judgments have addressed the arbitrability of shareholder disputes in limited liability companies. In 1996 the Supreme Court held that disputes arising from a limited liability company’s shareholders’ resolutions are generally not arbitrable.\(^3\) The court reversed course in 2009,\(^4\) and held that disputes regarding the validity of shareholders’ resolutions are arbitrable, provided that the arbitration agreement and the arbitral proceedings meet minimum legal requirements intended to safeguard the rights of shareholders. These safeguards include the right of every shareholder to receive such information about the initiation and conduction of the arbitration proceedings as is necessary to decide whether to join the proceedings, the right of every shareholder to take part, including by way of majority decision, in the selection and nomination of the arbitrators, and the consolidation of all disputes concerning the same subject matter into the same proceedings before one and the same arbitral tribunal. With its judgment from April 2017 the Supreme Court has extended these principles to limited partnerships.

The dispute arose from a resolution by which a majority of partners had ousted several limited partners from a German limited partnership. The ousted limited partners, on the basis of an arbitration clause in a previous partnership agreement, commenced arbitration proceedings against the majority partners who had deposed them. The arbitration clause in the previous partnership agreement referred to a separate arbitration agreement, which itself, in turn, specifically referenced the previous partnership agreement. By contrast, the current partnership agreement contained no arbitration clause and made no reference to the separate arbitration agreement.

The majority partners challenged the validity of the arbitration agreement as well as the jurisdiction of the arbitral tribunal. The arbitral tribunal confirmed its jurisdiction in an interim decision. The majority partners subsequently filed a request with the Higher Regional

\(^2\) Docket number I ZB 23/16.
\(^3\) Docket number II ZR 224/95.
\(^4\) Docket number II ZR 255/08.
Court of Oldenburg for a declaratory ruling that the arbitral tribunal lacked jurisdiction. The application was denied. The court found that the original arbitration agreement had not been terminated by virtue of the partners’ resolution to adopt the new partnership agreement.

The majority partners appealed this decision to the Supreme Court. The Supreme Court granted the appeal and ruled that, although disputes arising from limited partnerships were arbitrable in principle, the arbitral tribunal lacked jurisdiction in this case because the arbitration agreement did not meet the minimum legal requirements for procedural fairness it had already established for limited liability companies in its 2009 decision.

ii Requirements for a valid arbitration agreement under German law

The Higher Regional Court of Munich ruled on 13 July 2017 that a provision in a contract pursuant to which the parties merely undertake to conclude an arbitration agreement does not by itself constitute an arbitration agreement.\(^5\) The judgment serves as a reminder of the formal requirements for the conclusion of an arbitration agreement under German law.

The parties had entered into a contract wherein they provided that they would conclude a separate arbitration agreement that would govern all disputes arising under or out of the contract. The parties ultimately did not conclude a separate arbitration agreement. The claimant commenced litigation before the Regional Court Munich. The Regional Court interpreted the aforementioned contractual provision as an arbitration clause and, accordingly, held that it lacked jurisdiction to hear the dispute. The claimant appealed the decision.

The Higher Regional Court of Munich reversed the Regional Court’s decision and ruled that the provision did not constitute a valid arbitration agreement. The clause merely established a contractual obligation to enter into an arbitration agreement. Since the parties had not concluded an arbitration agreement, the defendant could not in good faith expect that the claimant would initiate arbitration proceedings rather than bring the dispute before a state court. The court held that clauses of this type do not exclude the jurisdiction of the state courts, nor do they prove any intention of the parties to refer disputes to the exclusive jurisdiction of an arbitral tribunal.

iii Vacation of arbitration award due to non-disclosure of potential bias of appointed expert

The Supreme Court held in a recent decision that in certain circumstances an arbitral award may be set aside if an expert appointed by the arbitral tribunal does not disclose all circumstances that potentially raise concerns about his or her impartiality or independence.\(^6\)

In this case, the arbitral tribunal appointed a technical expert who stated that he had no professional or private relationship with either of the parties. The expert did not disclose the fact that his employer had a business relationship with the claimant in the arbitration. Subsequent to the evidentiary hearing, the respondent made an unsuccessful bias challenge against the expert that referenced, inter alia, doubts as to the independence and impartiality of the expert. The tribunal ultimately issued an award that relied on the expert’s opinion.

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5 Docket number 23 U 1260/17.
6 Docket number I ZB 1/16.
The respondent challenged the award at the Higher Regional Court of Karlsruhe, claiming, *inter alia*, that its procedural rights had been violated, as the expert had failed to disclose all circumstances that may have given rise to doubts as to his impartiality and independence. The court declared the award enforceable.

The respondent then appealed to the Supreme Court. Although in this case the award was not set aside, the Supreme Court held that the appointment of an expert by the arbitral tribunal may be challenged by the parties if circumstances give rise to reasonable doubts as to his or her impartiality or independence. Moreover, the award is subject to challenge if the tribunal-appointed expert violates his or her duty to disclose such circumstances, thereby depriving a party of the opportunity to address concerns regarding the expert’s impartiality or independence during the arbitral proceedings, and if the tribunal subsequently renders an award relying on the expert’s opinion.

### iv Seizure of legal documents from law firm conducting internal investigation for client

The Federal Constitutional Court, in an interim ruling from 25 July 2017, found that German state prosecutors cannot, at least for the time being, use documents they seized from a law firm that had conducted an internal investigation for one of its clients.7

Munich regional courts had initially granted the state prosecutors permission to seize documents the law firm had created in the context of an internal investigation it had carried out on behalf of one of its clients.8 The internal investigation was carried out before the client was formally charged in criminal proceedings, but under the expectation that it might be. When the German prosecutors initiated proceedings against said client, it seized the results of the law firm’s internal investigation to use as evidence in its own investigation.

The respondent, the law firm, applied for interim relief from the Federal Constitutional Court on the basis that such a seizure violates German law on attorney–client privilege (see more below). Attempts to receive relief from lower federal courts had failed.9 The protection provided by the Constitutional Court is, however, only provisional. A final ruling by the Court is still pending on whether attorney–client privilege indeed applies to documents that were prepared in expectation of a potential investigation by state authorities, but before such an investigation was formally initiated.

### 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.

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7 Docket number 2 BvR 1562/17.
8 Docket number ER II Gs – 2238/17.
9 Docket numbers ER II Gs – 2811/17 and 6 Qs 5/17.
Finally, several EU directives and regulations on the matter of civil procedure apply and supersede domestic German law.

**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 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. To prepare 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, proceedings can, however, 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. Means 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.

It should be noted that 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 inquire 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 goes with 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 of 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 an attachment order and a preliminary injunction 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, be it 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. The 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 permissible. 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, a civil litigation.

The Capital Market Model Case Act, however, provides for an option 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 motion 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 for 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.

Currently, the German government is discussing the introduction of model case proceedings without a limitation to capital market mass disputes. If such proceedings are introduced, it will give plaintiffs the opportunity to register their claims in a ‘claim register’ (opt-in). Subsequently a representative, for instance a consumer protection organisation, may bring a model case in which specific legal and factual aspects will be established before the regional court or, in specific cases, the higher regional court. The plaintiffs who registered their claims may afterwards file individual suits against the defendant in which the competent court will be bound by the previously established legal and factual aspects of the model case. In contrast to the Capital Market Model Case Proceeding, the decision will be binding for all registered claims, irrespective of whether individual suits were already pending prior to the filing of the model case. Furthermore, the registration of the respective claim in the ‘claim register’ will suspend the limitation period.

In addition, multiple parties may, and in some cases must, jointly file or defend a claim in one single court proceeding. They may join voluntarily if they are either legally connected or their claims are based on the same factual or legal grounds, for example if the parties are ‘joint and severable debtors’ or ‘debtor and guarantor’. The parties must join if the subject matter of the dispute calls for a single decision in respect of all parties concerned, for example an action by several shareholders for a declaration that a stock corporation was not validly founded.

Moreover, 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 nominate 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 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).10

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. Main features of the 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 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.

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10 Docket numbers VIII ZR 114/10 and VIII ZR 190/10.
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 with 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 a German court to take 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 respective 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.

### ix 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, if 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.11 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 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).

11 Docket number IX ZR 5/06.
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 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 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.

Data protection

The data protection requirements applicable to private data controllers are set out in the Federal Data Protection Act. As a general rule, the collection, processing and use of personal data is prohibited except to the extent permitted by the Act. There are no provisions in the Act 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 are 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 required to protect a legitimate interest of the data controller. Furthermore, no reason must be given to assume that the data subject’s interest in prohibiting the processing or use of personal data outweighs the data controller’s interest.

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 case where legal counsel reviews the material for purposes of the representation of the 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 with respect to 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 that the privilege be extended to them. In 2010, the European Court of Justice held that the lawyers’ privilege does not apply to communication with in-house lawyers due to the fact that they are not independent of their clients. 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 a court proceeding 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 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.

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

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12 Docket number C-550/07.
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.\textsuperscript{13}

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 infringes 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.\textsuperscript{14}

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 (GWB) 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 which will probably enter into force within the first quarter of 2017.

The revised law will provide 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.

\textsuperscript{13} Docket number XI ZR 277/05.
\textsuperscript{14} 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 its 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), which provides parties with a comprehensive set of rules, the DIS Arbitration Rules of 1 July 1998, 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).15

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 cases filed per year has more than trebled from 1998 to 2015.

15 Docket number III ZB 69/09.
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.

Other forms of alternative dispute resolution

Other forms of ADR 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 the expert to produce 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 EU directive on consumer ADR of 2013 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.
VII OUTLOOK AND CONCLUSIONS

The possibility of a collective redress mechanism for consumers recently regained political traction in Germany. In July 2017, the Federal Ministry of Justice published a draft bill for a 'model case declaratory action'. Because the bill was not passed before the general elections in September 2017 and the end of the most recent legislative period, its future is uncertain at best. The bill does, however, showcase which questions have arisen in the context of collective legal redress for consumers in Germany and therefore serves as an indication of how these questions may be answered in the future. The draft bill pursued two main goals: firstly, to provide injured parties with an effective collective redress mechanism in cases of widespread damages and secondly, to avoid the introduction into German law of a collective redress mechanism akin to US class actions. The draft bill replicated in large part the framework for the model procedure for claims arising from capital markets disputes in Germany. Unlike a traditional class action lawsuit, a claim would not have been asserted by a single claimant on behalf of every class member. Instead, legal and factual issues relevant to all of the claims were to be addressed and ruled on in a judicial model proceeding. The assertion of the individual claims was to remain the responsibility of each individual claimant. Asserting those claims would, however, have been eased significantly by the fact that the common issues that were already subject of the model proceedings would not have to be decided again in the subsequent proceedings between individual consumers and the company. The draft bill left open the question of whether a decision in the model proceedings would be binding only for the company against whom the claims have been brought or also for the consumer claimants.

The draft bill offered a further advantage to consumers. Under the bill, consumers would have been able to register their claims in an electronic claims register at a low cost, thereby suspending the statute of limitations and preventing their claims from becoming time-barred while the model proceedings were pending. Consumers who registered their claims could, therefore, have awaited the outcome of the model proceedings and then decided whether to assert their individual claims in court.

According to the draft bill, only certain consumer protection associations would have been allowed to initiate model proceedings. This was seemingly to ensure that model case declaratory actions would only be initiated in the interest of injured consumers and to thereby prevent the emergence of a 'claims industry' in which the interests of lawyers ultimately would decide which actions were filed. Experience has shown, however, that consumer associations, due to their limited financial and personnel resources, are usually unable to commence litigation that entails a significant cost risk for them anyway, thus calling into question whether limiting the initiation to only certain associations is necessary.

The draft bill further provided for the possibility of having a settlement between the consumer protection association and the company approved by a court. If fewer than 30 per cent of the consumers who registered their claims opted out of the settlement, the court-approved settlement would have become binding on all registered claimants.

It remains to be seen what form the bill will ultimately take if a new German government, as and when it is constituted, continues pushing for the introduction of a model case declaratory action at all.
Chapter 13

GIBRALTAR

Stephen V Catania

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 for. 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.

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.

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

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) of the Act.
5 Sections 3 and 4.
6 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.
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.

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. 7

Court proceedings are the principal method of dispute resolution, even though there are a number of English-qualified mediators in Gibraltar.

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 2017 the Supreme Court decided two cases; the Jyske case and the RBS case. 9 Both these decisions relate to accessory liability of banks connected with the Marrache fraud. 10

In the Jyske 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 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 at trial was whether Jyske was dishonest. 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.

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7 See Section 66 of the Constitution and Section 22A of the Court of Appeal Act.
9 It should be noted that both cases are each subject of an appeal to the Gibraltar Court of Appeal.
10 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.
In both the cases, Jack J adopted a three-stage approach to the allegations of dishonest assistance: was the bank relevantly on notice under the test in *Rowlandson v. National Westminster Bank Limited*? If yes, is the bank relieved of its liability under Section 85 of the Solicitors Act 1974 (UK)? If no, was the relevant individual dishonest given his or her knowledge and understanding?

The main issue in both cases was the extent of investigations which the relevant bank did or should have undertaken when acting as the firm’s banks. Jack J considered the general duties of a bank regarding trust accounts and followed the approach taken in *Rowlandson*. Jack J also held that section 85 applied to Gibraltar in the *Jyske* case pursuant to Section 33 of the Supreme Court Act 1960 (Gibraltar). It was held that a bank can in general rely on the presumption that a solicitor is operating his client account honestly and correctly. However, if a bank is sufficiently on notice of irregularities or matters which arouse suspicion, then it is under the normal duty to investigate. What amounts to sufficient notice will turn on the relevant facts. The judge then considered the law on dishonesty. In both cases, Jack J found that the two relationship managers concerned were experienced bankers and had a good understanding of the function of the office and client accounts and the need for segregation. Jack J found dishonesty in both cases on the basis of actual knowledge and Nelsonian knowledge in respect of the relationship manager concerned.

In the *Jyske* matter, the court has ordered a retrial of the claim as it found that the trial judge made a material error in refusing to have regard for expert and other banking evidence offered by Jyske Bank.

Claim No. 2017/ORD/31 was the progeny of matrimonial proceedings that took place in London that concerned issues relating to a discretionary trust of which the husband was the settlor. The trust is governed by Gibraltar law. The trustee is a company registered in Gibraltar where the trust is administered. The trustee commenced a Part 8 Claim commenced which sought directions in relation to the validity of two deeds executed in 2012 and 2015 whereby certain beneficiaries, including the husband and the wife, were excluded as potential beneficiaries.

On 26 and 27 July the Chief Justice heard the trustee’s substantive application and reserved judgment. The central issue for the Court of Appeal was whether the Chief Justice ought to have heard the substantive application at all. The Court of Appeal announced that, to the extent that the application sought to prevent the Chief Justice from handing down a judgment on jurisdiction, it refused leave to appeal but that leave to appeal was granted on the issue whether the Chief Justice should have proceeded to hear the merits of the Part 8 Claim prior to the achievement of finality on jurisdiction. The wife’s submissions failed to have regard to the unique circumstances of this case, which uniqueness, was brought about

11 *[1978] WLR 798.*
12 See Paragraph 21 of the *Jyske* case and Paragraph 22 of the *RBS* case.
13 Paragraph 40 of the *Jyske* case.
by the wife's recent approach to the litigation. In these circumstances, the court held that it was permissible, albeit unorthodox, for the Chief Justice to proceed with the merits hearing and that he did not act in a way which can be described as procedurally unfair, whether by reference to Article 6 ECHR or otherwise. Therefore, on this basis, the appeal was dismissed.

In respect of the wife's dispute as to whether the Supreme Court of Gibraltar had exclusive jurisdiction over it, the Chief Justice held that the Supreme Court did have jurisdiction as the trust instrument confers jurisdiction; the proceedings were brought against beneficiaries and the claim dealt with relations between the trustee and the beneficiaries and their rights. It follows that the claim is within the scope of article 25(3) and therefore the court had exclusive jurisdiction. In respect of the deeds of exclusions, the court held that they were valid, albeit the matter was unchallenged, on the ground that the trustees did not breach their duties and that it did not go against the trust instrument as it conferred a power to exclude.

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.\(^\text{17}\)

The main areas of difference with English practice and procedure are in relation to liquidation proceedings, bankruptcy and family cases.\(^\text{18}\) Service of documents within the jurisdiction is also covered by local rules.\(^\text{19}\)

Civil cases may be commenced by the lodging of a claim form in the Supreme Court Registry pursuant to the CPR, winding-up petition 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.

\(^{17}\) See Section 15 of the Supreme Court Act, Rule 6(1) and (2) of the Supreme Court Rules 2000 (SCR).

\(^{18}\) Pursuant to Rule 6(2) of the SCR, the following former English Rules apply: Companies (Winding-up) Rules 1929 as amended, the Matrimonial Causes Rules 1957 as amended, and the Bankruptcy Rules 1952, as amended.

\(^{19}\) Rule 3 of the SCR.
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.

iv Service out of the jurisdiction

The Civil Jurisdiction and Judgments Act 1993 applies the Brussels Convention and the Lugano Convention 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, and the claimant must also establish that the claim on its merits has a reasonable prospect of success.

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

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20 Section 4(1).
21 Section 4(3).
22 CPR 6.37(1)(a).
23 CPR 6.37 (1)(b).
implement the said regulation. Article 36 of the Recast Brussels Regulation provides for automatic recognition resulting in no requirement for a special procedure. The grounds 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.

**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 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.

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24 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 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.
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.

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.

25 CPR 5.4(2).
26 CPR 5.4C(2).
27 In the matter of an application to the Chief Justice pursuant to the Supreme Court Rules, Rule 2 [2001-02 Gib LR 329].
Money laundering, proceeds of crime and funds related to terrorism

Gibraltar has fully implemented the Third Money Laundering Directive (the Directive),\(^{28}\) 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)\(^ {29}\) 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);\(^ {30}\) 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)\(^ {31}\) applies; and

\(e\) makes a disclosure concerning a state or territory that is prohibited.

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\(28\) 2005/60/EC.

\(29\) Formerly known as the Criminal Justice Act.

\(30\) 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.

\(31\) 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:

\[a\] buying and selling real property or business entities;
\[b\] managing client money, securities or other assets;
\[c\] opening or managing a bank, savings or securities accounts; and
\[d\] 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.\(^{32}\) 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.\(^{33}\)

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:

\[a\] the data must be obtained and processed fairly;
\[b\] it must only be used in relation to one or more specified and lawful purposes;
\[c\] data must be stored confidentially and only released to third parties with prior written consent from the individual permitting such release to third parties;
\[d\] it is a requirement that it be stored in a safe and secure manner;
\[e\] the data must be accurate and up to date;
\[f\] 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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32 Gibraltar Regulatory Authority Act 2000.
33 Data Protection Act 2004.
In respect of legal practices in Gibraltar, the same principles apply regarding the handling of data in conjunction with the recognised principles in relation to the status of legally privileged documents.

However, data protection is due to change with the European General Data Protection Regulation (GDPR) which comes into force in May 2018. Under the GDPR, fines for serious breaches will be increased to a staggering maximum of €20 million or 4 per cent of a group’s turnover (whichever is the highest). Increased compensatory rights for individuals who suffer damage are also being introduced, meaning that organisations should not discount the increased prospect of also having to deal with third-party actions where non-compliance causes damage to individuals.

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;
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

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 of 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 not common 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

Hong Kong’s judiciary is generally well regarded and operates free of political or other interference. It is perhaps for that reason that the Hong Kong courts have recently found themselves being asked to rule on cases involving the politics of Hong Kong. However, the uninvited interpretation of Article 104 of the Basic Law by the Standing Committee of the National People’s Congress (NPCSC) last year has given rise to some concern among constitutional lawyers in Hong Kong regarding the sanctity of the rule of law in Hong Kong, the independence of Hong Kong’s judiciary and the PRC’s approach to the ‘one country, two systems’ policy. (See Section II, infra.)

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$1 million) 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 England, Australia and New Zealand who serve as non-permanent judges. It hears appeals from the CA and the CFI.

There are a range of specialist tribunals set up 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 also a major centre for international arbitration. There is a sophisticated statutory regime in place to support arbitrations (see Section VI, infra). Mediation has become more widely accepted in Hong Kong, and this trend should continue over the coming years given the judicial encouragement of mediation under Practice Direction 31, which came into effect on 1 January 2010 (see Section VI, infra). With the opening of the Financial Dispute

1 Mark Hughes is a partner and Kevin Warburton is a senior associate 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.
Resolution Centre (FDRC) in 2012, the option of mediation is intended to be available for the majority of disputes that arise between retail investors and financial institutions (see Section VI, _infra_).

II  THE YEAR IN REVIEW

The moderate growth of the Hong Kong economy continued in 2017, supported by growth in private consumption expenditure and export of goods. On the other hand, inbound tourism and retail sales experienced a decline. Although the outlook for Hong Kong’s economy remains broadly positive, global trends – such as the rising tide of US protectionism and a period of transition in the EU – may bring to Hong Kong a degree of inherent uncertainty.

Hong Kong deservedly retains a reputation for a relatively 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 commencement of the Competition Ordinance on 14 December 2015, which aimed 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 (see Section II, _infra_).

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 the quarter ending 30 June 2017, the SFC alone started 89 investigations, a decrease from the 160 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 three licensed corporations and seven representatives, resulting in total fines of HK$11 million. In its 2016–2017 Annual Report, the SFC named corporate fraud and misbehaviour as a top enforcement priority area against which it will focus its resources.

The Independent Commission Against Corruption (ICAC) has stayed in the headlines following the trial in 2014 of the wealthy Kwok brothers, chairmen of Sun Hung Kai Properties, and Rafael Hui, former Chief Secretary of the Government of Hong Kong and former managing director of the Mandatory Provident Fund Schemes Authority. In 2015, the ICAC’s high-profile investigation – launched in 2012 – of corruption complaints related to ex-Chief Executive Donald Tsang culminated in its announcement on 5 October 2015 that Tsang had been charged with two counts of the common law offence of misconduct in public office. Tsang faced allegations that he received, while in office, inappropriate favours from businessmen (see Section VI, _infra_). In 2017, The ICAC has remained active. For example, on 29 March 2017, the ICAC charged a former associate director of UBS AG Hong Kong over a conspiracy to accept bribes adding up to HK$1.5 million.

Recent headlines in Hong Kong have been 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 Court of Appeal sentenced the activists to between six and eight months' imprisonment.

This decision provoked strong reactions in Hong Kong and globally. Chris Patten, former governor of Hong Kong, criticised the appeal as politically motivated and the final decision as ‘deplorable’. Other critics believed the outcome was evidence of Beijing’s mounting influence on Hong Kong’s independent judiciary and the increasing erosion of the rule of law.

Further, issues arising out of the Legislative Council (Legco) elections held on 4 September 2016 continue to be debated. The issue was initially triggered by the manner in which 13 newly elected Legco members purported to take their oaths at the first meeting of the Legco on 12 October 2016. The five localist and 13 pro-democratic Legco members used the oath-taking ceremony as an opportunity to protest by, for example, making extra statements before, during and after taking their oaths. The oaths of two newly elected Legco members, Sixtus Baggio Leung and Yau Wai-ching, were invalidated by Legco Secretary-General Kenneth Chan.

A court action was commenced by the government shortly afterwards, seeking (among other things) a declaration that Leung and Yau were disqualified from taking, or had vacated, their offices because they had, by their conduct, ‘declined or neglected’ to take the required oath under Article 104 of the Basic Law and Sections 19 and 21 of the Oaths and Declarations Ordinance. The case was heard by the CFI on 3 November 2016. However, prior to the handing down of the CFI’s judgment (see below), the NPCSC issued its interpretation of Article 104 on 7 November 2016 (the 2016 Interpretation). While the Hong Kong courts exercise the judicial power of Hong Kong, have the power of final adjudication and exercise that power free from any interference, Article 158 of the Basic Law vests the ultimate power of interpretation of the Basic Law in the NPCSC. Prior to the 2016 Interpretation, there had been four interpretations of the Basic Law by the NPCSC since the Basic Law came into force. The 2016 Interpretation was, however, unique in that it had not been requested (either by the courts or the Chief Executive) and was given while the court was considering its judgment.

The litigation and the 2016 Interpretation have generated significant public debate in Hong Kong and around the world. On the same day as the 2016 Interpretation was issued, the Hong Kong Bar Association issued a statement expressing ‘deep regrets’ regarding it, commenting that it is ‘unnecessary’, and ‘indeed would do more harm than good’ as it ‘inevitably gives the impression that the NPCSC is effectively legislating for Hong Kong,

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4 ‘HK government has made a deplorable decision’, Financial Times, 29 August 2017.
5 Chapter 11 of the Laws of Hong Kong.
6 Article 80 of the Basic Law.
7 Article 82 of the Basic Law.
8 Article 85 of the Basic Law.
thereby casting doubts on the commitment of the Central People’s Government to abide by the principles of “One Country Two Systems, Hong Kong People Ruling Hong Kong, and High Degree of Autonomy”’.

The Law Society of Hong Kong also, on 8 November 2016, issued a statement stating that ‘frequent interpretations of the Basic Law by the NPCSC give an impression that the independence of the judiciary has been undermined’ and that ‘the NPCSC should exercise restraint in invoking its power’ to interpret the Basic Law under Article 158.

On 1 September 2017, the CFA dismissed Leung and Yau’s applications for leave to appeal. The CFA further reiterated that an interpretation of the Basic Law issued by the NPCSC is binding on Hong Kong courts and that ‘it declares what the law is and has always been since the coming into effect of the Basic Law on 1 July 1997’. However, in its decision, the court also clarified that it would have reached the same outcome regardless of the 2016 Interpretation. The court therefore concluded it was not reasonably arguable that the effect of the 2016 Interpretation was to ‘oust the jurisdiction of the courts.’

i Regulatory enforcement

The SFC, as the independent non-governmental 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.

In December 2014, the SFC commenced proceedings in the Market Misconduct Tribunal (MMT) against Mr Andrew Left, the former head of Citron Research which is a US-based publisher of research reports on listed companies. He was alleged to have published a report that contained false and misleading information about Evergrande Real Estate Group Limited (a listed company in Hong Kong). The report stated that Evergrande was insolvent and had consistently presented fraudulent information to the investing public. The share price of Evergrande fell sharply on the same day following the publication. It was alleged that shortly before the publication, Mr Left short-sold up to 4.1 million shares of Evergrande, which made him a net profit of about HK$1,596,240. On 26 August 2016, the MMT found that Left had made false allegations against Evergrande recklessly and negligently inducing transactions – and therefore engaged in market misconduct under Section 277 of the Securities and Futures Ordinance (SFO). Left was banned from trading securities in Hong Kong for five years and the Tribunal has issued a cease and desist order against him. He was also ordered to disgorge his profit from short-selling and pay for the SFC’s investigation and legal costs. Mr Left attempted to appeal, contending that there was no evidential basis for the MMT to find that he was aware of the risk that the allegations in the research report were false or misleading as to material facts and that the risk was of such substance it was unreasonable to ignore it. However, the Court of Appeal dismissed Mr Left’s application for leave to appeal in January 2017.

In the past year, the SFC has also commenced proceedings against directors of different corporations under Section 214 of the SFO, which gives the court power to disqualify persons from being directors for up to 15 years if they are found to be wholly or partly responsible for

9 The Hong Kong Bar Association’s Statement Concerning the Interpretation made by the National People’s Congress Standing Committee of Article 104 of the Basic Law, 7 November 2016.
10 Yau Wai Ching v. Chief Executive of the Hong Kong Special Administrative Region, Secretary for Justice FAMV 7/2017.
11 Chapter 571 of the Laws of Hong Kong.
the company's affairs having been conducted in a prejudicial manner or a manner involving misconduct. Notably, on 4 September 2017, the SFC obtained disqualification orders in the CFI against the former chairman and four independent, non-executive directors of Hanergy Thin Film Power Group Limited (Hanergy) for breach of directors’ duties. Former chairman Mr Li Hejun, briefly considered China's richest person in 2015, was banned from holding a corporate directorship in Hong Kong for eight years. The SFC commenced legal proceedings in the Court of First Instance on 23 January 2017, alleging that the five directors failed to question the viability of Hanergy’s business model, which relied on sales to its parent company and affiliates as its main source of revenue. Further, the SFC alleged that the five directors did not properly assess the financial positions of these connected parties and therefore the recoverability of the receivables due from them as a result of the connected transactions. The SFC had also imposed a suspension of trading in the shares of Hanergy on 15 July 2015, which remains in place at the time of writing.

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 joint sponsors in certain initial public offerings in 2009. In January 2017, the SFC filed a lawsuit against the two banks, alleging market misconduct.

In May 2017, the Takeovers and Mergers Panel of the SFC (Panel) ruled that a whitewash waiver ought to have been granted in relation to a share buy-back offer announced by Television Broadcasts Ltd (TVB) in January 2017, subject to a majority of votes being cast in favour of the resolution to approve the offer and the whitewash waiver not being put before TVB’s shareholders for a separate vote. In the ruling, one of the issues considered by the Panel was whether the scaling-back provisions in the Broadcasting Ordinance (detailed below) may affect the requirement under General Principle 1 of the Codes on Takeovers and Mergers and Share Buy-backs (the Takeover Code) to treat all shareholders even-handedly. TVB subsequently applied for leave for judicial review of the Panel’s ruling, which was granted on 4 October 2017. The Court of First Instance has quashed the above finding in the Panel’s ruling, declaring that Section 19 of Schedule 1 of the Broadcasting Ordinance (which states that where votes cast by unqualified voting controllers exceed 49 per cent of the total, their votes shall, for the purpose of determining the matter, be reduced so that they amount to 49 per cent of the adjusted votes cast) applies to the shareholders’ approval of the whitewash waiver. This case, importantly, sheds light on the interplay between statutory law and the Takeover Code.

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 Court of Appeal. In October 2017, the Court of Appeal dismissed Moody's application for leave to appeal the decision to the CFA.

In April 2017, the MMT ruled no market misconduct had been committed by the executive directors of Citic Limited (CITIC), concerning an issue regarding Section 277(1) of the SFO. The case related to a profit warning announcement issued by CITIC in October 2008 regarding losses from target redemption forward contracts (TRFs) that stated CITIC was ‘aware of the exposure’ since 7 September 2008. On 12 September 2008, CITIC had issued a circular regarding a discloseable and connected transaction that included a statement from the CITIC directors stating ‘save as disclosed in this Circular, the directors are not aware of any material adverse change in the financial or trading position of the Group since … the date to which the latest published audited accounts of [CITIC] were made up’ (No-MAC Statement). It became apparent that the directors made the No-MAC Statement after some of them were aware of the issue regarding the TRFs. The question for the MMT to decide was whether the directors who were aware of the issue regarding the TRFs had committed market misconduct. Ultimately, the MMT decided no market misconduct was committed, as the No-MAC Statement was unlikely to influence the market and because the No-MAC Statement was not false or misleading as to a material fact.

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.

On 7 February 2017, the MMT found that Mayer Holdings Limited (Mayer) and nine of its current and former senior executives failed to disclose inside information as soon as reasonably practicable (as required under Section 307B(1) of the SFO), following proceedings brought by the SFC.

Between April and August 2012, Mayer’s auditors at the time informed management about multiple issues they identified while auditing Mayer’s financial statements. In August 2012, the auditors told Mayer that they would qualify their audit opinion for the financial statements if the outstanding audit issues were not resolved. In December 2012, Mayer’s auditors resigned. However, Mayer only disclosed the auditors’ resignation and brief details of the outstanding audit issues on 23 January 2013. It was the MMT’s view that the auditors’ resignation and the outstanding audit issues constituted specific and price-sensitive information, which should have been disclosed as soon as reasonably practicable.

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 with some enforcement powers. 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. The Commission opened a formal investigation within eight days after receiving the complaint, underscoring the efficiency of the Commission in taking action against contraventions of the Ordinance.

On 14 August 2017, the Commission announced that it had brought its second case before the Tribunal against 10 local construction and engineering companies (or their representatives) for engaging in market-sharing and price-fixing conduct in the provision of renovation services at a public rental housing estate. The Commission alleged that the contractors engaged in market sharing by allocating among themselves specific floors of a housing estate project and agreeing among themselves that they would not actively seek or accept business from tenants on floors allocated to other contractors. Further, the Commission alleged that the contractors engaged in price-fixing by jointly producing and using promotional flyers containing package prices for different services, giving the impression that the prices were indicative of ‘standard pricing’ or that all contractors charged similar prices. The focus of the Commission on the local contractors indicates that the Commission is concerned not only with large multinational corporations, but with any case that might have an impact on Hong Kong consumers.

iv Third-party funding in arbitration

On 12 October 2016, the Law Reform Commission published a report recommending that the Arbitration Ordinance should be amended to state that the common law principles of maintenance and champerty (both as to civil and criminal liability) should not apply to arbitration and associated proceedings under the Ordinance, hence clarifying the position that third-party funding for such proceedings is permitted provided that appropriate financial and ethical safeguards are complied with. The report also recommended that consideration should be given as to whether the same arrangements should be extended to mediation within the scope of the Mediation Ordinance.\(^ {12}\)

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 new amendments therefore remove the common law principles of maintenance and champerty in the context of arbitration and mediation.

v Anti-corruption

Two significant anti-corruption cases were brought before the courts in recent months, keeping concerns about corruption in the headlines.

The first case concerns the former chief executive Donald Tsang Yam Kuen. Tsang was charged with two counts of 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

\(^ {12}\) Chapter 620 of the Laws of Hong Kong.
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.

The ICAC’s action against Tsang has prompted public debate about possible reforms to Hong Kong’s bribery laws. Currently, under Section 3 of the Prevention of Bribery Ordinance (POBO), any civil servant ‘who, without the general or special permission of the Chief Executive, solicits or accepts any advantage shall be guilty of an offence’. The result is that as it currently stands the Chief Executive cannot commit this offence.

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. The prosecution accused Chan, an employee and thus agent of 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.

13 Chapter 201 of the Laws of Hong Kong.
vi Insurance Authority
The Insurance Companies (Amendment) Ordinance 2015 (Commencement) Notice 2017 (Commencement Notice) was gazetted on 21 April 2017. On 26 June 2017, relevant provisions of the Insurance Companies (Amendment) Ordinance 2015 came into operation, enabling the newly established Insurance Authority to take over the statutory functions of the Office of the Commissioner of Insurance in regulating insurance companies.

The Insurance Authority is a new insurance regulator independent of the government. Previously, the Office of the Commissioner of Insurance, a government department, regulated insurance companies. It is expected that in the long term, the Insurance Authority will be financially independent of the government.

vii Apology legislation
On 13 July 2017, Legco passed the Apology Bill, which will come into force as the Apology Ordinance on 1 December 2017. This legislation is the first of its kind in Asia, and provides that the making of any sort of apology will not constitute an admission of fault or liability, nor may it be admissible as evidence for determination of fault, liability or other issues to the prejudice of the apology maker.

The Apology Ordinance defines an apology as any expression of regret, sympathy or benevolence, and includes an admission of fault or liability or any statement of fact. However, it is worth noting that the Apology Ordinance will not apply where the apology is in documents like pleadings and witness statements submitted in applicable proceedings, where it is given orally at a hearing, or where it is adduced as evidence by or with the consent of the apology maker.

Prior to the Apology Ordinance, there was no protection under Hong Kong law against apologies being construed as an admission of fault or liability, thus rendering parties reluctant to make apologies. The legislation on apologies is intended to remove barriers to making apologies, in hopes that it may facilitate more effective de-escalation and resolution of disputes.

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\(^\text{14}\) or, in severe cases of non-compliance, to have their

\(^\text{14}\) See, for example, Cheung Man Kwong Thomas v. Mok Chun Bor [2009] HKEC 1636.
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.

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 about the time frame for a piece of civil litigation. This will depend on a variety of factors, including the extent of discovery, 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. 16 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.17

**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 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.

**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 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. 18 Accordingly, the courts are very concerned to ensure
that the process is not abused.

As with a Mareva injunction, if an 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.

### 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

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16 Hong Kong Civil Procedure, Rules of the High Court, O.14.
17 Hong Kong Civil Procedure, Rules of the High Court, O.19.
opt-in approach), so that once the court certifies a case as suitable for a class action, the 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 13 meetings to date. In addition, a sub-committee 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 50 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

19 HRAB, ‘Standards of Professional Competence’.
20 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.21 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 mainland China may be enforced in Hong Kong and Hong Kong judgments in China, came into operation on 1 August 2008. However, the scope of this legislation is quite limited. It only applies to judgments from certain PRC courts (essentially Intermediate People’s Courts and higher) that must arise from a ‘commercial agreement’ and must also be final and conclusive. The requirement for the agreement to be a commercial agreement prevents, for example, judgments arising from tortious acts, IP infringements and product liability disputes from being registered. Furthermore, the underlying contract must give the relevant mainland court exclusive jurisdiction to resolve disputes that may arise. As it is relatively rare for non-PRC corporations to provide in their contracts for exclusive jurisdiction of the PRC courts, the underlying arrangement between Hong Kong and mainland China may be more important in facilitating the enforcement of Hong Kong judgments against assets in the mainland rather than vice versa. The arrangement only applies to contracts entered into after 1 August 2008, and thus far this arrangement has not been widely used to enforce Hong Kong judgments in the PRC.

vii  Assistance to foreign courts

Hong Kong courts will assist foreign courts to serve process in Hong Kong22 and to obtain evidence from witnesses resident in Hong Kong for use in foreign proceedings.23

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21 Hong Kong Civil Procedure, Rules of the High Court, O.11 r.1.
22 Hong Kong Civil Procedure, Rules of the High Court, O.69.
23 Hong Kong Civil Procedure, Rules of the High Court, O.70; see also Section 75 Evidence Ordinance.
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.

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;

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;

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.

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

27 Principle 8.01.
28 Principle 8.03.
29 Principle 9.02.
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\(^\text{30}\) 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
addition to the Ordinance, and other statutory requirements that apply generally to everyone
in Hong Kong,\(^\text{31}\) solicitors in Hong Kong are subject to mandatory requirements (which
reflect the statutory law) to:

\(\begin{align*}
\text{a} & \quad \text{have appropriate policies and internal control procedures in place for identifying and}
\text{reporting suspicious transactions;} \\
\text{b} & \quad \text{take reasonable steps to identify and conduct due diligence on all clients and to}
\text{maintain detailed records;} \\
\text{c} & \quad \text{consider with special care unusual transactions and high-risk clients, especially those}
\text{from internationally recognised high-risk jurisdictions such as offshore tax havens and}
\text{the PRC; and} \\
\text{d} & \quad \text{report to the Hong Kong authorities, without reference to the client or potential client,}
\text{any suspicion of money laundering or terrorist financing that the solicitor may have.}
\text{This would include suspicions that a solicitor may have in the course of representing}
\text{a client in litigation; for example, the subject matter of the litigation may arouse}
\text{suspicions that it relates to money laundering. Solicitors can face criminal sanctions if}
\text{they fail to do this or if they tip off a client or potential client about their suspicions}
\text{or the fact that they are about to or have reported the matter to the Hong Kong}
\text{authorities. Note, however, that any communications protected by legal professional}
\text{privilege (LPP) would not be covered by the ambit of these strict requirements.}\(^\text{32}\)
\end{align*}\)

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.

\(^{30}\) Chapter 615 of the Laws of Hong Kong.

\(^{31}\) See the Drug Trafficking (Recovery of Proceeds) Ordinance, the Organised and Serious Crimes Ordinance

\(^{32}\) The reasoning of the English Court of Appeal in \textit{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.
On 11 July 2016, the CFA in *HKSAR v. Yeung Ka Sing Carson*\(^{33}\) 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 proposed amendments are expected to come into effect on 1 March 2018.

### 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.\(^ {34}\)

Two exceptions to this rule are:

- 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;\(^ {35}\)
- 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.\(^ {36}\)

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 they approach the data subject with marketing messages. Second, 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.

## 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.

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33 [2016] HKEC 1506.
34 Schedule 1 (Principle 3) of the Personal Data (Privacy) Ordinance (Chapter 486).
35 Ibid, Section 60B.
36 Ibid, Section 63B.
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.*

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,* 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.* 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 policy 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

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40 See the Guideline of March 2006 – Cooperation with the SFC.
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).

The trio of cases of Rockefeller & Co Inc v. Secretary for Justice,41 James Daniel O’Donnell v. Lehman Brothers Asia Ltd (In Liq)42 and CITIC Pacific Ltd v. Secretary for Justice and Commissioner of Police43 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.44 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).

41 [2000] 3 HKC 48 (CA).
42 HCMP 1081/2009 (unreported).
43 [2012] 2 HKLRD 701.
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 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 require 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.

In February 2016, the English courts, for the first time, approved the use of predictive coding technology in electronic discovery in *Pyrrho Investments Ltd & Anor v MWB Property Ltd & Ors.* Predictive coding refers to the review of electronically stored documents by computer software using specifically designed algorithms, where the software grades and

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45 Order 1A, rule 1.
46 [2015] IEHC 175.
prioritises the documents for human review according to their relevance to the issues of a case. The Pyrrho decision acknowledged that predictive coding could significantly reduce inconsistencies and costs to legal proceedings, and it is anticipated that the English case may prompt the Hong Kong judiciary to more readily accept the use of technology in electronic discovery going forward.

VI ALTERNATIVES TO LITIGATION

i 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.

Schedule 2 of the Arbitration Ordinance contains all of the existing domestic provisions currently applicable and parties will still be free to opt in to one or more of the provisions outlined in this Schedule in their arbitration agreement, which include arbitration by a single arbitrator, consolidation of arbitrations, the ability of the court to decide a preliminary point of law, the right of appeal against awards on questions of law and challenging an arbitral award on the grounds of serious irregularity. The provisions contained in Schedule 2 will automatically apply to existing arbitration agreements or arbitration agreements entered into within six years of the commencement of the Arbitration Ordinance if the arbitration agreement states it is a domestic agreement.

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 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 mainland China 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 Arrangements with the Hong Kong government to facilitate the conduct of PCA-administered arbitration in Hong Kong, including state-investor arbitration.
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 2015, the HKIAC handled 271 arbitrations, of which 94.8 per cent were international in nature and featured parties from 41 jurisdictions.

The HKIAC revised its Administered Arbitration Rules with effect on 1 November 2013. The measures are intended to reflect the latest international developments in arbitration, while enhancing the flexibility afforded to parties. The key developments include the following:

a. Arbitrators are given a broad power to join an additional party to an existing arbitration and to consolidate two or more arbitrations, provided that the claims arise under the same contract or the same series of contracts.

b. Arbitrators may now be engaged on the basis of a capped hourly rate, although the rules retain the flexibility to allow parties to agree on a payment above the capped rate.

c. A party may now apply for emergency relief concurrent to or following the filing of a notice of arbitration. In urgent cases, an emergency arbitrator must be appointed within two days and any emergency decision must be made within 15 days of the date on which the HKIAC delivered the file to the emergency arbitrator. The emergency arbitrator will remain in place until the arbitral tribunal is constituted; the tribunal’s jurisdiction is not bound by the previous decisions of the emergency arbitrator. The interim measures that the emergency arbitrator may make are broad, which could be any temporary measure, whether in the form of an award or an order.

The Arbitration Ordinance was also amended with effect from 19 July 2013, partly to accommodate the provisions in the HKIAC’s rules for emergency arbitrators. Hong Kong courts now have the power to enforce relief granted by an emergency arbitrator, whether obtained in or outside Hong Kong.47 In the case of agreements between Hong Kong parties and non-Hong Kong parties, the difficulties of enforcing Hong Kong court judgments in other jurisdictions are an important factor in favour of arbitration.48 Further amendments have been made to the Arbitration Ordinance to reflect the arbitration sector’s concern over whether parties that opt for domestic arbitration and specify the number of arbitrators in the arbitration agreement retain rights to seek the court’s assistance in accordance with Sections 2 to 7 of Schedule 2 of the Arbitration Ordinance. Schedule 2 of the Arbitration Ordinance preserves the rights formerly granted to parties under the domestic regime prior to the unification of the arbitration regimes for domestic and international arbitration under the Arbitration Ordinance. Section 100 of the Arbitration Ordinance states that Sections 1 to 7 of Schedule 2 apply automatically to parties to two types of domestic arbitration agreements;49 Section 100, however, is subject to Section 102 (specifically Section 102(b)(ii)), which provides that Section 100 does not apply if the arbitration agreement concerned has

47 Section 22B of the Arbitration Ordinance (Chapter 609).
48 Hong Kong had only a limited number of reciprocal enforcement arrangements with other jurisdictions prior to 1997. This decreased further following the PRC’s resumption of sovereignty, as many of the arrangements were tied to Hong Kong being a part of the Commonwealth.
49 The two types of domestic arbitration agreements under Section 100 of the Arbitration Ordinance (Chapter 609) are (1) an arbitration agreement entered into before the commencement of the Arbitration Ordinance which has provided that arbitration under the agreement is a domestic arbitration; or (2) an arbitration agreement entered into at any time within a period of six years after the commencement of the Arbitration Ordinance which provides that arbitration under the agreement is a domestic arbitration.
provided expressly that ‘any of the provisions in Schedule 2 applies or does not apply’. The effect of these provisions was therefore that either all or none of the provisions applied. Under Section 1 of Schedule 2,\(^50\) if parties to an arbitration fail to agree on the number of arbitrators, Section 1 takes effect; consequently, if parties specify the number of arbitrators in a domestic arbitration agreement, they are in effect expressly providing that Section 1 applies or does not apply, which would trigger Section 102(b)(ii) and result in the disapplication of Section 100.

The Arbitration Ordinance has been amended to clarify that even if parties opting for domestic arbitration agree on the number of arbitrators, they retain their right to seek the court’s assistance on matters set out under Sections 2 to 7 of Schedule 2.

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*,\(^51\) 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*,\(^52\) 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 (the Arrangement), 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. Polystek Engineering Co Ltd*,\(^53\) and in particular the ‘public policy’ ground for refusal to enforce a foreign arbitral award. In the *Hebei* case, the CFA held that the ‘public policy’ ground for refusal of enforcement is to be narrowly construed and applied. It also held that the courts have a residual discretion to uphold leave to enforce an

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\(^{50}\) Section 1 of Schedule 2 of the Arbitration Ordinance (Chapter 609) states, ‘If the parties to an arbitration agreement fail to agree on the number of arbitrators, any dispute arising between the parties is to be submitted to a sole arbitrator for arbitration.’

\(^{51}\) [2016] HKEC 656.

\(^{52}\) [2015] HKEC 2439.

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.\(^54\) 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.\(^55\) 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 \(U v. A\)\(^56\) 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 JV’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.

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

\(^{54}\) [2012] 3 HKC 498.

\(^{55}\) FAMV 18/2012.

\(^{56}\) HCCT 34/2016.
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*, 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*, 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.

In terms of statutory amendments, 2017 saw significant developments in Hong Kong arbitration law. First, the Arbitration (Amendment) Bill 2016 was passed on 14 June 2017, 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. Second, 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. It is hoped these amendments to the law will further strengthen Hong Kong’s position in the Asia region as a leading arbitration centre in resolving intellectual property rights disputes.

### 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) came into force on 1 January 2013. The primary purpose of this relatively short Ordinance is to provide statutory underpinning to support

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57 HCCC 41/2015.
58 HCMP 3060/2016.
59 Chapter 620 of the Laws of Hong Kong.
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 child or where
the disclosure is required by law.

The FDRC came into operation on 19 June 2012. The FDRC’s primary function is
to allow retail investors alleging mis-selling by banks and other financial intermediaries the
opportunity to make claims for compensation not exceeding HK$500,000 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.

The Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill
2017 also introduced a new Section 7A to the Mediation Ordinance, allowing third-party
funding in mediation.

iii Expert determination

Expert determination is frequently incorporated into agreements as a cost-effective and quick
means of resolving a narrow dispute, for example, as to the amount of deferred consideration
that is payable under a sale and purchase agreement or the terms of a renewed lease.

VII OUTLOOK AND CONCLUSIONS

The number of investigations and enforcement actions begun by the key regulators is
expected to remain consistent into 2018. 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.
Chapter 15

INDIA

Zia Mody and Aditya Vikram Bhat

I 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, 2016 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 under it). 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.

1 Zia Mody is the founder and managing partner and Aditya Vikram Bhat is a partner at AZB & Partners. The authors would like to acknowledge Rhea Mathew, who is a senior associate at AZB & Partners, for her assistance.
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.\(^7\) By acceptance of the doctrine of stare decisis, law declared by High Courts binds subordinate courts\(^8\) and may have persuasive value over High Courts of other states.\(^9\) 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,\(^10\) 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 primary legislative change brought about this year was the notification of the Insolvency and Bankruptcy Code 2016 (IBC).

The IBC 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 provisions relating to the insolvency and restructuring of corporate persons came into effect on 1 December 2016.

The IBC empowers various categories of creditors including foreign creditors to trigger the insolvency resolution process and provides a single forum to oversee resolution and liquidation proceedings. 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. In addition, the institutional infrastructure in place to support proceedings under the IBC include the Insolvency and Bankruptcy Board of India (IBBI) which is the regulatory body, a cadre of regulated insolvency professionals and central information utilities to maintain records of debts and defaults. Some of the important provisions introduced by the IBC include the following.

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\(^7\) Article 141 of the Constitution of India.

\(^8\) Baradakanta Misra v. Bhimsen Dixit (1973) 1 SCC 446.


A financial creditor (who has extended credit for interest or other consideration) or an operational creditor (who has extended credit in exchange for goods or services) may initiate corporate insolvency resolution process (CIRP) against a corporate debtor, by approaching the NCLT bench with requisite territorial jurisdiction. The CIRP may be initiated on the occurrence of a single payment default of 100,000 rupees.

The NCLT will determine whether a payment default has taken place, and accordingly admit the CIRP application against the corporate debtor. In addition, the NCLT shall declare 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.

Once a restructuring plan has been formulated, it must be sanctioned by the NCLT before it can be implemented. In addition, the NCLT has the power to initiate liquidation proceedings against a corporate debtor if either a resolution plan could not be formulated within the stipulated time, or if it rejects the resolution plan submitted to it for approval.

Once CIRP has been initiated, the NCLT becomes the sole forum to entertain disputes either initiated by the corporate debtor, or against the corporate debtor.

Appeals from orders of the NCLT shall be adjudicated by the National Company Law Appellate Tribunal (NCLAT). Further, appeals from orders of the NCLAT will lie directly with the Supreme Court.

While the IBC is a fairly recent legislation and provisions are still being tested in courts of law, various benches of the NCLT, and the Supreme Court has had the occasion to interpret certain provisions of the IBC. The NCLAT in several decisions examined the issue of whether a corporate debtor should be heard before an application is admitted and has held that a corporate debtor must be given adequate opportunity of being heard, unless such a hearing is not merited. Another issue of relevance that has been examined is the existence of a dispute before the notice is issued by a creditor, which is a ground on which the commencement of insolvency resolution process by an operational creditor can be rejected. The Supreme Court held that the definition of ‘dispute’ under the IBC was inclusive and was not limited to a suit or arbitration only and additionally, need not be a bona fide dispute. The key ingredient to keep in mind was that such a ‘dispute’ should be pre-existing or pending prior to issue of the notice of demand by the operational creditor. However, in Innovative Industries v. ICICI, the Supreme Court observed that a financial creditor’s application to initiate CIRP against a corporate debtor should be admitted by the NCLT when the debt is due as a matter of law or

11 Section 7 and Section 9 of the IBC.
12 Section 7 and Section 9 of the IBC.
13 Section 14 of the IBC.
14 Section 13 of the IBC.
15 Section 30 and Section 31 of the IBC.
16 Section 30 and Section 31 of the IBC.
17 Section 60(5) of the IBC.
18 Section 61 of the IBC.
19 Section 62 of the IBC.
fact, regardless of whether it is ‘disputed’. In *Surendra Trading Company v. Juggilal Kamlapat Jute Mills Co. Ltd. & Ors*,23 the Supreme Court held that certain timelines prescribed under the IBC are directory and not mandatory. It was observed that such provisions are procedural in nature and were introduced with the intention of preventing a delay in hearing the disposal of the cases. However, these cannot be treated to be a mandate of law and in appropriate cases, the adjudicating authority may admit applications made after the prescribed time periods if there are valid, weighty and justifiable reasons for doing so.

The Supreme Court and High Courts have considered several procedural and substantive issues.

In *NTT Docomo v. Tata Sons*,24 the Delhi High Court rejected the Reserve Bank of India’s (RBI) objections to the enforcement of a foreign arbitral award of damages worth US$1.6 billion, which allegedly violated extant foreign exchange regulations. These objections were filed by the RBI when it attempted to implead itself into the enforcement proceedings. It was determined that the RBI had no locus to object to a foreign award’s enforcement since it was not a signatory to the arbitration agreement. Further, the Delhi High Court observed that since the foreign award directed the payment of damages and not transfer of securities, it did not, in any event, violate any foreign exchange regulations framed by the RBI. Accordingly, it was held that there was no bar on the enforceability of the award under Section 48(2)(b) of the Arbitration Act. In a similar vein, the Delhi High Court in *Cruz City 1 Mauritius Holdings v. Unitech Limited*25 refused to entertain the argument that even if an arbitral award seemingly violated provisions of the Foreign Exchange Management Act 1999, it remains enforceable and does not attract the public policy bar under Section 48(2)(b) of the Arbitration Act.

In *Voestalpine Schinen GmBH v. Delhi Metro Rail Corporation*26 (DMRCL), the Supreme Court upheld the appointment of a former employee of DMRCL, a government owned corporation as an arbitrator, while interpreting Section 12 and Schedule 7 of the amended Arbitration and Conciliation Act. It was held that mere former employees of one party, who had no connection to the dispute at hand, could not be barred from acting as arbitrators if the arbitration agreement provided for the same.

In *Sasan Power Limited v. North American Coal Corporation India Private Limited*,27 the decision of the Madhya Pradesh High Court, which had held that Indian parties are free to opt for a foreign seat of arbitration, was appealed to the Supreme Court. While upholding the decision of the Madhya Pradesh High Court, the Supreme Court did not clarify the legal position and held that as the case involved an adjudication on the rights of a foreign party to the arbitration, parties were free to choose the governing law. Recently, the Delhi High Court in *GMR Energy Limited v. Doosan Power Systems India Private Limited & Ors*28 relied on the Supreme Court decision in *Sasan Power* and held that two Indian parties can choose a foreign seat or arbitration.

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24 2017 SCC OnLine Del 8078.
25 2017 239 DLT 649.
27 AIR 2016 SC 3974.
28 2017 SCC OnLine Del 11625.
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 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

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30 Schedule I to the Limitation Act 1963.
31 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.
34 Order VIII, Rule 1 of the CPC.
35 Order VI, Rule 17 of the CPC.
36 Order VII, Rule 14 of the CPC; Order XII Rule 2 of the CPC.
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.

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.

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.

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.

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.

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.

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 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 restricts the

37 Section 15 of the Arbitration Amendment Act.
38 Section 5 of the Arbitration Amendment Act.
39 Section 12 of the IBC.
40 Order I, Rule 8 of the CPC.
41 Section 241 read with Section 244 and Section 245 of the Companies Act 2013. Sections 397, 398 and 399 of the Companies Act 1956.
42 People’s Union for Democratic Rights v. Union of India 1983 SCR (1) 456.
43 Article 22 of the Constitution of India.
44 Section 13 of the Family Courts Act 1984.
45 Section 36 of the Industrial Disputes Act 1947.
conditions under which a lawyer can appear before the industrial tribunal. The Advocates Act\textsuperscript{46} 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\textsuperscript{47} and the CrPC\textsuperscript{48} contain provisions for service outside 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 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.\textsuperscript{49} 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\textsuperscript{50} and 14\textsuperscript{51} of the CPC.

\textsuperscript{46} Section 32 of the Advocates Act 1961.
\textsuperscript{47} Order V, Rule 25 of the CPC.
\textsuperscript{48} Section 105 of the CrPC.
\textsuperscript{49} Section 44A of the CPC.
\textsuperscript{50} Section 13 of the CPC states:

\textit{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.}

\textsuperscript{51} Section 14 of the CPC states:

\textit{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.}
Section 44 of the Arbitration Act prescribes that a foreign award that arises out of (1) an agreement to the New York Convention on the Recognition and Enforcement of Foreign Awards (the New York Convention) applies and (2) is made one of the territories by the Central Government as a territory to which the New York Convention applies 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.

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.53

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.55

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 some standards on advocates to ensure that conflicts of interest are avoided. These include:

52 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.

53 Section 29 of the CPC.


55 *Re KL Gauba* AIR 1954 Bom 478; *In Re: Mr ‘G’, A Senior Advocate of The Supreme Court* AIR 1954 SC 557.
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;
g a prohibition on appearing before relatives who are judges;
h 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
i 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 and the Companies Act, 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)\(^{56}\) 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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\(^{56}\) 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’.

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57 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.

58 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.

59 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.

60 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.

61 There are two statutory exceptions to the rule of client–attorney privilege. Firstly, any communication made in furtherance of any illegal purpose is not protected and secondly, 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.

62 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*\(^63\) 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*\(^64\) in light of the observations of the Supreme Court in *Satish Kumar Sharma v. Bar Council of Himachal Pradesh*.\(^65\)

### 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.\(^66\)

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.\(^67\)

### ALTERNATIVES TO LITIGATION

#### 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.\(^68\)

#### Arbitration

Apart from the Arbitration Act, the Supreme Court of India in *Salem Bar Association v. Union of India*\(^69\) 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.

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\(^63\) AIR 1982 Bom 6.

\(^64\) (2003) 114 CompCas 141 (Bom).


\(^66\) Section 162 of the Indian Evidence Act 1872.

\(^67\) See, for instance, the judgment of the Bombay High Court in *Larsen & Toubro Limited v. Prime Displays Private Limited* (2003) 114 CompCas 141 (Bom).


\(^69\) 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:

\[a\] the Geneva Protocol on Arbitration Clauses of 1923;
\[b\] the Convention on the Execution of Foreign Awards 1923 (the Geneva Convention);
and
\[c\] 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,\(^{70}\) the essentials of an arbitration agreement\(^ {71}\) and the procedure for determining the validity of such an agreement.\(^ {72}\) 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 Amendment Act has also introduced various provisions that promote arbitration by reducing the timelines and costs involved.

Further, although statistically there are more \textit{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, \textit{inter alia}, have set up arbitration centres with the objective of providing recourse to credible yet affordable arbitration.

\section*{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

\begin{itemize}
  \item \[70\] Section 2(1)(f) of the Arbitration Act.
  \item \[71\] Section 7 of the Arbitration Act.
  \item \[72\] Section 16 of the Arbitration Act.
\end{itemize}
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.73 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, Chennai 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,74 it proves an easier form of dispute resolution. The parties can appoint up to three conciliators.75 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.76 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.77

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

73 Thermax Limited v. Arasmeta 2008 (1) ALT 788.
74 Section 62 of the Arbitration Act.
75 Section 63 of the Arbitration Act.
76 Section 64(2) of the Arbitration Act.
77 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.
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.

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 new Court of Appeal 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. The Supreme Court will continue to exercise the function of an appellate court, dealing with cases that involve issues of general public importance.

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.

THE YEAR IN REVIEW

New Court of Appeal

The Court of Appeal was established on 28 October 2014 and has the jurisdiction that was previously vested in the Supreme Court, the Court of Criminal Appeal and the Courts-Martial Appeal Court, the latter two courts having been abolished by the Court of Appeal Act 2014. This effectively means that it is the default court for all appeals from decisions of the High Court and its decision will, except in certain limited circumstances, be

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1 Andy Lenny is a partner and Peter Woods is an associate at Arthur Cox. The information contained in this chapter is accurate as of February 2015.

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final. Only in exceptional circumstances, and subject to the Supreme Court’s own ‘leave to appeal’ requirements, will it be possible to bypass the Court of Appeal and to bring a ‘leapfrog appeal’ directly to the Supreme Court. It is anticipated that the Court of Appeal Act will have a significant impact on the current waiting lists and will greatly improve the overall efficiency of the Irish court system. The Court of Appeal Act 2014 made substantial amendments to the Rules of the Superior Courts 1986 (RSC).

ii Courts and Civil Law (Miscellaneous Provisions) Act 2013

Following commencement of Part 3 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013 (the 2013 Act) on 3 February 2014, the District Court now has a monetary jurisdiction of up to €15,000 while the Circuit Court has a monetary jurisdiction of up to €75,000. Regarding personal injury actions, the revised jurisdiction limit of the Circuit Court is restricted to €60,000. Any amount exceeding €75,000 falls within the remit of the High Court.

iii Legal Services Regulation Bill

The Legal Services Regulation Bill 2011 was published in October 2011 and proposes the unification of the legal professions of solicitor and barrister (multi-disciplinary practices or ‘MDPs’). It remains unclear whether the Bill will be implemented and, if so, when. In December 2014, it was announced that the proposal will be subject to six months of research followed by six months of public consultation. It is anticipated that the new Legal Services Regulatory Authority will become operational in the first half of 2015, after which the research period will begin.

III COURT PROCEDURE

i Overview of court procedure

Civil proceedings in the District Court, Circuit Court and High Court are initiated by issuing a warning letter to the defendant, prior to commencing proceedings, 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 cause of action accrues.

c. Actions under a claim for personal injuries: two years from the date on which a cause of action accrues or the date the claimant first had knowledge, if later.

d. Actions for defamation: one year from the date of publication of the defamatory statement.

2 As defined in Section 2 of the Civil Liability and Courts Act 2004.
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.

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.

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.

g) 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.

h) 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 frames. 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 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 30 weeks 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.

iii Class actions

Recourse to class actions is restricted in Irish law. In particular, 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.
Representative actions are permitted by the RSC. Order, 15 Rule 9 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.

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.

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 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. In *Gabriel Coffey v. Tara Mines Ltd*, the High Court relied on its inherent jurisdiction to manage court proceedings, and in consideration of the nature of that case permitted the spouse of a lay litigant (who had communication difficulties due to ill health) to represent him in the proceedings.

v Service out of the jurisdiction

Service is effected in compliance with Irish law, for example, personal service is required where reasonably practicable. However, service in accordance with Irish law only guarantees that any judgment obtained will be enforceable in Ireland. To ensure enforceability in another country, service must be effected in accordance with the law of that state.

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.

Service on a company is generally effected by delivering the document or sending same by registered post to the company’s registered office. For partnerships, service is effected by serving one or more of the partners at the partnership’s principal place of business.

Where the person to be served is not an Irish citizen, a notice of summons and not a summons itself should be served.

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3 Order 6, Rule 10.
4 [2007] IEHC 249.
vi Enforcement of foreign judgments

Enforcement and recognition of foreign judgments between Member States (excluding Denmark) 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). Regulation (EU) No. 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast) (the Recast Regulation) will be applied by all Member States (including Denmark) from 10 January 2015. The Brussels I Regulation will be repealed, except that it will continue to apply to judgments given in proceedings instituted before 10 January 2015. The Brussels Convention (which the Brussels I Regulation supersedes) still applies to Denmark and also territories in Member States that are excluded from the Brussels I 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 2007 continues to apply in parallel to the Brussels I Regulation and applies 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.

To enforce a Member State judgment in Ireland, an application must be made, by way of a motion grounded on affidavit, setting out the objective measures requested, on an ex parte basis to the Master of the High Court. The procedures 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.

vii Assistance to foreign courts

On 15 April 2008, Regulation (EC) No. 1206/2001 on Cooperation between the Courts of the Member States in the taking of Evidence in Civil or Commercial Matters came into effect in Ireland with the enactment of the European Communities (Evidence in Civil or Commercial Matters) Regulations 2008 (the 2008 Regulations). The 2008 Regulations were revoked by the European Communities (Evidence in Civil or Commercial Matters) Regulations 2013 except insofar as the 2008 Regulations will continue to apply to requests made before the commencement of the new Regulations. The 2013 Regulations 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.


All requests for assistance must be in writing, addressed to the Minister for Justice, Equality and Defence and must indicate the relevant international instrument under which the request is being made.

viii Access to court files

The Courts Service website\(^{10}\) 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, 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.\(^{11}\)

The recent decision of the High Court in *Allied Irish Bank plc v. Tracey*\(^{12}\) 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.\(^{13}\)

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,\(^{14}\) which generally relate to family law matters, those involving minors or certain proceedings brought under data protection legislation.

\(^{10}\) www.courts.ie.


\(^{12}\) [2013] IEHC 242. This decision is currently under appeal.

\(^{13}\) See also *Ewing v. Ireland & Anor* [2013] IESC 44 (No 2).

\(^{14}\) 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.
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Litigation funding

The decision of Mr Justice Clarke in *Thema International Fund plc v. HSBC Institutional Trust Services (Ireland) Limited & Ors* 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. Mr Justice Clarke in the *Thema* case (referring to his own judgment in *Moorview Developments Ltd v. First Active plc*) implied that *bona 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.

Costs

In terms of payment of costs, although the courts have a 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.

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* cited with approval the decision of the UK’s House of Lords in *Hilton v. Barker Booth & Eastwood*. 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 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.19

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 Act 2013. 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

Data Protection is governed by the Data Protection Act 1988 as amended, among others, by the Data Protection (Amendment) Act 2003 (the DPA), which transposes Directive 95/46/EC on data protection into Irish law. The laws apply to individuals or organisations established in Ireland that collect, store or process data about living people on any type of computer or in a structured filing system 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 DPA. There are eight fundamental principles that apply to all data controllers, including the obligation that personal data is only kept for one or more specified, explicit and lawful purposes, and that personal data is kept safe and secure.

19 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.
In addition to complying with the eight fundamental principles before processing data, a data controller must meet at least one of the following additional conditions:

a. the data subject involved has consented to the processing; or

b. the processing is necessary for:
   - the performance of a contract to which the data subject is a party (including pre-contract steps taken at the request of the data subject);
   - the compliance with a non-contractual legal obligation on the data controller;
   - the prevention of serious injury, loss or damage to the data subject or property of the data subject;
   - the purpose of the legitimate interests pursued by a data controller; or
   - the satisfaction of statutory obligations or public services.

Special obligations apply to the processing of sensitive personal data.

The DPA provides 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.

While there are registration requirements for data processors and controllers, a wide exemption is available for normal commercial activity including solicitors and barristers who only process data for legal professional purposes.

Personal data cannot be shared or transferred without the consent of the individual involved. Further, personal data cannot be transferred to a country or territory outside the European Economic Area unless that country or area ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i. Privilege

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. In Fyffes v. DCC & Ors20 the High Court applied the principles

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laid down in *Smurfit Paribas Bank Limited v. AAB Export Finance Limited*\(^1\) and found that communications from the plaintiff’s solicitors in response to a letter of complaint from the plaintiff’s shareholder brought the plaintiff into the area of possible litigation and afforded the documents legal advice privilege.

In *Ochre Ridge Ltd v. Cork Bonded Warehouses Ltd*,\(^2\) the Irish High Court ruled that legal advice privilege does not extend to advice of a legal nature provided on business matters. The decision of the European Court of First Instance in *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v. European Commission*\(^3\) 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*\(^4\) 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 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 European Communities (Mediation) Regulations 2011 (the 2011 Mediation Regulations) expressly 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.

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\(^{1}\) [1990] IR 469.


\(^{3}\) [2007] EUECJ T-125/03.

\(^{4}\) [2001] 1 IR 627.
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 & Ors25. The effect of common interest privilege is that the documents will remain privileged, notwithstanding their release to a third party.

In the recent case of Redfern Limited v. O’Mahony26 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 Haughey27 the Irish 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.’

It is unclear whether an Irish court would enforce a foreign order for disclosure of a document where to do so would contravene Irish law. There has been no recent case law on this point; however, assuming the Irish courts were to follow the English decision of XAG & Others v. A Bank,28 such a foreign order for disclosure of a document that was privileged under Irish law would not be enforced by the Irish courts.

ii 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 Circuit Court and District Court where a request for general discovery of ‘all documents relevant to the issues in dispute in the case’ can be made. 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 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’.29 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.

29 Order 31 Rule 12 (1) RSC as amended by SI No. 93 of 2009.
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.30 The Commercial Court decisions in Flogas Ireland Limited v. Tru Gas and Flogas Ireland Limited v. Langan Fuels Limited31 makes clear that any discovery of confidential or commercially sensitive documents will require a full and detailed explanation as to why these documents are relevant and necessary to the pleadings. 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 alternative dispute resolution (ADR) such as mediation and expert determination as more flexible and cost-efficient ADR mechanisms.

ii 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 has led to a number of significant changes to the previous regime. In strengthening the integrity of the arbitration process, the 2010 Act abolishes the ‘case stated’ procedure, whereby the arbitrator could refer a question of law to the High Court. In addition, the jurisdiction of the arbitrator is 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. Factorias Vulcano SA,32 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.

### iii Mediation

There are no specific rules governing the conduct of mediation in Ireland for purely internal disputes. As mediation in Ireland is a relatively new concept, there is a relatively small but 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.

Mediations have become the increasingly favoured form of ADR because of the support of the Commercial Court judges. In addition, there is explicit legislative support for mediation in equality legislation, and landlord and tenant disputes through the Private Residential Tenancies Board (PRTB), which was established under the Residential Tenancies Act 2004. In addition to mediation, the PRTB offers adjudication via a single adjudicator as an ADR mechanism.

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The 2011 Mediation Regulations transposed European Directive 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial Matters (the 2008 Directive). There are separate rules applicable to mediations in relation to internal disputes and mediations in cross-border disputes. This bifurcation of the rules applicable to mediations in Ireland is unfortunate, especially considering those aspects of the 2008 Directive that would tend to actively encourage recourse to mediation, namely the suspension of the limitation period during the mediation process and the confidentiality of discussions at mediations.

One must not, however, overstate the matter. One of the principal novelties of the 2008 Directive was to permit a court to adjourn proceedings and either to invite the parties to consider mediation or to refer the proceedings to mediation where there is an agreement between the parties. This option is already open to the High Court in internal disputes by virtue of the Rules of the Superior Courts (Mediation and Conciliation) 2010 (the RSC (Mediation and Conciliation) 2010).33 The option of adjournment to allow the parties to consider ADR has also been open to the Commercial Court since its inception in 2004.

The provisions in the 2008 Directive allowing for settlement agreements to be enforceable as if they were court orders differ slightly from the general rule in Irish law that settlement agreements are, as a matter of contract law, valid and enforceable and a party may be ordered to specifically perform any obligations arising therefrom. In a purely internal matter, the parties are obliged to apply to take proceedings in order to enforce their settlement agreement. The regime under the 2011 Mediation Regulations allows for the parties to simply apply to court and have the terms of the agreement reflected in an enforceable court order.

The opportunity to avoid the burdensome costs of litigation is an attractive feature of mediation. As such the RSC (Mediation and Conciliation) 2010, mentioned above, sought to encourage the use of mediation to resolve disputes by providing that in awarding costs, the court may take into account any party’s refusal or failure to participate in mediation or conciliation in circumstances where there was no good reason for such refusal or failure. This provision was considered in the recent case of *Hollybrook (Brighton Road) Management Company Limited v. All First Property Management Company Limited*34 where Ms Justice Laffoy refused to give any weight to a refusal by one party to a dispute to consider ADR in assessing the parties’ liabilities for costs. This approach was legally sound as the court had made no order adjourning the proceedings and inviting the parties to mediate the dispute but had simply suggested it as an option. It is possible however that in an appropriate case, the refusal to engage in ADR where the court has suggested it as an option could have some bearing on the allocation of the burden of costs between the parties.

The most recent development in Irish mediation is the publication of a Draft General Scheme of Mediation Bill in March 2012 (the Scheme). The Scheme provides for a number of matters including the imposition of a new statutory duty on solicitors to advise their clients, prior to the commencement of civil proceedings, of the possibility of using mediation and a requirement that the solicitor provide the client with information concerning mediation services; and before proceedings are issued, they must be accompanied by a written statement from the plaintiff confirming that they have been advised of mediation, and that they have considered this as an option for settling the dispute. The Scheme also refers to the necessity of having a mediation agreement in place between the parties, which should be enforceable and seeks to introduce a statutory basis for the courts to invite parties to consider mediation and

adjourn court proceedings while mediation is ongoing. This latter element echoes existing procedures in the court rules. Publication of the Mediation Bill has been delayed but it is anticipated that it will be enacted in the first half of 2015.

iv Other forms of ADR

Expert determination and adjudication have been most often utilised in specialist disputes, for example, construction industry 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 this jurisdiction will continue to see an expansion of disputes in relation to financial and regulatory matters. The continued expansion of such disputes will put pressure on the Irish courts and, in particular, the Commercial Court; however, this specialist court has proved itself very effective in continuing to ensure that significant disputes are efficiently resolved, notwithstanding the expansion of its caseload, and we expect that this will remain the case in the coming year.

It is anticipated that the new Court of Appeal Act will have a significant impact on the current appeal waiting lists and will greatly improve the overall efficiency of the Irish court system.

Increasingly, mediation clauses are included as part of the dispute resolution mechanisms in commercial contracts. This success of mediation is undoubtedly being encouraged by legislative backing and strong judicial support. It is anticipated that when the Mediation Bill comes into force the rules of civil procedure will be further revised to embed mediation as an increasingly utilised fixture within the legal system. The continued and increasingly prevalent use of ADR as an alternative to litigation should also ease the burden on the courts system and ensure that Ireland retains efficient and flexible dispute resolution mechanisms.
Chapter 17

ITALY

Monica Iacoviello, Vittorio Allavena, Paolo Di Giovanni and Tommaso Faelli

I 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 moveable goods for a maximum value of €5,000.

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 CCP.

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II  THE YEAR IN REVIEW

i  Supreme Court, sitting en banc, 5 July 2017, No. 1661

The Supreme Court sitting en banc overruled previous cases in which punitive damages were considered contrary to public policy for the purpose of recognition and enforcement of foreign judgments and arbitral awards. In particular, the Supreme Court stated that a foreign judgment awarding punitive damages is not incompatible with Italian public policy, provided that the foreign judgment is based on legal provisions that precisely identify the cases in which such damages can be awarded and, in such cases, the awardable amounts can be reasonably foreseen.

ii  Supreme Court, 17 January 2017, No. 941

The Supreme Court held that an arbitration clause in a contract does not automatically extend the arbitral tribunal’s jurisdiction to disputes arising from other contracts that are connected with the said contract.

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, infra).

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. 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.

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.

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2  Article 163 bis CCP.
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 when the court is composed of a single judge.

Generally, the court issues decisions within 30 or 60 days from 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.

iii 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 from 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: (1) two class actions against two major automobile manufacturers (for unfair and restrictive business practices involving the misrepresentation of vehicle emissions); and (2) one against a major smartphone and tablet producer (which allegedly misrepresented the storage capacity of its devices).

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 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.

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 On 21 November 2016, the Supreme Court clarified that, if a court of appeal regards a claim as admissible, the decision may not be further challenged. Conversely, the possibility to challenge a court of appeal’s inadmissibility ruling, which was excluded by Supreme Court’s decision dated 14 June 2012, is now controversial. In fact, the matter has been referred to the United Divisions of the Supreme Court on 24 April 2015, and the court has not ruled yet.

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 the 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 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 743–744 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

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.

6 Article 10 of the Code.
7 Article 28 of the Code.
8 Article 24 of the Code.
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 restrain 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 (1) due diligence measures concerning clients, when participating in financial or corporate transactions, including when providing tax advice; and (2) 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

Processing of personal data in Italy is regulated by Legislative Decree No. 196 of 30 June 2003 (the Data Protection Code), which consolidates all laws and regulations relating to data protection, and Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (the GDPR) as of 25 May 2018.

The Data Protection Code sets out standard requirements, among which are:
\[a\] the provision of an information notice to the data subject; and
\[b\] the data subject’s consent.

9 Article 68 of the Code.
However, the data subject’s consent is not required, *inter alia*, where the relevant processing activity is aimed at investigating, claiming for or defending a right in a legal action.\(^{10}\) Therefore, since legal practice is generally aimed at defending a right in a legal action, these data processing activities can be carried out without collecting the prior data subject’s consent (i.e., either a client or a third party).\(^{11}\) Indeed, under this exemption, lawyers are generally allowed to conduct defensive investigations on strictly confidential personal data as, for instance, in case of audit procedures on professional email folders or computers aimed at acquiring documentary evidence.

On the same ground, sharing of personal data between lawyers, either nationally or internationally,\(^{12}\) is allowed as long as such activities fall within the ‘defensive’ exception above.

Finally, the admissibility in civil legal proceedings of personal data processed in breach of the data protection rules must be assessed under the CCP only (not the Data Protection Code), as Article 160, Paragraph 6 of the Data Protection Code expressly states. Therefore, the breach of the Data Protection Code does not lead to the exclusion of the evidence from the proceedings if such evidence is genuine, can be verified by the civil court and is relevant to the matter.\(^{13}\) Conversely, personal data processed in breach of the data protection rules are excluded by labour law proceedings.

The Data Protection Code is in the process of being harmonised with the GDPR, however, this should not lead to a change in the principles described above.

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 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

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10 Article 24(f) of the Data Protection Code.

11 This ‘consent exception’ does not avoid the need of previously informing the data subject of the processing of its personal data. However, if the prior information may put at risk the acquisition of the relevant evidence, it can be postponed to a later time (see Article 13, Paragraph 5(b) of the Data Protection Code, and Italian Data Protection Authority decision of 6 November 2008 on defensive investigations).

12 Note that the European data protection authority (Article 29 Working Party) adopted a strict interpretation of the above-mentioned ‘defensive’ exception in case of personal data transfer outside the EU territory (see Working document on a common interpretation of Article 26(1) of Directive 95/46/EC of 24 October 1995 of 25 November 2005), aimed at avoiding ‘massive’ transfer of personal data. In this regard, processing of personal data for defensive needs must be actually necessary.

13 Decision of the Italian Supreme Court No. 7783 of 3 April 2014, recently confirmed by Italian Supreme Court, Criminal Section, No. 43414 of 13 October 2016, and No. 33560 of 28 May 2015.
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.

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 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. CCP, subject to certain conditions, the court may order a party or a third person to produce a document that has not been filed.

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.

14 Article 116 CCP.
15 Supreme Court Decisions No. 13072 of 8 September 2003; No. 4363 of 16 May 1997; No. 2760 of 27 March 1996; and No. 9715 of 14 September 1995.
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.

**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.\(^{16}\)

An arbitration clause may also be set out in a contract.\(^ {17}\)

With the exception of specific cases provided by the law, an arbitrator cannot order interim measures.\(^ {18}\) Consequently, only the state judge may grant such measures prior to or pending the arbitration proceedings.\(^ {19}\)

**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.\(^ {20}\)

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,\(^ {21}\) to decide on challenges against arbitrators,\(^ {22}\) to issue interim measures and to grant the *exequatur* of the arbitral award.\(^ {23}\) 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.\(^ {24}\) The annulment proceedings will be governed by Italian law.\(^ {25}\)

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

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16 Articles 807, 808 and 808 bis CCP.
17 Article 808 CCP.
18 Article 818 CCP.
19 Article 669 quinquies CCP.
20 Article 806 CCP.
21 Articles 810 and 811 CCP.
22 Article 815 CCP.
23 Article 825 CCP.
24 Articles 829 and 831 CCP.
25 Articles 827 to 831 CCP.
840 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).

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 effects 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 after the day on which the award has been notified to the appellant or, failing the notification, within one year after the day the arbitrator has signed the award.

The grounds for appeal are established by Article 829 CCP and are there are two types, errores in procedendo and errores in iudicando.

The appeal on the grounds of errores in procedendo is admissible in any case, even if the parties have agreed that the award is not subject to appeal. The appeal based on errores in iudicando 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.

26 Article 832 CCP
27 Articles 828 and 831 CCP.
28 Article 828 CCP.
29 Article 831 CCP by reference to Article 404 CCP.
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.

iv 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 *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 *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.

VII OUTLOOK AND CONCLUSIONS
Unlike in recent years, in 2017 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 375 days in 2016.
INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

Japanese society is renowned for its nature being averse to litigations. In 2016, only about 150,000 civil cases (including appeal proceedings) were newly brought to courts in Japan. This number represents 0.001 case per one national. It is said that such per-capita figure is one-third to one-eighth of that of most other countries.

Irrespective of such characteristic of Japanese society, the Japanese court system is well structured and judges are respected by the public. Thus, the court system has been the centre of the dispute resolution in Japan.

Structure of law

Japan is a civil law country. Civil Code was enacted in 1896 (Law No. 89 of 1896) and since then has been amended from time to time. In 2017, Part III of the Civil Code (Claims) was substantially amended by Law No. 44 of 2017. Though some influence of English law can be also detected from the outset, the Japanese Civil Code still remains as a successor of Roman law.

Civil proceedings are governed by Code of Civil Procedure. The original Code of Civil Procedure was drafted by a German law professor on the basis of German practices and enacted in 1890 (Law No. 29 of 1890). After World War II, GHQ ordered the Japanese government to modify the original Code of Civil Procedure to incorporate certain American-style civil procedures such as cross-examination system. As a result, the conduct of Japanese civil procedures has become a hybrid style. The original Code of Civil Procedures was replaced by a new Code of Civil Procedure in 1996 (Law No. 109 of 1996), however, the basic structure has remained unchanged.

While the doctrine of stare decisis is not applicable in Japan, the decisions of the upper courts are often referred to by lower courts.

Court system

Japan has a four-layer unified court system under the Supreme Court: As of July 2017, there are (1) the Supreme Court, (2) eight High Courts and their six branches, (3) 50 district
courts and their 203 regional branches and 50 family courts and their 203 regional branches, and (4) 438 summary courts. Under the Japanese Constitution, no court independent from the Supreme Court can be established and the judicial branch is independent from the administrative branch and the legislative branch. Further, each judge is independent from, and is not subordinate to, any other judges or other authorities.

First instance judgments rendered by district courts may be appealed to the High Courts whether on the ground of legal issues or factual issues. The ground for the super appeal to the Supreme Court are limited to unconstitutionality and some other fundamental defects of the judgment.

iii  The framework for ADR procedures

In 2004, the Act on Promotion of Use of Alternative Dispute Resolution (Law No. 151 of 2004) was adopted to promote the use of ADR. Under such Act, various ADR systems were set up to resolve small disputes or tort disputes of specific categories.

Most frequently used ADR for the resolution of ordinary commercial disputes is the conciliation administered by summary courts.

Arbitration Act which is drafted on the basis of the 1985 UNCITRAL Model Law provides for the scheme of arbitration, however, arbitration is not common for domestic disputes except for construction disputes and maritime arbitrations. While Japanese companies are the parties to many international arbitration agreements, the choice of Japanese cities as the seat of arbitration is rather limited. Thus, the number of international arbitrations conducted in Japan is limited, though the number is increasing gradually, in particular, with respect to the cases between Japanese companies and Asian companies.

II  THE YEAR IN REVIEW

Judgment of Tokyo District Court of 15 February 2016 is noteworthy for practitioners engaged in cross-border dispute resolution, though it remain as a lower court interim judgment. In this case, Shimano Seisakusho (Shimano), a small Japanese company supplying certain electronic parts to Apple Inc (Apple), the international giant, sued Apple before Tokyo District Court alleging Apple's breach of a contract, tort and violation of Act on Prohibition on Private Monopolization and Maintenance of Fair Trade (Anti-Monopolization Act). Among others, Shimano alleged that the unilateral discontinuation of the purchase from Shimano constitutes a breach of a contract and that the forcing Shimano to discount supply price and to pay certain rebates to Apple is a violation of the Anti-Monopolization Act. Shimano's annual sale amount was only US$20 million, while that of Apple was nearly US$200 billion.

5 In Japan, there is no clear distinction between the concept of mediation and that of conciliation. Though there are different concepts of ‘assen’ and ‘chotei’ relating to the dispute resolution between the parties assisted by a third party, such difference does not match with the difference between conciliation and mediation. As in the Japanese Law Translation Date Base offered by the Ministry of Justice, the word ‘conciliation’ is used to mean this proceeding, the author uses the word ‘conciliation’ in this article.

6 Articles 19.9.5 and 19 of the Anti-Monopolization Act prohibit a business entity who has a superior bargaining position against its business partner from abusively taking advantage of such position in forcing the business counter-party to accept unreasonable contract terms (‘abuse of dominant positions’). Violation of such prohibition may be subject to a huge fine. Recently, the Japanese Fair Trade Commission (JFTC) is very active in investigating the violation of this category.
The Master Development and Supply Agreement executed between Shimano and Apple in 2008 (MDSA) provided for the exclusive jurisdiction of the Californian courts for the disputes between the parties irrespective of whether such dispute arose from the MDSA or not. Apple alleged that the claim should be dismissed on the based on the above exclusive jurisdiction clause. The judges of Tokyo District Court refused such motion to dismiss by the interim judgment stating that the said exclusive jurisdiction clause was too broad to specify the category of disputes which the parties had agreed to submit to the jurisdiction of the Californian courts.

Paragraphs (1) and (2) of Article 3–7 of Code of Civil Procedure read as follows:

(1) Parties may establish, by agreement, the country in which they are permitted to file an action with the courts.

(2) The agreement as referred to in the preceding paragraph is not valid unless it is made regarding actions that are based on a specific legal relationship, and executed by means of a paper document.

This Article concerning agreed international jurisdiction was newly added by the amendment of the Code of Civil Procedures in 2011 (Law 36 of 2011). While the judges held that the provision of Paragraph (2) of this Article did not apply to the MDSA, which had been executed prior to the enactment of the amendment, they held that the underlying principles requiring the scope of the agreement to be specified by referring to the specific legal relationship for the sake of predictability had been same even prior to the enactment of the amendment.

No precedents had exited on this issue prior to the interim judgment. While it is possible that the far smaller size of Shimano in comparison with Apple affected the judges’ decision, the majority of academics seems to support this judgment. As no party can appeal against an interim judgment independently from the judgment on claims, we yet need to wait for judgments of upper courts. For the meanwhile, practitioners should be aware of the risks that validity of too wide jurisdiction clause can be denied by Japanese courts.

Judgment of 27 July 2017 of Tokyo District Court may also be of some interest to practitioners from the cross-border dispute resolution perspective. In this case, a Canadian company that was listed on NASDAQ and Toronto Stock Exchange started a patent infringement action against a few Japanese companies before the United States District Court for the District of Delaware on the basis of a US patent (the US case). One of the defendant companies, which is a small-medium Japanese company (A Co), filed an action to seek for declaratory judgment holding that A Co is not liable for the alleged patent infringement with Tokyo District Court before A Co received the summons of the US case. The judges of Tokyo District Court refused the similar argument presented by the plaintiff that the scope of the jurisdiction clause is too broad as it covers disputes indirectly arising from the supply contract, holding that the scope is sufficiently specific as far as it refers to the specific agreement. In this case, the business size of the plaintiff was far larger than the defendant.

Some practitioners suggest that the judges could have also refused the motion of Apple on the ground that the jurisdiction of Japanese courts over the private disputes involving violations of the Anti-Monopolization Act could not be excluded as a matter of public policy. The judgment of Tokyo District Court of 6 October 2016 referred to in the previous footnote, however, denied the argument that U.S. courts lacks the jurisdiction over the violation of the Anti-Monopolization Act, holding that even if U.S. courts do not decide on the violation of the Anti-Monopolization Act, the U.S. courts would render similar decision taking account of the unconscionability doctrine existing in the U.S. contract law, and thus the validity of the agreement of the jurisdictions between the parties should be respected. Tokyo High Court upheld this judgment.
case. The US case had been proceeded with respect to a Japanese co-defendant company even before the completion of the service to A Co. A Co argued that the US patent infringement action could cover acts of A Co within Japan as contributory infringement action and that Japanese courts have the jurisdiction.

The judges of Tokyo District Court dismissed the action of A Co on the ground that the Canadian company was alleging only the acts of the A Co within the United States as the infringement action and thus Japanese courts had no jurisdiction over the case.

Further, the judges went on to say that it would put unreasonable burden on the Canadian company to have it prove the infringement of the US patent in the Japanese court where most of the evidence existed within the United States, even taking into consideration the difference in the size as an enterprise between A Co and the Canadian company.

III COURT PROCEDURE

i Overview of court procedure

All proceedings are conducted in Japanese. A court case is initiated by filing a complaint with a court which has the jurisdiction over the case. If the amount of the claim exceeds ¥1.4 million, the case needs to be filed with a district court as the first-instance court. The plaintiff needs to specify the object of the claim (i.e., the remedies the plaintiff is seeking) and the statement of the claim in the complaint. The plaintiff has to pay a filing fee proportionate to the amount of the economic interest of the object.\(^9\) Usually, the complaints are accompanied by key documentary evidence supporting the claims.

Upon the filing, the case is assigned to a bench consisting of one judge or three judges depending upon the complexity of the case. No jury system exists with respect to civil cases. Then, the bench determines the first oral argument date and serves the summons on the defendant together with a copy of the complaint and evidence. The defendant needs to file an answer no later than the first oral argument date. If defendant fails to file the answer and does not appear before the court on such date, the court will issue a default judgment.

At the first oral argument date, the bench determines the next oral argument date (or, instead, a preparatory proceedings date) which is normally one month or two months ahead from the first oral argument date. By that date, each party (or one of them) files further pleadings and evidence. In practice, though the date is named as ‘oral argument date’, oral arguments are rarely presented by the parties before the judges. Each party just states at the courtroom that it presents its oral argument as set out in the pleading filed prior to the oral argument date. The judges may ask each party for some clarification on the content of the pleading. In the second oral argument date (or the preparatory proceedings date) and thereafter, the same conduct is repeated virtually until the parties are satisfied that they have sufficiently presented their arguments and evidence. There is no limitation on the number of the pleadings that can be filed by the parties. In very complicated cases, more than 20 pleadings may be filed by both parties. The pleadings may contain both factual argument and legal argument. During the proceedings, each party can submit evidence from time to time. The judges can, however, either on their own authority or upon the request of

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\(^9\) To illustrate the level of the filing fee, if the amount of such economic interest is ¥100 million the amount of the filing fee is ¥320,000.
the counterparty, dismiss new arguments or evidence that was submitted at a later stage, if allowing such arguments or evidence to be presented would further delay the proceedings. In practice, the judges rarely make such dismissal decision.

Generally, any kind of documentary evidence is admissible. There is no restriction on hearsay evidence in terms of a civil proceeding. The value of such evidence is evaluated by the judges. All evidence needs to be translated into Japanese. Partial translation may be accepted by courts depending upon the nature of the document. In Japan, there are no certified translators. Translation can be done by anyone.

As discussed below, the effectiveness of discovery proceedings is rather limited. Accordingly, the discovery proceedings are not an important part of the Japanese civil proceedings. In principles, each party needs to fight with the evidence in their possession.

When the judges think the proceedings have progressed sufficiently following several exchanges of the pleadings and evidence, the bench designates the dates of the witness hearing. Each party requests their witnesses to be heard. Generally the bench limits the witnesses to be heard to those whose testimony is important for the determination on the case. This is particularly true in the case where the judges have felt that the pleadings and the evidence submitted by the parties were enough for the determination of the case. Not only for the numbers of the witness but also the time assigned for the witness’ examination may be rather limited. The time allocation is pre-determined and the attorneys need to finish the examination of each witness within such time frame. If a witness does not speak Japanese, the time necessary for interpreting is taken into account when determining the allocation of witness hearing time. Each party is asked to submit written statements of each witness before the witness hearing.

Though parties can present expert witnesses, generally, the judges do not put much importance on a party’s appointed expert witnesses because the judges believe that such experts cannot be neutral and impartial. This is also true in intellectual property disputes. Given such environments, there is no pool of professional expert witnesses in Japan. If the bench feels it necessary to be assisted by an expert, the bench will appoint its own expert and have such export to prepare an expert report. Sometimes courts put too much importance on the expert report prepared by the court-appointed expert.

Witness hearings entail direct examination followed by cross-examination and then redirect. At the end of the witness testimony, judges may make some questions.

After the completion of the witness hearing date, each party is allowed to file the final pleading. If the judges find something missing for determination, the bench urges the party to supplement their argument or submit additional evidence.

One of the unique features of Japanese court proceedings is the settlement administered by the court. One or more of the judges who are actually handling the case act as mediators. Anytime during the proceedings, the bench may suggest that the parties engage in settlement talks. If the bench does so at a later stage, such as after the completion of the witness hearing, the judges even propose specific settlement conditions while disclosing their evaluation of the case. The party that believes it will win may make a concession to settle the case taking account of the burden and risks of appeal proceedings. The other party will consider whether or not it can reverse the judges’ determination in the appeal proceedings. In case judges suggest settlement talks at an earlier stage, the judges act rather as facilitative mediators. In 2015, 52,957 first instance cases were finished by such settlement administered by the
judges among 148,106 completed first instance cases. Though this kind of settlement proceeding administered by the decision maker is criticised in many other jurisdictions, it has been traditionally working well in Japan and accepted as appropriate dispute resolution measures by Japanese legal practitioners.

ii Time frames
In 2016, 77.3 per cent (114,371 cases) of all completed first instance cases (148,016 cases) took no more than one year to conclude, 94 per cent (139,274 cases) took no more than two years and 4.2 per cent (6,259 cases) took more than two years but no more than three years. Complicated disputes such as construction disputes, labour disputes and medical malpractice disputes tend to take longer.

The Act on the Expediting of Trials (Law No. 107 of 16 July 2003) obligates the government and relevant parties to develop and implement measures to enable the proceedings of the first instance to be concluded in as short a time as possible within a period of two years. The Code of Civil Procedure as amended by Law No. 108 of 16 July 2003 obliges judges and parties to endeavour to abide by the planned progress of the litigation proceedings (Article 147-2), and as to complicated cases, obliges judges to formulate a plan for proceedings after consultation with the parties, where judges consider it appropriate (Article 147-3). Once such plan is formulated, the courts are expected to more actively dismiss arguments and evidence that was submitted behind such plan. However, in practice, the planned proceedings are not well implemented except for the specific area such as intellectual property litigation.

iii Class actions
Class actions are not generally permissible in Japan. In the field of consumer protection, however, certain consumer organisations certified by the Prime Minister can conduct legal proceedings on behalf of a group of the consumers who suffered damages due to common consumer contracts with a specific business enterprise under Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers (Law No. 96 of 2013). Once the common obligation of such business enterprise towards relevant consumers is determined by a court through the litigation by such organisation, individual consumers can notify their individual monetary claims to the court and recover them through simple proceedings. This procedure is very unique from Japanese law perspective and sometimes is referred to as a Japanese version of class actions. As the Act came into force in October of 2016 and only two consumer organisations have been certified so far, no actual case has been reported. If this procedure proves to be successful, the scope may be extended to other area such as damages suffered by cartels.

iv Representation in proceedings
Representation by a lawyer is not mandatory. In any type of civil case, a litigant can represent himself or herself. In the case of legal entities, however, the registered legal representatives of the legal entities such as a representative director (in case of Japanese corporations, usually the president of the company) or a registered branch general manager must attend the court.

10 Justice Statistics issued by the Supreme Court for the fiscal year of 2016.
11 Ibid.
12 Foreign companies can register their representatives in Japan.
proceedings in person, except for small cases at summary courts. It follows that except for very small legal entities, it would not be practical for such legal representatives to attend the court proceedings. For this reason, most legal entities are represented by attorneys.

v Service out of the jurisdiction

Whether the defendant is inside or outside Japan, court clerks are primarily responsible for service. Neither the plaintiff nor its attorney makes direct service to the defendant.

Where the defendant is not located in Japan, whether the defendant is a natural person or a legal entity, the court will serve the summons (1) in accordance with the Convention of 1 March 1954 on Civil Procedure, (2) in accordance with the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, (3) by a Japanese consul stationing in the location of the defendant pursuant to the bilateral consular treaties (the treaty with the United States and the treaty with the United Kingdom) or on the basis of personal jurisdiction over the Japanese individuals staying abroad, or (4) in accordance with the permanent or ad hoc diplomatic understanding with other countries. In short, the service is made by the competent servicing authorities of the country where the defendant is located, or the Japanese consul stationing in such country. Same applies to both the court document initiating the proceedings and any other judicial documents such as judgments or extrajudicial documents such as enforceable notarised deed.

vi Recognition and enforcement of foreign judgments

Foreign judgments can be recognised and enforced in Japan, if they satisfy the conditions set forth in Article 118 of Code of Civil Procedures. Such conditions are:

a the jurisdiction of the foreign court is recognised pursuant to Japanese laws and regulations or any convention or treaties to which Japan is a party;

b the defeated defendant has been served (excluding service by publication or any other service similar thereto) with the requisite summons or order for the commencement of litigation, or has appeared without being so served;

c the content of the judgment and the litigation proceedings are not contrary to public policy in Japan; and

d a guarantee of reciprocity is in place.

Under the condition (a), a judgment obtained in a foreign country against a Japanese defendant in which jurisdiction of such foreign court was admitted on the basis of 'doing business doctrine' may not be recognised because Japanese Code of Civil Procedure does not recognise the jurisdiction on the basis of such doctrine.

Under the condition (b), the defeated defendant needs to have been served the summons by the central authority in accordance with the above-mentioned two conventions, or where permissible under relevant bilateral treaties, or by a consul of the foreign country. The direct
service of the summons by a foreign party to the defendant residing in Japan may not be valid for the sake of the recognition and enforcement in Japan. It would be safer to avoid direct service if the enforcement of the judgment in Japan is expected.

Under condition (c), the enforcement of US judgments awarding punitive damage is refused.

Most of common law countries that admit the validity of foreign judgment will liberally satisfy the reciprocity requirement under condition (d). In contrast, the judgments of the countries in which courts have the power to review the decision on the merit of the foreign judgments in enforcing such foreign judgments, cannot satisfy this requirement. For this reason, a Belgian judgment was refused to be enforced.

Under condition (d), Japanese courts do not enforce Chinese judgments because a Chinese court had refused to enforce a Japanese judgment in China before the first case on the enforcement of Chinese judgments was brought to the Japanese court.

If a foreign judgment satisfies the above-mentioned conditions, they are automatically recognised as valid in Japan. If the judgment creditor wants to enforce the foreign judgment in Japan, however, the creditor needs to obtain a decision of a competent Japanese court to allow the enforcement of the foreign judgment in accordance with under Article 24 of Civil Execution Act (Law No. 4 of 1999 as amended). Then, the foreign judgment can be executed in the same manner as a judgment rendered by a Japanese court.

vii Assistance to foreign courts

Japan is the party to (1) the Convention of 1 March 1954 on Civil Procedure and (2) the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. In addition, Japan has entered into certain diplomatic agreements on the mutual judicial assistance with many countries which are not the parties to the above-mentioned conventions. Pursuant to these conventions, diplomatic understandings and sometimes even on ad hoc basis, Japanese courts provide assistance to foreign courts in relation to the service of judicial documents and the collection of evidence.

13 The Japanese government has not declared the objection to the direct service as permitted under Article 10(a) of the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

The Japanese government has explained that it does not object to such direct service which is made for the purpose of the proceedings of a foreign country as long as it is permissible under the laws of such foreign country, however, this does not mean that such service is valid for the purpose of Japanese laws. Under such circumstances, it is controversial in Japan whether foreign judgments rendered on the basis of direct service can be enforced by courts. So far, there is no definitive judgment in this respect. The views of academics and practitioners vary.

14 Judgment of the Supreme Court, 11 July 1997.

15 Judgments of California State, New York State, Nevada State, Hawaii State, England, Singapore and Hong Kong have been recognised as valid. Furthermore, though it is a civil law country, judgments of Germany and South Korea whose law on the recognition of foreign judgments is more or less same as that of Japan have been recognised.

16 Judgment of Tokyo District Court, 20 July 1960. The author understands that this ruling is no longer applicable in respect to Belgium, because the Belgian law on the recognition of foreign judgment has been changed.

17 Judgment of Osaka High Court, 9 April 2003.
The service is usually made by a special post service. If such service by post is not accepted by the defendant, the service is made by a court execution officer. Foreign practitioners should note that if the documents the service of which was requested lack their Japanese translation, the Japanese court will contact the defendant and ask whether or not it will accept the service on a voluntary basis. If the defendant does not so accept within certain time period, the court will return the document to the requesting court. Therefore, in order to ensure the compulsory receipt of the summons by the defendant, the Japanese translation of those documents needs to be attached. Sometimes we see very poor Japanese translations, and although this does not prevent the summons from being compulsorily served on the defendant, the quality of the translation may become an issue at the enforcement phase.

A typical assistance with respect to the collection of the evidence is for a Japanese judge to take the testimony of a witness or a party. Such collection is made in accordance with the Japanese laws. Where the foreign court ask specific manner in relation to such collection, the Japanese judge will comply with such request to the extent admissible under Japanese laws.

ix Access to court files

There is no public list of the ongoing court proceedings. If one can identify a specific case, any member of the public can inspect the case files including pleading and evidence, whether the case is ongoing or has been completed. Only the party who has prima facie interest in the case can obtain a copy of the file. If a party does not want that a specific part of the pleadings or evidence submitted by such party is disclosed to the public, the party can apply for the court's decision not to disclose such part to the public. Generally, if the court finds that the specific part contains confidential information or information concerning the privacy of such applicant, the application will be granted.

x Litigation funding

So far, the practice of the litigation funding does not exist in Japan. The discussion on the permissibility of the litigation funding has not been well developed. There is a view that litigation funding is not permissible under the laws of Japan.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

Attorney Act provides for the basic rules on the conflict of interest. The Basic Rules on the Duties of Practising Attorneys (Basic Rules) issued by the Japan Federation of Bar Associations (JFBA) supplement these rules. Under these rules, a lawyer can act for the case of the client which is the counterparty of the other case that the lawyer is handling, if the client of the latter case agrees.

The Basic Rules provides that a member of a law firm cannot handle the case with respect to which another member of the firm cannot provide service due to conflict of interest unless there is a reason that the former member can maintain impartiality. The Chinese wall

Japanese law firms jointly operated by more than one members are either in the form of partnership or in the form of legal professional corporation (LPC). While LPC constitutes a legal entity, the partnership is not regarded as a legal entity. For this reason, the Attorneys Act does not provide for the rules on conflict of interest in respect to the law firm in the form of partnership, however, the Basic Rules do so.
has been understood to be the method to ensure the maintenance of impartiality in this context. The Basic Rules do not provide any specific definitions of the Chinese wall. It has been left to the reasonable practices by the law firms.

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

No responsibilities relating to money laundering are legally imposed on Japanese lawyers because of the historical independence of the lawyers from the government. The rules of JFBA impose certain responsibilities on the lawyers. Either (1) if a lawyer is deposed the money of no less than ¥2 million by or on behalf of its client (except for the fund to be paid to courts in relation to litigation, the advance payment to cover the lawyer's remuneration or the fund to be received from the counterparty in accordance with the judgment or court settlement), or (2) if a lawyer is instructed to assist a sale and purchase of real estates, a M&A transaction or other specified transactions, the lawyer is obligated to confirm the identity of the client by verifying certain official certificates. If the client is a foreign individual or entity, the lawyer must confirm the identity of the client by those documents that would be used for the same purpose in the relevant country. In short, where Japanese lawyers are instructed by a client to represent such client in a Japanese litigation, the liabilities concerning money laundering are rarely applicable.

iii Data protection

Though the legislations regarding data protection has been tightened also in Japan, so far such legislations has not substantially affected the practice of lawyers. One of the methods frequently used by Japanese lawyers to collect evidence is the request of provision of the information to various public or private entities through the Bar association to which the lawyer belongs pursuant to Article 23-2 of Attorneys Act. As this procedures has such legal ground, the provision of personal information is out of the scope of the protection under the Act on the Protection of Personal Information (APPI). Under APPI, the restriction on the share of personal information with third parties are limited to the personal data which constitutes a data of a data base that was systematically organised so as to be able to search for particular personal information using a computer. Usual personal information to be shared with other lawyers in connection with a litigation, whether domestically or internationally, does not fall within the scope of restriction. Further, as opposed to EU data protection rules, where the information relating to the employees of a client constitutes protected personal data, the consent of the employees can validly exempt the obligation of the client not to transfer the personal data to third countries.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

No common-law-type privilege is admitted by Japanese law. Japanese lawyers can refuse to testify on any fact that the lawyer learned in conjunction with her or his processional activities. Similarly Japanese lawyers can refuse the production of the documents that include such fact. However, clients have no right to refuse to testify on communications with lawyers or to produce a document containing information relating to the communications with lawyers. In addition, whether or not the right of lawyers to refuse the production of the documents is applicable in administrative proceedings such as the investigation by the Japanese Fair Trade Commission is not clear. The LDP, the party in charge of the current government is
presently proposing the adoption of the US-type privilege in connection with the antitrust proceedings, however, the JFTC have resisted such legislation. In the future, the US-type privilege may be adopted in relation to certain administrative proceedings.

ii Production of documents

Under Article 220 of the Code of Civil Procedure, a party to a case can request the court to order the counterparty or a third party to produce documents in their possession. The documents include an electronic data.

Certain documents are exempted from the documents to be produced. Among others, following exemption are important: (1) documents containing confidential information and (2) documents prepared exclusively for the internal use of the requested party. Documents containing technical know-how fall under the scope of exemption (1). Internal minutes, memorandum or personal notes fall under the scope of exemption (2). Accordingly, the documents the content of which the requesting party is keen to know may not be easily produced.

The court grants such request only if the court thinks such evidence is relevant for its determination. This means that unless the requesting party succeeds in persuading the judges for all other issues that support its claim or defence, it is difficult to have the court grant the production request. It is the general practice of courts that upon the filing of the request, the court asks the counterparty to voluntarily produce the requested documents. If the counterparty refuses the voluntary production, the courts will not decide on the production request until it becomes confident that such document is necessary for the determination on the case. Often, the requests are formally dismissed at the last oral argument date.

Once the request is granted and if the counterparty fails to produce the requested document without any justifiable reason (such as the non-existence of the requested documents), the court may find the requesting party's allegations concerning the details of said document to be true. This is the sole sanction against the requested party. In order to ensure the effective sanction on the failure to produce, the requesting party needs to allege the content of the requested document with reasonably detailed specifications, which is not easy for the requesting party without reviewing the document.

When the requesting party possesses the requested document as a result of the discovery proceedings in other jurisdiction as a part of parallel litigations but is unable to use such document in Japanese proceedings because of a protection order, the use of Japanese production order can be considered to the extent it does not violate the protective order.

If a third party fails to comply with the order, such third party will be subject to the civil penalty in the amount of no more than ¥200,000, which would not be a very serious penalty for the third party if such party has any serious reason not to produce the documents.

For the above-mentioned limited scope of the documents to be produced and the less effective sanction, it is difficult to effectively make use of the document production order. The document production request is most effectively used for the proof of damages in intellectual property litigations because the accounting documents are not generally exempted from the documents to be produced and the defendant cannot excuse that no accounting documents are left. Also, in labour disputes and medical malpractice disputes, the document production request may be effective where payrolls or medical records are requested to be produced.

Because of such circumstances, the discussion on the issues which might be relevant in other jurisdictions, such as whether the requested party needs to produce the document located outside of Japan or in the possession of its subsidiary or agent, has not been well developed.
VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

The most frequently used alternative to litigation is the conciliation administered by courts. Public institutions including Bar associations and various industrial associations are offering ADR services that mainly aim to resolve small disputes such as those between business operators and consumers or neighbourhood disputes, and alleged tortfeasor and alleged victims of the torts of certain categories (such as car accidents or medical malpractice). Disputes concerning damage caused by the Fukushima nuclear power plant accident are also resolved through a special ADR mechanism. So far, it is not common to use arbitration or other non-court ADR for the resolution of ordinary domestic commercial disputes.

ii Arbitration

For domestic commercial disputes except for the area of construction disputes and maritime arbitration, use of arbitration is not common. For international disputes, though many Japanese companies are parties to arbitration agreements, cities of Japan are not often designated as the seat of arbitration.

Arbitration Act was adopted in 2003 based upon 1985 UNCITRAL Model Law. Japanese courts may set aside an arbitral award only on the limited grounds listed in Article 44 of Arbitration Act that conform to the grounds set out in Article 34 of the 1985 Model Law. There are two recent cases to be noted in this respect.

On 12 December 2017, the Supreme Court reversed a decision of the Osaka High Court. In its decision, Osaka High Court set aside an arbitral award of the Japan Commercial Arbitration Association (JCAA) on the ground that one arbitrator had failed to disclose a certain fact constituting a reasonable ground to doubt the impartiality or independence of the arbitrator that occurred during the course of the arbitral proceedings. During the arbitration proceedings, a new partner handling a case for a sister company of a party to the arbitration joined a different office of the same law firm to which the arbitrator belongs. The arbitrator did not inform the parties that the new partner had joined. The Supreme Court held that if the arbitrator knew such fact or could learn such fact with a reasonable investigation, the arbitral award should be set aside, but otherwise should not be set aside. The Supreme Court sent the case back to the Osaka High Court and ordered it to further investigate facts with a view to the above-mentioned standard.

On 13 June 2011, Tokyo District Court set aside an arbitral award of JCAA on the ground that the award was contrary to Japanese public policy. The award erroneously specified a certain fact that a party had been disputing as an undisputed fact and on the basis of such specification, the arbitrators had formulated the decision. The District Court held that such substantial procedural defect makes the award contrary to Japanese public policy. The judgment was upheld by higher courts.

Japan is a party to the New York Convention and Japanese courts enforce foreign arbitral awards within the framework of the New York Convention. If the creditor of an arbitral award wants to enforce the award, the creditor needs to obtain the execution order of a competent court pursuant to Article 46 of the Arbitration Act. The author is not aware of any recent cases where the enforcement of foreign arbitral awards was refused.

The JCAA is the major arbitral institution commonly used for international disputes. Japanese companies often agree to the ICC arbitration with the seat being Tokyo or Osaka.
as well. For domestic construction disputes, arbitration by Committees for Adjustment of Construction Work Disputes\(^{19}\) are often used because the widely used standard construction contract form contains such arbitration as a standard dispute resolution mechanism.

### iii Mediation

As stated above, most frequently used alternative to litigation is the conciliation administered by courts under the Civil Conciliation Act. Mainly, summary courts handle such conciliation irrespective of the amount of the involved economic interest. Three court-appointed conciliators (one judge and two part-time conciliators such as lawyers, architects, business persons or accountants, chosen depending upon the nature of the disputes) act as a conciliation panel. Each year, 30,000–40,000 new cases are filed. If the parties do not agree to the settlement conditions, the conciliation fails. Even large commercial business entities make use such conciliation proceedings.

Unlike conciliation or mediation in many other jurisdictions, the conciliation proceedings at summary courts take time. Parties meet once or twice in a month for one to two hours. Each party considers settlement conditions carefully during the period up to next session and in the next session, presents its position including further concession to the panel. Such mechanism generally fits for the decision making system of Japanese companies, while sometimes it does not catch up the speed of the business.

Though there is no statutory limitation on the length of the conciliation proceedings, if the parties do not reach agreement within certain period (e.g., six months), the conciliation panel decides to discontinue the proceedings without success.

There are some other institutional mediations or conciliation proceedings offered mostly by public organisation to resolve disputes of specific categories.

Ad hoc mediation to resolve commercial disputes is not common in Japan and nor are other forms of alternative dispute resolution.

### VII OUTLOOK AND CONCLUSIONS

Over the last decade Japan has adopted various new schemes to improve and expedite Japanese civil proceedings at courts; however, such new schemes have not sufficiently changed the actual practice, while the number of complicated litigations such as construction disputes, disputes involving innovative financial products and new IT technologies is increasing. As presently there is no concrete plan for further amendment of the Code of Civil Procedure, we do not expect any dramatic changes in Japanese court proceedings in the near future.

The involvement of Japanese companies in arbitration proceedings and international mediation proceedings has been demonstrably increasing. Though Japan has fallen behind other Asian countries such as Singapore, Malaysia and South Korea, the Japanese government has committed to making an effort to develop the infrastructure to solicit more international arbitration and mediation to Japan. In line with such commitment, in December 2017 the Japan Association of Arbitrators (JAA) announced its plan to set up a hub of international mediation in Kyoto. It will be interesting to see to what extent Japan can rival other Asian competitors in this respect.

\(^{19}\) Pursuant to the Construction Business Act, one in each prefectural government and one in central government were established.
I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

Jersey is a self-governing British Crown dependency. It is the largest of the Channel Islands. It is not part of the United Kingdom and is not a member of the European Union. Originally part of the Duchy of Normandy, it has owed its allegiance to the British Crown for over eight centuries. It has always maintained a separate legal system from Britain, as well as its own legislature and tax system.

Jersey law derives from legislation and customary law (a concept similar to common law). Most modern legislation emanates from the Island’s legislature, the States of Jersey. Occasionally the UK parliament extends its legislation to Jersey, but only with the consent of the States of Jersey.

Jersey customary law derives from a variety of sources, including Norman customary law, the French Code Civil and English common law and statute. The sources relied upon vary depending on the area of law: typically the areas of law with the oldest origins – such as immovable property and succession – rely most heavily on Norman customary law, while areas that have developed more recently, such as tort, administrative law and criminal law, are heavily influenced by English authorities. Jersey contract law is a blend of English and French law. The law of trusts has developed relatively recently and is rooted in English law and procedure, but it has been governed by a Jersey statute since 1984 and there are some significant local differences from English trusts law.

Jersey’s principal court is the Royal Court, presided over by the Bailiff, the Island’s chief judge. All but the most minor civil and criminal cases are heard there. The Bailiff is assisted by jurats, who are the judges of fact in all civil cases. There are 12 full-time jurats, elected by the Jersey legal profession and the legislature. Jurats need not be legally trained but typically have long experience of professional, business or civic life. Two jurats sit with the judge in civil trials.

The Deputy Bailiff and a number of Commissioners also exercise the Bailiff’s judicial functions. As well as local Commissioners drawn from the Jersey Bar there are a number of specialist overseas Commissioners, appointed from time to time to hear particular types of case. They are typically British QCs or retired High Court judges.

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1 William Redgrave is a partner and James Sheedy is a senior associate at Baker & Partners.
2 The Petty Debts Court hears civil claims for under £10,000 and rent arrears cases of under £15,000, and the Magistrate’s Court hears less serious criminal cases; its sentencing powers are limited to imprisonment of 12 months. There is also a Jersey Employment Tribunal.
Civil appeals are to the Jersey Court of Appeal. Its members include the Bailiff and Deputy Bailiff of Jersey, the Bailiff of Guernsey, and a number of lawyers from Commonwealth jurisdictions, the majority being British QCs or former judges.

The ultimate appellate court in civil matters is the Judicial Committee of the Privy Council, in London. Only decisions of the Privy Council on appeals from Jersey are binding in Jersey, although appeals from other jurisdictions may be persuasive in Jersey.

II THE YEAR IN REVIEW

i CMC Holdings Ltd & Anor v. Forster, RBC Trust Company International Ltd & Ors [2017] JRC 014A

CMC Holdings brought claims against its former director for breach of fiduciary duty and against two Jersey financial services institutions for dishonest assistance for their (and others) participation and benefit from an alleged scheme by which secret commissions were siphoned into accounts in Jersey and then distributed to a select group of directors of CMC Holdings for a period of over 30 years.

The Jersey financial institutions issued an application to join a number of third parties to the proceedings on the basis that they should pay a contribution or indemnify the Jersey institutions in the event that they were found liable to CMC Holdings. The third parties were all former directors of the Plaintiffs who had benefitted from the Scheme over the years but whom the Plaintiffs had elected not to sue.

The Court resolved that it had an inherent jurisdiction to join third parties to proceedings on the basis of the third parties’ unjust enrichment from the alleged Scheme. The case extends the basis upon which it had been understood the Royal Court had jurisdiction to join third parties for a contribution or indemnity. The Law Reform (Miscellaneous Provisions)(Jersey) Law 1960, which is based on an English statute from the 1930s provides that claims for contribution and indemnity were confined to cases in tort. The decision provides that it was at least arguable that the Royal Court had an inherent jurisdiction to apportion liability between the Jersey financial institutions and as third parties on the basis of unjust enrichment also. The decision also confirms that in Jersey law, a claim for dishonest assistance is not a claim in tort or founded on tort.


Nigeria brought proceedings in relation to funds originally held by the Defendant company, Doraville, in a Jersey bank account. The funds were alleged to have been stolen from Nigeria and laundered through the United States.

The bank account of Doraville was subject to a property restraint order under the Civil Asset Recovery (International Co-operation) (Jersey) Law 2007 (2007 Law). Funds were vested in the Viscount. The United States had obtained a default judgment in rem in the United States over the bank account of Doraville. That default judgment had not yet been registered in Jersey under the 2007 Law. The United States applied to intervene in the proceedings brought by Nigeria and for a stay or dismissal of them, claiming that this would enable it to ensure that the assets were used for the benefit of the people of Nigeria.

The Court held that the judgment of the United States was not enforceable at common law, being a judgment in rem in relation to property outside the territory of the United States or because it was penal in nature. Nor was there evidence that these were ‘collusive
proceedings’ between Nigeria and Doraville, intended to frustrate the United States from registering and enforcing its judgment. Having invoked international mutual assistance, Nigeria might be estopped from contesting registration of the United States’ judgment under the 2007 Law, but this was not sufficient ground for joinder. The United States had no locus to intervene in the proceedings. Nigeria could take judgment on part of its claim, but not on an element that might impact on the United States’ interest under the 2007 proceedings.

iii  **In the matter of the K Trust [2017] JRC 177**

The Court set aside a transfer from a UK bank account into a Jersey law trust, giving rise to substantial IHT liability. The Court considered the state of mind necessary for an operative mistake.

An application was made under Article 47E Trusts (Jersey) Law 1984 (the Law) by the settlor, who was neither resident nor domiciled in the UK. He had taken advice on purchasing investment properties in London and had been advised that the properties should be owned through a non-UK company, put into trust to minimise IHT. The settlement was made from a UK situs bank account.

The Court examined the three definitions set out in English law as to what amounts to an operative mistake: incorrect conscious beliefs; incorrect tacit assumptions and mere causative ignorance. As a matter of English law, equity will only correct mistakes under the first two categories (*Pitt v. Holt*).

The Court was satisfied that the Representor had acted under an incorrect conscious belief and declared the transfers void ab initio. The Court declined to decide whether mere causative ignorance is sufficient as a matter of Jersey law to amount to an operative mistake.

iv  **Al Tamimi v. Al Charmaa [2017] JRC 033**

The case arises from a divorce. The Jersey Royal Court was asked to determine the true beneficial ownership of two Jersey companies that held valuable assets. The wife, in whose name the shares of the companies were registered, claimed that they belonged to her. The husband argued that in fact he was the true beneficial owner of the companies and that the wife only held the shares for him as his nominee or otherwise on bare trust for him. The husband also claimed, as alternatives, that the wife held the shares on resulting trust for him, that she held the shares on constructive trust for him and as a further alternative that she had been unjustly enriched by her ownership of the companies.

In Jersey there is an obligation on those applying to the Jersey Financial Services Commission (JFSC) for permission to incorporate a Jersey company to make complete and accurate answers to the questions raised.

The judgment is a salutary warning that the Royal Court will take a dim view of those who make false declarations to the JFSC or who abuse the island’s finance industry in attempting to conceal the true beneficial ownership of assets by placing them into the names of third parties.

The court refused the husband’s claim to ownership of the companies on all bases. The court went so far as to say that it would not recognise any arrangement that detracts from the ability of regulators or law enforcement authorities to identify the beneficial owners of companies, or the beneficiaries under trusts. It held that even if it had been satisfied (which it

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was not) that the shares were held as a nominee or on trust for the husband, or that the wife had been unjustly enriched at the expense of the husband, it would have nevertheless refused to grant relief in the exercise of its equitable discretion.

III COURT PROCEDURE

i Overview of court procedure

The civil procedure of the Royal Court is governed by the Royal Court Rules 2004. These rules are modelled on the Supreme Court Rules that existed in England and Wales before the introduction of the Civil Procedure Rules, there. Though Jersey does not have the CPR, the Royal Court has modelled some of its recent amendments upon it, including importing the overriding objective, in seeking to ensure the prompt and proportionate resolution of legal disputes.

ii Procedures and time frames

Civil proceedings may be brought either by simple summons (for straightforward debt claims); order of justice (like a statement of claim in England: applicable to actions including commercial disputes); or representation (for other proceedings, including non-contentious trust applications).

Actions brought by summons or order of justice proceed by a fixed timetable, which may be varied by agreement of the parties or by the Royal Court. All cases have an initial hearing on the first Friday afternoon four clear days after service. If the case is defended, the matter is placed on the ‘pending list’ and an answer (statement of defence) is due within 21 days, with a further 21 days for any reply. The Court requires the parties to attend a directions hearing three months after the matter is placed on the pending list, if one has not already been fixed, at which the Court will give further directions to trial, for example, on discovery and exchange of evidence. Failure to indicate an intention to defend can lead to judgment in default.

The Royal Court has stated that actions should generally be concluded within 12 months, and that even a complex case should be concluded within 24 months. The Court may dismiss an action if it is not completed within two years of being set down on the hearing list, having given the parties 28 days’ notice. An action will be deemed to have been withdrawn if not completed within three years of being adjourned without a return date.

Most procedural remedies available in England are also available in Jersey, including striking out claims for abuse of process or disclosing no reasonable cause of action; summary judgment; security for costs; and stays for alternative dispute resolution (ADR).

Interlocutory injunctive relief is available in support of both Jersey claims and overseas claims, including freezing and ancillary disclosure orders (formerly known as Mareva injunctions), search and seizure orders (formerly Anton Piller orders) and Norwich Pharmacal orders (disclosure from non-party to help bring a claim against others). Urgent orders can be obtained ex parte and at very short notice, with a subsequent inter partes hearing to confirm, vary or discharge the injunctions; full and frank disclosure and an undertaking to compensate for damage and costs of compliance will be required.

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4 Ybanez and Mompo v. BBVA Privanza Bank (Jersey) Limited [2007] JLR Note 45.
5 RCR 6/25.
iii Class actions

Rule 4(3) of the Royal Court Rules permits a person to represent other persons with identical interests in the same proceedings. A plaintiff may apply to the court to appoint a specific defendant to represent other defendants. Any judgment will be enforceable on all those represented, but will only be enforceable with leave of the Court.

Where there are a number of similar cases before the Royal Court it may stay all but one and use that as a test case, if doing so will effectively dispose of the issues in the other cases.

iv Representation in proceedings

Only Jersey-qualified advocates have rights of audience before the Royal Court. Litigants who are not minors nor under an incapacity may represent themselves.

Bodies corporate may be represented by specific authorised directors, upon lodging a copy of the authorising resolution and the director’s name and address. Directors can if successful claim on a limited basis for their personal costs. Non-party cost orders may be made against those who fund or control litigation on behalf of another, so a director may be made personally liable for costs awarded against the company he or she represented, if the litigation was conducted other than purely for the company’s benefit.

v Service out of the jurisdiction

Leave of the court is required to serve process on persons outside Jersey. This applies equally to natural and non-natural persons. Rule 7 of the Service of Process Rules 1994 lists a number of circumstances in which it will be proper to grant such leave: for example where the subject matter of the dispute is connected to Jersey, or where the overseas defendant is a necessary or proper party to a claim involving another defendant who is already duly served; or to enforce a foreign judgment against assets in Jersey. The court may order substituted service if personal service is not practicable. The application is made by summons supported by an affidavit exhibiting the order of justice. Full and frank disclosure must be given of possible arguments against the grant of leave. The applicant must establish: a good arguable case that at least one of the situations in Rule 7 applies; that there is a serious issue to be tried on the merits; and that Jersey is an appropriate forum to try the claim.

Once the overseas person has become a party to the proceedings and the Royal Court’s jurisdiction over them has thereby been established, service on that party’s Jersey advocate is ordinarily sufficient in respect of further documentation in the proceedings.

vi Enforcement of foreign judgments

Foreign judgments can only be enforced in Jersey if they have been either registered or recognised by the Royal Court. Registration is applicable only to judgments of superior courts of the following jurisdictions, which afford the same treatment to Jersey judgments:

6 RCR 4/2A.
7 RCR 12/6(2)(b).
9 Judgments (Reciprocal Enforcement) (Jersey) Law 1960.
England and Wales, Scotland, Northern Ireland, the Isle of Man and Guernsey. A superior court judgment may include a county court judgment transferred to the High Court under the County Courts Act 1984.\(^\text{10}\)

The judgment must be final and conclusive and for a sum of money, not payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty. The application must be brought within six years of the judgment or appeal. If registration is not set aside for one of the reasons set out in the law, which include enforcement being contrary to public policy, then it can be enforced as if it were a Jersey judgment.

Judgments from any other jurisdiction must be recognised under common law. The plaintiff must bring fresh proceedings in Jersey by order of justice. If satisfied that the foreign court had jurisdiction according to the established Dicey and Morris conflict of laws rules, the Royal Court will ordinarily recognise an in personam money judgment (unless it is in respect of taxes\(^\text{11}\) or state penalties) that is final and conclusive. The merits of the claim will not be considered. If the application succeeds, a Jersey judgment is given in the same terms as the foreign judgment, and is liable to be enforced in Jersey. The Royal Court has a discretion under its inherent jurisdiction to enforce non-money judgments, but will exercise that jurisdiction cautiously.\(^\text{12}\)

\textbf{vii  Assistance to foreign courts}

Jersey is bound by the 1970 Hague Convention on taking evidence abroad. The Royal Court’s power to assist overseas courts in obtaining evidence for overseas civil and commercial proceedings (including insolvency cases) is set out in the Service of Process and Taking of Evidence (Jersey) Law 1960. The Court may order, for example, the inspection or seizure of property, the production of specified documents and the oral examination of witnesses in Jersey. Oral examination takes place in a closed Court, and (unusually for Jersey) foreign lawyers may conduct the examination. The Court will not make an order if it is contrary to public policy to do so.

The established procedure is that the letter of request from the requesting court is submitted (usually through official channels) to the Attorney General of Jersey, together with the sealed, original order. If it is in order, the request will either be presented to the Court by the Attorney General’s department or an independent Jersey advocate will need to be instructed to make the application.

The same Law also prescribes a procedure for the service within Jersey, by the Royal Court’s executive officer the Viscount, of process from outside Jersey. Where a convention is in force the documents must be sent to the Attorney General of Jersey for him to vet and present to the Court; otherwise it must go via letter of request to the UK government, and the Royal Court will only act on a request from the UK Home Secretary.

\textbf{viii  Access to court files}

Most proceedings are held in public, and any adult may attend. Proceedings may be held in camera if the interests of justice require it (typically family cases, non-contentious trust

\(^{10}\) \textit{In the Matter of the Representation of A Fallows & S Fallows (t/a Marbeck Association) (2014)(1) JLR 140.}

\(^{11}\) Given the international trend towards mutual assistance in preventing tax evasion and aggressive tax avoidance, it is open to question how long the widely followed and long-established common law rule against civil enforcement of overseas tax liabilities will last.

\(^{12}\) \textit{Brunei Investment Agency v. Fidelis (2008) JRC152.}
representations or cases involving highly confidential material). It is a contempt of court to reveal details of a hearing conducted in private. Many decisions of the Royal Court and Court of Appeal, interlocutory and final, are reported promptly on the Jersey Legal Information Board website. Where appropriate, identities of parties or witnesses may be anonymised in the reported judgments.

Ordinarily, pleadings in proceedings commenced by order of justice are available to the public once all parties to the action have filed their answers. A request must be made in writing to the Judicial Greffier stating the reason for the request. If the reason is adequate, then, unless the proceedings are subject to any restriction placed on them by the Court, the pleadings may be released. Pleadings by way of representation will not be released until the conclusion of the case.

ix  Litigation funding
The use of litigation funders is a relatively recent development but is increasing in Jersey following recent decisions approving their use. In In the matter of Valetta Trust the Royal Court endorsed the change in approach of the English courts, from regarding such arrangements as corrupting and refusing to enforce them, to approving them as promoting access to justice. It held that such arrangements are acceptable where the funder does not control the litigation, accepts the liability to pay adverse costs if the case is lost, and leaves the plaintiff with a substantial proportion of the winnings if the case is won.

In Barclays Wealth Trustees (Jersey) Limited v. Equity Trust (Jersey) Limited and others the Court held that even if a funding agreement were unenforceable, this would not necessarily lead to the proceedings being struck out as an abuse of process. It indicated that funders would still risk being ordered to pay the winning side’s costs even if the funding agreement were unenforceable.

The Court stated in Valetta that conditional fee (‘no win no fee’) arrangements between lawyers and clients are still prohibited in Jersey.

IV  LEGAL PRACTICE
i  Conflicts of interest and Chinese walls
The Law Society of Jersey’s Code of Conduct states in Rule 6.1 that:

Except in the limited circumstances dealt with in R.6.3, a member or their firm must not act if there is a conflict of interests or a significant risk of a conflict.

A

Rule 6.7 states:

A member or their firm may act for the adversary or counterparty (client A) of a client (including a former client, client B) provided that such member or firm is not privy to confidential information in respect of client B that is materially relevant to such dispute or matter, or can protect such confidential information effectively by the use of safeguards and, in the latter case, informed written consent has been obtained from client A and where possible client B…

14  [2013 (2) JLR 22].

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Confidentiality walls within firms are not uncommon; for example, where one member of a firm who has had historic involvement in a related matter is excluded from involvement and denied access to hard copy or electronic files. The relatively small number of firms makes such arrangements an occasional practical necessity. The adequacy of the arrangements may be challenged depending on the facts.

The Royal Court will prevent an advocate or his or her firm from acting if it is not satisfied that confidentiality can be adequately preserved in the circumstances.\textsuperscript{15} The Court will find that confidential information held by a firm in relation to one matter ‘might be’ relevant to another matter if there was a real (as opposed to fanciful or theoretical) risk that it would be relevant. However, in considering whether to bar a firm from acting, it will balance the risk of a significant breach of confidentiality against the public interest in litigants being able to instruct lawyers from among the relatively small number of firms in Jersey.\textsuperscript{16}

\section*{ii Money laundering, proceeds of crime and funds related to terrorism}

Jersey law firms that conduct transactional work, requiring them to hold and pay out client funds and to enter into arrangements regarding client assets, are subject to the anti-money laundering requirements in the Proceeds of Crime (Jersey) Law 1999 and the Money Laundering (Jersey) Order 2008. They must have systems and controls in place to guard against money laundering and terrorist financing, including measures to identify customers and the source of funds and to monitor transactions. They must appoint a money laundering compliance officer and a money laundering reporting officer.

It is a criminal offence for such a lawyer not to report knowledge or suspicion of money laundering that comes to their notice in the course of their business, unless that knowledge came to them in circumstances attracting legal professional privilege.\textsuperscript{17}

\section*{iii Data protection}

The Data Protection (Jersey) Law 2005 governs the processing and disclosure of personal data, hard copy or electronic. It is based on English legislation implementing the 1995 EU Data Protection Directive. Jersey will become subject to a regime equivalent to the EU’s General Data Protection Regulation (GDPR) in May 2018. The Data Protection Commissioner can investigate breaches and can bring civil or criminal actions.

As data controllers, law firms must register with the Commissioner. Personal data are exempt from the non-disclosure provisions if disclosure is required by law or court order, or if their disclosure is necessary:

\begin{itemize}
  \item[a] for the purpose of, in connection with, or in contemplation of, any legal proceedings;
  \item[b] for the purpose of obtaining legal advice; or
  \item[c] otherwise for the purposes of establishing, exercising or defending legal rights.\textsuperscript{18}
\end{itemize}

\textsuperscript{15} Le Pas Holdings Ltd v. Receiver General [1995 JLR 163].
\textsuperscript{16} Abacus (CI) Ltd v. Appleby [2007 JLR 499].
\textsuperscript{17} Proceeds of Crime (Jersey) Law 1999, Article 34D, Schedule 2 Part B.
\textsuperscript{18} Article 35, Data Protection (Jersey) Law 2005.
V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

Jersey law follows English principles and recognises several forms of privilege.

There are two forms of legal professional privilege: legal advice privilege and litigation privilege. Legal advice privilege protects confidential communications passing directly between lawyer and client that were created for the dominant purpose of obtaining or providing legal advice. It is likely that the Jersey courts would follow the English courts in restricting the privilege to communications involving lawyers, and not apply it to other professionals.

Litigation privilege protects confidential documents that pass between lawyer and client, the lawyer and third parties, or the client and third parties. These documents must be generated after litigation has commenced or become contemplated for the dominant purpose of obtaining information to be submitted to lawyers for the purpose of providing or obtaining legal advice in relation to or seeking evidence or information for such litigation. In *Smith v. SWM Limited*¹⁹ the Court ruled that litigation privilege did not attach to an expert accountant’s report that the defendant had been required to obtain pursuant to powers exercised by the Jersey Financial Services Commission. Litigation privilege requires a claim or dispute in an adversarial sense. A report obtained by the exercise of powers by a regulator, was not adversarial in nature. The existence of privileged documents must be disclosed as part of the discovery process, although they are exempted from production for inspection.

Common interest privilege protects communications between parties with a common interest in actual or potential litigation for the dominant purpose of informing each other of the advice received or of obtaining legal advice. This enables a client voluntarily to share privileged information with a third party who shares a common interest, without the waiver or loss of privilege.

In civil or criminal proceedings, no person will be compelled to produce any document for inspection or to answer any question, if to do so would tend to expose that person to a real and appreciable risk of a criminal charge, penalty or forfeiture action being brought against them.

Disclosure of evidence relevant to an issue in court proceedings can be withheld if, as a matter of public policy, the Court decides that the public interest requires that it should be so withheld.

ii Production of documents

*Discovery*

Discovery is the ordinary process by which each party must search for and identify documents that are or have been in their possession, custody or power and that relate to any matter in question in the litigation. This obligation is extremely wide. The term ‘documents’ extends to anything upon which information can be recorded and retrieved, or may be capable of being retrieved by the use of specialist equipment. Documents in the possession of a party are those that it physically holds (in paper or electronic form). Those in its custody are those that it has a right to obtain from the person holding them (this probably means ‘right, authority or practical ability’ to obtain them, though there is no specific Jersey authority on the point). The obligation also extends to

¹⁹ [2017] JRC 026.
identifying documents that the party previously had in its possession custody or power but no longer does. New amendments to the Royal Court Rules 2004 require parties to discuss the discovery of documents held in electronic form and the scope and form such discovery should take.\textsuperscript{20} The same amendments also emphasis that the court will manage the discovery process in a way that is proportionate to the issues, value and costs involved in the proceedings.

A document is considered to be relevant if it might lead another party on a train of inquiry that might result in identifying evidence that might help or harm a party’s pleaded case. The Court will ordinarily make orders for discovery after the close of pleadings. Discovery is provided by listing relevant documents and verifying on affidavit that that list is complete.\textsuperscript{21} Parties then have the right to inspect the documents listed, except for those that are privileged.

Where a party suspects that an opponent has failed to fully comply with his or her general discovery obligation, the Court may order specific discovery of specific documents if it is necessary to dispose of the case fairly.

As a general rule there is no right to pre-action discovery except in personal injury cases. However, it is possible to obtain limited pre-action disclosure from a party that has become mixed up (even innocently) in the suspected wrongdoing of another if such disclosure is necessary to identify the wrongdoer, or to identify assets, or otherwise to enable the applicant to bring a claim. These orders are known as \textit{Norwich Pharmacal} or \textit{Bankers Trust} orders after the English cases on which they are based. Although the scope of this jurisdiction has expanded in recent years, the Jersey courts have emphasised that such relief can only be justified in exceptional circumstances and should not be allowed to undermine the ordinary discovery process by enabling plaintiffs to obtain extensive disclosure at the pre-action stage. \textit{Norwich Pharmacal} relief is available in respect of overseas proceedings, but it will not be granted where the predominant purpose is to supplement the discovery or disclosure process in an overseas court. A disclosure order can also be obtained with a \textit{Mareva} injunction, but only to the extent necessary to police that injunction.

The Bankers’ Books Evidence (Jersey) Law 1986 allows parties to obtain copies of bank records. The law further provides that copies of the contents of bankers’ records made in the ordinary course of business (whether written, magnetic or electronic) constitute evidence of the entries and transactions they contain.

The Investigation of Fraud (Jersey) Law 1991 gives the Attorney General power to compel the production of documents and the provision of information to assist the relevant investigating authorities in cases of serious fraud. These statutory provisions can also be used in response to requests for assistance from overseas authorities. The States of Jersey Police can obtain production orders from the Royal Court under statutory powers for the purposes of criminal investigations.

\section{VI ALTERNATIVES TO LITIGATION}

\textbf{i\quad Arbitration}

Arbitration has for many years been a method of resolving disputes in Jersey. It has most commonly been used in disputes in the construction industry.

\begin{flushleft}
20 Practice Direction RC 17/08.
21 Practice Direction RC 17/07.
\end{flushleft}
The Arbitration (Jersey) Law 1998 governs arbitration in Jersey. It conforms to European Union law. It applies both to Jersey and overseas arbitration agreements. The Court is given various powers, exercisable at the request of one of the parties to the arbitration, (e.g., to stay Court proceedings pending arbitration; to remove and replace arbitrators; to refer points of law to the Court for determination; and to grant extensions of time and to tax costs).

Part 2 contains provisions relating to the procedure that will be implied in arbitration agreements unless the parties have expressly agreed otherwise, including as to the conduct of proceedings, the power to call witnesses and the enforcement of awards, costs and interest. Part 2 also prescribes rules of general application to arbitration, including the right to appeal to the Royal Court to review an arbitration award on grounds of an error of law. The Court will only interfere if there was a misdirection of law or the decision as to the law was one that no reasonable arbitrator could have reached.22


ii Mediation

Mediation is the main form of ADR in Jersey. It is encouraged by the courts in all forms of civil dispute. Courts will impose a stay for mediation where appropriate even if one party is strongly opposed. While involvement in mediation is not compulsory, a refusal to cooperate may be taken into account when considering costs.

Mediation is voluntary and confidential. The parties agree their own rules. Often the mediators in significant disputes are senior English lawyers in the relevant field. The mediation typically takes place either in England or Jersey.

iii Other forms of alternative dispute resolution

There are no other formalised forms of ADR. Parties may reach voluntary agreement by any means they choose and can then obtain an order from the Court in the form agreed.

VII OUTLOOK AND CONCLUSIONS

Jersey judgments offer important guidance across the offshore world and this is a development that is expected to continue. Jersey’s judiciary has demonstrated a consistent willingness to innovate, drawing on both local and foreign authorities, to ensure that Jersey law remains able to meet the demands of modern commercial litigation.

The Royal Court Rules have been amended and supplemented by practice directions during 2017 intended to streamline litigation. Active case management of proceedings and the principle of proportionality feature prominently in the new amendments. Cost budgeting in cases where the value of the claim and counterclaim is below £500,000 has recently been introduced.23 The Routier Review continues to look at the issue of access to justice and legal aid, with changes anticipated in 2018.

23 RCR 6/24A and practice direction RC 17/06.
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 Non-Contentious Matters Law.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

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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 on 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 Insufficient research of the applicable foreign law (OGH 6 April 2017, PO 2015.1)

The problem with which the OGH had to deal in these proceedings was that the previous instances had not properly researched the applicable foreign law despite the obligation to do so ex officio. The OGH decided that this is a procedural violation of its own kind that can be asserted as incorrect application of the law and that may lead to the setting aside of the decision of the previous instance.

ii Appealability of decisions of the OG (OGH 6 April 2017, 5 CG.2015.298)

The OGH decided that in cases in which the OG decides on an appeal against a judgment of the LG and sets the judgment aside and refers the matter back to the LG, the decision of the OG may in any event only be appealed to the OGH if the OG explicitly provides for the opportunity to do so. The case law with respect to decisions of the OG on appeals against orders does not apply to decisions of the OG on appeals against judgments. This case law provides that in cases in which the setting aside decision of the OG substantially amends the decision of the LG, the decision of the OG may be appealed to the OGH even if the OG does not provide for this opportunity.

iii Assertion of a specific legal ground (OGH 6 April 2017, 3 CG.2016.430)

The OGH decided that in cases where the claimant bases his or her claims explicitly and exclusively on one specific legal ground, the courts are bound by this and may not upheld the claim based on another legal ground.

iv Stage of the proceedings at which the opponent must apply for security of costs (OGH 7 July 2017, 2 CG.2016.140)

The OGH decided that the defendant must apply for the order of a security for costs in case of a first hearing (in the technical sense, a first hearing is a hearing with a specific content according to the Civil Procedure Law) at the first hearing and – if no first hearing has been scheduled – at the hearing for oral pleadings before defending on the merits of the case. However, there is no obligation to apply for the order of a security of costs before the first hearing or the hearing for oral pleadings (e.g., at a hearing that was just scheduled to decide whether a pending lawsuit impedes the new proceedings).
III COURT PROCEDURE

i Overview of court procedure

International jurisdiction is given once the jurisdiction of the Liechtenstein courts is established. National jurisdiction is given either where the general jurisdiction applies or 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 such 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 domestic 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

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3 OGH in LES 2009, 167; OGH in LES 2006, 480.
4 The LG has exclusive jurisdiction over disputes regarding immovable property located in Liechtenstein pursuant to Section 38 JN.
5 See Sections 30 et seq. JN.
6 It should be noted that free choice of forum is restricted, for example, in consumer cases.
7 Where the court concludes that its jurisdiction is not given, the action is normally dismissed ex parte.
8 Defendants not residing in Liechtenstein are normally served by way of letters rogatory to the competent court where they reside.
9 For example, the lack of jurisdiction.
10 This defence has to be raised.
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.\(^ {11}\)

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.\(^ {12}\)

**Ordinary appeals**

Each decision passed by the LG may be appealed to the OG within either 14 days, if an order is concerned, or within four weeks, if a judgment is concerned. In appellate proceedings, the OG, after having conducted an oral hearing on the appeal, 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. 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). Moreover, the parties may also contest procedural errors or the LG’s factual and legal findings. 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 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. Judgments of the OG may, in any event, be appealed to the OGH within four weeks.\(^ {13}\) 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.

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

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11 However, the court may refuse to accept the pleadings or take further evidence if it concludes that the pleadings or evidence, which have not been brought forward earlier, are obviously offered by the party with the intention to delay the proceedings and if their admission would considerably extend the proceedings (Section 179 (1) ZPO).

12 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.

13 The only exception applies to small-claims proceedings (values in dispute up to 1,000 Swiss francs; Section 471 ZPO) where the judgment of the OG is final.
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. 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 claim and of the risk that may 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. Sections 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

14 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).
15 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.
16 The term ‘free-standing injunction’ refers to an injunction granted by a court pending the resolution of a dispute before a foreign court.
17 Article 284 (4) EO.
defendants if their rights are based on the same legal or 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 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.

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.

Section III.vi, below details the few bilateral and multilateral treaties concluded by Liechtenstein and the enforcement of foreign judgments in the absence of an enforcement treaty.

Bilateral treaties

18 It should be noted that, in the absence of any international treaties on service of official documents, service can generally not be forced upon a party residing abroad. Therefore, no default judgment can be passed if the party abroad voluntarily refuses to accept service of the legal action. See OGH 09.01.2014, 6 CG.2013.248, published in GE 2014, 207.
Both treaties require all of the following conditions to be met in order to recognise a judgment:

_a_ 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;

_b_ 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;

_c_ the judgment must have entered into legal force according to the law of the state where it has been passed; and

_d_ 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.\(^{19}\)

Currently, Liechtenstein has not signed or become a party to any other multilateral treaty or instrument. In particular, it is not a party to the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1988/2007 or the Council Regulation (EC) No. 44/2001 of 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels-I Regulation).

**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.\(^{20}\) On the account of the _Rechtsöffnung_, the creditor who has obtained a default summons\(^ {21}\) or other decision within summary proceedings\(^ {22}\) 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.\(^ {23}\) The respondent in such proceedings may avoid an enforceable instrument only by bringing an action for denial.\(^ {24}\) 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.

\(^{19}\) LGBl. 2011 No. 325.

\(^{20}\) Articles 49–53 RSO.

\(^{21}\) _Zahlbefehl_ according to Sections 577 et seq. ZPO.

\(^{22}\) _Rechtsbot_ according to Sections 592a et seq. ZPO.

\(^{23}\) Article 49 (1) RSO.

\(^{24}\) _Aberkennungsklage_ according to Article 53 RSO.
vii Assistance to foreign courts
The provisions of Sections 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.25

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 (see Section II.iii, supra). 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.26 Parties may 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 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 Professional Conduct Guidelines, a lawyer must not accept a mandate if the danger of a violation of his duty of secrecy in respect of

25 Section 27 (2) (3) JN.
26 A limitation exists only as regards lawyers in Article 23(3) RAG, which provides that quota litis agreements or the assignment or pledging of the disputed claim or object are not permitted.
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. 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. 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:

- the buying and selling of undertakings or real estate;
- the managing of client money, securities or other assets;
- the opening or managing accounts, custody accounts or safe deposit boxes;
- the organisation of contributions necessary for the creation, operation or management of legal entities; or
- 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.

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

Processing personal data is governed by the DSG, by which the Data Protection Directive 95/46/EC was implemented into Liechtenstein law. 'Personal data' means any information that permits the identification of both private persons and legal entities (data subjects). Pursuant to Article 10 DSG, 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.

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27 Section 19 (2) Professional Conduct Guidelines (Standesrichtlinien).
28 Article 11 RAG and Section 4 Standesrichtlinien.
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 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 in his 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 by his 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 his 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.29

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.30

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

29 See Section IV ii, supra.
30 Section 304 ZPO.
produce such documents. If he 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 often does not know what documents that might assist his 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. 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 practically permits the submission of all types of disputes in relation to trusts, foundations or companies to arbitration, including, in particular:

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;33

b the seat of the arbitration tribunal and the language of the arbitration proceedings may be freely determined;34

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;35

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.36

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31 Sections 594–635 ZPO; LGBl. 2010/182.
32 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., the LG, the Foundation Supervision Authority (STIFA) or the Attorney General) and based on mandatory law (Section 599 (3) ZPO).
33 Sections 603 and 603 ZPO.
34 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.
35 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.
36 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.
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. 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.

VII OUTLOOK AND CONCLUSIONS

On 1 July 2017, the law regarding Alternative Dispute Resolution in Consumer Matters (AStG), which is the implementation of the EU Directive on Consumer ADR (Directive 2013/11/EU), entered into force. Since participation in such procedures is voluntary, the AStG will likely not be of great practical importance.

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.
Chapter 21

LUXEMBOURG

Michel Molitor

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 districts 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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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 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.

### 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 United Nations Convention (the New York Convention).

### THE YEAR IN REVIEW

This year, the LuxLeaks trial went before the Court of Appeal. The Court of Appeal has partially overturned the judgment of first instance under which the two defendants – two former employees of a major Luxembourg-based audit firm – were found guilty of theft, computer fraud, breach of professional secrecy, breach of trade secrets and laundering for having disclosed and distributed confidential documents to the press related to preferential tax treatment afforded to multinational companies in Luxembourg. According to the appeal decision issued on 15 March 2017, the defendants could not be convicted for breach of professional secrecy as they benefit from the protection granted to whistleblowers under Article 10 of the European Convention on Human Rights, which, following the European Court of Human Rights’ jurisprudence, allows an employee to reveal or disclose hidden or concealed facts, provided that they are of general interest and violate rules of law, ethics or public policy. However, the Court of Appeal confirmed that the employees are guilty of theft and computer fraud. The appeal decision was challenged before the Luxembourg Supreme Court. On 11 January 2018, the Supreme Court partially reversed the decision of appeal, stating that the recognition of the special status of whistleblower must be based on an overall appreciation of the facts in question, which means that the protection afforded to whistleblowers should, as a matter of principle, cover all breaches committed by a defendant who may avail himself of this status. In this regard, a distinction was made by the Supreme Court between the two defendants. While the Court considered that one of the defendants could not be found guilty of any criminal offence in view of the disclosure of the tax

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2 www.cmcc.lu/node/1.
documents he held, it ruled that the other had been rightly sentenced by the Court of Appeal since the tax declarations he released did not provide for any unknown information that might have contributed to or reopened the debate on tax evasion.

This might not, however, be the last step in the trial process, as the second defendant has already publicly stated that he will bring an action before the European Court of Human Rights. Regardless of the outcome of this case, it is clear that the ruling from the Court of Appeal, as partially upheld by the Supreme Court, reflects a general trend towards more transparency in Luxembourg tax practice.

Some interesting legislative developments should also be stressed. 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 a procedure for a creditor to obtain a preservation order to secure payment of pecuniary claims in civil and commercial matters in cross-border cases. The Luxembourg legislator has implemented this Regulation by the Law of 17 May 2017. This Act has introduced the Article 685-5 into the NCPC. Under this provision, a request for obtaining a preservation order has to be made before the Magistrates Court for claims under €10,000 or before the District Court for claims of more than €10,000. Also, under the same Act, a new paragraph has been added to Article 2 of the Law of 23 December 1998, which confers authority to the Luxembourg Financial Regulatory Authority, as the national information authority within the meaning of Article 14 of the EAPO Regulation, to deliver the information necessary to allow the bank(s) and the debtor’s account(s) to be identified in order to facilitate enforcement of a preservation order.

Finally, the fourth Money Laundering Directive (Directive 2015/849) has been implemented into Luxembourg legislation. As a result of this implementation, the scope of the Law of 12 November 2004 on the fight against money laundering and terrorist financing (the AML Law) has been extended. More specifically, the obligations as regards the identification of ultimate beneficial owners have been increased so as to include as many corporate forms as possible.

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.
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 (1) transactions in respect of buying or selling of real estate or business entities, (2) management of money, securities or other assets, (3) opening or management of a bank or securities account, (4) organisation of contributions necessary for the creation, operation or management of companies, or (5) creation, domiciliation, operation or management of trusts, companies or similar structures.

These obligations are:

(a) the establishment of adequate and appropriate internal proceedings;
(b) 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
(c) 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.

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 being made available, including operations performed by lawyers in the normal course of business, are considered as processing of personal data and therefore fall within the scope of the Law of 2 August 2002 on the Protection of Individuals with Regard to the Processing of Personal Data, as amended, and of 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 (the Data Protection Law).

The Data Protection Law would therefore apply to a law firm if:

(a) the data controller is established on Luxembourg territory; or
(b) the data controller, although not established on Luxembourg territory or in any other Member State of the European Community, uses a means of processing located on Luxembourg territory, with the exception of processing used only for the purposes of transit, regardless of the method used to collect the user data.

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 Law.

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.3

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; or

3 Articles 4 and 5 of the Data Protection Law.
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.

As a rule, any processing of personal data must be either authorised or notified to the Data Protection Authority (CNPD) beforehand. Some cases are, however, exempted from this obligation, in particular processing operations carried out by lawyers, notaries and process-servers that are necessary to acknowledge, exercise or defend a legal right.4

As regards the access and analysis of data, such processing will need to comply with the provisions set out in the Data Protection Law, but will be exempted from the notification obligation to the CNPD (see above).

It is also standard, prior to establishing a client relationship, to:

a. inform them about the collection of their data and that they have a right to access it and may ask for a correction if it is inaccurate or incomplete;5 and

b. request their consent via the lawyer’s terms and conditions.

As a rule, the transfer of personal data is not restricted within the EU, provided that data subjects are duly informed of such transfer. However, the data controller may not transfer personal data outside the EU to a state that does not offer a sufficient level of protection of individuals’ privacy, liberty and fundamental rights with regard to the actual or possible processing of personal data.

By exception to the above, the data controller may transfer personal data to a non-safe country if the data subject has expressly consented to the transfer or if the transfer is necessary for, inter alia:

a. complying with obligations ensuring the establishment, exercise or defence of legal claims;

b. the performance of a contract between the data controller and the data subject, or of pre-contractual measures taken in response to the data subject’s request; or

c. the conclusion or performance of a contract, either concluded or to be concluded in the interests of the data subject between the data controller and a third party.

The data controller may also transfer personal data to a non-safe country if duly authorised by the CNPD.

Additional rules on confidentiality may also apply. For example, the Code of Conduct of the Council of Bars and Law Societies of Europe (CCBE) 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

i 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.

4 Article 12.2(c) of the Data Protection Law.
5 Articles 26 and 28 of the Data Protection Law.
6 Article 5.3 of the CCBE Code of Conduct.
Communications between one Luxembourg attorney and another are also confidential unless otherwise specified or if the communication is by nature non-confidential. Relationships 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.

According to 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.\(^7\)

b. 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.

\(^7\) Article 1230 of the NCPC.
VII OUTLOOK AND CONCLUSIONS

No major reform of the judicial system or rules of procedure are expected in the forthcoming months.

However, the Luxembourg Consumers Association ULC has recently taken the lead in a series of individual civil actions brought by consumers against prominent car dealers in Luxembourg. These individual actions are all related to the VW ‘Dieselgate’. They are intended to obtain damages for unfair commercial practices for the sale of vehicles whose environmental performance were allegedly misrepresented in view of the rigging of emission tests by the German car manufacturer. This case is of some interest, as it will most certainly clarify the extent of the provisions of the Luxembourg Consumer Code regarding unfair commercial practices. It might also reopen the debate on the introduction of a class action in Luxembourg procedural law.
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 1,500 cases in 2016. The Mediation Division of the Supreme Court has also been actively involved in facilitating the settlement of ongoing civil and commercial disputes. Since 2012, around 1,600 cases have been referred to the Mediation Division of the Supreme Court, of which around 1,100 have been settled.

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.

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1 Muhammad R C Uteem is a barrister and head of chambers at Uteem Chambers.
Mediation and arbitration procedures are also available at the level of the Mauritius Chamber of Commerce and Industry (MCCI) and the LCIA-MIAC Arbitration Centre.\(^2\)

i The MCCI

The MCCI has, since 1998, 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 LCIA-MIAC Arbitration Centre

The LCIA-MIAC Arbitration Centre was established in July 2011 which provides for various forms of alternative dispute resolution procedures (the more common procedures Arbitration and Mediation) which are available to are Mauritian or international entities that have no connection to Mauritius.

II THE YEAR IN REVIEW

i Case law affecting ADR

**Ramloll Bhooshan Renovation & Building Ltd v. Ministry of Education & Human Resources, Tertiary Education & Scientific Research**\(^3\)

The applicant, a builder, applied to the court for the appointment of an arbitrator to resolve a dispute arising out of three contracts following the decision of the respondent to apply liquidated damages. The respondent resisted the application on the ground that an appendix to the building contracts had removed the reference of dispute to arbitration and substituted therefor reference to the competent court of Mauritius.

It was held that the dispute should be resolved by arbitration because including it in an appendix to the contract was an unacceptable way of inserting an exclusion clause of such importance.

**China International Water and Electrical Corporation v. The State of Mauritius & Ors**\(^4\)

The plaintiff wanted to bring a claim for damages for breach of contract, pertaining to the refund of customs duties and value added tax (VAT) which the plaintiff has paid on the import of equipment and other items. The plaintiff claimed that it was entitled to the refund of the customs duties and VAT since the second defendant never made any reservation or exception in relation to the refund of the said taxes in the contract.

The plaintiff initially triggered the arbitration clause in the contract and submitted a notice of arbitration and subsequently entered an application before the judge in chambers under Article 1005 of the Code of Civil Procedure for the appointment of an arbitrator.

The defendants objected on the ground that the plaintiff did not resort to the proper procedure provided for in the contract to initiate the arbitration proceeding. The defendant,

\(^2\) Created by an agreement between the Government of Mauritius, the London Court of International Arbitration (LCIA) and the Mauritius International Arbitration Centre Limited (MIAC).

\(^3\) 2016 SCJ 517.

\(^4\) 2017 SCJ 3.
however, intimated that the plaintiff was not debarred from seizing the court to resolve the dispute. Counsel for the plaintiff therefore withdrew the application before the judge in chambers.

A case was lodged before the Supreme Court to deal with the issue, which was, however, dismissed on the ground that the plaintiff had failed to give the defendants and co-defendants a one-month notice prior to lodging the case as required by law and the plaintiff was therefore precluded from proceeding with the current claim.

**Le Domaine des Alizes Ltee v. Building & Civil Engineering Co Ltd**

A dispute that arose between the parties based on a construction contract (the contract). The parties triggered the arbitration clause in the contract and referred the matter to be resolved by an arbitral tribunal. The applicant not being satisfied with the arbitration proceedings gave notice of his intention to challenge the arbitral tribunal on the grounds of impartiality.

Subsequently both parties entered into an arbitration termination agreement. In clause 3 of the arbitration termination agreement, the parties agreed to set up an escrow account with a sum of 27,878,690.62 rupees in respect of the amount allegedly owed under the certified payment valuation relating to the contract minus any amount deducted as alleged liquidated damages.

The respondent caused to be served on the applicant a statutory demand since it claims that the sum in the escrow account was agreed as a security for an undisputed sum owed to it by the applicant and that sum is now due and demandable. The applicant on the other hand claims that the sum agreed to be set up in the escrow account was merely done in good faith in order to satisfy the respondent that the applicant would be in a position to discharge its obligations to pay the respondent should that be the case.

The court agreed that clause 3 of the arbitration termination agreement did not imply in any way that the sum requested by the respondent was undisputed, due and demandable but it was merely a comfort for both parties to put an end to the workings of the arbitral tribunal and refer the dispute including all contested amount to a court of law. The court thus decided to set aside the statutory demand by the respondent.

**Hewlett-Packard International Trade BV v. Happy World Ltd**

An appeal against an interlocutory judgment setting aside a plea in limine to the effect that the dispute between the parties should be referred to arbitration under the Rules of Arbitration of the Chamber of Commerce and Industry of Geneva, Switzerland. The current contract (second contract) between the parties did not contain any such clause for arbitration and the learned judge sitting at first instance held that an arbitration clause pertaining to a previous contract between the parties (the first contract) could not be extended to be said to form part of a subsequent contract between the parties.

The jurisdiction of the court to hear the case was also questioned in light of the provisions of the International Arbitration Act 2008 and the competence-competence principle. The court held that it is only where a case initiated in a court of law is governed by

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5 2017 SCJ 131.
6 2017 SCJ 324.
an arbitration agreement that the court must decline jurisdiction to hear the matter. Since in this case the contention is whether an arbitration clause actually existed, the court was within its right to hear this matter.

The court also upheld the decision of the court of first instance and explained that should the intention of the parties have been to the effect that the second contract should contain an arbitration clause, the parties would have ensured that the such a clause would have been reflected in the agreement itself or at the very least they would have supplemented the agreement by way of an annex to the agreement.

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 the 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.

Six designated judges were nominated by the Chief Justice to hear all international arbitration matters in Mauritius. It was intended that in addition to the specialist knowledge that the designated judges will accumulate from hearing all international arbitration matters, they will receive specialist training in this field both in Mauritius and abroad.
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 so 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, the matter was fully argued by both parties before the arbitrator.

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 between US$115–125 million to Betamax for unjustified breach of contracts well as the legal cost and cost of arbitration.7

Following the decision of the SIAC, Betamax has made an application before the courts 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.

The STC has also notified its intention to appeal against the arbitral award delivered by the SIAC on the grounds that the SIAC did not have jurisdiction to entertain the said arbitration procedure on the ground that the dispute was a matter contrary to the public policy in Mauritius in light of Section 39 of the International Arbitration Award 2008.

Betamax has requested that the STC be ordered to deposit, in accordance with established practice, an irrevocable bank guarantee for US$115 million plus interest of approximately 3 per cent per annum, to cater for the eventuality that Betamax was to lose its case, which the STC has obstinately objected and so far refused to provide.

As a result of this refusal by STC to provide the requested deposits, Betamax Limited has obtained and injunction from a judge in state of Karnataka, in Mangalore, India ordering the New Mangalore Port Trust not to let a petroleum ship containing 40,000 metric tons of petroleum product, ordered by the STC, to be shipped out without his permission.

This matter is still under consideration by the relevant court.

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.

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7 The arbitral procedure and its ensuing arbitral award before the SIAC are protected by confidentiality provisions and are thus not available for public consultation.
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 from 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. §

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.

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§ Section 3 of the Court of Civil Appeal Act 1963.
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.9

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 from 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 50,000 rupees) last for a minimum of three months.

District courts also have a small-claims jurisdiction for civil actions where the sum claimed or the matter in dispute does not exceed 25,000 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 more than 50,000 rupees but less than or equal to 500,000 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 500,000 rupees) may take more than one year to be determined, depending on the intricacy of the case.

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.

9 Seebun v. Doomun 2013 SCJ 428.
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.10

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 Act (CCPA), 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 CCPA. 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.

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;

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10 Section 177 Companies Act 2001.
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 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 after 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 CCPA, 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

The Data Protection Act 2004 (DPA) provides that every data controller and data processor must, before keeping or processing personal data\(^\text{11}\) or sensitive personal data,\(^\text{12}\) register himself or herself with the Data Protection Commissioner (the Commissioner). A data controller is statutorily defined as being a person who, either alone or jointly with another person, makes a decision with regard to the purpose for which and the manner in which any personal data is to be processed. A data processor is someone who processes the data on behalf of the data controller.

The DPA provides for several instances where personal data processed for specific purposes is exempt from certain parts of the DPA and these, *inter alia*, include personal data consisting of information in respect of which a claim to legal professional privilege or confidentiality as between a client and legal practitioner in connection with actual or prospective legal proceedings; and disclosure of personal data necessary for the purpose of establishing, exercising or defending legal rights.

The DPA prevents a data controller from transferring personal data to another country without the written authorisation of the Commissioner. The DPA further provides that personal data must not be transferred to a third country unless that country ensures an adequate level of protection for the rights of data subjects in relation to the processing of personal data. This requirement can be circumvented if the data subject gives clear and unambiguous consent or the transfer is necessary, for instance, for the performance of or for entering into a contract between the data subject and the data controller.

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\(^{11}\) Personal data are data that relate to an individual who can be identified from those data or other information, including an opinion forming part of a database, whether or not recorded in a material form, about an individual whose identity is apparent or can reasonably be ascertained from the data, information or opinion.

\(^{12}\) Sensitive personal data is defined as personal information concerning a data subject and consisting of information as to their racial or ethnic origin; political opinion or adherence; religious belief or other belief of a similar nature; membership of a trade union; physical or mental health; sexual preferences or practices; the commission or alleged commission of an offence; any proceedings for an offence committed or alleged to have been committed by him or her, the disposal of such proceedings or the sentence of any court in such proceedings.
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 regards 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 (the Civil Code), 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.13 The intention of the parties to renounce the right to appeal must be clear and unequivocal.14

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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13 *Robert v. Martin* 1865 MR 140.
14 *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:

a 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;

b 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;

c the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties;

d 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;

e the subject matter of the difference is not capable of settlement by arbitration under the laws of Mauritius; or

f 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.

The number of civil cases received at the Mediation Division more than halved to 97 in 2016 from 226 in 2015. Out of 136 cases (97 received in 2015 and 39 pending at the beginning of 2016), about 52 per cent have been referred back to court, 22 per cent were

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15 ‘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.
where agreements between parties have been successfully recorded and 7 per cent were purely and simply struck out. The number of outstanding cases at the end of 2016 fell by 33 per cent compared to the same period in 2015.

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

On 8 May 2016, Mauritius held the 23rd Congress of the International Council for Commercial Arbitration entitled ‘International Arbitration and the Rule of Law: Contribution and Conformity’. The Congress welcomed 882 people from all over the world, among which were the Secretary General of the United Nations Ban Ki-moon and the Egyptian Nobel Peace Prize laureate Mohamed ElBaradei as keynote speakers. The 23rd Congress was the first one to be held in the African region. It aimed at developing Mauritius as a regional hub for international arbitration by strengthening the rule of law, increasing the acceptance of international arbitration as a legitimate, universal and peaceful means for the resolution of commercial and investment disputes, and enhancing the attractiveness of Africa to inward capital flows.

The LCIA-MIAC Arbitration Centre has recently won the Global Arbitration Review (GAR) 2015 award as an up-and-coming regional arbitral institution. GAR makes annual awards in various categories, including for best-prepared and most responsive arbitrator, and for the best international arbitration practice in large and boutique law firms. The winners are selected by a vote from readers of the journal, from a shortlist nominated by the editorial team of GAR.

In 2015, Mauritius chaired the UNCITRAL Working Group II (Arbitration and Conciliation), the Mauritius Convention on Transparency and hosted the signing of the Convention on Transparency dealing with the applicability of the Rules on Transparency, which came into force on 1 April 2014.

Mauritius held its third biennial International Arbitration Conference, ‘The Litmus Test: Challenges to Awards and Enforcement of Awards in Africa’, on 15 and 16 December 2014 to mark the successful continuation of the dynamic project to create a new platform in the region for international commercial and investment arbitration. Mauritius has established itself as a centre of expertise and training in international arbitration for the African continent and beyond.

Over the two days of the conference, the various panels chaired by the heads of the co-hosting arbitration institutions, including the Permanent Court of Arbitration, the LCIA and the International Court of Arbitration, held mock hearings focused on the current and emerging issues in relation to challenges to and the enforcement of arbitral awards in Africa.

In 2013, the MCCI signed a partnership agreement with the Paris Chamber of Commerce and Industry and the Centre for Mediation and Arbitration of Paris, marking the collaboration for the development of MARC into a national and international centre for alternative dispute resolution.
In addition to having a local seat of the PCA in Mauritius, on 28 July 2011 the government of Mauritius entered into an agreement with the LCIA and the Mauritius International Arbitration Centre Limited (MIAC) for the establishment and operation of a new arbitration centre in Mauritius for the conduct and administration of arbitrations within Mauritius. The LCIA-MIAC arbitration rules have been adopted and came into effect for arbitration on 1 October 2012. The Secretariat of the LCIA-MIAC Arbitration Centre has now administered its first arbitration case involving international companies.

The LCIA-MIAC mediation rules provide for the possibility of parties who want to mediate their dispute, irrespective of whether the contract provides for dispute resolution provisions by mediation to refer to the LCIA-MIAC Arbitration Centre for mediation. The Registrar of the LCIA-MIAC Arbitration Centre is also present in Mauritius.
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 inexistent and the court decisions that are the subject matter of such appeal will be considered valid.

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1 Miguel Angel Hernández-Romo Valencia is a partner at Gardere Wynne Sewell.
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:

- lawsuit;
- answer to the lawsuit;
- evidence period;
- allegations; and
- 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 different 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, 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 of 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 of 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 of 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
concession 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 of 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.

### 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’:

- 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;
- 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;

class actions can be of a declarative, constitutive or condemnatory nature;
in class actions interim measures can be requested; and
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:

- formalities related to letters rogatory were complied with;
- they were not issued in an in rem action;
- the foreign judge had jurisdiction according to international rules consistent with those mentioned in Mexican law;
- the defendant was notified or served personally;
- the judgment cannot be overturned or modified by any means in the jurisdiction where it was issued;
- 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;
- the fulfilment of the obligation ordered is not contrary to Mexican public policy; and
- 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:

- it must have an authentic copy of the judgment, award or judicial resolution;
- it must have authentic copies proving that summons were served personally and that the judgment cannot be overturned or modified by any means;
- it is translated into Spanish; and
- 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 fulfillment 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 fulfill 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

g 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 do not have the obligation 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 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 which incorporated 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; or
• the composition of the arbitral award or the arbitral proceeding does not comply with the agreement executed by the parties; or

b 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 computed 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.

iii 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.

iv 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.

VII 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 24

NETHERLANDS

Eelco Meerdink

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. A recent legislative proposal introduces the Netherlands Commercial Court (NCC), a specialised chamber of the Amsterdam District Court and Amsterdam Court of Appeal that 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. The bill, which introduces the Netherlands Commercial Court, has been presented to parliament and is expected to be approved in the first half of 2018. Practical preparations have been made to allow a quick start of the NCC in mid-2018. 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 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 Netherlands Commercial Court and Netherlands Commercial Court of Appeal will be special chambers of the Amsterdam district court and the Amsterdam court of appeal. The rules of the Dutch Code of Civil Procedure will 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, entirely 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 Section III.iii). In 2017, one of the biggest class action settlements in Europe (over €1.2 billion) was considered

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for approval by the Amsterdam court of appeal. Ageas, the successor of the Belgian/Dutch financial institution Fortis, which was bailed out during the financial crisis, had reached a settlement with various claim organisations that represented Fortis shareholders. The settlement provided for a higher compensation per share for ‘active’ claimants (those who were associated with certain claim organisations) than for ‘non-active’ claimants. In an interim decision of 16 June 2017, and upon complaints raised by certain ‘non-active’ shareholders, the Amsterdam Court of Appeal decided not to approve the settlement. The court reasoned that insufficient grounds had been given to substantiate why such a distinction between active and non-active claimants was reasonable. Subsequently, the parties to the settlement agreement renegotiated the terms thereof and submitted an amended settlement agreement for approval to the Amsterdam Court of Appeal on 12 December 2017.

The Enterprise Chamber of the Amsterdam court of appeal is a renowned business court dealing with major corporate battles. Last year, the Enterprise Chamber rendered an important decision in the AkzoNobel hostile takeover battle. AkzoNobel had received unsolicited takeover proposals from PPG Industries, which AkzoNobel’s management and supervisory boards rejected. Activist shareholder Elliott filed a petition with the Enterprise Chamber in Amsterdam requesting an inquiry into AkzoNobel’s conduct and policies, and certain interim measures, including an extraordinary general meeting to vote on the dismissal of the chairman of AkzoNobel’s supervisory board. Ruling on the application for interim measures, the Enterprise Chamber denied the requests by Elliott in its judgment of 29 May 2017. It held that it is the exclusive authority of the boards of a Dutch company to determine the response to an unsolicited takeover proposal. The boards do not have a duty to consult with shareholders prior to responding to an unsolicited takeover proposal. In such a situation, the boards need to carefully take into account the interests of all stakeholders of the company and they remain accountable to shareholders on the position taken in response to an unsolicited takeover proposal. In assessing an unsolicited takeover proposal, the board must be guided by the interests of the company and its stakeholders – which is a broader group than merely shareholders – with a view to long-term value creation. The logical consequence is that a target company can reasonably reject a takeover proposal, even if the majority of shareholders would intend to accept it.

III COURT PROCEDURE

i Overview of court procedure

The Code of Civil Procedure (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. In general, the burden of proof will be on the party that invokes the legal consequences of the facts or rights.

4 At the time of writing the Amsterdam court of appeal has not yet decided on this renewed application.
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.

At the request of the government, an expert committee has made suggestions 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 those suggestions will become law any time soon, if at all.

The judiciary is in the midst of a modernisation project. It is focused on two main themes: first, an increased focus on active case management and, second, on making proceedings fully digital. The new rules streamline and shorten procedures, and courts will exercise more control and will have the power to deviate from the basic procedural structure if the nature or complexity of the case gives cause for this. The digitalisation of the courts will be on a phased basis. Currently, proceedings for the Supreme Court and two district courts use the new procedural framework. At the end of 2018 all district courts will follow suit and, subsequently, the courts of appeal as well.

ii Procedures and time frames

Standard procedure

Under Dutch law, the standard procedure is initiated by a writ of summons. Under the new rules, litigation will start with an originating document that is served with a notice to appear – but the contents, albeit standardised, will be similar to the current 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 judgement 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 new legislation that is part of the aforementioned modernisation project should shorten the current time frame (it aims for judgment to be rendered in six weeks).

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 reimbursement is a fixed amount, however, 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 after 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 for the Supreme Court within three months after 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 an
expeditious trial. 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, will 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, \textit{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 \textit{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, where attachment is requested in order to preserve relevant evidence.

After assets are frozen, the party who has successfully done so must start 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).\(^6\) The EAPO allows a creditor located in an EU Member State to attach the 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 (an example of which is Elliott in the AkzoNobel case described above). 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 Dutch company – a 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.

### Class actions

As briefly mentioned above (see Section II above), 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’)\(^7\) and those on the settlement of mass claims (Act on the Collective Settlement of Mass Claims)\(^8\).

**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

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\(^7\) Governed by Article 3:305a Civil Code.

\(^8\) Articles 7:907-7:910 Civil Code and Articles 1013-1018a CCP.
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 pending 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 court can 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.9

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 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.

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9 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)
Examples are the *Shell Reserves* case\textsuperscript{10} and the *Converium* case.\textsuperscript{11} 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 due to 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 recent *BP Deepwater Horizon* case is an example of a Dutch court refusing to assert jurisdiction in a class action suit. On 7 November 2017, 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.\textsuperscript{12} 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.\textsuperscript{13} 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.

The jurisdiction of the Dutch court, when declaring a class actions 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,

\begin{itemize}
\item \textsuperscript{10} Amsterdam Court of Appeal, 29 May 2006, ECLI:NL:GHAMS:2009:BI5744.
\item \textsuperscript{13} 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.’
\end{itemize}
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.\textsuperscript{14}

**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.\textsuperscript{15} To serve a legal document to 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 of extrajudicial documents in civil or commercial matters.\textsuperscript{16} 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, the CCP applies, which provides 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.

**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.\textsuperscript{17} 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

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\textsuperscript{14} 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 I 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 I bis Regulation. The Converium 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.


\textsuperscript{16} The Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

\textsuperscript{17} Regulation (EU) No. 1215/2012 of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast).
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. Applying ground (3) of this test, the Amsterdam Court of Appeal recently refused recognition of the Russian judgment in which Yukos Oil Company was declared bankrupt. 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.

**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. 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. 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.

**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 — e.g., 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. 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.

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18 Supreme Court, 26 September 2014, ECLI:NL:HR:2014:2838 (Gazprombank).
22 www.rechtspraak.nl.
in mass claim settlements. For instance, in the *Converium* case the 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 interest is required to withdraw from the case as soon as the conflict arises, unless it is incapable 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 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 (expected to take place in April 2018) will limit the circumstances under which mere simplified client due diligence is permissible. Conversely, enhanced client due diligence will apply in more situations, for instance for personal asset-holding vehicles and non-face-to-face-business relationships. 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 Dutch Act on the Protection of Personal Data (APPD), which implements the European Data Protection Directive 95/46/EC and sets out the rules on data protection, will be replaced by the General Data Protection Regulation (GDPR) as of 25 May 2018. The GDPR is similar in many ways to the existing legal framework on data protection, but adds a number

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of stricter rules (which will be discussed below24) and provides more powers to regulators and higher sanctions (€20 million or 4 per cent of annual worldwide turnover, whichever is higher).

The APPD applies (as will the GDPR) 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 collection of operations on personal data, including collecting, recording, storing and using. It applies to activities of an establishment of a company in the EU, though sometimes also if the processing does not take place in the EU (e.g., a cloud service that uses non-EU subcontractors to perform part of the processing). The GDPR has a broader extraterritorial reach; it also applies to companies established outside 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 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 which require protection of personal data). Data processing is also permissible if the data subject has given consent to use data for a specific purpose.25 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) 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.26 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’ due to the fact there is a relationship of authority. When processing data, the processing methods must be proportional to the purposes of

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24 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 (Article 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).

25 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.

26 Legitimate interests can include alleged wrongdoing by an employee, preparation for litigation or compliance with foreign legal obligations.
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 on behalf of and at the instruction of the company, they qualify as data processors. The APPD requires that written agreements are made between a data controller and its data processors. Such agreements should contain provisions regarding instruction, security, supervision, 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. If processing or giving access to the information in a litigation involves transfers of personal data to countries outside the European Economic Area, this is only allowed under specific circumstances.27

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.28

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i 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

27 It is only allowed if (1) the recipient country is deemed by the European Commission to provide an adequate level of data protection or (2) the non-EEA recipient is willing to agree to an EC model contract and a permit for transmission is obtained.

28 According to Article 843a CCP a party can request (access to) certain documents in order to prepare its litigation. In the case Court of appeal Den Bosch, 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 APPD. The court of appeal 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.
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 practices in employment by the company.29

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.

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. It may be sufficient to identify a 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 confidentially relating to the requested documents, or for certain compelling reasons that outweigh the interests of the requesting party.30 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.31

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).

29 Supreme Court. 15 March 2013, ECLI:NL:HR:2013:BY6101.
30 For instance, because records encompass confidential personal or corporate material, or medical, financial or national security information.
31 Supreme Court. 13 September 2013, ECLI:NL:HR:2013:BZ9958.
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.

ii 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 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 (e.g., ICC or NAI) 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, 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 of 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 type of cases, and although business mediation may not be as frequently used as in certain common law jurisdiction, it is nonetheless regularly used in high-stakes disputes between large corporates, both national and international, with often favourable outcomes. Due to 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, currently pending before 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 Dutch 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. Due to 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 the 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 2018 will be the establishment of the Netherlands Commercial Court, the legislative process regarding class actions, and the full implementation of the digitalisation of the courts and increased focus on tailor-made proceedings and active case management.

The legislation establishing the NCC is expected to come into effect in 2018. As mentioned before (see Section II), the NCC is designed as forum for international civil and commercial disputes. In order to facilitate international parties to a cross-border
conflict, English will be the primary language of the NCC, and the proceedings will be largely digitalised. The NCC’s staff will be selected based on their excellent understanding of company law, experience in the field of cross-border dispute resolution, and proficiency in English. Considering the efficiency, pragmatism and low costs of Dutch proceedings, we believe the NCC will meet the growing need for efficient and reliable resolution of international disputes. It may become an attractive alternative for international arbitration and also for English court proceedings, in view of their relatively high costs and of Brexit.

The proposed amendment of the current legal framework for class actions is expected to be subject to further discussion in 2018. The main amendments will be the abolishment of the ban on claiming monetary damages in a class action, the possibility for the court to appoint a principle to represent all interest groups relating to the same subject of a class action, the tightening of eligibility requirements for interest groups wishing to start a class action, and the introduction of the court’s authority to declare a settlement resulting from a class action law suit binding on all prejudiced parties, subject to an opt-out system. We expect these amendments to increase the efficiency and effectiveness of litigating class actions in the Netherlands.

The implementation of the project to modernise civil proceedings will significantly change the way proceedings are conducted, including becoming fully digital. Currently, the Supreme Court and two district courts already use the new procedural framework. Other district courts and the courts of appeal will follow in the course of 2018 and implement the amended procedural law. We anticipate that proceedings will become tailor-made more often.

In conclusion, the Netherlands is putting substantial effort into making its dispute resolution framework more attractive in many ways, also for the benefit of foreign parties.
I  INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

i  The structure of laws in Nigeria’s legal system

The Constitution of the Federal Republic of Nigeria, a decree promulgated in 1999 by the outgoing military government, is the foundation of the Nigerian legal system. The Constitution stipulates that any law inconsistent with it shall be null and void to the extent of such inconsistency. Thus, all other legislation in the land is subordinate to the provisions of the Constitution.\(^2\) All actions of the government in Nigeria are governed by the Constitution, and it is the Constitution, as the organic law of a country, that governs the rights, liberties, powers and responsibilities of the people (both the governed and the government).\(^3\)

Next in the hierarchy is legislation made by the National Assembly for the whole of the territory of Nigeria, Nigeria being a federation, and within the Exclusive Legislative List, which sets out the legislative competence of the federal legislature.

State legislatures may pass laws for their respective states on matters that are not contained in the Exclusive Legislative List. They may also enact legislation in respect of matters that are contained in the Concurrent Legislative List, provided such enactments do not conflict with legislation enacted by the federal legislature.\(^4\)

The customary laws of the various indigenous tribes within Nigeria are also recognised as part of the legal system, provided that they are not repugnant to natural justice, public policy or contrary to any written law.

Last in the hierarchy is common law, law created and refined by judges and inherited from Nigeria’s past as a British colony.

ii  The structure of the courts and specialist tribunals

At the state level, there are two tiers of courts. The lower tier consists of magistrates’ and customary courts. Appeals from these courts go to the superior courts of record established for each state – the High Court, which is the upper tier. The lower courts are, for the present purposes, unimportant.

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1 Babajide Oladipo Ogundipe and Lateef Omoyemi Akangbe are partners at Sofunde, Osakwe, Ogundipe & Belgore.
3 Inspector General of Police v. All Nigeria People’s Party (2007) 18 NWLR Part 1066 457 at 496C-E.
4 See Orhiunu v. Federal Government of Nigeria, supra.
Appeals from High Court (federal or state) decisions lie with a federal court of appeal, and from there to the Federal Supreme Court, which is the final appellate court.

In addition, there are also special courts and tribunals such as the National Industrial Court, the Investment and Securities Tribunal and the Tax Appeal Tribunal. Appeals from the latter two lie with the High Court. The National Industrial Court began as an inferior court from which appeals went to the High Court. However, under a constitutional amendment that took effect on 4 March 2011, the National Industrial Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters relating to or connected with any labour, employment, trade unions, industrial relations and matters arising from the workplace, conditions of service, including health, safety, welfare of labour, employees, workers and matters incidental thereto or connected therewith. Appeal from the National Industrial Court before June 2017 lay with the Court of Appeal only on questions of fundamental rights as contained in Chapter IV of the Constitution of Nigeria. However, with a recent decision of the Supreme Court, all Appeals from the National Industrial Court can now be entertained by the Court of Appeal, and this jurisdiction is not limited only to fundamental rights matters. The jurisdiction of all the High Courts is set out in the Constitution, with the Federal High Court possessing exclusive jurisdiction in certain areas such as admiralty, aviation, taxation, revenue, trademarks, patent rights and corporate matters. State High Courts have unlimited jurisdiction over all other matters where the Federal High Court does not have exclusive jurisdiction. In Lagos State, the High Court is divided into five geographical judicial divisions, and into six subdivisions according to subject matter. There is no maximum number of judges in the High Court, and there are presently 56 judges in the Lagos State High Court.

Appeals may be made from the High Courts, as a matter of right, of final decisions. Appeals may also be made of interlocutory decisions, as a matter of right, if the grounds of appeal are grounds of law alone. Appeals in other instances may be pursued with leave, obtained from the High Court or from the Court of Appeal. Further appeals from the Court of Appeal to the Supreme Court may be made where the grounds of appeal are grounds of law alone. In all other circumstances, appeals require the leave of the lower court. Where leave is denied, a further application for leave to appeal may be made to the appellate court.

### iii The framework for alternative dispute resolution (ADR) procedures

The framework governing ADR in Nigeria includes statute, case law, customary law and general principles of law. Nigeria has ratified and enacted into law the New York Convention and the ICSID Convention. Nigeria’s Arbitration and Conciliation Act (ACA) is modelled on the UNCITRAL Model Law on arbitration. Lagos State is the only state in the federation that has enacted its own arbitration statute. Nigeria is also a member of the World Trade Organization, which also provides for the settlement of disputes between states.

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5 Established pursuant to Section 274 of the Investment & Securities Act No. 29 of 2007.
6 Established pursuant to Section 59 of the Inland Revenue Act, 2004.
8 In the second schedule of the Arbitration and Conciliation Act.
9 Decree No. 49 of 1969 Constitution.
10 Cap A18, Laws of the Federation of Nigeria, 2004
II  THE YEAR IN REVIEW

Over the last year the focus of the courts have been on matters relating to corruption and financial crimes. Thus there are no recent decisions that the authors consider to be material for inclusion here, as most of these cases have either been struck out or are still ongoing.

III  COURT PROCEDURE

i  Overview of court procedure

Many states in the federation have reviewed the civil procedure rules applicable in their High Courts along the lines of the review carried out by Lagos State in the High Court of Lagos State (Civil Procedure) Rules 2004. As indicated above, Lagos State has published new civil procedure rules for the High Court of Lagos State, which took effect on 1 January 2013. Specifically, the most recently introduced rules all aim to discourage frivolous litigation and expedite dispute resolution by means of several novel provisions. The new Lagos Rules are used as a reference below.

Below is a summary of steps to be taken in a civil action commenced in the Lagos State High Court:

a  the claimant prepares a statement of claim together with a list of documentary evidence, a list of witnesses and sworn written statements;

b  the defendant files and serves a statement of defence together with a list of documentary evidence, list of witnesses and sworn written statements within 42 days after service of the statement of claim;

c  the claimant serves a reply to the statement of defence (optional) within 14 days;

d  after issues have been joined and pleadings have been settled, there is a pretrial conference, where the issues are narrowed down, admissions are made and judgment is given on the basis of admissions, discoveries and interrogatories, and relevant documents are exchanged;

e  after the pretrial conference, the case is set down for trial;

f  the trial takes place within one to 12 months after the pretrial conference, depending on the number of witnesses, the length of the documents to be tendered and the schedule of the court;

b  at the conclusion of the trial, the court must give its judgment within a maximum period of 90 days; and

b  unsuccessful parties may appeal to the Court of Appeal within three months of a final judgment and 14 days of an interlocutory decision.

Parties may file motions at any time during the course of litigation, although the pretrial procedure is designed to ensure that motions are disposed of in advance of a case proceeding to trial.

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12 The Federation of Nigeria is made up of 36 states and a Federal Capital Territory.

13 The Lagos State High Court Rules are preferable as their application is directed towards the achievement of a just, efficient and speedy dispensation of justice.
Procedures and time frames

The Lagos State Chief Judge has, pursuant to the Lagos Rules, issued practice directions for a fast-track procedure. Cases assigned to the fast-track route are to be concluded within eight months from their commencement, and for a case to qualify for the fast-track procedure it must be for a claim (or counterclaim) of a minimum of 100 million naira; involve at least one party who is a non-resident investor in Nigeria; or involve a mortgage transaction. All the procedures provided for in the fast-track programme stipulate time frames shorter than those provided for in regular proceedings. For example, the pretrial conference period is limited to just 30 days, when for the regular procedure it lasts three months, and final judgment is to be delivered within 60 days of closing addresses, whereas for regular procedures it is 90 days. Although the application of these new rules has resulted in speedier resolution of applicable rules, the targets set by the rules are not being met by the courts.

All court rules provide for the bringing of urgent applications, which may be brought without notice (ex parte) against the adversary in appropriate circumstances, and the seeking of interim preservative orders to last until the determination of a subsequent similar application notified to the adversary. Where a party apprehends an occurrence that may irreparably damage his or her interests, the rules require him or her to bring his or her application (setting out his or her interests and the dangers apprehended in an accompanying affidavit) without delay to ensure an expedited hearing.

Conversely, to discourage parties that obtain an interim restraining order from employing time-wasting tactics to prolong the order, the rules also stipulate the length of an ex parte order to be seven days subject to extension by another seven days on application or after hearing.

The most notable innovation of the new court rules is the requirement for a party to attach to his or her originating processes all documentary evidence and statements of witnesses to establish a claim or defence. This enables the adversary to have a fair picture of the claim and the evidence by which it would be proved. It also enables the court to assess the strength or otherwise of the claim. The court could then direct that the parties explore the possibilities of arbitration by referring them to the arbitration or mediation arm of the court, where the compromise effort could be professionally directed. In addition, filing charges for new cases are assessed at a percentage of the sum being claimed, and this new practice has made it more expensive for plaintiffs to file actions. The aim is to deter all but the most serious litigants.

Another novel provision of the new rules is the requirement of filing written briefs of argument in respect of motions and responses thereto with a stipulated time frame for all filings, failing which, penalty payments would become due for each day of default.

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14 See Paragraph 2 of the Practice Directions on Fast Track Procedure.
15 See Paragraph 7 of the Practice Directions on Fast Track Procedure.
19 See Order 3, Rule 2(1) of the High Court of Lagos (Civil Procedure) Rules 2012.
21 See Order 44, Rule 4 of the High Court of Lagos (Civil Procedure) Rules 2012.
The final noteworthy innovation of the new rules for treatment here is with regard to the treatment of costs. Previously, Nigerian courts rarely, if ever, awarded costs remotely related to the expenditure incurred by a successful litigant. Costs awarded were, in the main, merely nominal and of little value. Indeed, appellate courts continue to award what are, essentially, nominal costs. In many High Courts now, the previous policy has been reversed by the introduction of the new rules.\textsuperscript{22}

In addition, another objective of the new rules is to expedite the delivery of justice.

iii Class action procedures

In Nigeria, it is possible for a limited number of claimants to institute and prosecute actions for themselves and for persons with similar interests. However, individual claimants must establish their own loss or damage. As a result, class actions of the type frequently seen in the United States, for example, are extremely rare in Nigeria.

iv Representation in proceedings

Citizens’ rights to represent themselves in proceedings before a court are contained in the Constitution as part of the right to fair hearing.\textsuperscript{23} This provision permits all natural persons to prosecute their cases or defend cases against them without counsel if they so choose. Where a person cannot afford litigation (for civil and criminal proceedings), legal aid is made available in Nigeria. The Legal Aid Act provides for a Civil Litigation Service to assist indigent persons to defend and enforce any right or privilege to which that person is ordinarily entitled under the Nigerian legal system. It also provides for a Criminal Defence Service to assist indigent persons involved in criminal investigation or proceedings with advice, assistance and representation.\textsuperscript{24} Lagos State has also established an Office of Public Defender, and the statute makes provision for legal aid to be provided in civil cases.

The question as to the possibility of a non-natural person appearing in court to handle proceedings was settled by the Supreme Court in \textit{Mode (Nig) Ltd v. UBA Plc.}\textsuperscript{25} In that case, the appellant company’s director sought to argue the appeal on behalf of the company as the company was unable to afford counsel. The Court ruled that a litigant may appear in person, but a company is not in the same position as a natural person and thus could not be represented by its director or officer and only by counsel, as the rules of court do not contemplate that a company can sue or appear in person.

v Service out of the jurisdiction

The various rules of courts in Nigeria contain similar provisions for service of process on parties outside their primary jurisdictions.\textsuperscript{26} The State High Court’s jurisdiction is limited to the physical territory of that state, but the Federal High Court has nationwide jurisdiction, so outside jurisdiction for it is outside Nigeria.\textsuperscript{27} However, the rules ordinarily provide that service on natural persons shall be personal; that is, the delivery of process physically on

\textsuperscript{22} See Order 49, Rule 1 of the High Court of Lagos (Civil Procedure) Rules 2012.
\textsuperscript{23} See Section 36(2)(a) of the 1999 Constitution.
\textsuperscript{24} See Section 8, Legal Aid Act, 2011. The second schedule to the Legal Aid Act also lists the proceedings in respect of which legal aid may be given.
\textsuperscript{25} 2004 15 NWLR (Part) 897 p. 542.
\textsuperscript{26} See Order 8 of the Federal High Court (Civil Procedure) Rules 2000.
\textsuperscript{27} See Order 6, Rule 5 of the Federal High Court Rules.

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the defendant,\(^{28}\) and for non-natural persons by delivering same on specified categories of principal officers at designated addresses of such entities.\(^{29}\) However, regarding service out of the jurisdiction, the rules make no distinction between the mode of service on natural and non-natural defendants, but it is widely accepted that the modes of service stipulated in Rules 6 and 8 would apply, and in the event of failure of such service the court could order substituted service upon application by the plaintiff.

As an example, the provisions of Order 8 of the High Court of Lagos State (Civil Procedure) Rules 2012 have laid down the procedure for the service of process on both natural and unnatural persons outside the jurisdiction.\(^ {30}\)

Under the Lagos Rules, a judge may permit service of process out of Nigeria where the entire claim relates to land situated within the jurisdiction (Lagos State); or where the suit calls for the construction of an instrument affecting land or hereditament\(^ {31}\) situated within the jurisdiction; or if the relief sought is against any person domiciled or resident within the jurisdiction; or if the claim is for the administration of the estate of a deceased person who was ordinarily resident within the jurisdiction at the time of death; or the claim is brought to enforce a contract against a defendant resident within jurisdiction, or if said contract was made within or by an agent within the jurisdiction, etc.\(^ {32}\)

Furthermore, where parties have by their contract prescribed the mode or place of service, or the person that may serve or the person who may be served, the court will enforce the same.\(^ {33}\)

For originating processes, the rules require service by court bailiffs or other accredited process servers.\(^ {34}\) Parties are expected to be served personally except where this has proved impossible, whereupon the plaintiff could apply for substituted service as discussed above. However, where a party has instructed counsel that has entered appearance to the action, processes meant for service out of the jurisdiction could be properly served on counsel.

The rules apply to natural and legal persons.

\section{vi Enforcement of foreign judgments}

Judgments of courts outside Nigeria are enforceable in Nigeria, but this is regulated by two statutes—the Reciprocal Enforcement of Judgments Act of 1958 (the 1922 Ordinance) and the Foreign Judgments (Reciprocal Enforcement) Act of 1960 (the 1960 Act). The applicability of both statutes to foreign judgment enforcement is another issue entirely. Decisions of the Supreme Court have indicated that the 1922 Ordinance regulates only judgments of courts from the ‘United Kingdom and other parts of Her Majesty’s Dominions and Territories under Her Majesty’s protection’,\(^ {35}\) while the 1960 Act regulates the enforcement of judgments from all other countries that extend reciprocity to judgments of Nigerian courts if so proclaimed by

\begin{footnotesize}
\begin{enumerate}
\item See Order 13, Rule 2 of the Federal High Court Rules.
\item See Order 13, Rules 6 and 8 of the Federal High Court Rules.
\item Ibid.
\item The said provision of the Lagos State Civil Procedure 2012, particularly Order 8 Rule 1, is in reference to land or any property that can be inherited; that is, anything that passes through intestacy. In other words, a judge may allow any originating process or other process to be served outside Nigeria where the property to be inherited is within its jurisdiction.
\item See Order 8, Rule 1 (a–l).
\item See Order 8, Rule 2 of the High Court of Lagos State (Civil Procedure) Rules 2012.
\item See Order 13, Rule 13 of the Federal High Court Rules.
\item See the introductory and descriptive part of the 1958 Ordinance.
\end{enumerate}
\end{footnotesize}
the Federal Minister of Justice. The Supreme Court, however, has held this part of the 1990 Act still to be inoperative because the Minister of Justice is yet to make the proclamation required for its commencement. Therefore, court judgments from the United Kingdom, Her Majesty’s former dominions and protected territories and Commonwealth countries can currently be registered and enforced in Nigeria under the 1922 Ordinance. Judgments from other countries are only enforceable within 12 months of their delivery (or such a longer period as may be granted by the court) under Section 10(a) of the 1960 Act by virtue of statute until the Minister of Justice makes the necessary declaration. Such judgments may, however, be enforceable under common law by an action in court.

vii  Assistance to foreign courts

The circumstances in which courts in Nigeria may render assistance to foreign courts are set out in the rules of the High Courts. These provisions occur with little or no variation in the rules of the various state courts. Furthermore, the Federal High Court rules also contain similar provisions regarding when a court in Nigeria may render assistance to a foreign court.

Most often, the kind of assistance courts in Nigeria render to foreign courts is limited to granting leave to effect the service of foreign process on a resident within the jurisdiction of the court. A letter of request is required from the court or tribunal for service on any person who is to be directed to the Attorney General of the Federation to effect service. Two copies of the processes or citation must be served. On payment of the approved amount, the process or citation shall be served on the person unless otherwise directed by the judge.

viii  Access to court files

Generally, Section 36(3) of the Constitution of the Federal Republic of Nigeria, the rules of court and other enactments expressly make it mandatory for proceedings of court to be held in public. Members of the public have unfettered access to attend and observe any ongoing court proceedings. This right of access does not, however, give members of the public an automatic right to obtain information in relation to court proceedings. A citizen desiring information regarding specific proceedings must comply with the prescribed application process.

However, there are qualified exceptions to this constitutional provision, one of which is Section 36(4), which states:

Provided that –
A court or such a tribunal may exclude from its proceedings person other than the parties thereto or their legal practitioners in the interest of defence, public safety, public order, public morality, the

40  Ibid.
41  Ibid.
welfare of persons who have not attained the age of eighteen years, the protection of the private lives of the parties or to such extent as it may consider necessary by reason of special circumstances in which publicity would be contrary to the interest of justice.

If, in any proceedings before a court or such a tribunal, a minister of the federal government or a commissioner of the government of a state satisfies the court or tribunal that it would not be in the public interest for any matter heard in private to be disclosed, it shall take such other action as may be necessary or expedient to prevent the disclosure of the matter.

In cases where the proceedings are not restricted, an application for certified true copies of evidence is approved by a judge in chambers and, more often than not, the applicant making the request may be required to state his or her interest in the matter before request for pleadings or evidence is granted.

After the grant of the approval, a statutory fee, usually assessed by the registrar, is paid before the eventual collection of same. In addition, the passage of the Freedom of Information Act, No. 4, 2011, has made public records and information more freely available to the public. Under this Act, a person has the right to access or request information, whether or not in any written form, that is in the custody or possession of any public official, agency or institution howsoever described. An applicant need not demonstrate any specific interest in the information being applied for.

Public access to case files of concluded proceedings

The position is slightly similar to the one stated above. An application is usually made to the chief registrar of the court stating the request and if possible the reasons for it. Where the applicant is a party in the proceedings, the approval for information is usually given as a matter of course except if there are cogent reasons for its refusal. After the approval in both cases, statutory fees, usually assessed by the registrar, are paid before a certified true copy of the information is obtained.

ix  Litigation funding

Nigeria, as a former British colony, operates a common law system, under which maintenance, ‘the procurement, by direct or indirect financial assistance, of another person to institute, or carry on or defend civil proceedings without lawful justification’ and champerty, an aggravated form of maintenance, in which the maintainer received ‘a share of the proceeds of the action or suit or other contentious proceedings’ were prohibited. In the general context, however, it was not certain whether Nigerian courts would continue to recognise these ancient prohibitions. However, within the Nigerian legal profession, both champerty and maintenance were expressly prohibited under the rules of professional conduct, until 2007, when new rules were introduced.

The removal of this prohibition went unnoticed for several years. The increased interest in litigation funding in other jurisdictions, has resulted in renewed scrutiny of this area in Nigeria. While there do not appear to have been any instances where litigation funding has been considered by Nigerian courts, it seems to be clear that there are no restrictions in Nigeria as to third-party funding of litigation.
IV LEGAL PRACTICE

Lawyers’ fees can be categorised into two areas. The first is the fees to be earned as an advocate, and the second the fees to be earned as a solicitor. The fees earned as a litigator are unregulated. These fees are essentially determined by negotiation between the client and the litigator.

With regard to work done for basic non-contentious or advisory work, the fee is also a matter for agreement between the solicitor and the client, but in assessing the fee, the solicitor would ordinarily be expected to take into account such factors as the subject matter of the dispute, the amount of time spent and the experience or age of the counsel involved.

The Legal Practitioners (Remuneration for Legal Documentation and other Land Matters) Order 1991 regulates the remuneration of legal practitioners in the preparation of legal documentations and other land matters. These fees are fixed and non-negotiable. However, instances where the scale is not applied are frequent, and these pass with little, if any, attempt to prevent the practice.

Regarding fees charged for probate matters, lawyers have developed the practice of charging a fixed percentage of the total amount of the estate, usually 10 per cent.

A conditional fee arrangement is permissible depending on the agreement between the parties and provided it is not champertous, which would make it void and unenforceable. The emerging trend in line with the practice in other jurisdictions in this area relates to the usage of a predetermined hourly rate as the basis of the calculation of fees.

i Conflicts of interest and Chinese walls

The practice of establishing Chinese walls is a possible departure from the long-standing rule against one lawyer acting for both sides in a dispute.

Information barriers that are common in jurisdictions where large firms are the norm and the separation is more easily enforced are less likely to be needed in Nigeria, where the firms, if partnerships, are small and are mostly single-proprietor firms. This is an area in which Nigeria awaits future developments, as law firms grow in size and sophistication.

ii Lawyers’ responsibilities in relation to money laundering, proceeds of crime and terrorism

The Rules of Professional Conduct (2007) regulate the ethical conduct of lawyers in Nigeria. They make provision for the duties of lawyers towards judges, co-lawyers and their clients.

Rule 15(2)(a) specifically provides that a lawyer, in representing a client, must keep strictly within the law notwithstanding any contrary instruction by the client and, if the client insists on a breach of the law, the lawyer shall withdraw his or her service. The lawyer is also under the obligation to endeavour to restrain and prevent the client from committing the breach of law.

45 Order 7, Section 1 of the Legal Practitioners (Remuneration for Legal Documentation and other Land matters) Order, supra.
46 See Oyo v. Mercantile Bank (Nig) Ltd, supra, Paragraphs B–C.
A lawyer also has the obligation to reveal any illegal or fraudulent act of his or her client, except when the information is a privileged communication.

iii Data protection

There is presently no precise or detailed data privacy or protection law in Nigeria. The only legislation that provides for the protection of privacy is the Constitution of the Federal Republic of Nigeria (the Constitution). Section 37 of the Constitution provides that: ‘The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected’. Other than this general protection given by the Constitution, there is no comprehensive law on data protection. However, there are a few industry-specific laws and regulations that provide some privacy-related protections, which include the Freedom of Information Act, 2011 (the FOI Act), the Child Rights Act 2003, the Consumer Code of Practice Regulations 2007 (the NCC Regulations), the National Information Technology Development Agency Guidelines on Data Protection (the NITDA Guidelines) made pursuant to the NITDA Act 2007, The National Identity Management Commission Act (the NIMC Act).

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

Nigeria’s legal system, being based on English principles of common law and equity, also recognises the common law principles regarding privilege, which involve some advantages, special rights, exemptions or immunity enjoyed by an individual or class of persons as opposed to a right enjoyed by all. In Nigeria, however, certain types of privilege receive statutory protection, having been enacted into Nigeria’s Evidence Act. In Nigeria, privilege attaches only as provided for in the Evidence Ordinance. Thus, no privilege attaches to communication between priest and penitent or doctor and patient, spousal communications where couples were not married under the statute, Islamic law and common law. Under common law, a solicitor may not disclose the contents or the condition of any document

49 (Chapter C23, Laws of the Federation of Nigeria 2004 (as amended).
50 Section 14 of the FOI Act provides that a public institution is obliged to deny an application for information that contains personal information unless the individual involved consents to the disclosure, or where such information is publicly available. Also, Section 16 of the FOI Act provides that a public institution may deny an application for disclosure of information that is subject to various forms of professional privilege conferred by law (such as lawyer-client privilege, health workers-client privilege, journalism confidentiality privilege).
51 This Act regulates the protection of children (persons under the age of 18 years) and limits access to information relating to children in certain circumstances.
52 Section 26 of the NIMC Act provides that no person or corporate body shall have access to data or information contained in the Database with respect to a registered individual entry without the authorisation of the Commission. The Commission can however provide another person with information recorded in the individual's entry in the Database without the individual's consent for example, interest of National Security, for purposes connected with the prevention or detection of crime or for any other purpose specified by the Commission in a regulation.
54 For example, see Sections 161(3), 166, 168, 170, 174 and 176 of the Act.
that he or she has become acquainted with in the course of and for the purpose of such employment. The privilege is that of the client and not of the legal practitioner and, as such, can only be waived by the client. The right of confidentiality guaranteed by Section 170(1) of the Evidence Act is absolute, as the courts cannot compel counsel to disclose information given to them by a client in confidence.

The protections conferred by privilege attach to the individuals and class of persons named in the statutory provisions conferring the privileges. Principally it protects a witness from giving evidence relevant to an issue before the court. Persons not protected by privilege cannot avail themselves of it.

An individual from whom privileged information is ordered by a regulatory agency may only seek judicial intervention to prevent being made to hand over the required information.

Foreign lawyers would be bound from violating privilege if they are to be witnesses in proceedings conducted in accordance with Nigerian law under which the protections conferred by the Evidence Act would be given effect.

ii Production of documents

The only documentary evidence admissible in Nigerian courts is evidence relevant to prove facts in issue. Relevance is the foundation of admissibility in this jurisdiction, and if the court finds a document to be irrelevant to the determination of the issues in dispute then such a document would be rejected and so marked.

Relevance of evidence for the purpose of admissibility in proceedings occurs in varying degrees, thus some relevant facts may not be receivable in evidence or admissible because the court finds them to be remotely relevant. Furthermore, the relevance of some documents does not automatically make that document receivable in evidence; it only becomes admissible when it passes the tests of admissibility prescribed by the evidence ordinance (for example, if it is a copy of a public document). It only becomes admissible if it is shown that it is properly issued from proper custody or if proper foundation was laid for its admissibility.

Subject to the proper foundation being laid regarding the production of documents stored electronically overseas, copies would be receivable in evidence in proceedings in Nigeria if they are private documents. Copies of public documents similarly stored overseas would also be admissible if shown to have been issued from proper custody. Only copies of said documents need be produced in court to be received in evidence. The rule of evidence in Nigeria has not been reformed to permit documentary evidence in Nigeria by electronic means.

Regardless of who has custody of the originals of a document, copies would be received in evidence if the party intending to rely on them shows them to be relevant and lays proper foundation for their admissibility. There is no requirement to produce all documents held by subsidiary or parent companies, but if they are relevant and proper foundation is laid, they would be admissible. The production of documents held by third-party advisers is subject to the provisions regarding privilege in the Evidence Act. To enjoy privilege, third-party advisers

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55 Abubakar v. Chuku [2007] 18 NWLR.
56 See Sections 6 and 10 of the Evidence Act and also Agunbiade v. Sasegbon 1968 5 NSCC p. 147 at 150.
57 Ogunonze v. the State 1997 8 NWLR Part 516 566 at 588.
must be legal practitioners as the Act only protects attorney–client communication acquired or produced in the course of the relationship or employment. This privilege does not cover the client.

Electronically stored documents cannot be received in evidence in that state unless hard copies are made and the necessary foundation laid for their admissibility. A litigant may review electronic records for the purpose of litigation mainly under the rules of discovery where the facilities and the documents are under the control of the adversary or third party, where a document that may aid the litigant is in the electronic storage of the adversary and the adversary consents to the litigant’s access to such records. This scenario is optimistic, as practice shows that adversaries do not normally hand their opponents the information voluntarily. Rather, the natural reaction of the adversary would be to suppress records and seek to disclaim or discredit copies of said records produced by the litigant.

The rules of privilege also apply to in-house lawyers because they are bound by both the Evidence Act, various rules of court and case law. An in-house lawyer like any other lawyer cannot be compelled to give evidence or produce confidential information or exhibits of what transpired between himself or herself and a client.

The rules regarding privilege may apply to a foreign lawyer in the same manner it would apply to an in-house lawyer in Nigeria. Except where this does not comply with the privilege law in his or her country of origin, a foreign lawyer cannot be compelled to give evidence or documents containing confidential information shared with a client.

There has been no recent development in this area in Nigeria as the law still appears to be static in this regard.

VI ALTERNATIVES TO LITIGATION

i Arbitration

Arbitration in Nigeria is primarily governed by the Arbitration and Conciliation Decree, which is a federal statute. However, in 2009, the Lagos State House of Assembly enacted an Arbitration Law, in force in Lagos State, providing a different statutory framework for the conduct of arbitration in Lagos State. The constitutional basis upon which the Lagos State House of Assembly enacted the legislation is that the subject of the legislation – commercial contracts – is a residual matter, not being contained in the legislative lists in the second schedule to the Constitution.

The major local arbitral institutions are the Lagos Court of Arbitration, the Nigerian Branch of the Chartered Institute of Arbitrators and the Lagos Regional Centre for International Commercial Arbitration. The Lagos Court of Arbitration was created by the Lagos State legislature in 2009 to promote arbitration and ADR within Lagos State, and to make rules for arbitration conducted under the Lagos State Arbitration Law. The main international institutions involved in Nigeria-related disputes include the Permanent Court

59 Arbitration and Conciliation Act.

60 Under the Nigerian Constitution, legislative powers are shared between the federal and state legislatures. While the federal legislature is empowered to make laws in respect of matters contained in the exclusive and concurrent legislative lists, state legislators are empowered to make laws in respect of matters not contained in the exclusive legislative list. Such matters include those on the concurrent legislative list (to the extent that the federal legislatures have not made any law in respect thereto). All other matters are considered to be ‘residual’ matters, and are matters in respect of which only the states may legislate.
of Arbitration, the International Centre for Settlement of Investment Disputes, the Court of Arbitration of the International Chamber of Commerce, the London Court of International Arbitration, and the WIPO Arbitration and Mediation Centre.

Arbitration is increasingly accepted by both the legal and business communities in Nigeria as an alternative to litigation. Furthermore, it has become common for investors to always insist on inserting arbitration clauses into commercial agreements; this is to avoid resorting to litigation in the event of a dispute and is considered expedient as it is flexible and faster; parties can choose their venue and the applicable laws and appoint their arbitrators, and privacy and confidentiality is also guaranteed.

There is no right of appeal available to a party under either the Arbitration and Conciliation Act or the Lagos State Arbitration Law. An award may only be set aside for reasons of misconduct or other procedural irregularity by the courts.61

The options viable for the enforcement of foreign awards are laid down in Section 51 of the Arbitration and Conciliation Act.

The application for the enforcement of a foreign award is made ex parte supported by an affidavit with, inter alia, a duly authenticated original award or duly certified copy thereof, an original arbitration agreement or duly certified copy thereof and, where the award is not made in English, a duly certified translation.

The New York Convention applies to arbitration in Nigeria. The Arbitration and Conciliation Act incorporates the New York Convention of 1958, which is particularly set out as the Second Schedule to the Act.62

Recent decisions from the Federal High Court sitting in Abuja have raised issues about the types of cases that are arbitrable in domestic arbitration in Nigeria.63 Certain commentators appear to have taken the view that Nigerian courts have improperly intervened in international arbitration, though we do not believe this is the case.64

ii Mediation

In this jurisdiction, mediation is generally governed by the agreement of the parties to a contract. The rules governing mediation may be established by the parties involved in a dispute or by incorporating rules of some mediation and conciliation organisation, such as the Optional Conciliation Rules of the International Chamber of Commerce or the Conciliation Rules of the American Arbitration Association.

The statutory provisions governing mediation include the Arbitration and Conciliation Act, the Lagos State Multi-Door Courthouse Laws of Lagos State, 2007.

In Lagos State, the Practice Direction of the Lagos Multi-Door Court House (the ADR Centre), states that, on referral to any of the ADR methods, the ADR sessions shall be administered in accordance with the Negotiation and Conflict Management Group (NCMG) Mediation Procedure Rules 2002 or the NCMG Arbitration Procedure Rules 2002.65

61 See Sections 30 and 32 of the Arbitration Act.
64 Comments by Emmanuel Gaillard at the ICCA Conference in Singapore in June 2012.
65 See the Lagos Multi-Door Court House, The ADR Centre Practice Direction pursuant to Section 274 of the Constitution of the Federal Republic of Nigeria 1999.
Other forms of ADR are provided for by the Multi-Door Court House. The Multi-Door Court House is an ADR centre annexed to the court that offers a variety of ADR processes. It was established to supplement available resources for easy access to justice. The options available at the Multi-Door Court House include, but are not limited to, the following: early neutral evaluation, conciliation and negotiation.

VII OUTLOOK AND CONCLUSIONS

The year 2017 was challenging for Nigeria and the country’s legal profession. Anti-corruption litigation still dominates the landscape as the Buhari-led regime have concentrated more on the crippling corruption that has placed the nation in a deprived political and economic situation, and was widely alleged to have been perpetrated by previous political and military leaders.

The legal profession also has its own share of anti-corruption litigation, as the crusade ensured that judges, including Supreme Court justices, were arrested in late 2016 for allegations of bribery and corruption. A number of those judges have been arraigned before the court, and one of them have been dismissed of all charges preferred against him. The trial of other judges arrested is still ongoing.

In pursuance of the anti graft war waged by the Buhari-led administration, anti-graft agencies have been able to recover huge sums of money and property that have been alleged to be fraudulently converted from Nigerian National Petroleum Commission (NNPC) by Diezani Allison-Madueke (former Minister of Petroleum), for the federal government, mostly through the whistle-blowing policy introduced in December 2016. The Nigerian government has also signed various bilateral agreements on extradition and Transfer of Sentenced Persons and Mutual Legal Assistance on Criminal Matters, which include the recovery and repatriation of stolen wealth.

A prominent case that has been decided in 2017 is the case that settles the issue of whether an appeal in labour disputes can be made from the National Industrial Court to the Court of Appeal on any issue, without considering whether or not they bother on Human Rights. Over the years, it had been the belief that appeals from the National Industrial Court to the Court of Appeal should only rest on questions of Fundamental Human Rights. However, the decision of the Supreme Court in 

Skype Bank v. Victor Anaemem Iwu

(2017) 16 NWLR Part 1590 24

has finally put to rest the controversy on conflicting Court of Appeal decisions on the right to appeal against a judgment of the NIC. By this decision, an appeal against the decision of the NIC is not limited to only fundamental rights. The practical implications of this decision would be that most employers with the financial resources will now initiate appeals against the decisions of the NIC thereby frustrating aggrieved employees who may not be able to afford the high cost of prosecuting appeals to the Court of Appeal.

Nonetheless, widespread support for the anti-corruption drive will likely ensure that 2018 is set to be a busy year for reforms in terms of the judiciary.
Chapter 26

POLAND

Krzysztof Ciepliński

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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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, due 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 40 minor amendments to the Code of Civil Procedure and related laws.

The year 2017 also saw the 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, modifications aimed at facilitating the pursuit and enforcement of claims:

a. increasing the value of claims heard in the simplified procedure to 20,000 zlotys (from 10,000 zlotys);

b. extending the validity of an injunction granted pending the proceedings to two months (from one month) after the final resolution of the dispute;

c. introducing the possibility – in the event that enforcement from the debtor's estate fails – to demand that the debtor disclose any acts by which it disposed of its rights or assets concluded within the five years preceding the institution of the enforcement proceedings, as a result of which its solvency worsened (in order to allow the creditor to file Paulian action claims against third-party beneficiaries of the debtor's acts).

The year 2017 also brought some interesting awards addressing important procedural issues in civil and commercial matters:

a. In a decision of 19 January 2017, the Supreme Court (Case No. II CSK 459/15) ruled that the lack of a formal decision to accept evidence brought by a party to the proceedings as evidence, does not constitute a procedural error serious enough to annul...
the ruling, if challenged, as long as it results clearly from the written justification what
the evidence material that the court examined was, and what conclusions were drawn
from the evidence.

b In a resolution of 16 February 2017, the Supreme Court (Case No. III CZP 105/16)
explained that the respondent must be served with court correspondence using its
current first and last name, and if the service was made using out-of-date personal data
of the respondent, then the service was irregular and produced no legal effects with
respect to the respondent.

c In a judgment of 13 April 2017, the Supreme Court (Case No. I CSK 270/16) clarified
that the court could not sustain claims and rule in favour of the claimant on a different
legal basis that was brought by the claimant before advising the parties in advance
about the possibility. Otherwise, the respondent has no time to organise its defence
properly, meaning that its constitutional right to be heard becomes infringed. The
Supreme Court concluded that the court's decision must not come as a surprise.

d In a resolution of 24 May 2017, the Supreme Court (Case No. III CZP 18/17)
confirmed the majority opinion in the jurisprudence that a request to be served with a
judgment along with its written justification must be made after the judgment is issued,
or has no legal effect.

e In a judgment of 23 June 2017, the Supreme Court (Case No. I CSK 625/16) stated,
contrary to the existing court practice, that if the respondent defends itself against
contractual penalty claims and requests a reduction, among other defences, then the
arguments in support of that request must be made in due time in order to allow the
claimant to respond, even if the respondent also challenges the validity of the entire
contractual penalty claim (i.e., that a request to dismiss the law suit in full does not
cover a request for a reduction).

f In a judgment of 20 July 2017, the Supreme Court (Case No. I CSK 716/16) recalled
that a conciliation petition would interrupt the limitation period of the claims it relates
to, as long as these claims are detailed enough, and only with respect to the amount
claimed. The limitation period would not be interrupted with respect to other claims
that might result from the same relationship between the parties that gave rise to the
dispute, even if they were generally referred to in the petition.

According to the official statistics published by the Ministry of Justice, in the first half of
2017:6

a there were over 1.8 million new civil law claims (excluding land and mortgage, labour
law, social insurance, and family law claims) and almost 300,000 new commercial
claims (excluding registry, consumer and competition protection and EU trademark
and design cases) brought before the Polish courts (jointly 33 per cent of all cases
brought to the courts;

b almost 1.8 million civil law cases (excluding the cases mentioned above) and almost
208,000 commercial cases (excluding the cases mentioned above) were concluded
before the Polish courts (around 32 per cent of all cases concluded); and the above
figures are likely to double by the end of 2017;

c 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 less than 40 per cent of their appeals);

d the average length of first instance civil court proceedings in civil law cases was 5.5 months before the district courts and 7.3 months before the regional courts, whereas the average length of first instance civil court proceedings in commercial cases was 6.5 months before the district courts and 9.1 months before the regional courts; and

e the average length of first instance civil court proceedings in purely contentious (litigious) matters (exclusive of summary proceedings terminating with the issue of an order for payment on an *ex parte* hearing) was essentially longer: in civil law cases it ran to 10.8 months before the district courts and 8.4 months before the regional courts, and in commercial cases it was 14.1 months before the district courts and 15.5 months before the regional courts, which gives a better general idea of how fast a simple ordinary case (not involving expert opinions, etc.) is likely to be resolved at first instance.

In general terms, the 2017 statistics show a slight decrease in all the above parameters (i.e., in particular, the proceedings are taking longer) with respect to 2016, and it is likely that the situation will worsen by the end of 2017.

### 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, due 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 pronouncement of the judgment and the issue of written grounds (which need to be additionally requested within seven days following the public pronouncement 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 from 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:

a matrimonial matters (in particular to divorces);
b certain relations between parents and their children;
c labour law and social insurance cases;
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 timeframe, 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, 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. 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.

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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.

### Class actions

Class actions were introduced to the Polish legal system by the Act on Pursuing Claims in Group Proceedings dated 17 December 2009,\(^8\) 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 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.

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\(^8\) Journal of Laws of 2010, No 7, Item 44, as amended.
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 advisor (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 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.

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
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:

a performing those actions would be contrary to the basic principles of the legal order of Poland (the public policy clause);
b performing those actions is beyond the scope of the activities of Polish courts;
c the petitioning country refuses to perform such actions when petitioned by Polish courts; or
d 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:

a drafting and receiving copies and excerpts from case files; and
b 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

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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 advisors’ 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

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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 Financing of Terrorism of 16 November 2000, which implements into the Polish legal system Directives 2001/97/EC and 2005/60/EC, 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 the following professionals:

a notaries within the scope of notarial activity regarding trading in assets;

b statutory auditors practising their profession; and

c tax advisers practising their profession;

The definition also includes the following legal practitioners:

a advocates practising their profession;

b legal advisers practising their profession outside an employment relationship with agencies serving government and local government authorities; and

c foreign lawyers providing legal assistance outside their employment relationship.

The obligations of the ‘relevant persons’ are set out in Chapter 3 of the Act. Under its Article 8(5), legal professionals practising one of the professions mentioned above (with the exception of notaries) are excluded from the general rule set out in Article 8 of this Act, which provides that a relevant person who carries out a transaction with a value exceeding €15,000 must register it. In addition, Article 10d of the Act excludes the applicability of many obligations provided under the Act to legal practitioners – advocates, legal advisers and foreign lawyers.

In this context, due consideration should be given, in particular, to Article 8(3), which sets out that a relevant person (covering all the types of professionals mentioned above,
including legal practitioners) conducting a transaction that appears to be linked with money laundering or financing terrorism must register that transaction, irrespective of its value or nature.

In addition, Article 8(3a) extends the applicability of the obligation specified above. It sets out a duty for legal practitioners to register suspicious transactions even if they are not actually conducting particular transactions themselves but have gained knowledge of them through performing a contract with the client. However, in relation to advocates, legal advisers and foreign lawyers, this obligation is limited by Article 8(3b), which stipulates that they must comply with this obligation only if they participate in transactions when providing their clients with assistance in planning or conducting transactions regarding:

- buying or selling of immovable properties or enterprises;
- management of money, securities, or other assets;
- the opening or managing of accounts;
- organising payments or additional payments to share capital, organising contributions into the establishment, operation or management of companies; or
- establishing and operating enterprises in another organisational form and managing their business.

The above are exclusive of cases involving representation under power of attorney in relation to pending proceedings or advice for the purpose of said proceedings.

Information on all transactions registered by legal professionals has to be immediately communicated to the General Inspector of Financial Information.

Legal professionals must keep a register of suspicious transactions, and must keep all suitable documents and information relating to them for a period of five years, starting from the first day of the year following the one in which the most recent record regarding the transaction is made. Finally, legal professionals are obliged to take due diligence measures in reference to their clients. Article 8b(3) Point 1 of the Act imposes an obligation to identify the client and to verify the client’s identity based on documents or publicly available information. The scope of application of that duty is determined based on an assessment of the risk of money laundering and financing of terrorism by taking into account, in particular, the type of the client, the business relationships, the products or the transactions. If a legal professional cannot perform that obligation, then he or she cannot carry out the legal transaction, or must terminate the agreements already made, and is also obliged to communicate the information on that particular client and the planned transaction to the right authority.

Article 6 Section 4 of the Law on Advocacy of 26 May 1982, as well as Article 3 Section 6 of the Law on legal advisers of 6 July 1982 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 29 August 1997 (as well as by several regulations issued under the provisions of this Act, covering specific requirements and technical details regarding

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processing of personal data), which will be heavily revised by 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). The new EU data protection regulation will apply from 25 May 2018 (it entered into force on 24 May 2016).

According to Article 23 Section 1(5) of the Polish Personal Data Protection Act, the personal data administrator is entitled to process personal data within the scope necessary to fulfil the administrator’s ‘legally justified purposes’.

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.

Under the explicit wording of the Act, pursuing claims related to business activity conducted by a personal data administrator constitutes one of the ‘legally justified purposes’.

Legal professionals 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) under a written personal data processing agreement concluded between legal professionals and the client, granting authorisation for processing such personal data.

Under the agreement, personal data processing is limited and covers processing personal data only for the purposes and within the scope as defined in the agreement (usually for the purposes of pursuing claims, including access to case files, evidence, etc.). Legal professionals act as personal data processors and the client remains the sole personal data administrator.

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, either a personal data processing agreement is required (if another law firm or outsourcer will act as the processor) or, rarely, the person whose personal data will be transferred should grant his or her consent to the transfer (if a law firm or outsourcer will act as personal data administrator).

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 subject to numerous restrictions, including the need to obtain the consent of the person for such transfer, concluding a processing agreement using standard clauses issued by the European Commission or, on certain occasions, the consent of the national data protection authority.

iv  Other areas of interest

Legal professionals – advocates and legal advisors – 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 advisors are a little less severe than those applied to advocates.

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 Advisors 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 advisors. They apply the rules of secrecy and professional privilege of their own foreign legal professions.

ii 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.

### 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 to 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:

a the full digitalisation of court files and the right to access them online;

b uniformity of the cases’ numeration at a national level;

c the service of court correspondence and the parties’ submissions through IT systems;
Poland

d the fast-tracking of enforcement proceedings by taking more measures electronically (such as online auctions); and
e 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 27 November 2017, a proposal for an act amending the Code of Civil Procedure was published by the Government Legislation Centre. If adopted, it would certainly constitute the most significant reform of the civil court proceedings since 2005. The main proposed changes are the following:

a 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);
b 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 judgement, but also a detailed summary of the parties’ claims and defences, with the evidence brought in support;
c 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); and
d 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;
e establishing that conciliation petitions must be accompanied by a draft settlement agreement;
f 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); and
g introducing the admissibility of written statements at the court’s discretion.
Chapter 27

PORTUGAL

Francisco Proença de Carvalho

I  INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

In Portugal the state is the uncontested leader in dispute resolution. In fact, the majority of conflicts are resolved through the legal system, supported by a large network of courts with specific and complex procedural rules; however, with the lack of efficiency of the public system, the importance of arbitration and other alternative dispute resolution methods is increasing significantly.

There are three levels of 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.

Bearing in mind that the main problem of dispute resolution in Portugal is still the length of time proceedings usually take, in recent years the state has actively amended the legal system – not only implementing procedural rules but also improving infrastructure (new courts, new technologies) and modifying the judicial structure to respond to the increase in litigation and to improve the effectiveness and the degree of specialisation of the courts and judges. No major judicial reform was carried out in 2017. As was the case in 2016, it was a year of stabilisation for legislation that has been in force since 2013 and 2014. This legislation has still not 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 we saw the reinstatement of approximately 20 first instance courtrooms in rural areas that had been shut down due to their low number of court proceedings. It is still too soon to know how efficient this measure will prove to be. Nevertheless, this seems to be a political measure, more aimed at pleasing local communities than having an effective impact on the functioning of the system.

The resolution measure applied by the Bank of Portugal to Banco Espírito Santo (one of the biggest Portuguese private banks) in 2014 is still contributing to an increased number of client, shareholder and bondholder disputes.

Also contributing to the increased number of ongoing civil disputes in Portuguese courts are the bonds issued by the former Portugal Telecom SGPS, SA, prior to its merger with the

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Brazilian communications operator OI. A very high number of civil actions regarding these bonds have made their way to the civil courts, with the obvious consequence of hindering the performance and efficiency of the latter still further.

Litigation costs have continuously increased in the past 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 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 in discussion and the government will probably take some measures in order to make the cost more reasonable and fair.

As a result of the economic crisis, the rise in lawsuits and insolvency proceedings of a heightened level of complexity and value has continued. Although this trend slowed to some degree during the course of 2015 and 2016, it was still somewhat present during 2017. The Insolvency Law was amended (and came into force on 20 May 2012) in order to introduce fast-track court approval procedures for restructuring plans, which in the past years 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 amended during this year, the major change being that it is no longer applicable to all debtors who finds themselves in 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.

Besides the Special Recovery Procedure, there is also SIREVE (extrajudicial system of company rehabilitation), which came into force on 3 August 2012 and was amended in February 2015. This is an extrajudicial process, which means that it takes place without the intervention of the courts.

### 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. Subsequently, the trial takes place and the court issues its decision. Finally, the parties can appeal said judgment, provided that certain conditions are met.

Despite the foregoing, the Civil Procedure Code establishes that all witnesses must be offered with the submission of the complaint.

#### 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 in force, the court may decide on issues raised by the parties, as well as on instrumental, complementary or notorious facts that may not have been raised by the parties, and sentence the defendant to the extent required by the claimant bearing in mind said other facts.
Enforcement proceedings may serve three purposes:

a. the payment of an amount;

b. the delivery of a certain object; or

c. forcing the counterparty to carry out a certain action.

Said enforcement proceedings are filed based on a previous court decision or on 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 cheques).

It may take from one to three years in ordinary declaratory proceedings for a final court decision to be issued, while enforcement proceedings may take from one to two years.

To avoid damages resulting from the delay in court decisions and to assure the effectiveness of the final decision, a claimant may request that the court issue an adequate preliminary injunction; this may take from three to six months in Portugal.

Please note that any of the mentioned time frames are indicative, as such 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.

In 2014, a pre-enforcement out-of-court proceeding\(^3\) was introduced, allowing the claimant to verify whether the defendant has any attachable assets before filing a petition. In 2015, Regulatory Ordinance No. 349/2015, published on 13 October, provided the regulation regarding the IT platform related to the above-mentioned pre-enforcement out-of-court proceeding.

Unlike in civil proceedings, in which 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 to uncover the truth. Generally, ordinary criminal proceedings in Portugal take two years, but in certain cases, such as white-collar crimes, proceedings may take longer. As for civil proceedings, the term provided here is also indicative.

The 2016 amendment to the Criminal Procedure Code\(^4\) expands the range of crimes that can be prosecuted under summary procedure, in an effort to decrease the usual length of time of these proceedings.

iii 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 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:

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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 said 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.
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 economic value exceeds €5,000 or when the proceedings are taking place before 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, inter alia, during interrogation, trial and appeal. As regards the representation of victims, certain 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 outside Portuguese jurisdiction, the initial summons or other notices requesting attendance to court will be served by mail, by means of a registered letter with acknowledgement of receipt, unless international treaties or conventions set out otherwise.

Other notices will be served on 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 certain rules of the relevant jurisdiction.

In criminal proceedings, notices for parties whose domicile is outside 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 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 mail.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 is also a party to the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, and other codes of practice. Pursuant to this Convention, documents will be served by means of letters rogatory sent to the competent entities of the state concerned.

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5 As amended by Council Regulation No. 17/2013, 13 May.
6 Article 5.
vi Enforcement of foreign judgments

Within the EU, Council Regulation No. 44/2001, 22 December 2000 sets out the conditions under which a judgment (concerning civil and commercial matters) issued in a Member State can be enforceable in another.

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 application by the interested party, it has been declared enforceable. The application of enforceability is filed in the competent superior court.

Without prejudice to international conventions and treaties in force (for instance, the Lugano Convention), under Portuguese law, it is generally possible to enforce foreign court civil judgments provided that these are subject to a prior confirmation procedure before a Portuguese court. Said conformation will be granted whenever:

a there are no well-grounded doubts concerning either the authenticity of the submitted documents or the judiciousness 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 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 it is 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.

viii Access to court files

The Civil Procedure Code sets out, as a general rule, that court files may be accessed by the parties, lawyers or any persons 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 lead to the ineffectiveness of the decision to be issued by the court, as, for instance, in interim application proceedings.

In addition, the Criminal Procedure Code sets out, as a general rule, the possibility of parties and lawyers accessing 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, which occurs whenever the public prosecutor or judge forbids the parties and their respective lawyers from accessing such records during the investigation stage when disclosure could interfere with the investigation or cause damage to any of the parties.

i  Litigation funding
In Portugal, disinterested third parties cannot fund litigation.

IV  LEGAL PRACTICE

i  Conflicts of interest and Chinese walls

The current legal system considers conflicts of interest a central issue, promoting the prevention or prohibition of any conduct that may create such conflict for a lawyer or firm.

The regime seeks both to protect and promote the dignity and independence of the lawyer in their role as a true participant in the administration of justice and to ensure the relationship of trust that must be established between a lawyer and 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 ensuring compliance with and enforcement of the law, having disciplinary power over its members; however, the decisions of the Bar Association can be appealed before the administrative courts under Article 6 of the Regulations. Furthermore, the courts are responsible for the enforcement of the law in any proceedings other than disciplinary proceedings.

The Criminal Code establishes, in Article 370.2, that certain abuses of conflicts of interest by lawyers are criminal offences. Thus, a lawyer who acts in a situation where the interests of his or her clients are conflicting, with the intention of benefiting or damaging either, will be penalised with up to three years of imprisonment or with a fine.

The Regulations establish the duties with which lawyers are obliged to comply 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 eventual 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 further new legislation is unlikely on this matter, we can expect decisions that will detail what is expected of lawyers.

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.

Portugal transposed the aforementioned Directives in Law No. 25/2008 of 5 July into Portuguese law. From this date, financial institutions and a large number of service providers, such as notaries and civil servants, are bound, inter alia, 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 since produced 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 in turn revoked Law No. 25/2008 of 5 July. The new law is more extensive than its predecessor, being applicable to a larger number of entities. Lawyers, amongst others, are now bound by the same duties of not participating in any suspicious or criminal activities relating to money laundering.

Obviously, confidentiality issues arise when legislators decide to extend such obligations to service providers such as lawyers bound by the rules of secrecy, even more so now, seeing as the legal statute now in force is much more extensive than the previous one.

iii  Data protection
The processing of personal data in Portugal is governed by Law No. 67/98 of 26 October (the Data Protection Act), which requires that for the lawful and fair processing of personal data, the data controller (the entity deciding on the data processing purposes and means) must meet the following requirements:

a providing notification of existing personal data files to the Portuguese Data Protection Authority;

b providing information to the data subjects about the processing of their personal data (including regarding transfers and the sharing of information with any third party);

c as a general rule, obtaining the prior consent of the data subjects for any processing activity;

d when the recipient is not located in the EU or EEA (or in a country whose regulations do not afford an equivalent or adequate level of protection to that identified by the EU Commission or the Portuguese Data Protection Authority), obtaining the prior authorisation of the Data Protection Authority, unless a legal exemption applies;

e adopting specific security measures to protect personal data from unlawful disclosure or undue access;

f granting the data subjects a right to access all data relating to them and to rectify and cancel data that does not comply with the data protection principles, in particular, when data is incomplete or inaccurate or excessive in relation to the legitimate purpose of its processing; and

g granting the data subjects a right to object to certain processing activities that do not require their consent or that are carried out for direct marketing purposes.
These general rules also apply to the activities of law firms that involve the processing, access or transfer of personal data.

The current Law will be soon be revoked, because the new European Data Protection Regulation (Regulation (EU) 2016/679) that intends to unify data protection within the European Union will become enforceable as from 25 May 2018.

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 when 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, *inter alia*, have, in broad terms and under the terms 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 said disclosure regards facts or documents relating to the professional activity.

In some cases, this prerogative also entails special protection against searches and seizure. For instance, searches inside law firms must be conducted by a judge, unlike in 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 null 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 stipulates that only superior courts may decide whether privilege should be broken and thus consequently force the disclosure of protected facts.

The existence of said 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 to, *inter alia*, 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 recent 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 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 said 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 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 is higher than 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 such 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 in 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 protection of privacy. Furthermore, the Portuguese Constitution expressly forbids any intrusion in 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, such 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 of or backup of deleted documents.
VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

The greatest criticism of the Portuguese legal system is still 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 37 months. Furthermore, during the past decade, the annual number of actions filed before court has risen dramatically.

In light of the foregoing, both 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 agreements 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.


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.

After four years since its entry into force, it is legitimate to state that the Law has increased flexibility in Portuguese arbitration and facilitated the increasing number of arbitral agreements included in contracts.

Thus, among its most important innovations, the Arbitration Law:

a contains a major change in the arbitrability analysis;

b expressly foresees 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;

c regulates the most important aspects of the application of interim measures, closely following the Model Law;

d includes the regulation of multiparty arbitration and third-party intervention; and

e foresees 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 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

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8 Law No. 63/2011 of 14 December.
9 Law No. 31/86 of 29 August 1986.
Portugal 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).

iii 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 object 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 homologation from a court or the obligation to execute extrajudicial settlements in mediation centres supervised by the Ministry of Justice.

The specific circumstances are as follows:

\( a \) the settlement’s object must be able to be mediated and not subject to a mandatory court decision;

\( b \) parties must have capacity to execute the settlement;

\( c \) the settlement must have been reached through mediation and according to law;

\( d \) the content of the settlement must not violate Portuguese public policy; and

\( e \) 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 among individuals and
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. While justices of the peace are proving useful in simple disputes, strong suspicion still remains about the quality of their decisions on the merits.

VII OUTLOOK AND CONCLUSIONS

The current year, much like the previous one, has not seen many legislative reforms to the judicial system. That being said, there were some changes.

First and foremost, the law that reinstated over 20 first instance courtrooms was only enacted towards the end of last year. Thus, the impact of this legislation has only just started to manifest itself, and it is still too soon to assess the full consequences of this measure.

What can be said at this moment is that the average length of civil actions at trial has decreased, though not in a significant way. No direct correlation can be established between this decrease and the recent reinstatement of the first instance courtrooms, seeing as this decrease took place over the past few years. This reduction may be due to a number of factors, including the increased use of ADR and high litigation costs.

At the end of 2017, it was clear that the number and duration of civil actions in civil courtrooms is still an unresolved issue, even if an improvement has been observed.

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, some court decisions have become available for review online, including decisions of the Board of Grievances 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 Judiciary⁵ has been slow to take effect, but significant reorganisation of the court system is 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 Law⁶ 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 courts⁷

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, which 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.

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.’
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).
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, as a separate entity from the Board of Grievances, 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.

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 also 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, while the newly constituted general courts will 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

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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.
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 Committee for the Settlement of Labour Disputes, the Insurance Dispute Committee under SAMA (the Saudi Arabian Monetary Agency), 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.12 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.

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 continued to implement 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 began hiring and promoting judges throughout the court system at an increased pace. This reorganisation led to modest delays for some cases.

In 2014, the Ministry of Justice also announced the launch of new traffic courts located primarily in Riyadh, Mecca, Medina and the Eastern Province. The new courts deal with disputes arising from traffic accidents, and violations will be linked electronically to the General Directorate of Traffic. Further, the Ministry of Justice issued an order allocating

12 Royal Decree No. M/34, dated 16 April 2012.
certain powers of the notaries public to eligible attorneys, including the power to issue powers of attorney, authenticate contracts and handle real estate sales. An important aim of this measure was to ease the workload of the notaries public.

In 2015, practitioners saw significant changes to substantive law alongside continued court reform. The changes aimed at further improving the business environment for investors and workers alike, both domestic and foreign. 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. 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. Among other changes for investors was the introduction of a ‘single person company’ (SPC).

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 after the implementation of the new Arbitration and Enforcement Laws. For example, the enforcement circuit has a direct online connection to other government entities such as SAMA. In another important arbitration development, the Saudi Centre for Commercial Arbitration (SCCA) released its first set of arbitration rules. Finally, in a development relating to the Saudi court system, the Supreme Judicial Council issued an announcement 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 as in recent years, 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 three commercial courts in Riyadh, Jeddah and Dammam. Finally, the Board of Grievances introduced an electronic system for the Supreme Administrative Court relating to inter-departmental and court objections.

III COURT PROCEDURE

i Overview of court procedure

The Law of Procedure before shariah courts15 contains articles dealing with various aspects of procedure in Saudi Arabia.16

15 Royal Decree No. M/21, dated 19 August 2000. Articles 96 to 232 have been superseded by the new Enforcement Law described below.
16 The Law of Procedure before Shariah Courts, issued by Royal Decree No. M/21 20 Jumada 1421 (19 August 2000) has been amended by Royal Decree No. M/1, 22/1/1435 (25 November 2013) (the Law
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. 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 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, recently 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 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 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. 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.

23 Id. at Article 18(c).
24 Articles 49 to 50 of the Law of Procedure before Shariah Courts.
25 The Procedural Rules before the Board of Grievances, issued by Royal Decree No. M/3, 22/1/1435.
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. 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 new 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 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 proven to be a 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.

Practitioners have generally welcomed the new Enforcement Law and hope it will reduce delay and the likelihood that a judgment or award will be reopened and reconsidered on the merits. It remains to be seen how the new law will be applied in the courts. Early indications suggest that, in practice, 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 foreign courts outside Saudi Arabia may seek the assistance of Saudi courts via a number of international and regional agreements.

Articles 16 through 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 other contracting party; or if the request concerns a crime that the other 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 began posting summaries of selected judgments on the Ministry’s

\(^{29}\) 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.
The summaries on the Ministry’s website do not include the names of the parties. In any event, while past decisions of Saudi Arabian courts are influential, as noted above, 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. 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.

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.33 A lawyer also may not represent an adversary in connection with a previously handled case or in connection with any other related matter.34 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.35

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 no express procedures regarding the proper application of an information barrier. Historically, in Saudi Arabia the practice of law has typically been performed on an individual basis. The practice of law within a professional firm is a relatively recent development. Information barriers have not, therefore, been historically required in Saudi Arabia because of the nature of the practice of law.

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).36 Under the AML, lawyers are subject to certain obligations designed to prevent

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31 Article 3 of the Law of Procedure before Shariah Courts.
33 Id. at Article 14(1).
34 Id. at Article 15.
35 Id. at Article 14(2).
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.\textsuperscript{37}

Lawyers are also under an obligation to report unusually large, complex or suspicious transactions to the Financial Intelligence Unit (FIU).\textsuperscript{38} 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.\textsuperscript{39} 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.\textsuperscript{40} Failure to comply with the obligations imposed by the AML may result in a fine or imprisonment.\textsuperscript{41} However, an exception to liability under the AML exists for violations that occur while acting in good faith.\textsuperscript{42}

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.\textsuperscript{43} 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.\textsuperscript{44} Where no specific provisions are applicable courts will apply general principles of shariah law.

VI  
**DOCUMENTS AND THE PROTECTION OF PRIVILEGE**

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**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

\begin{itemize}
  \item[37] Id. at Articles 4, 6 and 10.
  \item[38] Id. at Article 7.
  \item[39] Id. at Articles 8 and 13.
  \item[40] Id. at Article 5.
  \item[41] Id. at Article 18.
  \item[42] Id. at Article 22.
  \item[43] Article 40.
  \item[44] Issued under the Council of Ministers Resolution No. 74, 2001.
\end{itemize}
in the course of practice by a lawyer is prohibited from being disclosed by the lawyer even after expiration of the power of attorney.\textsuperscript{45} This obligation, however, does not apply where non-disclosure would violate a shariah requirement.\textsuperscript{46}

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.\textsuperscript{47} 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.

\section*{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.

There are no specific rules in Saudi Arabia governing the discovery of documents.\textsuperscript{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.

\section*{VII ALTERNATIVES TO LITIGATION}

\section*{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) in respect of certain types of dispute.
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 (Ministerial Resolution No. 7/2021/M). The new Arbitration Law was published in the Official Gazette (Umm Al Qura) on 18/07/1433 H (8 June 2012) and became effective on 18/08/1433 H (8 July 2012).

The new Arbitration Law\(^50\) 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.\(^51\)

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.\(^52\) 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\(^53\) and separability\(^54\)). The new Arbitration Law also grants more control to the parties and provides greater clarity on several issues.

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49 Royal Decree No. M/46.  
50 Royal Decree No. M/34.  
51 New Arbitration Law, Article 2.  
52 New Arbitration Law, Article 50(2).  
53 New Arbitration Law, Article 20.  
54 New Arbitration Law, Article 21.
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:

- Article 2 provides the Court of Appeals with original jurisdiction to hear issues relating to an arbitral dispute including challenges to arbitration awards;
- Article 3 provides that electronic service of notices is now permissible;
- 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 ten days prior to implementing them; and
- 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 written guidelines for determining whether an agreement to arbitrate may be enforced and how. This change provides parties with some additional clarity when forming agreements.

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

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55 New Arbitration Law, Articles 9–12.
56 New Arbitration Law, 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 concerning a specific regular relationship, whether contractual or not and whether the Arbitration Agreement shall be in the form of an arbitration condition stipulated by a contract or in the form of an independent arbitration stipulation.’
57 New Arbitration Law, Article 20.
58 New Arbitration Law, Article 21.
59 New Arbitration Law, Articles 13–24.
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.60

**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 from 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 from 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).61

**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.62 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).

### 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.63 These time limits should help to move the arbitration process along more quickly. However, it is still unclear whether the courts will adhere to such 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.64 A second

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60 New Arbitration Law, Article 29.
61 New Arbitration Law, Article 40.
62 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).
63 New Arbitration Law, Article 15.
64 New Arbitration Law, Article 23.
provision provides that a ‘competent court’ may order temporary or preventive measures upon application from a party.\textsuperscript{65} It is unclear whether such measures, which are extremely rare in practice 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 many 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 went into effect on 31 July 2016.\textsuperscript{66} 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 in 2017, and another in Dammam in 2018.

v The popularity of arbitration as a dispute resolution mechanism

Courts remain the most popular forum for disputes involving local commercial transactions. Some have considered the value of arbitration to be limited as courts have, in any case, closely supervised arbitration proceedings and may also rehear the merits. Additionally, under the old Arbitration Law, an arbitration clause did not necessarily affect the right of the parties to pursue court litigation.\textsuperscript{67} In such cases, arbitration could end up adding additional steps to the dispute resolution process. It remains to be seen how courts will respond to the new Arbitration Law.\textsuperscript{68} 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.\textsuperscript{69} 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.

Nevertheless, there remain significant limitations 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

\textsuperscript{65} New Arbitration Law, Article 22.

\textsuperscript{66} Arbitration Rules, Saudi Center for Commercial Arbitration, July 2016.

\textsuperscript{67} 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).

\textsuperscript{68} 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.

\textsuperscript{69} Verses 4:35 and 49:9 of the Koran are sometimes cited as examples.
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 are generally not appealable, but may be subject to annulment actions. Under Article 50, a party may petition for the annulment of an arbitral award within 60 days from notification of the award (i.e., before enforcement proceedings can begin). In principle, it 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.’

vii 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

70 New Arbitration Law, Article 10.
72 Council of Ministers Resolution No. 58, dated 03/02/1383 AH (25 June 1963); see also Article 8 of the Implementing Regulations.
73 The ICSID Convention came into force on 14 October 1966 when it had been ratified by 20 countries.
75 New Arbitration Law, Article 49.
York Convention), which Saudi Arabia acceded to in 1994, with a reciprocity reservation pursuant to Article 1(3) of the New York Convention. 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.

Recent developments and trends in arbitration

Current examples of arbitration involving Saudi state entities are limited, as such disputes do not often reach arbitration. Arbitration of commercial disputes involving private parties is more common, though enforcing a resulting award can be 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.

The Jadawel case highlights the difficulty of enforcing arbitral awards. The case also illustrates 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 judgement 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

76 Royal Decree No. 11, dated 16 Rajab 1414 (30 December 1993).
77 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 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. If the parties are unable to settle the dispute during mediation, the dispute is referred to the Preliminary Commission for Settlement of Labour Disputes for a hearing on the merits.79

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 affords the terminated distributor the opportunity to submit a claim to the Commercial Agents Disputes Reconciliation Committee.80 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.81 The expert’s opinion is non-binding but guides the court’s determination.82 Experts may be appointed by agreement of the parties, with the approval of the court.83 Where the parties cannot agree, however, the experts may be court-appointed.84 The cost of the experts is borne by the parties.85 In practice, the use of experts is becoming more common, at least in disputes concerning technical matters, which require specialised training and experience.

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.
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 certain 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 governmental parties, including ‘contract-related disputes’. However, jurisdiction over private-sector commercial disputes now resides with the newly introduced commercial courts.

In recent years, a prospering economy and an increase in foreign investment has prompted Saudi Arabia to take steps towards modernising the way disputes are resolved. 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.

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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

South Africa has a hybrid legal system characterised by constitutional supremacy underpinned by uncodified common law rooted in its history of diverse influences. Historically, South African private law was based on Roman-Dutch principles introduced by the first European settlers in the 17th century. Subsequent British colonialisation imported English legal principles and traditions that shaped procedural and mercantile law. More recently, and increasingly, customary law has become part of the formal South African legal framework.

The advent of constitutionalism brought about a shift in legal development. The Constitution is the supreme law and legislation not congruent with the Constitution must be amended. Furthermore, the courts have a constitutional duty to develop the common law to promote the values enshrined in the Constitution.

The doctrine of precedent is an integral feature of the legal system and lower courts are bound by the decisions of courts higher in the hierarchy.

The court structure consists of the superior courts, being the Constitutional Court, Supreme Court of Appeal and the various divisions of the High Court, and the lower courts, comprising the regional and district magistrates’ courts.

The Constitutional Court is the highest court in respect of constitutional matters, with both original and appeal jurisdiction as set out in Section 167(3) of the Constitution. Generally operating as a court of appeal in respect of constitutional issues, the court may also be approached directly in special circumstances.

The Supreme Court of Appeal serves as final court of appeal in respect of all non-constitutional matters. It hears appeals in both civil and criminal matters from the High Court and may not be approached directly.
The High Court is divided into nine provincial divisions, and various local divisions, with jurisdiction over prescribed territories. The High Court has inherent jurisdiction and has the discretion to make any order that the law does not prohibit, including regulating its own procedure and adjudicating the unlawful interference with rights.\(^7\)

The High Court functions both as court of first instance and court of appeal for the lower courts, and a full bench of the High Court serves as court of appeal for judgments of a single High Court judge in the first instance.

The High Court also comprises specialised courts and tribunals such as the tax court, labour and labour appeal courts, competition tribunal and appeal court, land claims court, consumer courts and equality courts, which have jurisdiction to hear matters specifically designated in legislation.

The magistrates’ courts are creatures of statute, deriving their powers from the Magistrates’ Court Act 32 of 1944, with no jurisdiction to hear matters beyond the parameters of the enabling legislation. These courts have jurisdiction over claims up to a prescribed maximum amount and over defendants residing or working in the court’s geographical area of jurisdiction as well as over specified causes of action that arise therein.

Small claims courts, located at the district magistrates’ courts and presided over by volunteering attorneys, provide an opportunity for litigants to pursue claims of 12,000 rand or less without legal representation.

II THE YEAR IN REVIEW

The much-anticipated International Arbitration Bill, which was initially approved by Cabinet in April 2016, was again approved in March 2017 after errors in the bill were discovered and corrected. The Act came into operation as the International Arbitration Act 15 of 2017 on 20 December 2017 and incorporates the Model Law of the United Nations Commission on International Trade Law (UNCITRAL) as the cornerstone of the international arbitration regime in South Africa, providing much-needed reform in South Africa’s arbitration regulatory framework. Previously, the Arbitration Act, a 51-year-old statute, regulated both domestic and international arbitrations.

The International Arbitration Act governs all international arbitrations (both commercial and investment arbitrations) seated in South Africa. A key theme of the Act is to distinguish between the law governing international arbitrations seated in South Africa, through the incorporation of the UNCITRAL Model Law, and domestic arbitrations, which will continue to be regulated by the Arbitration Act.

The Act seeks to align the South African statutory framework with international best practice and positions South Africa as an attractive venue for international parties to resolve their commercial disputes, particularly multinational corporations with subsidiaries in South Africa. The South African courts are reluctant to interfere with arbitration agreements and awards, and have continually upheld the sanctity and integrity of the arbitration process. The courts’ views in this regard should not be any different when faced with international arbitrations, which are expected to enjoy equal respect and protection.

The Courts of Law Amendment Act 7 of 2017 was assented to by the President on 31 July 2017 and aims to amend the Superior Courts Act\(^8\) and the Magistrates’ Courts Act\(^8\).

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\(^8\) Act 10 of 2013.
South Africa

Act\textsuperscript{9} so as to regulate the rescission of judgments where the judgment debt has been paid, jurisdiction by consent of parties, the factors a court must take into consideration to make a just and equitable order, consent to judgments and orders for the payment of judgment debts in instalments, the issuing of emoluments attachment orders, the suspension of execution of a debt and the abandonment of judgments.

On 14 November 2017 the Constitutional Court handed down judgment in the matter of \textit{State Information Technology Agency SOC Ltd v. Gijima Holdings (Pty) Ltd}\textsuperscript{10} where the application for leave to appeal turned on whether an organ of state can seek to have its own decision reviewed and set aside in terms of the Promotion of Administrative Justice Act (PAJA).\textsuperscript{11} The Court, overturning the earlier decisions of the High Court and Supreme Court of Appeal, found that PAJA does not apply when an organ of state applies for the review of its own decision and that an organ of state seeking to review its own decision must do so under the principle of legality. The Court held that, on an interpretation of Section 33 of the Constitution and PAJA itself, it cannot be said that an organ of state seeking to review its own decision can be a beneficiary of the rights under Section 33 of the Constitution, which creates the right to just administrative action to be enjoyed by private persons only, and that the state is only the bearer of obligations under that Section.

Other notable judgments of the Constitutional Court and Supreme Court of Appeal during the year in review directed the spotlight on civil appeals and submissions made in affidavits in motion proceedings, and in the landmark decision by the \textit{Gauteng Local Division in Uramin (Incorporated in British Columbia) v/ Areva Resources Southern Africa v. Perie}\textsuperscript{12} oral evidence of foreign witnesses led by video link was allowed.

The Constitutional Court and Supreme Court of Appeal reaffirmed three important principles in civil appeals, namely that:

\begin{itemize}
  \item[a] an appeal does not lie against the reasons for an order or decision by the court a quo, but against the decision itself;\textsuperscript{13}
  \item[b] in accordance with Section 16(2)(a) of the Superior Courts Act, the appellate court is empowered to dismiss an appeal where the judgment or order sought would have no practical effect or result;\textsuperscript{14} and
  \item[c] the general rule that a litigant who has deliberately abandoned a right to appeal will not be permitted to revive it is but one aspect of a broader policy that there must at some time be finality in litigation in the interests both of the parties and of the proper
\end{itemize}

\textsuperscript{9} Act 32 of 1944.
\textsuperscript{10} (CCT254/16) [2017] ZACC 40 (14 November 2017).
\textsuperscript{11} Act 3 of 2000 (PAJA).
\textsuperscript{12} (2017) 1 SA 236 (GJ).
\textsuperscript{13} Baliso v. FirstRand Bank Ltd t/a Wesbank 2017 (1) SA 292 (CC).
administration of justice. Given the policy underlying the rule, it must necessarily be open to a court to overlook the acquiescence where the broader interests of justice would otherwise not be served.15

Significant decisions during the past year in the context of application proceedings include *FirstRand Bank Ltd v. Kruger*,16 where it was emphasised that affidavits must contain admissible evidence and that the deponent to an affidavit must set out enough facts to demonstrate personal knowledge, *Mashamaite & others v. Mogalakwena Local Municipality & others* and *MEC, Limpopo & another v. Kekana & others*,17 where the court pointed out that an applicant must, in the founding papers, disclose facts that would make out a case for the relief sought and that the relief granted by the court must be consistent with the facts and averments contained in the papers, and *Media 24 Books (Pty) Ltd v. Oxford University Press Southern Africa (Pty) Ltd*,18 where the court remarked that a finding to the effect that facts deposed to by a respondent constituted bald denials or were palpably implausible, far-fetched or so clearly untenable that they could safely be rejected on the papers occurs infrequently because courts are always alive to the potential for evidence and cross-examination to alter its view of the fact and the plausibility of evidence.

Other noteworthy developments can be found in cases dealing with the correct application of the principle of *res judicata*,19 interdicts,20 rescission of judgment,21 review proceedings,22 punitive cost orders,23 contempt of court,24 forfeiture of property in terms of the *Prevention of Organised Crime Act*25 and the enforcement of foreign judgments.26

Further changes in the law include the determination of new areas of jurisdiction of the Gauteng Provincial Division and the Gauteng Local Division as well as the North West, Mpumalanga and Limpopo Divisions of the High Court, and the restructuring of

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15 *South African Revenue Service v. Commission for Conciliation, Mediation and Arbitration 2017 (1) SA 549 (CC).*
16 2017 (1) SA 533 (GJ).
18 2017 (2) SA 1 (SCA).
19 *De Freitas v. Jonopro (Pty) Ltd 2017 (2) SA 450 (GJ); AON South Africa (Pty) Ltd v. Van den Heever NO (615/2016) 2017 ZASCA 66 (30 May 2017); Transalloys v. Mineral-Loy (781/2016) [2017] ZASCA 95 (15 June 2017).*
20 *Hutz v. University of Cape Town 2017 (2) SA 485 (SCA); Cipla Agrimed v. Merck Sharp Dohme Corporation (972/16) [2017] ZASCA 134 (29 September 2017).*
21 *Botha v. Road Accident Fund 2017 (2) SA 50 (SCA); Hassim Hardware v. Fab Tanks (1129/2016) [2017] ZASCA 145 (13 October 2017); Mosalasuping & others v. NC Housing & others (903/2016) [2017] ZASCA 121 (22 September 2017).*
22 *Helen Suzman Foundation v. Judicial Service Commission 2017 (1) SA 367 (SCA); South African National Roads Agency Ltd v. Cape Town City 2017 (1) SA 468 (SCA).*
23 *Lushaba v. MEC for Health, Gauteng 2015 (3) SA 616 (GJ); followed by MEC for Health, Gauteng v. Lushaba 2017 (1) SA 106 (CC); Kenton-on-Sea Ratepayers Association v. Ndlambe Local Municipality 2017 (2) SA 86 (ECC); AB v. Minister of Social Development 2017 (3) SA 570 (CC).*
24 *Department of Transport v. Taisiona (Pty) Ltd 2017 (2) SA 622 (CC); AG v. DG 2017 (2) SA 409 (GJ).*
26 *Wile v. MEC, Department of Public Works, Gauteng 2017 (1) SA 125 (WCC); Danielson v. Human 2017 (1) SA 141 (CC).*
the Magistrates’ Courts in North West, Limpopo and Mpumalanga, the amendment of the Magistrates’ Courts Rules and the issuing of new practice directives for a number of Divisions of the High Court.

The new Consolidated Practice Manual of the Gauteng Local Division which was implemented in July 2017 continues the trend towards more active judicial case management in the High Court and introduced mandatory case management and pretrial certification for specified types of opposed matters.

The Legal Practice Act\textsuperscript{27} came into partial operation in February 2017 and has set in motion a process that will fundamentally change the organisation of the legal profession, representation in proceedings and regulation of legal costs. At the time of writing, the Legal Practice Act Amendment Bill, which addresses issues identified during the initial implementation of the Act such as the need for further regulation of the areas of jurisdiction of the Provincial Councils, restricting performance of certain acts or rendering of certain services to practicing legal practitioners, regulating the duties of banks in respect of trust accounts, the duration of the National Forum on the Legal Profession and functions of the National Forum and the dissolution date of the law societies, is serving before parliament for approval.

III
court procedure

i Overview of court procedure

The South African judicial system is an adversarial system and the procedural rules governing the civil process are set out in various sources, including the Constitution and specific enabling legislation, procedural rules and the common law. Commentary and interpretative authority on the rules, particularly the Uniform Rules of Court (the Uniform Rules) that regulate civil practice in the High Court, provide useful guidance to practitioners.

Matters may be brought to court either by action or application. Actions are characterised by disputes of fact and provide for oral evidence to be led. Applications are decided on affidavit deposed to by, or on behalf of, the parties and are undertaken when the facts are common cause or can be determined without evidence being heard.

The focus of the summary below will be the usual procedures and time frames applicable to civil proceedings in the High Court.

ii Procedures and time frames

Action proceedings are initiated by way of a summons issued by the registrar of the Court, directed at the sheriff to serve on the defendant.\textsuperscript{28} Three types of summonses are differentiated, namely simple summons (for claiming debts of liquidated amounts), combined summons (which includes the plaintiff’s particulars of claim setting out the cause of action and relief sought as an attachment) and provisional sentence summons (a hybrid and summary procedure for claims based on liquid documents).

The recipient of a summons may deliver a notice of intention to defend within 10 court days. If a simple summons was used, the plaintiff must deliver a declaration setting out his or

\textsuperscript{27} Act 28 of 2014.

\textsuperscript{28} Uniform Rule 17.
her cause of action within 15 court days of delivery of the defendant’s notice of intention to defend. If the plaintiff served a combined summons, the defendant will be required to deliver a plea within 20 court days of delivery of the notice of intention to defend.

Once pleadings have been exchanged, the preparation for trial phase commences, which includes discovery and exchange of documents, delivery of expert summaries and compulsory pretrial conferences. Depending on the nature of the matter and the prevailing practice in that particular division of the High Court, the registrar may require a pretrial conference to be convened or for the matter to meet trial readiness certification requirements before a trial date will be allocated. The waiting periods for trial dates differ substantially between divisions, particularly in light of the move towards case management of matters by judges aimed at ensuring that matters are brought before the court more efficiently and expeditiously, and a waiting period of anything between 2-3 months and 12-14 months can be expected, depending on the division.

Applications proceedings are brought by notice of motion, addressed to the registrar and the respondent (where applicable) as an essential first step and must be accompanied by a founding affidavit setting out the facts upon which the applicant relies for relief as well as true copies of all annexures thereto.

A respondent must be given no less than five days from delivery of the notice of motion to notify the applicant of an intention to oppose. The respondent’s answering affidavit must be delivered together with relevant annexures within 15 days of the notice of intention to oppose. If the respondent fails to give notice of an intention to oppose, the applicant may enrol the matter on an unopposed basis.

Where an answering affidavit is filed, the applicant has an opportunity to file a replying affidavit within 10 days of delivery of the respondent’s answering affidavit. The filing of further affidavits will only be allowed with the leave of the court upon consideration of the facts in dispute and such leave will only be granted in exceptional circumstances.

The process for enrolling opposed applications are governed by the Uniform Rules read with the particular division’s practice manual or directives. The current waiting period for a hearing date for an opposed motion varies between divisions and can be between four and eight months.

Judicial review proceedings follow a sui generis application procedure.

Specific requirements and notice periods for civil proceedings instituted against the state, local and provincial governments and other organs of state are prescribed by legislation. This includes deviations from the periods detailed above.

29 Every notice of motion must comply with Uniform Rule 6(5)(b).
30 Uniform Rule 6(2).
31 *Finishing Touch 163 (Pty) Ltd v. BHP Billiton Energy Coal South Africa Ltd* 2013 (2) SA 204 (SCA), overruling *BHP Billiton Energy Coal South Africa Ltd v. Minister of Mineral Resources* 2011 (2) SA 536 (GNP).
32 Uniform Rule 6(1).
33 Uniform Rule 6(5)(a).
34 Uniform Rule 6(5)(d).
35 Uniform Rule 6(5)(d)(ii).
36 Uniform Rule 6(5)(e).
37 Uniform Rule 6(5)(e).
38 *Hano Trading CC v. JR 209 Investments (Pty) Ltd* 2013 (1) SA 161 (SCA).
The ordinary forms, procedures, time frames and service requirements for applications may be departed from on the grounds of urgency. The applicant’s founding affidavit, which may be brought on notice or ex parte, must clearly set out the circumstances giving rise to the urgency, which may include commercial interests. Varying degrees of urgency are dealt with in different ways in the different divisions, with some divisions providing for both an urgent and a semi-urgent roll that operates in parallel to the ordinary motion rolls.

Interdicts are granted to protect against an unlawful violation of rights and may be granted on an interim or final basis. Various special interdicts have been developed in terms of statute and common law, including certain automatic interdicts in terms of statute as well as Anton Piller (i.e., preservation) orders.

iii  Class actions

The advent of South Africa’s current constitutional dispensation has seen class actions being utilised as an instrument for collective redress. Section 38 of the Constitution enshrines the right of anyone acting as a member of, or in the interest of, a group or class of persons to approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened. When a suit is brought by way of a class action, parties who form part of the group are bound by, and are able to benefit from, the outcome of the litigation. Individuals may invoke procedures to either opt out of the litigation, if they want to be exempt from the consequences flowing therefrom, or to opt in, should they wish to benefit from the outcome. In Mukaddam v. Pioneer Food it was held that an opt-in class action may only be used in exceptional circumstances.

The Companies Act, the Consumer Protection Act and the National Environmental Management Act all provide standing to persons acting on behalf of a class when seeking specific relief in terms of these acts. In more general terms, Uniform Rule 10 provides that any number of persons may be joined as plaintiffs to a matter provided that the relief sought by all parties depends on the same question of law and fact.

A few landmark cases have resulted in the emergence of more class actions. In Ngxuza v. Permanent Secretary, Department of Welfare, Eastern Cape it was held that class actions are tailor-made for claimants who are lacking in ‘protective and assertive armour’ with claims unsuitable for individualised enforcement. In Child Resources Centre v. Pioneer Food (Pty) Ltd the Supreme Court of Appeal held that class action proceedings are available even when a non-constitutional right is involved. The case further detailed the requirements for certification, which is a prerequisite for instituting a class action.

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40 Chapter 2 of the Constitution.
41 2013 (5) SA 89 (CC).
42 Act 71 of 2008.
43 Act 68 of 2008.
45 2001 (2) SA 609 (E), see also Permanent Secretary, Department of Welfare, Eastern Cape, and Another v. Ngxuza and Others 2001 (4) SA 1184 (SCA).
46 2013 (2) SA 213 (SCA).
47 Such requirements are (1) the existence of a class identifiable by objective criteria; (2) a cause of action raising a triable issue; (3) the relief sought must stem from issues of law and fact common to all members of the action; (4) there must be no conflict of interest between the interests of the class and those of the representative; and (5) the representative must be able to adequately protect the interests of the class and have capacity to properly conduct the litigation.
iv Representation in proceedings

The legal profession is characterised by a split Bar comprising attorneys (solicitors) and advocates (barristers). A litigant may be represented in the High Court by an advocate, or an attorney who has been granted the right of appearance.48

It is not compulsory to have legal representation, and a party may conduct his or her own case and appear in person before the court. A party may not, however, be represented by a third party who is not a qualified attorney or advocate.

Provision is made for indigent persons to approach the Legal Aid Board and various legal aid clinics for legal representation at a significantly reduced rate. In addition, the law societies have set up pro bono initiatives in terms of which attorneys are required to assist indigent clients on a pro bono basis. The Uniform Rules also make specific provision for persons possessed of property totalling less than 10,000 rand to bring or defend proceedings in forma pauperis, in terms of which an attorney or advocate will be mandated to represent such person gratuitously.

A juristic person cannot be represented by an official or employee and must be represented by a qualified legal representative. Municipal and other local authorities must be similarly represented.

v Service out of the jurisdiction

Substituted service may be applied for in circumstances where the defendant or respondent is believed to be in South Africa but where one of the normal forms of service set out in the rules cannot be effected. Edictal citation is required where the defendant or respondent is (or is believed to be) outside the borders of South Africa, or where their exact whereabouts are unknown.49

The rules pertaining to service in a foreign country apply equally to all process of court and not only to the initiation of proceedings.50

A defendant is permitted one month to defend a summons served outside the area of jurisdiction of the division that issued the summons, if the summons was served at a place more than 150 kilometres from the seat of the court.51

Where a person over whom the court exercises jurisdiction is outside South Africa, an ex parte application52 for leave of the High Court is required for legal process to be served either to institute application proceedings or prosecute actions. The application must set out the nature and extent of the claim, the grounds upon which the claim is based and upon which the court has jurisdiction to determine the matter, the manner of service that the court is asked to authorise, the inquiries made to determine the person’s whereabouts and, if a manner other than personal service is requested, the last known whereabouts of the person upon whom service is required.53

Service of process by fax or other electronic means is provided for in Section 44(1) and (2) of the Superior Courts Act, and substituted service via fax and even via Facebook messages have been authorised in terms of Uniform Rule 4(2). In CMC Woodworking Machinery (Pty) Ltd v. Pieter Odendaal Kitchens 2012 (5) SA 604 (KZD).54

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49 CMC Woodworking Machinery (Pty) Ltd v. Pieter Odendaal Kitchens 2012 (5) SA 604 (KZD).
50 See Uniform Rule 4(3) that refers to ‘any process of the court’.
51 Section 24 of the Superior Courts Act 10 of 2013.
52 Uniform Rule 5.
53 Uniform Rule 5(2).
South Africa

**Enforcement of foreign judgments**

The position in relation to the enforcement of foreign judgments is regulated by common law. In *Jones v. Krok* it was held that a foreign judgment is not directly enforceable, but constitutes a cause of action that will be enforced by the courts provided that:

\[ a \]  the court that pronounced the judgment had jurisdiction to entertain the case according to the principles recognised by South African law with reference to the jurisdiction of foreign courts (international jurisdiction or competence);

\[ b \]  the judgment is final and conclusive in its effect and has not become superannuated;

\[ c \]  the recognition and enforcement of the judgment by the South African courts would not be contrary to public policy;

\[ d \]  the judgment was not obtained by fraudulent means;

\[ e \]  the judgment does not involve the enforcement of a penal or revenue law of the foreign state; and

\[ f \]  the enforcement of the judgment is not precluded by the provisions of the Protection of Businesses Act.

A judgment of a foreign court is enforced by launching proceedings out of a competent South African court with jurisdiction over the person against whom the foreign judgment was granted, for an order in the same terms as the foreign judgment. The foreign judgment is regarded as irrefutable proof of the defendant's indebtedness and once the requirements in *Jones v. Krok* have been met, a South African court does not have the authority to investigate the merits of the matter. A dissatisfied party must take up any issues on the merits with the foreign court in terms of its processes and procedures.

Important recent developments include the Supreme Court of Appeal's finding in *Richman v. Ben-Tovim* that, in order to satisfy the requirement of jurisdiction (particularly the international competence leg of the enquiry), it is not necessary for the plaintiff to establish that the defendant was either domiciled or resident within the foreign jurisdiction. It is sufficient for the defendant to have merely been physically present in that foreign jurisdiction at the time that the proceedings were instituted provided that the laws regarding jurisdiction in that foreign country recognise mere physical presence as a sufficient basis to find jurisdiction. This more flexible approach to jurisdiction is a welcome development in the context of international commerce.

The Constitutional Court also considered the enforcement of foreign judgments in the matter of the *Government of the Republic of Zimbabwe v. Fick & Others* and found that

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54 2012 (5) SA 604 (KZD).
55 1995 (1) SA 677 (A).
57 2007 (2) SA 283 (SCA).
58 2013 (5) SA 325 (CC).
the common law must be developed to allow for the enforcement of judgments and orders handed down by international courts or tribunals, which are established by international agreements or treaties that are binding on South Africa.

vii Assistance to foreign courts

South African courts may provide assistance to foreign courts in a number of ways, including providing evidentiary support, execution of warrants or judgments, and issuing subpoenas.

Where a foreign state or a foreign court wishes to obtain evidence within South Africa, such request must be transmitted to a consular official of South Africa within the foreign country, a registrar of the High Court or an official in the South African Department of Justice, who will refer the request to a High Court judge in chambers.59

The manner of dealing with letters of request and documents for service originating from foreign countries is dealt with in legislation. Where a litigant in a foreign country wishes to serve civil process in South Africa, the request must be submitted via the South African Department of International Relations and Cooperation. The registrar of the court will arrange for such service to be effected according to the Uniform Rules, provided the Minister of Justice deems it appropriate.

In addition to its domestic provisions, South Africa is also a signatory to international instruments that provide a basis for local courts to assist foreign courts, including The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters and the Rome Statute of the International Criminal Court, and is obliged to cooperate fully with the International Criminal Court in the investigation and prosecution of crimes within the jurisdiction of the Court.

viii Access to court files

Section 32(1)(a) and (b) of the Constitution entrenches the right of access to information in possession of public and private bodies, and imposes a responsibility on the state to promulgate legislation to give effect to this right. Section 11 of the Promotion of Access to Information Act60 provides that any person may request records in possession of the government or private bodies. This would include judicial records held by the court.

The public have free access to court papers before the matter is heard in court. In the matter of City of Cape Town v. South African National Roads Authority Limited,61 the Supreme Court of Appeal had to reconsider the court a quo’s decision to invoke Uniform Rule 62(7) to conclude that only persons with a direct interest in the matter may have access to judicial records before the matter is heard. The Court overturned the restrictive interpretation adopted by the High Court and held it to be inconsistent with the Constitution as it impinged on the principles of open justice, public hearings, freedom of expression and access to information. Prior restrictions to access court documents should only be imposed where a substantial risk of grave injustice is posed.

59 See Sections 39 and 40 of the Superior Courts Act.
60 Act 2 of 2000 (PAIA).
61 2015 (3) SA 386 (SCA).

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Litigation funding

A litigation funding agreement is not per se contrary to public policy or void, having regard to the constitutional right to access to justice. The Court does, however, retain the power to prevent third-party litigation funding if it amounts to an abuse of process.

Recent High Court decisions reflect the Court’s circumspection in allowing for third-party litigation without adequate measures in place to avoid bad faith or fraudulent conduct by third-party funders. In one instance the Court granted relief to the defendant in funded proceedings in the form of an order joining the funder to the litigation as a co-plaintiff, against its will, so that the defendant could seek a costs order directly against the funder. In another recent matter the Court held that where the funder substantially controls the proceedings or will benefit from them, if successful, then it is considered just that such third party be held liable for any adverse costs order.

IV LEGAL PRACTICE

Conflicts of interest and Chinese walls

Attorneys are ethically bound to act in the best interests of their clients, which includes a duty to avoid conflicts of interest that could affect the attorney’s judgment in the conduct of a matter.

An attorney owes a fiduciary duty to the client during the period of the attorney–client relationship, to act in the best interests of the client. In fulfilment of this duty an attorney is not permitted to act for two clients in a matter in which their interests conflict.

An attorney also owes a former client the remaining duty of confidentiality. The Supreme Court of Appeal has confirmed that South African law affords protection to a former client of a legal practitioner insofar as he or she will be precluded from acting against a former client where the practitioner has confidential information about the former client that might be misused. As with English law, such a client may apply to court for an interdict to restrain the attorney, where the attorney is in possession of information that is confidential to the client (and the client has not consented to its disclosure), and the information is relevant in the new matter in which the interest of the other client is adverse to his or her own. By restraining attorneys from acting against their former clients in certain circumstances, South African courts protect the administration of justice.

Typically, the need for Chinese walls is most often encountered in commercial transactions but it is not unheard of in litigation. While there is currently no legislation regulating the implementation of Chinese walls in South Africa, practitioners may look to English law principles to guide their actions and to manage conflicts of interest. To implement a Chinese wall, an agreement whereby the dissemination and processing of information is restricted is entered into and, to limit the parties’ liability for breach of confidentiality it is recommended that the Chinese wall include the following:

a. the physical separation of various departments to insulate them from one another (this may even extend to dining arrangements);

64 Prince Jefri Bolkiah v. KPMG [1999] 2 AC 222 (HL).
b an educational programme to emphasise the importance of not divulging confidential information;
c implementing strict procedures for dealing with a situation where it is felt the wall should be crossed and the maintaining of proper records where it occurs; and
d monitoring the effectiveness of the wall.

In addition, to minimise the risk of unauthorised dissemination of confidential information, the parties should evaluate the need to implement technological measures; for example, increasing IT security by introducing password protection for electronic documents.

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

South Africa has developed a broad regulatory framework for the prevention of organised and financial crimes.

Keeping pace with international developments, mechanisms to combat organised crime, money laundering and racketeering activities were introduced by the Prevention of Organised Crime Act (POCA), aimed at depriving offenders of the benefit of their criminal activities and criminalising the act of assisting another to benefit from the proceeds of their unlawful activities. To curb corruption and related crimes (such as theft and fraud), POCA places a reporting duty on certain office bearers of companies.

The Financial Intelligence Centre Act (FICA) was promulgated to assist with the identification and combating of money laundering activities and the financing of terrorist activities. FICA places a duty on accountable institutions such as attorneys, bankers, insurers and estate agents to adequately identify the clients they intend to transact with prior to establishing a business relationship or concluding a single transaction. The accountable institution is required to establish and verify the identity of the client (as well as the person on behalf of whom the client is acting). Records of the client’s identity, the nature of each business transaction, the amounts and parties involved in the transaction must be kept for a prescribed period of time, and certain financial transactions must be disclosed to the Financial Intelligence Centre.

A failure to comply with the reporting obligations provided for in POCA and FICA is a criminal offence.

More recently, the Prevention and Combating of Corrupt Activities Act (PCCAA) brought South African legislation in line with the UN Convention against Corruption and the AU Convention on Preventing and Combating Corruption. The PCCAA prohibits cross-border acts of corruption and creates reporting obligations for known, or suspected, acts of corruption, fraud, theft, extortion, forgery and uttering. Where the offender is a South

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66 Act 121 of 1998 (POCA).
67 POCA Preamble.
68 Act 38 of 2001 (FICA).
69 Section 21(1) of FICA.
70 Section 22(1) of FICA.
71 Act 12 of 2004 (PCCAA).
African citizen residing in South Africa, or a company incorporated in South Africa, South African courts will have jurisdiction over the offence.\textsuperscript{72} The PCCAA provides for companies convicted of corruption to be placed on a blacklist.\textsuperscript{73}

Following regulatory gaps that were identified in assessments conducted by the Financial Action Task Force and the International Monetary Fund, FICA is being reviewed to better align South Africa’s legal framework with global anti-money laundering and counterterrorist financing standards.

\textbf{iii Data protection}

The right to privacy is considered a fundamental personality right, protectable as part of the rights to human dignity or reputation enshrined in the Constitution. Where legislation does not adequately protect personal data, a wronged party may have recourse in terms of the common law. The courts have recognised two forms of invasion of the right to privacy: an unlawful intrusion upon the personal privacy of another and the unlawful publication, or public disclosure, of private facts about a person.\textsuperscript{74}

A dedicated data protection law in the form of the Protection of Personal Information Act (POPI)\textsuperscript{75} has been promulgated but, apart from a few limited sections dealing with the establishment of the regulator and the provisions allowing for the drafting of the regulations, POPI is not yet in force. Once the commencement date of the Act is determined, South African organisations will have a one-year grace period to establish POPI-compliant practices. Until then, protection of personal data will continue to be governed by various statutes, including the Consumer Protection Act, the National Credit Act,\textsuperscript{76} the Promotion of Access to Information Act (PAIA), the Electronic Communications and Transactions Act\textsuperscript{77} and the Regulation of Interception of Communications and Provision of Communication-Related Information Act.\textsuperscript{78}

POPI is applicable to the processing of all personally identifiable information entered into a record, which includes any recorded information regardless of its form or medium (i.e., whether recorded and stored physically or electronically).

In the context of dispute resolution, POPI’s provisions do not apply to court proceedings, but personal data that is regulated by POPI includes, \textit{inter alia}, the criminal behaviour of a data subject to the extent that such information relates to the alleged commission of any offence or any proceedings in respect of any offence allegedly committed or the disposal of such proceedings.\textsuperscript{79}

\begin{footnotesize}
\begin{itemize}
\item Section 35 of PCCAA.
\item Section 28 of PCCAA.
\item \textit{Financial Mail (Pty) Ltd v. Sage Holdings Ltd} 1993 2 SA 451 (A).
\item Act 4 of 2013 (POPI).
\item Act 35 of 2005.
\item Act 5 of 2002 (ECTA).
\item Act 70 of 2002.
\item Section 26(b) of POPI.
\end{itemize}
\end{footnotesize}
V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

Legal privilege in South Africa is governed by the common law and has historically been premised on English legal principles, applied in a South African context.

Legal privilege is also recognised by PAIA, which specifically upholds privilege, firstly, by excluding its application to pending litigation where the rules of discovery remain unchanged, and secondly, by expressly prohibiting access to privileged records.

The recognised categories of legal privilege include legal professional privilege (encompassing litigation privilege and legal advice privilege), ‘without prejudice’ privilege, the privilege against self-incrimination and marital privilege.

Litigation privilege protects communications between a litigant and a legal representative, as well as between a litigant or his or her legal representative and third parties, where such communications are made for the purpose of pending or contemplated litigation.80

Legal advice privilege extends beyond communications made for the purpose of litigation, to all communications made for the purpose of giving or receiving legal advice. Oral and written communications between a legal representative and a client, even if litigation is not specifically contemplated, are protected from disclosure provided that the legal representative was acting in a professional capacity at the time and was consulted in confidence, the communication was made for the purpose of obtaining legal advice, the advice does not facilitate the commission of a crime or fraud, and privilege is claimed by the client.81

Communications with advocates, attorneys, their candidate attorneys and other law firm employees who act under the control and direction of an attorney that satisfy the requirements of legal professional privilege are also protected from disclosure.82 Similarly, legal professional privilege also extends to communications with in-house lawyers.83

South African courts have not pronounced on the question whether the rules of privilege apply to foreign lawyers. Given that legal professional privilege is based on the notion that freedom of consultation between lawyers and clients, with the assurance that the information exchanged will not be subject to disclosure, is required for the optimal functioning of an adversarial legal system, and further that legal professional privilege belongs to the client and not the lawyer, it is likely that a foreign qualified lawyer’s legal advice would also be regarded as privileged.

Legal professional privilege does not extend to other professionals, such as auditors, even if they undertake work which could otherwise be done by a legal representative, such as forensic investigations.

82 S v. Mushimba 1977 2 SA 829 (A); International Tobacco Co (SA) Ltd v. United Tobacco Cos (South) Ltd 1953 (4) SA 251 (W).
83 Van den Heever v. Die Meester 1997 (3) SA 102 (T); Mohamed v. The President of the Republic of SA 2001 (2) SA 1145 (C).
Legal professional privilege is a right of the client and cannot be raised merely motu. Only the client may claim legal professional privilege and only the client can waive legal professional privilege. A waiver of legal professional privilege can be express, implied or imputed.84

ii Production of documents
The Uniform Rules confer an obligation on a party to civil proceedings to make full disclosure of all documents and tape recordings (including electronic documents stored on a computer hard drive or other storage device such as a flash stick)85 that are or were in the possession or under the control of such party, within 20 court days86 from the date of receipt of a written notice from any other party to the proceedings requesting such disclosure, or from the date of receiving notice of a trial date.87

A party may also be required, at any time before the hearing of the matter, to disclose any document or tape recording to which reference is made in its pleadings or affidavits,88 and may not rely on documents or records it has not discovered.

Legally privileged documents must be identified but are not discoverable, and discovery is limited to those documents and tape recordings that are relevant to the matter and under the control or in the possession of a party irrespective of where these documents are stored. Relevance is a factual question to be determined by the court from the issues raised in the parties’ pleadings or affidavits.89 A party would be obliged to make discovery of documents that may enable the party requiring discovery to advance his or her own case or to damage the case of his or her opponent. It has been held by our courts, as in foreign jurisdictions, that the protection of confidential information and trade secrets is a valid consideration to be weighed up against the interests of an applicant to be placed in a position to present its case fully when determining relevancy.90

VI ALTERNATIVES TO LITIGATION
i Overview of alternatives to litigation
Alternative dispute resolution (ADR) mechanisms, such as conciliation, mediation and arbitration, have become increasingly popular in South Africa, mainly due to the lengthy delays which can be associated with court proceedings, contrasted with the relative speed with which disputes can be resolved using ADR methods. ADR mechanisms offer advantages such as allowing parties to choose a presiding officer with specialised knowledge, convenience in choosing suitable times and venues for proceedings, a degree of flexibility regarding rules and procedures and the fact that proceedings are mostly private and confidential.

85 Makate v. Vodacom (Pty) Ltd 2013 JOL 30668 (GSJ).
86 Ten court days in terms of Rule 23 of the Magistrates’ Court Rules.
87 Rule 35 and Rule 37(1) of the Uniform Rules.
88 Rule 35(12) of the Uniform Rules.
90 Moulded Components and Rotomoulding South Africa (Pty) Ltd v. Coucourakis and Another 1979 (2) SA 457 (W).
Arbitration

Arbitration is the most commonly used method of ADR in South Africa, and domestic arbitrations are regulated by the Arbitration Act.91 Most civil disputes can be referred to arbitration, but a limited number of disputes are not permitted to be resolved by private arbitration and are reserved for adjudication by the courts, such as matrimonial matters and any matter relating to status.92 A judicial review brought under the Promotion of Administration of Justice Act,93 which was enacted to give effect to the right to just administrative action under Section 33 of the Constitution,94 is also reserved for the High Court and cannot validly be referred to a private arbitrator.95

Before a dispute can be referred to arbitration, the parties must enter into an arbitration agreement setting out the terms and basis for the arbitration, including the rules that will govern the proceedings and the arbitrator that will oversee the process. In domestic arbitrations, parties usually choose to apply the Uniform Rules or the rules of the South African arbitration institutions, such as the Arbitration Foundation of Southern Africa (AFSA) or the Association of Arbitrators (AASA). Foreign parties often elect to have the arbitration proceedings held according to the rules of the London Court of International Arbitration and the rules of the International Chamber of Commerce.

An arbitrator is not obliged to follow the normal rules of evidence, but this is subject to the terms of the arbitration agreement, and to the provision that the arbitrator must adopt a procedure that is fair to all parties and conforms to the requirements of natural justice.96

Although arbitration awards are considered binding on the parties by agreement, in order for such award to be enforced, the successful party must apply to court to have the award made an order of court by way of provisional sentence or application proceedings. The court will not consider the merits of the dispute, and the applicant must merely show that the dispute was submitted to arbitration according to the terms of an arbitration agreement, that the arbitrator was appointed and that a valid award was made.

Unless an arbitration agreement provides otherwise, an arbitration award shall be final and not subject to appeal.97 It is, however, common for parties to agree to an appeal procedure in their arbitration agreement.

An arbitration award may be set aside by the High Court where the arbitrator misconducted himself or herself, committed any gross irregularity in conducting the proceedings or exceeded his or her powers or if the award was improperly obtained.98 South African courts have, however, maintained their lack of jurisdiction to enquire into the correctness of the conclusion arrived at by an arbitrator.99

References

91 Act 42 of 1965.
92 Section 2 of the Arbitration Act.
93 Act 3 of 2002 (PAJA).
94 Preamble to PAJA.
95 Airports Company SA Ltd v. ISO Leisure OR Tambo (Pty) Ltd 2011 (4) SA 642 (GSJ).
97 Section 28 of the Arbitration Act.
98 Section 33 of the Arbitration Act.
South Africa is a member of the New York Convention of 1958 and enacted the Recognition and Enforcement of Foreign Arbitral Awards Act in order to give effect to its obligations under the Convention, and to allow a foreign award to be made an order of court. South African courts will not enforce a foreign arbitration award if it is contrary to South African public policy, the parties do not have the requisite capacity to contract, the agreement is not valid under the foreign law, the defendant did not receive notice of, or participate in, the arbitration proceedings or if the dispute was not arbitrable. In addition, the award must be binding and it must not have been set aside by another competent authority. Foreign arbitration awards regarding transactions relating to raw materials require ministerial consent in terms of the Protection of Businesses Act.

The China-Africa Joint Arbitration Centre (CAJAC), which opened in October 2015, was the result of an agreement between AFSA, Africa ADR (AFSA’s external arm), AASA and the Shanghai International Trade Arbitration Centre, to specifically resolve commercial disputes between Chinese and African parties.

The recently enacted International Arbitration Act distinguishes between the law governing international arbitrations seated in South Africa, through the incorporation of the UNCITRAL Model Law, and domestic arbitrations, which will continue to be regulated by the Arbitration Act. The Act repealed the Recognition and Enforcement of Foreign Arbitral Awards Act, and applies to both private and public (state-owned) entities, subject to the Protection of Investment Act, which provides for dispute resolution mechanisms in the event of a dispute between a state-owned company and an international investor. The Act provides arbitrators and their arbitral institutions (including their representatives) with immunity (unless an act or award is shown to have been in bad faith). The Act further provides that arbitrations involving any public body are to be held in public (unless the arbitrator directs otherwise based on compelling reasons), and that arbitrations held in private, including the award and all documents in relation to the arbitration that are not otherwise in the public domain, must be kept confidential by the parties and tribunal. Significantly, in terms of the Act, the permission of the Minister of Economic Affairs will not be required for the enforcement of certain foreign arbitral awards and an award, irrespective of the country in which it was made, shall be binding and, upon application in writing to the court, shall be enforced, save for certain exceptions (including that the enforcement is against public policy, is in bad faith or the subject matter is not arbitrable in South Africa). A further welcome development for international entities is that, in terms of the Act, security for costs may no longer be ordered against a foreign party at the commencement of the arbitration proceedings.

### Mediation

Mediation is a form of ADR in which an impartial third-party mediator assists parties to resolve their dispute by negotiation and mutual agreement. Mediations do not produce

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100 Act 40 of 1977.
101 Section 1 of the Foreign Arbitral Awards Act.
102 Sections 4(1)(a)(ii), (b)(i), (b)(iii), (b)(ii) and (a)(i) of the Foreign Arbitral Awards Act.
103 Section 4(1)(b)(v) of the Foreign Arbitral Awards Act.
104 Act 99 of 1978, Section 1(1) read with Section 1(3).
105 Act 22 of 2015.
binding resolutions unless the parties reduce the agreement reached to a binding contract. Due to the non-binding nature of mediation proceedings, parties often agree to refer the dispute to arbitration if mediation is unsuccessful.

There is no legislation governing the application of mediation in South Africa generally, but the Rules of Voluntary Court-Annexed Mediation came into operation in December 2014. These rules provide for court-annexed mediation in civil proceedings in the magistrates’ courts in order to assist in the reduction of disputes appearing before courts and to promote access to justice. The rules make provision for the referral of disputes for mediation at any stage during civil proceedings, provided that judgment has not yet been delivered. As with other forms of mediation, the mediator merely assists with the negotiation of settlement, which may lead to the conclusion of a settlement agreement, which is a binding and enforceable contract and may also be made an order of court. Legal representation is permitted but not required. The introduction of these Rules is likely to lead to an increase in the use of mediation as a method of dispute resolution.

Mediation is also commonly used in employment disputes before the Commission for Conciliation, Mediation and Arbitration (CCMA), an independent dispute resolution body established in terms of the Labour Relations Act.

iv Other forms of alternative dispute resolution

Other alternative dispute resolution methods commonly used in South Africa are expert determinations and conciliation. Expert determinations are mostly used in professional industries where the disputes are of a technical nature, and they involve parties to a dispute entering into an agreement providing for the appointment of an independent and neutral expert to determine the dispute in private. The confidential nature of the proceedings ensures the protection of trade secrets, the limited adversarial interaction between the parties preserves business relationships, it is cost-effective and the referee’s decision is likely to be accepted as it is based on expert knowledge and an intricate understanding of the subject matter.

Conciliation is used for employment disputes by the CCMA. A commissioner or panellist meets with the parties in a dispute and seeks resolution of the dispute by mutual agreement. The conciliation process is fast, uncomplicated, inexpensive and does not allow for any legal representation. The decision to settle is in the hands of the parties involved and the commissioner may determine a process that could include mediation, facilitation or making recommendations in the form of an advisory arbitration award. If the dispute is settled, an agreement to that effect will be concluded and the commissioner will issue a certificate.

VII OUTLOOK AND CONCLUSIONS

The ongoing integration of South Africa into the global economy and the prevalence of international commerce have facilitated the development of commercial dispute resolution in South Africa to meet the contemporary demands of multinational dispute resolution processes. Much progress has been made in this regard, particularly within the realm of commercial arbitration and the recognition of foreign judgments and arbitration awards.

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106 Chapter 2 of the Magistrates’ Courts Rules.
An overburdened court system and local legislation that has not always kept pace with global trends remain challenges to be overcome. Various reform initiatives that are under way to streamline civil proceedings, promote accountability and align local anti-corruption legislation with global developments aim to address some of these challenges.

The current political climate in South Africa is forcing the courts to play a more crucial role than ever in upholding democratic constitutionalism and some of the key themes that will be prevalent in the next few years will be how far the courts can go without traversing the boundaries of the separation of powers between the judicial, executive and legislative branches of government, and whether the existing constitutional checks and balances that are in place to sustain the doctrine of separation of powers can withstand political pressure.

Notwithstanding the challenges faced, the South African dispute resolution framework continues to offer reliable, established and predictable processes firmly rooted in the constitutional democracy and the rule of law that the courts are mandated to uphold.
I  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.

i  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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Spain

Laws
The 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 Navarra.

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.

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.ii, infra).

**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), while 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.

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.

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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.
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
This body is in charge of the organisation and inspection of Spanish courts. The main functions of the General Council of the Judiciary 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 noteworthy rules were enacted in 2017.
Decree Law 9/2017 on rules governing actions for damages caused by infringements of competition law

Decree Law 9/2017 transposes Directive 2014/104/EU of 26 November 2014 on claims for damages arising from antitrust infringements. Some of the main points are the following:

a. It recognises the right of any natural or legal person to claim full compensation for damage caused by the infringement of competition law (punitive damages are expressly excluded) through civil courts and specific actions with a prescription period of five years.

b. Joint and several liability is enshrined as the general principle applicable to infringements committed collectively (with some exceptions in the case of immunity recipients and small and medium-sized enterprises). Parent companies’ liability for acts of their controlled companies is expressly recognised, unless independent economic behaviour of the latter is proved.

c. Decree Law 9/2017 modifies the legal concept of a cartel to be consistent with the practice of the European Union. The new definition eliminates the secrecy requirement and broadens the legal concept to include concerned practices between competitors (and not necessarily agreements) aimed at coordinating their competitive behaviour in terms of prices, quantities, distribution of customers and markets and other anticompetitive measures against competitors.

d. The finding of an infringement of competition law made pursuant to a final decision of the Spanish or European Union competition authorities will be non-rebuttable in actions for damages brought before Spanish courts (this effect will only affect the existence of the infringement and the identity of the offender, and not the rest of the sanctioning resolution). In turn, declarations of infringement made by competition authorities or courts of other Member States will only be a rebuttable presumption of the existence of the infringement.

e. Claimant’s burden of proof of the damage suffered is maintained; however, the decree law establishes a rebuttable presumption of the existence of damage in the case of cartels. The decree law allows judges to estimate damages caused by the infringement of competition law when the calculation is ‘in practice impossible or excessively difficult’.

f. Decree Law 9/2017 incorporates a new regulation on the production of documents that is only applicable to procedures of claims for damages derived from antitrust infringements. The new mechanism 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. The new provisions are governed by the principle of proportionality and do not permit indiscriminate searches of information. The production of documents may be requested before the proceedings commence, along with 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.

Law 7/2017 on alternative dispute resolution for consumer disputes

Law 7/2017 transposes Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes and aims to guarantee all consumers residing in the
European Union access to high-quality, independent, impartial, transparent, effective, fast and fair alternative dispute resolution (ADR) mechanisms. The following are some of the law’s main points of interest:

a. Law 7/2017 is applicable to entities established in Spain, both public and private, that facilitate ADR mechanisms for the resolution of national or cross-border disputes between consumers and businesspersons regarding obligations derived from sales or service contracts and compliance with certain unfair competition and advertising codes of conduct.

b. The Law establishes the requirements that must be met by those ADR entities and the corresponding procedures in order to be included on the national list of accredited entities as well as the European Commission’s consolidated list of accredited entities. It also regulates the accreditation procedure and various obligations that ADR-accredited entities must meet (information and transparency obligations, confidentiality, protection of personal data, annual activity information, self-regulation and training of individuals in charge of resolving litigation).

c. The ADR procedures to be carried out by accredited entities must be voluntary except when otherwise established by a specific rule (the decision issued within compulsory ADR proceedings may not prevent the parties from subsequently resorting to a judicial proceeding), free of charge for consumers and must be concluded within a fixed term of 90 days from the moment the ADR entity receives the complete claim (this term may be extended in cases involving heightened complexity). The filing of a claim with an accredited ADR entity will interrupt the expiration of limitation periods.

d. One of the most novel aspects of the law is the establishment of specific information obligations for businesspersons in relation to the ADR entities and procedures. Thus, a businessperson adhered to an accredited entity in Spain or in any Member State of the European Union or who is bound by a norm or code of conduct to accept its intervention in the resolution of disputes, must inform consumers of the possibility of resorting to that ADR entity. Likewise, when a claim filed directly by the consumer to the businessperson has not been resolved, it must provide the consumer with information on whether it is adhered to an ADR accredited entity or if it is bound by a norm or code of conduct to participate in the procedure with a specific entity. If not, it must at least provide information about a competent ADR entity and indicate to the consumer whether it will participate in an ADR procedure heard by that entity.

e. Law 7/2017 provides for the future creation of unique ADR entities for the financial sector and for the protection of air-transport users. The participation in the ADR procedures to be carried out by these special ADR entities will be compulsory for businesspersons.

Agreement on criteria for admission of the cassation appeal and extraordinary appeal due to procedural infringements

The Civil Chamber of the Supreme Court has adopted new rules on the criteria for the admission of cassation appeals and extraordinary appeals due to procedural infringements. The criteria for admission are binding and, in accordance with the jurisprudence of the Constitutional Court, complement the legal regulations governing these appeals.

The new criteria seek to reformulate and simplify previous criteria (dating back to December 2011) and further define the scope of the new legal causes of inadmissibility of the
appeals introduced by Law 7/2015 amending the Basic Judiciary Law. Among other things, they establish, for the first time, an extension limit for the pleadings pursuant to which these appeals are lodged.

ii Court practice

Among others, the following noteworthy decisions were handed down in 2017.

The Supreme Court’s judgment of 24 May 2017, on the preservation of legal personality by liquidated corporations

The Supreme Court held that a liquidated company, whose entries in the commercial registry have already been cancelled, maintains its legal personality for the purpose of addressing pending legal relationships.

Resolving this issue that had been controversial in view of divergent jurisprudence and opinions of legal scholars, the Supreme Court stated that, although the registration of the extinction deed and the cancellation of the registry entries entails, in principle, the loss of legal personality, legal persons may retain their personality with respect to pending claims based in supervening liabilities (which should have formed part of the liquidation transactions) and that, therefore, they have the standing to be sued in legal proceedings.

The Supreme Court states that, although the Spanish Corporation Law provides for the liability of former partners with respect to unpaid social debts up to the limit of their liquidation quotas, there are some cases in which judicial recognition of the credit will be necessary in order to enforce this responsibility. In these cases, it will be pertinent to direct the claim against the liquidated company, which will be represented in the proceedings by its liquidator.

The Supreme Court’s judgment of 13 July 2017, on rebus sic stantibus and the supervening inability to comply

The Supreme Court held that, in the case of pecuniary obligations, difficulties in obtaining financing do not entitle a debtor to avoid its obligations through the invocation of the rebus sic stantibus doctrine nor does it constitute a case of supervening inability to comply with its obligations that could release a debtor from the same.

The decision stated that, as a general rule, the difficulty or inability to obtain financing to fulfil a contract is a risk assume by the debtor, who in turn cannot avoid its obligations alleging that its expectations of financing have been frustrated. As an exception, the debtor may be released from the corresponding obligation when the other party has assumed the risk of financing (for example, by undertaking the commitment of financing by a third party or by linking the enforceability of the main contract to the financing).

The Spanish Civil Code recognises that a non-negligent supervening circumstance that makes compliance impossible in fortuitous situations can release the debtor in cases that involve the supervening loss of the specific thing to be delivered or in case of objective impossibility of fulfilling an obligation to do something; however, according to the Supreme Court’s decision, that does not apply to pecuniary obligations.

The Supreme Court stated that, in order for a lack of access to financing to be considered as an unforeseeable alteration in the circumstances existing at the time of hiring that could justify a debtor’s discharge of its obligations, it would be necessary to prove the unforeseeable impossibility of financing. It would not be sufficient to claim the debtor’s subjective financing difficulties. In the particular case before the Supreme Court relating to the purchase of real
Spain

estate, the difficulties in obtaining financing could not be considered unforeseeable because the contract itself set out the consequences of the buyer’s withdrawal or breach of the corresponding payment obligations.

**The Supreme Court’s judgment of 27 June 2017, on the scope of the Kompetenz-Kompetenz principle in the Spanish legal system**

The Supreme Court analysed the scope of the Kompetenz-Kompetenz principle in cases in which, after the initiation of a judicial proceedings, the defendant challenged the court’s jurisdiction on the grounds of the existence of an arbitration agreement.

The Supreme Court held that there was no basis to apply the ‘strong thesis’, which sustains that, following the filing of a declinatory plea in favour of arbitration, the judicial body hearing a claim must limit its activity to a superficial analysis and, if the existence of an arbitration agreement is verified, it must admit the plea to allow the arbitrators to decide on their own competence (only through the subsequent action of annulment of the arbitral award may judicial bodies review the arbitrators’ decision on their own competence).

The Supreme Court explicitly upheld the application of the ‘weak thesis’ (which had already been applied in jurisprudence with some minor exception) pursuant to which the judicial court hearing the declinatory plea must carry out a comprehensive valuation on the validity, effectiveness and applicability of the arbitration agreement; only if those requirements are met must the court refrain from hearing the case in favour of arbitration.

The Supreme Court based its position on (1) the acceptance of the ‘weak thesis’ by international legal instruments such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, UNCITRAL Model Law on International Commercial Arbitration and European Union Regulation 1215/2012; (2) unlike other specific cases, the Spanish Arbitration Law does not expressly limit the judge’s involvement when ruling on declinatory pleas; and (3) in 2011, a proposal was made to reform the Arbitration Law in a way that would make it more favourable to the ‘strong thesis’ (expressly establishing the recusal of the court when the existence of an arbitration agreement was raised unless ‘it verified that the agreement is manifestly null or ineffective’); however, this change was not approved.

**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.\(^3\)

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\(^3\) For example, the Spanish Arbitration Law regulates the judicial appointment of arbitrators if the parties are unable to reach an agreement on that and establishes that the corresponding judicial court will only reject the request to intervene in the appointment of arbitrators when it concludes that, based on the documents provided, no arbitration agreement exists. In that case, the enforceability of the arbitration agreement or its interpretation is not the subject of the proceedings (notwithstanding the fact that the nullity of the arbitration agreement provided under specific norms of a public order nature must be assessed, even *ex officio*).

\(^4\) 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.

**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 certain 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**

The monitory proceedings are a special type of proceedings 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 a 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 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 due to procedural infringements: this appeal allows parties to file an appeal to the Supreme Court challenging final rulings issued by provincial courts due to an infringement of procedural formalities based on one of the following grounds: (1) breach of rules relating to the court’s jurisdiction, (2) breach of procedural rules regulating the form and content of judicial decisions, (3) 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 (4) 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: (1) the value or economic interest at stake exceeds €600,000, (2) the proceedings concern fundamental rights other than those established in Article 24 of the Spanish Constitution, or (3) the appellate decision has reversal interest.5

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 due 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.

There is no ‘opt-out’ procedure for consumers who wish to initiate proceedings independently.

5 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.
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:

- *a* exclusive domestic jurisdiction is respected;
- *b* foreign judgments are not contrary to domestic public policy;
- *c* the parties' rights of defence have been respected;
- *d* the foreign resolution is not incompatible with a domestic resolution or a previous foreign resolution that is recognised in Spain; and
- *e* no national proceedings involving the same subject matter and parties were initiated prior to the foreign proceedings.

Law 29/2015 also regulates:

- *a* 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);
- *b* 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);
- *c* 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.6

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6 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.
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, supra).

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.

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. The Royal Decree establishes stronger due diligence measures and expands the information duties imposed on lawyers and other professionals.

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 Basic Data Protection Law 15/1999 and Royal Decree 1720/2007. The authority in charge is the Data Protection Authority (DPA). As to the processing of personal data, the controller must register the creation, modification and deletion of each database with personal data it controls with the Spanish DPA. It is generally necessary to provide information to data subjects on the processing of their personal data.
and to obtain their prior consent before the implementation of personal data processing (unless the processing may be justified on any other legitimate ground recognised by the Data Protection Law). 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 generally obtain the DPA’s authorisation.

In 2016, the new General Data Protection Regulation (EU Regulation 2016/679) was approved. Although its obligations will become binding in May 2018, according to the Spanish DPA’s guidelines, data controllers must initiate a transitional period in order to be in a position to comply with the new data protection legal framework at that time.

For legal professionals, it is important to fulfil the obligations provided by data protection regulations, since personal and private data is frequently reviewed.

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 of 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 petition of the public prosecutor, the police or any party to the proceedings.

Decree law 9/2017 has incorporated a new regulation of the production of documents applicable from 27 May 2017 to procedures of claims derived from antitrust infringements (see Section II.i, supra).
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, due to the activity of persons or due 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
In 2017, the first year of the current legislature, there has been an increase in legislative activity compared to 2016, but without reaching the levels of 2015, in which major reforms to the Spanish procedural system were approved. The adoption of new norms is likely to increase its pace in the coming years.

The public authorities continue to take measures aimed at enhancing the effectiveness, efficiency and transparency of the Spanish procedural system. Of note, for example, are the adoption of new criteria for the admission of cassation appeals and extraordinary appeals due to procedural infringements by Civil Chamber of the Supreme Court (see Section II.i, supra) and the creation of a new transparency website for the Supreme Court that joins those created since 2014 for the General Council of the Judiciary and the various High Courts of Justice, which allows access to a large amount of information, including the possibility of citizens to directly consult the status of their proceedings before the Supreme Court.

The Supreme Court has continued to review an array of doctrines and legal concepts. This judicial approach is expected to continue in the coming years. 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 (nevertheless there has been an increase in procedures related to ‘floor clauses’ included in mortgage loan contracts and other issues related to these contracts that has led to the temporary specialisation of 54 courts of first instance to hear these disputes).

International arbitration’s growth persists (in both commercial and investment arbitrations), making Spain a reference in the field, especially in disputes involving Latin American parties. Recently, three of the most important arbitration courts in Spain (Spanish Court of Arbitration, Madrid Court of Arbitration and the Civil and Mercantile Court of Arbitration) have entered into a memorandum of understanding to unify their arbitral activities and to 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.

These reforms included amendments to Spain’s Basic Judiciary Law and Spanish Civil Procedure Law establishing, for example, the use of electronic systems to file documents and make judicial communications, several laws to establish electronic auctions in Spain in judicial and extrajudicial spheres and a new law on voluntary jurisdiction. These reforms are expected to contribute to the development and optimisation of Spain’s Administration of Justice.
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 damages, 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 ADR 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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II THE YEAR IN REVIEW

1 The Arbitration Rules and Rules for Expedited Arbitrations

The SCC Institute has introduced a number of changes to its Arbitration Rules and Rules for Expedited Arbitrations. The new rules entered into force on 1 January 2017. A few of the key changes are set out below.

Summary procedure

A provision for summary procedure has been introduced. The summary procedure will enable the arbitral tribunal to determine factual or legal issues without necessarily undertaking every procedural step that may otherwise be adopted for the arbitration. The purpose of the summary procedure is to save time and costs in cases such as when a party has made an allegation that is manifestly unsustainable, or when a claim is clearly unfounded as a matter of law.

The summary procedure is flexible and designed as a case management tool available at any time during the arbitration. If the tribunal grants a request for summary procedure, the tribunal shall seek to determine the issue in question in an efficient and expeditious manner, giving each party a reasonable opportunity to present its case.

Joinder and multiple contracts

A new provision has been introduced with respect to multiple contracts, which allows a party to bring claims under more than one arbitration agreement in a single arbitration.

Moreover, the possibilities to consolidate arbitrations under the SCC Rules have been broadened. A party may request that a newly commenced arbitration be consolidated into a pending arbitration under the SCC Rules, provided that the relevant criteria are met. In addition, a new article has been introduced regarding joinder of additional parties, according to which a party to the arbitration may request that the SCC’s board join one or more additional parties to the arbitration. The board may decide to join one or more additional parties provided that the SCC does not manifestly lack jurisdiction over the dispute between the parties.

Administrative secretary

Pursuant to the new rules, the tribunal has to request the parties’ approval to appoint a specific candidate as secretary, who shall be impartial and independent. The tribunal shall consult the parties regarding the tasks of the secretary.

The new provision safeguards the tribunal and the continued development of the proceedings, by allowing the removal of the secretary through challenge proceedings and explicitly stating that a party’s request for removal does not prevent the arbitration from proceeding. If a secretary is removed, the tribunal may propose the appointment of another secretary.

Efficiency and expeditiousness

A new article has been introduced that describes the expectation on the conduct of the participants to the arbitration, be it the tribunal, the parties or the SCC; all of whom shall act in an efficient and expeditious manner. Moreover, the SCC Rules now explicitly state that the tribunal shall apportion the costs of the arbitration between the parties, having regard to each party’s contribution to the efficiency and expeditiousness of the arbitration.
The standard of efficiency and expeditiousness can be found in a number of provisions throughout the new SCC Rules, such as joinder, multiple contracts, consolidation, case management conference, summary procedure and, importantly, in the provisions regulating costs.

**Additional provisions for investment treaty disputes**

The SCC has introduced an Appendix for investment treaty disputes, which consists of four new provisions that supplement the Arbitration Rules and that apply to cases based on a treaty providing for arbitration of disputes between an investor and a state.

With respect to the number of arbitrators, the new Appendix provides that the tribunal shall be composed of three arbitrators where the parties have not agreed on the number of arbitrators.

The Appendix also provides that third parties may request or be invited by the tribunal to make a written submission in the arbitration. For a written submission to be allowed, it shall meet the relevant criteria and the tribunal will take into account relevant circumstances, such as the nature and significance of the interest of the third party in the arbitration and whether the submission assists the tribunal in determining an issue by bringing a perspective or knowledge distinct from that of the disputing parties.

**ii Enforcement of a foreign arbitral award**

A foreign arbitral award can be enforced in Sweden by submitting an application to the Svea Court of Appeal. The Supreme Court has examined the issue whether the court, *ex officio*, shall establish whether a foreign arbitral award is in fact an arbitral award and not a court ruling. This is an issue that is not regulated in the Swedish Arbitration Act or the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The Supreme Court concluded that the court indeed shall examine this issue on an *ex officio* basis because the existence of an arbitral award is a procedural prerequisite for enforcement. Thus, a request for enforcement of a foreign arbitral award shall be subject to an *ex officio* examination of whether the award sought to be enforced is, in fact, an arbitral award.

**iii The principle of jura novit curia in Swedish arbitration**

The Svea Court of Appeal has recently confirmed that the principle of *jura novit curia* is applicable also in Swedish arbitration proceedings. Based on the ruling, the arbitrators are allowed to apply provisions or parts of Swedish law not explicitly referred to by the parties. However, when the tribunal is considering to apply a legal provision not having been referred to by either of the parties, the tribunal shall seek to avoid surprising the parties by bringing the provision to the parties’ attention. It should be noted that the Svea Court of Appeal did not address whether this principle also applies in an international arbitration proceeding seated in Sweden.

**iv Arbitrator’s decision on the advance on costs cannot be reviewed by Swedish courts**

The Supreme Court has concluded that an arbitrator’s decision with respect to the advance on costs cannot be reviewed by the Swedish courts under the Swedish Arbitration Act.
In the case, a party failed to deposit its share of the advance on costs and the tribunal therefore decided to terminate the proceedings. The Supreme Court concluded that since the right to request an advance on costs exists in order to protect the arbitrators’ interests, a decision to request an advance or a decision regarding whether the advance provided is acceptable, is for the arbitrators to decide and cannot be reviewed by a Swedish court.

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 re-hear 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. In the event that 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.
iii 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 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 and Norway on Mutual Assistance in Matters Concerning Service of Documents and Taking 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.


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. 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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iii  Data protection
According to the Swedish Data Protection Act,4 processing of personal data is generally prohibited unless the registered person 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 a legitimate interest. In the field of dispute resolution, the privacy legislation consequently affects the possibility to store evidence that contains personal data and the data controller must ensure that the processing complies with all requirements of the privacy legislation. Moreover, it is generally prohibited to transfer any personal data, such as evidence that contains personal data, to any country outside the EU or EEA, except for certain situations, inter alia, where the transfer is necessary to establish, exercise or defend a legal claim. However, it is generally required that the transfer be made in close connection with the proceedings in which the legal claim is established, exercised or defended.

The Swedish Data Protection Act is applicable until 25 May 2018. Thereafter, the General Data Protection Regulation will be enforced as a directly applicable law in Sweden and the rest of the European Union. The regulation includes stricter requirements for storing personal data which strengthens the data protection for individuals within the European Union.

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 has to 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.

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4 1998:204.
The obligation to produce documents applies also to electronic documents. So far, only paper printouts of electronic documents have been ordered to be produced by the Supreme Court. However, it is unclear whether this obligation could also extend 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 199 new cases in 2016.

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;

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.

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, it should be noted that Sweden did not exercise either the reciprocity reservation or the commercial nature reservation available to the signatories to the New York Convention.

As previously mentioned, the new and revised SCC Arbitration Rules and the SCC Expedited Arbitration Rules entered into force on 1 January 2017.

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, also the courts of appeal 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.

However, recent case law from the Swedish Supreme Court following the revision of the Code of Civil Procedure indicates that the courts of appeal apply the rules too restrictively and, thus, leave to appeal is denied in too many cases. Of the appealed decisions in 2012 not to grant leave of 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. While 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 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. The Arbitration Act will also be revised in the coming years. The focus of both these revisions is to further establish Sweden’s position as a preferred venue for arbitration. The proposed amendments to the Arbitration Act should, if enacted, 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. Both the revision of the SCC Arbitration Rules and the SCC Expedited Arbitration Rules as well as the proposed amendments to the Arbitration Act represent steps forward in this regard.

5 NJA 2012 N 19.
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 (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.

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 Tribunal is the sole instance of appeal.
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. A few selected decisions will be summarised hereinafter. Namely, the Swiss Federal Tribunal confirmed that it is generally permissible for attorneys to agree on a success premium in addition to professional fees (calculated based on an hourly rate) with their clients (see Section II.i below). The Swiss Federal Tribunal also found that the right to appeal an arbitral award may be waived in a mere email (see Section II.ii below). The Swiss Federal Tribunal further rendered a decision elaborating on the absolute necessity to raise a plea of lack of jurisdiction anew at every stage of an arbitral proceeding as otherwise a party risks entering an unconditional appearance to a tribunal’s jurisdiction (see Section II.iii below). The Swiss Federal Tribunal also clarified that the competence of an arbitral tribunal to decide on an underlying claim to an attachment does not imply the tribunal’s competence to also render a decision concerning the validation of the attachment order within the deadline required by law (see Section II.iv below).

i Remuneration for services rendered by attorneys in contentious matters: Success premium in addition to professional fees is generally permissible under Swiss law

When a client engages an attorney the former usually would like to know on what basis the latter is charging for the services rendered. In this regard, the Federal Lawyers’ Act4 (FAFML) stipulates the professional rules of attorney conduct. To this effect, the Swiss Federal Tribunal has repeatedly confirmed that for contentious matters Swiss lawyers are prohibited from agreeing on pure contingency fees (pactum de quota litis) under Article 12 lit. e FAFML. Such provision, prohibiting exclusive profit quota agreements, stipulates that attorneys may not agree to receive a portion of the winnings from litigation as a replacement for professional fees (e.g., calculated based on hourly rates). In a recent decision, the Swiss Federal Tribunal has now clarified that, in contrast to (prohibited) pure contingency fees, an agreement on a success premium payable in addition to professional fees (pactum de palmario) is generally permissible provided that certain conditions and limitations are observed.

In the case submitted to the Swiss Federal Tribunal for review, the mandate agreement between an attorney and a client provided for an hourly rate of 700 Swiss francs as well as for a success fee of 6 per cent in relation to a succession-related dispute. Upon completion of the mandate, the client received an invoice from the attorney for an aggregate amount of approximately 1,060,000 Swiss francs (consisting of hourly rates in the amount of approximately 590,000 Swiss francs and a success fee of approximately 470,000 Swiss francs). After a total of 560,000 Swiss francs of the invoiced amount was paid by the client, the attorney filed a claim against the client demanding payment of the outstanding amount. While the court of first instance dismissed the attorney’s claim in its entirety, the claim was

granted in part by the court of appeal which held that the fee agreement of the parties was generally permissible under Swiss law. Subsequently, the client appealed the decision to the Swiss Federal Tribunal.

The Swiss Federal Tribunal had to elaborate whether Article 12 lit. e FAFML, besides the *pactum de quota litis*, also prohibits the *pactum de palmario*. Commencing with the interpretation of the wording of said provision, the Swiss Federal Tribunal noted that while Article 12 lit. e FAFML prohibits the replacement of professional fees in their entirety with a success premium, a *pactum de palmario*, providing for professional fees only supplemented with an additional success premium, appears to be permitted. The Swiss Federal Tribunal then went on to elaborate on the rational of Article 12 lit. e FAFML stating – in agreement with the legal doctrine – that said provision primarily aims at protecting clients from being taken unfair advantage of while at the same time the provision ensures that the attorneys’ independence is not lost due to personal financial interests in the outcome of a case. The Swiss Federal Tribunal explained that any success fee bears inevitable risks; such as attorneys rashly concluding a mediocre settlement agreement to receive the success fee, even though with additional effort and more time a better settlement could have been achieved. However, the Swiss Federal Tribunal also recognised that this risk is considerably reduced if a success fee is only paid in addition to – and not as a substitute for – professional fees, as the professional fees provide for a certain economic security that in turn strengthens the attorneys’ independence. To conclude, the Swiss Federal Tribunal found that the rationale of Art. 12 lit. e FAMFL does not call for a prohibition of a *pactum de palmario*. Nevertheless, in order to ensure the attorneys’ independence and to minimise the risk of unconscionability, the following three prerequisites need to be cumulatively met for a *pactum de palmario* to be valid:

1. Irrespective of the outcome of a case, the fees payable ought to covers the attorney’s costs and allows the attorney to turn an adequate profit;
2. Professional fees and success premium must not be in a proportion affecting the attorney’s independence or creating a risk of unconscionability (while the Swiss Federal Tribunal did not set a ceiling it stated that the success premium may in any case not be higher than the professional fees; and
3. The success premium may only be agreed upon at the beginning or after the conclusion of the mandate, however, not during an ongoing mandate.

The Swiss Federal Tribunal found the fee agreement in the present case to have fulfilled the above prerequisites, with the exception of the last prerequisite listed above as the success premium was only agreed upon by the parties one year after the attorney accepted the mandate. Accordingly, the appeal by the client was upheld by the Swiss Federal Tribunal and the attorney was not able to recover his success premium.

**ii Valid waiver of right to appeal against an arbitral award declared in an email**

Another case decided by the Swiss Federal Tribunal exemplifies how an email that was incautiously sent combined with internal miscommunication may curtail a party of its available remedy against an arbitral award. The case concerned a publicly listed bank that was ordered by the sanction commission of Switzerland’s principal stock exchange to pay a fine of 3 million Swiss francs. The stock exchange’s arbitral tribunal subsequently dealing with this matter modified the sanction commission’s decision and imposed a fine of 2 million Swiss francs on the bank. The bank appealed the award to the Swiss Federal Tribunal asserting a violation of its right to be heard as well the arbitral award to be arbitrary in its result because
it constitutes an obvious violation of law. In its reply, the stock exchange moved that the appeal be declared inadmissible as the bank had waived its right to appeal. In this regard, the stock exchange submitted an email sent by the bank’s external counsel which included the following wording: ‘I confirm – also in view of the information given concerning the fact that your client, the stock exchange will refrain from appealing the award to the Swiss Federal Tribunal – that our client decided not to lodge an appeal either.’

To start with, the Swiss Federal Tribunal reiterated that parties to a domestic arbitration may not waive their right to appeal the award in advance (i.e., before such award has been rendered). Under Swiss law, such waiver in advance is only admissible if none of parties to an international arbitration\(^5\) have their domicile, habitual residence or a business establishment in Switzerland. The Swiss Federal Tribunal clarified that after an arbitral award is rendered, parties to a domestic arbitration may validly waive their right to appeal such award during the appeal period, either in relation to the arbitral tribunal or the counterparty.

The Swiss Federal Tribunal considered the email sent by the bank’s external counsel to be a clear waiver of the right to appeal. It particularly rejected the bank’s argument that said email merely constituted a statement of intent not to appeal so as to enable the stock exchange to publish a media release informing about the arbitral award and its consequences. The context of the email does not change its content and the Swiss Federal Tribunal held that the bank’s external counsel did not only declare the intention of not lodging an appeal but irrevocably stated that the bank would not lodge such appeal. In this regard, the Swiss Federal Tribunal also elaborated that after intense discussions with the bank’s in-house counsel and prior to sending the aforementioned email the external counsel was in fact of the opinion that the bank decided not to appeal the award. None of the involved counsel was, however, aware that the responsible bodies of the bank had not yet reached a decision on this issue. Once the responsible bodies of the bank became aware of the ongoing preparations to release a media statement concerning the arbitral award, a decision was taken to appeal against such award. However, by then the external counsel had already bindingly waived the bank’s right to appeal. Accordingly, the Swiss Federal Tribunal declared the appeal inadmissible.

iii Entry of unconditional appearance in international arbitration

Lack of jurisdiction is one of the very few grounds stipulated in the Swiss Private International Law Act\(^6\) (PILA) based on which an international arbitral award rendered in Switzerland may be appealed to the Swiss Federal Tribunal. In a recent case the Swiss Federal Tribunal decided to dismiss the appeal without entering into the substance of the case based on such grounds. It held that the appellants made an unconditional appearance on the merits without objecting to the arbitration’s jurisdiction.

The case concerned 34 Australian football players suspected of having committed doping offences. After an initial investigation, the Australian Football League Anti-Doping Tribunal (AFL Tribunal) acquitted the players of any charges considering that a violation of the applicable anti-doping rules could not be proven. This decision was appealed to the Court of Arbitration for Sport in Lausanne, Switzerland (CAS) by the World Anti-Doping Agency (WADA). The CAS granted the appeal and suspended each of the players for two years. As

\(^5\) In principle, an arbitration is deemed international, if a least one party to the arbitration agreement has its domicile or habitual residence outside Switzerland at the time of the conclusion of the arbitration agreement.

final remedy, the players appealed the CAS decision to the Swiss Federal Tribunal arguing that the CAS exceeded its jurisdiction by reviewing the facts and the law (de novo) while, according to the players, the CAS would have only had the power to conduct a limited review under the applicable anti-doping code.

In its decision, the Swiss Federal Tribunal considered that under Swiss law a plea of lack of jurisdiction must be raised prior to any defence on the merits. In case of any failure to timely raise jurisdictional objections, an arbitral tribunal's jurisdiction may, irrespective of a valid arbitration agreement, be established by unconditional appearance. In the case at hand, the players had raised their objections regarding the CAS's power of review already before pleading on the merits. However, in an order subsequently sent by the CAS to the parties, the former informed the latter that the case would be reviewed de novo despite the objections raised by the players. In addition, the order of procedure – signed by the appellants without any reservations – referred to the CAS Code stipulating that the panel has full power to review the facts and the law. The Swiss Federal Tribunal found that, despite their initial objections, the players made an unconditional appearance. It concluded that the players, represented by various attorneys, would have been expected in good faith to make a reservation to the order of procedure if they had wished to insist on their objection regarding the power of review. Accordingly, the Swiss Federal Tribunal held that the players' right to appeal the award to the Swiss Federal Tribunal based on such grounds was forfeited.

The decision illustrates that a plea of lack of jurisdiction should be raised anew at every stage of the proceeding. Otherwise, a party risks making an unconditional appearance to a tribunal's jurisdiction.

iv Validation of attachment order before an arbitral tribunal

In a very recent decision, the Swiss Federal Tribunal elaborated on and developed its practice regarding the validation of an attachment order before an arbitral tribunal. In the case submitted, the Swiss Federal Tribunal considered whether an arbitral award may be appealed based on the ground that said award included a ruling declaring an attachment to be validly validated ("The freezing order dated … has been validly validated").

Under Swiss debt enforcement law, debtors who have successfully applied for an attachment order must pursue their claim within 10 days to validate such attachment. If the respective proceeding is not commenced within such time limit, attachment orders lapse. The Swiss Federal Tribunal concluded that in case the parties have agreed too resolve a dispute by way of arbitration, the attachment order may be validated by submitting the underlying claim to an arbitral tribunal. In this regard, the attachment creditor must comply with the following two deadlines: first, within 10 days after having received the certificate of attachment, a creditor must have completed all steps necessary for the appointment of the arbitrators; second, within 10 days after the constitution of the arbitral tribunal, the creditor must submit its claim to the arbitral tribunal.

In its decision, the Swiss Federal Tribunal clarified that the competence of an arbitral tribunal to decide on an underlying claim to an attachment does not imply the arbitral tribunal's competence to also declare whether the attachment has been validated within the required deadline. Such decision is only for the relevant debt enforcement office to be rendered. Consequently, the Swiss Federal Tribunal found that the arbitral tribunal exceeded its jurisdictions by declaring the validation of an attachment.
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 the ordinary proceedings 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
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 64.4 per cent of the cases in 2016). 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, it is worth noting that 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 adding 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 speaking 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.

While 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.
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.

Service out of the jurisdiction

Summonses, 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.

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 are 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.

vii 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.

The service of documents from a foreign court into Switzerland and the taking of evidence by a foreign court in Switzerland must occur in line with international treaties ratified by Switzerland. In relation thereto, Switzerland has ratified the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial

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, while 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 speaking, the Swiss authorities have in recent years proven to be very amenable to judicial assistance requests from foreign authorities.

viii  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. While 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, in a recent decision, 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.

One should note that while 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 FAFML 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:

- if an attorney has personal interests contradicting the client’s interests;
- if an attorney represents two or more clients with contradicting interests; or
- 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 when 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. 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 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, etc.) 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,

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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.8

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 has to) 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 which otherwise comes to his or her attention in the course of performing his or her mandate. While it is of no relevance from whom the lawyer learned the 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.

ii Production of documents

Contrary to other – predominantly common law – jurisdictions, the CCP does, basically, not 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);

d matters pertaining to due process, the right to be heard and equal treatment; and

e 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 (ICC). In sports matters, the majority of arbitration proceedings are conducted under the rules of the CAS in Lausanne, while many intellectual property disputes are conducted under the arbitration rules of the 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, while the parties are given the opportunity to opt out and choose their arbitral proceedings to be governed by the PILA instead.

iii 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.

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 with the objective of introducing selected improvements and updating certain provisions in line with the extensive case law developed by the Swiss Federal Tribunal since the PILA entered into force back in 1989. The consultation on the revised Chapter 12 of the PILA was concluded in May 2017. The final legislative proposal will be submitted 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

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9 www.swiss-arbitration.ch.
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. The revised DPA is expected to enter into force in 2018.

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 a nutshell, 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.

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.
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
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 which, 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**

**i Procedure of issuing a certificate of an action being initiated**

Article 254 of the CCP provides that if the acquisition, creation, loss or alteration of a claimed right must be registered pursuant to the applicable laws, the court in which the action is pending may, upon the plaintiff’s motion, issue a certificate of fact stating that the action has been initiated. With such certificate, the plaintiff may request the registrar agency to register the fact of an action being initiated. Based on such registration, a third party has the chance to decide whether or not to acquire the subject matter of the action. Given this, the third party’s interest would not be affected unexpectedly by the forthcoming judgment.

However, such registration might be used by the plaintiff to infringe the defendant’s and other parties’ rights. Thus, the newly amended CCP provides that (1) the plaintiff must indicate a preliminary showing about the reasons of its motion, (2) the court must provide opportunities for both parties to state their opinions prior to issuing such certificate, and (3) the court may assess an amount of security and, after the plaintiff deposits the security, instruct the registrar agency to register such fact.

**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 while 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, etc.) are applicable to civil court procedure.

ii 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 from time to time 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 submit briefs to the Supreme Court from time to time. 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.

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4 Article 467 of the CCP.
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.

**Summary proceedings**

Some types of case 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, etc.) 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,

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5 Article 427 of the CCP.
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.

iii Class actions
No typical class action is provided in the CCP but the CCP 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.\(^6\) 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.\(^7\) 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.\(^8\)

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 due 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.\(^9\)

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. In case 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’.

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\(^{6}\) Article 41 of the CCP.
\(^{7}\) Article 44-1 of the CCP.
\(^{8}\) Article 44-3 of the CCP.
\(^{9}\) Article 40 of the CCP.
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{10} 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{11}

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{itemize}
  \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{itemize}

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{itemize}
  \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{itemize}

Service by Taiwanese courts will be effectuated in accordance with the CCP and the Code of Criminal Procedure, respectively.

\textsuperscript{10} Article 131 of the CCP.
\textsuperscript{11} Article 128 of the CCP.
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 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;
h a matter that is commissioned by several clients having a conflict of interest among themselves;

i other matters that are in conflict with his or her current, existing obligations to other clients, former clients, or third persons;

j 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

k 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.

**ii 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. On the other hand, 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.

**iii Data protection**

The PIPA has comprehensive protection of personal data. Generally speaking, 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. On the other hand, 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.12

Notwithstanding the foregoing, a party has the duty to produce the following documents:13

a documents to which such party has made reference in the course of the litigation proceedings;
b documents which the opposing party may require the delivery or inspection thereof pursuant to the applicable laws;
c documents that are created in the interests of the opposing party;
d commercial accounting books; and
e 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.

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12 Articles 342 and 343 of the CCP.
13 Article 344 of the CCP.
The motion shall also specify, among others, the reason why the third 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 may order the third party to produce the document.\footnote{Articles 346, 347 and 343 of the CCP.} With limited exceptions,\footnote{Articles 306–310, 344I(2)–(5) and 344II of the CCP.} 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.

**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.

**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.\footnote{Articles 345 of the CCP.} 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.\footnote{Articles 349 of the CCP.}

VI ALTERNATIVES TO LITIGATION

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.

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. 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.

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:

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:

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.

18 Article 40 of the Arbitration Law.
19 Articles 37 and 38 of the Arbitration Law.
20 Article 49 of the Arbitration Law.
21 Article 50 of the Arbitration Law.
iii Mediation

Mediation is provided in the CCP to be held by the court and in other laws to be held by other institutions.

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,\textsuperscript{22} the following matters shall be subject to mediation by the court before the relevant action is initiated:\textsuperscript{23}

\begin{enumerate}
\item disputes arising from a relationship of adjacency between real property owners or superficiaries, or other persons using the real property;
\item disputes arising from the determination of boundaries or demarcation of real property;
\item disputes among co-owners of real property arising from the management, disposition, or partition of a real property held in undivided condition;
\item 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;
\item disputes arising from an increment or reduction or exemption of the rental of real property;
\item disputes arising from the determination of the term, scope and rental of a superficies;
\item disputes arising from a traffic accident or medical treatment;
\item disputes arising from an employment contract between an employer and an employee;
\item disputes arising from a partnership between the partners, or between the undisclosed partners and the nominal business operator;
\item 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
\item other disputes arising from proprietary rights where the price or value of the object in dispute is less than NT$500,000.
\end{enumerate}

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

\textsuperscript{22} Article 406 of the CCP.
\textsuperscript{23} Article 403 of the CCP.
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.

**Mediation outside the court**

Some other laws provide for mediation:

- **a** the Family Act, for family matters;
- **b** 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;
- **c** the Regulations for Consumer Dispute Mediation, for consumer disputes;
- **d** the Act for Settlement of Labour Management Disputes and the Regulations for the Mediation of Labour Management Disputes, for labour disputes;
- **e** the Regulations for Mediation on Disputes of Contract Performance of Government Procurement: for government procurement;
- **f** the Regulations of Copyright Dispute Mediation, for copyright disputes;
- **g** the 37.5% Arable Rent Reduction Act, for disputes involving farm land leasing; and
- **h** 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**

Performing the commitment to judicial reform in her inaugural address last year, Ms President Ing-Wen Tsai convened a meeting of hundreds of professionals, including professors, judges, lawyers and celebrities, to discuss the issue of judicial reform. Many suggestions were made at the meeting, among which public participation in the judicial process, training of legal professionals and efficiency of judicial proceedings were the most significant. The suggestions are expected to be executed in 2018 and a new judicial system may be introduced in the near future.
I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

The Kingdom of Thailand is a constitutional monarchy with the King as the head of state. The legal system of Thailand is a civil law system, based on codes, as opposed to a common law or case law system. The interpretation and application of laws by the Supreme Court of Thailand does not constitute precedent for other courts to follow; it is, however, very influential. Therefore, in practice intensive research into the decisions of the Supreme Court concerning particular issues is often necessary.

The court system of Thailand comprises the Constitutional Court, the courts of justice, the administrative courts and the Military Court. The courts of justice, in general, have three levels: the courts of first instance, the courts of appeal and the Supreme Court. In the absence of alternative dispute resolution agreements, most infrastructure investment cases are subject to the administrative courts, which have jurisdiction over cases where one of the parties is a state official, administrative agency or entity appointed to perform administration. The administrative courts have two levels: the administrative courts of first instance and the Supreme Administrative Court.

II THE YEAR IN REVIEW

Following the coup by the National Council for Peace and Order (NCPO) in May 2014, national reforms, including legal and judicial reforms, have been implemented. Under the legal reforms, numerous laws and amendments, including amendments to the Civil Procedure Code, the Act on Establishment of Administrative Court and Administrative Court Procedure, several pieces of legislation on criminal procedure and anti-corruption laws have been enacted or are being considered by the National Legislative Assembly. The major amendments to the Civil Procedure Code include provisions for class action suits, changes to the judicial review procedure of the Supreme Court, electronic submission of pleadings, alternative means to the diplomatic channels for service of process on defendants and third parties outside Thailand, and execution of judgment.

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III COURT PROCEDURE

i Overview of court procedure

Civil procedure is governed by the Civil Procedure Code, which is based on an adversarial approach. Administrative court procedure under the administrative court system is governed by the Act on Establishment of Administrative Court and Administrative Court Procedure BE 2542 (1999). The administrative court system is basically an inquisitorial system.

Procedural rules for some special courts, such as the Bankruptcy Court and the Intellectual Property and International Trade Court may be slightly different from those applied by other civil courts.

There is no official English translation of the laws, but a number of versions produced by practising lawyers and scholars are available. Although the Office of the Council of State has recently published translations of some legislation on its website, they are marked as unofficial, and the original Thai texts remain the sole authority with legal force.

ii Civil procedure and time frames

A civil action is commenced by a person filing a complaint with a competent court when a dispute with regard to a personal right or obligation of the person arises. A person who wishes to exercise any legal right may also file a petition with a court. In 2015, the Civil Procedure Code has been amended to allow electronic storage of information subject to detailed regulations to be issued by the President of the Supreme Court under approval of the General Assembly of the Judges of the Supreme Court. Following the amendment, electronic litigation system is being developed by the Office of Judiciary. The system has been planned to comprise electronic database, filing system, hearing recording system, case file, courtroom and researchable database and case management system. The electronic filing system for filing of complaints and other pleadings have been officially launched and applicable at some courts located in Bangkok and its suburbs, and Chiang-mai province for specific kinds of cases including sale and purchase, lease, mortgage, pledge, guarantee, loan, hire-purchase and credit card.

The service of complaint on a defendant is carried out by a court officer, unless the court orders otherwise. The plaintiff has to request, within seven days from the filing date, the court officer to deliver to the defendant a writ issued by the court ordering delivery of a copy of the complaint. The defendant is required to submit an answer, and may also file a counterclaim within 15 days from the date the writ is served or deemed to be served on the defendant. If a counterclaim is filed, the plaintiff is required to submit an answer to the counterclaim within 15 days from the date the counterclaim is served on the plaintiff. If the defendant fails to file an answer within the time specified by law, the plaintiff has to request the court within 15 days from that date to pass a default judgment that the plaintiff is a prevailing party. Otherwise, the law requires that the court strikes the case out of the list of cases.

The court then has to specify the date of pretrial meeting and notify the parties 15 days in advance, unless the court deems pretrial is not necessary. The pretrial meeting is for the court to determine issues and to arrange the proceedings as to which issues should be heard in priority over others. The court is required to determine the first hearing date, which has to be

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2 www.krisdika.go.th.
appointed on a date at least 10 days from the pretrial meeting. There is no specific time frame or time limit for the court in conducting the hearings, but the court is required to conduct a continuous trial for a specified time until the presentation of evidence is completed.

Because of the nature of the adversarial procedure in general, each party is required to submit, within seven days before the hearing date, a list of witnesses and evidence to which it intends to refer or the court is not allowed to admit that evidence or witnesses, unless the court deems it necessary to hear or accept that evidence or witnesses.

During the procedure, commencing from when the court accepts the complaint, the plaintiff may request the court for an interim measure, which is available in the forms of a temporary prohibition order, a seizure of assets and confinement. The application of an interim measure before the filing of a complaint is available in certain situations. For example, the Arbitration Act BE 2545 (2002) allows a party to an arbitration agreement to request a court for an interim measure during or before the commencement of arbitral proceedings. However, the interim measure ceases to be in effect if the parties do not proceed to arbitration within 30 days from the date of the court order or the date specified by the court. The Act does not provide any special requirement for a party in requesting an interim measure before the filing of a complaint. Under the Act on Establishment of and Procedure for Intellectual Property and International Trade Court BE 2539 (1996), a person may also request a court to issue an order to seize or attach documents or materials before a complaint is filed, for the purpose of preservation of evidence.

A decision of a court of first instance may be appealed to a court of appeal. Previously, the parties had the right to appeal against the decision of the court of appeal to the Supreme Court with certain limitations and conditions for appeal on questions of fact, and the Supreme Court had to accept the appeal if the specified conditions were satisfied. Now, the law provides that the judgment of the courts of appeal is final. The final judgment may be reviewed by the Supreme Court solely on petition for permission to appeal the judgment to the Supreme Court. The appealing party must file the petition together with the statement of appeal within one month after the date the final judgment is rendered by the court of appeal. The Supreme Court has discretion to grant or deny the petition in whole or in part. The same principle applies to both general courts and special courts. Special courts of appeal, established to handle appeals of cases from special courts, have been operating since 1 October 2016.

Most time frames for the filing and submission of documents may be extended by a party submitting a request to the court for an extension; the court has discretion to grant an extension order based on the relevant provisions of law.

iii  Class actions

The provisions on class actions were inserted into the Civil Procedure Code in April 2015 and have been in effect since December 2015. The scope of application is confined to claims of tort, breach of contract, and legal rights including rights under environmental law, consumer protection, labour protection, securities and securities markets, trade competition, etc. To initiate a class action suit, the plaintiff needs to file a petition together with the complaint stating the grounds and factual basis and providing the basis and methods for calculation of individual damages (for monetary claims) to obtain court approval. The court may grant approval if the following conditions are satisfied:

a  the claims of the plaintiff and the group members have common grounds, factual basis and prayer for relief;
b  the plaintiff sufficiently specifies the common characteristics of the group;
the group has a significant number of members such that normal proceedings would be inconvenient;  
a class action would be more equitable and efficient; and  
the plaintiff is qualified under the relevant regulations and the plaintiff, including the plaintiff's lawyer, is able to pursue the proceedings to protect the right of the group sufficiently and equitably.

According to the Requirements of the President of the Supreme Court issued under the relevant provisions of the Civil Procedure Code, if the complaint or the petition requesting a class action suit is found to be incorrect or lacks any substance, the court or court officer may give advice to the plaintiff for correction of such complaint or petition.

In addition, the court has the authority to refine the scope of the group. The court can also divide the group into subgroups any time during the proceedings, but solely based on difference in characteristics of damage incurred among the group.

Any member of the group can opt out of the class action within the date specified in the notice of court approval of the class action and bring their own lawsuit individually under the normal proceedings. Once the opt-out is made, that person would be barred from rejoining the class action.

The class action law also promotes the roles of the court in fact-finding procedure, allowing the court to hear additional evidence that has not been obtained through the parties in the suit. The law also creates an incentive for lawyers to bring class action lawsuits and gather members of the group and facilitate injured persons with limited resources to engage in the legal process at the same time. It requires the court to grant a monetary award to the plaintiff's lawyer based on how difficult the case is, the time spent and the performance of the lawyer, actual costs and expenses in addition to court fees, including damages entitled to the plaintiff and the group members at the rate not exceeding 30 per cent of the total damages awarded. The monetary award for the lawyer has higher seniority than damages owed to the plaintiff and the group members in the debt priority ranking.

iv  Representation in proceedings

The law does not require that a party to civil litigation appoint an attorney. A natural person with full legal capacity, or a legal entity, through its authorised representative, may proceed with a case, or appoint an attorney or attorneys in all court proceedings.

v  Service out of the jurisdiction

In general, pleadings and other documents can be served to a party either at his or her domicile (i.e., his or her principal residence or place of business). If the defendant is domiciled outside Thailand, Section 83 bis of the Civil Procedure Code provides that a copy of the complaint and a summons for appearance shall be served to his or her domicile in the foreign country. If the defendant operates a business in Thailand – either by him or herself or by an agent – the documents shall be served to the business place of the defendant or of the agent as the case may be. The parties can agree in writing that all pleadings and other documents to be served to the defendant are to be served on a designated person having a domicile in Thailand appointed to receive service of process.

To serve to the defendant outside Thailand, the plaintiff has to request the court within seven days from the complaint filing date to arrange delivery of a copy of the complaint together with a summons to the defendant and provide a deposit for expenses in the amount
and within the period determined by the court. The complaint, the summons and supporting documents must be translated into an official language of the destination country or the English language; and the translation must be certified.

Previously, the documents had to be served through diplomatic channels conducted by the Ministry of Justice and the Ministry of Foreign Affairs unless other means of service are allowed by any applicable international agreement. Currently, Thailand has agreements on judicial cooperation with only five countries: Australia, China, Indonesia, South Korea and Spain.

The amendment to the Civil Procedure Code in 2015, however, now provides alternative means to diplomatic channels for service on defendants and third parties outside Thailand. According to the Requirements of the President of the Supreme Court issued under the relevant provisions of the Civil Procedure Code, the court can order that a copy of the complaint and a summons for appearance be served by international express mail, by courier or through diplomatic channels.

vi  Enforcement of foreign judgments

Any judgment or order obtained from a foreign court would not be enforced as such by the courts of Thailand, but such a judgment or order may, at the discretion of the court, be admitted as evidence in new proceedings instituted in a court in Thailand in which the court would judge the issue on the evidence before it.

vii  Assistance to foreign courts

Thai law does not provide specifically for assistance with regard to lawsuits occurring in foreign countries. However, under the principle of reciprocity, the courts usually cooperate and provide assistance to foreign courts in particular for the service of process, issuing summonses and subpoenaing evidence, and the deposition of witnesses residing in Thailand. A request for assistance may be submitted to the Thai consulate or a responsible diplomatic representation in the country of litigation. The Ministry of Foreign Affairs and the Ministry of Justice will then forward the request to the court having jurisdiction in respect of the requested action. Currently, Thailand has agreements on judicial cooperation with only five countries: Australia, China, Indonesia, South Korea and Spain.

viii  Access to court files

Only the parties to the case are allowed to access court files. A third party having an interest may access court files by submitting a request to the court during an ongoing proceeding or post-judgment. If the case is conducted on a confidential basis or involves public interest, the court may not allow the access.

ix  Litigation funding

There is no provision of law specifically governing litigation funding. Based on the past precedents of the Supreme Court of Thailand, litigation funding, especially where the funding provider has no interest and aims to receive benefit from such litigation, is considered as conflicting with public policy and good morals. An agreement for litigation funding is, therefore, void.
Administrative court procedure and time frames

Cases that can be brought to the administrative courts include (1) cases involving unlawful acts by administrative agencies or officials (such as *ultra vires* actions), (2) cases involving negligence of officials in their duty or performance of their duty with unreasonable delay, (3) cases involving administrative contracts (such as concession agreements), (4) cases involving wrongful acts and (5) other cases stipulated by relevant laws, such as enforcement of arbitration cases involving administrative contracts.

The procedure may be commenced by a person filing a complaint with an administrative court having jurisdiction (as of 2016, there have been 11 regional administrative courts established and situated in different parts of Thailand). A copy of the complaint shall be delivered to the defendant and the defendant may file an answer. In such a case, the plaintiff is entitled to submit an objection to the answer, to which the defendant is also allowed to submit an additional answer. Then the court may determine whether the facts are sufficient for the court to review and render judgment and announce the end date of fact-finding. The parties may submit additional evidence and statements with the court before such an end date.

On the first hearing date scheduled by the court, the parties may present their statements. The judge-commissioner of justice shall provide his or her personal opinion on the case, which has no binding effect. A party may appeal the decision of the administrative court of first instance to the Supreme Administrative Court within 30 days and this time limit cannot be extended. Under the Act on Establishment of Administrative Court and Administrative Court Procedure BE 2542 (1999), the mere filing of a case with the administrative court for revocation of a by-law or an administrative order does not constitute grounds for suspending the execution of the by-law or administrative order. However, the Act empowers the administrative court with discretion to order otherwise upon request of the plaintiff. The request may be made in the plaint or by submitting an application at any time before the court delivers a judgment or issues an order disposing of the case.

In addition to the above, the Act also provides that the administrative court is empowered to prescribe provisional remedial measures or means in favour of the party concerned before delivery of judgment, upon request of the plaintiff. Such a request must be made before the delivery of a judgment or an order disposing of the case. Further, the Act allows the party in the case to submit an application to the court for an order prescribing a means for protection of the benefits of such party during the trial, or for the execution of a judgment.

For execution of a judgment of the administrative court, previously, the Act on Establishment of Administrative Court and Administrative Court Procedure provided that execution can be conducted only after the case is final and no longer subject to appeal. The Act as amended in 2016 also allows the prevailing party to file a petition to the relevant administrative court to issue an order for execution of the judgment as the court deems appropriate, based on the regulations issued by the General Assembly of the Judges of the Supreme Administrative Court.
IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

The Lawyer Act BE 2528 (1985) and the Rules of the Lawyers Council on Lawyer’s Ethics BE 2529 (1986) govern the matter of conflicts of interest. Only lawyers who hold a licence to practise are required to comply with these laws and rules. Lawyers are not allowed to work for each of the opposing parties on the same matter.

These laws and rules prohibit lawyers from assisting an opposing party of a client in particular by providing or using information obtained, either directly or indirectly, in the course of performing services or duties as a lawyer for the client. The Chinese walls concept does not exist in Thai law. A lawyer wishing to work for the opposing party of a client on the same matter must obtain approval from both parties.

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


However, under the Anti-Money Laundering Protection Act the authorities may address a written inquiry to, or summon, a person, or in this case a lawyer, to give a statement or furnish a written explanation or an account, document or evidence for the purpose of examination or consideration if money laundering is suspected. Although the Anti-Money Laundering Protection Act does not provide an exemption for lawyer–client privilege, it is disputable whether a lawyer can be forced to furnish information and documents in breach of lawyer–client privilege.

In 2013, the Counter Terrorism Financing Act was promulgated. Under the Act, there are currently no requirements for lawyers to set out any ‘know your customer’ measures for the prevention of the financing of terrorism.

iii Data protection

Currently, there is no specific data protection law in Thailand. The latest version of draft legislation on personal information protection that was proposed by the Office of the Permanent Secretary, Prime Minister’s Office has been withdrawn from consideration by the legislature in September 2015 for review and reconsideration by the Ministry of Information and Communication Technology. However, the previous Constitutions provided personal data protection. This protection can also be found in the following Acts, Code and Rules:

a Official Information Act BE 2540 (1997): the Act prohibits a state agency from disclosing personal data in its control to other persons without prior consent in writing of the person who is the subject of the disclosure, unless a law requires such a disclosure, such as disclosure to court, state officials or agencies, disclosure necessary for the prevention or elimination of hazards to the life or health of persons, etc.

b Criminal Code: unlawful disclosure may result in criminal punishment. Some professionals (i.e., doctors, pharmacists, nurses, priests, lawyers, auditors and assistants in the said professions) are prohibited from disclosing any confidential information of another person that is made known to them in the course of their occupation.

c Civil Registration Act BE 2534 (1991): the Act allows only interested persons to review or make a copy of a civil registration. In particular, only the person whose profile or data is shown in such a civil registration may make a copy thereof.
Section 17 of the Act prohibits disclosure of the data in the civil registration to any person except in the circumstances provided in the said Section. A lawyer seeking a copy of a person’s household registration must present to the Civil Registration Registrar a deed for the appointment of a lawyer indicating that he or she is authorised by a client to pursue legal proceedings against such a person.

Lawyer Act BE 2528 (1985) and Rules of the Lawyers Council on Lawyer’s Ethics BE 2529 (1986): a lawyer is not allowed to disclose confidential information of a client that comes into his or her knowledge in the course of performing his or her duties as a lawyer, unless consent is given by the client or the disclosure of such information is required by a court order.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege
The attorney–client privilege may be found in certain laws that aim at protecting client confidentiality (i.e., the key principle of the legal privilege concept under Thai law revolves around the concept of confidentiality).

In summary, the requirements and exemptions for disclosure of confidentiality are as follows:

a disclosure of information obtained from communication with clients may result in a violation of the Rules of the Lawyers Council on Lawyer’s Ethics BE 2529 (1986) and result in the suspension or revocation of a lawyer’s licence pursuant to the Lawyer Act BE 2528 (1985);

b Section 323 of the Criminal Code provides that a lawyer who discloses confidential information of others that is obtained through his or her position as a lawyer in a manner that may cause damage to any other person, is subject to criminal punishment; and

c under Section 231(2) of the Criminal Procedure Code and Section 92(2) of the Civil Procedure Code, a lawyer is allowed to refuse disclosure, to a court in testimony, of any confidential document or information that he or she obtained through his or her position as a lawyer, unless the court deems there is no reasonable grounds for such a refusal.

In the case of in-house legal counsel, the privilege also applies in the extent that information is obtained through his or her duty or position as a counsel. The counsel may also be subject to additional confidentiality requirements in an employment contract or organisation’s employment rules. However, the right to refuse disclosure in testimony does not apply and disclosure does not amount to a violation of the Rules on Lawyer’s Ethics unless the counsel is also appointed or acts as a lawyer representing the organisation in litigation or a court proceeding.

ii Production of documents
If documentary evidence is in the possession of the opposing party or a third party, the party whose allegation has to rely on such evidence is entitled to file a petition requesting the court to issue a subpoena to compel production of the evidence by the opposing or third party. The issuance of a subpoena by the court is conditional upon whether the evidence in question is important and relevant to an issue in the case.
Under Section 92 of the Civil Procedure Code, a party to the litigation or a witness may refuse to produce confidential official documents, information involving intellectual property or trade secrets, or a lawyer may refuse to produce material to protect a client’s confidentiality. However, the court has a power to summon such a person to appear before the court and give an explanation for not producing the requested evidence. If the court finds the explanation unreasonable, the court may order production of the evidence. Failure to comply with such a request would result in criminal punishment.

The Electronic Transactions Act BE 2544 (2001) recognises that transactions in electronic form are binding and enforceable and prohibits courts from refusing to receive information generated by electronic means as evidence solely because of its electronic form. With respect to the production of electronically stored evidence, it is especially governed by the Regulations of the President of the Supreme Court Re Criteria for Adduction of Evidence and Examination of Witnesses Located Out of the Court by Video Conference BE 2556 (2013). A party can request the court to order the possessor to produce such evidence.

The laws are silent on the production of documents in foreign jurisdictions. However, the court may request the assistance of foreign courts through the Ministry of Foreign Affairs. Thailand currently has agreements on judicial cooperation with only five countries: Australia, China, Indonesia, South Korea and Spain.

VI ALTERNATIVES TO LITIGATION

i Arbitration

Arbitration can be institutional or ad hoc depending on what the parties agree. Most arbitration cases in Thailand are handled by the main arbitration institution, the Thai Arbitration Institution (TAI), under the Alternative Dispute Resolution Office, Office of the Judiciary. The TAI provides arbitration services under the TAI Rules of Arbitration. It also offers facilities and administration for ad hoc arbitration such as arbitration under the UNCITRAL Arbitration Rules, and arbitration conducted under the auspices of other institutions, such as the International Chamber of Commerce. In addition, recently, the Thailand Arbitration Center (THAC) was established under the Act of Arbitration Center BE 2550 (2007) as an independent agency to promote dispute resolution through arbitration. The aim is for THAC to become the centre of arbitration in the Association of Southeast Asian Nations (ASEAN) following the establishment of the ASEAN Economic Community in 2015. THAC provides arbitration services under the Arbitration Rules of THAC. THAC is also the first institution in Thailand to open an online dispute resolution service, provided through a system called TalkDD, to facilitate resolution of disputes arising from e-commerce transactions to be conducted under the THAC Rules on Online Dispute Resolution for E-Commerce Transactions BE 2558 (2015).

Other institutions in Thailand that also provide arbitration services under their own set of rules include the Thai Chamber of Commerce and Board of Trade of Thailand and some specific institutions with established regimes typical of industry-specific arbitration procedures, examples of which include: the Thai General Insurance Association (for disputes between general insurance firms); the Office of Insurance Commission (for disputes in connection with insurance contracts, between insurers or insurance firms, insured parties and beneficiaries or interested parties in insurance contracts); the Department of Intellectual
Property (for civil remedies for intellectual property infringement); and the Securities and Exchange Commission (for disputes between business operators or financial institutions and investors).

The enforcement and enforceability of arbitral awards in Thailand is governed by the Arbitration Act BE 2545 (2002). Since Thailand is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), a court is required to enforce an arbitral award made in a signatory country of the convention.

However, the Arbitration Act specifies circumstances in which an arbitral award may be set aside or a court may refuse to enforce an arbitral award, and which are in line with the UNCITRAL Model Law on International Commercial Arbitration. Those circumstances include issues regarding capacity to arbitrate, validity of arbitration agreement, improper notice of the appointment of arbitrators or the commencement of arbitration, scope of arbitration, compliance with the arbitration agreement (for example, number of arbitrators), non-arbitrable subject matter, finality of arbitral award, and conflict with public policy. The Act does not provide the courts with authority for a review on the merits of a decision.

According to Section 42 of the Act, a request for the enforcement of an arbitral award can be made to the court having jurisdiction. Section 9 provides that the courts that have jurisdiction are the central or regional intellectual property and international trade courts, or the court in whose jurisdiction the arbitration takes place, or the court in whose jurisdiction either party is domiciled, or the court that has jurisdiction to consider the matters that are proposed to arbitrators. For an enforcement of an arbitral award the claims of which are based on an administrative contract, a request for the enforcement shall be submitted to the administrative court system. A jurisdictional question as to which court has jurisdiction over cases involving administrative contracts was finalised by the Adjudication Committee for Power and Duty of Court under Decision No. 4/2547.

ii Mediation

In Thailand, mediation is mostly done in courts after a lawsuit is filed, where the parties can immediately request the court to enforce the resulting settlement agreement without having to file a separate case for enforcement thereof. If the mediation is done out of court, the parties would be required to file a lawsuit with a court on the grounds of breach of contract to enforce their agreements, the validity and enforceability of which the court may need to review, along with how the agreement had been breached.

The Regulations of the Judicial Administration Commission on Mediation BE 2544 (2001) as amended set the standard for mediation in court by tribunal judges and mediators, aiming to resolve court congestion and delay in proceedings. Under the Regulations, mediation may be conducted by (one or more) judges, judicial service officers or any third parties. In appointing mediators, the court has to consider the satisfaction of the parties involved and suitability. Upon appointment, the mediator is required to disclose any conflict of interest to the parties. A person may register with the court for listing as a mediator if the following qualifications are satisfied: (1) to have knowledge of an area such as science, economics, law and social science; (2) to be at least 25 years old; (3) not to be a judicial service officer; (4) to have no negative reputation; (5) not to be an incompetent person, or quasi-incompetent person; and (6) never to have been subject to a final judgment of imprisonment, except for negligence or a misdemeanour.

The regulations also set the standard of conduct for mediators, and that a mediator shall not have the authority to consider or decide any issue unless the parties agree otherwise.
Instead, a mediator is required to assist the parties in negotiating and provide guidance for dispute resolution. In other words, the major role of the mediator is to conciliate and mediate between the parties to reach mutually agreed resolution.

There are no rules obliging parties to mediate; however, Thai courts, especially the Labour Court, usually encourage parties to consider and enter into a mediation process before commencing formal proceedings and a trial. If the mediation is not successful, judges sometimes encourage parties to mediate during the trial and act unofficially as a mediator.

Currently, every court in Thailand including provincial and municipal courts has its own mediation centre to facilitate parties in mediation.

In addition, the Alternative Dispute Resolution Office, a formal body established by the Office of the Judiciary was set up in BE 2533 (1990) to encourage and provide facilities and services for alternative dispute resolution. In particular, an arbitration service is provided through the TAI (see Section VI.i, supra) and a mediation service is provided through the Mediation Centre under the Rules on Out-of-Court Mediation. The Rules encourages the parties to mediate before commencing a formal court procedure, or at any time during an ongoing court proceedings. The appointed mediator, who can act in a mediation procedure under the Rules on Out-of-Court Mediation, shall have to be agreed by the parties. The mediator can also perform in the role of arbitrator if the parties agree.

iii Other forms of alternative dispute resolution

In addition to arbitration and mediation, the parties may resolve a dispute by any means or in any form that they wish. For example, there are commercial contracts that specify dispute resolution by expert determination. However, since any adopted procedure other than arbitration would have no binding effect, the parties are allowed and may commence or continue litigation if such a resolution process is unsuccessful.

VII OUTLOOK AND CONCLUSIONS

Currently, numerous draft laws and amendments have been proposed and are pending review by the legislative entities. Following the referendum on the draft Constitution held in August 2016, the draft was amended and finally officially publicised on 6 April 2017. It is expected that general elections will be held in late 2018.
Chapter 35

TURKEY

H Tolga Danışman, Z Deniz Günay and Emek G F Delibas

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 government come next in the ranking. These are followed by regulations, by-laws and communiqués passed by various public authorities.

From a historical perspective, codification 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.

An overwhelming majority of disputes that cannot be resolved through amicable negotiations are adjudicated in the courts. Arbitration comes a distant second and mediation has only recently become a hot topic in Turkish law. Almost six years after the enactment of the Code on Mediation, the very recent Law on Labour Courts was published in the Official Gazette dated 12 October 2017. This will reduce the workload of labour courts by making 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. This provision will fundamentally change the way employment cases are litigated and will bolster state efforts, which began with the enactment of Code on Mediation.

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

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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 of appeals, 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, on the other hand, 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 mixed 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 II, infra.
II 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 Civil Procedure Code (CPC) No. 6100, 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 their case

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2 This section was based, with the necessary modifications and updates, on the 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.
logs 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.

While 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. While 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.

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 him 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.
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 of course. 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 in 1931 and ratified in 1933.3 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 Turkish embassy or consulate at the place of domicile of the addressee.

Turkish law does not distinguish natural persons from legal entities in international service procedures.

3 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.
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 Article 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 him or herself;

f. 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

e. 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. While 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.

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. While 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.

While 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.

III  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 *ex officio* 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 wall 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.

**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.

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.
While 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 CPAs; (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 to 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 requirement (brokerage houses, for example).

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.

### 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 Data Protection Code became fully effective on 7 October 2016 following the end
of a grace period in relation to the enforcement of certain provisions. The Data Protection Code follows the general structure of the European Union Data Protection Directive on processing of personal data.

Although there are sector-specific regulations or by-laws on the processing of personal data in some sectors, such as the health sector or the electronic communications sector, there is no similar regulation specific to the processing of data in the legal sector. In the absence of specific regulations, the processing of personal data by lawyers or law firms is only possible according to the applicable provisions of the DPC (i.e., if a data subject gives his or her explicit consent or if there is a statutory exception allowing the processing of personal data without a data subject’s consent). Since the legislation is quite recent and there are no established precedents, it is hard to provide a clear answer as to whether law firms fall under a statutory exception or not. However, it is highly possible that the data protection framework with regard to the legal sector will continue to follow EU practice and precedents in the following years.

In addition to the DPC, 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.

IV 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:

- it is prohibited for an attorney to disclose information communicated in the course of his or her representation (unless expressly permitted by the client);
- even when the client grants permission, the attorney may still decline to disclose any such information;
- an attorney cannot be forced to be a witness involving his or her client’s confidences; and
- an attorney cannot be subjected to any legal or criminal liability for refusing to be a witness.

Article 37(a)–(b) of the Professional Rules of the Turkish Bar Association stipulates 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.
ii Production of documents

As a follower of the European continental civil law tradition, Turkish law does not allow for an 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:

a) 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
b) 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.4

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.

V ALTERNATIVES TO LITIGATION

i Arbitration5

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 and 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.

4 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.
5 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.
The following circumstances are qualified as constituting a foreign element under Article 2 of the Code:

\(a\) the usual residence, domicile or place of business of any party to the arbitration agreement is located outside Turkey;

\(b\) 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, 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 when a loan or a guarantee agreement is executed in order to bring foreign investment to Turkey for performance of the relevant agreement; and

\(d\) the main agreement or legal relationship constituting the basis of the arbitration agreement permits the flow of capital or goods from one country to another.

**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 longstanding 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). Law No. 5718 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 as mentioned above.

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 tribunal’s jurisdiction and courts’ interference**

The arbitral tribunal may rule on its 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 indicate the arbitration method of their choice. 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 enforce the 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.

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6 Article 7 of the International Arbitration Code.  
7 Id.  
8 Id.  
9 Article 5 of the International Arbitration Code.  
10 Id.  
11 Article 6 of the International Arbitration Code.  
12 Id.
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, which are determined in an exclusive manner.

The court of first instance of the defendant’s usual residence, domicile or place of business will have jurisdiction to hear an application for the setting aside of an award. 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.

The parties can appeal a decision to set aside an award in line with the provisions of the CPC. An appeal is limited to the legal grounds applicable to the setting aside of the award. An arbitral award may be set aside by the court if:

- a party to the arbitration agreement lacks the necessary competence;
- 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;
- 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;
- the award was not rendered within the agreed or statutory term for arbitration;
- the arbitrator or the arbitral tribunal did not have jurisdiction to hear the dispute;
- 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;
- 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;
- the principle of equality of the parties was not respected;
- the subject matter of the dispute is not capable of settlement by arbitration under Turkish law; or
- the award is in conflict with Turkish public policy.

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13 Id.
14 See, e.g., Article 15 of the International Arbitration Code, which is based on the same principles as Article 5 of the New York Convention.
15 Articles 3 and 15 of the International Arbitration Code.
16 Article 15 of the International Arbitration Code.
17 Article 15 of the International Arbitration Code.
An action for setting aside the award should be filed before the competent court of first instance within 30 days from delivery of the award or, as case may be, of the correction or interpretation of a complementary award. The court will give priority to this action and conclude it urgently.

Pursuant to the International Arbitration Code, the parties may partially or fully waive their right to file an action to set aside the award. 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.

**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, 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.

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.

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.

**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.

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18 Id.
19 Id.
20 Id.
21 Id.
22 Id.
23 Id.
Domestic awards

Domestic awards issued in Turkey are rendered because of arbitral proceedings conducted in accordance with applicable provisions of the CPC. These awards are also subject solely to the setting-aside procedures.24 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 rendered in another signatory state and the relevant dispute is defined as commercial under the Turkish Commercial Code.25 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, while 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:

a the award is not yet binding, or has been set aside or suspended by a court;
b the subject matter of the dispute is not arbitrable; or
c the award is a violation of public policy.26

Violation of public policy is grounds for refusing recognition or enforcement of foreign arbitral awards.27 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

24 Article 439 of the CPC
25 Turkey limited the enforcement of foreign arbitral awards to the ones of commercial nature by reserving its rights under Article 1(3) of the New York Convention.
26 Article 61 of Law No. 5718.
27 See Law No. 5718, Article 62.1(b); and the New York Convention, Article V.1 and 2.
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 *sui generis* 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:

- a lack of due process;
- b invalidity of the arbitration agreement under the law of the country to which the parties have subjected it;
- c improper arbitral procedure or composition of the arbitral tribunal;
- d inarbitrability of the subject matter; and
- e lack of reciprocity.28

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.29

**ii Mediation**

Mediation is the second type of compromise of proceedings 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.

According to the figures announced by the Department of Mediation, 16,056 mediation proceedings were conducted in 2017 alone. From November 2013 to December 2017, the Department of Mediation announced that 19,292 cases had been amicably resolved out of 21,517 cases in total, putting the success rate at 89.7 per cent.

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

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28 Article 61 of Law No. 5718.
29 Turkey brought the requirement of reciprocity by reserving its right under Article 1(3) of the New York Convention.
or during litigation, and 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.

Despite its discretionary nature, the provisions of the newly enacted Law on Labour Courts provide mandatory mediation for several disputes such as receivable claims and reinstatement cases. These provisions have gone into effect as of 1 January 2018. According to this mandatory mediation procedure, parties would be required to mediate before commencing a lawsuit. The government has also proposed extending mandatory mediation to commercial disputes below a monetary ceiling.

The Code on Mediation also focuses on confidentiality and imposes a strict confidentiality requirement on both the 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:

\[ a \] the invitation to mediate by one party, or either party’s willingness to participate in the mediation process;
\[ b \] comments and proposals made by either party to resolve the dispute through mediation;
\[ c \] proposals made by a party, or acceptance of a claim or factual matter during the mediation process; and
\[ d \] 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, 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. In cases where 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 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.
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 FIDIC 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.

VI OUTLOOK AND CONCLUSIONS

It is likely that the future of dispute resolution in Turkey will be determined primarily by the restructuring of the courts, the adoption of mandatory mediation in employment law cases, and the growing use of arbitration instead of litigation. Improving the efficiency of the legal system vastly depends on how well the new courts function together and how frequently the ADR mechanisms will be embraced by legal practitioners and disputing parties. The major responsibility for this lies with the practitioners themselves. Hence, legal professionals from lawyers to judges will need to lead the disputing parties through the new system and when possible, to amicable ways of settlement, the latter of which does not have to deter parties from pursuing their legal rights, nor should it confine them to any offer made, but rather it can create options for parties who might previously have been trapped in lengthy litigation proceedings.
Chapter 36

UNITED ARAB EMIRATES

Nassif BouMalhab and Aimy Roshan

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) that 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
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 zones that have been established in the UAE that allow for 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 Penal Code and international treaties.

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 civil UAE jurisdiction that they are geographically situated in. The other free zones remain subject to the ‘onshore’ UAE court system.

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 Financial Services Regulatory Authority, which was established by Dubai Law No. 9 of 2004. A DIFC Court of First Instance and DIFC Court of Appeal have been established 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.

### iii The framework for ADR 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 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\(^\text{12}\) in 2006. There are several institutions in the UAE that administer commercial arbitrations and a new arbitration law is expected to be enacted imminently, which is said to be based on the UNCITRAL Model Law. For the time being, however, arbitration in the UAE is governed by specific provisions of the UAE Civil Procedure Law.\(^\text{13}\) Specific legislation based on the UNCITRAL Model Law is in force in each of the DIFC and ADGM and applies to arbitrations seated within those free zones.

There is no formal legislation that governs the enforcement of decisions of conciliation boards or mediators. 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*,\(^\text{14}\) 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*,\(^\text{15}\) 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*.\(^\text{16}\)

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13 Articles 203 to 218 of the UAE Civil Procedure Law.
14 [2013] DIFC ARB 002.
The era of the conduit jurisdiction of the DIFC Courts, however, has been tempered since June 2016 by the establishment of the Judicial Tribunal for the Dubai Courts and DIFC Courts. 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. 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.

A series of decisions have been published by the Judicial Tribunal. The trend which appears to be developing suggests that the DIFC Courts shall be preferred to the Dubai Courts only where the arbitration is seated in the DIFC free zone. Conversely, the Dubai Courts are preferred where the arbitration is seated onshore Dubai (outside of the DIFC).

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.

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 local advocates (UAE nationals) appearing on behalf of the respective 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 the court is requested to adjourn for judgment, or the court declares the

17 Decree No. (19) of 2016 establishing the Dubai-DIFC Judicial Tribunal.
18 Cassation No. 1 of 2016 (JT).
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 and 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 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.

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). 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 which permits or requires the use of a Part 8 claim form. 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.

**Urgent or interim remedies**

In both onshore UAE courts and the DIFC 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. Firstly, there must be serious reasons to believe that the defendant will flee the country. Secondly, the debt must be known, due for payment and unconditional. Thirdly, 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.

Precautionary attachment

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 Courts

The DIFC 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 are listed at Rule 25 of the Rules of the DIFC Courts and include: interim injunctions (Rule 25.1(1)), freezing orders (Rule 25.1(6)), disclosure orders (Rule 25.1(7)) and search orders (Rule 25.1(8)).

The procedure for seeking an interim order is to make an application to the DIFC Court by filing an application notice with the court (Rule 23.2). 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 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.

**Representation in proceedings**

**Onshore UAE courts**

Only local advocates licensed by the Ministry of Justice have rights of audience before the onshore UAE courts. The local 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 local advocate and work with the advocate to prepare pleadings for the local 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, a local 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 a lawyer.

**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.

**Service out of the jurisdiction**

The Civil Procedure Law provides for service of proceedings issued in the UAE on persons living abroad. As set out in Article 9.7, the summons should be delivered to a person domiciled abroad as follows (unofficial translation):

> For persons having a known domicile abroad, it shall be delivered to the Ministry of Justice for communication to them through diplomatic channels, unless the summoning procedures are regulated in this case by special agreements. However, service may take place by any means agreed by the parties. In this case, service may be made through a company, an office or more in accordance with the controls specified by a Cabinet resolution.

This means service overseas is carried out exclusively through the court. In practice, service by the courts is effected through diplomatic channels. This process can take a few months depending on how quickly the respective courts action the request.

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19 See: https://registrations.draacademy.ae/.
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).

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, the China Convention, the India Convention, the UK Convention, the GCC Convention, and the Riyadh Convention.

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.

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)–(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.

The DIFC Courts

It is possible to enforce foreign judgments by utilising the conduit jurisdiction of the DIFC Courts even where the defendant has no assets in 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.

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.

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 treaty26 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 & Commonwealth Office in London;
c the documents will be sent to the British Embassy in the UAE;

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26 Supra, footnote 23.
the documents will be passed to the UAE Ministry of Foreign Affairs;
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 Court proceedings on the other hand are public and all pleadings and evidence are accessible from the Registry or the e-Registry. The exception to this are 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 DIFC Courts.

Legal professionals cannot however offer contingency fee arrangements that are on a ‘no win, no fee’ basis.27

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).28 Each emirate also has its own independent body which governs the legal profession. For example, in Dubai, firms must be 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 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 has previously acted, provided the advocate does not breach confidentiality and he 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.

27 UAE Federal Law No. 23 of 1991 regarding the Regulation of the Legal Profession.
28 Ibid.
DIFC
The DIFC has in place the Mandatory Code of Conduct for Legal Practitioners in the DIFC Courts (the DIFC Code). The 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.

ii Money laundering, proceeds of crime and funds related to terrorism
Lawyers are subject to the UAE’s federal anti-money laundering (AML) and combatting the financing of terrorism (CFT) regime, which was last materially amended in 2014. Lawyers in some of the UAE’s financial free zones, such as the DIFC, 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 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 new 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.

29 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.
30 UAE Cybercrime Law No. 5 of 2012.
**DIFC**

The DIFC Data Protection Law (DPL) applies to entities registered in the DIFC, including law firms. Pursuant to the DPL, 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. 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.

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**

There is no specific legislation in the DIFC that deals with privilege although the concept is referred to in a number of laws and regulations. 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. 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.

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32 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.
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.;
- loss or destruction of the documents; or
- other sensitivities that the Court finds compelling. Each of these objections will be considered case by case.

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, back-up systems and other devices.

**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.
Arbitration

*The rules governing arbitration*

There is no formal federal legislation that governs arbitration with a Dubai seat or seat in another Emirate within the UAE. Currently, UAE-seated arbitrations are governed by Articles 203-218 of the Civil Procedure Law. The applicable provisions of the Civil Procedure Law are not based on the UNCITRAL Model Law. It is expected that a new arbitration law based on the UNCITRAL Model Law will be enacted in 2018. Where the seat of arbitration is the DIFC, the DIFC Arbitration Law\(^{33}\) governs the arbitration. The DIFC Arbitration Law is based on the UNCITRAL Model Law.

The rules that are applied to the arbitration will vary depending on party choice of rules.

*Major arbitral institutions*

The major arbitral institutions in the UAE are the Dubai International Arbitration Centre (DIAC), Abu Dhabi Conciliation and Arbitration Centre (ADCCAC), Sharjah International Commercial Arbitration Centre (SICAC or 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 ICC is the institution of preference in the majority of construction disputes.

*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 207 in 2016 the trend remains positive. The decline measured against the number of DIAC Arbitration cases reported in 2011 is largely owing to the global financial crises and in particular a peak in real estate disputes from 2010–2012.

Diversity in the types of matters that are being submitted to arbitration, which includes maritime, telecommunication, finance and banking, media and general commercial\(^{34}\) 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).

\(^{33}\) DIFC Arbitration Law No.1 of 2008.

Rights of appeal

Arbitration awards are not subject to any appeal. Parties may, however, apply to annul an award in the limited circumstances listed at Article 216 of the Civil Procedure Law. This includes where the award was issued without an arbitration agreement or on the basis of an invalid arbitration agreement, the arbitrator acted outside the scope of the arbitration agreement, the arbitrator was not appointed in accordance with the law or was otherwise not authorised to make the award, the person that entered into the arbitration agreement did not have capacity, or where the proceedings were invalid.

It is not uncommon for the losing party to seek to annul an award at the time the judgment creditor seeks to enforce the award or even before. The procedure for commencing annulment proceedings is identical to the procedure for commencing a regular claim in the onshore UAE courts.

Similarly, arbitral awards cannot be appealed to the DIFC Courts but they can be set aside on the limited grounds which are set out in the DIFC Arbitration Law, which mirror the UNCITRAL Model Law. Any application to set aside an award 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.

Article 41(2)(b)(ii) of the DIFC Arbitration Law provides that the DIFC Court can set aside the award where it finds that the subject matter of the dispute is not capable of settlement by arbitration under DIFC Law, the dispute is expressly referred to the jurisdiction of another tribunal or body under the applicable law or the award conflicts with the public policy of the UAE.

iii Enforcement of arbitration awards

Domestic awards

An arbitral award must be ratified by the courts 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. This involves filing a claim with the court of first instance of the emirate where enforcement is sought.

The application will then be served on the defendant and the claim will proceed in the same manner as a regular claim. The arbitral award must satisfy all of the requirements of the Civil Procedure Law in order to be enforceable.

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.35

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.36

Recent developments and trends
The long-awaited new arbitration law that is expected to be enacted imminently and limitations to the conduit jurisdiction of the DIFC Courts are two of the most significant developments in the arbitration space.

The current draft of the new arbitration law provides for a streamlined approach to the execution of arbitration awards which will allow an award creditor to enforce an award through the execution courts of the UAE without first seeking to ratify the award. An award debtor will have 30 days to challenge the award but this will not automatically stop the enforcement. The new arbitration law is also expected to provide the UAE supervisory courts with the power to address spurious procedural and jurisdictional challenges, which can currently lead to inefficiencies in the arbitration process.

Limitations to the conduit jurisdiction of the DIFC Courts is addressed previously in the present chapter.

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.

36 See for example: Dubai Court of Cassation Case No. 132/2012.
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 is taking a step in the right direction with a number of reforms to the ADR arena resulting in parties employing alternative means of dispute resolution rather than resorting to court, which can often be a slow-paced and costly process.

The new arbitration law, which is said to be modelled on the UNCITRAL Model Law, is a welcome change and is expected to provide further stability to an emerging area of law. With a set of rules that will be consistent with internationally accepted principles, the new arbitration law is expected to respond to a need to modernise the legal framework around UAE-seated arbitration.

There remains uncertainty, however, with regard to the extent to which parties can utilise the conduit jurisdiction of DIFC Courts to enforce foreign and domestic arbitral awards and foreign judgments.

The establishment of the DIFC, ADGM and international arbitration institutions together with the long-awaited reforms to the arbitration law, demonstrate the UAE’s intention of maintaining its status as a global hub for business and a platform that connects the GCC’s market with other global economies. It is likely that there will continue to be a series of further positive law reforms that will bring greater transparency to dispute resolution in the region and will encourage parties to utilise the various courts and arbitral institutions offered in the UAE. The current legal framework, especially within the DIFC and ADGM, lends itself to investor confidence.
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

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1 Timothy G Cameron is a partner, and Lauren R Kennedy, Daniel R Cellucci and Alex B Weiss are associates, at Cravath, Swaine & Moore LLP.
2 A corporation, whether domestic or foreign, is deemed a citizen of both its state of incorporation and the state in which its principal place of business is located. See 28 USC Section 1332(c)(1).
3 New York, for example, has four districts: the Southern, Northern, Eastern and Western Districts.
4 For example, in the US District Court for the Southern District of New York, which is one of the four federal district courts in the state of New York, there are currently 27 active judges.
5 For example, the Court of Appeals for the Second Circuit hears appeals from the federal district courts in the Southern, Northern, Eastern and Western Districts of New York, as well as the District of Connecticut and the District of Vermont.

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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, but not all, 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 (but not all) 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.

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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/2017/year-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 2263–64.
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 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 (ADR) procedures

ADR mechanisms include arbitration and mediation. ADR mechanisms are used by mutual agreement of the parties. They are discussed in more detail below.

II THE YEAR IN REVIEW

Notable decisions of 2017 include the following cases.

i Matal v. Tam

In Matal, the Supreme Court considered whether Section 1052(a) of the Lanham Act, which prohibits the Patent and Trademark Office (PTO) from registering trademarks that ‘may disparage ... persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute’ (the ‘disparagement clause’), is unconstitutional because it violates the First Amendment of the US Constitution. Among other things, the First Amendment forbids government entities from ‘abridging the freedom of speech’ based on the viewpoint expressed by the speaker.

The PTO – which is a US governmental entity – had rejected the plaintiff’s application for a trademark on the ground that the proposed trademark was offensive towards a specific ethnicity and, therefore, violated the disparagement clause. The plaintiff sued, arguing primarily that the disparagement clause impermissibly regulated speech in violation of the First Amendment. The government argued, inter alia, that (1) trademark registration is government speech, not private speech, and is therefore not subject to the First Amendment; and (2) trademarks are a form of government subsidy and that the government may therefore deny trademark applications under the established rule that the ‘government is not required to subsidize activities that it does not wish to promote’.

The Supreme Court ruled in favour of plaintiff, concluding that (1) trademark registration is not government speech; and (2) trademarks are not a form of government subsidy. Accordingly, the Court concluded that the Lanham Act’s disparagement clause was unconstitutional in violation of the First Amendment.

11 Many commercial contracts, for example, contain express provisions to submit any claims arising from the contract to arbitration, rather than court litigation.
12 137 S Ct 1744 (2017).
13 15 USC Section 1052(a).
14 US Const amend I.
15 Matal, 137 S Ct at 1757, 1761.
16 Id. at 1758-60.
17 Id. at 1761.
Kindred Nursing Centers Limited Partnership v. Clark, et al.\textsuperscript{18}

In \textit{Kindred Nursing}, the Supreme Court was asked to consider a Kentucky state law that provided an agent could bind her principal to an arbitration agreement—implicitly waiving the principal’s state constitutional rights to a jury—only if the principal expressly granted her agent the authority to do so.

Estate representatives of two deceased individuals had brought claims in Kentucky state court against Kindred Nursing on behalf of the decedents’ estates, arguing that Kindred Nursing had delivered substandard care to their relatives.\textsuperscript{19} Kindred Nursing moved to dismiss the cases, on the ground that the estate representatives had signed arbitration agreements on behalf of their decedents’ estates. According to Kindred Nursing, those arbitration agreements required the parties to arbitrate their disputes and prohibited courts from hearing the disputes.

Notwithstanding the arbitration agreements, the Kentucky Supreme Court sided with the plaintiffs and held that the underlying claims could be heard in court. The Kentucky Supreme Court reasoned that the Kentucky state constitution protects an individual’s rights to trial by jury and to access the courts, and that those rights could be waived by an agent on behalf of a principal only if the principal explicitly provides the agent with that authority. Because the deceased individuals did not expressly grant their estate representatives authority to waive their rights to trial, the arbitration agreements signed by the estate representatives could not preclude their claims from being heard in court.

The Supreme Court of the United States reversed. It held that the rule announced by the Kentucky Supreme Court was pre-empted by the Federal Arbitration Act, which is a federal law that has been interpreted to prohibit state governments from enacting rules that uniquely discriminate against the enforcement of arbitration agreements. According to the US Supreme Court, the rule announced by the Kentucky Supreme Court did just that—it ‘specially impeded the ability . . . to enter into arbitration agreements’—and, therefore, the rule could not apply in light of the Federal Arbitration Act.\textsuperscript{20}

Nelson v. Colorado\textsuperscript{21}

In \textit{Nelson}, the Supreme Court considered whether the US Constitution requires a state to refund fees, court costs and restitution paid by a defendant in connection with a conviction that was later overturned and not subject to retrial.

The case involved two petitioners whose convictions in the state of Colorado were ultimately invalidated. The petitioners moved for a refund of the money they had paid to the state in connection with their convictions, but the Colorado Supreme Court refused to grant the petitioners their refund, holding that under Colorado state law the petitioners were required to file a separate civil claim and to prove their innocence by clear and convincing evidence before they could recover the requested amounts.\textsuperscript{22}

The United States Supreme Court reversed. It held that the procedure set forth in the Colorado state law violated the Fourteenth Amendment of the US Constitution, which provides that ‘No State shall ... deprive any person of life, liberty, or property, without due

\textsuperscript{18} 137 S Ct 1421 (2017).
\textsuperscript{19} Id. at 1425.
\textsuperscript{20} Id. at 1429.
\textsuperscript{21} 137 S Ct 1249 (2017).
\textsuperscript{22} Id. at 1253-54.
process of law’. 23 The Supreme Court concluded that, ‘[t]o comport with due process, a State may not impose anything more than minimal procedures on the refund of exactions dependent upon a conviction subsequently invalidated.’ 24

iv  **Salman v. United States** 25

In *Salman*, the Supreme Court considered whether an individual who trades securities on non-public corporate information (i.e., a ‘tippee’) may be held liable under US securities laws for insider trading, where the person received the ‘inside information’ from a relative or close friend who did not personally benefit in a tangible, financial way from the disclosure. 26

The petitioner in *Salman* had been convicted of insider trading based on information that he received from an extended family member. The petitioner’s family member had, in turn, received the information from the petitioner’s brother-in-law. The petitioner, relying on recent lower-court precedent, argued that he could not be held liable for insider trading because his brother-in-law (i.e., the ‘tipper’) did not personally benefit from disclosing the inside information, which is a prerequisite to finding a tippee liable for insider trading. Among other things, the petitioner argued that his brother-in-law did not seek money, property, or something of tangible value in exchange for the tips. 27

The Supreme Court rejected the petitioner’s argument, holding that — consistent with prior Supreme Court precedent — a tipper breaches his fiduciary duty by making ‘a gift of confidential information to a trading relative or friend’ and that, on the present facts, the Court could infer a personal benefit to the tipper. 28 The Supreme Court therefore concluded that the petitioner was properly convicted of insider trading notwithstanding the fact that the tipper did not receive anything of pecuniary value in exchange for disclosing the inside information.

III  **COURT PROCEDURE**

This section will focus on the procedures applicable in federal courts. 29

i  **Overview of court procedure**


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23 US Const amend XIV Section 1.
24 Id. at 1258.
25 137 S Cr 420 (2016).
26 Id. at 424.
27 Id. at 426.
28 Id. at 427 (citing *Dirks v. SEC*, 463 US 646 (1983)).
29 State court procedures are similar in many respects, but each of the 50 states has its own set of procedural rules.
30 In addition, each individual federal district may promulgate rules to supplement, and in some instances to modify, the FRCP; and each individual judge within each district may promulgate rules governing proceedings in his or her courtroom.
31 Each Circuit Court of Appeals may promulgate its own rules to supplement the FRAP.
Procedures and time frames

A lawsuit is commenced by the filing of a complaint with the court, a copy of which must be served, along with a summons, on the defendant. The defendant responds to the complaint by serving a responsive pleading, called an answer, which may include defences and counterclaims. 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.

Following this initial pleading phase, the parties usually engage in ‘discovery’ (including document production and depositions). The FRCP provide for depositions, production of documents, including electronically stored information, and written discovery. The 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.

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.

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.

32 See FRCP 3.
33 See FRCP 4.
34 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.
35 See FRCP 12(b).
36 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.
37 See FRCP 34.
38 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’).
39 Recently adopted amendments to the Federal Rules of Civil Procedure 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.
40 28 USC Section 1407(c).
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 10.4 months in 2016–2017. For civil cases that proceed to trial, however, the median time from filing to trial was 26.6 months in 2016–2017.

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.

### iii 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. 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. 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, an owner may represent a solely owned business or partnership. However, 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;

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41 See www.uscourts.gov/file/23320/download.
42 Id.
43 See FRCP 23.
44 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.’).
(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’.45

vi Enforcement of foreign judgments

The United States is not a signatory to any treaty that requires the recognition or enforcement of foreign judgments.46 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.

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.47

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

46 However, many of the individual 50 states in the United States have adopted the Uniform Foreign Money-Judgments Recognition Act (UFMJRA).
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 1782.48

viii Access to court files

There is a presumption of public access to court records.49 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.50 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.51 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 from unauthorised disclosure.52 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.53

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.54 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

52 See FRCP 26(c) (protective orders).
53 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.
54 The issue of litigation funding was addressed by the Supreme Court in 2008 in 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.
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, diligence, duty of confidentiality and conflicts of interest.

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’. Notwithstanding 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. 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. 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). The BSA and the USA Patriot Act cover ‘financial institutions’ and require such entities to have anti-money laundering programmes and customer identification programmes.

55 MRPC 1.1.
56 MRPC 1.3.
57 MRPC 1.6.
58 MRPC 1.7-1.11.
59 MRPC 1.7.
60 MRPC 1.7(b)(4).
61 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.’
62 31 USC Section 5311 et seq.
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.63

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.’64 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’.65 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.66 The privilege extends only to communications, not to the underlying facts.67

When the client is a corporation, the privilege is commonly viewed as a matter of corporate control.68 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.69

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

63 26 USC Section 6050I.
65 Id.
66 See McCormick on Evidence Section 87, n.19 (7th ed, June 2016).
67 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 395–96.
68 See McCormick on Evidence Section 87.1 (7th ed, June 2016).
69 Id.
and the corporation’s outside counsel is normally protected by the attorney–client privilege. 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’. 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.’

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 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

72 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.’
73 See FRCP 26-36.
74 FRCP 34.
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.\textsuperscript{75} Limits on discovery (and e-discovery in particular) generally turn on whether ‘the information is not reasonably accessible because of undue burden or cost’.\textsuperscript{76} In the context of e-discovery, courts have articulated various formulations of this standard.\textsuperscript{77}

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 ensure the preservation of relevant documents.\textsuperscript{78} 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{79}

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{80} 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:

- the significance of the discovery and disclosure to issues in the case;
- the degree of specificity of the request;
- whether the information originated in the jurisdiction from which it is being requested;
- the availability of alternative means of securing the information sought in the discovery request; and
- the extent to which non-compliance would undermine the foreign sovereign’s interest in the information requested.\textsuperscript{81}

\textsuperscript{75} FRCP 34(a)(1)(A).
\textsuperscript{76} FRCP 26(b)(2)(B).
\textsuperscript{77} See, for example, \textit{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).
\textsuperscript{78} See \textit{Zubulake v. UBS Warburg 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{80} See FRCP 37.
\textsuperscript{81} See Restatement (Third) of Foreign Relations Law Section 442(1)(C)(1987).
VI ALTERNATIVES TO LITIGATION

i Overview
Given the time, disruption and expense associated with litigation, some parties opt to settle their disputes out of court through alternative dispute resolution procedures. Arbitration and mediation are the most common alternatives.

ii 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.

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 *Rubin v. Islamic Republic of Iran*, the Supreme Court will determine whether the Foreign Sovereign Immunities Act (FSIA) allows terrorism victims to seize any assets of a foreign state after securing a default judgment against that state for sponsoring terror, or whether the FSIA allows a judgment creditor to seize only those assets that have been used for commercial activity in the United States. In *Carpenter v. US*, the Court will decide whether law enforcement officers need a warrant (which requires a reasonable basis to believe that a crime may have been committed) to obtain historical cell phone records from wireless carriers revealing the movements and locations of a cell phone user, or whether courts may apply a less exacting standard requiring only that there be ‘reasonable grounds to believe that the contents of a wire . . . are relevant and material to an ongoing criminal investigation.’ In *Janus v. American Federation of State, County, and Municipal Employees*, the Court will re-examine whether the First Amendment prohibits public employers from requiring non-union employees to pay a fee to help pay the union's collective bargaining costs, where the union negotiates contracts that would apply to all public employees regardless of union membership.

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83 There are numerous private organisations that offer mediation services.

84 A warrant is a court order giving law enforcement permission to search one's body or property for evidence. With a few exceptions, evidence obtained from a warrantless search is inadmissible at trial.

85 18 USC Section 2703(d).
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. Five judges – one chancellor and four 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 mid-level 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.

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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.

Delaware’s court of general jurisdiction is the Superior Court, which 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). The Superior Court is a court of law, and litigants have the right to elect trial by jury.

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 Delaware courts’ application of forum non conveniens – a common law doctrine that gives courts the discretion to decline jurisdiction over an action when a defendant demonstrates that it would face overwhelming hardship. The decisions also demonstrated how Delaware courts construe and apply contractual forum selection and choice of law provisions.

**SRL Mondani, LLC v. Modani Spa Resort, Ltd** involved an action by a Delaware limited liability company, SRL Mondani LLC (SRL), against Israeli company Modani Spa Resort Ltd (Modani) and Israeli residents Neil Kaye and Judy Kaye (collectively, the ‘Modani defendants’) in the Superior Court of Delaware. SRL sought to enforce a bridge financing agreement, promissory note and personal guarantee by which SRL loaned the Modani defendants US$1.5 million to assist in the building of a resort in Israel. The bridge financing agreement and personal guarantee both contained forum selection provisions mandating that any dispute arising out of the agreements be submitted to the exclusive jurisdiction of Delaware courts and designating Delaware law as the governing body of law. In connection with these agreements, the parties had signed a related ‘Iska contract’, which provided that the Modani defendants had received US$1.5 million to use for business purposes, were obligated to use the funds for the purpose of generating profits, and that any profits realised or losses sustained would be shared equally between SRL and the Modani defendants. The Iska contract contained a forum selection provision stating that any ‘dispute which may arise in connection with this agreement shall be submitted before the courts of Israel’.

The Modani defendants moved to dismiss the action. They argued that the Iska contract’s forum selection provision superseded the bridge financing agreement’s and personal guarantee’s forum selection clauses and that the action should therefore be dismissed. Alternatively, the Modani defendants argued that the Court should dismiss the action under forum non conveniens on the grounds that they would suffer ‘overwhelming hardship and inconvenience if required to litigate in Delaware’. The Court rejected both arguments.

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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.
9 Id. at *2.
10 Id. at *3.
First, the Court determined that because the action sought to enforce the bridge financing agreement, promissory note and personal guarantee and did not involve a dispute regarding the Iska contract, the Iska contract’s forum selection clause should not supersede the forum selection clauses in the bridge financing agreement and personal guarantee. The Court also noted that even if the Iska contract were applicable, the Modani defendants did not cite and the Court could not locate ‘any case law showing [that] an Iska or any contract comporting with Jewish law supersedes other, concurrent contracts.’

Second, the Court determined that dismissal under forum non conveniens was inappropriate. In doing so, the Court conducted a forum non conveniens analysis guided by six factors known as the Cryo-Maid factors:

a. relative ease of access to proof;
b. the availability of compulsory process for witnesses;
c. the possibility of the view of the premises;
d. the application of Delaware law;
e. the pendency or non-pendency of a similar action or actions in another jurisdiction; and
f. all other practical problems that would make the trial of the case easy, expeditious and inexpensive.

The Court determined that only one of the above six factors arguably favoured the Modani defendants. Specifically, with respect to the sixth factor, the Court noted that litigating in Delaware would require the Modani defendants to incur some expense. But this lone factor did not outweigh the other five factors. Because the action concerned breaches of contract, modern methods of communication would ‘facilitate transcontinental document exchange’ and ‘transcontinental depositions’ and the ability to view the resort underlying the dispute would have ‘little effect on the case’s outcome’. Furthermore, Delaware law applied to the bridge financing agreement and personal guarantee, and there was no prior pending action. With respect to the latter factor, the Court noted that ‘the absence of a prior pending action in another jurisdiction is an important, if not controlling consideration’.

Accordingly, the Court held that Delaware was a proper venue for the action and denied the Modani defendants’ motion to dismiss.

In contrast to SRL Mondani, which involved only a ‘first-filed action’ in Delaware, in Gramercy Emerging Markets Funds v. Allied Irish Banks, p.l.c., the Delaware Court of Chancery conducted a forum non conveniens analysis in an action that was preceded by the filing of two virtually identical actions in Illinois courts. In Gramercy, Gramercy Emerging Markets Fund, a Cayman Islands investment fund, and Delaware limited liability companies Balkan Ventures LLC and Rila Ventures LLC (together, the ‘Gramercy plaintiffs’) filed claims against Allied Irish Banks, p.l.c. (Allied), an Irish public limited company, and the Bulgarian-American Enterprise Fund (BAEF), a not-for-profit corporation incorporated in Delaware, arising out of BAEF’s sale of 49.99 per cent of the outstanding shares of non-party

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11 Id. at *2.
12 The ‘Cryo-Maid factors’ are named for the seminal case in which they were set forth: General Foods Corporation v. Cryo-Maid, Inc., 198 A.2d 681 (Del. 1964).
14 Id. at *4 (citation and internal quotation marks omitted).
Bulgarian-American Credit Bank (BAC Bank) to Allied. BAEF’s and Allied’s stock purchase agreement contained a Delaware choice of law provision, a clause providing that actions arising out of the agreement may be brought in Delaware, and a provision providing that there were no third-party beneficiaries to the agreement. The Gramercy plaintiffs, which owned 26 per cent of BAC Bank, alleged, among other things, that BAEF’s sale of stock to Allied was ’structured with the “goal” of permitting Allied to gain “de facto control over [BAC Bank]’” while avoiding a Bulgarian Public Offering of Securities Act requirement that a shareholder purchasing a majority stake in a publicly traded company file a tender offer for purchase of all outside shares. Prior to filing their claims in Delaware, the Gramercy plaintiffs had filed ‘a virtually identical action’ in an Illinois federal court and then in an Illinois state court. The Illinois federal action was dismissed for ‘lack of subject matter jurisdiction due to a failure of complete diversity of citizenship’.16 The Illinois state action was dismissed under Illinois forum non conveniens law.

Allied and BAEF moved to dismiss the Gramercy plaintiffs’ Delaware action on forum non conveniens grounds. Because Delaware was not the Gramercy plaintiffs’ first choice of forum, the Court conducted its forum non conveniens analysis pursuant to the ‘McWane’ doctrine instead of the Cryo-Maid factors. A McWane analysis directs the court to examine whether the actions arise from the same facts, and whether the first forum can provide justice; if so, the court may freely exercise discretion to stay or dismiss.’17 The Court noted that the McWane analysis even applies where the action in the first forum has been dismissed. Applying the McWane analysis, the Court found that the parties in the Delaware action and the prior Illinois actions were ‘nearly identical’ and that the ‘disputes pursued in Illinois and [Delaware] ar[owe from a common nucleus of operative fact’ and were indeed ‘identical’.18 The Court further found that the Illinois state court was capable of providing justice. Accordingly, the Court determined that dismissal under the McWane analysis was appropriate and granted Allied’s and BAEF’s motion to dismiss. In ruling, the Court noted that the choice of law and forum selection provisions favouring Delaware in Allied’s and BAEF’s stock purchase agreement did not require or favour a ruling that this litigation occur in Delaware because the provisions were limited to the parties to that agreement (i.e., BAEF and Allied).

In Reid v. Siniscalchi,19 consistent with SRL Mondani and Gramercy, the Delaware Court of Chancery made clear that it will strictly construe choice of law provisions. Plaintiff Dennis Reid (Reid), on behalf of US Russian Telecommunications, LLC (USRT), brought multiple causes of action against defendants Finmeccanica SpA (FIN), Alenia Spazio (Alenia), Alcatel Alenia Space Italia SpA, Vincenzo Davide Siniscalchi (Siniscalchi) and Giorgio Capra (Capra). These causes of action included claims for breach of contract, breach of fiduciary duty, conversion, civil conspiracy, and tortious interference. The contours of the parties’ business relationship were memorialized by a memorandum of agreement (the MOA) between USRT, FIN and Alenia. The MOA contained a choice of law provision stating ‘[t]his MOA shall be construed in accordance with the laws of the United Kingdom’.20 It also contained a choice of forum provision stating that any ‘dispute between the parties arising in connection with

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16 Id. at *5.
17 Id. at *8. Like the Cryo-Maid factors, the McWane analysis is named for the seminal case in which it was set forth: McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng’g Co., 263 A.2d 281 (Del. 1970).
18 Id. at *11.
20 Id. at 7–8.
this MOA shall be settled under the rules of conciliation and Arbitration of the International Chamber of Commerce of Paris’ and the ‘venue of arbitration shall be London, UK’. The defendants contended that these two provisions reflected the parties’ election of the law of England to govern all aspects of their relationship. The Court disagreed.

To determine what law applied to Reid’s claims, the Court undertook the Restatement (Second) of Conflict of Laws’s most significant relationship analysis. Under this analysis, the Court must (1) ‘determine if the parties made an effective choice of law through their contract’; (2) ‘if not, determine if there is an actual conflict between the laws of the different states each party urges should apply’; and (3) ‘if so, analyze which state has the most significant relationship.’

The Court, noting that the choice of law provision in the MOA had been negotiated, determined that the election of English law in this case was deliberate. Interpreting the language of the choice of law provision, the Court further determined that English law should apply to Reid’s contract claims arising out of the MOA, but that the language did not extend to non-contract-based claims. For the non-contract claims related to the MOA, the Court determined that ‘Italy has the most significant relationship’. Italy was where one of the parties was domiciled, where the parties met and signed the first iteration of the MOA, where a significant extent of the performance of the joint venture was to occur, and where much of the conduct constituting alleged breaches occurred. And finally, for the tortious interference claims, the Court determined that English law should apply. A non-disclosure agreement was at the heart of those claims, and it contained a broad choice of law provision reflecting ‘a clear intent to choose English law as the controlling law for all claims arising out of or relating to the nondisclosure agreement’.

As shown in the above-described cases, over the past year, the Delaware courts demonstrated their commitment to applying the doctrine of forum non conveniens to ‘discourage forum shopping and promote the orderly administration of justice “by recognizing the value of confining litigation to one jurisdiction, whenever that is both possible and practical”’ as well as strict construction of choice of law and choice of forum provisions.

### III COURT PROCEDURE

#### i 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

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21 Id. at 8.
22 Id. at 11.
23 Id. at 18, 22.
24 Id. at 24.
25 Id. at 25.

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. For example, in May 2010, the Superior Court created a complex commercial litigation division to manage cases with amounts in controversy of US$1 million or more.

ii Procedures and time frames

In all Delaware state courts, there are generally four phases of litigation: pleadings, discovery, trial and judgment.

Pleadings

Litigation in Delaware is typically commenced by filing a complaint electronically. 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'. After filing the complaint, service of the complaint and a summons must be made on the defendant. The defendant must generally respond to the complaint within 20 days of service. In the Superior Court, civil cases are subject to compulsory alternative dispute resolution. 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.

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. Many types of discovery are authorised: depositions, written interrogatories, production of

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31 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).
documents or electronically stored information, permission to enter upon land for inspection, physical and mental examinations, and requests for admission. Delaware state courts have discretion to limit the scope of discovery if, for example, it is unreasonably burdensome.

Over the past few years, Delaware state courts have recognised the importance of electronic discovery. The Court of Chancery recently amended its discovery rules to specifically address electronically stored information (ESI). 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.

**Trial**

Delaware has an adversarial system of trial in which the opposing parties have the responsibility and initiative to find and present proof. Lawyers are expected to act as zealous advocates for 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. 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

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38 Super. Ct. Civ. R. 26(b)(1); Ct. Ch. R. 26(b)(1). 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. Hensey, 2007 Del. Super. LEXIS 105, at *8–9 (Del. Super. 13 April 2007) (limiting discovery to make it ‘reasonable and without undue burden’).
41 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).
42 Del. Lawyers’ R. Prof’l Conduct pmbl.
45 See Ct. Ch. R. 38.
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, ‘[i]f 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.

### 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;
- that the party opposing the class has acted or refused to act on grounds generally applicable to the class; or
- 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.

Class action settlements require the approval of the court. 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. But in recent years, the Court of Chancery has

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48 Super. Cr. Civ. R. 12(c); Ct. Ch. R. 12(c).
49 Super. Cr. 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).
50 Super. Ct. Civ. R. 56(c); Ct. Ch. R. 56(c).
52 Reid v. Spazio, 970 A.2d 176, 181 (Del. 2009).
54 Super. Ct. Civ. R. 23(a); Ct. Ch. R. 23(a).
55 Super. Ct. Civ. R. 23(b); Ct. Ch. R. 23(b).
56 Super. Ct. Civ. R. 23(c); Ct. Ch. R. 23(c).
57 See, e.g., In re Celera Corp S’holder 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 BVF P’rs LP v. New Orleans Emplois Ret Sys, 59 A.3d 418 (Del. 2012); In re Sauer-Danfoss Inc S’holders 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
begun questioning such settlements. Though, in *BVF Partners LP v. New Orleans Employees’ Retirement System*,58 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.59

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 pro se litigants with some leniency regarding compliance with court procedures.60 Legal entities cannot represent themselves.61

v Service out of the jurisdiction

Natural persons and legal entities may be served with legal process outside of Delaware. Delaware’s primary vehicle for service of process outside the state is its long-arm statute.62 This statute authorises service of process outside of 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 of 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.63

58 59 A.3d 418 (Del. 2012).
59 Id. at 436–37.
60 See, e.g., *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 *Vick v. Haller*, 522 A.2d 865, 1987 Del. LEXIS 1046, at *3 (Del. 1987)).
62 10 Del. C. Section 3104. Other statutes, with narrower scopes, provide alternative bases for service of process on non-residents. See, e.g., 8 Del. C. Section 321; 10 Del. C. Sections 3111, 3114.
63 10 Del. C. Section 3104.

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vi 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’.64

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.65 To seek enforcement of a foreign-country judgment under this Act, a party must file an action seeking recognition of the foreign-country judgment.66 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.67

vii Assistance to foreign courts

The rules of the Delaware state courts do not include specific provisions on assisting foreign courts.68 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.69 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.70 Delaware courts, however, will sometimes limit access to judicial proceedings and records regarding sensitive information.71 The Court of Chancery emphasised the importance of the public’s right of access to information about judicial proceedings by

65 10 Del. C. Section 4802(a).
66 10 Del. C. Section 4809(a).
67 10 Del. C. Section 4810(1)–(2).
69 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).
70 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’).
71 See Kronenberg, 872 A.2d at 605.
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 work product 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 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’. 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.

Where a lawyer is associated with a firm, a lawyer’s conflicts of interest are generally imputed to the other members of that firm. Members of a firm can avoid imputation of a new colleague’s conflicts of interests arising from surviving duties to former clients if ‘(1) 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’. Also, subject to certain conditions, a member of a firm can avoid such an imputation by obtaining the informed consent of the former client.

73 719 F. Supp. 2d 373 (D. Del. 2010).
74 See id. at 376.
75 Del. Lawyers’ R. Prof’l Conduct 1.7(a).
76 Del. Lawyers’ R. Prof’l Conduct 1.7(a)(1)-(2). Other types of conflicts of interest are outlined in Rule 1.8 of the Delaware Lawyers’ Rules of Professional Conduct.
77 Del. Lawyers’ R. Prof’l Conduct 1.7(b)(1)-(4), 1.9(a)-(b)(2).
78 Del. Lawyers’ R. Prof’l Conduct 1.10.
79 Del. Lawyers’ R. Prof’l Conduct 1.10(c)(1)-(2).
80 Del. Lawyers’ R. Prof’l Conduct 1.10(d).
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.81 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.82

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.83 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.84 Additionally, parties can redact confidential information from public court documents.85

iv Other areas of interest

Delaware court procedure requires lawyers from outside of Delaware who want to practise in Delaware courts to associate with lawyers admitted to the Delaware Bar.86 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 pro hac vice.87 In connection with the motion, the attorney seeking admission must certify, inter alia, that he or she will be bound by all rules of the court.88 Furthermore, after a member of the Delaware Bar makes a 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,89 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.

81 Del. Lawyers’ R. Prof’l Conduct 1.16(b)(3).
82 Del. Lawyers’ R. Prof’l Conduct 1.6(b)(2)-(3).
84 Super Ct. Civ. R. 26(c); Ct. Ch. R. 26(c).
86 See Super Ct. Civ. R. 90.1(a); Ct. Ch. R. 170(b).
87 Super Ct. Civ. R. 90.1(a); Ct. Ch. R. 170(b).
88 Super Ct. Civ. R. 90.1(b); Ct. Ch. R. 170(c).
89 State Line Ventures LLC v. RBS Citizens NA, CA No. 4705-VCL, at 2 (Del. Ch. 2 December 2009) (LETTER).
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.”90 The Delaware Supreme Court recently 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.”91 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.92 The privilege is not, however, accorded to communications that render business advice as opposed to legal advice.93

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 privilege.94 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’.95

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.96

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90 DRE 502(a)(3).
92 See also 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).
94 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.").
95 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.
Delaware courts also recognise the attorney work-product doctrine (protecting information prepared in anticipation of litigation)\(^97\) 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’).\(^98\)

**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’.\(^99\) 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’.\(^100\)

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’.\(^101\) The request must specify where, when and how the documents should be produced.\(^102\)

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:

\(\text{(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.}\)\(^103\)

Delaware courts often adjudicate disputes where the evidence is located outside Delaware and require parties to produce documents located in foreign jurisdictions.\(^104\) ‘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

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100 DRE 401.
101 Ct. Ch. R. 34(a); see also Super. Ct. Civ. R. 34(a).
102 Ct. Ch. R. 34(b) & (d); Super. Ct. Civ. R. 34(b).
103 Ct. Ch. R. 26(b)(1).
jurisdictions. 105 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. 106 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”’. 107

A party must produce all documents that are responsive to a proper document request and in its ‘possession, custody or control’. 108 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. 109

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

Parties seeking to resolve a dispute outside of the courtroom may do so through arbitration and mediation. As noted above, the Superior Court has a compulsory alternative dispute resolution (compulsory ADR) programme. 110 Every civil case filed in the Superior Court is subject to this compulsory ADR programme. 111 The programme permits parties to choose the format of the alternative dispute resolution, 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

107 In re Asbestos Litig, 929 A.2d 373, 384 (Del. Super. 2006).
109 See Dawson v. Pittco Capital P’rs 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).
110 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).
the purpose of court mediation. Finally, the recently enacted Delaware Rapid Arbitration Act provides Delaware business entities with a streamlined and cost-effective process by which to resolve business disputes through voluntary arbitration. 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’. 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. 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 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 is a key benefit of the act, because it limits parties’ ability to delay arbitration by raising challenges in

112 10 Del. C. Section 349.
113 10 Del. C. Section 5802.
115 10 Del. C. Section 5808.
116 See 10 Del. C. Section 5803(a).
117 10 Del. C. Section 5805.
119 See Delaware Rapid Arbitration Rule 5.
120 See 10 Del. C. Section 5804.
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’.121

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.122 The Supreme Court ‘may only vacate, modify, or correct the final award in conformity with the Federal Arbitration Act’,123 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.124 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.125 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.126

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.127 Further, the parties can agree to make the arbitrator’s decision binding.128 If the parties agree to binding arbitration, the matter will be removed from the Superior Court’s docket.129 The arbitration process itself consists of the arbitrator reviewing evidence, hearing arguments from the parties, and rendering a decision based on the facts and the law.130 ‘Every party has trial de novo appeal rights if they are not satisfied with the arbitrator’s decision’.131

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 Act132 and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention133).134

122 10 Del. C. Section 5809(b).
123 10 Del. C. Section 5809(c).
124 10 Del. C. Section 5809(d).
125 10 Del. C. Section 5810(a).
126 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.
130 Id.
132 9 USC Section 1, et seq.
133 The United States has been a party to the New York Convention since 1970. N.Y. Convention, Contracting States, available at http://newyorkconvention.org/contracting-states/list-of-contracting-states.
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 alternative dispute resolution. 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’, or, if no such agreement can be reached, the Superior Court will appoint a mediator from its Mediator Directory. The mediator’s role in the mediation process is to help the parties reach ‘a mutually acceptable resolution of a controversy’. 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’.

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’. 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 things, must be met: at least one party is a business entity; at least one of the parties to the dispute is a business entity formed in Delaware or having its principle 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.

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

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139 Court of Chancery of the State of Delaware: Mediation Guideline Pamphlet, at 2, available at http://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.
140 10 Del. C. Section 347(a)(1)–(5).
142 Id.
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.143

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’.144 The parties may select a neutral assessor from a list of approved neutral assessors by agreement, or, if no such agreement can be reached, the Superior Court will select a neutral assessor from the approved list.145 The neutral assessment process consists of the parties providing the neutral assessor with confidential statements and participating in a confidential neutral assessment hearing.146 ‘The neutral assessor may use mediation and/or arbitration techniques to aid the parties in reaching a settlement.’147 Moreover, the parties can agree to make the neutral assessment outcome binding.148

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 and the Delaware Supreme Court involving alternative entities.

143 See id. at 4.
146 Id.
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Jon has extensive experience in managing the unique e-discovery and record management challenges of complicated litigation. He has presented to peers at professional conferences, as well as to a number of industry and professional organisations on how corporate litigants can best address the new challenges of the e-discovery age.

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In 2017, Nassif was one of 12 members of the task force which 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 Sharjah International Commercial Arbitration Centre (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 amongst 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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His practice covers a wide range of civil litigation with special emphasis on ad hoc and institutional commercial arbitration proceedings. Tamir is particularly well-versed in complex international arbitration disputes, where he has predominantly advised corporate clients from Europe, CIS countries and Asia. Tamir regularly represents clients in sports-related arbitration proceedings before the Court of Arbitration for Sport in Lausanne, Switzerland, and also sits as an arbitrator in ICC and DIS proceedings.

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.

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.
KAI MCGRIELE

*Solomon Harris*

Kai McGriele is a partner in the Solomon Harris litigation group and has been with the firm since 2012. Formerly with Cadwalader (London) and Appleby (Jersey), Kai's practice focuses on general commercial litigation with a particular emphasis on insolvency and restructuring, having represented liquidators, directors, and secured and unsecured creditors in both Cayman and foreign insolvency proceedings. Kai also has extensive experience representing both institutional trustees and beneficiaries in a variety of complex multi-jurisdictional trust disputes. Kai is both English and Cayman-qualified and in addition was called to the Jersey Bar as a Jersey advocate in 2012 (non-practising). Kai's professional memberships include the Law Society of England and Wales, the Cayman Islands Law Society, INSOL, RISA, NAFER and STEP. Kai is also a member of the STEP Council Cayman.

JAC MARAIS

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Jac Marais is a partner with a general litigation practice. His particular areas of expertise include commercial litigation (including arbitration), competition law and constitutional law (including litigation).

Jac holds qualifications from the University of Stellenbosch, Wits and King's College, London.

Jac advises and represents a number of corporate and public entities in a wide range of dispute resolution and regulatory forums in South Africa and abroad. He and his team represents clients in numerous high-profile matters and their experience spans various sectors, including agriculture, defence, tax administration, construction, financial regulation, health and government at all levels.

Jac presents annual pre- and postgraduate lectures on competition law at the University of Pretoria and is a regular author and speaker on a range of corporate legal matters.

EELCO MEERDINK

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Eelco Meerdink has extensive experience in complex and cross-border litigation, international arbitration and ADR. He represents companies and management in diverse industries, including financial services, energy, technology, construction, pharmaceutical and manufacturing. Eelco has represented multinational corporations in both ad hoc arbitration and institutional arbitrations administered by the world’s leading arbitration institutes. He has successfully argued several cases against recognition of unlawful state actions. Working on complex litigation across the globe, Eelco regularly works in close cooperation with other international law firms.

Eelco is a partner in the litigation and arbitration practice group at De Brauw. He graduated with honours from Utrecht University and Columbia Law School (LLM). He joined De Brauw in 2000, and served on De Brauw’s management committee and as practice head of the litigation department from 2015 to 2018. Eelco publishes and lectures regularly in the field of dispute resolution.
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Zia Mody is the founder and managing partner of AZB & Partners and one of India’s foremost corporate attorneys. Apart from being the vice president and a member of the London Court of International Arbitration, Zia has been nominated as one of the world’s leading practitioners by Who’s Who Legal Commercial Arbitration 2013 and Who’s Who Legal of Business Lawyers 2013. She was also listed by Forbes India as one of India’s ‘10 most-powerful women’ in 2013.

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Teppei Mogi is the firm’s partner in charge of business dispute resolution. He graduated from the faculty of law of Tokyo University in 1983, and joined the firm in 1989. He obtained an LLM degree in European law at Katholieke Universiteit Luven in 1992. Then he spent two years in Europe, working for a leading American firm in Brussels and a leading Dutch firm in Rotterdam.

He represents large pharmaceutical companies, heavy industry companies, energy companies, chemical companies, textile companies, and electronic parts, car components and other machinery producers in both international and domestic dispute resolution proceedings. He has been advising such clients on various transactions such as distribution agreements, licensing agreements, joint venture agreements and infrastructure projects for nearly 30 years. In addition, before he was qualified as a lawyer, he was engaged in the plant construction business at a leading Japanese trading house. With such unique background, he is active in assisting his clients in the business disputes resolution, including arbitration and mediation. He has represented clients in a number of international arbitration cases such as JCAA, ICC, AAA, SIAC and LCIA and acted as arbitrators. He was identified as a leading expert in arbitration by Who’s Who Legal 2017.

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Michel Molitor, Avocat à la Cour, is the managing partner of Molitor Avocats à la Cour and has been a member of the Luxembourg Bar since 1985. His practice areas include dispute resolution and litigation, banking and finance, and employment.

Michel has a law degree from the University of Strasbourg and a PhD in political sciences from the University of Vienna.

He is an active member of the International Bar Association, the Luxembourg Banking Lawyers Association and the Luxembourg Investment Fund Industry Association.

Michel has been listed in Chambers Europe where he ‘is commended for his expertise, efficiency, reliability and client-focused service’. The Legal 500 continues to list the firm Molitor as a top-tier dispute resolution firm and identifies Michel as a leading individual in this practice area. He is further ranked as a top insurance lawyer in Who’s Who Legal.

Michel is fluent in English, French, German and Luxembourgish.
ANDREW MOLVER

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Andrew Molver is a partner and has particular expertise in constitutional and administrative law (including public procurement law), regulatory law and general commercial litigation.

Andrew advises and represents both private sector clients and public authorities on a range of constitutional and administrative law issues. He has represented the Public Protector (a prominent constitutional institution) in various matters before both the Supreme Court of Appeal and Constitutional Court concerning the legal effect of her powers and the enforcement of her remedial action.

Andrew's constitutional and administrative law experience extends across several practice areas, including public procurement, education, health insurance, environmental matters, energy, property, licensing and registration, local government and general regulatory matters.

Andrew represents multiple local and foreign clients from various industries on all types of commercial and contractual disputes in both the High Courts and private arbitration bodies. His expertise in this regard relates primarily to contractual and delictual damages actions, restraint of trade enforcement, unlawful competition claims, shareholder and director disputes, defamation matters and enrichment claims.

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Paul Neufeld is a senior associate based out of Houston and, previously, Dubai in the United Arab Emirates. Mr Neufeld’s practice focuses on international arbitration and litigation, as well as advice on cross-border transactions and investments. He serves as counsel in arbitral proceedings conducted under the ICC, LCIA, AAA/ICDR, DIAC and UNCITRAL Arbitration Rules, among others.

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Renée Nienaber is a senior associate and practising notary public.

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Renée’s practice covers all aspects of commercial and contractual litigation, with a specific focus on property litigation, consumer law and franchise disputes as well as disputes around restraints of trade and unfair competition.
Renée’s notarial practice involves assisting clients with all aspects of notarial work, including ante-nuptial contracts and other notarial deeds, as well as the legalisation and authentication of documents for use in other jurisdictions.

ELENA C NORMAN

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Elena C Norman is a partner in the corporate counselling and litigation section at Young Conaway Stargatt & Taylor, LLP in Wilmington, Delaware.

Ms Norman regularly counsels clients on Delaware corporate and commercial matters, and frequently represents parties to litigation, most often in the Delaware Court of Chancery. Her practice focuses primarily on counselling and litigation in connection with merger and acquisition transactions, going-private transactions, corporate stock appraisal, corporate governance, Delaware alternative entities, and cases involving fraud and breach of contract. Ms Norman also litigates commercial matters in the district and bankruptcy courts.

Ms Norman often represents non-US entities in US litigation proceedings and she frequently speaks on corporate governance and cross-border legal issues.

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Babajide Ogundipe graduated from the University of London in 1978 and was admitted to the Nigerian Bar in 1979.

After completing his national service in Kaduna State, he joined the chambers of Chief Rotimi Williams, where he was employed from 1980 to 1989.

In 1989, he co-founded the firm of Sofunde, Osakwe, Ogundipe & Belgore with three other partners.

He is a notary public of the Federal Republic, a fellow of the Chartered Institute of Arbitrators and a former chairman of the Nigerian Branch of the Chartered Institute of Arbitrators. He is a listed arbitrator with the International Centre for Dispute Resolution’s Energy Arbitrators, and the former president of the Lagos Court of Arbitration. He is a member of ICC Fraudnet, the National Committee of the International Chamber of Commerce (Nigeria) and the International Bar Association, where he is currently Africa regional representative of the Anti-Corruption Committee and vice-chair for Africa of the Regulation of Lawyers’ Compliance Committee.
RICHARD PARRY

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Richard Parry has been an associate with Solomon Harris since 2016. He completed his training contract in the UK with Eversheds LLP (now Eversheds Sutherland LLP) where he worked for eight years representing the world’s leading banking, investment and insurance institutions in financial disputes. In addition to being qualified in the UK and the Cayman Islands, Richard is also a licensed US attorney, having been admitted to the California State Bar in 2013, giving him the ability to offer valuable advice and insight on a variety of cross-border matters. Richard’s core practice includes general commercial litigation, professional liability, insurance disputes, investment fund litigation and enforcement actions. He also has experience in corporate finance, property transactions, insolvency, regulatory compliance and litigation funding. Richard’s professional memberships include the Law Society of England and Wales (non-practising), the State Bar of California, the American Bar Association, the Cayman Islands Law Society, INSOL and RISA.

ÁNGEL PÉREZ PARDO DE VERA

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Ángel Pérez Pardo de Vera is a partner in the Madrid office of Uría Menéndez. He focuses his practice on dispute resolution conflicts in the areas of litigation and arbitration. He completed his international practice at the litigation department of the New York office of Cravath, Swaine & Moore LLP.

Mr Pérez Pardo de Vera advises on conflict situations of a civil, commercial and private international nature – mainly contractual liability and corporate litigation. He has experience in a wide variety of complex high-profile proceedings, often involving several jurisdictions (banking, electrical, telecommunications, technology, the internet, the automobile industry, engineering and the health sector).

He received his law degree with honours from the University of Navarra and completed his education on finance at Columbia Business School. He is a lecturer on the master’s programme at the Universidad de Navarra.

In 2011 he received the ‘40 Under Forty’ award from the legal publication Iberian Lawyer. He has also been distinguished as a leading lawyer in litigation (2013), and in both the litigation, and arbitration and mediation areas (2014, 2015, 2016, 2017 and 2018) by Best Lawyers.

SOTERIS PITTAS

Soteris Pittas & Co LLC

Mr Soteris Pittas graduated from Athens University in 1984, obtained his LLM (in commercial and corporate law) from the London School of Economics in 1988 and was admitted to the Cyprus Bar in 1989. From 1989 until 1994 he was an associate in the law firm of Andreas Neocleous & Co and from 1994 until March 2002 he was a partner and the leading litigation lawyer of the said law firm dealing with international trade law, trusts and equity, company and partnership disputes and all insurance and admiralty claims. Mr Soteris Pittas joined the firm of Patrikios Pavlou & Co in April 2002 as a partner and he was in charge of the commercial litigation and arbitration department of the firm until November 2009.
In December 2009 Mr Soteris Pittas established the boutique law firm Soteris Pittas & Co LLC and since then he has been acting and he is the managing partner. His main fields of expertise include international trade law, trusts and equity banking and finance, company, corporate and commercial law (local and international), stock exchange, capital markets, mergers and acquisitions, commercial and criminal litigation, commercial litigation, arbitration, international tax planning, insurance law, admiralty and European law. Furthermore, Mr Soteris Pittas has been involved in numerous complex commercial litigation and arbitration cases and in large cross-border litigation disputes.

ALEJANDRO PONCE-MARTÍNEZ
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Alejandro Ponce-Martínez, a senior partner at Quevedo & Ponce where he has worked since 1963, is a doctor of jurisprudence from the Catholic University of Ecuador (1970), and a master of comparative jurisprudence from New York University (1973). He has practised in all branches of law, in most of the courts of Ecuador, and in two international tribunals, as well as in arbitration both domestically and internationally. He has presided over an average of 10 arbitration cases per year. He has been a law professor at the Catholic University of Ecuador, Universidad Central del Ecuador, Catholic University of Santiago de Guayaquil, Universidad del Azuay and Universidad Andina Simón Bolívar. He has written a wide range of legal articles and legal textbooks, and was chief legal adviser to the President of Ecuador (1985 to 1987) and associate judge of the Superior Court of Quito (1988 to 1992 and 2000 to 2004), and of the Administrative Tribunal (2011 to 2012). He is a member of the Ecuadorian Group of the Permanent Court of Arbitration, an ICSID arbitrator, and a WIPO arbitrator, and was a correspondent of UNCITRAL. Since August 2008, he has been the director of the section on juridical sciences of the Casa de la Cultura Ecuatoriana Benjamín Carrión. He is also part of the arbitration section of the International Bar Association. He has been appointed as a member of the Academy of Lawyers of the Quito Bar Association.

CRISTINA PONCE-VILLACIS
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Cristina Ponce-Villacis earned her master’s degree in American law from the University of Arizona in May 2017. She previously obtained her law (2005) and psychology (1998) degrees from the Universidad San Francisco de Quito. Additionally, she holds a certificate from the program of advanced studies on human rights and humanitarian law from the American University (2009).

At Quevedo & Ponce (2008–2010, 2012–2016, and 2017–present), she has represented clients in actions for damages, probate processes, family law proceedings, administrative proceedings, intellectual property cases, commercial arbitrations, constitutional and human rights cases, and international arbitrations. She was the head of the litigation department at Asylum Access Ecuador (2010–2012), a non-profit organisation which represented refugees. Previously, as a civil servant of the National Council for Children (2006–2007), she provided advice on mechanisms for the protection of children, and developed proposals for the new Constitution (which was enacted in 2008).

She has written research papers on medical malpractice (a comparison between damages proceedings in Ecuador and the United States), unfair competition, free competition, rights of isolated indigenous peoples and gender equality.
Since 2015, she has been a member of the Academic Section on Juridical Sciences of the Ecuadorian House of Culture.

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Andrew Poole is a dispute resolution consultant at the Copenhagen office of Gorrissen Federspiel. He has almost a decade of dispute resolution experience, within both private practice and institutional bodies. He completed a Master of Laws (LLM) at the University of Stockholm.

**TIM PORTWOOD**  
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Tim Portwood is a partner at Bredin Prat, and a French-qualified English barrister. He specialises in international arbitration and international litigation. He acts as counsel and arbitrator in both institutional (e.g., ICC, LCIA, SCC, ICSID) and *ad hoc* arbitration proceedings in disputes covering an extensive range of industries, sitting in common law and civil law jurisdictions, and applying French, English and other national substantive and procedural laws. Born in the United Kingdom, Tim Portwood graduated from the University of Cambridge (with ‘double first’ honours in law). Prior to joining Bredin Prat in 1996, Tim Portwood practised as a barrister with Old Square Chambers in the United Kingdom. He was the co-editor of European Human Rights Reports (1991–1994) as well as the author of *Mergers in European Community Law* (Athlone Press, 1995) and of *Competition Law and the Environment* (Cameron May, 1995). Tim Portwood is a native English speaker and is also fluent in French, Italian and German.

**DANIEL PRAETORIUS**  
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Daniel Praetorius focuses on securities, regulatory and white-collar crime litigation. He has broad experience representing clients in criminal cases related to business activities and anti-corruption regulations as well as in securities enforcement proceedings. He has also been involved in the development of compliance programmes and conducted internal corporate investigations.

For many years Mr Praetorius also practised as a corporate attorney, advising clients on corporate, M&A and finance matters, experience which has become a useful complement to his litigation skills on complex economic disputes.

His previously worked at the Chilean National Prosecutor’s Office’s Money Laundering, Business and Organised Crime Special Unit and at Freshfields Bruckhaus Deringer LLP in Frankfurt, Germany.

Mr Praetorius received his law degree (JD equivalent) from Universidad de Chile, *summa cum laude*. He obtained his LLM degree, *summa cum laude*, at Albert Ludwig University of Freiburg, Germany, studies that were sponsored by the Alban Program of scholarships of study of High Level for Latin America implemented by the European Commission.
FRANCISCO PROENÇA DE CARVALHO

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Francisco Proença de Carvalho joined Uria Menéndez – Proença de Carvalho in April 2010 following the merger of the firm Proença de Carvalho & Associados with Uria Menéndez. He is now a partner in the litigation and arbitration department of the Lisbon office. Before that, he was a partner at Proença de Carvalho & Associados, a prestigious litigation and business law boutique in the Portuguese market.

He focuses his practice on litigation, covering all areas of professional litigation and arbitration practice. In the past few years he has been a lawyer in some of the most important corporate and white-collar crime cases in Portugal.

He has a postgraduate degree in law and business.

Mr Proença de Carvalho is a regular speaker at seminars and conferences on themes related to his field of expertise, and also is a frequent presence in the media as an opinion-maker in economic and legal issues.

JAKOB RAGNWALDH

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Jakob Ragnwaldh is a partner in Mannheimer Swartling’s dispute resolution practice group focusing on international arbitration.

He has represented clients in well over 100 arbitration proceedings before arbitral tribunals both in Sweden and abroad, including arbitrations under the auspices of the SCC, ICC, ICSID, HKIAC and VIAC, and under the UNCITRAL Arbitration Rules. He also represents clients in investment treaty arbitration proceedings under applicable treaties and public international law.

Mr Ragnwaldh sits as an arbitrator in institutional and *ad hoc* arbitration proceedings, such as those under the SCC, ICC, HKIAC, CIETAC and the Swiss Rules. He is vice-chair of the board of the Arbitration Institute of the Stockholm Chamber of Commerce and is the chair of the executive board of the European Federation for Investment Law and Arbitration. Mr Ragnwaldh also served as the chair of the SCC Rules Revision Committee.

He is co-editor of the treatise *International Arbitration in Sweden – a Practitioner’s Guide* (Kluwer 2013). Mr Ragnwaldh teaches investment treaty arbitration at Stockholm University and is a member of the editorial board of *CDR* magazine.

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Jacob Skude Rasmussen is a partner at the Copenhagen office of Gorrissen Federspiel. He specialises in dispute resolution and appears regularly before Danish courts as well as in national and international arbitrations. He completed a Master of Laws (LLM) at the University of Lund in 2004, and the following year he graduated with a master’s degree in law from the University of Copenhagen. He was admitted to the Danish Bar in 2009 and obtained the right of audience before the Supreme Court of Denmark in 2017.

For several years he has been an assistant professor in international and European commercial law at the University of Copenhagen. He is a member of the Danish branch of the Comité Maritime International and the International Law Association, as well as a
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member of the Danish Arbitration Association. He is also a member of the advisory board of the Danish Institute of Arbitration on Maritime Disputes.

Jacob has acted as counsel (advocate) in national as well as international arbitrations (institutional and ad hoc) and large-scale domestic litigation. His recent work as counsel includes disputes in relation to oil and gas, shipping and professional liability (inter alia, liability following the bankruptcy of one of Denmark’s then-largest banks).

WILLIAM REDGRAVE
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William Redgrave is a Jersey advocate and English barrister with extensive experience of litigation and a focus on advocacy. He practised at the English Bar for 13 years before moving to work in Jersey in 2008. He was appointed as a Crown Advocate in 2012.

William has appeared in many notable recent civil decisions in Jersey. He acts for both professional trustees and beneficiaries in relation to trust disputes and has extensive experience of civil fraud claims.

He currently acts for a major Jersey trust company in the substantial breach of trust dispute, Crociani v. Crociani.

CHRISTIAN RITZBERGER
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Christian Ritzberger, born in 1984, studied law and economics at the University of St Gallen (HSG) first, where he earned an MA degree in law and economics in 2010. He then graduated from the Private University of the Principality of Liechtenstein (UFL) in Triesten with a Dr. iur. degree in 2016. In 2017, he was awarded the qualification Liechtenstein Fiduciary Expert by the University of Liechtenstein, Vaduz. He went in for the Liechtenstein Bar examination in 2013, and before joining Marxer & Partner Attorneys-at-Law in 2016 he worked for the internationally operating Ivoclar Vivadent AG in Schaan, as a law clerk at the Princely Court in Vaduz and as a legal associate with major Liechtenstein law firms. He focuses on foundation, trust and company law. Moreover, he is a specialist in the defence of white-collar crime cases and legal assistance in criminal matters. In addition, he regularly writes contributions to renowned publications on wealth and estate planning and litigation.

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Francisco Javier Rodríguez Ramos is an associate in the Madrid office of Uría Menéndez. He focuses his practice on the litigation and arbitration areas.

Mr Rodríguez Ramos advises on civil and commercial disputes, mainly in the areas of corporate litigation, contractual liability and inheritance law.

He obtained a law and a business administration and management degree from the University of Salamanca. He also holds a master’s degree in business law from the IE Business School in Madrid, which included a period of study at UC Hastings College of the Law in San Francisco.
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Aimy is an Australian-qualified associate in the Dubai office of Clyde & Co. She is a member of the firm’s dispute resolution group and has worked in the UAE since joining the firm in 2014.

Aimy represents clients in all areas of dispute resolution and has particular expertise advising clients on contentious issues arising from a wide variety of commercial contracts including shareholder and joint venture disputes, commercial agency disputes, property development disputes and investment disputes. She has experience of a broad range of clients including financial institutions and multinational corporations. Aimy has experience of handling disputes through court litigation before the UAE courts, DIFC Courts, Federal Court of New South Wales, Supreme Court of New South Wales and High Court of Australia. She also had experience of handling cross-border disputes through arbitration under the rules of the DIFC-LCIA, LCIA, UNCITRAL, DIAC and ICC.

Prior to joining Clyde & Co, Aimy trained and practiced as a solicitor in a national law firm in Sydney, Australia.

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Carsten van de Sande, born in 1970, studied law at the University of Bayreuth and Duke University School of Law. He received his doctorate in law in 2000 with a thesis on the supervision of groups of companies in the banking and insurance sector, and his LLM in US law in 2001. He joined the Düsseldorf office of Hengeler Mueller in 2001 and, following a secondment to London, transferred to the Frankfurt office in 2004. Mr van de Sande became a partner in 2007 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 international and domestic arbitration, in particular in relation to post-M&A disputes, product liability and general commercial litigation as well as disputes involving financial institutions and complex financial products. Mr van de Sande is admitted to the Bar in Germany and in the state of New York.

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James is a Jersey advocate and English barrister who has a particular focus on contentious and non-contentious trust work as well as advising in relation to a broad range of contentious commercial and company law disputes.

He acts for beneficiaries, trustees and other power-holders in relation to breach of trust claims, asset tracing and recovery, and claims for secondary liability against accessories in addition to issues concerning trust administration, the appointment and removal of trustees and the exercise of powers, applications to court for directions, the variation and rectification of trusts and the disclosure of information to beneficiaries and third parties.

He is also the author of the leading Jersey practitioner text *Litigating Trust Disputes in Jersey*. 

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Smriti is an associate in the dispute resolution group at Slaughter and May, with experience in advising on arbitration, High Court litigation, regulatory compliance matters and regulatory investigations. Prior to joining Slaughter and May, Smriti worked as a legal assistant at the International Criminal Tribunal for the Former Yugoslavia in the Hague and as a justices’ law clerk at the Supreme Court of Singapore.

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Robert Staley is a commercial, securities and class action litigation lawyer at Bennett Jones Toronto. He is a partner, and is head of the shareholder activism and critical situations group.

Rob’s practice focuses on complex commercial and securities litigation, securities regulation, shareholder activism and class actions. He has extensive experience in Canadian and cross-border securities regulatory and enforcement matters, class actions, takeover bid litigation, foreign corrupt practices, appraisal and share valuation remedies, derivative actions, arrangements and the oppression remedy. Rob regularly advises corporations, boards of directors, audit committees and special committees in connection with internal and regulatory investigations and in connection with proxy contests and contested transactions. Rob has a broad trial and appellate practice in the Ontario Superior Court of Justice, Ontario Court of Appeal, Federal Court of Canada, Federal Court of Appeal and Supreme Court of Canada. Rob has appeared before the Ontario, British Columbia and Alberta Securities Commissions. Rob also has a robust pro bono practice, including in significant constitutional cases. Rob has served as chair of the firm’s securities litigation practice group, as co-chair of the firm’s litigation department and as a member of the firm’s partnership board.

Rob is listed in *Chambers Global* as one of the world’s leading lawyers for dispute resolution – the publication has commended him in 2009, 2010, 2011, 2012, 2014 and 2015. In both 2014 and 2015, Legal Media Group’s Benchmark Canada, which has consistently recognised Rob in its rankings in securities litigation and class actions, conferred on Rob Benchmark’s award as Canada’s Securities Litigator of the Year. Rob is recognised by *The Canadian Legal Expert Directory* in the securities litigation, corporate and commercial litigation and directors’ and officers’ liability litigation categories. He is repeatedly recognised in the *Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada* in the securities litigation and corporate commercial litigation categories.

Rob has served as a member of the board of directors of the Advocates’ Society.

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Jessica Starck’s litigation practice is focused on corporate and commercial disputes, securities litigation and class actions.

Jessica joined Bennett Jones after summering and articling with the firm. She is a member of the Advocates’ Society, the Canadian American Bar Association, the New York State Bar Association and the Ontario and Canadian Bar Associations.
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*Soteris Pittas & Co LLC*  
Ms Nada Starovlah obtained her bachelor of laws degree LLB (Hons) in 2012 from the University of Manchester, United Kingdom. Subsequently in 2013 she completed the Bar Professional Training Course from the Honorable Society of the Inner Temple, United Kingdom. Following the above in 2017 she completed her masters in law (LLM) specialising in the field of international commercial arbitration from the University of Queen Mary, United Kingdom.

Nada started her career by undertaking her training at the law firm of Nicos Chr. Anastasiades & Partners, and upon completing the Bar exams in Cyprus in 2015 she joined the law firm of Soteris Pittas & Co LLC as an advocate in the litigation department. She is also a lecturer at the Tutors Panaretos Educational Center where she teaches law as well as the President of the Cyprus branch of the World Commission of Human Rights, a non-profit organisation with a seat in London, United Kingdom focusing on pro bono work and the protection of human rights. She is the VIP lawyer for the Chinese agency Etouce on immigration and property law as well as one of the authors of the Cypriot company Epsilaw.

Her main areas of expertise are in the field of corporate and commercial litigation (local and international), human rights, family law as well as international commercial arbitration. She is a member of the Cyprus Bar Association, the General Council of the Bar, United Kingdom, the Honourable Society of the Inner Temple and the Chartered Institute of Arbitrators (CIArb) of the United Kingdom.

ANTONIO TAVARES PAES, JR  
*Costa e Tavares Pais Advogados*  
Antonio Tavares Paes, Jr is a partner at Costa e Tavares Pais Advogados in Brazil, a law firm with offices in São Paulo, Rio de Janeiro and Brasilia.  
He is a former partner of three Brazilian law firms and was outside general counsel at TeleNova Communications in Miami (US) as well as international attorney at SG Archibald in Paris, White & Case in New York and Fox & Horan in New York.  
He spent almost 10 years in finance as senior vice-president (private equity) of Scudder Kemper Investments in New York and vice-president of the Chase Manhattan Bank (Project Finance/Latin American Corporate Finance) in New York.  
He holds a law degree from UERJ (1985) and an LLM in corporate finance law and transnational litigation from Columbia University School of Law (New York, 1987), and also attended the Chase Manhattan Corporate Finance MBA finance course. He is a member of the Brazilian and New York State Bars, the American Bar Association and of the Scientific Council of the Journal of Legal Technology Risk Management.  
Antonio practises in the following areas: corporate law, mergers and acquisitions, labour and employment law, capital markets, crisis management, international law, litigation and arbitration.  
Antonio’s other notable activities include guest speaking at postgraduate programmes at Brazilian universities. He is a member of the board of directors of Brazilian and foreign companies, a member (alternate) of the arbitration committee of the Brazilian Bar Association (chapter of the state of São Paulo) and speaker at several conferences in Brazil and abroad. He is the author of various articles published in several foreign publications.  
He speaks Portuguese, English, French and Spanish.
DAMIAN TAYLOR
*Slaughter and May*

Damian Taylor is a partner in the dispute resolution department of Slaughter and May. He is the co-author of a student textbook on contract law and maintains a keen interest in this subject in addition to restitution and the conflict of laws, which formed the basis of his BCL master’s degree in European and comparative law at the University of Oxford.

His practice covers a wide range of civil and public law disputes including fraud, insurance, product liability, pensions, judicial review, sports law and general commercial disputes. Damian sits on Slaughter and May’s Africa practice group and energy law group, which develop and direct the firm’s strategy and business development initiatives across Africa and the energy sector respectively.

MUHAMMAD R C UTEEM
*Uteem Chambers*

Muhammad Uteem is the founder and head of Uteem Chambers, a leading law firm of barristers in Mauritius. His practice concentrates on international commercial law, trusts, tax consultancy and litigation and on all aspects of offshore business activities. He has a very diverse portfolio of international clients, who range from sophisticated institutional investors, merchant banks and government-linked agencies to high net worth individuals who require international tax and estate planning solutions. He has also been involved in legislative drafting in Mauritius.

Prior to returning to Mauritius, he worked for a number of years as an associate of Winthrop Stimson Putnam & Roberts (now Pillsbury Winthrop Shaw Pittman LLP), an American law firm, in Singapore, Hong Kong and Japan.

Muhammad Uteem holds a master’s in international business law from King’s College London. He won first prize for best overall performance at the bar exams of England and is a Chevening Scholar. He is also an elected member of the National Assembly.

ANJA VOGT
*Niederer Kraft & Frey*

Anja Vogt is an associate in the dispute resolution team of Niederer Kraft & Frey. Anja’s practice focuses on commercial litigation and arbitration as well as internal investigations. She regularly represents clients in large and complex cross-border litigation and arbitration proceedings as well as in governmental investigations. Furthermore, she advises clients in the fields of contract, commercial and employment law.

Before joining Niederer Kraft & Frey, Anja worked at a law firm in Zurich. She is a member of the Zurich, Swiss and International Bar Association, as well as a member of the Swiss Arbitration Association.
LAURA VOGT
Marxer & Partner Attorneys-at-Law
Laura Vogt, born in 1990, studied law at the University of Lucerne and Northwestern Pritzker School of Law (student exchange programme). She has joined Marxer & Partner Attorneys-at-Law in 2014 and passed the Bar exam in 2017. She is part of the litigation team of Marxer & Partner Attorneys-at-Law.

KEVIN WARBURTON
Slaughter and May
Kevin Warburton is a senior associate in Slaughter and May Hong Kong’s dispute resolution department. He joined Slaughter and May’s London office in 2007 and, after spending time in the Hong Kong office in 2009 and 2014, relocated there permanently in 2016. He advises a broad range of clients both inside and outside Hong Kong on matters of litigation, arbitration, regulatory investigations and inquiries and alternative dispute resolution mechanisms.

ALEX B WEISS
Cravath, Swaine & Moore LLP
Alex B Weiss is an associate in Cravath’s litigation department.
Mr Weiss was born in New York City, New York. He received a BA magna cum laude from Tufts University in 2012 and a JD with honours from Columbia Law School in 2017, where he was a senior editor of the Columbia Law Review. Mr Weiss joined Cravath in 2017.

STEFAN WENAWESER
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Stefan Wenaweser, born in 1972, studied law at the University of Innsbruck, the University of Paris Val-de-Marne (Erasmus) and the University of Edinburgh. He received an LLM from King’s College London and a Dr iur degree from the University of Innsbruck. He has practised law since 2000, passed the Bar exam in 2003 and became a partner of Marxer & Partner in 2008. He specialised in the law of trusts and company law during his studies, and in his practice he regularly advises clients in foundation law, trust law and litigation. Moreover, he is a specialist in the defence of white-collar crime cases and legal assistance in criminal matters. He frequently speaks at conferences and regularly writes contributions to renowned publications on trust law, wealth and estate planning, litigation and white-collar crime. In addition, he functions as a member of the board of the Liechtenstein Institute of Professional Trustees and Fiduciaries.
JAN WOLONIECKI
ASW Law Limited
Mr Woloniecki is head of litigation at ASW. Mr Woloniecki has appeared as counsel before the Supreme Court of Bermuda and Court of Appeal for Bermuda in over 50 cases reported in Bermuda. In addition to his practice as an advocate before the Bermuda courts, he has an extensive international arbitration practice, and has accepted appointments as an arbitrator in international arbitrations (ICC/LCIA) and domestic (Bermudian) arbitrations. As counsel and arbitrator he has participated in arbitrations held in London, Singapore, Hong Kong, Bermuda and the United States. He has acted as an expert witness (on Bermudian and English law) in numerous cases before United States courts and arbitration tribunals.

GRÉGOR WOLTER
Adams & Adams
Grégor Wolter is a partner specialising in dispute resolution and is the chairman of the commercial, property and litigation department of the firm, which has shown significant growth over the past few years.

He holds BBusSci (Hons) (1991) and LLB (1993) degrees from the University of Cape Town, was admitted as an attorney in South Africa in 1996 and has more than 20 years’ post-admission experience.

Grégor’s practice areas include commercial litigation and dispute resolution (including contractual disputes, delictual and enrichment claims, disputes around restraints of trade and unfair competition, construction and insolvency), regulatory and administrative law.

PETER WOODS
Arthur Cox
Peter Woods is an associate in the litigation and dispute resolution group and advises on various commercial disputes, including disputes relating to banking and financial services and public procurement, with experience in matters listed before the Commercial Court. He also has experience in resolving disputes through ADR. Mr Woods has completed postgraduate studies in commercial litigation. He is a contributor to The European, Middle Eastern and African Arbitration Review.

SEBASTIÁN YANINE
Bofill Escobar Abogados
Sebastián Yanine received his law degree from Pontificia Catholic University in Chile, summa cum laude, and an LLM degree from University of California at Berkeley for which he received the Bicentenario-Chile scholarship. He also holds a Certificate in International Commercial Arbitration from the Universidad de Chile and attended Albert-Ludwigs-Universität, Freiburg, Germany with the Landesstiftung Baden-Württemberg scholarship.

Mr Yanine concentrates his practice in civil and commercial dispute resolution, with a special focus on complex disputes and cross-border litigation. Mr Yanine's experience in dispute resolution has been recognised by Chambers Latin America and The Legal 500. Some representative works include advising and acting on behalf of the Chilean government before the Chilean Supreme Court in a dispute concerning an energy project; representing a European and a Chilean investor in ICSID arbitration under investment treaties relating to
the termination of an airport concession; representing a Chilean and foreign clients in several industries in commercial arbitration under ICC and UNCITRAL Rules; representing a Central American government in two ICSID cases (under Investment Treaties and DR-CAFTA) involving European and American investors in the electricity sector; representing a European government and a European bank in proceedings for recognition and enforcement of foreign judgments before Chilean courts; and, representing a multinational in the food industry in the context of setting aside proceedings before Chilean courts and satellite litigation in connection to awards rendered under ICC Rules.

Before joining the firm, Mr Yanine worked with the International Arbitration Group of Freshfields Bruckhaus Deringer in New York as foreign associate and at Bofill Mir & Alvarez Jana with the litigation and arbitration team.

WANCHAI YIAMSAMATHA
LS Horizon Limited

Wanchai's practice focuses mainly on administrative and constitutional law, and regulatory law.

He has extensive expertise in administrative and constitutional law, frequently involved in sophisticated and innovative cases. He not only represents private plaintiffs in challenging the state, but also defends administrative agencies in the administrative courts and the Constitutional Court.

He has strong expertise in providing complex legal analysis on administrative procedure law, administrative court law, constitutional law, factory law, telecommunications law, energy law, procurement law, consumer protection law, and other regulatory laws. He teaches administrative and constitutional law at universities.

He is currently an adviser to the executive board of the Master’s Degree Project for Financial Executives (Special Class), Business School, Kasetsart University. He has been appointed, on attachment, as a legislative expert to a member of the National Legislative Assembly.

He was a member of the Committee on Economics and Foreign Affairs, of the Lawyers Council of Thailand (2010–2013), and a member of the Committee on Law Drafting and Revision, of the Ministry of Justice (2009). He was a member of the sub-committee of the Extraordinary Committee on Intention Records, Archive and Minutes Scrutiny, of the Constitutional Drafting Assembly (2007), and a member of the National Human Rights Commission sub-committee on the Scrutiny of Violations of Economic, Social and Culture Rights (2010–2015).

Wanchai obtained his LLB from Thammasat University and is admitted to the Thai Bar. He received an LLM from Southern Methodist University, an LLM from the University of Pennsylvania, certificate of achievement on the training programme for administrative case officials for the general public from Chulalongkorn University and Office of the Administrative Courts, certificate on administrative justice for executives, from the Administrative Justice College, of the Office of the Administrative Courts, and the certificate on justice administration for executives from the Office of Justice Affairs, Ministry of Justice.
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