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The Dispute Resolution Review provides an indispensable overview of the civil court systems of 32 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, as well as overcoming challenges that life and politics throws up along the way. 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 from those closer to home.

Sitting here in London at the start of 2020, we at least have a better idea of the immediate direction of travel for Brexit. The UK will have left the EU by the time this edition goes to print. The road has been long and twisting and it has thrown up novel problems of when politics and law clash head on. The Supreme Court in the UK – not so long ago having completed its metamorphosis from the old judicial committee of the House of Lords – confirmed that it was the ultimate check against the unlawful exercise of power by the Executive; declaring that Boris Johnson’s advice to the Queen to prorogue Parliament was unlawful (see the case summary of R (on the application of Miller) v. the Prime Minister in the England and Wales chapter of this edition). Politicians cried foul. There was (and still is) talk of reassessing how Supreme Court judges are selected; talk of political appointments (as in the US) and a fundamental rewriting of the Constitution (except there cannot be, as no one has written it down in the first place). The same judiciary that is often praised for its independence and professional approach was at times along the tortuous road to Brexit branded in the media ‘enemies of the people’, part of the growing band of ‘traitors’ who allegedly opposed Brexit – that is despite all the judgments making clear that they were not deciding whether Brexit should happen or on what terms.

Looking back on events, far from the collapse of the Constitution, the year saw a reaffirmation of the constitutional balance of powers and the rule of law. The Supreme Court spoke and was respected. Parliament was recalled and took an October no-deal exit off the table.

But politics perhaps had the final say: an election was called later in the year, the people made their choice, and Mr Johnson’s Conservative government was returned with a sufficient majority to ‘get Brexit done’.

All this leaves me writing this preface five days before ‘Brexit Day’, after an exhausting 2019 in which clients have not known whether to plan for the ‘May deal’, ‘No deal’, ‘Boris’s deal’, a referendum (on Brexit and/or Scottish independence), no Brexit, or the extensive nationalisation of private industries and tax rises outlined in Labour’s manifesto. At least we now know at the end of it all that the UK will leave the EU on 31 January 2020.
That is not to say that everything will be plain sailing from now. The process of disentangling the UK from the EU legal and political framework will be long and complex. Fundamental questions remain. No doubt the Supreme Court will be called on to determine issues that no one had ever thought would need to be asked not so long ago. The transitional deal with the EU expires at the end of the year and the government’s position is that it will not be extended. The same questions and uncertainties will surface as the clock ticks down if a deal is not apparent.

Whatever your views on Brexit, this is law in action. It happens every day of the year, but when the stakes are so large and politicised, the scrutiny so intense, it is hard not to see and feel it a little bit more. This edition therefore includes an updated Brexit chapter that charts the progress over the past year and what lies ahead.

There is of course much more to 2019 and beyond than Brexit – especially away from these shores (where it has occupied so much of Parliament’s time, to the detriment of other legislative programmes). This 12th 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 can be found in Appendix 1 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 2020
Chapter 1

BREXIT

Damian Taylor and Robert Brittain¹

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 that it would give effect to the referendum’s result by following the procedure set out in Article 50 of the Treaty on European Union. Accordingly, on 29 March 2017, the Prime Minister, acting with the authority of Parliament, gave the European Council formal notice of the UK’s intention to withdraw from the EU. That set in train a two-year period for the negotiation of terms for an orderly departure and a framework for a future relationship. The effect of Article 50 was that the UK would leave the EU at the expiry of those two years, whether or not a withdrawal agreement had been concluded. A draft agreement was reached in December 2018, but it was rejected by the UK Parliament. The Prime Minister resigned and her successor reopened negotiations with the EU (two extensions to the Article 50 deadline having been agreed in the meantime). The parties announced a revised agreement in October 2019 and a third extension of the Article 50 deadline, to 31 January 2020, was agreed shortly afterwards. Following the victory of the incumbent Conservative Party in the UK general election in December 2019, ratification of the revised withdrawal agreement by the UK Parliament now seems assured; the European Parliament is then expected to give the agreement its blessing. The UK will leave the EU at 11pm London time on 31 January 2020.

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

a determine which law applies to contractual and non-contractual obligations;

b determine which country’s courts have jurisdiction to hear disputes;

c recognise and enforce the judgments of other (and in particular European) states’ courts; and

d support international arbitrations.

Much of this procedural law derives from the UK’s membership of the EU. In principle, it should cease to apply when the UK ceases to be a Member State. In fact, it will not: a major function of the withdrawal agreement is to provide for the continued application of EU law to the UK during a time-limited transition period. Even after that time, EU law will continue to be binding in the UK in certain defined circumstances. And the government’s stated ambition is to conclude a new relationship agreement with the EU which, in this field

¹ Damian Taylor is a partner and Robert Brittain is a professional support lawyer at Slaughter and May.
at least, would largely replicate the benefits of the pre-Brexit regime. In spite of all of this, it is an inevitable consequence of Brexit that, at some point, at least some of the current rules will change. This chapter seeks to assess the extent, nature and timing of that change.

II RELEVANT LEGAL CONSEQUENCES OF BREXIT – A SUMMARY

The foundation of the EU and its unique legal order are the various treaties entered into by the Member States. As a matter of international law, the UK is bound by these treaties for as long as it is a party to them. As a matter of domestic law, however, the treaties produce legal effects only if and to the extent Parliament legislates to that effect. The European Communities Act 1972 was the means by which the UK implemented the EU treaties in domestic law; the 1972 Act has been described as the ‘conduit pipe’ through which EU law flows into the UK’s domestic legal order. The UK’s notification under Article 50 set in train a process which will conclude with the UK ceasing to be bound at the international level by the treaties; subject to the terms of the withdrawal agreement, the flow of EU law will be cut off at its source. Reflecting this in domestic law and providing for its consequences requires Parliament to enact fresh legislation.

i Legislating for Brexit

A mass of primary and secondary legislation has been or will be enacted to deal with Brexit and its consequences. Two Acts of Parliament are of particular importance and are addressed briefly below.

The European Union (Withdrawal) Act 2018

The European Union (Withdrawal) Act 2018 became law in June 2018. Its purpose is twofold: it repeals the 1972 Act, dismantling the mechanism by which EU law is given automatic effect in the UK. At the same time, in order to avoid the legal vacuum which would otherwise result from the wholesale and sudden disapplication of EU law, the 2018 Act will convert into UK law all EU law as it applies the moment before exit. In and of itself this will not be enough to preserve the legal status quo. Some retained EU law will not function post-exit in the way it did pre-exit. In some cases, these problems can be remedied fairly easily by amending the retained law (for example to replace references to EU institutions with UK replacements or equivalents). In other cases, the problems will be more substantial and not capable of unilateral remedy. Laws that are premised on reciprocity as between Member States are an important example: once the UK has left the EU, it can make a unilateral choice to continue treating the remaining Member States favourably, but it cannot expect or require those states to do likewise. Domesticating laws of this kind would create a one-sided structure at odds with the purpose of the underlying EU regime. The 2018 Act accordingly provides ministers with powers to amend retained EU legislation or to revoke it entirely.

The European Union (Withdrawal Agreement) Bill

The withdrawal agreement sets out the terms for the UK’s orderly departure from the EU. Among other provisions relating to citizens’ rights, a settlement of the parties’ financial obligations to each other, and the winding-down of issues and matters currently subject to EU law, the agreement provides for a transition period (sometimes referred to as an implementation period) after the UK formally leaves the EU on 31 January 2020. During the transition period, EU law will continue to apply in and to the UK, even though it has ceased
to be a Member State. The European Union (Withdrawal Agreement) Bill is intended to give domestic legal effect to the rights and obligations conferred by the withdrawal agreement. The greater part of the Bill, which at the time of writing was expected to complete its passage through Parliament and become law in January 2020, is taken up with amendments to the 2018 Act. Notably, for present purposes, the Bill would postpone the domestication of EU law to the end of the transition period, prohibit any extension of the transition period beyond 31 December 2020, and empower ministers to consult on and make regulations providing for courts to depart from pre-exit CJEU jurisprudence in specified circumstances.

ii The withdrawal agreement and civil justice cooperation

The transition period provided for in the withdrawal agreement will mean that EU law continues to apply in and to the UK until 31 December 2020. This means that, subject to the fuller discussion below, the rules as they relate to governing law, jurisdiction and the enforcement of judgments will remain broadly as they are now until the end of 2020.

Even after the end of the transition period, certain elements of EU law will continue to apply in defined circumstances. For instance, legal proceedings instituted in the UK (and, where there is a UK element, in the EU27) before the end of the transition period will continue to be subject to EU rules on jurisdiction. Similarly, judgments in proceedings instituted before the end of the transition period will continue to be enforceable in the UK and in the EU27 in accordance with EU rules. The most significant omission from these grandfathering provisions is jurisdiction agreements with a UK element. Jurisdiction agreements in favour of a Member State court are accorded a special status by the EU regime and any Member State court other than that nominated must generally decline to hear proceedings subject to such an agreement. That can make obtaining redress simpler and quicker. After the end of the transition period, jurisdiction agreements in favour of the English courts, even where concluded before the end of transition, will not be upheld in accordance with EU rules in EU27 courts. That does not necessarily mean that such agreements will not be respected but, as discussed further at Section IV.ii, it introduces an element of uncertainty and the potential for delay.

iii Post-transition: a new relationship agreement?

If Brexit is seen as a process rather than an event, the UK ceasing to be a Member State on 31 January 2020 will constitute the end of the beginning. Attention will immediately shift to the negotiation of a new set of arrangements to replace, to a greater or lesser extent, those which currently govern trade and cooperation between the UK and its nearest neighbours. The 11-month transition period under the withdrawal agreement is intended to allow the parties the space to conclude these new arrangements. A political declaration on the framework for a future relationship was negotiated alongside the withdrawal agreement and is intended to guide the next stage of the process. It is notable that the political declaration includes no reference to continued cooperation in the sphere of civil justice. But even if it had done, the truncated timetable would likely have pushed perceived second order questions like civil justice in a later round of negotiations.

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2 Article 132 of the withdrawal agreement permits the parties, acting by agreement in a joint committee, to extend the transition period for up to two years, provided such a decision is taken before 1 July 2020. The UK government has indicated (and expressly stated in the European Union (Withdrawal Agreement) Bill) that no such extension will be sought or agreed.
The upshot is that there is likely to be a space of time after the end of the transition period when there will be reduced cooperation and coordination between the UK and the EU27 in this field. As explained further below, that will not matter much for questions of governing law (because it is within the UK’s power unilaterally to replicate the current arrangements and Brexit will not affect their operation in the remaining Member States). However in the area of jurisdiction and enforcement of judgments, any change will be felt more keenly. The Hague Convention on Choice of Court Agreements (see Section IV.i) is the only currently applicable element of the regime to which the UK will be able to re-accede. The rest of the European regime will be revoked in the UK. The Hague Convention provides valuable cross-border recognition and protection for exclusive jurisdiction clauses and the judgments in litigation based on those clauses. But as regards the EU, it is far less comprehensive than the current arrangements.

What might an eventual new agreement on civil justice cooperation look like? The UK government has said since the summer of 2017 that it wants in large part to replicate the effects of the current regime. The EU has, to date, been more guarded, expressing a hope for cooperation only in the fields of family and criminal law (both of which were mentioned in the political declaration). However, that does not mean that there is no prospect of an agreement. The Lugano Convention is a precedent for EU civil justice cooperation with third countries; the UK will seek to accede to the convention post-exit and, if successful, can be expected to use it as a basis for further and deeper cooperation with the EU.

III GOVERNING LAW

i The present position

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

Contracts

The governing law of a contract is determined according to the provisions of Regulation (EC) No. 593/2008 (commonly known as the Rome I Regulation). As an EU regulation, Rome I has ‘direct effect’; 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: counterparties are free to choose the law they wish to govern their contractual obligations. This default rule is subject to various overriding exceptions that are intended to protect the weaker party in certain types of contracts (for example, contracts for the carriage of passengers, consumer contracts, employment contracts and insurance contracts), to respect public policy imperatives in the law of the forum and to seek to restrain forum-shopping...
(such that, where the parties have chosen one country’s law to govern their contract but all the other elements of the situation at the time they made that choice point to a different country, certain mandatory provisions of that country’s law may be applicable).

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

The Rome Regulations (or their substance) will continue to apply in the UK even after the end of the transition period and their application will produce the same results as before exit.

Where a contract is concluded before the end of the transition period, or an event giving rise to damage occurs before the end of the transition period, the withdrawal agreement expressly provides that English courts will, after the end of the transition period, continue to apply the Rome Regulations.³

For contracts concluded and events occurring after the end of the transition period, EU law will no longer apply, but the Rome Regulations will be transposed into domestic law by operation of Section 3 of the Withdrawal Act. Secondary legislation will make various, generally minor, amendments to the text of the Rome Regulations to facilitate their practical operation post-transition.

So Brexit will produce no immediate changes in the substantive rules relating to governing law. The nature of Brexit, however, creates the potential for future changes. The regulations are native to EU law, the ultimate arbiter of which is the CJEU. Member State courts are obliged to interpret EU law in line with the CJEU’s jurisprudence. After the end of the transition period, however, the UK’s courts will not be ‘bound by any principles laid

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³ Article 66, withdrawal agreement.
down, or any decisions made, on or after exit day by the European Court’. Those decisions will instead be merely a discretionary consideration. That opens up the possibility of a divergence between EU27 and UK courts in the interpretation of an otherwise shared set of laws.

The courts of remaining Member States will, throughout this time, continue to apply the Rome Regulations to situations with a UK element and the results produced by their application will not be affected by the UK ceasing to be a Member State.

iii Practical implications

An English choice of law clause in a contract will be not be affected by Brexit. Courts of the remaining Member States will continue to apply Rome I, which, as already noted, generally respects the choice of law made by the parties. Even where other rules in Rome I are engaged, they are blind to the country the laws of which their application prescribes. In short, whether 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-transition. Moreover, the reasons for choosing English law will remain powerful. It is a highly sophisticated, commercially aware, flexible system of laws used regularly in international business relations.

IV JURISDICTION

i The current position

The Recast Brussels Regulation and the Lugano Convention

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

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

Where the European regime does not apply (e.g., because the claim in question does not relate to a civil or commercial matter; is specifically excluded from its scope (arbitration is one notable example); or because the defendant is resident in a state not a party to the European regime), and nor does the Hague Convention on Choice of Court Agreements (see below), the common law rules apply. According to these rules, the jurisdiction of the English

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4 Section 6, European Union (Withdrawal) Act 2018.

5 The Lugano Convention 2007 applies to legal proceedings instituted after its entry into force in the state in whose courts the proceedings are brought: the EU (including Denmark) and Norway on 1 January 2010, Switzerland on 1 January 2011 and Iceland on 1 May 2011.
court is founded by service of process. If a person can be served (either as of right where a person is within the jurisdiction, or with the permission of the court where the person is outside the jurisdiction), then the court may (not must – in comparison with the European regime) hear a claim against them.

**The Hague Convention on Choice of Court Agreements**

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

Although the convention is a significant advance for cross-border civil judicial cooperation, there are a number of important points to be borne in mind:

\[ a \] Most obviously, the convention applies only to exclusive jurisdiction agreements; these must have been concluded in civil and commercial matters (see (b) below) with a cross-border element. One-sided jurisdiction clauses (where one party is compelled to sue in one country's courts while the other party has the freedom to sue in any court which will entertain the case) are probably outside the scope of the convention (although the English court has expressed a contrary view (albeit in a non-binding context))\(^6\).

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

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

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

**Interaction between the Brussels regime and the Hague Convention**

Where an exclusive jurisdiction agreement is concluded in favour of the courts of an EU Member State (including, for these purposes, the UK), which rules should the court apply to its interpretation? The Hague Convention, Brussels Recast and the Lugano Convention all contain potentially applicable provisions. To manage these conflicts, the Hague Convention contains 'give way' provisions, setting out the circumstances in which the Brussels regime takes priority. In broad overview, where at least one of the contracting parties to the

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jurisdiction agreement resides in Mexico, Singapore or Montenegro (in other words, the non-EU contracting states to the Hague Convention), the Hague Convention will apply in preference to the Brussels regime. Otherwise, the Brussels regime applies.

**ii The legal effect of Brexit**

**Transitional arrangements**

For the duration of the transition period, the regime outlined above will continue to apply to and in the UK. Insofar as the regime binds only Member States, plus the UK, that is straightforward. The potential problem comes for those parts of the regime that involve third countries: the Lugano Convention and the Hague Convention. The UK will be bound to uphold those instruments by virtue of the withdrawal agreement but the contracting parties which are not also EU Member States will be under no such obligation (because they are not parties to the withdrawal agreement). Although the EU has said it will notify relevant third countries of the provisions of the withdrawal agreement, there remains a risk that those countries will decline to extend reciprocal treatment to the UK during the transition period.

After the end of the transition period, EU law as it relates to jurisdiction will continue to apply to legal proceedings already on foot in the UK and the EU27. This grandfathering arrangement does not extend to jurisdiction agreements concluded before the end of the transition period. Where they fall to be interpreted by UK or EU27 courts after the end of the transition period, no dispensation will be made for the fact that the UK was a Member State at the time they were signed; that means they will not automatically be upheld as they would likely have been while the UK was, or was treated as, a Member State. This does not necessarily mean that such agreements will not be upheld in the EU27 and the UK, simply that they will be the subject of a different legal analysis. This is considered further below.

**Post-transition**

The nature and extent of future EU–UK cooperation in civil justice will be a matter for negotiation between the parties after the UK formally leaves the EU on 31 January 2020. The UK’s public position is that it wants a close relationship similar in substance to the current EU regime. The EU has not yet set out its view on the question, and the political declaration agreed by the parties in October 2019 was silent on the point. In these circumstances, it is possible, and perhaps probable, that after the end of the transition period there will be no formal agreement on civil justice cooperation in place between the UK and the EU.

The UK has developed contingency plans to deal with such a scenario. They involve the preservation of the one element of the current regime which exists outside the EU’s structures – the Hague Convention on Choice of Court Agreements – and a reversion to the common law rules in other areas.

As explained in Section IV.i above, the UK is currently bound by the Hague Convention by virtue of its membership of the EU; it will cease to be bound by its terms once EU law no longer applies to the UK. The UK government has said since 2017 that it would take steps to ensure that the UK continues to participate in the convention after Brexit. To that end, the UK deposited its instrument of accession with the relevant authority on 31 December 2018 and the Hague Convention will enter into force for the UK in its own right on 1 January 2021 (in other words the day after the end of the transition period). The government has said it will ask Parliament to pass primary legislation to give domestic
Brexit

legal effect to the Convention. Secondary legislation has already been enacted that seeks to ensure legal certainty by providing that there be no difference in the treatment of jurisdiction agreements concluded during the two distinct periods of UK adherence to the Convention. However, there is no guarantee that the courts of other contracting states will adopt a similar approach (and the European Commission has asserted that once the UK re-accedes to the Convention, jurisdiction agreements made earlier should not be upheld in accordance with the Convention; the correctness or otherwise of this assertion will ultimately be a matter for the CJEU).

Other elements of the EU regime on jurisdiction (and judgments) will be revoked after the end of the transition period. Because the EU rules are premised on reciprocity between Member States, the government has taken the view that unilateral domestication of the regime would create an unacceptably one-sided arrangement as between the UK and the EU27. In its place, English courts will be directed to apply the common law rules which currently apply to matters outside the scope of the EU regime.

At the time of writing, the EU has not indicated that it will adopt any unilateral measures to ease the potential cliff-edge of a no-deal after the end of the transition period. This is perhaps not surprising: as a matter of law, the operation of the EU rules on jurisdiction will not be affected by the departure of one Member State; the UK will become a third country and the rules will be applied to it (or not) accordingly.

As a final point, the UK government has said it will seek to continue to participate in the Lugano Convention, an international agreement between the EU and three of the four EFTA states (referred to in Section IV.i below). Accession 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 simple matter of logistics obtaining consents could take some time: the Convention provides that contracting parties should indicate their acceptance (or not) of a party’s application for accession within one year of it being made; at the time of writing, it does not appear that any such application has been made.

Even were the UK ultimately to participate in the Lugano Convention as an independent state, it should be noted that from a substantive point of view the 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

7 The Private International Law (Implementation of Agreements) Bill was included in the Queen’s Speech delivered on 19 December 2019.
9 European Commission, ‘Questions and answers related to the United Kingdom’s withdrawal from the European Union in the field of civil justice and private international law’, 11 April 2019, Paragraph 3.3.
pre-emptively in a court in which cases are known to move slowly. That tactic was commonly referred to as the ‘Italian torpedo’. The most reliable way to thwart it was to issue proceedings in the desired court before a would-be opponent had a chance to issue in a slower jurisdiction. One unfortunate side effect of this race between the parties to issue a claim in their preferred court was to limit the scope for alternative dispute resolution and early settlement.

iii  Practical implications

*Will the Hague Convention protect my pre-Brexit English exclusive jurisdiction agreement?*

Yes, in many cases but not all. Providing a clear answer of general application is complicated by the effects of the UK’s re-accession to the Hague Convention following the end of the transition period. A question arises of whether jurisdiction agreements concluded during the first period of UK adherence to the Convention (as a Member State and then during the transition period) should be treated differently to agreements concluded during the second period of UK adherence (as a contracting party in its own right). This is a question that will need to be resolved by the courts of each contracting state (meaning the CJEU in the case of the Member States).

In the UK, the government has sought to ensure legal continuity and consistency in the treatment of exclusive jurisdiction agreements falling within the scope of the Hague Convention. In broad terms, secondary legislation provides that the Convention is to be given the effect it had at the time the jurisdiction agreement in question was signed. For agreements post-dating the end of the transition period, the position is easily expressed: English courts will uphold qualifying jurisdiction clauses in favour of the English courts (or those of any other contracting state, which include the remaining Member States of the EU); English courts will also enforce judgments from the courts of contracting states in proceedings arising from in-scope jurisdiction agreements. The position is more complicated for agreements signed before the end of the transition period. Because the Convention is construed as if the UK were still a Member State, its provisions relating to conflicts with Brussels Recast continue to apply (see Section IV.i above). That means that where none of the parties to the jurisdiction agreement is resident in Mexico, Singapore or Montenegro (in other words, the vast majority of such agreements), the Convention will give way to Brussels Recast. But once the transition period is over, and assuming the UK and EU have not agreed a new relationship which effectively replicates the current arrangements, the UK will have revoked the Brussels regime (as discussed in Section IV.ii). The UK secondary legislation makes no provision for the grandfathering of pre-exit jurisdiction agreements. Instead the common law rules will be applied by the English court. Because the common law generally upholds parties’ agreements on choice of forum, the result of this somewhat tortuous analysis is likely to be the same as if the Hague Convention had applied: the court will uphold the jurisdiction clause.

No other contracting state to the Hague Convention has passed legislation to deal with the effects of the UK’s re-accession. As noted above, the European Commission has asserted that agreements in favour of the English courts concluded before the end of the transition period should not thereafter be upheld by EU27 courts in accordance with the Convention. Whether that is correct or not will be a matter for the courts of Member States (and ultimately the CJEU) to determine. Parties to agreements signed before the end of the
transition period who consider that proceedings in an EU27 (or other Hague contracting state) are possible should consult with local lawyers to understand the national law that would apply in the event the Hague Convention does not.

**Should parties still be agreeing English jurisdiction clauses?**

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

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

\[ a \] relevant only to the extent parties have a potential nexus with other EU countries; and

\[ b \] mitigated within the EU (and certain other states) by actions the UK has within its sole power to take – notably accession to the Hague Convention on Choice of Court Agreements.

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

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

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

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

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

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

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

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

V ENFORCEMENT

i Current position

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

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

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

ii The legal effect of Brexit

Transitional arrangements

For the duration of the transition period, the current EU enforcement regime, as described above, will continue to apply in and to the UK. Judgments handed down after the end of the transition period will continue to be enforceable in UK and EU27 courts in accordance with EU law provided that the proceedings to which the judgment relates were commenced before the end of the transition period.
Post-transition

Under the European regime, reciprocal enforcement of judgments by the courts of participating states is a corollary to rules governing the allocation of jurisdiction. Brussels Recast, the Lugano Convention and the Hague Convention all adopt this approach. It follows that the post-transition considerations discussed in the context of jurisdiction at Section IV above apply equally to enforcement: in essence, the Hague Convention will survive Brexit, but unless a new arrangement can be negotiated with the EU over the course of 2020, other elements of the European regime will be revoked in the UK once the transition period is over, and EU27 courts will accord no special treatment to UK judgments under EU law.

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

Insofar as it relates to the European countries listed above, the 1933 Act has been superseded and in effect disapplied for nearly all purposes by EU law. It continues to have a residual application in respect of judgments that fall outside the scope of the European regime (for instance, where a judgment is given in a claim that is not a civil or commercial matter). Might the treaties be fully resuscitated after the UK ceases to be bound by EU law?

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 judgments? What steps can be taken to reduce uncertainty?

If, as expected, the withdrawal agreement is ratified, judgments obtained in the English courts up until 31 December 2020 will be fully enforceable in accordance with the current European regime. In the event of a no-deal Brexit, or after the end of the transition period if there is a deal, there is considerable incentive for EU Member States to maintain the current regime, or a version of it, so that their local judgments continue to be easily enforceable in the UK. At the time of writing, accession by the UK to the Lugano Convention (which would require the consent of the EU, as well as Norway, Iceland and Switzerland) would go a long way towards achieving this objective.
Further and in any event, the Hague Convention, which the UK will become a party to independently of the EU on 1 April 2019, will provide another post-Brexit means by which English judgments in disputes arising from qualifying exclusive jurisdiction agreements will continue to be enforceable in Member States.

VI  INTERNATIONAL ARBITRATION

i  The current position

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

Jurisdiction

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

Governing law

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

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

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

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

Enforcement

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

ii The effect of Brexit

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

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

iii Practical implications

A return of the anti-suit injunction in Europe?

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

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

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

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

a The UK has said it wishes to reach an agreement with the EU that substantially replicates the provisions of the European regime. It has also taken steps to accede in its own right to the Hague Convention on Choice of Court Agreements, and has signalled that it wishes to continue to participate in the Lugano Convention. Although it is unlikely that any new relationship 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 the tenor of a relationship along the lines envisaged by the UK. It might even place the UK in direct breach of any new agreement with the EU.
The English court’s jurisdiction to grant an anti-suit injunction is exercised in personam; that is to say, it is not technically a direct interference with a foreign court’s process, but rather a restraint on a person who is already within the English court’s jurisdiction. Where that person is abroad, jurisdiction might be contingent on obtaining permission from the English court to serve that person outside England. It may be difficult to persuade a court to exercise its discretion to permit service out in circumstances where that could be perceived by an EU court as an unwarranted interference with its jurisdiction. In other words, principles of comity might take the place of formerly applicable CJEU jurisprudence.

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

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

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

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

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

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

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

BRAZIL

Antonio Tavares Paes, Jr and Vamilson José Costa¹

I INTRODUCTION TO THE 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 ² 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 (STJ), a higher court located in the country’s capital Brasilia that has jurisdiction over the entire Brazilian territory and is tasked with ensuring compliance with infra-constitutional laws. However, the jurisdiction of the 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

In 2019, Brazilian courts continued to be called to decide on the construction and applicability of several procedural rules, including those introduced by the new Civil Procedure Code, which entered into force in 2016, with special emphasis on the issue of alternative dispute resolution methods and insolvency practice. Additionally, amendments to the Public Limited Companies Act and economic developments relating to new technologies played a relevant role over the past year.

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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.
As to the insolvency law, the Federal Court of Appeals recently detailed and expanded on the use of insolvency proceedings and creditors’ protection by small agribusiness producers. Further, the Brazilian National Justice Council put in place a task force with the specific goal to encourage the modernisation and effectiveness of insolvency cases in Brazil. Among the recommendations issued by such task force is the use of mediation as a means to settle disputes within the context of insolvency proceedings, and the role that insolvency courts should play in fraud prevention. Such recommendations arrive with some delay, but still in an appropriate time, as, on the one hand, the discussions of the bill for the update of the Insolvency Act (PL 10220/2018) have stalled in Parliament and, on the other hand, the insolvency law remains a hot topic due to the persistent economic doldrums that have affected several businesses. In this regard, major bankruptcy proceedings have been filed, among which are the largest one ever filed – the debt of the construction group Odebrecht amounts to 98.5 billion reais – and the one filed by Avianca airlines, which introduced substantive new issues – such as the applicability of the Cape Town Convention.

With regard to alternative dispute resolution methods, the enactment of Federal Decree Law No. 10025/19, regulating the use of arbitration in infrastructure disputes involving the federal government, is noteworthy. This decree provides for a list of issues that may be submitted to arbitration, among which are those relating to: (1) the economic imbalance of contracts; (2) damages arising out the termination or assignment of partnership agreements; and (3) breach of contractual obligations and penalties. Another interesting aspect of the decree is the standard, 24-month time limit for the issuance of the arbitral award, which may be extended to up to 48 months upon the parties’ agreement. The decree also provides that the amounts set by an award rendered in disfavour of the federal government should not be paid by writs of payment, granting, therefore, the private party a more efficient collection proceeding.

Another relevant development in 2019 regards the amendments to the Public Limited Companies Act (Law 6404/76). Henceforth, mandatory public information of companies ought to be published directly on the Brazilian Securities and Exchange Commission’s website. This amendment results in greater and more effective access to public information and, alongside other recent provisions, will save time and money for companies. Red-tape softening is a trend that should continue to strengthen in the coming years, especially as part of Brazil’s efforts to attract foreign investments.

In tune with the technological developments, data protection and tech law have gained relevance over the past years. Following international developments and pressure towards data protection and processing, in December 2019, the Brazilian Senate passed a constitutional amendment bill to introduce data protection as a fundamental right. If approved by the House of Representatives, the right to data protection will become Brazilian’s latest fundamental right. Further, in 2019, the impacts of the Brazilian General Data Protection Law (that will enter into force in August 2020 and required adjustments vis-à-vis former practices) were one the most discussed subject matters among lawyers and business people.
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.  

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

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

A proceeding usually commences with the filing of a claim before the clerks of the court with jurisdiction over the particular matter. A judge from within the court will be assigned, at random, to hear the case. After a preliminary analysis of the claim, should all the requirements be fulfilled, the judge will order the defendant to be served with process. The defendant is expected to file its defence within 15 business days of the service of process 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.

5 Court proceedings in Brazil do not contemplate out-of-court discovery (including e-discovery), such as in ‘fishing expeditions’. Evidence production is highly regulated and the burden of producing such evidence is clearly allocated depending on the kind of procedure.
6 The deadline for a defendant to present written opposition to a claim will start running from the moment of the filing of the receipt of service of process.
7 Parties are allowed to hire and appoint their own experts to supervise the expert examination, collaborate with the court-appointed expert and present reports that complement or oppose the one presented by the court-appointed expert.
8 Brazilian law and court rules do not allow for deposition of parties or witnesses by lawyers only, as is prevalent in certain common law jurisdictions.
Finally, in terms of territorial jurisdiction, the general rule is that civil and commercial lawsuits that do not concern real property rights should be brought before the courts of the place where the defendant is domiciled, or in which its headquarters are located. Several exceptions and supplemental jurisdiction rules are provided by the Civil Procedure Code and specific law. Choice-of-forum clauses are valid for lawsuits arising from contracts, and the new Civil Procedure Code provides that Brazilian courts may not have jurisdiction to hear disputes arising out of international contracts containing exclusive choice of foreign courts. However, courts may render a choice-of-forum clause void should they deem that the agreement is unequitable or that it has been reached through abuse of rights.

ii Procedures and time frames

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

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

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

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

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

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9 The review of the decision should be requested within two years from the date when it was officially published.
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:

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

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

iv Representation in proceedings

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

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

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

With respect to arbitral proceedings, parties are not required to be represented by lawyers enrolled with the OAB. On the other hand, the Statute of the Brazilian Bar

\textsuperscript{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.
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 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,11 a public notice will be published on the website of the state appellate court and the judge may also order it to be published in a widely read local newspaper in the location where the lawsuit is under development.

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

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.
vi Enforcement of foreign judgments

A foreign court decision as it pertains to arbitral awards. See Section VI.ii. will only produce its effects and become enforceable within the Brazilian territory after a ratification proceeding before the Federal Court of Appeals. 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).

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:

- the service of process, summons, and in-court and out-of-court notifications;
- evidentiary production and obtaining information;
- acknowledgment and enforcement of decisions;
- granting of a preliminary relief;
- international legal assistance; and

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12 As it pertains to arbitral awards. See Section VI.ii.
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 Convention on Consular Relations and the Inter-American Convention on Letters Rogatory.

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).

### 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.

### 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 worth noting 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 owing to causes of personal nature, without being required to disclose the specific reasons for doing so. The new Civil Procedure Code expressly states that a motion for replacement will be deemed unlawful if the party claiming such replacement has acted so to cause a conflict of interest or has agreed with its occurrence.

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. The law was widely criticised as it provides for legal concepts that are overly broad and ambiguous, leading to uncertainty and potential disrespect of human rights.

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

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

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

iii Data protection
Privacy, honour, mail (including electronic mail), and government data are examples of fundamental rights granted by the Federal Constitution (Article 5, X and XII). The specific regulations concerning said rights are provided by several laws and decrees.

Succeeding the Internet Act (Federal Law No. 12965, enacted on 23 April 2014), regulated by Decree No. 8771, dated 11 May 2016, the Brazilian General Data Protection Law was enacted in August 2018 (Law No. 13709); however, it will only enter in force in August 2020. The new legislation expressly regulates the communication of third-party data to companies, allows the exclusion of personal information from databases, to which the concerned can require access, and enumerates the lawful basis for data processing, outside which data handling becomes illegitimate.

Likewise, the breach of confidentiality involving personal data must be preceded by a court order. Should a post on the internet breach an individual’s right to privacy, its removal can be sought before local courts or even through out-of-court measures, depending on the content of the post.

Regarding bank secrecy, despite 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. In this regard, in November 2019, the Supreme Court decided that all information held or obtained by control and supervisory bodies may be shared with the Public Prosecutors’ Offices regardless 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.

Once the Brazilian General Data Protection Law comes into force (August 2020), law firms will also be subject to the new standards and rules for personal data protection and data processing, and to the penalties described above.

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 outside of the court’s jurisdiction, the judge will issue a national letter of request or an international letter rogatory, as appropriate.

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

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

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

ii Arbitration

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

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

Lately, the scope of matters that may be subject to arbitration has been enlarged. In addition, the recent amendment to the Arbitration Act included certain matters that were so far deemed controversial among the subjects that may be referred to arbitration. The possibility of government-controlled entities referring disputes related to disposable rights to arbitration is now specifically authorised, as is the possibility (theretofore non-existent) of establishing arbitration clauses in employment agreements where employees are executive officers or statutory managers of companies (and are therefore assumed to be sophisticated, senior-level employees). Further, currently, certain matters involving consumer relationships may also be subject to arbitration.

The Brazilian Arbitration Act provides that, in order to be binding, the arbitration clause shall be in writing and contained in the contract or in a separate document referring thereto. Nevertheless, there is no provision regarding whether the arbitration agreement must be signed by the parties in order to be effective. On 26 April 2016, the 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. However, additional requirements to enforce arbitration agreements in contracts of adhesion and standard form contracts are provided by the Arbitration Act. In fact, on 15 September 2016, the 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:

a. the arbitration agreement is null and void;
b. the award is rendered by someone who cannot act as an arbitrator;
c. the award fails to comply with the formal requirements;
d. the award exceeds the limits set forth by the arbitration agreement;
e. the award fails to address all of the issues submitted to the arbitration;
f. the award is rendered through unfaithfulness, extortion or corruption;
g. the rendering of the award exceeds the time limit set forth by the parties; or
h. 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 few years, mediation has become a possible answer to the ineffectiveness of in-court litigation and to the increasing number of proceedings. Mediation was originally adopted by courts only as an attempt to settle small claims and family disputes. The new Civil Procedure Code, however, has enlarged the use of mediation, causing it to be a standard stage of the proceedings, except when a party expressly informs that it does not intend to be subjected to mediation.

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

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

### iv Other forms of alternative dispute resolution

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

### VII OUTLOOK AND CONCLUSIONS

In 2020, major legal reforms are expected to be voted on by Parliament or to enter into force. The Welfare Reform approved in 2019 will enter into force in the first quarter of 2020, providing for substantial changes to retirement rights. Additionally, a bill for a major tax reform is expected to be voted on in 2020, although the outline of such reform is still being debated. Also, changes to the legal framework of insolvency proceedings and creditors’ protection should take place in 2020.

Next year, efforts to reduce the bureaucracy and simplify the management of legal obligations with which companies must comply should continue to be carried out by federal and state governments.

In tune with its consistent increasing practice, arbitration and other alternative dispute resolution methods should continue to be in the spotlight. Over the next few years mediation should gain attention and face a material development in business relations. As to arbitration, although no major changes in the legal framework nor in the court precedents are expected, Brazilian practice should become even more in tune with the international standards and practice.

The other hot topic for 2020 concerns data protection, and the regulation of new technologies. The Brazilian General Data Protection Law will enter into force in August
2020, forcing companies to adapt to the new standards and rules set forth by such law, especially regarding data handling, mapping of data collected, stored, shared and handled, and reporting to the National Agency for the Protection of Personal Data or public prosecutors. Through the Provisory Act 869/18, the National Agency for the Protection of Personal Data was created, but still awaits the appointment of its board of directors for developing sectoral regulation and further auditing the legality of data processing.
I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

The British Virgin Islands (BVI) is a British overseas territory. BVI law is comprised of locally enacted legislation supplemented by BVI common law precedent. Decisions of the courts of England and Wales, and of other countries within the Commonwealth, are of persuasive authority.

The court system in the BVI is part of the Eastern Caribbean Supreme Court. For civil matters, the High Court is the court of first instance. The High Court also has a Commercial Division (often referred to simply as the Commercial Court), which is sited in the BVI and hears many of the jurisdiction's international and large-scale disputes. Appeals from the High Court (including the Commercial Division) go up to the Eastern Caribbean Court of Appeal. Any appeals from the Court of Appeal go to the Privy Council in London.

Off the back of its reputation for having a reliable and efficient legal system, the BVI has taken various measures in recent years to establish itself as a centre for international arbitration.

II THE YEAR IN REVIEW

There have been numerous important decisions that have developed BVI jurisprudence over the past 18 months (there was no BVI chapter in last year’s edition of this publication), including several Privy Council decisions. These include decisions relating to the extent of a trustee’s fiduciary duties, the application of the forum non conveniens test in the context of service out of the jurisdiction, the court’s jurisdiction to grant relief in support of legal proceedings in foreign jurisdictions (both court and arbitral proceedings) and the application of BVI insolvency law.

i Gany Holdings (PTC) SA v. Khan and others; Rangoonwala v. Khan and others [2018] UKPC 21

On 30 July 2018, the Privy Council dismissed an appeal from the Eastern Caribbean Court of Appeal concerning the principles surrounding trust property and the fiduciary duties owed by trustees. Specifically, the case concerned whether certain assets, including BVI companies, had become part of trust property held by the trustee.

The Court of Appeal had relied on a legal presumption that property gratuitously transferred to a person or persons who were, at the time of the transfer, trustees of a trust...
previously established by the transferor, was to be regarded as transferred subject to the terms of that trust. The Court of Appeal relied on the case of Re Curteis’ Trusts for the basis of that legal presumption.

The Privy Council held that both the Commercial Court and the Court of Appeal went wrong in their analysis as the issue should not, in the first instance, be resolved by reference to any legal presumption. The correct approach was to: (1) first look at whether there was an oral or written declaration of the parties’ intention; then (2) look at the available evidence and come to a common sense decision; and (3) if there is no evidence, one can have regard to legal presumptions but as a last resort.

The Privy Council decided that there was sufficient evidence to establish the divestment of assets had the effect of making them part of the trust assets. The Privy Council held that it was therefore within the Court of Appeal’s discretion to void the distribution of the trust assets. Importantly the Privy Council opined that failure of a trustee to investigate the assets that constituted trust property was a serious breach of its fiduciary duties.

This case provides helpful guidance to BVI trustees in understanding the extent of the duty imposed while also clarifying the Court’s position on gratuitous transfers involving trust property.

ii  Nimati International Trading Limited & Others v. JSC MCC Eurochem & Another BVIHCMAP 2016/0042-0046

On 18 September 2018, the Court of Appeal handed down an important judgment concerning the application of the forum non conveniens test in the context of several challenges to the BVI court’s jurisdiction to try a dispute relating to an alleged large-scale international fraud, which entailed various BVI registered companies receiving and distributing bribes. The Court of Appeal ultimately concluded that Russia was a more appropriate jurisdiction than the BVI to try the claims.

One of the key features of the judgment was the Court of Appeal’s conclusion that it was necessary to determine the governing law of the claims where governing law had not been positively pleaded. It held that the claimants could not simply proceed on the assumption that the applicable law was the law of the forum (i.e., BVI law). The Court of Appeal also found that too much weight had been placed on the fact that BVI companies had allegedly received bribe payments as being a connecting factor to the BVI.

In November 2018, the Court of Appeal granted the claimants permission to appeal its decision to the Privy Council. In doing so, the Court of Appeal recognised the importance of seeking clarification on the approach to be taken on the points highlighted above, particularly given the frequency with which claims in the BVI are subject to jurisdiction challenges. The Privy Council appeal is due to be heard on 5 March 2020.

iii  Q v. R Corp & Others (case under seal)

On 13 December 2018, the BVI Commercial Court held that it had the power to grant Norwich Pharmacal orders (i.e., third-party disclosure orders) in support of foreign proceedings.

In coming to his decision, Justice Wallbank held that the BVI Courts would not follow the decision of the English Court of Appeal in Ramilos Trading v. Buyanovsky. Ramilos had cast doubt as to the English Court’s power to grant Norwich Pharmacal orders in aid of foreign proceedings where there was existing legislation governing the process of how evidence was to be shared between foreign courts.
Justice Wallbank held that where an innocent party is mixed up in wrongdoing, they come under a duty at that point in time to assist the wronged party by providing it with information that will allow the wronged party to seek recourse. It followed that the duty to give disclosure did not only arise if and when the court made an order pursuant to application brought by the wronged party. Wallbank J concluded that the focus of the Norwich Pharmacal application was to enforce this duty and not on whether the Court is assisting a foreign court in obtaining evidence.

The decision marks a further divergence between the courts of the BVI and England when considering applications for Norwich Pharmacal relief. Such relief has become increasingly important in the BVI, where it is often the only method by which information relating to companies, particularly ownership information, can be sought in a civil law context.


On 17 January 2019, the Eastern Caribbean Court of Appeal delivered judgment in one of the first cases in the jurisdiction dealing with interim relief in support of foreign arbitral proceedings.

The Court held that the jurisdiction to grant interim measures in support of foreign arbitral proceedings is to be found in the clear wording of Section 43 of the Arbitration Act; the Court need not rely on or read Black Swan principles into the Act, which would require evidence of assets within the jurisdiction. It was also made clear that asset disclosure orders can be made as part of a freezing injunction granted pursuant to Section 43, which represents another difference from the Black Swan relief. The disclosure order was necessary to give teeth to the freezing injunction and was part of the judge's exercise of discretion under Section 43 of the Act.

The case demonstrates the different tests applicable to applications for freezing injunctions in support of foreign arbitral proceedings and those for freezing injunctions in support of foreign court proceedings (i.e., Black Swan injunctions).

v The Matters of Constellation Overseas Ltd and Ors (BVIHC (COM) 2018/0206, 0207, 0208, 0210, 0212 of 5 February 2019)

On 5 February 2019, the BVI Commercial Court for the first time ordered a light touch provisional liquidation as a protective measure to ward off creditors who may wish to take ex parte actions against the company to prioritise their debt recovery.

In granting this relief, the Court held that it had a very wide common law jurisdiction to appoint provisional liquidators to preserve and protect assets owned or managed by a company. This wide jurisdiction, the Court held, included making such appointments to aid in the company’s reorganisational efforts aimed at achieving that overriding objective. The Court also stated that the ‘light touch’ liquidation would allow the Court to cooperate with foreign courts and to have oversight of the restructuring process for the benefit of the creditors as a whole. This was in the context of evidence that the restructuring had a real prospect of succeeding in maintaining the company as a going concern.

This decision demonstrates not only that the BVI Court has a common law jurisdiction to appoint provisional liquidators to facilitate a cross-border group restructuring and provide
a moratorium against predatory creditor claims but also more generally that BVI Courts will seek to give companies the protection required if it can be shown that they have a real prospect of recovering financially.

vi  UBS AG New York and Ors v. Fairfield Sentry Ltd (In Liquidation) and Ors  
[2019] UKPC 20

On 20 May 2019, the Privy Council handed down its second decision in the long-running dispute between the liquidators of the Fairfield Funds and the Funds’ investors. The question before the Privy Council was whether the Court of Appeal (and Commercial Court before that) had been correct to dismiss an application for an anti-suit injunction that would prevent liquidators from bringin proceedings in the US pursuant to BVI insolvency law.

The Board held that the BVI Insolvency Act, 2003, did not expressly or by necessary implication confer exclusive jurisdiction on the BVI High Court such as to prevent a foreign court from exercising such powers at the request of a BVI liquidator. The Board opined that it was not uncommon for a foreign court to apply the insolvency laws of another country when assisting in cross-border insolvency and that it is a question for the US court whether they should apply BVI law as requested by the liquidators. The anti-suit injunction had been rightly refused.

This decision demonstrates that liquidators appointed over BVI companies will be able to rely on courts in foreign jurisdictions granting relief pursuant to the BVI insolvency regime.

III COURT PROCEDURE

i  Overview of court procedure

The rules governing civil procedure in the BVI are set out in the Eastern Caribbean Supreme Court Civil Procedure Rules, often referred to simply as the EC CPR or the CPR. These rules apply to civil proceedings in all jurisdictions of the Eastern Caribbean Supreme Court and as such there is a healthy body of case law from these jurisdictions that aids the interpretation of the rules.

For cases proceeding in the Commercial Division of the High Court there is a specialised procedure set out in dedicated parts of the EC CPR to ensure these cases are dealt with appropriately and expeditiously.

ii  Procedures and time frames

Broadly speaking, there are four types of proceeding in the BVI: (1) standard claims; (2) fixed-date claims; (3) originating applications; and (4) ordinary applications.

Proceedings commenced by claim form

Standard claims are commenced by the filing of a claim form. A standard claim form must be accompanied by a statement of claim either at the time the claim form is filed or shortly thereafter and that document should contain the material facts upon which the claim is brought and set out the causes of action and relief that is being sought.

For claims that are commenced against defendants located within the BVI the defendants will have up to 14 days to acknowledge service and up to 28 days to file a defence from the time the claim form and statement of claim have been served on them. Where a
defendant is located outside the BVI the claimant will need to seek permission from the court to serve out of the jurisdiction before service can be effected, an application which will ordinarily take between two and four weeks to be determined. If and when permission to serve out is granted, the claimant will then need to effect service by certain specified methods (what is permitted will depend on the laws of the country where the defendant is located). Once a defendant located outside the BVI has been served they will have between 28 and 35 days to acknowledge service and 42 and 56 days to file a defence based upon where they are located (for most jurisdictions outside the BVI the longer period applies). A defendant may file a counterclaim alongside their defence.

A claimant may file and serve a reply to a defence and will ordinarily have 14 days to do so after the defence has been served. If a counterclaim has been filed, there will be an opportunity for the claimant to file and serve a defence to the counterclaim and for the defendant to file and serve a reply to that defence.

Once pleadings close there will ordinarily be a case management conference at which the court will set down directions to trial and set a trial date. The directions will generally provide for a disclosure (discovery) process and for the parties to adduce witness evidence. Some cases may also require the parties to adduce expert evidence. The time between close of pleadings to trial will depend on the size and complexity of the case, how much documentary evidence there is, how many witnesses there are and whether expert evidence is required.

**Fixed-date claim forms**

Fixed-date claim forms must be used for certain types of dispute. Fixed-date claims are intended for cases that will require minimal evidence and the procedure is therefore designed to bring the claim on for trial more quickly than a standard claim.

When commencing proceedings by way of a fixed-date claim form the claimant will generally file and serve an affidavit instead of a statement of claim and a defendant will have the opportunity to put in responsive evidence by way of affidavit. A hearing date will be set at the time the fixed-date claim form is filed. The first hearing will normally be used by the court to give directions for the trial of the matter but in situations where there is no defence or where the case can be dealt with summarily, the court can treat the first hearing as the trial.

**Originating applications**

Originating applications are used to commence certain actions within the regime laid out by the Insolvency Act and the Insolvency Rules. This will usually be related to applications to appoint liquidators or other insolvency-related applications.

The originating application procedure is similar to that commenced by fixed-date claim form – an originating application must be supported by affidavit evidence and a hearing will be fixed at the time the application is filed. The respondent(s) and/or interested parties will have an opportunity to file evidence in response and to be heard at the hearing.

**Ordinary applications**

Ordinary applications will usually be made within proceedings that have been, or will be, commenced through one of the originating procedures described above. However, there are limited circumstances in which ordinary applications can be used to commence free-standing proceedings in the BVI, including where interim relief is sought in support of foreign arbitral proceedings and where *Black Swan* injunctive relief is sought in support of foreign court proceedings.
Applications can be made on an urgent basis, in which case underlying proceedings do not need to be on foot at the time the application is made even if the applicant intends for the application to be in support of anticipated proceedings in the BVI. In such a situation a claim can be commenced by way of a claim form following the grant of the urgent interim relief. Urgent applications are generally heard at very short notice by the court and, when necessary, on the same date the application is filed.

iii Class actions
The EC CPR allows groups of five or more persons who have a similar interest to be represented by a single claimant or defendant and as such class actions are theoretically permitted. However, such actions are not common in the BVI.

iv Representation in proceedings
Natural persons are able to represent themselves in legal proceedings in the BVI. For corporations, a duly authorised director or other officer may conduct the proceedings on behalf of the corporation, although the court’s permission is required for the corporation to be represented at any hearing in open court by anyone other than a BVI legal practitioner.

v Service out of the jurisdiction
For the BVI court to permit service of a claim form on a defendant located outside the jurisdiction the following three-stage test must be satisfied: (1) that in relation to the foreign defendant there is a serious issue to be tried on the merits; (2) that there is a good arguable case that the claim falls within one of the jurisdictional ‘gateways’ for service out, as set out at EC CPR 7.3; and (3) that the BVI is clearly and distinctly the appropriate forum for the trial of the dispute.

Where permission to serve out has been granted, a claimant must ordinarily serve a claim form by one of three methods: (1) through diplomatic channels or foreign governments (e.g., in accordance with the provisions of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters); (2) in accordance with the law of the country in which the document is to be served; or (3) personal service by the claimant or the claimant’s agent. While personal service is expressly permitted as a method of service, this is only insofar as it is not contrary to the law of the country where service is to take place.

In circumstances where the ‘ordinary’ methods of service are demonstrably impracticable the court may permit the claimant to serve by alternative methods.

Where the court has granted permission to serve a claim form on a defendant out of the jurisdiction a claimant may serve other documents relating to the proceedings on the same defendant without the need to obtain further permission.

vi Enforcement of foreign judgments
There are different methods of enforcing foreign judgments in the BVI depending on: (1) the jurisdiction from which the judgment originates; (2) the nature of the relief granted in the judgment; and (3) whether the judgment was issued by a court or arbitral tribunal (although the latter is generally referred to as an ‘award’ rather than a ‘judgment’).
Generally speaking, there are four methods by which foreign judgments may be enforced in the BVI:

\( a \) Money judgments issued by certain courts in certain jurisdictions can be enforced in accordance with the Reciprocal Enforcement of Judgments Act. This includes money judgments issued by the High Court in England and Wales, the High Court in Northern Ireland, the Court of Session in Scotland, and courts in the Bahamas, Barbados, Bermuda, Belize, Trinidad and Tobago, Guyana, St Lucia, St Vincent and the Grenadines, Grenada, Jamaica, New South Wales (Australia) and certain courts within Nigeria. The procedure for registration of such a judgment is relatively straightforward and is set out within the EC CPR. Once registered, the judgment shall be of the same force and effect as a judgment of the High Court in the BVI and will be enforceable as such.

\( b \) Money judgments from other jurisdictions can be enforced by way of a common law debt claim brought in the BVI as a free-standing claim. Although this entails commencing a new claim in the BVI, such a claim will usually be dealt with on a summary basis.

\( c \) Foreign non-money judgments can be enforced in the BVI, although this requires the claimant to commence a new claim in the BVI and rely on issue estoppel to prevent the defendant from raising any of the same arguments that it has already relied upon in the foreign proceedings in which the judgment was issued. The relief awarded in the foreign jurisdiction must also be available in the BVI for the judgment to be effectively replicated.

\( d \) Foreign arbitral awards are enforceable in accordance with the provisions of the Arbitration Act, and there is a summary procedure provided for in the EC CPR which means that registration of foreign arbitral awards, particularly awards from countries that are signatories to the New York Convention, will be quick and relatively straightforward absent any irregularity.

vii Assistance to foreign courts

One of the ways in which the BVI courts are able to provide assistance to foreign courts is to compel entities within the BVI to produce information or documentation. There are various ways in which a foreign court, or foreign litigants, may seek the assistance of the BVI courts in obtaining information and documentation. This includes the power of the BVI courts to grant Norwich Pharmacal relief in support of foreign proceedings and a statutory power to order an entity in the BVI to produce documentation for use in foreign legal proceedings, pursuant to the BVI receiving a letter of request from that foreign court.

In addition to the provision of information and documentation, the BVI courts are also able to assist foreign courts by granting injunctive relief, or other forms of interim relief, in support of foreign court proceedings. The most prominent way in which assistance can be provided is through the granting of injunctive relief to hold the ring pending determination of foreign proceedings. The Black Swan jurisdiction has evolved in the BVI which allows freezing injunctions to be granted over assets located in the BVI to assist foreign proceedings even if the parties to the proceedings are not domiciled in the BVI. In addition, the BVI courts have taken a liberal approach to the granting of interim relief in support of foreign arbitration proceedings.
viii Access to court files
Members of the public are entitled, upon paying the prescribed fee, to search for, inspect and take copies of the following documents that have been filed in proceedings: a claim form; a notice of appeal; judgments and orders. For a non-party to obtain any other document they will need to make an application to the court for leave to obtain such further documents, which will not generally be made available without good grounds.

The parties to any proceedings may search for, inspect and take copies of all documents on the court file (except anything that has been placed under seal).

ix Litigation funding
Although there is not currently any legislation in the BVI governing third-party funding of litigation, a 2011 decision of the Commercial Court suggests that third-party funding is not unlawful and that a third-party funder will be entitled to share in any award or profits of litigation. Despite this decision, third-party funding has historically not been commonly used in the BVI.

As to the use of contingency fees, while these are explicitly allowed in respect of non-contentious work provided that the fee is fair and reasonable, there is no such provision in respect of contentious work. As such, the common law rules relating to champerty and maintenance have not been expressly modified and it remains unclear whether CFAs would be permitted in respect of litigation.

IV LEGAL PRACTICE
i Conflicts of interest and Chinese walls
As the BVI has a limited number of law firms, it is relatively common for law firms to be asked to act against persons or entities that they have previously advised in relation to other matters. It is also common for law firms to be asked to act for multiple parties where there is the potential for the parties’ interests to diverge.

While a law firm cannot act if their previous instruction for a client gives rise to a direct conflict with a new instruction or if they have already advised an adverse party in relation to the same matter, in practice it may be possible to set up appropriate information barriers to ensure that any previous work and the new instruction are dealt with by completely separate teams and to ensure no information passes between them.

Law firms may act for multiple parties for as long as their interests are aligned. If there comes a point at which the interests diverge and this gives rise to a conflict, then the law firm can no longer act for the two or more parties whose interests conflict.

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

Under the Proceeds of Criminal Conduct Act 1997, a number of offences are created which apply to all persons incorporated, established or resident in the territory, which includes lawyers who practise in the BVI. These offences are: assisting another to retain the benefit of
criminal conduct; acquisition, possession or use of proceeds of criminal conduct; concealing or transferring proceeds of criminal conduct; failure to report suspicious transactions; and tipping-off.

Persons carrying on ‘relevant business’, which includes lawyers, are subject to further obligations under the Anti-Money Laundering Regulations 2008 and the Anti-Money Laundering and Terrorist Financing Code of Practice 2008. A person subject to the Code of Practice and the Regulations is a ‘relevant person’. A ‘relevant person’ must assess the risk that any business relationship or one-off transaction may involve money laundering and take a view whether they can act having regard to the degree of risk assessed.

The obligation to conduct due diligence on clients and customers may be ‘simplified’ or ‘enhanced’ depending on the perceived risks in dealing with a given client or applicant for business.

### iii Data protection

Under BVI law there is no specific data protection legislation, outside of certain limited provisions relating to computer misuse. There are, however, duties of confidentiality owed by lawyers to their clients (see above) and also statutory duties of confidentiality owed in banking, trust and fiduciary relationships.

### V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

#### i Privilege

BVI law largely follows the position in English common law as to when communications will attract privilege. For the purposes of legal advice privilege, this means that communications between a client and their foreign lawyers or in-house counsel are capable of attracting privilege.

In addition to the overarching common law position, the Evidence Act 2006 also provides a statutory mechanism whereby clients can object to documents being disclosed in legal proceedings.

The Evidence Act provides that communications will attract privilege and not be disclosable where they are: (1) created for the dominant purpose of providing legal advice to the client; (2) for the dominant purpose of providing or receiving professional legal services in relation to legal proceedings (anticipated or pending); or (3) for the dominant purpose of preparing for or conducting the proceedings.

The Evidence Act 2006 defines ‘client’, a term that has been subject of both controversy and scrutiny in England and Wales. For the purpose of the legislation ‘client’ takes on a wider meaning than the English common law definition, including: (1) an employee or agent of a client; (2) a person acting, for the time being, as manager, committee or other person however described, under a law that relates to a person of unsound mind and in respect of whose person, estate or property, the person is so acting; or (3) if the client has died, the personal representative of the client.

#### ii Production of documents

Generally, parties to claims in the BVI will be required to disclose all documents that are or were within their possession or control and which are directly relevant to the matters in question in the proceedings. A document is directly relevant if: (1) the party with control of the document intends to rely on it; (2) it tends to adversely affect that party’s case; or (3) it
tends to support another party's case. A party has or has had control if: (1) it is or was in the physical possession of the party; (2) the party has or has had a right to inspect or take copies of it; or (3) the party has or has had a right to possession of it.

If documents are overseas or are in the possession of another person or entity but held to the order of the party then those documents will need to be disclosed if they are directly relevant. The obligation also extends to electronic records and it is common place in the BVI for large disclosure exercises to comprise the review and disclosure of digital documents and communications.

The BVI courts tend to take a pragmatic approach to disclosure and, in the event that a party makes a compelling argument that a strict application of the rules will lead to a disproportionate or oppressive process, the court will exercise its broad case management powers to apply appropriate limitations to the process.

A party discloses a list of documents that come within the criteria set out above. That list should explain which documents are no longer in the party's control and should also refer to any documents that are privileged. However, documents no longer in the control of the party or that are privileged will not have to be made available to the other party for inspection.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

Historically the BVI has been a jurisdiction with a heavy focus on litigation and the courts. However, as in the wider world, parties are increasingly encouraged to explore alternative methods of resolving their disputes both before and during litigation, and the courts are generally receptive to granting parties additional time in which to explore such alternatives where litigation is already afoot.

Additionally, arbitration is gaining traction in the BVI and is increasingly seen as an attractive alternative to litigation, particularly given the confidentiality that attaches to arbitral proceedings.

ii Arbitration

Since the introduction of the BVI Arbitration Act, there has been a drive internationally to increase the BVI's prominence as a centre for international arbitration. The past few years in particular have seen a growing trend towards the use of arbitration in the BVI, which includes the incorporation of BVI arbitration agreements within contractual documents and the use of ad hoc arbitrations.

The UNCITRAL Model Law has been largely reflected in the Arbitration Act with some modifications. This will ensure that BVI arbitrations are conducted according to familiar and internationally accepted standards, and by reference to tried and tested procedural law, on which there is already a vast body of existing interpretation. The variations to the Model Law are aimed at retaining flexibility to ensure that the BVI is an attractive jurisdiction to arbitrate disputes and which also allows for the efficient registration and enforcement in the BVI of foreign arbitral awards.

As a member of the New York Convention, arbitral awards granted in the BVI benefit from being easily exportable to other jurisdictions around the world.
The BVI has its own arbitral body, the BVI International Arbitration Centre (the BVI IAC). The territory also has state of the art facilities to accommodate arbitral hearings. The BVI IAC has developed a bespoke set of arbitration rules, which have been developed by prominent arbitration practitioners.

iii Mediation

The BVI courts are expressly permitted by the EC CPR to encourage the parties to a dispute to use any appropriate form of dispute resolution including, in particular, mediation, if the court considers it appropriate. The court can facilitate the use of such procedures and, to this end, the Eastern Caribbean Supreme Court offers court connected mediation which coordinates mediations and provides trained mediators, where the parties agree to use it or where the court orders that the case be referred to mediation.

In practice, the court will rarely order the parties to refer their dispute to mediation unless all parties agree.

iv Other forms of alternative dispute resolution

Other forms of alternative dispute resolution are not widely used in the BVI. However, the EC CPR provides a mechanism whereby a referee can be appointed to try the claim or any specific issue or allegation. Referees will only be used where there are specific issues to be determined that it is not convenient for the court to determine or where the parties agree to refer the case or issue to a referee.

VII OUTLOOK AND CONCLUSIONS

Litigation continues to be the default method of resolving disputes in the BVI, although those doing business in the BVI are increasingly becoming aware of the benefits of arbitration and it is expected that there will be an increase in arbitration proceedings with their seat in the BVI, and that take place in the BVI, in the coming years. The courts have demonstrated that they are willing to grant interim measures in support of arbitral proceedings elsewhere, regardless of whether there is evidence of assets being located in the BVI.

Early in 2020 the Privy Council will hear the appeal in Eurochem, which could have far-reaching consequences regarding the ability of the BVI courts to retain jurisdiction over disputes concerning BVI entities, particularly in cases concerning fraud, where BVI companies have been used as a vehicle for the wrongdoing.

Finally, the BVI courts have also demonstrated a willingness to apply the Norwich Pharmacal jurisdiction more liberally than the courts in England, and this is increasingly becoming a crucial tool in uncovering actionable wrongs that would otherwise go undetected in the BVI.
I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

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

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

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

An action for relief up to a value of CI$20,000 can be brought in the Summary Court. Claims for a higher value, or other matters such as judicial review or winding up companies, should be brought in the Grand Court. The business of the court takes place in six divisions: civil; criminal; matrimonial and family; admiralty; probate and administration; and financial services. Civil law claims, for example, for breach of contract, tort, trust matters and companies, would be brought in either the civil division or the financial services division. The latter is 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 always decided by a judge sitting alone, except in a civil case for fraud where the defendant has the option of a jury trial.

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

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II THE YEAR IN REVIEW

The year 2019 saw many important decisions on a variety of topics: preference payments or clawback which affect nominee shareholders; the nature of appeal hearings from Cayman governing bodies, which is likely to impact on anti-money laundering regulation; whether recognition of foreign receivers in Cayman is best achieved through common law or statute; a rare decision by the Court in refusing to enforce an arbitration award – for lack of consent to the arbitral process; on use of notification orders rather than freezing orders; on when sanction might be granted for liquidators to settle proceedings despite the existence of a separate proprietary claim; and a review of the principles surrounding shareholder claims and ‘reflective loss’.

i Skandinaviska Enskilda Banken AB (Publ) (Appellant) v. Conway and another (as Joint Official Liquidators of Weavering Macro Fixed Income Fund Ltd) (Respondents) (Cayman Islands)²

In an important decision for nominee shareholders in Cayman companies, the Judicial Committee of the Privy Council (PC) considered whether redemption payments made by an insolvent company (Weavering) were preferences over other creditors of the company under Section 145(1) of the Companies Law³ (the Law). The payments had been made to a bare nominee (SEB), which had passed on payments to its principals. It was then discovered that the redemption payments had been based on a net asset value (NAV) which had been set incorrectly as a result of internal fraud.

The joint official liquidators (JOLs) appointed to Weavering argued that the redemption payments were preferences and invalid under Section 145(1) of the Law. They applied to the Cayman Grand Court for an order that SEB repay all of the redemption sum received of US$8,217,761.54 plus interest.

The Grand Court found the redemption payments to SEB were invalid as preferences over Weavering’s other creditors. SEB was ordered to repay the redemption sum to the JOLs together with interest and costs. SEB appealed to the Cayman Islands Court of Appeal (CICA), which dismissed the appeal. SEB then appealed to the PC on six points:

a internal fraud meant the NAV was not binding on Weavering, therefore no redemption notices were valid and no money was due to any shareholders. If no money was due there were no creditors and therefore no payment could prefer one creditor over the other;

b preferring one creditor over another means both must be creditors. If redeeming shareholders had not yet become creditors and entitled to payment there could be no preference;

c whether Weavering was insolvent at the relevant time under the Cayman test of a company’s solvency under Section 93 of the Law;

d whether the payer made the payments with the required intention to prefer one creditor over another under Section 145(1) of the Law. This considered the difference between an intention to prefer and mere knowledge that other payments could not be made;

e that the last two payments could not count as preferences;

³ 2013 Revision.
as Section 145(1) of the Law does not create a statutory cause of action for the recovery of preferential payments, the JOL’s claim for repayment is under common law for ‘unfair enrichment’. SEB was not enriched as it acted as a bare nominee for mutual investment funds. In paying the redemption proceeds to those funds it suffered an irreversible ‘change of position’ because it had no means to recover them from its principals.

The PC decided that the payments SEB received were preferences. Although equitable defences were available to SEB, the policy of ensuring that all creditors were paid pari passu overrode the equitable principles that would allow a ‘change of position’ defence. The PC recognised that this gave rise to a ‘harsh result’ and commented that legislation in other jurisdictions has addressed this situation to mitigate against such a result.

There was a majority finding on point (a) as to whether internal fraud meant those setting the NAV were not doing so in good faith and so the NAV was not binding. The PC found that situation was distinguishable from that in Fairfield Sentry Ltd v. Migani where those within the company who were setting the NAV were completely unaware of the underlying Madoff fraud that had affected the NAV.

All nominee shareholders in Cayman companies will now be vulnerable to preference claims and they should take advice on ways to avoid a similar result.

ii Robert Patraulea v. The Council of the Cayman Islands Institute of Professional Accountants

Where a professional governing body has exercised a regulatory function given to it by statute and where the statute provides a right of appeal to the Grand Court (the Court), the appeal should be by way of a rehearing which examines whether the discretion has been properly exercised. The Court should not reconsider the whole matter afresh and decide whether it would have reached the same decision. This is a decision that will affect the appeal of decisions taken by professional governing bodies exercising a regulatory function, and in particular those decisions relating to money laundering offences.

The relevant legislation in this case (the Law) gave a right of appeal to the Court from a governing body’s refusal to grant or renew a professional licence to practice. It gave the Court various powers to confirm, reverse, vary or modify the decision, return it to the relevant governing body, or make any order or exercise any power that the governing body could have made.

What the Law did not do was set out the scope of the rehearing or the type of appeal. The Court considered three types of possible statutory appeals procedure it could follow:

- Did the governing body come to the right decision on the evidence it was given at the time?
- Does the Court affirm or overturn the governing body’s decision in light of the documents, possibly with further evidence, put before it on the appeal?

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5 Unreported Judgment dated 21 July 2019, Grand Court: Civil (General) G70 of 2018 – Justice Williams.
6 The Accountants Law, 2016, Section 13.
Does the Court redetermine the original application based on a rehearing of all of the evidence and the material presented to it without being limited in any way by the governing body (de novo).

The Court considered that the Law had ‘persuasive indications’ that the legislature intended that the right of appeal would be by way of rehearing. The Law gave the Court wide powers to ‘confirm, reverse, vary or modify the [governing body’s] decision ‘or’ to make an order in the matter that it thinks just’. The Law did not limit the Court’s power to receive further evidence under Grand Court Rules’ (GCR) Order 55. Further, had the legislature intended that any rehearing should be de novo, it would not have given the Court the power to remit the matter to the governing body.

The correct approach to the review of the decision was to consider whether the governing body made some error in exercising the discretion the Law had given it. In this case, having had the opportunity to rehear the matter, with a thorough review of all of the evidence, careful consideration of the oral and written submissions and authorities provided by the parties, the judge reached the same decision as that reached by the governing body.

iii Silk Road Funds Ltd

A judgment published in May 2019 for an application to the Grand Court (the Court) reviewed the basis for recognition of foreign receivers appointed to act by a court outside Cayman. The judgment concluded that, of the three possible ways for foreign representatives to get recognition to act in Cayman, the common law was the most appropriate as it gave the Court jurisdiction without the need to consider Part XVII of the Companies Law or the principles of ‘modified universalism’.

The application was for recognition in Cayman of joint receivers (receivers) appointed by the Supreme Court of Bermuda to a fund (M3), which was a ‘segregated account’, forming part of a ‘segregated accounts company’ incorporated in Bermuda (Silk Road). As is the case with Cayman segregated portfolio companies (SPCs) a Bermudian segregated account is not a separate legal entity to its segregated accounts company.

The Court recognised the Bermudian court’s order appointing the receivers (appointment order) and recognised the receivers had all the functions and powers of the directors and managers of Silk Road in respect of the business and assets linked to the M3 fund, including those powers and functions set out in the appointment order.

The nature of the M3 fund meant that Part XVII of the relevant Companies Law (the 2016 Revision) could not apply. Part XVII applies where the foreign representative is ‘a trustee, liquidator or other official appointed in respect of a debtor for the purposes of a foreign bankruptcy proceeding’. A foreign bankruptcy proceeding includes ‘proceedings for the purpose of re-organising or rehabilitating an insolvent debtor’ where a debtor is ‘a foreign corporation or other foreign legal entity’. In this case M3 was not a separate legal entity. It was only one part of a larger entity which was not insolvent.

The Court also declined to recognise the receivers by reliance on principles of ‘universality of insolvency or bankruptcy’, also known as ‘modified universalism’. It distinguished previous cases on those principles as applying, for example, in circumstances where a foreign representative needed to be given powers that were not available under the law of the country.
where the foreign representative was appointed or under the terms of their appointment. That was not the case here. Under the Bermudian appointment order, the receivers had been given the powers they wanted to exercise in Cayman. There was no need to rely on ‘modified universalism’ because the Court’s inherent jurisdiction in common law was enough to give the power to recognise the receivers powers and functions set out in the appointment order.

The Court set out criteria to be applied for it to recognise a foreign-appointed receiver at common law. There must be a ‘sufficient connection’ between both the entity over whose assets the receiver has been appointed and the jurisdiction in which the receiver is appointed. The tests to apply to establish this were summarised by the Court and set out in the Cayman Islands Court of Appeal decision in Canadian Arab Financial Corp and Kilderkin Investments Limited v. Player.9

a. Has the company in respect of whose assets the receiver and manager has been appointed been made a defendant in the action in the foreign court?
b. Has the company in respect of whose assets the receiver and manager has been appointed been incorporated in the country that appointed the receiver and manager?
c. Would the courts of the country of incorporation recognise a foreign-appointed receiver?
d. Has the company carried on business in the jurisdiction of the appointment or is the seat of its central management and control located there?

The Court considered these were met, setting out a clear path for recognition in Cayman of the powers of a receiver appointed by a foreign court over an entity in a structure such as a segregated accounts company.

iv VRG Linhas Aereas S.A. v. Matlin Patterson Global Opportunities Partners (Cayman) II L.P. & Ors10

In February 2019, the Cayman Grand Court (the Court) took the rare decision to refuse an application to enforce a foreign arbitration award under the New York Convention and Foreign Arbitral Awards Enforcement Law.11 The Court recognised it had only a narrow discretion to exercise the power to refuse to enforce an award and the decision is a useful reminder that it will exercise that power when appropriate.

The defendants (MP Funds) offered three bases for its refusal: a lack of consent to arbitration; the judgments offended against natural justice; and, even had the parties consented to arbitration, the Tribunal that heard the arbitration purported to decide a claim that had never been submitted and award relief that had not been sought. In all the circumstances the Court found it was just to refuse to enforce the award.

The Court found the award offended against the underlying principle of arbitration, that the parties must have agreed to it. It found that MP Funds were not parties to the arbitration agreement and even if they had been, the Tribunal decided matters that had never been pleaded or set out and therefore fell outside the boundaries of the submission to arbitration. Although the arbitration took place in Brazil, the Court was required to apply Cayman standards of fairness and due process. MP Funds could not reasonably have foreseen that they would be held liable as third parties in tort when the claim against them was to

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9 [1984-85 CILR 63].
11 1997 Revision.
hold them responsible for a contractual obligation of their indirect subsidiaries. Under the Brazilian Civil Code they were entitled to express notice of the proposal so they could respond to it. The fact that they were not given notice offended against the cardinal principle of natural justice that enshrines a party’s right to be heard. As such it was contrary to Cayman public policy, the express provisions of the New York Convention, and the Enforcement Law.

v  In the Matter of ArcelorMittal USA LLC v. Essar Steel et al

The Cayman Grand Court (the Court) has accepted that it has the jurisdiction to grant a notification order in circumstances where the applicant has satisfied the grounds for a conventional freezing order but it would not be just and convenient to do so.

As in other jurisdictions, where there is a risk that a party to court proceedings may dissipate their assets to avoid having to satisfy any judgment against them, a party may apply to the Court for an order to freeze that party’s assets. A notification order is less onerous, as rather than freezing the subject’s assets, they have to give the applicant notice of dispositions of assets of a certain type or over a certain value.

An applicant for either order must show they have a good arguable case on the underlying merits and solid evidence to support a conclusion that there is a real risk, judged objectively, that a future judgment would not be met because of unjustifiable dissipation of assets.

The Court considered Lord Justice Gloster’s views in the England and Wales High Court decision in Holyoake v. Candy [2018] Ch. 297 that when deciding to make a freezing order ‘the ultimate question a court must ask, . . . was whether it is just and convenient to do so.’ She continued:

> But it is not every risk of a judgment being unsatisfied which can justify freezing order relief . . . the intrusiveness of relief will be a highly relevant factor when considering the overall justice and convenience of granting the proposed injunction . . . an applicant should consider what form of relief a court is likely to accept as just and convenient in all the circumstances.

vi  Saad Investments Company Limited (in official liquidation)

Joint official liquidators (JOLs) of Saad Investments Company Limited (SICL) applied to the Cayman Grand Court (the Court) to sanction entering into an agreement and mutual release between SICL, AB Ltd and XY Ltd (in voluntary liquidation), to settle claims proven in both of the liquidations of SICL and of XY Ltd. A further company (AHAB) had proprietary claims over the assets of SICL which prevented the JOLs from making the settlement.

The JOLs were required by Section 110(1)(a) of the Companies Law (2018 Revision) (the Companies Law) to distribute the assets to the creditors, however powers conferred on them in SICL’s winding up order did not include the power in Part I of Schedule 3 to the Companies Law:

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. . . to compromise on such terms as may be agreed all debts and liabilities capable of resulting in debts, and all claims (present or future, certain or contingent, ascertained or sounding only in damages) subsisting, or supposed to subsist between the Company and a contributory or alleged contributory or other debtor or person apprehending liability to the Company.

The JOLs could only exercise that power when sanctioned by the Court.

In its judgment, the Court emphasised this was 'an exceptional application justified by the clear interests of the . . . liquidation estate which are protected by the grant of sanction' and 'that it would be inappropriate for such application to be routinely made'.

vii Primeo Fund (In official liquidation) v. Bank of Bermuda (Cayman) Ltd and HSBC Securities Services (Luxembourg) SA14

The Cayman Islands Court of Appeal (CICA) rejected the claims having considered the legal and public policy basis for the principle of 'reflective loss', which bars a claim by a shareholder for a loss that is fundamentally the same as one that the company in which they hold shares could claim or is claiming. The decision was in proceedings for losses arising from the collapse of the Bernard L Madoff Securities (BLMIS) Ponzi scheme. Key points from the decision were that the claim being made has to have a 'realistic prospect of success' and that you make an assessment of whether a claim is for 'reflective loss' based on the circumstances at the time the claim is made and not before.

CICA defined 'reflective loss' as applying where a company and a shareholder both have a claim against a defendant arising out of the same facts and where all or part of the shareholder's loss is not separate and distinct from the loss to the company, and the shareholder’s rights of recovery will be satisfied, if at all, through the company’s recoveries against the defendant.

To determine whether this principle is engaged, it is important to establish that the company has a valid claim on the merits. The claimant argued that the correct test for this was whether the company’s claim would succeed if it were to bring it, but having considered the various authorities and arguments, CICA considered the correct ‘merits test’ is ‘whether the company’s claim has a realistic prospect of success’.

CICA also considered authorities on how losses claimed by a shareholder might be fully ‘made good’ if the company were to make its own claim. It concluded that ‘whether a loss is in fact reflective is to be tested and determined in the light of the circumstances that exist when the claim is made.’ Accordingly, it rejected the claimant’s argument that the reflective loss principle did not engage because it became a shareholder in the company after the cause of action accrued.

CICA reviewed the rationale behind the principle and suggested that it may apply even where there is no prospect of double recovery (such as there is a defence to the company’s claim). It set out four considerations underlying the principle:

\begin{enumerate}
\item to avoid double recovery against the defendant by the same claim made by the shareholder and the company;
\item causation – if a company decides to accept less or not to claim at all, then this may add to the shareholder’s loss but it is not the fault of the defendant;
\item conflict of interest – the possibility of a shareholder action would make it difficult for the directors or a liquidator to settle an action on behalf of the company, effectively
\end{enumerate}

14 Unreported, 13 June 2019, CICA (Civil ) Appeal No. 21 of 2017.
taking the conduct of the litigation out of their hands. Further, where directors are shareholders or creditors, there may be a conflict of interest where settlement of the company’s claim at less than its true value would leave them with a personal claim against the defendant as shareholder or creditor; and company autonomy – the need to preserve company autonomy and avoid prejudice to minority shareholders and other creditors.

### III COURT PROCEDURE

#### i Overview of court procedure

Civil litigation in the Cayman Islands is commenced by an aggrieved party setting out the nature of the claim made and against whom it is made. 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 (Revised) (GCR), subsequent amendments, sub-rules and practice directions. The GCR do not apply to disputes governed by Parts I to III of the Succession Law (Probate and Administration) Rules 1977 (as amended); the Matrimonial Causes Rules 1986, (as amended); the Grand Court (Bankruptcy) Rules 1977 (as amended); Summary Court Rules 2004; and the Companies Winding-Up Rules 2018 (as amended).

#### 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, which 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 that the plaintiff is seeking (a generally endorsed writ). Alternatively, a plaintiff may issue the writ with a statement of claim that gives full details of the facts of the claim (a 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 the plaintiff has served a generally endorsed writ they must serve the statement of claim within 14 days of the date for filing the AS. Once served, a defendant has 14 days

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from the date for filing the AS to file a defence and any counterclaim. The plaintiff then has 14 days from the date for filing the defence and any counterclaim to file any reply and any defence to counterclaim. The defendant may then file a reply to the defence to counterclaim within 14 days of the date for filing the reply and any defence to counterclaim.

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

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

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

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

Interlocutory applications
Interlocutory applications, to ask the court to determine matters such as procedure or points of law, or applications to strike out a claim or to 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 hearings 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, and there is a strict responsibility on the applicant to disclose all relevant matters, including those that are contrary to their case. 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:

- to prevent action being taken or to compel someone to do something;
b to prevent assets being dissipated by freezing them (a *Mareva* injunction);\(^{17}\)

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);\(^{18}\)

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);\(^{19}\)

e to enter and search premises to find documents or movable property and prevent their destruction (an *Anton Piller* injunction);\(^{20}\)

f to appoint a receiver or to prevent disposal of company property before the appointment of a receiver (under GCR Order 30);

g to appoint a receiver or grant other interim relief in aid of proceedings outside the Cayman Islands (under Section 11A of the Grand Court Law 2015 Revision) (including a stand-alone *Mareva* injunction).

### Class actions

There is no formal process for class actions in the Cayman Islands. 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 who are represented but not named cannot have a judgment enforced against them without leave of the court.

### Representation in proceedings

Natural persons can represent themselves in proceedings or can instruct a Cayman Islands qualified attorney to represent them. Those whose claims are 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.

### Service out of the jurisdiction

A party wishing to serve an originating process on a person (natural or unnatural) located outside the Cayman Islands needs to apply for leave of the court to do so, unless the action is one where a law provides that leave is not required. 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 of service need not be in person, so long as it is in accordance

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\(^{18}\) *Norwich Pharmacal Co. v. Customs and Excise Commissioners* [1974] AC 133.

\(^{19}\) *Bankers Trust Co. v. Shapira* [1980] 1 WLR 1274.

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 where the defendant did not appear) which is for money, which is not contrary to Cayman Islands public policy (e.g., 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

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23 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), Article III.
24 In The Matter Of China Agrotech Holdings Limited 19 September 2017.
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.25

**Hague Conventions**

The Hague Conventions apply to both service of documents abroad26 and taking evidence abroad.27

viii **Access to court files**

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

ix **Litigation funding**

The common law torts of maintenance (where a third party assists or encourages a claim without any benefit to the third party) and champerty (where the assistance or encouragement is given in return for an interest in the proceeds of litigation) still apply in the Cayman Islands. While the Grand Court has previously approved third-party funding agreements subject to certain conditions,28 the scope for such agreements has been limited to liquidation proceedings involving impecunious estates.

However, recent decisions of the Grand Court29 have approved funding agreements in commercial disputes. This represents a notable evolution in the judicial interpretation of the law as it applies to the Cayman Islands, as well as a perceived shift in public policy.

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25 Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978.
26 Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.
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 2015,30 which included a draft bill.31

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

Conflicts of interest

Under the Code of Conduct for Cayman Islands Attorneys at Law,32 without the prior informed consent of a client, an attorney must not act for a client where there is or it is reasonably foreseeable that there might be in the future, a conflict of interest with the attorney or an existing or prospective client, nor may the attorney act for more than one party in the same matter or transaction.

Chinese walls

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

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

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

Many laws and regulations that cover this sector apply in the Cayman Islands.33 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.

31 The Private Funding of Legal Services Bill, 2015 (Draft).
32 Code of Conduct for Cayman Islands Attorneys at Law.
33 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.
The most significant of the Cayman Islands laws is the Proceeds of Crime Law (2019 Revision) (PoCLaw), under which the Anti-Money Laundering Regulations 2018 (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.

In addition, an attorney who has any information that may be of assistance in preventing an act of terrorism or which would secure an arrest or prosecution under the Terrorism Law (2018 Revision) (including the belief that a person has committed an act of terrorism) must report that to the relevant authority. The exception is where the information came in privileged circumstances that did not involve the intention of furthering a criminal purpose.

### iii Data protection

The Data Protection Law, 2017 (DPL) came into effect on 30 September 2019. The DPL imposes restrictions (based on eight principles) on the processing of any personal data relating to an identifiable living person, by or on behalf of, a Cayman Islands-established individual responsible for determining the manner in which the data will be processed. Under the DPL, sensitive personal data such as racial or ethnic origin, religion, health, sex life, offences or court sentences is afforded special protection. As well as the DPL, how attorneys treat or process personal data is governed by the Code of Conduct for Cayman Islands Attorneys at Law. This requires attorneys to protect the confidentiality of the affairs of present or former clients, unless otherwise allowed or required by law or applicable rules of professional conduct, as well as common law duties on the treatment of information that must by its nature be confidential (such as health, legal or financial information), which is neither common knowledge nor in the public domain, and which is disclosed in circumstances where it gives rise to a duty of confidence.

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

### 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

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34 Code of Conduct for Cayman Islands Attorneys at Law Section 4.
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, without prejudice privilege can prevent such communications between the parties for that purpose from being put before the court.

ii Production of documents

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

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

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

VI ALTERNATIVES TO LITIGATION

i Arbitration

The Cayman Islands Arbitration Law (2012) (the Arbitration Law) provides procedural rules regulating the Grand Court’s practice and procedures in relation to arbitrations (which can be varied by agreement) and sets out the duties of arbitrators. It is based on the UNCITRAL Model Law and the English Arbitration Act 1996. Foreign arbitration awards
can be enforced in the Cayman Islands under the Foreign Arbitral Awards Enforcement Law (1997 Revision)\textsuperscript{35} 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).\textsuperscript{36}

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.

\textbf{ii Mediation}

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

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

\textbf{VII OUTLOOK AND CONCLUSIONS}

There are two important decisions awaited in 2020 from the ultimate appeal court of the Cayman Islands, the Judicial Committee of the Privy Council. In \textit{Pearson (in his capacity as Additional Liquidator of Herald Fund SPC (in Official Liquidation)) (Appellant) v. Primeo Fund (in Official Liquidation) (Respondent) (Cayman Islands)} Case ID: JCPC 2018/0064 the question of whether an in specie subscription, where all the calculations were made on fraudulent and fictitious figures provided by Bernie Madoff’s Fund, is subject to a liquidator’s power under Section 112(2) of the Companies Law (2013 Revision) ‘to settle, and, if necessary, rectify the company’s register of members, thereby adjusting the rights of members amongst themselves’ given that it would be pre-existing rights to which the power would be applied. In \textit{Shanda Games Ltd (Appellant) v. Maso Capital Investments Ltd and others (Respondents) (Cayman Islands)} JCPC 2018/0062 JCPC 2018/0058 the issues are whether the requirement to award a fair rate of interest following a Section 268 of the Companies Act (2016 Revision) determination (fair value of shares) requires the Court to award interest in accordance with the same principles on which the Court awards interest on an award of damages, and whether or not the Court of Appeal was correct to hold that a minority discount was to be applied in the determination of the fair value of the shares.\textsuperscript{37}

On a more macroeconomic level the US litigation market is poised for its third consecutive year of growth as although the current US economic expansion is in its 11th

\textsuperscript{35} Foreign Arbitral Awards Enforcement Law (1997 Revision) G21/1997 Section 3.
\textsuperscript{36} Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), Article V.
\textsuperscript{37} JCPC decision on 27 January 2020 held minority discount should be applied and interest rate should reflect reality.
year, many predict slow growth in 2020 and litigation is a practice area that increases as others start to fall off during downturns. This will have an inevitable trickle-down effect in the Cayman Islands. This growth could be fuelled by the increasingly litigation funding friendly environment in the Cayman Islands, which is tapping into the 237 per cent increase in litigation finance worldwide since 2012. Litigation finance is one answer to clients’ pressuring firms to keep legal fees low and provide alternative fee arrangements when an economy slows. Another solution to fees pressure is use of boutique firms and smaller litigation teams that can innovate, take advantage of new technology and flexible staffing and achieve efficiencies by operating on a leaner approach.

The Cayman Islands is home to many Latin American based structures, which, as a region is experiencing vulnerability to slowing global trade and a weakening of capital flows. This, together with a worldwide financial tightening, ongoing trade tensions and Brexit uncertainties, means that economic difficulties may well lie ahead, which would increase the need for restructuring and insolvency advice.
Chapter 5

CHILE

Francisco Aninat and Carlos Hafemann

I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

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

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

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

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

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

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1 Francisco Aninat is a partner and Carlos Hafemann is an associate at Bofill Escobar Silva Abogados. The information in this chapter was accurate as at February 2019.
II THE YEAR IN REVIEW

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

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

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

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

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

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

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

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

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

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

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

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

### III COURT PROCEDURE

#### i Overview of court procedure

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

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

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

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

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

ii Procedures and time frames

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

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

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

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

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

iii Class actions

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

iv Representation in proceedings

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

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

vi Enforcement of foreign judgments

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

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

- not being contrary to Chilean law (with the exception of the procedural laws under which the judgment would have been issued in Chile);
- not being in conflict with the Chilean courts;
- the foreign judgment should have been duly served to the losing party. Even in that case, the losing party may challenge the *exequatur* proving that, among other reasons, it was prevented from presenting a defence; and
- the foreign judgment should be final and irrevocable in accordance with the laws of the country in which it was issued.

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

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

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

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

vii Assistance to foreign courts

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

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

a the performance of procedural acts of mere procedure, such as notifications, summonses or placements abroad; and

b the receipt and obtaining of evidence abroad.

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

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

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

viii Access to court files

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

ix Litigation funding

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

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

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

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

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

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

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

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

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

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

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

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

The regulations issued by the Financial Analysis Unit, the governmental agency that seeks to prevent the use of the financial system and other economic sectors for money laundering and financing of terrorism, requires from certain persons and entities (e.g., banks and other financial institutions) certain due diligence, ‘know-your-client’ and the report of suspicious activities that may result in money laundering.
Lawyers and law firms are not among the persons and entities who are subject to these reporting duties. In any case, lawyers who take part in their clients’ illegal activities may also be held liable for such actions.

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

### Data protection

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

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

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

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

## DOCUMENTS AND THE PROTECTION OF PRIVILEGE

### Privilege

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

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

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

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

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

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

### Production of documents

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

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

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

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

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

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

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

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

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

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

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

ii Arbitration

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Chapter 6

CYPRUS

Soteris Pittas and Kyriakos Pittas¹

I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

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

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

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

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

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² Section 29(i)(c) of Law 14/1960.
courts 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 Increasing the efficiency of the justice system

The great increase in the workload of the Cypriot courts in recent years, owing to, inter alia, the backlog of civil jurisdiction cases, coupled with limited use of information and communications technology in the Cypriot courts, has drastically influenced the efficiency of the Cypriot justice system.

Acknowledging the importance of having an efficient and effective justice system, the government has made the reform of the justice system a high priority and the following measures have been either implemented, or will be implemented, in 2020:

Filtering the right of appeal

Legislation was enacted providing for the filtering of the right to file an appeal in civil cases, as far as interlocutory decisions are concerned, during the proceedings; however, the parties are free to raise, at the stage of the appeal against the final decision, issues relating to any interim decision.

Administrative Court of International Protection

All cases involving international protection have been transferred from the Administrative Court to the recently established Administrative Court of International Protection, allowing the Administrative Court more time to deal with all other administrative cases. Decisions of the Administrative Court of International Protection are subject to appeals for exclusively legal grounds.

Commercial Court

It is expected that by 2020 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 deal with cases involving amounts exceeding €2 million. The seat shall be in Limassol and Nicosia, with five judges being appointed holding the title of District Court President. The commercial court will have a separate structure and will operate independently from the district courts.

The idea is to have a fast-track procedure that is completed within 18 months at first instance. The establishment of the commercial court is to increase the speed and efficiency of the system in Cyprus and is an attempt to attract further investment and companies to Cyprus as well as promoting Cyprus as an attractive and efficient dispute resolution centre. In October 2018, the bill aimed at the establishment of a commercial court was approved by the Cabinet and contains aspects relating to the court's defining structures, its jurisdiction, the qualifications required from judges who shall be appointed to conduct hearings, as well as the procedural guidelines and regulations of the court. This bill is expected to be presented before Parliament before the end of 2019.
E-Justice

E-Justice is one of the main and most important pending reforms of the judicial system. A tender was launched in March 2017 to purchase an electronic court administration system to digitise all the operations of the courts. The system is expected to be fully operational in mid 2020.

New code of conduct of Cypriot judges

The Cypriot Supreme Court has adopted a new code of conduct of Cypriot judges in its attempt to restrict issues of existence of conflicts of judges, in adjudicating cases raised before them. Pursuant to this new code of conduct, a judge is, inter alia, obliged to declare immediately the existence of any relationship he or she has with any of the parties to the dispute, including their lawyers, and to exempt him or herself from dealing with such case or dispute.

Training of judges and reform

A former judge of the Supreme Court has been appointed as the Director of Reform and Training. It is expected that a training school for judges within the Supreme Court will be established in 2020 and until its establishment, Cypriot judges are requested to attend seminars conducted by the Training Department of the Supreme Court.

Establishment of three tiers of courts

At this stage, Cyprus has two tiers of courts: the Supreme Court and the subordinate courts. A bill has been prepared, which is expected to be adopted in 2020, for the creation of three tiers of courts: the Supreme Court, appellate courts and first instance courts.

The Supreme Court will consist of six judges and hear appeals on legal grounds filed against appellate decisions and it will act also as the Constitutional Court.

The appellate courts will consist of 15 judges who will create five appellate courts.

Reform of the Civil Procedure Rules

The Cyprus Civil Procedure Rules (CPR) have been reviewed by an expert group headed by former member of the English Supreme Court, Lord Dyson, and it is expected that in 2020 the existing CPR will be replaced and drastically changed by new rules of procedure, which will be similar to the existing English Civil Procedure Rules.

New Law for Certified Translation

Up to the end of June 2019, official translations in Cyprus were solely carried out by the Press and Information Office via its translators’ associates, but things have changed since then.

The House of Representatives proceeded with the adoption of new legislation relating to certified translators, namely Law 45(I)/2019. The Law introduces the concept of a sworn translator, namely a private translator who performs certified translations as a sworn translator, particularly valid and accurate translations from a foreign language to Greek or Turkish, or vice versa. These translations are considered valid and accepted by the courts in Cyprus and the authorities of the Republic as they bear the seal of the Republic and are duly stamped. However, for a person to be considered as a sworn translator under the Law, he or she will need to be registered in the Registry of Sworn Translators and satisfy the conditions set out under Article 6 of the Law, which provide a clear description of the criteria that each
translator needs to fulfil and also hold. Responsibility for the maintenance of the Registry shall lie with the Council of Sworn Translators. Moreover, the procedure that needs to be followed to be successfully registered in the Registry of Sworn Translators is clearly set out by the law and will need to be followed.

Overall the introduction of the above law and the introduction of the Registry of Sworn Translators can be considered as a positive step in removing the need to obtain official translations solely by the Press and Information Office as was the case up until now.

ii Recent case law

The Supreme Court of Cyprus in Re Finvision Holdings granted a prerogative order of certiorari quashing an anti-suit injunction blocking a Cypriot company from filing any proceedings in any part of the world, except before the London Court of International Arbitration (LCIA).

The Supreme Court decided to quash and set aside the anti-suit injunction on the following grounds:

\( a \) The Cypriot courts do not have jurisdiction to grant an anti-suit injunction, pursuant to Section 9 of the International Commercial Arbitration Law (Law 101/87), which has adopted verbatim the UNCITRAL Model Law, in aid of LCIA proceedings filed by the respondent to the certiorari proceedings, because the term ‘protective measures’ contained in Section 9 of Law 101/87 does not include or cover an anti-suit injunction.

\( b \) The Cypriot courts did not have jurisdiction to grant any anti-suit injunction, because the competent courts were the English courts, in the jurisdiction of whom the arbitral proceedings filed by the respondents to the certiorari proceedings were conducted.

In Iguasu Enterprises Ltd & Another v. Voice International Ltd & Another, the District Court of Nicosia held that an arbitral award issued in an arbitration conducted in Cyprus, which was international and commercial, within the meaning of Article 2 of Law 101/87, was not a domestic award, but an international award, covered by the provisions of the New York Convention, and consequently capable of being recognised and enforced in Cyprus, as per the provisions of the New York Convention.

In a recent Supreme Court case, Intersputnik International Organization of Space Communications v. Arlena Investments Ltd, the Court examined whether the first instance judge, as was the allegation of the appellants, erroneously concluded that the requirements under Article IV(1)(a) were not fulfilled. In particular, the first instance court stated that a duly authenticated original award had not been submitted as the authenticity of the signatures and the seal of the arbitral tribunal had not been certified. In fact, what the appellants submitted was, as they argued, a duly authenticated original of the arbitral award since it bore the tribunal’s seal and the signature of the arbitrators.

The Supreme Court, on the other hand, reversed the decision of the first instance court relying, inter alia, on the case of Anthony Lombard-Knight v. Rainstorm Pictures Inc (2014) EWCA Civ 356, in which the court held that an arbitral award is authentic when the document includes the original signatures of the arbitrators. Therefore, the conclusion of the Supreme Court was that since the document had the original signatures of the arbitrators and the official seal, no further certification was needed. Hence there was no room for challenging the validity of the award’s authenticity.
This case serves as a relaxation from the stringent examination to be put on the requirements imposed by Article IV, which as stated in the well-known case of *Bristol Business Corporation v. Besuno Ltd* (2011) are imperative and substantial and need to be strictly satisfied.

In *OJSC Bank of Moscow v. Andrey Chernyakov and Others*, the District Court of Limassol dismissed an application for granting interim injunctions on the basis of Article 35 of EU Regulation 1215/12 in support of pending English proceedings filed by Bank of Moscow for the recognition and enforcement in UK of a Russian judgment issued against Mr Chernyakov, because the English proceedings for enforcement of a Russian judgment were not covered by the provisions of EU Regulation 1215/12 and the Cyprus court did not have jurisdiction to grant such interim relief.

The Cypriot district court decided that proceedings for enforcement of a foreign judgments filed before courts of Member States are not covered by the provisions of EU Regulation 1215/12.

### III COURT PROCEDURE

#### i Overview of court procedure

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

#### ii Procedures and time frames

Before commencing proceedings one will need to examine the limitation or prescription periods for the filing of civil claims, a matter governed by the Limitation Law 66(I)/2012.³ The said Law states the limitation period for civil wrongs,⁴ contracts,⁵ secured loans⁶ and various other types of actions.

Once the above issue has been examined, then civil proceedings may either be commenced with the filing of an originating process that states the nature and extent of the claim made or the remedy or relief sought by the plaintiff. The forms of an originating process are the writ of summons, the application for originating summons and the petition. Most civil actions in Cyprus commence by a writ of summons having the form of either a writ with a general endorsement or a writ with a special endorsement. The difference is that the specially endorsed writ of summons has the statement of claim of the plaintiff providing a factual background whereas the generally endorsed writ has only a concise statement of the nature of the claim made and the relief sought. When a generally endorsed writ is filed, a statement of claim should be filed separately. With regard to originating summons, the body of the summons must include a statement of the questions on which the plaintiff seeks the court’s determination of the relief or remedy claimed. Moreover, petitions are those related to the bankruptcy of individuals and winding up of companies.

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³ Limitation Law 66(I)/2012.
⁴ Section 6 of the Limitation Law 66(I)/2012.
⁵ Section 7 of the Limitation Law 66(I)/2012.
⁶ Section 5 of the Limitation Law 66(I)/2012.
Following the determination of commencement for any action to be filed, legal proceedings in a district court are commenced when a writ of summons or an originating summons is filed and sealed. Actions filed by resident Cypriot plaintiffs must be accompanied by a retainer that demonstrates the appointment of the advocate, whereas this is not a requirement with regard to foreign resident plaintiffs. Following the above, the next step for the plaintiff is to serve the legal proceedings to the relevant parties to the action. Service nowadays under Order 5B of the Civil Procedure Rules is effected through private bailiffs approved by the Supreme Court of Cyprus for carrying out this type of service upon payment of a fee. With regard to service upon foreign defendants to the action, the plaintiff is under an obligation to file an *ex parte* application in order to obtain the authorisation of the Court to serve the relevant party through methods that shall be included and supported by the plaintiff in the said application. The service of the writ of summons, or the notice thereof to the foreign defendants, is made in accordance with any multilateral or bilateral conventions concluded between the Republic of Cyprus and the country where such service is to be made. Customarily, this is effected through the Ministry of Justice of the Republic of Cyprus. In the absence of any such bilateral arrangement service may be effected by registered post, courier or any other method approved by court.

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

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

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

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7 Order 5B of the Civil Procedure Rules, Cap 6.
8 Order 5, Rules 9 and 10 of the Civil Procedure Rules, Cap 6.
Pleadings consist of the statement of claim, whether it be on special writ of summons or filed subsequently, the defence and counterclaim if any and the reply and defence to the counterclaim. In the statement of claim the plaintiff is required to set out the facts of the case on which he or she intends to rely upon in order to prove his or her cause of action. It is vital to note that evidence in such circumstances is never pleaded. The statement of defence must contain a reply to the various allegations contained in the statement of claim, setting the material facts on which the defendant relies for his or her defence. A counterclaim may also be filed together with the defendant’s statement of defence. The next step is for the plaintiff to file its reply to the statement of defence answering any issues as a matter of response to the defence. Provided that the defendant’s statement of defence also included a counterclaim then the plaintiff may also file the reply and defence to the counterclaim. The Civil Procedure Rules also provide for time frames upon which the parties need to abide in order to file their respective pleadings; however, in practice the parties do not follow the prescribed time limits. Usually each party may file an application before the court to obtain an order for extension of time to file the statement of defence, a practice commonly used in Cyprus courts and granted by the courts.

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

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

**The issuance of interim orders before the Cyprus courts**

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

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

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

Cypriot courts have jurisdiction to issue interim injunctions in the context of civil proceedings pending in Cyprus or in aid and in support of international commercial arbitrations to be commenced or that are pending, either in Cyprus or abroad, as per Section 9 of Law 101/87 or in aid and in support of cases filed before courts of EU Member States (except Denmark), as per EU Regulation 1215/2012 or the Lugano Convention (i.e., Switzerland, Iceland, Norway and Denmark).

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

### iii Class actions

Class action lawsuits can be brought by a number of people, particularly where they share similar harm or the same issue in an action both in law and in fact, against another entity or person, as this is a form of collective redress. Cases involving class action lawsuits can include consumer fraud, or the haircut Cyprus cases by bank depositors or even cases where shareholders act on behalf of all other shareholders in an attempt to redress wrongs that have been committed against the company.

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

### iv Representation in proceedings

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

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

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

vi Enforcement of EU foreign judgments

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

For EU judgments that fall within the sphere of EU Regulation 44/2001 or the Brussels Recast Regulation 1215/2012, the judgment creditor must provide to the Cyprus courts, a certificate of authenticity for the judgment, issued by the court of origin, and a declaration of enforceability from the court of origin if filed pursuant to EU Regulation 44/2001 or the standard certificate issued by the court of origin pursuant to the applicable regulation pursuant to Article 53 of the Brussels Recast Regulation 1215/2012. As per the changes effected by the Brussels Recast Regulation 1215/2012 the judgment creditor will solely need to present a copy of the judgment and a standard form certificate and can then begin the enforcement process. It is worth noting that the procedure for the enforcement of judgments given in another Member State shall be governed by the law of the Member State addressed. As per Article 43 of the Brussels Recast Regulation 1215/2012, where enforcement is sought of a judgment given in another Member State, the certificate issued pursuant to Article 53
shall be served on the person against whom the enforcement is sought prior to the first enforcement measure.\textsuperscript{10} The certificate shall be accompanied by the judgment, if not already served on that person.

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

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

\begin{itemize}
\item[a] a complete and certified copy of the foreign judgment;
\item[b] 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;
\item[c] 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
\item[d] 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.
\end{itemize}

Cyprus is bound by bilateral treaties relating to the recognition and enforcement of foreign judgments with the Czech Republic,\textsuperscript{11} Serbia,\textsuperscript{12} Slovenia,\textsuperscript{13} Slovakia, Ukraine,\textsuperscript{14} Russia,\textsuperscript{15} Bulgaria,\textsuperscript{16} China, Greece,\textsuperscript{17} Hungary, Poland,\textsuperscript{18} 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

\textsuperscript{10} Article 43 of the Brussels Recast Regulation 1215/2012.
\textsuperscript{11} Ratifying Law 68/82.
\textsuperscript{12} Ratifying Law 179/86.
\textsuperscript{13} Ratifying Law 179/86.
\textsuperscript{14} Ratifying Laws 172/86 and 8/2005.
\textsuperscript{15} Ratifying Law 172/86.
\textsuperscript{16} Ratifying Law 18/84.
\textsuperscript{17} Ratifying Law 55/84.
\textsuperscript{18} Ratifying Law 10/97.

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

vii Assistance to foreign courts

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

viii Access to court files

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

Besides the parties to the action, any other interested party can obtain access to court files only provided that they file an ex parte application before the court explaining the reasons why they require access to the court file and what their interests are. In most cases permission is granted where such parties are allowed to intervene in the proceedings and added as parties or for collection of evidence to be used in pending or new cases to be filed.

ix Litigation funding

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

i Conflicts of interest and Chinese walls

Qualified practising lawyers and trainees are subject to the Code of Conduct Regulations, which set out their legal duties with respect to their clients and the profession in general. As stated expressly under Article 21 of the Code of Conduct Regulations, advocates must not ‘act as counsellors or representatives or advocates of more than one client in the same case, if there is a conflict of interests among the said clients or significant risk of such a conflict arising’. 19 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. 20 The practical approach is for law firms who are approached by new clients to undergo a conflict of interest check before accepting and moving forward to any engagement agreement between the said client. If this is not complied with, then disciplinary actions can be initiated against the particular law firm. The Cyprus Securities and Exchange Commission regulates companies and includes Cysec Rules and Regulations establishing policies and procedures to manage conflict of interest that may arise.

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

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

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 from 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,

19 Article 21(1) of the Code of Conduct Regulations.
20 Article 21(2) of the Code of Conduct Regulations.
the Central Bank of Cyprus is the main body that cooperates with MOKAS on any such issues. Other bodies that work with MOKAS include the Cyprus Bar Association, which is the supervisory authority of lawyers, and the Cyprus Association of Certified Public Accounts, which supervises all auditors and accountants licensed to practise in Cyprus. They cooperate with MOKAS in order to monitor the compliance of their members. The relevant law on the above matters in Cyprus is Law No. 58(I)/2010, which has replaced the Prevention and Suppression of Money Laundering Activities Law 2007 No. 188(I) 2007.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

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

ii Production of documents

Order 28 of the Civil Procedure Rules provides that a party to the proceedings may apply to the court for an order directing the other party to make discovery on oath of the documents that are or have been in his possession or power.21 If a party ordered to make discovery of documents fails so to do, he or she shall not afterwards be at liberty to put in evidence on his or her behalf in the action any document he or she failed to discover or to allow to be inspected, unless the court is satisfied that he or she had sufficient excuse for so failing, in which case the court may allow such document to be put in evidence on such terms as it may think fit.22 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.

21 Order 28(1) of the Civil Procedure Rules.
22 Order 28(3) of the Civil Procedure Rules.
Moreover, negotiation and mediation are methods used either before legal proceedings are initiated or during the period when proceedings are commenced for an amicable out of court settlement of a dispute.

ii Arbitration

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

In Cyprus, arbitration proceedings are governed by two separate legal regimes. Domestic arbitration is governed by the 1944 Arbitration Law, which provides for the procedure to be followed. International arbitration is governed by Cypriot International Arbitration in Commercial Matters Law of 1987 (Law 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 with the parties who via their written agreement, choose and submit their disputes, and which 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, the Cyprus Chamber of Commerce and Industry and the Cyprus Arbitration and Mediation Centre.

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

iii Mediation

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

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

VII OUTLOOK AND CONCLUSIONS

i EU General Data Protection Regulation

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

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

ii Cyprus arbitration forum

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

Chapter 7

ENGLAND AND WALES

Damian Taylor and Smriti Sriram

I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

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

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

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

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

2 On 23 June 2016, a referendum was held on the UK’s membership of the EU in which a majority of the UK electorate voted to leave. For consideration of the dispute resolution implications, please see Chapter 1.
England and Wales

jurisdiction to hear any civil case in England and Wales at first instance, and has an appellate jurisdiction in respect of certain matters in the courts below. The High Court is divided into three divisions, two of which are relevant for commercial disputes, namely the Queen’s Bench Division and the Chancery Division. Within these divisions there are a number of specialist courts or lists, including the Commercial Court, Financial List, Circuit Commercial Court (previously the Mercantile Court), Admiralty Court, Technology and Construction Court (TCC), Administrative Court, Planning Court, Companies Court, Bankruptcy Court, Intellectual Property Enterprise Court and 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. There are also Business and Property Courts in Birmingham, Manchester, Leeds, Bristol and Cardiff, with expansions to Newcastle and Liverpool made in 2018.

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), although a court or tribunal in England and Wales may refer questions regarding the interpretation of the Treaty on European Union and the Treaty on the Functioning of the European Union or the validity or interpretation of acts of the EU institutions to the CJEU for a preliminary ruling. Having obtained such a ruling, the case will (often after many years’ delay) return to the referring court or tribunal, which must apply the CJEU’s ruling, together with any non-conflicting national law, to the facts before it. The court or tribunal

3 The third division is the Family Division, which deals with matrimonial and other family-related matters.
4 These are: business; competition; financial; insolvency and companies; intellectual property; trusts and probate; and revenue.
5 Formerly the Court of Justice of the European Communities (the collective name for the Court of Justice (commonly known as the ECJ), the Court of First Instance (CFI) and the Civil Service Tribunal). Following the Treaty of Lisbon, the collective court is known as the Court of Justice of the European Union (CJEU). The ECJ remains the Court of Justice and the CFI is now known as the General Court.
is not required to make a reference where previous CJEU decisions have already dealt with the point or where the correct application of EU law is so obvious as to leave no scope for reasonable doubt (referred to as acte clair).

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

II THE YEAR IN REVIEW

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

i  R (on the application of Miller) v. The Prime Minister, Cherry and others v. Advocate General of Scotland [2019] UKSC 41

In a landmark constitutional law decision, an 11-member Supreme Court unanimously ruled that the Prime Minister’s advice to Her Majesty the Queen to prorogue Parliament was unlawful, and so the Order in Council setting out the prorogation was also unlawful and of no effect. On the question of justiciability, the Supreme Court held that the courts did have the jurisdiction to decide on the extent and limits of the government’s prerogative power. This power is limited by the constitutional principles of parliamentary sovereignty and parliamentary accountability, and the court would be performing its proper function under the English constitution by ensuring that the government did not act unlawfully. On the legal test for lawfulness of the advice, the Supreme Court looked to the effect of rather than the motive for prorogation: prorogation would be unlawful if it had the effect of frustrating or preventing, without reasonable justification, the power of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive. On the facts, proroguing Parliament for five weeks rather than the usual four to five days, in the context of what was, at the time, the imminent deadline for the UK’s withdrawal from the EU – a fundamental constitutional change – was unlawful.

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6 Parliamentary sittings are normally divided into sessions, usually lasting for about a year: ‘prorogation’ of a parliamentary sitting brings the current session to an end, with the result that Parliament cannot meet, debate, or pass legislation until the next session begins.

7 At the time, the position at EU and UK law was that the United Kingdom would leave the EU on 31 October 2019 whether or not the parties had concluded an agreement setting out the terms of the UK’s withdrawal. The European Union (Withdrawal) (No. 2) Act 2019, which required the Prime Minister to seek an extension of this deadline from the European Council, passed all stages in both Houses of Parliament and received Royal Assent on 9 September 2019.
ii Vedanta Resources PLC and another v. Lungowe and others [2019] UKSC 20

This case concerned a claim brought by 1,826 Zambian citizens against Konkola Copper Mines plc (KCM) (incorporated in Zambia) and its parent company Vedanta Resources Plc (Vedanta) (incorporated in England) in respect of pollution caused by a copper mine owned and operated by KCM. As an English-domiciled company, Vedanta was subject to the jurisdiction of the English courts. KCM, as a foreign company, could only be brought before the English court if the claimants could persuade the court that it was a necessary or proper party to the claim against Vedanta. In a jurisdictional challenge by both defendants, the Supreme Court decided that England was the proper place for the proceedings, and considered the scope of a parent company’s liability for the activities of its foreign subsidiaries.

The court observed that:

a Contrary to the decisions of the High Court and Court of Appeal, the risk of irreconcilable judgments (if the case against KCM was heard in Zambia but the case against Vedanta was heard in England) was not a decisive factor in choosing to accept jurisdiction in England. Zambia would ordinarily be the proper place for the proceedings, given the location of the claimants, the alleged damage, the location of the evidence, and the suitability of the Zambian courts to interpret Zambian law. However, the courts could still accept jurisdiction if satisfied that there was a real risk that substantial justice was not available in a foreign jurisdiction; this was the case here, as the claimants would not be able to afford legal representation in Zambia, and Zambia lacked legal teams of sufficient size and experience to pursue such mass claims effectively.

b Parent company liability depended on the extent to which the parent company took control of or supervised or advised on the management of the operations of the subsidiary’s business. It was arguable from Vedanta's published materials that it had asserted its own assumption of responsibility for the maintenance of proper standards of environmental control over the activities of its subsidiaries.


The Supreme Court reviewed the law of causation in professional negligence cases, providing guidance on how proving harm in ‘loss of a chance’ cases should be approached. The court acknowledged the difficulty in assessing what financial or other benefit the client would have obtained in a counter-factual world (where the court had to decide on the claimant’s position if the defendants had fulfilled their duty of care) or forming a view about the likelihood of a future rather than past event. In both these counter-factual and future scenarios, the court occasionally departs from the ordinary burden on a claimant to prove facts on the balance of probabilities. However, the basic requirement remained that the claimant had to prove their loss was caused by a breach of duty. In drawing this line, the court affirmed Allied Maples Group Ltd v. Simmons & Simmons [1995] 1 WLR 1602: to the extent that the question of whether the client would have been better off depends on what he would have done on receipt of competent advice, this must be proved by the claimant on the balance of probabilities; to the extent that the supposed beneficial outcome depends on what others would have done, this would depend on a loss of chance evaluation.

iv Lloyd v. Google LLC [2019] EWCA Civ 1599

In a significant case in the development of the UK class action and data protection regimes, the Court of Appeal overturned the High Court’s decision ([2018] EWHC 2599 (QB)) to refuse permission to serve proceedings on Google in California. Representing more than
4 million iPhone users, the claimants had sought to bring a £3 billion representative action against Google under CPR 19.6 (see Section III.iv, below), for Google’s alleged misuse of private data under the Data Protection Act 1998 (DPA 1998). Among the court’s findings were the following:

a A person’s control over data or their browser-generated information was an asset with value, and damages were capable of being awarded for the loss of control of data under Section 13 of the DPA 1998. On this definition of ‘damage’, the represented claimants were all victims of the same alleged wrong, and had all sustained the same loss of control over their data.

b The Court of Appeal also confirmed the test in Emerald Supplies Ltd v. British Airways plc [2010] EWCA Civ 1284 that for a claim brought under CPR 19.6, it must be possible to say of any particular person whether or not they qualify for membership of the represented class of persons by virtue of having ‘the same interest’ as the representative. The class action did not have to rely on the facts of how each individual had been affected to pass the ‘same interest’ test. However, if it did not, any damages awarded would be restricted to the lowest common denominator. In this case, the represented claimants were not seeking to rely on any personal circumstances, but all had had their browser-generated information taken by Google without consent in the same circumstances.

The case opens the prospect of damages based on breach of the data protection legislation alone, without requiring proof of pecuniary loss or distress. It also appears to invite class actions by lowering the threshold required to establish a common interest between the individuals forming the represented class.

v Robertson v. Persons Unknown (Unreported; 8 August 2019) and Vorotyntseva v. Money-4 Ltd (t/a Nebeus.com) and others [2018] EWHC 2596 (Ch)

In two unrelated and novel cases about the legal status of cryptocurrencies, the High Court held that cryptocurrencies are a form of property that can constitute the subject of proprietary orders. In Robertson, the High Court granted an asset preservation order over 80 identifiable bitcoin in a UK wallet, relying on the 2019 decision of the Singapore International Commercial Court in B2C2 Ltd v. Quoine Pte Ltd [2019] SGHC(I) 03, which held that bitcoin are personal property that can be the subject of a trust. While the court in Robertson refused to grant a freezing order against ‘persons unknown’ on the basis that neither the ‘balance of convenience’ nor the ‘risk of dissipation’ requirements had been met, the later case of Vorotyntseva considered that in that case, there was a sufficient risk of dissipation and so granted a preliminary freezing order over bitcoin and ethereum cryptocurrencies.

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 website 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 based on the procedure in the Chancery Division and is only a general summary.

Before even commencing a claim, a claimant should check whether a specific pre-action protocol applies 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). Where there is no specific pre-action protocol, 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 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’). 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 injunction to be made via the social networking site Twitter against an anonymous defendant who had impersonated the claimant’s blog on that site. In 2019, in a legal first, the Intellectual Property Enterprise Court granted permission for a court order to be served through Instagram. 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 the claimant’s case, the relevant facts and basis for the claim in law as well as the remedy sought. Both the claim form and the particulars of claim must be verified by a statement of truth signed either by the claimant (or authorised signatory on behalf of the claimant where the claimant is an organisation) or the claimant’s legal representative.

Assuming the defendant intends to defend the claim and acknowledges service by the appropriate court form, his or her response is by way of the defence, to be served within 28 days of receipt of the particulars of claim (note that this timescale can vary between different courts and is in any event subject to extension by agreement between the parties or by court order). The defendant should respond in the defence to each of the allegations made in the particulars of claim by either admitting it, denying it (with explanation), or putting the claimant to proof. Following service of the defence, the claimant has a right of reply in relation to any new issues or allegations raised in the defence, as well as a right to defend any counterclaim raised in the defence. The claimant’s reply should be served within 21 days of

9 See the Pre-Action Conduct and Protocols Practice Direction at www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct.
10 Blaney v. Persons Unknown (Unreported; October 2009).
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. The court will then 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 3.12, 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 22 April 2014, except for proceedings where the amount of money claimed or value of the claim as stated on the claim form is £10 million or more. 11 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. 12

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.

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11 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)).

12 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 Seekings & Ors v. Moores & Ors [2019] EWHC 1476 (Comm), where the defendant sought to revise his cost budget upwards, the court held that there had been no ‘significant developments’ in the litigation to justify the increase because the additional work should have been anticipated.
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.\textsuperscript{13}

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. On 5 March 2019, HMCTS stated that it was extending the completion date of the reform programme to 2023. The programme involves 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 ‘Digitisation’, below). Other separate but complementary steps to reform and rationalise court processes are also considered directly below.

Reform of the appeals process

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

\begin{itemize}
\item[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
\item[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.
\end{itemize}

Shorter and flexible trial schemes

Two pilot schemes, one for shorter trials, the other for flexible trials, began in the Business and Property Courts in London in October 2015. After three years of piloting, both schemes became permanent on 1 October 2018. The objective of the schemes is to achieve more efficient trials in the context of commercial litigation. This was prompted, in part, by a recognition that comprehensive (and costly) disclosure is not always required for justice to be achieved. The Shorter Trials Scheme is open to cases that can be tried in no more than four

\textsuperscript{13} Lewis v. Eliades (No. 1) [2002] EWHC 335.
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 12 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.* 14 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 £50 million or over is in issue;
b. require particular judicial expertise in the financial markets; or
c. raise issues of general importance to the financial markets (see CPR Part 63A).

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

In *Property Alliance Group Ltd v. Royal Bank of Scotland plc*, 15 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 in the Business and Property Courts in London and seven other cities. Since 1 July 2019, the system has become mandatory for professional users in claims issued in the Queen’s Bench Division since 1 January 2019;
b. the Online Civil Money Claims Pilot Scheme running from September 2019 to November 2021, which tests an online process for unrepresented claimants to start money claims with a value of £10,000 or less;

15 [2016] EWHC 207 (Ch).
the County Court Online pilot, operating from September 2017 to November 2021, by which legally represented claimants can issue certain money claims online at the County Court Money Claims Centre;

d
the introduction of pilot programmes allowing the cross-examination of victims and witnesses of crime to be pre-recorded so as to avoid the pressure of a live hearing. It was announced in March 2017 that because of the success of a pilot scheme for the evidence of certain witnesses (mainly children), it was 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 would pilot pre-recorded cross-examination for complainants and witnesses in respect of certain offences; and

e
the Courts and Tribunals (Judiciary and Functions of Staff) Act, which permits judges to delegate a range of work to court staff (such as granting an extension of time or issuing a summons) received Royal Assent on 20 December 2018, with some provisions coming into force on 20 February 2019.

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;16 and

b
group litigation orders (GLOs),17 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.18 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.

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16 CPR 19.6.
17 CPR 19.10–19.15.
Orders made in a representative action are binding on all represented persons and may be enforced, with the court’s permission, against any other person. Judgments issued in claims subject to a GLO are binding on every party entered on the ‘group register’ (which will have been established pursuant to the GLO).

A single claim can be selected from any set of similar claims (including those governed by a GLO) to be advanced as a test case. There are no formal rules governing test cases and it is usually the parties who decide which cases will be selected to proceed to trial 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 Office of Fair Trading’s claim.19

Although there have been some high-profile cases involving representative actions and GLOs,20 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).

20 See, for example, the class actions brought by shareholders of RBS in respect of the 2008 RBS rights issue and the shareholders of Lloyds/HBOS in respect of alleged losses suffered as a consequence of Lloyds’ acquisition of HBOS in January 2009 and the subsequent recapitalisation of the merged entity. On the Rights Issue litigation, RBS announced on 5 December 2016 that it had settled with three of the five claimant groups, and in April 2017 further settlements occurred with additional shareholders, resulting in an effective settlement of 87 per cent of the claim (by value). The trial on liability began in May 2017; however further settlements were announced in June 2017, and the High Court vacated the trial. On the Lloyds/HBOS litigation, the High Court has recently handed down judgment in Sharp v. Blank [2019] EWHC 3078, dismissing the claim against the bank and five of its former directors on the basis that the bank’s failure to provide sufficient information to its shareholders had not been causative of any loss. See also, the Equitable Life litigation (in the House of Lords: Equitable Life Assurance Society v. Hyman [2002] 1 AC 408), where Equitable Life sponsored one defendant, Hyman, to represent around 90,000 of its policyholders to establish the correct interpretation of a life insurance policy it had issued. In January 2017, the High Court granted a GLO that will see a class action against the Post Office regarding claims that sub-postmasters were wrongly punished because of flaws in the Post Office’s Horizon computer system. The first two of three timetabled trials, the ‘common issues trial’ and the ‘Horizons issue trial’ have taken place; the Post Office have been refused permission to appeal the judgment to the first, and the judgment for the second is expected to be published this year. The third trial, the ‘further issues trial’, has yet to take place. In March 2018, the court granted a GLO to manage the legal claims brought against Volkswagen Group UK for financial compensation in respect of the NOx emissions scandal. Over 90,000 car owners joined the action. A trial of two preliminary issues of law will be heard in December 2019, and a further trial to determine the Volkswagen Group’s liability is likely to be heard in 2021. On 4 October 2019, the court granted a GLO allowing claimants to bring legal action against British Airways following its data breach in September 2018, resulting in the theft of customers’ personal data. This is the first UK group action brought under the General Data Protection Regulation seeking to claim compensation for non-material damage.
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 follow-on claim against Mastercard for damages arising from the EU Commission’s 2007 decision that Mastercard’s European Economic Area (EEA) multilateral interchange fees breached Article 101(1) of the Treaty on the Functioning of the European Union. The CPO application was made by Walter Merricks, former Chief Ombudsman of the UK Financial Ombudsman Service, on behalf of approximately 46 million customers on an opt-out basis). At first instance, the CAT refused to grant the CPO, in a judgment dated 21 July 2017. The CAT 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.

The Court of Appeal overturned this decision in a judgment dated 16 April 2019, stating that the CAT ruling had been too narrow. The Court of Appeal agreed that Pro-Sys Consultants Ltd v. Microsoft Corp. provided the correct guidance on the proper approach to claims for aggregated damages. However, the CAT had placed too heavy a burden on the proposed representative at the certification stage, who should not be required to demonstrate more than that the claim had a real prospect of success. The CAT had effectively conducted a mini-trial in requiring detailed specifications as to what data would be available for each

relevant retail sector during the infringement period. The CAT had also wrongly directed itself that an aggregate damages award had to be distributed on a compensatory basis; the rights of individual claimants could be vindicated by obtaining the aggregate award itself.

On 25 July 2019, permission was granted for Mastercard to appeal to the Supreme Court, which will make a definitive ruling on the legal test to be applied when certifying claims as eligible for inclusion in the collective proceedings regime.

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.23

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

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

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

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

Claim forms must be filed and served accompanied by a statement explaining the grounds supporting service out of the jurisdiction. CPR 6.32 makes specific provision for service without permission in Scotland or Northern Ireland. In all other cases, an application must be made to the High Court for permission to serve a claim form on a party situated outside the jurisdiction. The applicant must establish that it has a good arguable case and that the claim falls within one of the stipulated categories set out in CPR 6B PD.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 the forum conveniens) and that there is a serious issue to be tried.

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23 See, for example, Nelson v. Halifax plc [2008] EWCA Civ 1016.
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 (Regulation (EC) No. 805/2004) as though it was a judgment of the English court. Other judgments may be enforced using the procedure in the Judgments Regulation, the Lugano Convention or the Hague 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 in collecting evidence in civil or commercial matters. Courts of EU Member States (other than Denmark) may request that the English courts take evidence on their behalf or grant permission for the requesting court to take evidence in England directly under the Taking of Evidence Regulation (Council Regulation 1206/2001/EC). The grounds for refusing the application are limited (for instance, where the witness has a right not to give evidence under English law or the law of the requesting Member State), and the court must either comply with the request or refuse to do so within 90 days.

Courts of non-EU Member States (and courts of EU Member States, if necessary) can request assistance under the Evidence (Proceedings in Other Jurisdictions) Act 1975 in relation to civil or commercial matters. Generally, the English court will exercise its discretion to assist the foreign court; however, the court will not make orders for pretrial discovery, general disclosure or require a witness to do anything he or she would not be required to do in English civil proceedings.
ix Access to court files
As a general rule, members of the public may obtain copies of statements of case, judgments or orders without the permission of the court. Parties or any person mentioned in a statement of case may apply to the court in advance for a pre-emptive order restricting the release of statements of case to non-parties.

The right of access does not extend to documents attached to statements of case, witness statements, expert reports, skeleton arguments and correspondence between the court and the parties, although members of the public may obtain access with the court’s permission. In *Cape Intermediate Holdings Ltd v. Dring (Asbestos Victims Support Group)*, the Supreme Court confirmed that the default position was that the public should be allowed access not only to the parties’ written submissions and arguments, but also to documents that had been placed before court and referred to during the hearing. The court will carry out a fact-specific balancing exercise, considering on the one hand the purpose of the open justice principle and the potential value of the information in question in advancing that purpose, and on the other hand any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others.

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 provided they contain no element of impropriety that impairs the integrity of the litigation process. Relevant factors in this assessment include the nature of the funder’s involvement in the litigation (control of the litigation must not be ceded to the funder); the nature of the relationship between the funded party and the solicitor and the extent to which the funded party can make informed decisions about the litigation (this should be a genuine and independent relationship); the amount of profit the funder stands to make (it has been held that 25 per cent may not be excessive); whether there is a risk of inflating damages or distorting evidence; whether the funder is regulated; and whether there is a community of interest between the funder and the funded party.

Lord Justice Jackson recommended in his final report on civil litigation costs, published on 14 January 2010, that a voluntary code should be drawn up to which all litigation funders should subscribe. The Code of Conduct for Litigation Funders was launched on 23 November 2011. The Code contains provisions concerning effective capital adequacy requirements, restrictions upon a funder’s ability to withdraw support for ongoing litigation and restrictions on a funder’s ability to influence litigation and settlement negotiations.

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24 CPR 5.4C(1). In *British American Tobacco (UK) Ltd v. Secretary of State for Health* [2018] EWHC 3586, the court affirmed that it had inherent jurisdiction to grant access to documents on the court file, even though the documents might not technically fall within the scope of the CPR.


Third-party funders may also be potentially liable for the full amount of adverse costs, subject to the agreement between the funder and the litigator. The Court of Appeal considered the basis and extent of funders’ liability to a successful opponent in *Excalibur Ventures LLC v. Texas Keystone Inc and others.* Indemnity costs were awarded against the funded claimants on the basis that their ‘spurious’ claims had been pursued to trial despite having ‘no sound foundation in fact or law’. The Court of Appeal dealt with the issue of whether third-party funders could be made liable on the same basis as an unsuccessful party. Agreeing with the trial judge that the litigation was ‘egregious’ and a ‘war of attrition’, the Court of Appeal held that a funder should ‘follow the fortunes’ of the funded party. A funder seeks to derive financial benefit from the pursuit of a claim, just as much as the funded litigant. It cannot avoid any downside that may instead arise (subject to the ‘Arkin cap’, which limits a funder's adverse liability to the amount of its investment). In any event, in the matter of liability for indemnity costs it was not appropriate to seek to differentiate between a party to litigation and those who stand behind that party purely on that basis; that would be to misconstrue one of the tests for indemnity costs, which requires a court to consider the character of the action and its effect on the successful party (and not any other party).

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

**Conditional fee agreements**

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 emerged. 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.

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28 [2016] EWCA Civ 1144.

29 *Arkin v. Borchard Lines Ltd and Others* [2005] EWCA Civ 655. In *Davey v. Money* [2019] EWHC 997 (Ch), the High Court clarified that the *Arkin* cap is best understood as an approach which the Court of Appeal intended should be considered as a means of achieving a just result in all the circumstances, but it was not a rule to be applied automatically in all cases involving commercial funders.
Under CFAs entered into before 1 April 2013, a winning party could recover any success fee payable to its lawyer from its losing opponent (in addition to the ordinary fees for which the client was liable to its lawyer). Reforms introduced following Lord Justice Jackson’s report on civil litigation costs abolished the recoverability of success fees.

**Damages-based agreements**

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 cause of action has arisen and been formulated). Before the Jackson reforms of 2013, ATE insurance premiums were recoverable from a losing party. The end of recoverability does not appear to have significantly reduced the availability of ATE insurance and it is frequently offered in conjunction with third party funding of a party’s own legal costs. The liberalisation of the regime for third party funding and the corresponding development of a market for professional funders is making it easier for claimants to commence and maintain proceedings, particularly in relation to class actions where there can be very many claimants and such funding options represent an opportunity to spread the funding risk.

**Bill of costs**

In October 2015, as part of the Jackson reforms, a voluntary pilot scheme was introduced at the Senior Courts Costs Office with a view to establishing a new mandatory model form electronic bill of costs based on uniform task-based time-recording codes. This was aimed at reducing the time and expense of drawing up the bill of costs by aligning it with the time-recording technology used in practice. On 6 April 2018, the electronic bill of costs scheme became mandatory in the Senior Courts Costs Office and the County Court. CPR 47 and the associated PD were amended accordingly.

**LEGAL PRACTICE**

**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 for Solicitors, RELs and RFLs 2019 (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 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 (although this does 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:

a effective measures have been taken which result in there being no real risk of disclosure of the confidential information to B; or

b B, whose information the lawyer or his business or employer holds, has given informed consent, either in writing or evidenced in writing, to the lawyer acting, including to any measures taken to protect B’s information.

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.

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

The key money laundering offences are contained in the Proceeds of Crime Act 2002 (POCA) and the Terrorism Act 2000. These ensure that the balance of responsibility for detecting and preventing financial crime rests more than ever before on the firms participating in the UK financial markets, including law firms.

There are essentially three ‘principal’ money laundering offences. A person (including a firm, corporation or individual) commits a money laundering offence if he or she:

- conceals, disguises, converts or transfers the proceeds of criminal conduct or of terrorist property;
- 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
- 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:

- failure to disclose any of the offences from (a) to (c) above;
- 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
- 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.
iii Data protection

The processing of personal data is primarily regulated by the General Data Protection Regulation (Regulation (EU) 2016/679) (GDPR), the Data Protection Act 2018 (DPA) and certain secondary legislation made under the DPA. The GDPR was adopted on 27 April 2016 and entered into force on 25 May 2018 after a two-year transition period.

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

a. both data controllers and data processors have statutory obligations under the GDPR;

b. data controllers and data processors must comply with the six data protection principles under Article 5(1) GDPR and the additional accountability principle under Article 5(2) GDPR (the Principles); and

c. data subjects have certain rights, including to access personal data held about them, to rectify erroneous personal data, to object to the processing of their personal data and to the erasure of their personal data.

The Information Commissioner’s Office (ICO) is charged with policing and enforcing the regime, and has been given enhanced powers under the DPA to do so. The ICO’s enforcement powers include the ability to serve four types of notices:31

a. an information notice, requiring any person to provide information reasonably required for the purpose of investigating a range of compliance failures (and notably, there is no general exemption for legally privileged or confidential information);

b. an assessment notice, requiring a controller or processor to allow the ICO to enter the premises, be directed to documents, examine documents, be given explanations, observe the processing of information, and to interview staff;

c. an enforcement notice, requiring a controller or processor to take specified steps or refrain from taking specified steps, or both; and

d. a penalty notice, requiring a controller or processor to make a penalty payment of up to €20 million or 4 per cent of the undertaking’s total annual turnover in the preceding financial year, whichever is higher.

Data and personal data are widely defined under the GDPR such that any electronic information (and some information held in structured hard-copy filing systems) that relates to an identified or identifiable natural person (the data subject) is likely to be personal data. Processing is also widely defined under the GDPR to include anything that can be done with or in relation to data, including obtaining, recording, holding, organising, altering, retrieving, using, disclosing, transferring and destroying data. A data controller is a natural or legal person, public authority, agency or other body that determines the purposes and means of the processing of personal data. A data processor is a natural or legal person that processes personal data on behalf of the controller.

Access to, analysis of and disclosure of electronic information held by a client (or a third party) by legal professionals for the purposes of advising or acting on a dispute will almost always be subject to the GDPR. This is because such data will usually contain the names, 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)

31 Sections 142 to 159, DPA.
the data subject’s racial or ethnic origin, political opinions, religious beliefs, trade union membership, physical or mental health, sexual life or the commission or alleged commission of an offence by the data subject. Additional, more stringent conditions for processing apply in respect of sensitive personal data.

Law firms acting as data controllers or data processors (or both) and the clients who are providing them with personal data (for example, for the purpose of locating relevant documents or evidence in relation to a dispute) need to comply with the new data protection principles. In the context of dispute resolution practice, the relevant conditions for processing personal data for the purposes of the first principle include that the data subject consents to the processing, that the processing is necessary in order to comply with a legal obligation, or that the processing is in the legitimate interests of the controller or a third party. Even when one of those conditions is met, the client and law firm will also need to ensure that the processing is otherwise fair, transparent and that the other principles are complied with.

The new accountability principle contains two elements: first, the data controller is responsible for complying with the GDPR and second, the controller must be able to demonstrate this compliance. Data processors are also liable to the extent that they do not comply with their obligations under the GDPR. The subject access rights under the GDPR can be used as a means to seek relevant information for the purpose of a dispute involving a living individual. Law firms acting in a dispute with an individual and their clients may receive subject access requests by that individual for documents containing personal data relating to that individual. However, information that is subject to legal privilege is exempt from the subject access rights under the GDPR.

The DPA is slightly wider in scope than the GDPR, covering processing relating to areas outside the scope of EU law (such as national security and immigration). The DPA also implements the EU Data Protection Directive 2016/680 (Law Enforcement Directive) into UK law, setting out requirements for the processing of personal data for criminal law enforcement purposes.

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. 6)*[^32] that legal advice privilege protects confidential communications between a lawyer and client made for the 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. 5)*[^33], which warned that care must be taken when identifying the ‘client’ for the purposes of legal advice privilege. Particularly in large organisations, but potentially in any organisation, the client may be limited to a defined group within the instructing entity with the responsibility for

regular correspondence with the solicitors and not simply any employee or member of the instructing entity. In *Serious Fraud Office (SFO) v. Eurasian Natural Resources Corporation Ltd (ENRC)*, 34 although the Court of Appeal affirmed that *Three Rivers (No. 5)* remained good law, it did acknowledge that the case put large corporations in a less advantageous position than individuals and small businesses, and that English law was undesirably out of step with other common law jurisdictions in this regard. In *Re the RBS Rights Issue Litigation*, 35 the High Court dismissed an application by RBS to withhold from disclosure notes of interviews (which were created in the context of internal investigations). The High Court decided that legal professional privilege did not apply as: (1) applying *Three Rivers (No. 5)*, the notes of interviews were preparatory information gathered from current or former employees who did not form part of the lawyers’ client (notwithstanding that the information was collected in order to be shown to a lawyer to enable legal advice to be given to RBS); and (2) the interview notes could not be said to be privileged as ‘lawyers’ working papers’ as it was not sufficiently clear that the notes would give an indication as to the legal analysis or advice undertaken or given to RBS. The UK Supreme Court confirmed in *R (on the application of Prudential Plc) v. Special Commissioner of Income Tax* 36 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. 37 In those circumstances, any communication between a lawyer and client, or a lawyer or his or her client and a third party, is privileged if made for the dominant purpose of obtaining or giving legal advice or collecting evidence or information in relation to the litigation. Litigation privilege is wider in scope than legal advice privilege in that it may cover communications with third parties and therefore avoids the difficulties in identifying the client inherent in legal advice privilege. In *SFO v. ENRC*, 38 the Court of Appeal held that, in the context of internal investigations, litigation privilege arises where criminal proceedings are in reasonable contemplation. The Court of Appeal further held that, in both civil and criminal contexts, legal advice given for the purpose of avoiding or settling contemplated proceedings was protected by litigation privilege to the same extent as advice given for the purpose of resisting or defending such proceedings. In *WH Holding Ltd v. E20 Stadium LLP*, 39 the Court of Appeal clarified that litigation privilege did not extend to purely commercial discussions about settlement.

35 [2016] EWHC 3161 (Ch).
37 It is unlikely that the privilege applies to non-adversarial situations; *Re L (A Minor)* [1997] AC 16.
38 [2018] EWCA Civ [2006].
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.  

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

vi Without prejudice communications

Any communications made in a good faith effort to settle proceedings are covered by 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) or whether the agreement was procured by fraud, misrepresentation or undue influence.

The case of Brown v. Rice 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), 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). However, the European Court of First Instance and ECJ have ruled that such communications...

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43 [2007] EWHC 625 (Ch).
45 Three Rivers (No. 6) [2004] UKHL 48.
communications are not privileged in relation to Commission competition investigations. Communications with qualified lawyers in other jurisdictions in relation to foreign or English law may also be privileged before the English courts.

VI DOCUMENT PRODUCTION

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.

For two years from 1 January 2019, a new mandatory Disclosure Pilot Scheme (PD 51U) is in operation for the majority of new and existing proceedings in the Business and Property Courts in Birmingham, Bristol, Cardiff, Leeds, Liverpool, London, Manchester and Newcastle. The main objectives of the disclosure reforms, which almost entirely replace the old menu-based system, are to improve costs and streamline the process of disclosure. The new rules provide for a two-stage disclosure: initial disclosure and extended disclosure. As a general rule, each party is required to give initial disclosure by providing with their statements of case the key documents on which they have relied (expressly or otherwise), and key documents that are necessary to enable other parties to understand the claim or defence they have to meet. Extended disclosure is not an automatic right; a party seeking disclosure in addition, or as an alternative, to initial disclosure will need to request this from the court. Extended disclosure is ordered by reference to five disclosure models in relation to issues for disclosure drawn up by the parties. The five models range from a basic ‘no search needed’ disclosure through to a more onerous train of enquiry approach from Peruvian Guano.

The new rules also impose express duties on parties and their lawyers, such as confirming document preservation and disclosure of known adverse documents, with sanctions for non-compliance.

Cases in which the Disclosure Pilot Scheme do not apply are subject to the disclosure rules under CPR 31. 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. PD 31A.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

46 See joined Cases T-125/03 and T-253/03 Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v. Commission in the General Court and the subsequent decision of the ECJ in C-550/07 P.
48 (1882) 11 QBD 55.
49 In Kazakhstan Kagazy plc v. Zhunus [2019] EWHC 878 (Comm), the High Court partially granted an order for specific disclosure apparently under CPR 31.12, noting that the proceedings were subject to CPR 31 when standard disclosure was ordered even though ‘strictly’ CPR 31 no longer applied.
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),\(^{50}\) 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.

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. PD 31B sets out the procedure parties should follow in attempting to define and sensibly restrict the scope of electronic disclosure. Similar provisions are included in the Commercial Court Guide.

Searches for relevant electronic documents may include using specialist software to conduct keyword searches across computers, or even entire servers. It may also involve the restoration of backup tapes (or other electronic archives that are not readily accessible) for the purpose of conducting electronic searches for relevant material.

PD 31B was introduced with effect from 1 October 2010 and encourages the parties to complete an electronic documents questionnaire (EDQ) at an early stage of proceedings, setting out details of material held electronically that they intend to disclose. The EDQ must be supported by a statement of truth. The parties are then expected to discuss the disclosure of electronic documents, including the scope of the reasonable search for such documents and any tools and techniques that might reduce the burden and cost of the disclosure of electronic documents.

ii Predictive coding

Parties are making increasing use of information technology to assist in the review of large bodies of data. Such technology can take many forms. ‘Predictive coding’, for example, refers to the use of software to assess the likely relevance of documents to a dispute, so as to limit the time and expense incurred in conducting a reasonable search for disclosable documents under CPR 31.7. In Pyrrho Investments Limited v. MWB Property Limited and others,\(^{51}\) Master Matthews approved the use of predictive coding to expedite the search of more than 17 million documents. Ten reasons were given, chief of which was that predictive coding allows parties to search vast amounts of electronic documents at proportionate cost. Courts have since shown an increased inclination to order the use of predictive coding over and above other search methods, such as keyword searches. Pyrrho was approved in Brown v. BCA Trading Ltd,\(^{52}\) which endorsed the use of predictive coding in electronic disclosure. The court also stated that predictive coding would be significantly cheaper than a keyword search and there was no evidence to suggest that it would be less effective.

iii Privilege lists

Document production is a two-stage process: the parties disclose the existence of relevant documents by serving on each other a list of those documents. They then provide their opponent with copies of all those documents save for those which they have some legal basis for withholding (most commonly, documents over which privilege is claimed). Each

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51 [2016] EWHC 256 (Ch).
52 [2016] EWHC 1464 (Ch).
document over which privilege is claimed should be described. In *Astex Therapeutics Ltd v. AstraZeneca AB*,\(^{53}\) the High Court ruled that a generic statement to the effect that the categories of documents referred to in the relevant section of the disclosure list are privileged is insufficient to discharge the requirement under CPR 31.10(4)(a). In *Hutchison 3G UK Ltd v. EE Ltd*,\(^{54}\) the court refused an application for specific disclosure on the basis that a party could not rely on the court’s general management powers to avoid the specific disclosure provisions in CPR 31.12.

### VII ALTERNATIVES TO LITIGATION

#### i Overview of alternatives to litigation

There are a number of forms of alternative dispute resolution mechanisms available in England and Wales. The glossary to the CPR defines alternative dispute resolution (ADR) as a ‘collective description of methods of resolving disputes otherwise than through the normal trial process’. ADR encompasses a variety of dispute resolution methods ranging from non-binding negotiations, in which there is no third-party involvement, to formal binding arbitral proceedings.\(^{55}\) ADR has achieved acceptance as it is confidential and normally conducted in private, its outcome is normally subject to agreement of the parties, and it may offer a faster and more cost-effective resolution to a dispute than traditional litigation. The Civil Justice Council ADR Working Group recently considered, and dismissed, the idea of imposing mandatory ADR in its Interim Report, which was published in October 2017. The report notes that in England and Wales there are already a number of ADR processes that are effectively mandatory and introducing compulsory pre-action ADR would be ‘too heavy-handed’. The following reasons were cited in the report: the difficulties with avoiding unnecessary cost and hassle, the risk of delay due to difficulties with engaging defendants pre-action and the largely negative feedback about mandatory pre-action systems from jurisdictions such as Italy (which is the only European system with a mandatory pre-action mediation requirement).

#### ii Arbitration

The Arbitration Act 1996 (the 1996 Act) restated and aimed to improve the law in England and Wales relating to arbitration pursuant to an arbitration agreement. Certain provisions (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;

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\(^{53}\) [2016] EWHC 2759 (Ch).

\(^{54}\) [2017] 10 WLUK 149.

\(^{55}\) 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 40 – the parties are under a general duty to do all things necessary for the proper and expeditious conduct of the arbitral proceedings;

Section 67 – a party may apply to the court to challenge a tribunal’s substantive jurisdiction; and

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.*, the Supreme Court held that the terms of the 1996 Act and the New York Convention did not enable the court to order a partial enforcement of an arbitral award.

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56 [2017] UKSC 16.
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 CPRs strongly encourage parties to consider mediation at several stages during litigation, including before formal proceedings commence, when the case is allocated to track and at any CMCs. The court may also impose or grant a request for a stay of proceedings pursuant to CPR 26.4 to enable the parties to attempt mediation.

The Jackson ADR Handbook was published in April 2013 following Jackson LJ’s recommendation. It has been endorsed by Jackson LJ, the Judicial College, the Civil Justice Council, and the Civil Mediation Council and is the authoritative guide to ADR in England and Wales.

The approach of the court in this area has frequently been to treat mediation and ADR as effectively synonymous terms. In Dunnett v. Railtrack plc, the court declined to order that the defeated claimant pay Railtrack’s costs because Railtrack had, unreasonably in the court’s view, refused to consider an earlier suggestion from the court to attempt ADR. In Halsey v. Milton Keynes General NHS Trust, the court stated that it was for the unsuccessful party at trial to demonstrate that the successful party’s costs should be reduced because of its unreasonable failure to consider ADR. Relevant factors when assessing whether ADR was unreasonably refused include the nature of the dispute, the merits of the case, the relative costs of ADR to the case, and whether ADR had a reasonable prospect of success. However, in PGF II SA v. OMFS Company 1 Limited, the Court of Appeal made it clear that parties are expected to engage with a serious invitation to participate in ADR and they may be penalised in costs if they refuse to do so. In that case, the court refused to award the defendant its costs as it had ignored an offer from the claimant to mediate.

Mediation is becoming increasingly popular in England and Wales for disputes of all sizes. In 2008, the EU adopted Council Directive 2008/52, the Mediation Directive, which applies to all Member States when engaged in cross-border disputes within the EU. The Directive seeks to ensure that Member States facilitate mediation. This includes ensuring that local law does not prevent parties who emerge from unsuccessful mediations from being time-barred from litigation, and that settlement agreements reached in mediation are enforceable under local law.

At present, mediations and mediation services providers are not regulated by a central body, and there are no formal qualifications mediators must possess to be able to practise. In 2004, a voluntary code of conduct for mediators was introduced in EU Member States, and there is increased debate over whether a central regulatory body should be created, along with compulsory training or standardised accreditation for mediators.

57 Available from Oxford University Press.
60 [2013] EWCA Civ 1288.
iv Other forms of alternative dispute resolution

In addition to arbitration and mediation, there are a range of other processes available to parties seeking to settle their disputes out of court. These include: early neutral evaluation, 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 determination, typically a contractually binding determination by a neutral expert of a dispute involving technical or valuation issues; and adjudication, a statutory process which is mandatory for disputes arising under specified construction contracts entered into since 1 May 1998. Ultimately, private dispute resolution can take any form that the parties wish. In most cases, the procedures are non-binding and without prejudice, which allows the parties to commence or continue litigation or arbitral proceedings, if necessary.

VIII OUTLOOK AND CONCLUSIONS

There are a number of upcoming macro-level challenges to the existing state of the English legal system and its component parts, together with some substantive changes to practice and procedure.

i EU Referendum

The UK electorate’s June 2016 vote to leave the EU may have a number of legal and practical implications. Please see Chapter 1 for an analysis of the issues as they relate to the resolution of disputes.

ii Reform of the courts

The finish date of the £1 billion HMCTS reform programme has been extended to 2023, building on feedback received from the Public Accounts Committee and the National Audit Office. The reforms comprise an upgrade of facilities as well as the modernisation of technology. 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 (all of which have since been made permanent), as have initiatives aimed at digitising the courts system (see Section III.iii). Heading into its third phase, the reform programme will expand online services, with a view to offering a complete end-to-end service to users. Expected changes include the provision of additional IT infrastructure to courts, including providing Wi-Fi and video conferencing equipment in all courts and tribunals, and delivering additional centralised case administration centres. The recommendations put forward by The Disclosure Working Group, chaired by Lady Justice Gloster, to address the excessive costs, scale and complexity of disclosure, have taken effect in the Business and Property Courts from January 2019 in a mandatory disclosure pilot scheme in PD 51U (see Section VI.i). It is expected that if the pilot scheme is deemed successful, the existing CPR 31 will be revised to incorporate PD 51U and the scheme might be extended to proceedings outside the Business and Property Courts.
iii  Witness statements
The Witness Evidence Working Group has conducted a survey and completed a report in relation to the use of witness evidence in the Business and Property Courts (High Court, London), which is expected to be published in December 2019. The Working Group collected court users’ views regarding the current rules and practice on factual witness evidence, as well as possible alternatives. Potential reform could address judicial fatigue over unnecessarily lengthy statements or seek to curb the practice of lawyers drafting statements for witnesses to suit the cases being advanced.

iv  Video hearings
A one-year Video Hearings Pilot Scheme (PD 51V) was commenced on 30 November 2018, which covers applications to set aside County Court summary judgments heard at either the Birmingham or Manchester Civil and Family Justice Centres. The pilot scheme tests a procedure for these applications to be heard by the court via video link. Members of the public may access a hearing by attending the court in person; the proceedings are projected on a screen. An independent evaluation by academics is expected to commence soon and be published by May 2020. Although it is expected that most hearings will continue to take place in person, reforms are being considered to allow video hearings in appropriate individual cases, for example in case management hearings, to save time and expense for all those taking part.
I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

The legal system in Finland adheres to the civil law tradition. The primary institutional source of law is legislation and statutes, whereas legislative history and praxis by the higher courts are secondary sources of law. Other permitted sources of law such as legal literature and comparative law can be invoked, but do not hold an institutional position. In addition to national sources, multinational sources, such as regulation by the European Union and praxis by the Court of Justice of the European Union, are also considered sources of law in Finland. If there is a conflict of norms between national and binding international norms, the international norm will generally prevail.

The general court, which handles both civil and criminal cases, is three-tiered and consists of the district courts, the courts of appeal and the Supreme Court. The jurisdiction of a district court will in most cases be determined by one of the parties’ domicile, and the court of appeal will thereafter be determined by the district court that has tried the case. As jurisdiction is determined by geography, most courts handle a wide array of cases and the judges in Finnish general courts are therefore mostly generalists who do not specialise in a particular case type. A few special case types, for example, military, maritime and land courts, are, however, concentrated in specific general courts.

In addition to the general courts, Finland has specialist tribunals for cases that require expert knowledge. The current specialist tribunals are the Market Court, the Labour Court, the Insurance Court and the High Court of Impeachment. From a corporate point of view, the Market Court is the most relevant, as it deals with cases concerning market law, competition law, supervisory matters, public procurement and intellectual property rights.

Finland also has administrative courts specialising in administrative law and cases relating to the exercise of public power. The administrative court is two-tiered consisting of the administrative courts and the Supreme Administrative Court. The decisions of public authorities can generally be appealed to the administrative courts and the jurisdiction of the court is generally determined by the district of the decision-making authority.

The primary arbitration institute is the Arbitration Institute of the Finland Chamber of Commerce (FAI), which provides arbitration and mediation services in domestic and international disputes. Arbitrations are generally conducted under the FAI Arbitration Rules. Arbitration in Finland is also governed by the Arbitration Act of 1992.

Mediation and other forms of alternative dispute resolution have gained popularity in Finland on a theoretical level but are not yet widely used in commercial disputes.

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II THE YEAR IN REVIEW

The current Administrative Judicial Procedure Act will be replaced with a new law governing judicial procedure in administrative matters on 1 January 2020. The new act aims, among others, to specify the legal guarantees of due process and to ensure that the legal proceedings are not delayed without cause.

The Finnish Supreme Court rendered a decision (KKO:2019:90) in which the Supreme Court deemed on the basis of the ECJ’s preliminary ruling that in a restructuring situation where the infringing economic unit has been dissolved, a company acquiring the commercial activities of the dissolved company and continuing those activities is liable for the damages caused by anticompetitive behaviour.

Apart from the above stated, during the past year there have been no significant legislative amendments or new legislation enacted in the field of dispute resolution. Neither has the Finnish Supreme Court rendered other significant decisions of wider cross-border interest.

III COURT PROCEDURE

i Overview of court procedure

General court proceedings in civil cases in Finland are governed by the Code of Judicial Procedure, which originates from the Swedish Civil Code of 1734 but has been revised several times since, including a fundamental revision in the 1990s.

Court proceedings are generally limited to the claims and demands made by the parties and the court may not ex officio initiate proceedings, with the exception of matters of public interest (criminal cases and non-discretional disputes). Court proceedings in Finland follow the principles of immediacy, orality and concentration. According to these principles, proceedings should be conducted – and evidence presented – orally and directly in person to the judge deciding on the case, and only information that has been presented during the main hearings may affect the outcome of the case. Written witness statements are generally not allowed in hearings. Witnesses may, however, resort to written notes in order to recollect, for example, complicated technical data.

Following the 2015 revisions of the Code of Judicial Procedure, an appeal to the court of appeal now generally requires a leave to appeal, which should be requested in conjunction with the appeal. The threshold for the leave to appeal is not very high; the leave is granted if there is cause to suspect the correctness of the final result of the decision of the district court or if the correctness cannot be assessed without granting the leave. The appeal procedure is written, unless a party requests that a new main hearing be held and the court of appeal does not find this clearly unnecessary. In practice, a main hearing is held in all notable disputes.

In order to appeal a decision of the court of appeal, leave to appeal shall be requested from the Supreme Court. Leave to appeal may be granted only if it is important to bring the case before the Supreme Court for a decision that concerns the application of the law in other similar cases or because of the uniformity of legal practice; if there is a special reason for this because of a procedural or other error that has been made in the case on the basis of which the judgment is to be reversed or annulled; or if there is another important reason for granting leave to appeal. The threshold for the leave to appeal from the Supreme Court
is much higher than that of the courts of appeal, with an average of less than 10 per cent of leaves being granted.\(^2\) The procedure in the Supreme Court is, in general, in writing, though the court may hold a hearing if it deems it necessary.

**ii Procedures and time frames**

The civil litigation procedure is initiated by an application for a summons to the (district) court with jurisdiction in the matter. The application shall include the specified relief sought by the plaintiff and the circumstances on which the claims are based. If the application has no major flaws, the court shall issue a summons without delay and a response shall be requested from the respondent. The respondent shall state in its reply whether it admits or contests the action, and the grounds for the statement.

The procedure may continue with written preparation, where written submissions to the court are requested from the parties, or proceed directly to a preparatory hearing. The goal of these preparatory measures is to summarise the demands of the parties and the legal grounds therefrom to determine the disputed and undisputed facts of the case, and to identify the evidence that the parties intend to present and what they intend to prove with each piece of evidence (i.e., the themes of evidence). The parties generally may not present new legal grounds or evidence after the preparatory phase.

Once the preparatory phase has been conducted, the proceedings continue with a main hearing, unless it has been deemed unnecessary. During the main hearing, the parties present their case by giving short oral opening statements. Thereafter, the parties present the evidence supporting their arguments, both through written evidence and witnesses. All written evidence is typically presented by the parties. Witness hearings are generally conducted by the counsels of the parties in an adversarial manner and without interference from the judge. The main hearing is concluded with oral closing statements by both parties. A judgment should, in general, be given within two weeks of the conclusion of the main hearing, but in practice this only happens in very simple cases. In cases demanding more deliberation, rendering a judgment usually takes several months.

The duration of court proceedings depends greatly on the amount of evidentiary material to be presented, as well as the caseload of the court and the judge presiding. For a typical corporate dispute, one could expect a duration of 12 to 18 months from an application for a summons to a judgment per instance.

The court may order precautionary measures based on a party’s application at any time during the proceedings or even prior to the initiation of proceedings. The applicant needs to demonstrate that it is probable that he or she has a right and that there is a danger that the opposing party may infringe or inhibit that right in some way. The threshold for probability is, however, as a rule not too high, and precautionary measures are relatively easy to obtain.

The court may, as a precautionary measure, order attachment of the opposing party’s property, prohibit or order the opposing party to do, or not to do, something under threat of a fine, or order other measures necessary for securing the right of the applicant to be undertaken. In urgent cases, a temporary precautionary measure can be placed by the court *ex parte* without hearing the opposing party, and this can at best be done within a day. The applicant is liable for any damage the precautionary measure causes to the opposing party if

the measure turns out to be unjustified. The applicant is generally obligated to place a security to cover such potential damage as a condition for the enforcement of the precautionary measure.

iii Class actions
The Finnish Act on Class Actions of 2007 permits class actions in consumer civil cases against businesses. A class action can be brought by the Consumer Ombudsman if several persons have claims against the same defendant that are based on the same or similar circumstances. A class action can be filed, for example, in disputes concerning defects in consumer goods or the interpretation of a consumer contract. Class actions may not be brought by individual persons or by the initiative of a law firm. The members of the class action can choose to opt in to the action but are not considered parties in the case.

Since the Finnish Act on Class Actions entered into force in 2007, there have been no class actions filed by the Consumer Ombudsman. However, the Consumer Ombudsman is currently contemplating bringing a class action against two companies offering instant cash loans. The fact that no class actions have been filed yet is most likely because of the cases being resolved by the Consumer Complaints Board or settled otherwise. The possibility of a consumer class action may, however, have been used as leverage for negotiations in consumer cases.

As of 1 January 2019, the District Court of Helsinki has sole jurisdiction over all class actions.

iv Representation in proceedings
A litigant may always represent itself in proceedings. This means that a legal representative for a company or other legal entity may act as a representative for that entity. Natural persons may also represent themselves.

In order to act as counsel for someone else in court proceedings in Finland, one must be an attorney, a public legal aid attorney or a licensed legal counsel. A legal representative must therefore have a law degree and, in addition, fill the requirements that are placed on attorneys and licensed legal counsel – mainly training, experience and the supervision of a professional supervisory board. Representatives of their employers who are lawyers, namely, in-house counsel, form an exception to this rule and may represent their employers in court without filling the aforementioned qualifications.

v Service out of the jurisdiction
If the recipient of a notice resides abroad and his or her address is known, and if the service of the notice has not been entrusted to a party, the court shall ensure that the documents to be served are sent as provided in law or agreed with the foreign state in question. Finland has entered into several international treaties that govern the service of documents outside the jurisdiction.

Service within the European Union is governed by EU Regulation No. 1393/2007, which allows service of judicial documents from one Member State to another without diplomatic channels. The main principle is that the competent authorities (courts in Finland) send documents directly by post to an addressee residing in another EU Member State. Secondarily, documents are transmitted to the competent authority in the receiving country.

Between the Nordic countries, the Agreement between Finland, Denmark, Iceland, Norway and Sweden on Mutual Legal Assistance in Service of Documents and Production
of Evidence (Treaty Series 26/1975) is applied (the Nordic Agreement). This Agreement is based on the principle of direct transmission between the competent authorities. In Finland, courts send the documents directly to the receiving authority in the other Nordic country.

Finland has also ratified the Hague Service Convention (Treaty Series 51/1969). When this Convention is applied, the Finnish courts send the documents to be served abroad through the central authority (e.g., the Ministry of Justice).

Documents to those countries with which Finland has no agreement are transmitted by the courts to the Finnish Ministry for Foreign Affairs, which forwards them for service abroad to the relevant authority.

vi Enforcement of foreign judgments

Enforcement of foreign judgments in Finland can only be done by virtue of binding legislation or international treaties.

Within the European Union, civil judgments are directly enforceable in accordance with Brussels I Regulation (EU) No. 1215/2012. Under Brussels I, judgments issued in other EU Member States may be enforced directly under the same conditions as national judgments without a separate declaration of enforceability by the district courts. The recast Brussels I Regulation became fully applicable on 10 January 2015. Any judgments following proceedings that were initiated prior to this date fall under the scope of the prior Brussels I Regulation (EC) No. 44/2001, which requires that a court in the state of enforcement first declares the judgment enforceable.

In relation to Iceland, Norway and Switzerland, the Lugano Convention is applied. Under the Lugano Convention a judgment must be declared enforceable by a Finnish district court before it can be enforced.

If there is no binding legislation or treaties governing the enforcement, it is in practice very difficult to obtain. This is the case with most judgments from outside of the European Union, including from the United States.

vii Assistance to foreign courts

Finland can assist other EU Member States in the taking of evidence in civil cases. EU Evidence Regulation (EC) No. 1206/2001 allows for a court to send the requests for taking evidence directly to the competent court in the receiving EU country. The Nordic Agreement also allows for direct requests between courts.

Finland has also acceded to the Hague Evidence Convention (Treaty Series 37/1976). Under this Convention, Finnish courts transmit the requests for taking evidence abroad through a central authority. The Convention is applied, for instance, in relation to the United States of America and Turkey. In relation to Russia, Finland may apply the Hague Evidence Convention or the bilateral agreement between the Republic of Finland and Russia on legal protection and legal assistance in civil, family and criminal matters (Treaty Series 48/1980).

If no treaty or binding legislation is applied, requests for taking evidence must be transmitted through the Ministry for Foreign Affairs.

Besides taking evidence, Finnish courts may also assist foreign courts by providing information on foreign law under the European Convention on Information on Foreign Law (Treaty Series 58/1990).
viii Access to court files
All court proceedings and documents are public in Finland unless provided otherwise by law or ordered by the court. This means that the public has access to all the information relating to ongoing or completed proceedings, including pleadings and evidence, unless secrecy has been granted.

The Act on the Publicity of Court Proceedings in General Courts (370/2007) states that the court may, at the request of a party, decide that a court document shall be kept confidential to the extent necessary, if public access would probably cause significant detriment or harm to the interests protected by confidentiality obligations, such as trade secrets. Regardless of confidentiality, the parties to a case are entitled to access all court documents of the case.

ix Litigation funding
Litigation is generally funded by the parties themselves. Litigation funding by a third party is not prohibited, but it is not common practice.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls
The Code of Conduct of the Finnish Bar Association states that a lawyer shall be free of conflicts of interest when accepting and performing an assignment. A conflict of interest can arise from two or more clients’ conflict within the same matter, conflict owing to an obligation of loyalty or secrecy, or conflict based on a lawyer’s personal or financial interests. Conflict limitations apply generally and with few exceptions to the entire law firm of the attorney who has a conflict of interest in the matter. Information barriers (Chinese walls) cannot, therefore, be used to forego limitations of conflicts of interest. However, in some cases clients may authorise an attorney to perform an assignment despite a conflict of interest by giving their consent.

ii Money laundering, proceeds of crime and funds related to terrorism
The Fourth EU Anti-Money Laundering and Counter Terrorist Financing Directive (EU) 2015/849 has been implemented in the Finnish Act on Detecting and Preventing Money Laundering and Terrorist Financing (444/2017) (the Anti-Money Laundering Act). This Act states that an attorney is obliged to know who their clients – and the beneficial owners of their clients – are. Attorneys should also know their clients’ business, and detect and examine suspicious business operations, and report any such operations to Finland’s Financial Intelligence Unit, the national anti-money laundering unit.

Also, the Fifth EU Anti-Money Laundering and Counter Terrorist Financing Directive (AMLD) (EU) 2018/843 has been implemented in Finland. The fifth AMLD aims to improve international cooperation between Financial Intelligence Units and targets digital currencies, among other things.

iii Data protection
The European General Data Protection Regulation (EU) 2016/679 (GDPR) entered into force on 25 May 2018 and is directly applicable in Finland. In addition, the Finnish Data Protection Act (1050/2018) specifies and supplements the GDPR. The GDPR states that personal data can only be processed if there is a lawful basis for the processing. Lawyers must
take this into consideration when storing case material containing personal data, such as correspondence and evidence. The GDPR sets high standards for data protection and privacy settings, which means that lawyers and law firms must make sure that the systems for storing and processing data are not susceptible to breaches.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

According to the Code of Conduct of the Finnish Bar Association, a member of the Finnish Bar Association (attorney) may not, with some exceptions, disclose the secrets of an individual or a family, business or professional secrets, or any other information that has come to his or her knowledge in the course of professional activities.

The Finnish Code of Judicial Procedure also includes a provision regarding attorney–client privilege. In general, a member of the Finnish Bar Association or a licensed legal counsel may not, without permission of the client, testify regarding what he or she has learned in providing legal services to a client.

The provision above does not apply to in-house counsel. Under Finnish law, communication with in-house counsel is not privileged, but may, to some extent, be protected by the right to refuse to reveal business secrets.

ii Production of documents

In general, it is the parties’ obligation to obtain the necessary evidence in litigation. In a civil matter that is amenable to settlement, the court may not, as a main rule, on its own initiative and without the parties’ consensus, decide that a new document is to be presented.

The court may, however, pursuant to a party’s request, order the opposing party or a third party to produce a document if the document could be of relevance as evidence in the matter. The party requesting production of a document must identify the requested document and specify why it is of evidentiary relevance by defining the theme of evidence for the document in the other party’s or third party’s possession. The person requested to produce a document is reserved an opportunity to be heard before the court makes its decision regarding the request for production of a document. The person requested to produce a document can oppose the request, for instance, by claiming that the document includes business secrets or is subject to legal privilege.

The Finnish courts have adopted a rather strict practice on requests on production of documents. Quite often, the requests are dismissed on the basis of insufficient identification of the requested documents or the lack of established relevance.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

In many cases arbitration is the preferred method for settling larger commercial disputes, and, thus, it is quite common for a Finnish commercial agreement to include an arbitration clause.
During recent years, mediation has become more general and the experiences of mediation have been positive.

ii Arbitration

Under Finnish law, most disputes that can be settled amicably can be brought to arbitration. There are, however, some statutory limitations to arbitration. For instance, an arbitration clause in a consumer contract concluded between a business and a consumer before a dispute arises is not binding on the consumer.

Arbitration is governed by the Finnish Arbitration Act of 1992, which applies to both domestic and international arbitration. The Finnish Arbitration Act does not accord with the UNCITRAL Model Law on International Commercial Arbitration.

The Act includes provisions on the arbitrators and the proceedings as well as provisions on foreign arbitral awards and agreements providing for arbitration outside Finland. Provisions on the appointment of arbitrators and commencing an arbitration proceeding included in the Act are quite detailed, whereas provisions on the actual proceedings are very limited. The proceedings are largely based on party autonomy. In domestic arbitrations, the proceedings are in practice often carried out largely in a manner corresponding to the civil case proceedings in a court.

It is worth mentioning that the Finnish Arbitration Act does not include provisions on precautionary measures. If a party to an ad hoc arbitration carried out in accordance with the Finnish Arbitration Act wishes to apply for a precautionary measure, the application is made to a district court in accordance with the provisions governing precautionary measures included in the Finnish Code of Judicial Procedure.

The FAI provides arbitration services in domestic and international disputes. The revised FAI Rules will enter into force on 1 January 2020. The revised FAI Rules contain individual improvements to the 2013 FAI Rules. The FAI Rules are applied to arbitration proceedings provided that there is an arbitration clause referring to the FAI Rules or the parties have otherwise entered into an arbitration agreement with reference to the FAI Rules.

The FAI Rules can be considered state-of-the-art arbitration rules. The proceedings are commenced by the claimant submitting a request for arbitration and the respondent submitting an answer to the request for arbitration to the FAI. Thereafter, the proceedings will be continued by appointment and confirmation of the arbitral tribunal. After the case file has been transmitted to the tribunal, the proceedings are continued by exchange of the parties’ written briefs and the hearing.

Pursuant to the FAI Rules, the final award shall be made no later than nine months from the date on which the arbitral tribunal received the case file from the FAI. The FAI may extend this time limit.

The FAI Rules also incorporate rules on emergency arbitrators. According to these rules, a party in need of urgent interim measures of protection that cannot await the constitution of an arbitral tribunal may apply for the appointment of an emergency arbitrator before the matter has been referred to an arbitral tribunal. The emergency arbitrator shall make its decision within 15 days of the date of receipt of the case file. The FAI may extend this time limit.

The FAI also has separate rules for expedited arbitration. The expedited arbitration is intended for smaller disputes with lesser monetary interest. In expedited arbitration the arbitral award is rendered within three months of the date the case file is transferred to the arbitral tribunal.
Finnish arbitral awards are not open to appeal on the merits. An arbitral award may, however, be set aside by the court upon request of a party owing to procedural errors enumerated in the Finnish Arbitration Act – in other words, if the arbitrators exceeded their authority; an arbitrator has not been properly appointed; an arbitrator could have been challenged pursuant to the Finnish Arbitration Act, but a challenge properly made by a party was not accepted before the arbitration award was made; if a party became aware of the grounds for a challenge so late that he or she was unable to challenge the arbitrator before the arbitration award was made; or if a party was not given sufficient opportunity to present his or her case.

The action requesting setting aside an arbitral award must be made within three months of the date the requesting party received a copy of the award.

An award may also be declared null and void upon a party’s request to the extent the arbitrators have in the award decided on an issue not eligible for settlement by arbitration under Finnish law, to the extent that recognition of the award is to be deemed contrary to the public policy of Finland, if the arbitration award is so obscure or incomplete that it does not indicate how the dispute has been decided, or if the arbitration award was not made in writing or signed by the majority of the arbitrators. There is no time limit for a request regarding declaring an arbitral award null and void.

The court procedure related to requesting an arbitral award to be set aside or declared null and void is three-tiered. The district court’s decision is open to an appeal in the court of appeal, and the court of appeal’s decision may be appealed in the Supreme Court, provided that the Supreme Court grants a leave to appeal.

During the past few years, the number of actions requesting the setting aside of an arbitral award has increased. However, these actions do not usually succeed. The threshold for setting aside an arbitral award is high.

Finland has ratified the Convention on the Recognition and Enforcement of Foreign Awards (the New York Convention) without making the reciprocity reservation or the commercial nature reservation. Provisions regarding enforcement of a foreign arbitral award are implemented in the Finnish Arbitration Act, which states that a foreign arbitral award may be enforced upon written request to a district court.

iii Mediation

During recent years, there has been a lot of discussion about mediation within the Finnish legal community. Despite the ongoing discussion, mediation is still not very common in Finland.

In Finland, court mediation has been available since 2006. Court mediation typically takes place after submission of the application for a summons and the answer to the application for a summons before continuing the court proceedings. Court mediation can, however, also be commenced in a dispute not pending before a court. Compared to court proceedings, court mediation is considered speedier, more informal, more flexible and more cost-effective.

Court mediation is governed by the Finnish Act on Court-annexed Mediation. Mediation is always voluntary, and, therefore, all the parties to the dispute must consent to it. The court, however, makes the final decision on commencement of court mediation. The mediator is a judge in the court where the case is pending. Primarily only judges who have been trained as mediators act as mediators in court mediation.

A party may, at any time during the mediation, notify the mediator that he or she no longer wishes to have mediation in the matter. In this case, the mediation will be concluded.
The mediator may also decide, after hearing the parties, that there is no justification for continuing the mediation and conclude it. A settlement accepted by the parties may be confirmed by the court.

If an amicable settlement is not reached in court mediation, the possible pending court proceedings will be continued. The judge dealing with the matter in a trial will not be the same as the mediator. A party may not, in any later proceedings, without the consent of the other party, rely on representations made by the other party in the interest of settlement.

Out-of-court mediation is also available in Finland. For instance, the Finnish Bar Association and the FAI provide out-of-court mediation.

According to the mediation rules of the Finnish Bar Association, the mediator shall be a member of the Finnish Bar Association who has been trained to act as a mediator and who is included in the list of mediators maintained by the mediation board of the Finnish Bar Association.

The FAI administers mediations under the Mediation Rules of the Finland Chamber of Commerce, which entered into force on 1 June 2016. The parties may jointly nominate a mediator for confirmation by the FAI. At the request of the parties, the FAI may also propose prospective mediators for the parties to consider. If the parties do not jointly nominate a mediator, the FAI shall make the appointment. It is common to have only one mediator.

If the parties have reached an agreement in the out-of-court mediation, the settlement may, upon application, be confirmed as enforceable in a district court.

iv Other forms of alternative dispute resolution

Agreements related to mergers and acquisitions (M&A) typically include provisions whereby disputes involving valuation or other kinds of financial determination are to be resolved by expert determination, for instance by an independent auditor. Other kinds of M&A-related disputes are, however, typically resolved in arbitration.

Use of referees as an alternative dispute resolution method is not common in Finland. Typically, dispute resolution provisions involving the use of referees can be found in construction agreements, if at all.

Other alternative dispute resolution methods are also available in relation to different kinds of disputes. For example, consumer advisers and the Consumer Disputes Board deal with disputes related to consumer protection. The decisions of the Consumer Disputes Board are solely recommendations and cannot, thus, be enforced.

VII OUTLOOK AND CONCLUSIONS

In Finland, the prevailing dispute resolution method in business disputes is arbitration. Often a court procedure is considered to take too long. In many cases, even the court proceedings in a district court take longer than an arbitration proceeding. Also, the publicity of court proceedings as well as the courts' lack of special expertise are often considered to favour arbitration.

Finnish arbitration proceedings, as well as the arbitration community, have grown and developed during recent years, and the trend is continuing. For instance, at the beginning of 2019 the Ministry of Justice commenced a project concerning the revision of the Finnish
Arbitration Act. Many Finnish businesses, law firms and other entities and institutions involved with arbitration have submitted statements supporting the reformation and incorporating the UNCITRAL Model Law into the Finnish Arbitration Act.

It is expected that business disputes will increasingly be resolved in arbitration and mediation.
I  INTRODUCTION TO THE 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 ‘question prioritaire de constitutionnalité’ (QPC). The QPC is forwarded either to the Council of State or the Supreme Court for Civil and Commercial Matters, and then by them to the Constitutional Council, if the constitutionality of the legal provision in question (1) has not been considered before, (2) is legitimate, and (3) is applicable to the case at hand. The decision of the Constitutional Council is binding on everyone. 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, below), 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 Law on Programming 2018-2022 and Reform of Justice

The year 2019 was marked by the adoption of the Law on Programming 2018-2022 and Reform of Justice, which was promulgated on 23 March 2019. The main provisions of this Law will enter into force on 1 January 2020. In line with the Law on Modernisation of Justice in the 21st Century, the further reform introduced by this new Law is aimed at rendering access to justice more easily, simplifying civil procedure, promoting alternative methods of dispute resolution, improving the organisation and functioning of the justice system, and extending the scope of class actions. It focuses on structural reform and modernisation of the civil justice system. The Law is intended to simplify the civil court system by merging the small-claims courts with the High Courts, which will be renamed the ‘Tribunal judiciaire’, to reinforce alternative methods of dispute resolution, and to promote dematerialisation with the supervision of online conciliation, mediation and arbitration services provided by third parties and the possibility of bringing cases before the courts online.

ii International disputes

In 2018, the principal development was the creation of the International Chamber of the Paris Court of Appeal, which has jurisdiction over international commercial disputes. By introducing the possibility to have a bilingual procedure in French and English and by borrowing some procedural features from common law countries, such as cross-examination,
the aim of this chamber is to increase the attractiveness of Paris as an international venue for dispute resolution. By December 2019, the International Chamber of the Paris Court of Appeal had delivered 12 judgments and 60 cases were registered.

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. As noted above, the Law on Programming 2018-2022 and Reform of Justice also introduces a major structural reform of the judicial system by merging the former small-claims courts with the the High Courts, which will now be called the Tribunal judiciaire.

The first instance tier now comprises three main courts:

a The Tribunal judiciaire has 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 The Law on the Modernisation of the Justice System in the 21st Century required 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 Tribunal judiciaire.

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 €5,000, 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.
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.

Following the 2019 reform, provisional enforcement of a judgment provided by law becomes the rule unless the judge decides to exclude all or part of the provisional enforcement of a judgment, if he or she considers that it is incompatible with the nature of the case or that it may entail manifestly excessive consequences.

Proceedings before the other first instance courts (Tribunal judiciaire, 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 under certain conditions.

If a party wishes to appeal a first instance judgment, notice of appeal must be lodged with the relevant court of appeal within one month of notification of the judgment. This used to be done by an attorney, special counsel who enjoyed a monopoly on representation before the court of appeal. While this monopoly was abolished in 2012, given the specificity of appellate procedure, lawyers often have recourse to former attorneys to represent their clients before the court of appeal for procedural matters. The notice of appeal is usually succinct, identifying the parties, the judgment under challenge and, since the 2017 reform, reasons which are criticised (an overall appeal is no longer available). The registrar of the court of appeal communicates the notice of appeal to the respondent. The matter is then assigned to a particular chamber of the court of appeal. Written submissions are then exchanged. The instruction of the appeal is similar to that at first instance bearing in mind that appeal is a rehearing of the facts and law of the case. Although new claims are no longer allowed, parties can still invoke new legal arguments and present new evidence.

For international disputes, the International Chamber of the Paris Court of Appeal was created in February 2018 to adapt the French judicial system to contemporary economic and international issues. It has jurisdiction over international commercial disputes, particularly in the fields of transport, competition and the termination of commercial relationships. It is a bilingual chamber: provided the parties consent, the court may permit the production of exhibits as well as the making of oral submissions in English and cross-examination of witnesses and experts, under the supervision of the judge in charge of the case. Decisions will also be translated into English.

Decisions of a court of appeal (or judgments of lower courts of last resort) may be challenged before the Supreme Court for Civil and Commercial Matters only on the five grounds of error of law, incompetence of the court, formal defects of procedural orders and judgments sanctioned by nullity, lack of reasons, or denaturation. Recourse to the Supreme Court for Civil and Commercial Matters does not suspend enforcement of the judgment. The cassation appeal is lodged by a notice submitted to the registrar of the Supreme Court for Civil and Commercial Matters in a succinct form similar to that before the court of appeal. The ‘avocats aux conseils’ 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 Tribunal judiciaire (cases brought before the former High Court) and the court of appeal, a judge is specifically assigned to oversee the proceedings (the procedural judge). This judge sets the procedural timetable within certain mandatory time limits, especially before the court of appeal. Most delays set by the CPC are extended in the case of foreign parties.

There is no procedural judge before a commercial court or labour tribunal. The period between the filing of the case and the hearing is therefore not supervised.

As a general rule, the parties have no direct influence over case management. Although parties may apply for extensions of deadlines and for leave to file additional briefs or evidence, the final decision lies with the court.

The French courts are overloaded with work and under-resourced. It is difficult to predict the time required for a case to be heard at first instance. A period of at least 10 to 12 months is not uncommon. The timescale for the two levels of appeal is often longer, with 18 months not being uncommon for each stage.

Proceedings on the merits may be accelerated if circumstances so merit by way of a summons for a specific date. In such cases, rather than serving a summons on the defendant, the plaintiff presents unilaterally an *ex parte* request to the court to be authorised to serve a summons for a specific date in the near future. The urgency of the matter must be explained in such a request and a complete written brief with supporting documentary evidence must be filed. If leave is given, the plaintiff will serve a summons in the normal manner indicating a specific day and hour for the hearing. The defendant must file its documents before the hearing date.

Exceptionally, a plaintiff may be authorised to issue a summons on the same day as the hearing. If counsel does not appear for the defendant, the case is treated as a default proceedings and judgment is entered. If counsel for the defendant does appear but has not filed any documents, the case is still heard provided that the judge is confident that there was adequate time for the defence to be prepared. If it transpires that the case is more complex than originally thought, the judge may transfer the case to the ordinary docket where it will be overseen by the procedural judge.

The principal pre-action remedies available relate to the protection or establishment of evidence. Parties may seek a court-supervised inquiry into the facts of a dispute before the start of formal proceedings to preserve or even establish proof (Article 145 CPC). The range of the inquiry is wide, including personal and site inspections, the ordering of parties and non-parties to appear for questioning and the appointment of court experts.
Applications are made *ex parte* to the relevant court that would have jurisdiction over the proceedings on the merits. A real and pressing risk of the loss of the evidence must be shown.

In addition to the limited pre-action remedies discussed above, French law provides a summary procedure by way of emergency interim proceedings by which a party may obtain protective or other urgent or provisional orders from the court. Such orders are always *inter partes* and in theory do not finally determine the dispute on the merits.

Certain protective measures may be obtained on an *ex parte* application for the purpose of securing a defendant's assets with a view to enforcement. One such protective measure is the protective attachment. Applications must be made to the court with subject-matter jurisdiction in the area where the defendant is domiciled or where the assets to be attached are situated. The application must set out the grounds for seizure showing a prima facie case on the merits and must specify the amount for which security is claimed. It must also demonstrate some urgent threat to the satisfaction of the claim and the assets over which security is sought. If proceedings in respect of the claim have not already been started, the order of the court will set a time limit within which they must be commenced, failing which the order will lapse.

In addition to the protective attachment, the courts have power to direct the provisional registration of a charge over the defendant’s business or property or on shares or stocks owned by him or her. Attachments on earnings and other monetary debts are also available.

If judgments are not voluntarily complied with forced enforcement of judicial decisions settling the dispute – thus excluding acts of judicial administration – can be sought in two cases: either the court has ordered the provisional enforcement of the decision, or the decision has been duly signified and the time period to file an appeal has elapsed. Enforcement will not be available in cases of ongoing insolvency proceedings, and immunity from execution of foreign States. On this latter point the Sapin 2 Law of 9 December 2016 clarified which assets are presumed unseizable. More strikingly the reform introduced a preliminary judicial authorisation procedure. Although the authorisation is obtained on an *ex parte* application, it will not be possible to directly seek enforcement of a decision having recourse to a bailiff (as is the case in regular cases) against a foreign state.

Although exchanges between parties and courts are traditionally made via courier, the decree on simplification of civil procedure dated 11 March 2015, together with the circular dated 20 March 2015, encourages the use of emails and text messages. All information said to be communicated by courts without formal conditions can be sent to parties via emails or text messages, provided the receiving party had previously agreed on the use of such communications means. Said party is held responsible in case of modifications of email address or phone number. Since 1 January 2013 exchanges in appeal proceedings or in any court proceedings requiring legal representation by a lawyer are made via a virtual private network for lawyers and courts which ensures secure electronic transmission.

### 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.

Following the Law on Programming 2018-2022 and Reform for Justice, legal representation by a lawyer has become compulsory in ordinary civil proceedings before the Tribunal judiciaire, the commercial courts when the amount in dispute is more than €10,000 and for a number of rather technical disputes such as enforcement proceedings.

In the court of appeal, litigants must be represented by a lawyer although procedural matters are often entrusted to those attorneys, mentioned previously, who used to have a monopoly on the right of audience before the appellate courts. Representation before the Council of State and the Supreme Court for Civil and Commercial Matters is reserved to approximately 120 specially appointed lawyers.

There is no geographical restriction on the rights of audience of a lawyer, although he or she may only formally represent a client in the courts for the court of appeal district in which he or she is enrolled. In practice, a lawyer in one court of appeal district will instruct a lawyer in the district that has geographical jurisdiction over the client's case to act as an agent, to be on the formal record and to accomplish administrative tasks associated with the proceedings.

v Service out of the jurisdiction
Civil proceedings are generally commenced by the service of a summons on the defendant by a bailiff. The summons must be served personally on the defendant, although if this is not possible, it may be served on a member of the family, an employee, a neighbour or guardian at their domicile or, if this is not known, at their place of work. If there is no appropriate person who is able or willing to accept service, the bailiff delivers the summons at the relevant town hall and sends a registered letter to the defendant at his or her last known address informing him or her of this fact. If the domicile, residence or place of work of the defendant is unknown, the bailiff records any attempts to effect service in a formal minute that is sent to the defendant's last known address by registered letter.

Service on a foreign defendant who is present or resident in France or on the branch of a foreign company established in France is effected in the same manner.

In the absence of any other provision in an international convention, or EU Service Regulation No. 1384/2000, service on a defendant abroad (whether a natural person or corporate entity) is effected by the bailiff delivering the summons to the representative of the state. The summons is then transmitted to the defendant through diplomatic channels. Regardless of whether or when the summons is actually received by the foreign defendant, service is deemed to be complete when the summons is delivered to the representative of the state.

Service of documents after the commencement of the proceedings is made by simple delivery to the address of the lawyer representing the litigant whenever this is compulsory or is effected voluntarily or, where representation is not required, to the address of the litigant provided for the purposes of service by registered letter.
vi Enforcement of foreign judgments
As mentioned in Section II, above, pursuant to Chapter III of the Brussels I bis Regulation, any judgment rendered by (and enforceable in) a Member State must now be recognised and equally enforceable in all other Member States without any special procedure. However, the recognition and enforcement of a judgment can still be challenged on grounds of French international public policy or if it is irreconcilable with another judgment between the same parties in France or with an earlier judgment rendered in another state on the same cause of action and between the same parties.

In the absence of an enforcement treaty, enforcement proceedings for foreign judgments are the exclusive jurisdiction of the superior court and will succeed if the court is satisfied that the court that rendered the decision had jurisdiction under French rules of jurisdiction, that enforcement would not breach French international public policy and that the judgment was not obtained by fraud. The procedure is commenced by a summons and is made *inter partes*.

vii Assistance to foreign courts
The taking of evidence in France that is likely to be used in foreign proceedings (of any nature) is a criminal offence unless carried out under an international treaty. The main multiparty treaty that provides for rules and procedures for the taking of such evidence is the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. This Convention was signed by France on 24 August 1972 and officially incorporated into French law with the publication of the Decree dated 9 April 1975.

The Convention sets forth two procedures – one by a letter rogatory and one by diplomat, consulate agent or commissioner (i.e., an attorney mandated by the requesting party) – that both entail an order, issued by the foreign court in which the litigation is pending, granting the request for the collection and communication of French-based documents to a foreign signatory state for the purposes of eventually being submitted in a foreign judicial or administrative proceeding.

In a similar vein, the London Convention on Information on Foreign Law entered into force in France on 11 July 1972. The Convention provides for the obligation to state parties to give information on law and procedure in civil and commercial fields as well as on their judicial organisation to any judicial authority in another state party when requested.

With respect to other forms of assistance to foreign proceedings, there are no specific provisions in the CPC other than the measures of interim and urgent relief available to the parties (and not to the foreign judge) in *ex parte* proceedings where the French courts have jurisdiction.

viii Access to court files
Public access to documents and information regarding pending civil proceedings is extremely limited. Generally, rights of access are limited to the parties and their counsel. Further, the use of documents produced in the course of proceedings is limited to the purposes of the proceedings themselves.

Except for rare cases where the court decides that the hearing should be held in camera (usually for reasons of public interest), hearings are held in public, although again members of the public that are present do not have access to any of the documents on file.
Judgments are public, although there is no generalised system for the publication of all judgments. Members of the public can obtain copies of any such judgment from the court offices in question. Documents on the court file are, however, not available to the public.

ix Litigation funding

Legal aid is available to anyone resident in France who has insufficient resources to enforce or protect his or her rights. It is also available to non-residents when so provided by international treaty. It is not available to commercial companies. The process of obtaining legal aid usually 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 €1,031, and partial aid is available to persons with a monthly income of up to €1,546). The applicant also has to show that he or she has prospects of success, although in practice few applications are refused. When granted, the application is passed to the head of the local Bar, who appoints counsel to act for the legally aided party (who can be a lawyer already chosen by the party). Legal aid covers the court fees and the costs of enforcement of any judgment. Since 2017 legal aid is also available to persons taking part in participatory procedures and settlement agreements. Counsel receive a fixed-scale fee from the state. If the legally aided party loses, he or she is not protected, by reason of lack of means, from an order to pay the winning party’s costs.

Partial contingency or conditional fee arrangements are permitted under French law. Full contingency fees are not.

Disputes over fees are brought before the head of the local Bar, who must rule on the matter within four months. The decision may be appealed to the president of the relevant court of appeal within a further month.

Given the limited scope and effect of the rules on costs, there are no specific provisions in French law regarding security for costs. Claimants domiciled outside France are no longer required to give security for costs.

There is to date no regulation of third-party litigation or arbitration funding in France.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

The professional rules of conduct governing the exercise of the legal profession in France require all lawyers to avoid any conflicts of interest in the practice of their profession. A relatively wide definition of ‘conflict of interest’ is applied that covers not only individual lawyers but also any grouping of lawyers, whatever the nature of their structure.

Each case is, however, considered casuistically. This means in practice that, provided that a Chinese wall can be shown to be fully effective, there is no reason in principle why it should not be sufficient to avoid breaching the professional rule of conduct in any given grouping of lawyers.

Breaches of the no-conflict rule are treated as disciplinary matters and sanctioned by the Bar Association.

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

French law imposes two types of obligations on a lawyer advising a client in non-judicial matters with respect to money laundering, etc. The first is an obligation of awareness and the second is an obligation to inform of any suspicion of money laundering, etc.
The obligation of awareness requires the lawyer to undertake certain due diligence steps to know exactly who the client is, the transactions on which he or she is to advise, to conserve certain documents and to put in place internal procedures to ensure that these due diligence steps are always accomplished for any new client or any existing client that comes with a new matter.

The obligation to inform of any suspicion of the commission of money laundering or similar offence applies whenever the lawyer has reason to believe that such an offence may have been committed—there being no statutory definition of suspicion. The information must be given first to the head of the local Bar, who must then make an assessment of the case before deciding whether to inform Tracfin (the competent government body) or not.

### 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:

- **a** the processing of certain types of sensitive data (i.e., personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership and data concerning health or sex life);
- **b** the transfer of data outside the European Economic Area to a country without adequate protection;
- **c** automated processing consisting of a selection of people aimed at excluding some from the advantages of a right or the benefit of a contract;
- **d** automated interconnection files; and
- **e** biometric identity checks.

The processing of data relating to criminal offences and proceedings, health or social security numbers is also restricted. There are also a number of exceptions to the usual regime covering, for instance, the maintenance of public registers.

All personal data must be processed fairly and lawfully, collected for and processed in accordance with specific, explicit and legitimate purposes, collected in an adequate, relevant and non-excessive way, be accurate, comprehensive and when necessary kept up to date and kept in a form that permits identification of the data subject only for as long as is necessary for the purposes for which the data was collected. Certain information must be given to data subjects about the processing of their personal data.
The consent of data subjects is required before processing personal data unless an exemption applies (such as to enable performance of a contract to which the data subject is a party, to protect the data subject’s life, or to allow the data controller to perform a public service entrusted to it).

Finally, the European General Data Protection Regulation (GDPR) entered into force on 25 May 2018. It strengthens and establishes a harmonised data protection framework for individuals in the European Union and also applies to third country companies offering their services within the European Union. Individual rights such as the right of information, access, portability and to erase personal data are reinforced. In France, the CNIL has the power to punish any obstacle to the Regulation.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

Correspondence between outside legal counsel is privileged. It is confidential to the lawyers in question and may not even be disclosed to the lay client. This privilege may be waived by the counsel themselves (but not by the lay client). When counsel wishes a particular piece of correspondence to be capable of disclosure, it will be marked as being ‘official’ or ‘not confidential’. While confidential correspondence between the parties themselves will normally not be admissible in proceedings, this is not on the grounds of privilege but simply upon the confidentiality agreement between the parties, which can be set aside by the court.

Privilege does not attach to correspondence with or between in-house lawyers.

There are no specific rules governing privilege between French and foreign lawyers. The European Code of Conduct, which has legal force by way of incorporation in the rules governing the profession, gives no confidential character to exchanges between foreign lawyers unless specifically agreed. Whenever a French lawyer works with a foreign correspondent, it is important to check on the rules of privilege and professional conduct that apply to the foreign lawyer and ensure that they provide sufficient protection for the client’s interests. If not, the best that the lawyers can do is to establish a contractual framework from the outset in which their correspondence and exchanges will take place to ensure that professional secrecy and confidentiality is not breached. There is no certainty, however, that any such contractual protection will be sufficient to protect fully the client’s interests.

ii Production of documents

French law requires litigants to prove the facts on which they intend to rely. Judgments can only be based on the evidence produced during the proceedings. Evidence may be introduced in two ways: disclosures by the parties or enquiries supervised by the court.

While no party is required to produce all documents relevant to its case, court proceedings are governed by the adversarial principle, which implies that each party must be able to examine the documents relied upon by the other. The production of documents must be spontaneous and timely. The judge may refuse to take account of documents produced late, although this power is rarely exercised.

The parties are obliged to cooperate with the court in its enquiry into the facts of a dispute. The court may draw such inferences as it sees fit from a failure by a party to cooperate. Failure to comply with disclosure orders may be punished by a fine. The same may apply to third parties if there is no legitimate reason for the documents to be withheld.
There are no specific classes of document that do not require disclosure, subject to the rules on privilege (see Section V.i). Conversely, there are no specific rules regarding documents stored overseas, whether electronically or otherwise. Similarly, there are no specific rules regarding electronically stored documents and their reconstruction. All such documents, if within the possession or control of a litigant, may be subject to production if relied upon by that party or if ordered by the court.

There are no specific rules regarding disclosure by third parties, and indeed the measures available to the court include orders on third parties to disclose documents that are not privileged.

In general, documents obtained by disclosure in civil proceedings may not be used for any other purpose than as evidence in those proceedings.

VI ALTERNATIVES TO LITIGATION

i Arbitration

Arbitration is a widely used form of ADR in France. The original French international arbitration rules contained in the CPC predate the first UNCITRAL Model Law and were considered to be flexible and among the most liberal of all arbitration rules. French law on arbitration has been reformed by a decree that came into force in May 2011 designed to render the legal regime applicable to both domestic and international arbitrations taking place in France more user-friendly. The fundamental principles of the old law have been retained; what the new law has done is to codify much of the case law that has allowed the old law to evolve over the past 30 years.

Arbitration is the submission of a dispute by agreement for resolution by a panel of private decision-makers (composed of an odd number of members – usually either one or three) who are mandated to apply either the substantive law of a given jurisdiction or to decide the case on the basis of equity. The proceedings may be brought under the auspices of an institutional body, such as the International Chamber of Commerce (ICC), whose headquarters are based in Paris, or the French Arbitration Association, or on an ad hoc basis where the arbitrators determine and supervise all aspects of the procedure to be followed. Typically a written phase of the procedure is followed by a hearing of oral evidence and argument. The arbitral tribunal issues an award that is enforced by way of a court decision granting an exequatur order.

Only French law on international arbitration is considered here. The rules of French law on international arbitration apply provided that the interests of international trade are at stake and that the case bears some connection with France (e.g., the chosen place of arbitration is France). The interests of international trade will be concerned each time the dispute relates to an arrangement involving cross-border movement of goods, services, payments or involving the economies of two states.

The rules are distinct and distant from the French national legal system. The parties and the tribunal are given the widest possible freedom to organise the procedural aspects of the arbitration.

International arbitration agreements are not subject to any formal requirement or content. Provided that they evidence the intention of the parties to resort to arbitration, they are enforceable.
If the parties encounter difficulties in constituting the arbitral tribunal, they may apply for assistance to the president of the superior court who has authority to nominate the members of the tribunal in place of the parties.

French international arbitration law grants the parties and the arbitral tribunal wide freedom to organise the arbitration proceedings, the only true limits being due process and respect of the principles of French international public policy (since a failure to respect either will constitute grounds for annulment of the award).

The general principle is that French courts will interfere in arbitral proceedings only on an exceptional basis and even then only when the urgency of the circumstances so require.

There is no requirement as to when and in what form the award is to be issued (as opposed to domestic arbitration, which imposes an extendible six-month period). However, parties and arbitrators are bound to a duty of loyalty and celerity in the conduct of the proceedings. No appeal lies against an international arbitration award (again as opposed to domestic arbitration, where awards may be subject to appeal before the court of appeal if parties agreed to it). The only recourse is for annulment on certain limited specific grounds, namely: that the arbitrator wrongly asserted or denied jurisdiction; that the tribunal was irregularly constituted; that the arbitrator exceeded his or her terms of reference; that the principle of due process was breached; or that recognition or enforcement of the award would be contrary to French international public policy. The courts interpret the last ground very strictly, and apply a high threshold for a finding of violation of international public policy. The courts will never review the merits of the award or set it aside for a wrong application of the law. Courts indeed follow a minimum control approach except in cases of alleged corruption. Since 2011, the parties can waive (in writing and in an express and specific waiver) their right to bring an action for annulment to challenge the validity of an arbitral award before French courts.

The arbitral tribunal will normally make an order for costs as part of its award. The general practice today is for the tribunal to order at least part of the costs to follow the event.

France has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958. The New York Convention came into effect in France on 24 September 1959. The only outstanding reservation made by France is the ‘reciprocity reservation’ to recognise and enforce only awards that are made in the territory of another contracting state.

The rule that the enforceability of arbitral awards is suspended if there is an appeal against the grant of an order for enforcement (or an action for annulment of the award) has been reversed by the 2011 decree. The filing of an appeal no longer suspends the enforceability of the award, although the court may stay or set conditions for enforcement of an award if enforcement could severely prejudice the rights of one of the parties, including by ordering payment into court of award amounts in the event of an appeal to avoid a successful appellant being unable to recover such amounts paid to the award creditor if such amounts are substantial.

The general rule as to the arbitrability of any given matter is set forth in Article 2059 of the Civil Code, which provides that ‘all persons may agree to arbitration in relation to rights which they are free to dispose of’. Article 2061 of the Civil Code has been rephrased following the 18 November 2016 reform of the Justice in the 21st Century to state that ‘where one of the parties has not contracted in the course of his or her professional activity, the clause may not be opposed to him or her’. Arbitration is therefore an available dispute resolution mechanism for non-professionals as well, provided that they do not oppose it.
Certain types of dispute cannot, however, be submitted to arbitration:

- matters of civil status and capacity of individuals;
- matters relating to divorce or judicial separation of spouses;
- disputes concerning public communities and public establishments (i.e., municipalities);
- matters relating to domestic employment (except for arbitration agreements concluded after the termination of the employment contract);
- bankruptcy proceedings (although arbitration is possible where provided for by the underlying contract for claims against the insolvent debtor); and
- matters relating to the validity of compulsory licensing or the validity, nullity and infringement of patents (although arbitration is possible where ownership or exploitation of the patent is the main issue).

ii Conventional mediation and conciliation

Decree No. 2012-66, which entered into force on 20 January 2012, promulgates a separate book (Book V) of the CPC, dedicated specifically to the amicable settlement of disputes. It provides a common definition for conventional mediation and conciliation, directly inspired by Directive 2008/52/CE of 21 May 2008. Yet, while some of the new provisions apply to both mediation and conciliation, some are specific to one or the other procedure.

As to common provisions, the Code provides that both the extrajudicial mediator and the conciliator must accomplish their mission with impartiality, competence and due diligence. The Decree does not refer to any independence requirement, however, and simply refers to Article 21-3 of law No. 95-125 of 8 February 1995 concerning confidentiality.

There is a significant difference between the level of training required for mediators and for conciliators. Mediators are not required to have received specific mediation training or to have any experience of mediation, as long as they are qualified to understand the nature and object of the dispute. By contrast, conciliators are unpaid officers of the court, who must have had at least three years of legal experience.

In addition, while the views of the conciliator are not binding upon the parties, the agreement reached through mediation can be given binding force with the consent of both parties, which is a novelty brought by the ordinance of 16 November 2011. The binding force of such an agreement will then be recognised in all Member States of the European Union.

Pursuing the reform of the Law on the Modernisation of the Justice System in the 21st Century, the Law on Programming 2018-2022 and Reform of Justice has made the obligation to resort to an alternative method of dispute resolution before the *Tribunal judiciaire* applicable as a matter of principle. Thus, any application not exceeding a certain amount – which will be fixed by decree – that does not comply with this procedural requirement will be considered inadmissible.

The 2019 reform also regulated online dispute resolution services covering arbitration, mediation and conciliation. These third-party service providers may receive a certification if they comply with the requirements contained in the law.
iii Participatory procedure

In addition, the Decree of January 2012 provides for ‘participatory procedure’, a negotiation mechanism that is both procedural and contractual in nature. This amicable method of dispute settlement was first introduced into the Civil Code by Law No. 2010-1609 of 22 December 2010. The 2012 Decree defines its scope and effects, and deals with confidentiality issues.

iv Other forms of alternative dispute resolution

In certain specialist areas French law provides for specific tribunals, commissions or quasi-judicial organs with jurisdiction (examples include matters of social security, competition, journalism and broadcasting). Proceedings before such specialist tribunals or quasi-judicial bodies are governed by their own particular rules.

VII OUTLOOK AND CONCLUSIONS

The Law on Programming 2018-2022 and Reform of Justice aims at providing a more accessible and effective civil justice system for litigants. It modifies the first instance court system with the merger of the small-claims courts with the High Courts. Meanwhile, the law aims to relieve the caseload of the first instance courts by promoting alternative dispute resolution methods.

This landscape is also shaped by the necessity of the French judicial system to adapt to contemporary economic and international issues and by the desire to attract international disputes both in state court litigation and arbitration. This was the main goal of the International Chamber of the Paris Court of Appeal. It will be interesting to see how successful a tool it will become, and whether it will find its place among the various international dispute resolution venues.
Chapter 10

GERMANY

Henning Bälz and Carsten van de Sande

I  INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

The Federal Republic of Germany is a federation consisting of 16 states. While, in theory, the competence for enacting legislation lies with the federal states, federal law governs almost all areas of private law.

Germany has a civil law system characterised by codified legal provisions. Comprehensive statutes and regulations cover nearly all aspects of law. Nevertheless, court rulings, in particular rulings by the federal courts, play a significant role in the development and interpretation of the law.

Courts in Germany can be classified into five categories: ordinary courts including civil and criminal courts, which are competent for all lawsuits unless a specific rule provides for the competence of one of the following courts: labour courts competent in all matters related to labour issues; administrative courts dealing with lawsuits between a state authority and a citizen in matters of administrative law comprising, for example, municipal law, public construction law, trade concessions and environmental law; social courts in cases involving specific social law matters; and financial courts in tax matters. In addition, the jurisdiction of the Federal Constitutional Court and the European Court of Justice play an important role.

In cases involving matters of civil law, the court of first instance is either a local court or a regional court. Local courts have jurisdiction for disputes regarding claims in an amount of up to €5,000, for disputes between a landlord and a tenant and for matters of family law. In any other case, proceedings commence before a regional court. Matters before local courts are handled by a single judge and matters before regional courts by chambers consisting of one presiding judge and two associate judges (with the possibility to assign a case to one of the judges). Regional courts may also establish special chambers for commercial matters consisting of one professional judge and two lay judges from the business community. These chambers have jurisdiction over most commercial disputes on application by one of the parties.

The court of second instance is either the regional court (in cases commencing before a local court) or the higher regional court. In principle, these courts decide on appeals based on both factual and legal issues, although it must be observed that the parties to a lawsuit must submit all relevant facts in the proceedings of first instance, leaving only limited scope to introduce new facts in appeal proceedings. Senates of the higher regional court consist of one presiding and two associate professional judges.

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In certain cases, a party may submit a further appeal against a decision of a higher regional court with the Federal Supreme Court, which will review the legal aspects of the case only and will neither examine factual issues nor take evidence. Senates of the Supreme Court comprise five professional judges.

Jury trials and lay judges – with the exception of commercial law matters as described above – are alien to German civil litigation proceedings. It is solely the (professional) judge’s task to decide matters of law and of fact.

A court will always render a decision as to which party is to bear the costs of the proceedings, comprising court fees as well as the other party’s expenses. The general rule is that each party bears the costs to the extent it loses the lawsuit. For example, if A pursues a claim in the amount of €1,000 against B and obtains a ruling providing for the payment of €750, A will bear one-quarter of the costs, whereas B will bear three-quarters of the costs. The total reimbursable amount is subject to, and limited by, statutory law.

II THE YEAR IN REVIEW

i Federal Supreme Court upholds legal tech provider’s business model

In a landmark decision, the German Federal Supreme Court set out the conditions under which the business model of so-called legal tech providers is lawful. The case involved a legal tech provider, which operates an online portal that enables consumers to determine whether the rent payable under their residential lease agreements exceeds the statutory cap imposed in certain areas of Germany under a 2015 law. If the online portal determines that the rent is excessive, the consumer is given the opportunity to instruct the legal tech provider to recover the excess rent paid by the consumer. To that end, the consumer must assign its claims to the legal tech provider, which is then entitled to assert the consumer’s claims against the landlord in and out of court, but is not entitled to enter into a settlement without the consumer’s consent. In consideration of its services, the legal tech provider receives 33 per cent of any amount recovered from the landlord.

The question at issue was whether the various services performed by the legal tech provider were covered by the provider’s licence to act as a collection agent or whether they constituted legal advice and, thus, were not covered by the provider’s licence. The court held that the specific business model of the specific legal tech provider was still covered by the provider’s collection agency licence because the provider’s activities – including the operation of the online portal – were aimed at the collection of the consumers’ claims. In particular, the legal tech provider did not provide legal advice beyond what is strictly necessary in connection with the collection of the consumers’ claims and, because a settlement of the claims required the consumers’ consent, the legal tech provider’s business model did not give rise to a conflict of the legal tech provider’s interest with those of the consumers.

The Federal Supreme Court made clear that its decision related to the facts of the case at hand and emphasised that the question of whether a legal tech provider’s business model was lawful must be decided on a case-to-case-basis taking into account the specifics of each individual case. In spite of such cautions, the decision is widely viewed by consumer advocates and consumer protection associations as a milestone for the enforcement of small claims with the support of legal tech. If the conditions set out by the Federal Supreme Court

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2 Docket number VIII ZR 285/18.
are met, the so-called ‘assignment model’ may, therefore, prove to be a viable alternative to other means of collective consumer redress (such as the recently introduced consumer model case proceedings).

ii Federal Supreme Court awards damages for violation of choice of forum clause

The Federal Supreme Court held that, where a contract provides for a choice of forum clause in favour of the German courts, a contracting party that initiates proceedings in a US court may be liable to the other contracting party for the costs incurred in connection with the US proceedings.

In the case decided by the Federal Supreme Court, a German and a US telecommunication company had entered into a contract under which each party was obligated to make transmission capacity in its network available to the other party without any further consideration. The contract provided for the applicability of German law and the exclusive jurisdiction of the courts at the seat of the German party. After negotiations regarding an increase of the transmission capacity failed, the US party initiated proceedings against the German party in a federal district court in the US requesting an increase of the transmission capacity. The district court dismissed the US party’s claims because it did not have jurisdiction due to the parties’ choice of forum.

The German party sued in the competent German court seeking damages in the amount of the lawyers’ fees incurred in connection with the US proceedings. The Federal Supreme Court held that the parties’ choice of forum did not merely constitute a (procedural) agreement on the competent court, but also entailed each party’s obligation under applicable German law to initiate proceedings only in the chosen forum. Accordingly, if one party breached that obligation, the other party would be entitled to damages under German law. Due to the American rule on costs, the German party had not been able to seek reimbursement of its lawyers’ fees from the US party in the US proceedings. The German party, therefore, was entitled to request compensation for those costs under German law.

iii Failure to recognise the res judicata effect of an arbitral award may violate German public policy

According to a recent decision by the Federal Supreme Court, failure by the arbitral tribunal to recognise the res judicata effect of a prior arbitral award may constitute a violation of German public policy with the consequence that the arbitral award must be set aside.

The case decided by the Federal Supreme Court involved two arbitral awards issued in subsequent proceedings between the same parties. The respondent had appointed the claimant as a commercial agent. After the respondent terminated the agency agreement, the claimant initiated a first arbitration against the respondent claiming commission payments for deliveries made in 2012. The arbitral tribunal dismissed the claimant’s claims. The claimant then initiated a second arbitration in which the claimant sought an award ordering the respondent to consent to an audit of its books and records for the time period from January 2011 until July 2013. The arbitral tribunal dismissed the claimant’s claims arguing that it was bound by the res judicata effect of the arbitral tribunal’s decision in the first arbitration that
the claimant did not have a commission claim. In the absence of a commission claim, the claimant also did not have any ancillary claims (such as a claim to conduct an audit of the respondent’s books and records).

The Federal Supreme Court confirmed that, as a general matter, arbitral awards are capable of having a res judicata effect. Accordingly, unless the parties to the arbitration had agreed otherwise, the arbitral tribunal in the second arbitration was bound by the award issued in the first arbitration. However, the court concluded that in the case at hand the arbitral tribunal in the second arbitration had failed to recognise that the award in the first arbitration was limited to commission claims for 2012. Accordingly, the res judicata effect of the first award did not prevent the arbitral tribunal in the second arbitration from deciding whether the claimant was entitled to an audit of the respondent’s books and records for 2011 and 2013. Since the second award was based on the arbitral tribunal’s failure to recognise the true scope of the res judicata effect of the first award, the second award had to be set aside.

According to the Federal Supreme Court, the aforementioned principles only apply where the scope of the res judicata effect of the prior arbitral award is indubitably evident from the prior award. Something else may apply if the scope of the prior award is not clear or must be determined by interpretation. In that case, failure by a subsequent arbitral tribunal to recognise the res judicata effect of the prior award may not necessarily result in the set aside of the subsequent award.

III COURT PROCEDURE

i Overview of court procedure

The principal statute governing private law proceedings is the German Code of Civil Procedure. The Code contains rules governing proceedings before state courts as well as ad hoc arbitration proceedings. Further, it deals with the enforcement of judgments of German and foreign courts, as well as of arbitral awards.

Other relevant civil procedure laws are the Act on the Constitution of Courts, the Act on Enforcement of Claims with respect to Real Estate, the Lawyers Remuneration Act, the Court Fees Act and the Act on the Remuneration of Expert Witnesses, Witnesses and Others. Finally, several EU directives and regulations on the matter of civil procedure apply, and supersede domestic German law.

ii Procedures and time frames

Any ordinary proceeding starts with the filing of a statement of claim. The timing mainly depends on the applicable limitation period, which is a matter of substantive law. The general limitation period is three years and commences on the last day of the year in which the claimant became aware of the existence of the claim and the identity of the debtor, or would have been so aware had he or she not shown gross negligence. In principle, this period applies to claims for the performance of contracts, damages, tort, restitution or unjust enrichment. The filing of a statement of claim suspends the applicable limitation period.

The German judicial system requires the parties to submit all facts supporting their case and there are only limited means to have the opponent produce documents (see below). The concept is that each case should be dealt with within one single oral hearing, although it is not unusual that more than one hearing is held, for example to allow for the taking of evidence or the discussion of issues pointed out in an earlier hearing. In preparation for
the hearing, a judge may either give the parties the opportunity to present their case in a preparatory oral hearing or – as is more often the case – order the parties to submit their arguments in written briefs.

Although the Code of Civil Procedure provides for the principle that the decision of a court shall be based on the statements made in the oral hearing, the focus in almost all cases is on the written submissions of the parties (with the exception of the taking of evidence). The parties should always ensure that they plead all factual and legal submissions relevant to their case in writing. Written submissions are to be filed within the time limits set out by the judge in his or her discretion. If parties fail to comply with such time limits without proper excuse, late submissions may be precluded.

Court proceedings must be conducted in German. Since the beginning of 2010, however, proceedings can be conducted in English before specific courts in certain areas of Germany. Accordingly, complaints and other written submissions by the parties may be in English, and the court’s decisions would also be rendered in English. This pilot project is an initiative to establish special ‘chambers for international commercial matters’ at the regional court level. The initiative is aimed at increasing the attractiveness of German courts as a forum for international commercial litigation.

Oral hearings often take a surprisingly short time, during which the parties primarily refer to their written briefs. Permitted sources of evidence are documents, inspection by the court, witness statements, expert opinions and, to a rather limited extent, party testimony. As a general rule, written witness statements do not qualify as evidence. At the conclusion of a hearing, the judge usually sets a specific date on which he or she will render a decision, be it a judgment or an order as to the further procedure.

The Code of Civil Procedure provides that the court shall consider at all times during the proceedings whether a settlement can be reached. In particular, courts are required to enquire whether an amicable solution is an option prior to the first oral hearing. It is at the discretion of the judge how far he or she pursues such an enquiry. Whereas some judges merely ask whether the parties wish to settle the case and, if this is denied, promptly enter into the proceedings, other judges discuss their preliminary evaluation of the case with the parties in detail and make concrete proposals as to what the terms of a settlement could be.

While the duration of any litigation depends on the complexity of the case and, to a large extent, is subject to the discretion of the court, the average duration from the initiation of an action until the issuance of a judgment is in the range of seven months (local courts) to 15 months (regional courts) in the first instance and between 22 months (regional courts) and 27 months (higher regional courts) in the second instance.

In addition to regular court procedures, a party may initiate a number of alternative proceedings. Summary collection proceedings provide for a rapid procedure by which the applicant may obtain a collection order without an oral hearing if the subject matter is the payment of a certain sum of money. The evaluation by the court is limited to whether the claim appears to be plausible. Upon written objection by the defendant, the dispute is transferred to the competent court and the matter turns into a regular lawsuit. Generally speaking, a collection procedure is only an option if the defendant is likely to pay immediately or fail to respond, or if a limitation period needs to be suspended on short notice.

Further, a plaintiff may initiate summary proceedings that allow for documents or a bill of exchange as the only means of evidence. If a judgment is rendered against the defendant,
the latter may ask for the judgment to be set aside in subsequent proceedings. If the defendant makes use of this right, the dispute remains pending as a regular lawsuit, entitling both parties to resort to regular means of evidence.

Along with these options, a party may initiate ancillary proceedings, such as a procedure for the taking of evidence independent of a pending lawsuit or proceedings for interim measures.

Two different kinds of interim measures exist: attachment orders and preliminary injunctions. Both are provisional court orders issued in summary proceedings to obtain security for the future execution of a claim. While an attachment order secures satisfaction of monetary claims, a claim for payment of a purchase price or damages, for example, a preliminary injunction may be issued with regard to a non-monetary claim, for example a claim for the omission of a contractual violation.

To support a motion for interim measures, the applicant must submit facts establishing the jurisdiction of the court, the potential claim and the reasons why interim relief is required. In doing so, the applicant – unlike in regular proceedings – is not required to provide full evidence but may rely on prima facie evidence. In contrast to regular proceedings, this includes the submission of written affidavits regarding the facts of the case by the applicant or by third parties.

The execution of interim measures follows, in principle, the same rules as the enforcement of a regular judgment. Enforcement is restricted, however, to measures that safeguard the applicant’s interests without fully satisfying the claim.

Proceedings concerning provisional remedies are handled with priority and can be extremely fast. In urgent cases, a judge may decide without an oral hearing. Thus, in practice, it may take no longer than a few days, sometimes only hours, to obtain a court order or injunction.

In any case, the defendant may oppose the order of the court. Upon such a motion, the court will decide by judgment. Appeals against such judgments follow the general rules.

iii Class actions

In Germany, class actions in a formal sense are not permitted. It is a fundamental principle of German law that a litigant must appeal to the court as an individual to benefit from, or to be bound by, civil litigation.

The Capital Market Model Case Act, however, provides the possibility to establish certain factual or legal aspects of claims on behalf of a group of plaintiffs. The Act is designed for certain capital market mass disputes, claims for damages due to false or omitted public capital markets information or claims based on an offer under the Securities Acquisition and Takeover Act. In these disputes, the court of first instance may initiate a model case before the higher regional court upon the application of the plaintiff or the defendant, seeking the establishment of the existence of certain conditions or even the mere clarification of specific legal questions. The decision of the higher regional court will only be binding on the parties whose cases are already pending. The mere registration of a claim with the higher regional court is sufficient to suspend the running of the statute of limitations if the claim is based on the same facts as the model case proceedings.

On 1 November 2018 a new law introducing model case proceedings came into force. Unlike other forms of collective redress (e.g., under the Capital Market Model Case Act), this new procedural tool for collective redress is broad in scope and covers all disputes involving consumers on the one side and enterprises on the other side.
The action aims to establish whether certain factual or legal requirements for the existence of claims or legal relationships between consumers and a business are met. However, it is limited to actions aiming at declaratory judgments and does not allow for filing payment claims. The focus on declaratory objectives (mirroring the Capital Market Model Case Act) is designed to resolve certain recurring issues of fact or law that concern all affected consumers alike. It remains to be seen how this criterion will be interpreted by courts, for example, when it comes to whether or not an alleged breach of a contract or tortious act caused a certain (kind of) damage.

Actions under the new law may be brought only by certain qualified institutions that, among other things, have a certain number of members, have been registered for a certain time and do not file model cases in order to make a profit. When filing the suit, the institution must show that the declaratory judgment sought will be relevant for claims or legal relationships of at least 10 consumers; the action becomes admissible if at least 50 consumers register their claims or legal relationships within two months after the public announcement of the model case action. In the further course of the proceedings, consumers may register until the day before the first oral hearing; they may withdraw their registration until the end of the day on which the oral hearing took place.

An amicable settlement reached by the institution that lodged the action and the defending enterprise will be binding on every consumer registered at the time at which the court approves the settlement unless that registered consumer opts out of the settlement within one month after he or she was informed about the settlement. The settlement only comes into force if fewer than 30 per cent of registered consumers opt out.

A judgment rendered in a model action is binding on the court dealing with the lawsuit between a registered consumer and the defending enterprise. Thus, after termination of the model case proceedings, consumers who have registered their claims may file individual suits against the defendant in which the competent court will be bound by the established legal and factual aspects of the model case.

In addition to the new model case law, some specific statutes provide for actions by organisations on behalf of groups of individuals: under the Act on Actions for Injunctions, 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.

### Representation in proceedings

The question of whether a party must be represented by a lawyer or whether it is entitled to represent itself depends on the court with which the case is pending. In all lawsuits before a regional court, a higher regional court or the Supreme Court, as well as in family courts, a lawyer must represent the parties. In all other legal proceedings the parties may represent themselves.
v  Service out of the jurisdiction

Service Regulation No. 1393/2007 of 13 November 2008 governs the service of documents within the EU. The Hague Service Convention, the Hague Civil Procedure Convention and further bilateral treaties apply in the case of service of documents from Germany to any other foreign country.

Under the Service Regulation, each Member State must establish ‘transmitting and receiving agencies’ responsible for the transmission and receipt of the relevant documents. The transmitting agency issues the documents accompanied by a standard form to the foreign receiving agency. In Germany, the transmitting agency is the competent court initiating the service, and the receiving agency is the local court located in the district in which the document shall be served. The receiving agency located in the state of the defendant will examine the request and take all necessary steps to serve the document as soon as possible. It will serve the document in accordance with its domestic law or, if possible under its domestic law, by the method requested by the German courts.

Under the Hague Convention, each contracting state must designate a ‘central authority’, which, in Germany, is typically the Ministry of Justice of the respective federal state. Thus, a German court will first send the request for service to the Ministry, which in turn will transfer the request to the competent authority of the foreign state. The foreign central authority will then effect service in the same manner as under the Service Regulation.

Within the scope of the Hague Convention, the procedure described above applies to the service of statements of claim and initial court orders. For any subsequent document, the German court will request that the defendant nominates a service agent or attorney in Germany. If the defendant fails to comply with the order, the court will send the documents to the defendant’s foreign address by regular mail. This does not apply, however, under the Service Regulation. The Supreme Court has declared that the service of documents within the EU must adhere to the requirements provided for therein (until a domestic service agent or attorney is nominated). 4

These rules apply regardless of whether the recipient is an individual or a corporation.

vi  Enforcement of foreign judgments

With effect from 10 January 2015, Regulation No. 1215/2012 (Brussels Ia Regulation) replaced Enforcement and Recognition Regulation No. 44/2001. The main features of the recast Regulation are the abolition of exequatur, changes to the lis pendens provisions addressing the problem of ‘torpedo actions’ as well as amendments to the rules relating to jurisdiction agreements. In addition, the Lugano Convention on Recognition and Enforcement applies to judgments of the Swiss, Norwegian and Icelandic courts. German domestic law may apply, either if these rules do not apply, or if it is necessary to apply German law in order to complete the provisions of bilateral treaties. The relevant provisions are contained in the Code of Civil Procedure and in the Recognition and Enforcement Implementation Act.

Under the Brussels Ia Regulation, a creditor seeking enforcement of a foreign judgment must present a copy of the judgment and a standard certificate issued by the court that rendered the decision to the enforcing court. It is no longer necessary to file a request for execution as it was under the exequatur procedure. This process is in line with Regulation

4  Docket numbers VIII ZR 114/10 and VIII ZR 190/10.
No. 805/2004, which abolished the exequatur proceedings for uncontested claims in 2005 and introduced a uniform European enforcement order that is directly enforceable in all EU Member States (for which a creditor may apply to the competent court of its own jurisdiction).

The grounds for non-recognition of a judgment under both the Brussels Ia Regulation and the Lugano Convention are essentially the same as under the Code of Civil Procedure. They are listed in Article 45 of the Brussels Ia Regulation, Article 34 of the Lugano Convention and Section 328 of the Code of Civil Procedure. The only difference is that, under the Code, recognition is also denied if reciprocity is not guaranteed or if the foreign court has no jurisdiction in accordance with German law.

**vii Assistance to foreign courts**

Service of foreign documents follows the same rules as service of German documents abroad. In addition, under the Brussels Regulation No. 1206/2001, any court of a Member State may request that a German court takes evidence in Germany. In doing so, it may directly approach the competent German local court.

German authorities will also execute requests for the taking of evidence under the Hague Evidence Convention and the provisions of various bilateral treaties. Under the Hague Evidence Convention, the foreign authority sends a letter of request to the designated German central authority (usually the Ministry of Justice of the relevant German federal state). Such a letter must comply with several substantive and formal requirements and be accompanied by a certified translation. The German authority may refuse execution only on limited grounds.

Requests of foreign courts for information on German law are subject to the European Convention on Information on Foreign Law. The foreign court will send its request to the Federal Ministry of Justice in Berlin.

**viii Access to court files**

In principle, oral hearings, including the court’s decision and final judgments, are public (exceptions apply to proceedings before family courts). Only the parties to the litigation, however, may inspect the court files. Any other person seeking inspection of files must demonstrate a legally recognised interest to inspect all or part of the court records of a particular case. Another possible way for third parties to gain access to the files is to intervene in the pending action if the requirements of a third-party intervention are met.

**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, where otherwise a plaintiff would be unable to pursue a claim.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

According to the Federal Lawyers Act, a lawyer may not represent parties with conflicting interests. In contrast to many other jurisdictions, the prohibition against prevarication does not apply merely when the representation of one client may impair another client’s (legal or commercial) interests. A conflict of interests is rather only deemed to exist where a lawyer advises or has advised another party (or is or has been active in another capacity, for example as a judge, arbitrator, public prosecutor or notary) in ‘the same legal matter’.

Under certain circumstances, a lawyer must disclose potential conflicts of loyalty with existing clients, even if no conflict of interest is given: the Supreme Court held that a lawyer must inform a new client if the new client’s opponent frequently retains that lawyer or law firm in other legal matters.\(^5\) 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).

\(^5\) Docket number IX ZR 5/06.
ii Money laundering, proceeds of crime and funds related to terrorism

Under the Money Laundering Act, lawyers are subject to certain obligations aimed at detecting and preventing money laundering and the financing of terrorism. These obligations apply where a lawyer is involved on behalf of a client in the planning or execution of transactions related to the purchase or sale of real property or businesses, the administration of money, securities or other assets, the opening or administration of bank accounts, the establishment, operation or management of trust companies, companies or similar entities or structures and the procurement of funds required for such purposes.

Most importantly, lawyers must determine and verify the client’s identity and, where the client is acting for the account of a third-party beneficiary, also the beneficiary’s identity. The Money Laundering Act, inter alia, imposes the following further obligations on lawyers: to implement adequate internal safety measures to prevent the lawyers’ involvement in money laundering and terrorism financing, to continuously monitor the relationship with the client for suspicions of money laundering and terrorism financing, and to report any such suspicions to the competent authorities. Certain exceptions apply where an ongoing relationship with the client exists if the lawyer has already complied with the identification and verification requirements in connection with a previous mandate for that client. Since 2011, however, lawyers have a general obligation to determine and verify the identity of all clients and continuously monitor the relationship.

iii Data protection

The data protection requirements applicable to private data controllers are set out in the General Data Protection Regulation (GDPR) and the recast Federal Data Protection Act. As a general rule, the collection, processing and use of personal data is prohibited except to the extent permitted by German privacy laws. There are no provisions in the German privacy laws that expressly deal with, or generally permit the collection, processing and use of personal data for purposes of court proceedings. Whether, and to what extent, the access to and review of material containing personal data by legal counsel and the processing of such material by legal outsourcing service providers is permissible in the absence of consent by the data subjects depends on the circumstances of the individual case.

Since there is in principle no pretrial discovery, the access to, and review by legal counsel of, material containing personal data will typically not relate to material in the possession of the other party to the court proceedings, but to material in the possession of the lawyer’s own client. As a general rule, the collection, processing and use of personal data (or material containing personal data) for purposes of asserting claims of the data controller or defending the data controller against claims by third parties is only permissible to the extent necessary to protect a legitimate interest of the data controller.

Where a third party reviews the material on behalf of the data controller, the rules governing data processing by agency may apply (which require the implementation of additional contractual, operational and technical safeguards). This will typically not be the case where legal counsel reviews the material for purposes of representing its client in court proceedings. Review of the material by a legal outsourcing services provider is, however, generally considered to constitute data processing by agency. Where the legal outsourcing services provider is located in a country outside the European Economic Area (EEA), whose
laws do not provide for an adequate level of data protection, the data controller will have to ensure by contract that the service provider adheres to data protection standards that are equivalent to those applicable within the EEA.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

German law protects communications between a lawyer and the client by recognising a lawyer’s right to refuse to testify in court in respect of matters to which the lawyer’s professional duty of secrecy extends, namely all matters of which the lawyer becomes aware in the exercise of his or her profession. This ‘lawyers’ privilege’ also applies to the production of documents in the lawyer’s possession. It does not, however, apply to documents in the possession of third parties, including the client, even where the documents have been prepared by a lawyer.

In criminal proceedings, the courts are prohibited from ordering the seizure of written communications between the defendant and his or her lawyer as well as the lawyer’s files. By extending the application of certain provisions of the Code of Criminal Procedure, the German legislator promoted equal treatment of the counsel of defence and all other lawyers in criminal proceedings. These rules apply, mutatis mutandis, to administrative proceedings, for example investigations by the Federal Cartel Office or other regulatory authorities.

Lawyers’ privilege also applies to foreign lawyers practising in Germany, provided that they have become a member of the Bar association at their place of business in Germany.

In the past, courts have been reluctant to apply the lawyers’ privilege to in-house lawyers, while scholars and practitioners have generally advocated for the extension of lawyers’ privilege to them. In 2010, the European Court of Justice held that the lawyers’ privilege does not apply to communication with in-house lawyers owing to the fact that they are not independent of their clients. The court elaborated that a coherent interpretation and application of the lawyers’ privilege throughout the European Union is crucial to ensure equal treatment for all companies subject to inspections by the Commission in antitrust proceedings.

ii Production of documents

Under the rules regarding burden of proof, each party to court proceedings is responsible for pleading and proving all facts relevant to support its claim or defence. As a general rule, litigants do not have to disclose information enabling the opponent to plead and prove its case. General pretrial discovery proceedings are alien to the German judicial system. Consequently, an obligation of the opponent or a third party to produce documents at a litigant’s request only exists where the requesting litigant has a right to demand the production of such documents under contract or statutory law. In the absence of such a right, a litigant must obtain all information required to support its case from publicly available sources or from documents in its possession or to which it has access.

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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6 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.\footnote{Docket number XI ZR 277/05.}

In practice, the courts tend to exercise the sweeping power afforded them by the new rule rather cautiously. To avoid ‘fishing expeditions’ by the litigants, courts will only order the production of documents where it is required in light of a party’s conclusive and specific assertion of concrete facts. The Supreme Court has eased these stringent requirements for claims based on an alleged infringement of intellectual property rights. Acknowledging the difficulties a plaintiff typically faces in proving that the defendant has infringed its intellectual property rights, the Court held that the defendant or a third party may be ordered to produce documents where an infringement of the plaintiff’s intellectual property rights appears likely.\footnote{Docket number X ZR 114/03.}

A court may not order the production of documents if such an order would constitute an undue and disproportionate burden. Moreover, third parties are not required to produce documents to the extent they are entitled under statutory law to refuse to testify as witnesses.

As regards documents located abroad, a court may, in principle, order a litigant or a third party to produce documents regardless of where they are located. Such an order is not regarded as an infringement of the sovereignty of the foreign state in which the documents are located, provided the court does not impose, or threaten to impose, sanctions in the event that the addressee does not comply with the order.

Where it is not possible to obtain the documents from abroad for legal or practical reasons, the court may instead request that the competent authorities in the foreign state assist with the taking of evidence in accordance with the procedures set out in Regulation (EC) No. 1206/2001, the Hague Evidence Convention, bilateral treaties and the Code of Civil Procedure.

The 9th Amendment of the German Act against Restraints of Competition will implement EU Directive No. 2014/104/EU on Antitrust Damages Actions and introduce pre- and in-trial discovery proceedings with regard to actions for damages in antitrust cases. The German cabinet agreed on the relevant amendment on 28 September 2016 and it entered into force on 9 March 2017.

The revised law provides litigants with pre- and in-trial discovery claims against the other party or third parties that are in possession of evidence required to establish a cartel-damage claim or defence. Litigants will be able to obtain a court order for the disclosure of documents. A plaintiff must prove to the court’s satisfaction that he or she is entitled to a cartel-damage claim, and specify the documents that shall be produced as exactly as possible on the basis of the facts accessible with reasonable effort. A defendant must show that a cartel damage litigation is pending against him or her and also sufficiently specify the documents.

The judge concerned will have to ensure that disclosure orders are proportionate and that confidential information is protected. He or she must also balance a party’s interest in favour of disclosure against the other party’s interest in keeping the documents undisclosed. Thus the court must pay particular attention to the protection of company secrets as well as to the scope and content of the documents demanded, and the costs of the production.
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
The principal arbitral institution in Germany is the German Arbitration Institute (DIS), whose revised DIS Arbitration Rules of 1 March 2018 provide parties with a framework applicable to both national and international proceedings. The DIS also rendered a set of supplementary rules for expedited proceedings designed to enable the arbitral tribunal to issue an award within six to nine months. Such ‘fast-track’ proceedings are increasingly used in connection with M&A transactions, for example to determine whether a party may withdraw from the agreement under a material adverse change clause. The DIS also adopted supplementary rules for corporate law disputes to implement decisions of the Supreme Court confirming the arbitrability of disputes regarding the validity of shareholder resolutions.

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).9

There is a clear trend towards arbitration in Germany, in particular in complex and international cases requiring a highly skilled tribunal with particular knowledge of foreign languages and law as well as of the subject matter of the dispute. Its arbitration-friendly legal framework and the increasingly recognised competence and effectiveness of its arbitral institutions makes Germany an attractive place for arbitration, even for those who are less familiar with the German language or legal system. The Supreme Court has furthered this development through several rulings reinforcing the independence and effectiveness of arbitral proceedings in Germany. According to the statistics of the DIS, the number of proceedings administered per year has more than trebled from 1998 to 2015 and rose to 160 cases in 2017.

### iii Mediation

The Mediation Act of 2012 transforms Directive No. 2008/52/EG into German law. The Act is confined to fundamental provisions, so that the mediator is free to organise the mediation proceedings at her or his discretion (unless provided for otherwise by the parties). The Act defines mediation as a confidential and structured procedure in which the parties, assisted

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9 Docket number III ZB 69/09.
by one or several mediators, voluntarily and on their own responsibility seek an amicable resolution of their dispute. It contains provisions aimed at ensuring the independence and impartiality of the mediator as well as the confidentiality of the mediation.

Provisions regarding the enforcement of agreements achieved in mediation proceedings were included in earlier drafts but not included in the Act. Given the limited scope of the Act, it is doubtful that it will have the positive impact on the acceptance of mediation as a means of dispute resolution expected by many proponents of the earlier, more ambitious bill.

The DIS Mediation Rules correspond to international standards and provide a detailed and comprehensive framework for mediation proceedings. Several other national and regional institutions have also adopted mediation rules, for example the Bundesverband Mediation in Wirtschaft und Arbeitswelt, the European Institute for Conflict Management, the Centrale für Mediation and several local chambers of commerce. The European Institute for Conflict Management has acquired a leading position in the field of business mediation in Germany.

In recent years, corporations and individuals alike have increasingly accepted mediation as a means of resolving disputes. Notwithstanding its rising acceptance, mediation still plays a relatively small role. The reason may lie within the court system. As described above, judges are obliged to initiate conciliation hearings prior to regular hearings and to foster amicable solutions at all stages of the court proceedings. Thus, the incentive to take recourse to alternative forms of dispute resolution outside the courtroom is small.

The Introductory Law to the Code of Civil Procedure authorises the federal states to require obligatory mediation procedures for certain types of claims (e.g., claims of up to €750, disputes between neighbours) as a prerequisite for access to state courts. Some federal states have made use of this option, and the results vary as to their success.

### iv Other forms of alternative dispute resolution

The other forms of alternative dispute resolution (ADR) available in Germany are expert determinations and dispute resolution boards (DRBs).

Parties commonly resort to expert determinations for disputes regarding technical or accounting questions, for example in connection with the determination of the purchase price in M&A transactions. They typically request that the expert produces a written opinion which may, depending on the parties’ determination, be either binding or non-binding.

DRBs are particularly popular in the field of construction law. They are project-specific, stand-by dispute resolution mechanisms established by contract between the parties to avoid the escalation of disputes. Although the mechanism has proved very successful in practice, there are no specific regulations in Germany.

The 2013 EU Directive on consumer ADR and the regulation on consumer online dispute resolution (ODR) are aimed at providing consumers and traders with a simplified, quick, low-cost, out-of-court procedure to settle their disputes. The directive has been directly applicable in the EU Member States since January 2016 and was implemented into German law in February 2016.

### VII OUTLOOK AND CONCLUSIONS

The past year has brought fundamental innovations, especially in the area of collective redress in Germany. The recognition by the Federal Supreme Court of the business model of a certain legal provider will likely cause other providers to emulate that model. Referring to the Federal Supreme Court’s decision, lower instance courts have recognised other legal tech providers’
business models. Together with the recently introduced consumer model case proceedings, this development will not only lead to more small consumer claims being brought in court, it will also result in increased competition between consumer protection associations (who have standing to initiate model case proceedings) and legal tech providers (who will assert claims that have been assigned to them by the consumers).

This development will be further exacerbated by the European Commission’s draft directive on representative actions for the collective protection of the interests of consumers. Under the draft directive, qualified consumer associations would not only have standing to bring declaratory actions aimed at determining certain questions of law and fact for all affected consumers, but could also seek injunctive or compensatory redress (i.e., seek damages). In order to substantiate their claims, the plaintiff-consumer associations would be entitled to demand the disclosure of documents and, thus, to conduct a discovery that may go significantly beyond the limited document production that parties can obtain in civil proceedings in Germany today. Implementation of the directive as currently drafted would entail fundamental changes to the present framework for collective consumer redress in Germany.

The law of collective (consumer) redress will continue to evolve, and only the coming years will show which of the various instruments introduced by the courts and the legislature will prevail and whether they will live up the expectations.
I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

Gibraltar is a British overseas territory and can generally be described as an English common law jurisdiction.

The territory of Gibraltar has its own legislature, known as the Gibraltar Parliament, whose powers are governed by the Constitution of Gibraltar 2006 (the Constitution), which empowers it to make laws subject to the Constitution. The Constitution, inter alia, enshrines the fundamental rights and freedoms of the individual.

Section 2(1) of the English Law (Application) Act (the Act) applies the common law and rules of equity to Gibraltar insofar as they are applicable to local circumstances.

Statutory law in Gibraltar mainly comprises laws passed by the Gibraltar Parliament, but certain English statutes also apply.

Gibraltar is part of the European Union through the United Kingdom’s membership on the basis that it is a European territory for whose external affairs the United Kingdom is responsible. European directives are transcribed into Gibraltar law by local acts of parliament. Pursuant to the European Communities Act, EU legislation and decisions can have direct effect in Gibraltar. Notwithstanding the United Kingdom’s and Gibraltar’s withdrawal from the European Union, the Government of Gibraltar has established a ‘Withdrawal Bill’ Team in preparing Gibraltar’s legislation for Exit Day. The European Union (Withdrawal) Act 2019 came into force in Gibraltar on 31 January 2019. It is the principal piece of legislation in Gibraltar’s statute book that will take Gibraltar out from the EU, with or without a deal. A whole raft of other legislative texts, technical notices and contingency measures have also been enacted and published.

In June 2019, the Legal Services Act 2017 (LSA) was partly implemented, with its full implementation expected by early 2020. The implementation of the LSA is the first regulatory overhaul of Gibraltar’s legal profession in 50 years. The aim of this legislation is to promote and secure the rule of law and good standards of behaviour and services. The LSA

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1 Stephen V Catania is a partner at Attias & Levy.
2 Section 32 of the Constitution.
3 Sections 1 to 18 of the Constitution.
4 The English statutes that apply to Gibraltar are those listed in the Schedule to the Act, and any other statute extended to Gibraltar by Order in Council or by express provision in the Act – see Section 3(1) English Law (Application) Act.
5 Sections 3 and 4.
establishes the Law Council and the Legal Services Regulatory Authority, which has been given various powers previously held by the Chief Justice of Gibraltar and the Registrar of the Supreme Court of Gibraltar, such as in the context of issuing practising certificates to solicitors. The LSA also includes a full definition of legal services and defines ‘reserved legal activity’ and will cover in-house counsel, government lawyers, legal executives and law firms.

Civil cases are commenced in the Supreme Court of Gibraltar, whose powers are largely contained in the Supreme Court Act, and importantly, Section 12 of the Act provides that the Supreme Court shall possess and exercise all the jurisdiction, powers and authorities of the High Court of Justice in England. 7

The Supreme Court does not have any formal divisions. There are currently four Supreme Court judges – the Chief Justice and three puisne judges; an increase of one from the previous edition. The decision to recruit a fourth judge comes against the backdrop of increased workload for the Supreme Court, which handles both criminal and complex commercial matters, as well as civil and family cases. English judges sometimes join the Gibraltar bench to hear specific cases. Additionally, the Registrar, as an acting puisne judge, also hears cases in the Supreme Court, primarily in smaller civil disputes.

Appeals from the Supreme Court lie with the Court of Appeal for Gibraltar, whose powers and procedure are governed by the Court of Appeal Act and the Court of Appeal Rules 2004.

The Court of Appeal is composed of recently retired English Court of Appeal judges, some of whom may still sit in the English Court of Appeal on an ad hoc basis. The Court usually sits twice a year, usually in February and September, but may sit on other occasions as required.

Decisions from the Court of Appeal may be appealed to Her Majesty’s Judicial Committee of the Privy Council. 8

Court proceedings are the principal method of dispute resolution, even though there are a number of English-qualified mediators in Gibraltar. However, in recent years, a number of cases have been settled via mediation.

The Gibraltar Bar is mainly constituted by English-qualified barristers and solicitors who are then called to the Bar locally. The profession is a fused profession, whereby barristers can additionally act as solicitors and vice versa. It is not infrequent to call English specialist counsel and Queen’s Counsel to the Gibraltar Bar to appear in the Gibraltar courts for specific cases.

II THE YEAR IN REVIEW

In 2019, a number of important decisions were made by the Court of Appeal, namely GibFibre Limited v. The Gibraltar Regulatory Authority (GibFibre No. 1) 9 and GibFibre Limited v. Gibraltar Regulatory Authority (GibFibre No. 2). 10

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7 It was held in the case of Jones v. Simoni [SC] 1995-96 Gib LR 45 that Section 12 was not restricted by the English Law (Application) Act, or the Interpretation and General Clauses Act, and was not confined to procedural matters.
8 See Section 66 of the Constitution and Section 22A of the Court of Appeal Act.
In the GibFibre cases the claimants are GibFibre Limited (GFS) and the defendants are Gibtelecom Ltd (Gibtel) and the Gibraltar Regulatory Authority (GRA). Both Gibtel and GFS provide public communications network services. GFS wanted to enter into an agreement with Gibtel allowing GFS access to the data centre owned and controlled by Gibtel and where Gibtel hosts third-party servers under rack space rental agreements. GFS wanted this to connect directly via fibrelink with servers of potential customers to provide them with electronic communications services. Gibtel refused. GFS appealed to the GRA seeking the GRA to compel Gibtel to provide GFS access. The appeal proved unsuccessful. As such, the GRA started regulatory enforcement proceedings believing they had the power to compel Gibtel, but they concluded that they did not. GFS appealed against that decision but the Supreme Court, at first instance, decided in favour of GRA.

In Gibfibre (No. 1) GFS appealed Butler J’s decision to the Court of Appeal. The Court of Appeal ruled in favour of GFS, stating that the GRA did have the power to enforce Gibtel to provide access. The reasoning relied on was Article 5(1)\textsuperscript{11} of the Communications (Access) Regulations 2006, which implements Access Directive (Directive 2002/19/EC) on access to and interconnection of communications networks and associated facilities.

In GibFibre (No. 2) the GRA and Gibtel, both dissatisfied with the Court of Appeal decision, sought permission to appeal to the Judicial Committee of the Privy Council (the Privy Council). To obtain permission, you must satisfy the Court that the appeal raises arguable grounds and that it ought to be submitted to the Council ‘by reason of its great general importance or otherwise’.\textsuperscript{12} The GRA argued that the Court erred in the construction of Article 5, which provided three circumstances whereby access and interconnection can be required, and that it was wrong to state the list was not exhaustive of circumstances they can be required. It was conceded none of those three situations applied in the case and the GRA further submitted that if those three circumstances were the only ones, they were right to say the provision did not help GFS. It was held that the appeal gave rise to important issues regarding EU law which the Privy Council should scrutinise and stated that the issues are not of great general importance but of sufficient importance to grant permission.

In the Supreme Court, another significant case was decided. Reclaim Ltd (Reclaim) v. Law Abogados Patrimonial SL (LAP) and Luis Garcia Fernandez\textsuperscript{13} (Fernandez) and Reclaim Ltd v. Law Abogados Patrimonial SL and Luis Garcia Fernandez.\textsuperscript{14} The dispute relates to two companies related to Reclaim which were involved in a timeshare scheme in Spain. Reclaim operated a certificate scheme whereby purchasers were issued with certificates that, provided conditions were met, gave purchasers a refund of a proportion of the purchase price. The issue with the certificate scheme was that only a small percentage of holders would be able

\textsuperscript{11} Article 5(1) states:

\begin{quote}
An operator shall have -
\begin{enumerate}
\item the right to negotiate interconnection with another operator for the purpose of providing publicly available electronic communications services;
\item an obligation to negotiate interconnection with another operator for the purpose of providing publicly available electronic communications services when requested to do so by another operator whether authorised in Gibraltar pursuant to the Authorisation Regulations or in a Member State pursuant to Article 4 of the Authorisation Directive.
\end{enumerate}
\end{quote}

\textsuperscript{12} Section 66(2) of the Gibraltar Constitution Order 2006.

\textsuperscript{13} (2017) Comp 009.

\textsuperscript{14} (2017) ORD 003.
to claim the refund. LAP purchased a certificate. In 2014, Reclaim was wound up. The liquidators of Reclaim demanded account of monies held by LAP, but they refused, only paying a fee regarding distributed funds.

Reclaim issued a claim against LAP but LAP disputed the Court’s jurisdiction stating that the claim did not deal solely with insolvency claims. LAP relied on Brussels Recast submitting the matter can only be dealt with in Spain, particularly due to the fact that the two contracts entered into by Reclaim and LAP contain clauses requiring them to submit to the exclusive jurisdiction of the Spanish courts. Additionally, LAP advanced that due to the nature of the claim, the domicile of LAP as well as their assets and trusts existing in Spain, the case should be heard by the Spanish courts. The Court held that it did have jurisdiction to deal with applications such as the instant one to disclaim the contracts and order the transmission of funds. The Court further emphasised that the Court’s jurisdiction was not ousted by the contracts’ terms and regardless of the fact that Spanish law may apply to performance of the contract, it does not affect the powers of local courts to disclaim the contract arising from liquidation.

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.15

Service of documents within the jurisdiction is also covered by local rules in conjunction with the CPR.16

Civil cases may be commenced by the lodging of a claim form in the Supreme Court Registry pursuant to the CPR, application to appoint a liquidator or divorce petition.

Cases that are fully pleaded and proceed to a full trial may take between one and two years to get to trial.

Interlocutory applications for relatively non-urgent lengthy matters are usually given return dates six to eight weeks after the application is lodged.

The Supreme Court normally makes time to hear very urgent applications such as freezing orders and will usually grant a hearing date almost immediately upon the lodging of the application.

Applications to appoint a liquidator are usually given return dates of around two months from their lodging with the Supreme Court Registry.

ii Class actions

Gibraltar law and procedure on class actions are the same as in England given that the matter is governed by the Part 19 of the CPR.

15 See Section 15 of the Supreme Court Act, Rule 6(1) and (2) of the Supreme Court Rules 2000 (SCR).
16 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\(^\text{17}\) and the
Lugano Convention\(^\text{18}\) 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
\textit{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,\(^\text{19}\) and the claimant must also establish
that the claim on its merits has a reasonable prospect of success.\(^\text{20}\)

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 \textit{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.

\textbf{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.

\begin{footnotes}
\footnotetext[17]{Section 4(1).}
\footnotetext[18]{Section 4(3).}
\footnotetext[19]{CPR 6.37(1)(a).}
\footnotetext[20]{CPR 6.37 (1)(b).}
\end{footnotes}
The Recast Brussels Regulation

The Recast Brussels Regulation was implemented in Gibraltar and came into operation on 10 January 2015 by virtue of Legal Notice 3 of 2015, which amended the CJJA in order to implement the said regulation. 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. Notwithstanding the implementation of the Recast Brussels Regulation, the Brussels Regulation (44/2001) still continues to apply to judgments given in legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded before 10 January 2015 that fall within the scope of that Regulation.

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

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21 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.

22 Article 66.3 of the Recast Brussels Regulation. This has been given effect through Regulation 4 of the Civil Jurisdiction and Judgments Act 1993 (Amendment) Regulations 2015.
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.

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.

23 CPR 5.4(2).
24 CPR 5.4C(2).
25 In the matter of an application to the Chief Justice pursuant to the Supreme Court Rules, Rule 2 [2001-02 Gib LR 329].
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.

ii Money laundering, proceeds of crime and funds related to terrorism
Gibraltar has fully implemented the Third Money Laundering Directive (the Directive),26 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)27 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 or who has benefited from 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;

26 2005/60/EC.
27 Formerly known as the Criminal Justice Act.
he or she discloses any matter within subsection (2); and

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

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
(GRA). As a statutory body, it is responsible for regulating data protection, the electronic
communications sector, the gambling sector and, as from 2012, broadcasting in Gibraltar.

Pursuant to the principles underlined in Directive 95/46/EC of the European Parliament
and of the Council of 24 October 1995, the GRA is responsible for the implementation of
data protection law and protection of individuals with regard to the handling of personal data
and on the free movement of such data.

The Data Protection Commissioner, through the GRA, has ensured that a system is in
place that monitors the executory function of the Data Protection Act.

The GRA works closely with its counterparts abroad, and through its website provides
comprehensive advice on the implementation of the law in the workplace. Further, the
complaints procedure in place allows for individuals, as well as corporations, to make data protection-related complaints to an extent such that it vastly extends the GRA's continued responsibility to monitor the implementation of the law by corporations and individuals.

The basic principles that must be applied by businesses in relation to the handling of data are:

- the data must be obtained and processed fairly;
- it must only be used in relation to one or more specified and lawful purposes;
- data must be stored confidentially and only released to third parties with prior written consent from the individual permitting such release to third parties;
- it is a requirement that it be stored in a safe and secure manner;
- the data must be accurate and up to date;
- the data that is obtained must be exact and not excessive in consideration of the purpose for which it is held;
- the data must be retained only for the period required for the specified purpose;
- copies of a client's personal data must be supplied to them on the client's request; and
- if requesting data on behalf of a client, this must be requested in writing together with written permission from the client permitting collection or receipt of that data.

Significant changes have entered the data protection framework in the form of the EU General Data Protection Regulation (2016/679) (GDPR). GDPR emphasises transparency, security and accountability by data controllers and processors, and imposes a significant number of additional obligations on them. The headline changes coming as a result of GDRP are, inter alia, as follows:

- data processors will be subject to specific direct legal obligations (rather than contractual only), including maintaining records of personal data and processing activities, and will have significantly more legal liability if they are responsible for a breach;
- data subjects will have the right to sue controllers and processors directly for material and non-material damage;
- the definition of 'personal data' in GDPR is more detailed and includes information such as online identifiers (e.g., IP addresses, device identifier tags and location identifier tags);
- GDPR requires further information to be provided to individuals before collecting data, including the legal basis for processing, retention periods and the right to complain;
- GDPR has much stricter requirements for using consent as a ground for legally processing data; and
- GDPR makes notifying the data protection commissioner of any breaches mandatory.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

English common law is applied to the issue of privilege and in broad terms is divided between documents used or prepared when providing legal advice and those prepared or used in litigation or contemplated litigation.
ii Production of documents
The Civil Procedure Rules of England and Wales apply to Gibraltar by virtue of Section 38A of the Supreme Court Act 1960. As such, the rules governing the production of documents in litigated civil cases in Gibraltar is contained in these Civil Procedure Rules, more specifically Part 31, and mirrors the procedure followed in England and Wales.

VI ALTERNATIVES TO LITIGATION
i Arbitration
Arbitration in Gibraltar is governed by the Arbitration Act 1895, which has undergone several amendments since its initial commencement. Schedule 1 contains certain provisions that are to be implied in all arbitration agreements, unless the arbitration agreement contains a provision expressly stating the contrary. These provisions are general in their nature and relate to the appointment of arbitrators, the nature of the award and the costs therein.

Part 1 of the Act deals with the general provisions that would generally apply to most arbitration agreements. Sections worth noting include:

- 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;
- 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;
- 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 Gibraltar, albeit only among states that are a party to the New York Convention (Section 50). These are enforced in the same manner as those under Section 21 and carry equal weight and Section 51 states what must be produced by a party seeking to enforce such an award. Section 52 states the grounds upon which the courts may refuse to enforce an award under the New York Convention and these are self-explanatory in nature.
ii Mediation

In Gibraltar, there are no rules that make this course of action mandatory or that provide definitive guidelines on how mediations are to be conducted. Parties are generally free to agree between themselves all aspects of the mediation process as in England and Wales. Under the CPR mediation is encouraged; however, resorting to mediation is becoming more commonplace in Gibraltar.

VII OUTLOOK AND CONCLUSIONS

Formal methods of alternative dispute resolution have not taken root in Gibraltar, despite much encouragement by the judiciary after the CPR were introduced locally in 2001; however, the Gibraltar Bar has a long tradition of following a process of airing disputes informally and without prejudice between lawyers acting for opposing parties, which leads to many actions being settled before proceedings are issued or before trial.

In general, litigation in Gibraltar, as it is a small jurisdiction, is extremely varied and most of its experienced practitioners have very wide fields of practice and competence.
Chapter 12

HONG KONG

Kevin Warburton

I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

Although Hong Kong is a special administrative region of the People’s Republic of China (PRC), its legal system operates independently and there are very few similarities between PRC law and Hong Kong law. Hong Kong law is based on principles of common law, similar to those that apply in England, Australia and other Commonwealth jurisdictions, and this is formally acknowledged by the Basic Law (Hong Kong’s mini Constitution). The policy of ‘one country, two systems’ is constitutionally guaranteed until 2047.²

There are two levels of court dealing with civil claims of substance³ at first instance: the District Court (which has jurisdiction over claims of up to HK$3 million)⁴ and the Court of First Instance (CFI), which has unlimited jurisdiction.

The Court of Appeal (CA) hears appeals from both the CFI and the District Court. It also hears appeals from the Lands Tribunal as well as other statutory bodies. The Court of Final Appeal (CFA) is the highest court in Hong Kong and is made up of local permanent judges and distinguished judges from (currently) England and Australia who serve as non-permanent judges. It hears appeals from the CA and the CFI.

There are a range of specialist tribunals established under statute, such as the Lands Tribunal, which deals with cases concerning real property; the Labour Tribunal, which deals with employment matters; and the Competition Tribunal, which deals with cases connected with competition law in Hong Kong.

Hong Kong is a major centre for international arbitration. There is a sophisticated statutory regime in place to support arbitrations (see Section VI). Mediation is also widely accepted in Hong Kong (see Section VI).

II THE YEAR IN REVIEW

Hong Kong has entered its first recession for a decade amid prolonged protests (see Section II), which took a heavy toll on consumption-related activities, economic prospects and investment sentiment. The local protests, the continuing trend of US protectionism, the PRC–US trade war and a period of transition in the EU have all combined to introduce inherent uncertainty.

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1 Kevin Warburton is a counsel at Slaughter and May.
2 Article 5 of the Basic Law of the Hong Kong Special Administrative Region.
3 Claims involving monetary value of over HK$50,000.
4 The amendment came into effect on 3 December 2018.
Hong Kong deservedly retains a reputation for a relatively laissez-faire style of capitalism. However, there is now a perceptible legislative trend toward what might be considered a more socially responsible development model. The coming into effect of the Competition Ordinance on 14 December 2015, aiming to create a fairer marketplace for Hong Kong consumers by prohibiting certain anticompetitive conduct, is one example of the efforts being made by the Hong Kong government to achieve its stated objective of creating a fairer and more balanced society.

Regulators have maintained their prominent position in newspaper headlines in Hong Kong. On 3 May 2016, Mr Thomas Atkinson, the former Director of the Enforcement Branch of Canada’s Ontario Securities Commission, was appointed Executive Director of Enforcement to the Securities and Future Commission (SFC). Under his tenure, the SFC signed a memorandum of understanding with the Hong Kong Police on 25 August 2017 for stronger cooperation in combating financial crime. In November 2018, the SFC and the Independent Commission Against Corruption (ICAC) for the first time jointly raided offices of suspect companies. In its 2018–2019 Annual Report, the SFC stated that it commenced 238 investigations and laid 42 criminal charges against four individuals and one corporation and secured convictions against four persons and one corporation; it disciplined seven firms and three individuals and imposed fines totalling HK$867.7 million for failures as sponsors of initial public offerings; it reprimanded three firms for deficient selling practices and imposed fines totalling HK$24.6 million; and continued to list corporate fraud and misbehaviour as a top enforcement priority area.

The ICAC has stayed in the headlines. On 22 July 2019, an SFC-ICAC operation led to the charging of five former executive directors of Convoy Global Limited. The ICAC charged them with conspiracy to defraud the stock exchange of Hong Kong, Convoy Global, its board of directors and shareholders.

In 2017, the ex-Chief Executive Donald Tsang was held liable for misconduct in public office and was sentenced to 20 months in prison. His sentence was later reduced to 12 months by the CA. On 26 June 2019, the CFA allowed Tsang’s appeal and quashed his conviction and sentence, on the basis that the trial judge’s direction was inadequate (see Section II). On 31 August 2018, the ICAC charged a former Deputy Secretary for Economic Development and Labour and a former director of Hong Kong Express Airways with bribery and misconduct in public office in relation to a flats-swap deal.

Headlines in Hong Kong have continued to be dominated by constitutional law issues. Since 9 June 2019, there have been sizeable protests triggered by the government’s introduction of the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019. The proposed Bill would have enabled extradition of people to jurisdictions with no such existing formal agreement with Hong Kong, including mainland China. On 4 October 2019, in an attempt to curb further protests, Carrie Lam, the Chief Executive in Council (CEIC), invoked the Emergency Regulations Ordinance (Cap 241) (ER0) to implement an anti-mask law, the Prohibition on Face Covering Regulation (Cap 241K) (PFCR). On 18 November 2019, the CFI declared the ERO, insofar as it empowers the CEIC to make regulations on any occasion of public danger, as incompatible with the Basic Law. Furthermore, it held that the PCFR, while rationally connected to legitimate societal aims, went further than is reasonably necessary for the furtherance of those objects and was thus unconstitutional. The CA will hear Hong Kong government’s appeal against the CFI’s decision in January 2020.
In November 2018, the trial began for the nine leaders of the Umbrella Movement for various public nuisance offences. In April 2019, all nine leaders were convicted, receiving a sentence ranging from community service order to imprisonment of 16 months. Benny Tai Yiu Ting, one of the leaders, is currently on bail pending further appeal on his conviction and sentence.

Meanwhile, the joint border checkpoint with the PRC at West Kowloon Station, the Hong Kong terminal for the Guangzhou-Shenzhen-Hong Kong Express Rail Link, remains a focus of debate despite the opening of the railway on 23 September 2018. In June 2018, the Legislative Council (Legco) passed the heavily contested bill setting up a joint border checkpoint with the PRC at the West Kowloon Station. The joint border checkpoint allows passengers travelling on the express rail to clear border checks for both Hong Kong and the PRC at a single location, thereby avoiding the need to clear the Hong Kong border check at the West Kowloon Station and the PRC border check at the Shenzhen Station–Shenzhen–Hong Kong border. The decision has been controversial as the arrangement means Chinese law will be enforced in Hong Kong.

A number of activists in Hong Kong have applied for judicial review against the constitutionality of the joint border checkpoint at West Kowloon Station, relying, for example, on Article 18 of the Basic Law of Hong Kong. The CFI dismissed the judicial review application on 13 December 2018.

i Regulatory enforcement

The SFC, as the independent non-government statutory body responsible for regulating the securities and futures markets in Hong Kong, has been continuing its high-profile campaign to pursue enforcement actions under both its criminal and civil jurisdictions.

In 2019, the SFC has been active in taking actions against financial institutions for failure to discharge their obligations as joint sponsors in initial public offerings. In March 2019, the SFC reprimanded and fined UBS AG and UBS Securities Hong Kong Limited (UBS Securities Hong Kong) (collectively, UBS) a sum of HK$375 million for failing to discharge their obligations as one of the joint sponsors of three listing applications. Furthermore, the SFC partially suspended UBS Securities Hong Kong’s licence to advise on corporate finance for one year to the extent that it cannot act as a sponsor for listing application on the stock exchange of Hong Kong of any securities. The SFC also reprimanded and fined four other financial institutions for similar sponsor failure, namely Standard Chartered Securities (Hong Kong) Limited (HK$59.7 million), Morgan Stanley Asia Limited (HK$224 million), Merrill Lynch Far East Limited (HK$128 million) and China Merchants Securities (HK) Co, Limited (HK$27 million).

The SFC also took enforcement actions in other aspects in 2019. In February 2019, it reprimanded and fined Guosen Securities (HK) Brokerage Company Limited HK$15.2 million for failing to comply with anti-money laundering and counter-terrorist financing regulatory requirements when handling third-party fund deposits. In October

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5 Article 18 provides that ‘National laws shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to this Law . . . Laws listed in Annex III to this Law shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by this Law’.
2019, the SFC commended legal proceedings in the CFI, seeking disqualification and compensation orders against all the directors of Perfect Optronics Limited for their alleged breach of fiduciary duties.

ii Disclosure of inside information
The SFC has brought further proceedings in the MMT in respect of the disclosure obligations imposed on listed companies, which came into force under the SFO as Part XIVA on 1 January 2013.

In April 2018, the SFC commenced proceedings in the MMT against Fujikon Industrial Holdings Limited (Fujikon) for failing to disclose inside information as soon as reasonably practicable on discontinuing headphone production for one of Fujikon’s top customers. In April 2019, the MMT found that Fujikon and its senior management had failed to make timely disclosure of inside information, and ordered them to pay fines ranging from HK$300,000 to HK$1 million.

In June 2019, the MMT found that Health and Happiness (H&H) International Holdings Limited and its chairman failed to disclose inside information as soon as reasonably practicable and fined them HK$1.6 million each following proceedings brought by the SFC.

On 31 October 2019, the SFC commenced proceedings in the Market Misconduct Tribunal (MMT) against China Medical & Healthcare Group Limited (COL) and its senior management for alleged late disclosure of inside information. The SFC alleged that COL failed to disclose information in relation to its significant gains in securities as soon as reasonably practicable in 2014, and that six individuals who were COL’s directors at the material time engaged in reckless or negligent conduct causing the alleged breach.

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. According to the 2018–2019 Annual Report of the Commission, it received and processed 709 enforcement contacts in the financial year 2018–2019, of which 28 cases were escalated to the initial assessment or investigation phases.

The Competition Tribunal (the Tribunal) meanwhile has jurisdiction to hear cases brought before it by the Commission as well as private follow-on actions, and is armed with a wide range of powers including the power to grant injunctive relief.

On 23 March 2017, the Commission brought its first case before the Tribunal for alleged bid-rigging in a tender for the supply and installation of a new server by five information technology companies: Nutanix Hong Kong Limited, BT Hong Kong Limited, SiS International Limited, Innovix Distribution Limited and Tech-21 Systems Limited. Notably, the case was initially prompted by a complaint. In a strike-out hearing in November 2017, the Tribunal clarified the application of privilege against self-incrimination to companies, a decision with potential broader relevance to the conduct of interviews by regulators in Hong Kong. The presiding judge, Mr Justice Godfrey Lam (President of the Tribunal), held that statements made during interview are inadmissible only against the subject of compulsion, which is the person named on the interview notice, but not anyone else. The statements were therefore admissible against the defendant companies. Given the broad powers provided to the Commission by the Competition Ordinance to summon any person to attend an interview, the privilege against self-incrimination would appear to offer companies little (if any) protection in relation to statements made during such interviews. On 17 May 2019,
the Tribunal found that all respondents, except SiS International Limited, were liable for contravening the First Conduct Rule of the Competition Ordinance by engaging in bid rigging.

The Tribunal also handed down decision on another case on 17 May 2019, where it found the 10 respondent construction companies liable for contravening the First Conduct Rule of the Competition Ordinance by engaging in market sharing and price-fixing in relation to the provision of renovation services at a public rental housing estate. The hearing to determine the reliefs is scheduled in January 2020.

Separately, on 6 September 2018, the Commission announced that it had, for the first time, brought proceedings against individuals in what was then its third case before the Tribunal. The case relates to alleged market-sharing and price-fixing by three construction companies in the provision of renovation services at a subsidised housing estate developed by the Hong Kong Housing Authority. In its associated press release, the Commission stated that ‘Companies cannot act on their own. Every corporate contravention involves individual wrongdoing. For that reason, to deter a company from engaging in cartel conduct, it is also necessary to deter the individuals through which the company acts. Individual pecuniary penalties and disqualification are necessary deterrents’. This case has been set down for trial by the Tribunal in the third quarter of 2020.

iv Third-party funding in arbitration

On 14 June 2017, Legco passed the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016, allowing third-party funding in domestic arbitrations and work done in Hong Kong in association with foreign-seated arbitrations and mediations. The amendments remove the common law principles of maintenance and champerty in the context of arbitration and mediation.

v Anti-corruption

There has been an important decision in a significant anti-corruption case during the past year. It 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 alleged that, between December 2010 and July 2011, Tsang failed to disclose his engagement of an architect to carry out interior design work at his personal residential property while referring for consideration for nomination this same architect under the Hong Kong Special Administrative Region (HKSAR) honours and awards system.

In February 2017, nine jurors, by a majority verdict of eight to one, concluded Tsang had deliberately concealed the negotiations with the major shareholder of Wave Media Limited. Tsang was sentenced to 20 months in prison for misconduct in public office. The jury unanimously acquitted Tsang on the count relating to the referral of the architect for an honour under the HKSAR honours and awards system. On the separate bribery charge of Tsang accepting an advantage relating to the interior design work of the Shenzhen penthouse, the jurors were unable to reach a verdict. The government sought a second trial, which
resulted in, for the second time, a hung jury on 3 November 2017. While it is possible the government may seek a third trial, it is considered unlikely that the Department of Justice will insist upon it.

Tsang appealed against his conviction for misconduct in public office. In July 2018, the CA rejected Tsang’s appeal but reduced his original 20-month sentence to 12 months. On 26 June 2019, the CFA allowed Tsang’s appeal and quashed his conviction and sentence, on the basis that the trial judge’s direction was inadequate. Since Tsang had already served a custodial sentence ordered by the CA, the CFA decided not to order a retrial. 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.

III COURT PROCEDURE

Civil procedure in Hong Kong is governed by the Rules of the High Court and the accompanying Practice Directions issued by the Chief Justice. These Rules were substantially revised by the enactment of the Civil Justice Reforms (CJR), which came into effect on 2 April 2009.

i Ordinary commercial court proceedings

Reducing the cost of delay associated with litigation proceedings and proper case management are the declared cornerstones of the CJR. The reforms were introduced to counter a trend of multiple interlocutory applications, excessive discovery and unfocused proceedings that led to delay and unnecessary expense. Parties that do not follow the revised procedures as set out in the CJR can expect adverse cost orders or, in severe cases of non-compliance, to have their claims struck out by the court. Costs will no longer be necessarily awarded to the successful party and the court can now have regard to whether the costs that were incurred were in proportion to the amounts at stake in the claim.

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

6 Chapter 201 of the Laws of Hong Kong.
7 See, for example, Cheung Man Kwong Thomas v. Mok Chun Bor [2009] HKEC 1636.
evidence from both parties. Judgment may be given for the whole or part of the claim if the court is satisfied there is no real defence. If otherwise, the matter goes to a full trial, the stages of which are as follows:

- **a** the defendant files its defence, which must answer each of the matters raised in the statement of claim, and any counterclaim;
- **b** the plaintiff files its reply and defence to counterclaim;
- **c** the parties are then expected to proceed to disclose to each other documents relevant to the issues in dispute without the need to wait for an order of the court (this process, which is called ‘discovery’, is described in detail below);
- **d** the parties file and serve a timetabling questionnaire indicating their readiness for the trial;
- **e** the parties agree directions for trial and attend a case management conference where directions relating to the management of the case are made by the court;
- **f** there is the exchange of witness statements and any expert evidence (if required); and
- **g** trial.

It is difficult to generalise the time frame for a piece of civil litigation. This will depend on a variety of factors, including the extent of discovery, the availability of witnesses and the complexity of the issues in dispute. Nevertheless, one can usually expect a judgment at first instance within two years of the commencement of proceedings; a summary judgment application may be determined within as little as three, but usually within six, months of proceedings being initiated.

**ii Urgent or interim relief**

The Hong Kong courts will hear urgent or interim applications in relation to a wide range of matters.

**Interim applications**

Among the most common interim applications are those for summary or default judgment. As mentioned above, the plaintiff may apply for summary judgment on the grounds that the defendant has no defence to its claim, or no defence to a claim for liability, but possibly a defence to the amount of damages claimed.\(^9\) A plaintiff may enter default judgment against a defendant who has failed either to give notice of intention to defend or to serve a defence within the times prescribed in the rules.\(^10\)

**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

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\(^9\) Hong Kong Civil Procedure, Rules of the High Court, O.14.

\(^10\) Hong Kong Civil Procedure, Rules of the High Court, O.19.
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.11 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.

**Interim measures in relation to arbitral proceedings**

2019 has seen new developments related to the applying to the courts of mainland China for interim measures in support of arbitral proceedings in Hong Kong. On 2 April 2019, the Hong Kong government signed the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region (Arrangement). After signing the Arrangement, Hong Kong has become the first and only jurisdiction outside the Mainland where parties to arbitral proceedings, seated in Hong Kong and administered by a list of arbitral institutions established or set up in Hong Kong, can apply to the courts of mainland China for interim measures. Currently, the list of eligible institutions include the Hong Kong International Arbitration Centre (HKIAC), the China International Economic and Trade Arbitration Commission (CIETAC), the International Court of Arbitration of the International Chamber of Commerce (ICC), the Hong Kong Maritime Arbitration Group, the South China International Arbitration Center (Hong Kong) and the eBRAM International Online Dispute Resolution Centre.

In the case of mainland China, available interim measures include property preservation, evidence preservation and conduct preservation. In the case of Hong Kong, available interim measures include injunctions and other interim measures for the purpose of maintaining or restoring the status quo pending determination of the dispute; taking action that would prevent, or refraining from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral proceedings; preserving assets; and preserving evidence that may be relevant and material to the resolution of the dispute.

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The Arrangement came into force on 1 October 2019. On 11 October 2019, the HKIAC announced that within the first few days of the Arrangement coming into force, it has received five applications related to ongoing arbitrations seated in Hong Kong and administered pursuant to its rules. Within several days, in one of those applications, the Shanghai Maritime Court granted an order for the preservation of certain assets in mainland China pending the determination of the arbitral proceedings in Hong Kong.

### iii Class actions

Unlike many other jurisdictions, Hong Kong does not currently have specific provisions for dealing with multiparty litigation. In May 2012, the Law Reform Commission (LRC) published a report, following a three-month consultation period in February 2010, recommending the introduction of a comprehensive regime for multiparty litigation. The LRC further recommended that the new class action regime should adopt an opt-out approach (unless one of the plaintiffs is foreign, in which case the LRC recommended an opt-in approach), so that once the court certifies a case as suitable for a class action, the 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. As at 17 April 2019, the working group has held 25 meetings since its inception, while a subcommittee set up under the working group has met 30 times.

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,\textsuperscript{12} is equivalent to the level of competence expected of a barrister appearing in higher courts in the areas of ethics, evidence and procedure, general advocacy, trial advocacy and appellate advocacy. The first round of assessments took place in autumn 2012. Fifteen solicitors passed and were registered to practise in the highest court in February 2013. To date, a total of 54 practitioners have been appointed as solicitor-advocates.

A notable exception to the audience rule is in hearings before the Labour Tribunal where neither barristers nor solicitors have rights of audience unless they are appearing on their own behalf as a claimant or defendant in proceedings.\textsuperscript{13} If a company is a defendant in proceedings, it is expressly empowered to give notice of its intention to defend by any person 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.\textsuperscript{14} There are a number of different grounds under which leave to serve out may be obtained. These include, for instance, actions commenced in respect of contracts where the Hong Kong courts have explicitly been granted jurisdiction and contracts governed by Hong Kong law. However, in addition to a valid ground, applicants seeking the court’s leave to serve out of the jurisdiction need to satisfy the court that there is a serious issue to be tried on the merits of the claim and that Hong Kong is the most convenient forum for the trial of the case.

vi Enforcement of foreign judgments

At common law, an action may be brought in Hong Kong to enforce a foreign judgment debt (without the need to relitigate the underlying cause of action).

Under the Foreign Judgments (Reciprocal Enforcement) Ordinance, the judgments of certain countries (including Australia, Belgium, Brunei, France, Germany, India, Israel, Italy, Malaysia, New Zealand and Singapore) are capable of more direct enforcement by registration. Once registered, the foreign judgment may be enforced in the same way as a judgment obtained in a court in Hong Kong.

The Mainland Judgments (Reciprocal Enforcement) Ordinance, which provides a mechanism by which certain judgments made in the PRC may be enforced in Hong Kong and Hong Kong judgments in the PRC, came into operation on 1 August 2008. The effectiveness of this Ordinance has always been seen as quite limited since it applies only to judgments for damages arising from commercial agreements where the relevant agreement provides for exclusive jurisdiction of the chosen (Hong Kong or PRC) court. Although the Hong Kong government and the Supreme People’s Court of the PRC had since concluded two arrangements on mutual recognition and enforcement of judgments between the PRC courts and Hong Kong courts, namely the Choice of Court Arrangement (in 2008) and

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12 HRAB, ‘Standards of Professional Competence’.  \\
13 Section 23(2) of the Labour Tribunal Ordinance (Chapter 25).  \\
14 Hong Kong Civil Procedure, Rules of the High Court, O.11 r.1.  
\end{tabular}
Arrangement for Enforcement of Civil Judgments in Matrimonial Home and Family Cases (in 2017), both arrangements have limited effect on alleviating the constraints stipulated by the Ordinance. However, in January 2019, the Hong Kong government announced that it had concluded the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters (the Reciprocal Arrangement). The Reciprocal Arrangement, signed on 18 January 2019, has a significantly expanded scope of application compared with the existing Ordinance and arrangements. It provides specific guidance on recognition and enforcement of judgments arising from IP infringements, civil disputes over acts of unfair competition and awards of property. It will cover judgments in relation to civil damages awarded in criminal cases. It will also allow the enforcement of both monetary and non-monetary relief. Restrictions remain, such as the requirement for underlying contracts to give the relevant PRC or Hong Kong court exclusive jurisdiction to resolve disputes that may arise. Nevertheless, the Arrangement is a welcome development in terms of providing clarity to existing arrangements. It is not yet known when the Arrangement will come into effect.

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

viii Access to court files
As a general rule, the full court file cannot be inspected by members of the public; in exceptional cases the public may be granted leave from the High Court Registrar to inspect affidavits, pleadings and other evidentiary court documents if there are very cogent reasons for them to do so. However, the public may inspect and obtain copies of writs or other documents by which proceedings are commenced. Final and interlocutory court judgments are filed in the High Court library and are also freely accessible by the public on the judiciary website.

ix Litigation funding
Generally, third-party funding of litigation is prohibited under Hong Kong law. There are, however, three limited exceptions. First, a person may have a legitimate common interest in the outcome of the litigation sufficient to justify him or her supporting the litigation. Second, an individual may be permitted to fund litigation of a claimant who would otherwise be unable to pursue litigation owing to a lack of funds. This is because of the public interest in promoting access to justice. Finally, as recently confirmed by a decision of Harris J in the CFI, third-party funding may be permitted by the courts in order to allow a liquidator to

15 Hong Kong Civil Procedure, Rules of the High Court, O.69.
16 Hong Kong Civil Procedure, Rules of the High Court, O.70; see also Section 75 Evidence Ordinance.
pursue litigation that may improve the return to creditors. However, outside these situations, the Hong Kong courts take a firm approach towards third parties who aid litigation in return for a share of the profits.

x State immunity

The doctrine of state immunity applies in Hong Kong. State immunity only applies to foreign states, and therefore does not apply to the PRC or Hong Kong. On the other hand, the common law doctrine of crown immunity applies to the Central People’s Government of the PRC and its state organs. Crown immunity in Hong Kong is also absolute meaning that there is no exception for commercial acts of a state organ. Nevertheless, the extent to which immunity applies to a state-owned enterprise is often subject to dispute. The scope of crown immunity has recently been clarified in the case of *TNB Fuel Services Sdn Bhd v. China National Coal Group Corporation* in 2017. It was held that China National Coal Group Corporation, a state-owned enterprise that operates its business with significant autonomy and independence, is not a state organ and is therefore not protected by crown immunity. Separately, the Hong Kong government and its entities can still be sued under the Crown Proceedings Ordinance.

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; and
c not to accept instructions from a new client where it is likely that the solicitor would be duty-bound to disclose to that new client, or use for its benefit, relevant confidential knowledge where this would be in breach of the solicitor’s duty of confidentiality owed to an existing or former client.

The effect of these duties is that a solicitor who is in possession of confidential information concerning one client that is, or might be, relevant to another client is put in an impossible position because he or she owes duties to both clients that conflict; he or she must keep...

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22 HCCT 23/2015.
23 Cap 300 of the Laws of Hong Kong.
24 Principle 8.01.
25 Principle 8.03.
26 Principle 9.02.
the information confidential but at the same time must pass it on to the other client. Thus, managing conflicts of interest in Hong Kong can be a difficult process compared with, say, England, where the rules make allowances for this type of situation.

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

Lawyers in Hong Kong, as elsewhere in the world, are vulnerable to being used unwittingly to launder the proceeds of crime or to fund terrorism. The Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance\(^{27}\) came into force in April 2012, imposing stricter statutory requirements on financial institutions relating to customer due diligence and record keeping, and an obligation to report suspicious transactions to the authorities. The Ordinance empowers the Hong Kong Monetary Authority to prosecute or discipline banks for ignoring or assisting in money laundering or terrorist financing. In addition to the Ordinance, and other statutory requirements that apply generally to everyone in Hong Kong,\(^ {28}\) solicitors in Hong Kong are subject to mandatory requirements (which reflect the statutory law) to:

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

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.

On 11 July 2016, the CFA in *HK SAR v. Yeung Ka Sing Carson*\(^ {30}\) declined to follow English law and confirmed the position in Hong Kong that for a defendant to be convicted

\[ \text{References:}\]

27 Chapter 615 of the Laws of Hong Kong.

28 See the Drug Trafficking (Recovery of Proceeds) Ordinance, the Organised and Serious Crimes Ordinance and the United Nations (Anti-Terrorism Measures) Ordinance.

29 The reasoning of the English Court of Appeal in *Bowman v. Fels* [2005] EWCA Civ 226 has been adopted in Hong Kong under Section 81 of the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance.

30 [2016] HKEC 1506.
for dealing with the proceeds of crime under Section 25(1) of the Organized and Serious Crimes Ordinance, it is not necessary for the prosecution to prove that the property with which the defendant dealt in fact represented the proceeds of a serious offence. To secure a conviction it is sufficient to establish that the defendant had reasonable grounds to believe that it was.

On 28 June 2017, the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) (Amendment) Bill 2017 was introduced into Legco. The bill aims to extend statutory customer due diligence and record-keeping requirements to solicitors, foreign lawyers, accountants, real estate agents, trust and company service providers and introduce a new licensing regime for trust and company service providers. The amendments came into effect on 1 March 2018. The Guidelines on Anti-Money Laundering and Terrorist Financing (Practice Direction P) issued by the Law Society of Hong Kong have also been revised with effect from 1 September 2018. Similarly, the revised Guideline on Anti-Money Laundering and Counter-Financing of Terrorism for Money Service Operators, Authorised Institutions, Stored Value Facility Licensees, Insurance related intermediaries, Licensed Corporations, Associated Entities came into force on 1 November 2018 superseding the previous version.

iii Data protection

The protection of personal data in Hong Kong is governed by the amended Personal Data (Privacy) Ordinance (PDPO). One of the principles provided in the PDPO is that personal data may not be used for any purpose except with the prescribed consent of the data subject.\(^{(31)}\)

Two exceptions to this rule are:

\[\begin{align*}
\text{a} & \quad \text{the restriction does not apply to data that is required by any rule of law or court order in Hong Kong in connection with any legal proceedings in Hong Kong, or for establishing, exercising or defending legal rights in Hong Kong;} \quad \text{\cite{32}} \\
\text{b} & \quad \text{data may be transferred for the necessary due diligence exercise in the course of mergers and acquisitions, provided that goods or services provided to the data subject would be the same or similar after the completion of the proposed transaction.} \quad \text{\cite{33}}
\end{align*}\]

New provisions on the regulation of direct marketing activities and the provision of legal assistance under the PDPO came into force on 1 April 2013. First, a new opt-in system has been introduced to strengthen the right of data subjects to control their personal data. Direct marketers must have notified the data subject and obtained his or her consent before approaching the data subject with marketing messages. Second, the data subjects have the right to opt out from direct marketing activities, even if they have previously consented to receiving direct marketing messages or if they have not responded to requests to indicate their objection. There is no time limit for exercising the right to opt out.

Following the implementation of the General Data Protection Regulation (GDPR) in the European Union in May 2018, the Office of the Privacy Commissioner for Personal Data (PCPD) of Hong Kong published a booklet that aims at raising awareness among organisations and corporations of its possible application in Hong Kong. In an article published in February 2019, the Privacy Commissioner stated that the GDPR, the

\[\begin{align*}
\text{31} & \quad \text{Schedule 1 (Principle 3) of the Personal Data (Privacy) Ordinance (Chapter 486).} \\
\text{32} & \quad \text{ibid, Section 60B.} \\
\text{33} & \quad \text{ibid, Section 63B.}
\end{align*}\]
development of the global privacy landscape, and the recent data breach incidents, present a timely opportunity to review the local law. The PCPD continues to promote an ethical approach to the processing of personal data in Hong Kong.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

The two main forms of LPP – legal advice privilege and litigation privilege – that apply in Hong Kong are essentially the same as those recognised under English law.

Confidential communications between a lawyer and his or her client for the purpose of giving or receiving legal advice are protected from disclosure by legal advice privilege. This privilege is unlikely to extend to legal advice that may be given by other professionals such as accountants and surveyors, with the Hong Kong courts expected to follow the approach of the United Kingdom Supreme Court in its decision of R (on the application of Prudential plc and another) v. Special Commissioner of Income Tax and another. 34

Where there is litigation or it is reasonably contemplated that it will occur, not only will communications between the solicitor and a client be privileged but also communications they have with third parties, if it can properly be said that their sole or dominant purpose is preparing for the litigation.

In both cases, the privilege belongs to the clients and only the clients can properly choose to waive it. They can also lose it if, for example, legal advice is disclosed to third parties where there is no litigation or it is not reasonably contemplated.

In 2015, the CA, in CITIC Pacific Limited v. Secretary for Justice and Commissioner of Police, 35 set down a broader definition of ‘client’ to state that the client is the corporation, and the key question is therefore which employees are or should be regarded as authorised to act on behalf of the company in obtaining legal advice. The CA also adopted a broader test for legal advice privilege, which can now protect internal confidential documents in a client organisation that have been produced for the dominant purpose of obtaining legal advice. The court recognised that the definition of ‘client’ has to be broad enough to take into account the fact that various members of a corporation, not simply those in the legal team, may be required to obtain legal advice for the corporation. The CA in the CITIC decision declined to follow the approach of the English Court of Appeal in Three Rivers No 5. 36 In the Three Rivers case, the court defined ‘client’ more narrowly to refer only to those employees who had been authorised by the company to give instructions to legal advisers. Both the CITIC and Three Rivers cases were Court of Appeal decisions in Hong Kong and in the United Kingdom respectively. The issue of who is capable of constituting the client for the purposes of legal advice privilege has yet to be considered by the United Kingdom Supreme Court or the CFA in Hong Kong.

II Privilege and regulators

As a general rule, a lawyer or client cannot be compelled to disclose legally privileged communications in the context of a regulatory inquiry. Some statutes setting out the powers of the regulator expressly recognise this; for example, the SFO, which provides that persons being investigated by the SFC can rely on LPP in the same way as they could in the context of court proceedings. While this is the strict statutory position, the SFC has adopted a 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 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.

In February 2019, the CFI decided on *AA v. Securities and Futures Commission (No 2)*. This is a judicial review case raised by an investment manager and a responsible officer of a hedge fund regulated by the SFC. The applicants challenged the SFC’s exercise of its investigative powers to assist its Japanese counterparts and the constitutionality of Section 181 of the SFO, which empowers the SFC to demand licensed persons to provide routine trading information. The CFI ruled against the applicants, stating that Section 181 does not abrogate the privilege against self-incrimination and that based on the facts, the information provided by the SFC to the Japanese authorities would not expose the informant to self-incrimination in criminal proceedings in Japan.

Another question is whether the danger of SFC producing privileged material to its overseas counterparts 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*, *James Daniel O’Donnell v. Lehman Brothers Asia Ltd (In Liq)* and *CITIC Pacific Ltd v. Secretary for Justice and Commissioner of Police* 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. The judgment was affirmed on appeal, with an obiter comment from Keith JA that the ‘partial waiver’ may be ‘conceptually unsound’.

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37 See the Guideline of March 2006 – Cooperation with the SFC.
38 [2019] 2 HKLRD 16.
39 [2000] 3 HKC 48 (CA).
40 HCMP 1081/2009 (unreported).
41 [2012] 2 HKLRD 701.
In the *Lehman* case, the SFC sought from the liquidators documents that were relevant to the offering of the Lehman minibonds. The liquidators declined to disclose the minibond documents to the SFC on the grounds that the documents contained legal advice or were created for the purpose of obtaining legal advice. Instead, the liquidators disclosed redacted versions of the documents. The CFI held that the redacted portions indeed constituted a record of legal advice or were created for the purpose of obtaining legal advice. Accordingly, most of the documents should remain to some extent redacted. This decision confirms that the partial waiver of LPP for limited purposes could be achieved by tailoring the evidence to fulfil only the stated purposes.

The principles in the *Rockefeller* case were further discussed in the *CITIC* case in 2012. In this case, certain documents were surrendered to the SFC pursuant to an authority to require production of and a direction to produce records and documents. A declaration, inter alia, that the surrendered materials be returned was sought by CITIC. The CA unanimously held in favour of CITIC, overturning the lower court’s ruling that CITIC’s waiver was absolute and finding instead that it was partial and solely for the purpose of the SFC investigation.

While the CA’s decision in the *CITIC* case is very helpful, the CFA has not yet given a definitive judgment in this area. The risk that any disclosure might still be treated as a blanket waiver should not be lightly dismissed. Therefore, any partial waiver should be considered with great care and should not be granted unless it is clearly justified. Where the company has made the commercial judgment that the benefits of partial waiver outweigh the risks of prejudice, it should mitigate its risk by putting the specific terms in writing at the outset when the documents are handed over, making clear the precise purpose and scope of investigation for which the partial waiver is made (e.g., for the purposes of the SFC’s investigation only).

### iii  In-house lawyers

As a general rule, in-house lawyers are treated like external lawyers and thus communications to and from in-house lawyers conveying or seeking legal advice will be treated as covered by legal advice privilege. The main qualification to this is where the in-house lawyer has both a business and a legal role in an organisation. Requests for legal advice and pure legal advice given will still be privileged. However, where there is a mix of legal and business advice, for example, if the in-house lawyer in an internal memorandum proposes a course of action having regard to legal advice and other factors, it becomes more difficult to properly assert that the document is protected by legal privilege.

### iv  Legal privilege and foreign lawyers

Hong Kong law recognises legal privilege whether the lawyer involved in giving the legal advice is admitted in Hong Kong or elsewhere. Thus legal advice given by, say, a French lawyer on issues of French law will be protected by legal privilege in the same way as legal advice on Hong Kong law given by a Hong Kong lawyer. This principle applies equally to legal advice given by an in-house lawyer. Thus legal advice on an issue of New York law given by an in-house lawyer admitted in New York working in a Hong Kong branch of a US bank will be protected.

### v  Production of documents

A party to proceedings before the Hong Kong courts is under a strict duty to preserve and disclose to the other parties to the proceedings all documents in its possession, custody or control that are relevant to the matters in question in the proceedings. This disclosure
of documents is an automatic consequence of proceedings and generally must be given shortly after the parties have formally pleaded their respective cases. The reforms under the CJR allow for orders to be given to limit discovery in appropriate cases and ways; and the availability of pre-action and third-party discovery has been extended to all cases (previously these were only available in personal injury actions). The issues that have been pleaded provide the yardstick for determining what documents are relevant. The parties do not have to make a request for disclosure of particular documents. It is for the lawyers on each side to decide which documents are properly relevant to the pleaded issues and should therefore be disclosed. In doing this, the lawyers are deemed to act as officers of the court and not simply on the instructions of their clients. Parties are required to disclose the existence of all relevant documents. It is irrelevant that a document is prejudicial to a party’s case: it must still be disclosed if it is relevant and a party cannot choose which documents to disclose. A document is relevant if it may assist one or other of the parties to advance his or her own case or damage his or her opponent’s in relation to any issue, or if it may lead to a train of enquiry that may (indirectly) have that result. Such a result need not be inevitable: if disclosure of the document may potentially have that result, disclosure must be made. This rule applies equally to documents stored overseas, which must be brought into the jurisdiction for the purpose of litigation.

This obligation covers both documents in existence and those produced at any time after a dispute has occurred. A party will have to account for documents that are lost or destroyed and unfavourable inferences may be drawn if it is apparent that documents have been destroyed. The parties and their lawyers must preserve documents relevant to a dispute and thus destruction of unhelpful documents is not an option. The exception to this obligation is that a party may claim legal privilege as an objection to production of documents.

‘Documents’, for these purposes, are widely defined and they include anything on which information or evidence is recorded in a manner that is intelligible to the senses or capable of being made intelligible by the use of equipment. Thus computer records, tape recordings, emails and manuscript notes are all potentially disclosable to the other side in proceedings. Information on a computer database that is capable of being retrieved and converted into readable form is treated as a ‘document’.

The test of whether documents held by a third party are in the power of a party to proceedings is whether the party has a presently enforceable legal right to obtain the documents from the third party. Merely because a party is the majority shareholder of a subsidiary does not mean that it is deemed to have control over relevant documents that are held by the subsidiary. If a professional adviser holds relevant documents that are the property of the party, and the party has the immediate right to demand their return, they will be treated as being in the party’s control. However, the internal working papers of the adviser will generally not be treated as belonging to and thus under the control of a party.

The burden of disclosing documents may fall disproportionately on one party compared with another. Sometimes, because of the nature of the dispute and the degree of its involvement, a party may have a great deal more documents to disclose than the other parties. That is a risk of litigation and a factor to be taken into account when embarking on litigation (a plaintiff may quite possibly have a heavier discovery burden than the defendant in a case), and in the past the courts have not intervened to address any imbalance. It is possible that this position may begin to change following the introduction of the CJR that now requires parties and the judiciary to have regard to proportion and procedural economy.
in the conduct of proceedings. In particular, the new Practice Direction 5.2 requires parties ‘to try to agree directions for modifying discovery obligations … with a view to achieving economies in respect of discovery’. This may be of particular relevance, for example, with respect to disclosure of electronic records. The courts in the future may not require parties to expend disproportionate resources on retrieving electronic documents that have been ‘deleted’ from a computer system. However, it remains to be seen how this new approach will work in practice.

The parties will usually agree on a date by which they will exchange lists of documents, accompanied by a notice that the other party may inspect and take copies of documents (though parties are now encouraged to dispense with formal lists if this would be more economical).

In response to concerns regarding the increasing burden on parties of providing their electronic documents for discovery, the Hong Kong judiciary introduced the Practice Direction SL 1.2 – Pilot Scheme for Discovery and Provision of Electronically Stored Documents for Commercial List Cases. The Practice Direction came into effect on 1 September 2014, and is mandatory in terms of all actions commenced on, or transferred into the Commercial List on or after, 1 September 2014 in which the claim or counterclaim exceeds HK$8 million and there are at least 10,000 documents to be searched for the purposes of discovery.

VI ALTERNATIVES TO LITIGATION

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.

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.

43 Order 1A, Rule 1.
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 the PRC to host a China International Economic and Trade Arbitration Commission arbitration sub-commission. In January 2015, the Permanent Court of Arbitration (PCA) also signed a Host Country Agreement with the PRC government and a related Memorandum of Administrative Arrangement with the Hong Kong government to facilitate the conduct of PCA-administered arbitration in Hong Kong, including state-investor arbitration. In December 2017, the Hong Kong government and the National Development and Reform Commission of the PRC government signed an agreement aiming to advance Hong Kong’s full participation in and contribution to the Belt and Road Initiative, which included establishing Hong Kong as a hub for international legal and dispute resolution services for the Belt and Road Initiative.

Hong Kong has a wealth of lawyers experienced in arbitration and enjoys a reliable independent court system to support the use of arbitration. The latest available figures published on the HKIAC website, for example, indicate that in 2017, the HKIAC handled 297 arbitrations, of which 73.1 per cent were international in nature and featured parties from 39 jurisdictions.

In terms of statutory amendments, the Arbitration (Amendment) Ordinance 2017 was gazetted on 23 June 2017 and became effective on 1 January 2018, clarifying the law to allow disputes over intellectual property rights to be resolved by arbitration and that enforcing arbitral awards involving intellectual property rights is not contrary to Hong Kong public policy. Legislation allowing third-party funding in arbitration was also passed. This particular amendment, however, will not apply to funding provided by lawyers representing any parties to the arbitration, as professional conduct rules prohibit lawyers from acting on a contingency fee basis.

The HKIAC further revised its Administered Arbitration Rules with effect on 1 November 2018. The key amendments include the following:

- parties may agree to deliver documents through the use of their own secured online repository or a dedicated repository provided by the HKIAC;
- a third-party funded party is required to disclose promptly the existence of a funding agreement, the identity of the funder and any subsequent changes to such information. A funded party is permitted to disclose arbitration-related information to its existing and potential funder;
- after the commencement of an arbitration, where the parties agree to pursue alternative means of settling their dispute, a party may request the HKIAC, arbitral tribunal or emergency arbitrator to suspend the arbitration and resume at any time during or after the alternative process; and
- a party may file an application for the appointment of an emergency arbitrator before the commencement of an arbitration, provided that a Notice of Arbitration is submitted to the HKIAC within seven days unless the emergency arbitrator extends this time limit.

The Hong Kong court has generally adopted a pro-arbitration policy and a ‘hands off’ approach to cases involving arbitration. Recently, in *Chee Cheung Hing & Company Limited v. Zhong Rong International (Group) Limited*, the CFI considered an application to stay proceedings.

45 [2016] HKEC 656.
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,46 in which it was held that where the claimant had apparently departed from the applicable arbitration agreement between the parties by commencing proceedings before the ICC rather than the Singapore International Arbitration Centre, the court should leave the matter to the ICC tribunal to determine its own jurisdiction over the case.

Hong Kong, through the PRC, is a party to the New York Convention. As between Hong Kong and the rest of the PRC, there is an arrangement for reciprocal enforcement of arbitration awards called the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region, which broadly follows the New York Convention. Hong Kong also entered into a similar arrangement with Macau in January 2013. The enforcement arrangements for the New York Convention and arbitration awards concerning parties from the PRC remain in place and are unaffected by the Arbitration Ordinance.

The CFA considered the application of the New York Convention to Hong Kong in Hebei Import & Export Corp v. Polytek Engineering Co Ltd,47 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 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 2012.48 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

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46 [2015] HKEC 2439.
case management discretions. The judgment illustrated the court’s reluctance to interfere with arbitral awards and its preference for a pro-enforcement approach that is in line with the principles of ‘finality and comity’.

The pro-enforcement approach was further affirmed by the CFI in U v. A in February 2017. The case concerned a preliminary assignment contract (PAC), under which the claimant agreed to purchase majority shareholdings in a PRC joint venture company. The PAC also provided for transfer of assets from the second respondent to the joint venture company and certain changes in the joint venture’s board composition. Disputes arose between the parties, and the claimant commenced arbitration proceedings in Hong Kong for various breaches under the PAC. The claimant was awarded specific performance, damages and costs. Subsequently, the claimant obtained an order from the court for leave to enforce the arbitral award. The respondents applied to set aside the order, arguing that: (1) the arbitrator had refused to admit a PRC judgment the respondents relied heavily on, such that the respondents were not able to have a full opportunity to advance their case on the invalidity of the PAC; (2) the arbitral award dealt with an issue outside the scope of the submissions; and (3) it would be contrary to public policy to enforce the award as the PAC was invalid and ineffective under PRC law. The court rejected their arguments on the grounds that: (1) refusing to admit the PRC judgment did not cause any prejudice as the respondents were given a fair opportunity to present expert evidence to the arbitrator; (2) only decisions clearly unrelated to, or not reasonably required for, the determination of the subject dispute are decisions which can be rightly said to be beyond the scope of the submission; and finally, (3) an error of law made by the tribunal is not sufficient basis for refusing enforcement and that public policy arguments should not be used as a ‘catchall provision whenever convenient’. This case demonstrates the Hong Kong courts’ overall unwillingness to set aside arbitral awards without compelling grounds.

Moreover, the court is generally in favour of speedy and efficient enforcement of arbitration awards. Even in circumstances where the court is willing to stay enforcement of an arbitration award pending the result of a challenge made to set aside the award, substantial security is likely to be required from the party applying for the stay. In L v. B, 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.

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49 FAMV 18/2012.
50 HCCT 34/2016.
51 HCCC 41/2015.
52 HCMP 3060/2016.
Later, the defendant was granted leave from the CFI to enforce this award. The plaintiff subsequently failed to make the payment. When the Defendant served a statutory demand on the plaintiff as a signal to an impending winding-up order, the plaintiff sought to contend that the court could not exercise its discretion to issue a winding-up petition against it as it did not have any assets or conduct business in Hong Kong. The plaintiff’s only connection with Hong Kong was its secondary listing. Despite this, the CFI nevertheless held that it indeed had jurisdiction to wind up the plaintiff. This decision clearly conveys the robust measures the courts are willing to take in order to ensure the enforcement of arbitral awards.

**ii Mediation**

Mediation has been achieving increased prominence following the implementation of the CJR. Practice Direction 31, which came into force on 1 January 2010, requires parties to have made genuine attempts to resolve disputes by mediation. Any party that resists this could face a potential costs penalty if at the conclusion of the proceedings the court determines the party has unreasonably failed to engage in mediation. The HKIAC has its own mediation rules and maintains a list of accredited mediators.

The Mediation Ordinance (MO)\(^{53}\) came into force on 1 January 2013. The primary purpose of this relatively short Ordinance is to provide statutory underpinning to support the confidentiality of mediation communications, defined as anything said or done, any document prepared or any information provided for the purpose of or in the course of mediation. The MO specifies situations where a disclosure may be made, for instance, where both parties and the mediator consent to the disclosure, where the disclosure is necessary to prevent danger of injury to a person or of serious harm to the well-being of a child or where the disclosure is required by law.

The Financial Dispute Resolution Centre (FDRC) came into operation on 19 June 2012. The FDRC’s primary function is to allow retail investors alleging mis-selling by banks and other financial intermediaries the opportunity to make claims for compensation not exceeding HK$1 million\(^{54}\) under a framework of ‘mediation first, arbitration next’. Prior to the establishment of the FDRC, an aggrieved customer’s options were limited. He or she could have elected to report the alleged mis-selling to the SFC or the HKMA, but while the regulators may examine the practices of the financial institutions and impose penalties in appropriate cases, they do not adjudicate on claims for financial remedy. Instead, an aggrieved customer’s only way of recovering financial losses was to go through the court system, which was considered often too costly and time-consuming for relatively low-value claims. The FDRC was established to provide investors with an alternative avenue of dispute resolution that is hopefully more expeditious and affordable.

In order to facilitate the establishment of the FDRC, the SFC introduced amendments to the Code of Conduct for Persons Licensed by or Registered with the SFC, which took effect on 19 June 2012. The key amendment requires licensed or registered persons regulated by the SFC or the HKMA to comply with the FDRC Scheme and be bound by its process.

In order to enhance the Financial Dispute Resolution Scheme, the Terms of Reference of the FDRC were revised with amendments to become effective in phases from 1 January 2018 onwards. Pursuant to the updated Terms of Reference, the FDRC may handle cases with

\(^{53}\) Chapter 620 of the Laws of Hong Kong.

\(^{54}\) FDRC’s Term of Reference 2018 – the revised limit applies to claims where the date of first knowledge of loss by the claimant falls on or after 1 January 2018.
a claim up to HK$1 million (as compared with HK$500,000 in the past). Further, it may handle cases with a claim exceeding HK$1 million provided that all parties consent to such an arrangement.\textsuperscript{55}

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

\section*{VII OUTLOOK AND CONCLUSIONS}

The number of investigations and enforcement actions begun by the key regulators is expected to remain consistent into 2020. 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.

I INTRODUCTION TO THE 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 amendment to the Commercial Courts Act 2015 (the Commercial Courts Act) provides for the constitution of commercial courts at a district level, except areas where the High Court exercises ordinary civil jurisdiction and provides for commercial divisions (in all High Courts having ordinary civil jurisdiction) and commercial appellate divisions in each High Court for the adjudication and speedy disposal of commercial disputes of a specified value of not less than 10 million rupees or such other notified value within the limits of the relevant territorial jurisdiction.

The primary laws codifying court procedure in India are the Code of Civil Procedure 1908 (CPC) and the Code of Criminal Procedure 1973 (CrPC). Charter High Courts such as the High Courts of Bombay, Calcutta, Delhi and Madras may also apply Letters Patent Rules, which when applicable may override the provisions of the CPC. The procedure to be applied by tribunals is often governed by the statute that establishes the tribunal (and rules framed thereunder). Courts have held that the principles contained in the CPC would continue to apply to the tribunals even if the tribunals are not bound to follow specific provisions of the CPC.

1 Zia Mody is the founder and managing partner and Aditya Vikram Bhat is a senior partner at AZB & Partners. The authors would like to acknowledge Priyanka Shetty, who is a senior associate and Bhakti Parekh, who is an associate at AZB & Partners for their 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. By acceptance of the doctrine of stare decisis, law declared by High Courts binds subordinate courts and may have persuasive value over High Courts of other states. The Supreme Court and the High Courts are charged with original, appellate and writ jurisdiction. Under the writ jurisdiction they have the power to review administrative action including for the purposes of the enforcement of constitutional and fundamental rights granted under Part III of the Constitution of India.

The Arbitration and Conciliation Act 1996 (the Arbitration Act) governs the law related to domestic arbitration, foreign-seated arbitration and enforcement of foreign awards, in India. The Arbitration Act is based on the UNCITRAL Model Law as adopted by the United Nations Commission on International Trade Law on 21 June 1985. Mediation and conciliation have also been given statutory recognition through the Arbitration Act.

As a recent trend, even courts often promote alternative dispute resolution. This was discussed in great detail in the case of Afcons Infrastructure Limited v. Cherian Varkey Construction, where the Supreme Court laid down guidelines for courts to follow for the effective implementation of Section 89 of the CPC, which encourages parties to settle their disputes by means of alternative dispute resolution. Recently the Supreme Court in Perry Kansagra v. Smriti Madan Kansagra identified various kinds of disputes where alternative dispute resolution may be a better alternative than litigation, such as cases relating to trade, commerce and contracts including money claims arising out of contracts, etc. Disputes relating to specific performance or disputes between insurer and insured, bankers and customers were also considered to be better resolved through an alternative dispute resolution mechanism than litigation.

II THE YEAR IN REVIEW

The year 2019 witnessed a series of amendments aimed at introducing greater ease of doing business in India, and at bringing the current law in tune with the rapid economic growth in the country in order to aid foreign direct investments, public private partnerships, public utilities infrastructure developments, etc.

Two of the primary legislative changes brought about during 2019 were the amendments to: (1) the Arbitration and Conciliation Act, 1996 (the Arbitration Act); and (2) the Insolvency and Bankruptcy Code 2016 (IBC). Both have been discussed in further detail below. The amendments to the IBC introduce significant changes on the substantive as well as procedural aspects of the IBC. The IBC, which came into effect on 1 December 2016,
is a comprehensive legislation that seeks to replace extant insolvency and restructuring laws in India and proposes to cover corporate persons (i.e., companies and limited liability partnerships), individuals and partnerships. The National Company Law Tribunals (NCLT) have been vested with the jurisdiction in respect of insolvency and restructuring proceedings against corporate persons in India, while the Debt Recovery Tribunal will oversee proceedings against individuals and partnerships. On 5 August 2019, the President gave assent to the Insolvency and Bankruptcy Code (Amendment) Act, 2019 (the IBC Amendment) through which certain key changes have been introduced in the Code. Some of the important amendments to the IBC include the following:

a. The IBC Amendment seeks to bring clarity on allowing comprehensive corporate restructuring through merger, amalgamation and demerger under a resolution plan.

b. The time period of 14 days for disposal of such applications is now mandatory and the Adjudicating Authority is now obliged to record its reasons in case it fails to comply with the mandatory time period.

c. Under the IBC, various categories of creditors, including foreign creditors, may trigger the insolvency resolution process and provide a single forum to oversee resolution and liquidation proceedings. The IBC Amendment aims to facilitate the decision-making power of the committee of creditors by allowing an authorised representative to vote on behalf of such creditors in accordance with the decision taken by the class of creditors with more than 50 per cent voting share of the financial creditors, who have cast their votes.

d. The IBC provides that the Corporate Insolvency Resolution Process (CIRP) may be initiated on the occurrence of a single payment default of 100,000 rupees and the NCLT will determine whether a payment default has taken place. Accordingly, a CIRP application can be admitted against the corporate debtor. The IBC Amendment provides that the law of limitation will apply to IBC applications, removing earlier confusion in this regard.

e. Before the IBC Amendment, the NCLT was required to declare a moratorium of 180 days (that may be extended for a further period of 90 days) from the date of commencement of the CIRP. The amendment now provides for mandatory completion of the process within 330 days, including any extension of time as well as any exclusion of time on account of legal proceedings. An ongoing CIRP, which has not been closed yet within 330 days, shall be completed within the next 90 days. This extension was provided due to a number of CIRPs taking more than the total 270 days to complete the proceedings.

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

g. Yet another important amendment to the Code is the amendment regarding the distribution of payments made to the different classes of creditors. Post the amendment, the operational creditors shall be paid either: (1) not less than the amount payable to

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12 Sections 7 and 9 of the IBC.
13 Inserted by the Insolvency and Bankruptcy (Amendment) Act 2019 as Section 3 of the IBC.
14 Sections 7 and 9 of the IBC.
15 Inserted by the Insolvency and Bankruptcy (Second Amendment) Act 2018 as Section 238A of the IBC.
16 Inserted by the Insolvency and Bankruptcy (Amendment) Act 2019 as Section 4 of the IBC.
17 Section 60(5) of the IBC.
them in the event of liquidation of the corporate debtor under Section 53 of the IBC or (2) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority, whichever is higher. The financial creditors who did not vote in favour of the resolution plan shall be paid not less than the amount payable to them under liquidation priority. Thus, the IBC Amendment clarifies the payment distribution to be fair and equitable to such creditors.

The committee of creditors may approve a resolution plan after considering its feasibility and viability, and the manner of distribution of realisation under the plan, keeping in view priority of the creditors and their security interests.

Further, a resolution plan approved by the Adjudicating Authority shall now be binding on the Central Government, any state government and any local authority to whom any statutory dues are owed.

There were also a number of significant judgments of the courts in 2019.

a The Supreme Court in *Swiss Ribbons Pvt. Ltd. v. Union of India* upheld the constitutionality of the IBC and held that there were ‘crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid’. The challenge to the constitutional validity of the IBC inter alia on the ground that it accords differential treatment of operational creditors and financial creditors as violative of Article 14 of the Constitution of India, 1950 was rejected on the ground that there was intelligible differentia between financial and operational creditors. This was due to the fact that financial creditors from the beginning would be involved in assessing the viability of the corporate debtor and would engage in the restructuring of the loan in times of financial stress as well as reorganisation of the corporate debtor’s business, which operational creditors cannot do.

b In *Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors* the Supreme Court quashed an order that brought parity between financial and operational creditors of Essar Steel in matters of distribution of proceeds and held that the IBC ‘should not be read so as to imbue creditors with greater rights in a bankruptcy proceeding than they would enjoy under the general law, unless it is to serve some bankruptcy purpose.’ In order to pass the muster of law what is required to be seen is that ‘equitable treatment’ is accorded to ‘similarly situated creditors’ depending upon the class to which they belong: secured or unsecured, financial or operational and that all types of creditors cannot be treated equally. ‘The equality principle cannot be stretched to treating unequals equally, as that will destroy the very objective of the IBC – to resolve stressed assets.’ The Supreme Court further upheld the primacy of the
Committee of Creditors and held that the CoC in its commercial wisdom may approve a plan (with requisite majority) that provides for ‘differential payment to different class of creditors, together with negotiating with a prospective resolution applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors’.

c In Jet Airways (India) Ltd. (Offshore Regional Hub/Office), Holland v. State Bank of India & Anr.\(^2\) the question that arose for consideration was whether separate proceedings in CIRPs against a common corporate debtor could proceed in two different countries, one having no territorial jurisdiction over the other. The National Company Law Appellate Tribunal (NCLAT) settled this question with the introduction of elements of cross-border insolvency in the cross-border insolvency protocol agreed between the administrator of Jet Airways (India) Limited (Offshore Regional Hub) and the resolution professional of Jet Airways (India) Limited.\(^2\) The protocol recognises the Indian proceedings as the main insolvency proceeding, which also has the power to deal with the liquidation of the assets of the company located in the Netherlands. The protocol is aimed at promoting international cooperation and communication between the NCLAT and the Dutch court. It also aimed to promote effective, efficient, and fair proceedings, and to avoid duplication of effort and activities by the parties and to identify, preserve, and maximise the value of the company’s worldwide assets for the collective benefit of all creditors and other interested parties. The case laid down several ways to ensure a complete and effective overview of claims and to enable each party to fulfil its obligations.

d In K. Kishan v. Vijay Nirman Company Pvt. Ltd., the Supreme Court observed that the provisions of the IBC cannot be invoked with respect to operational debts if a proceeding has not yet been finally adjudicated upon under the Arbitration Act.\(^2\) The bench laid down the three-tier test and in the event any one of the conditions is lacking, the application is liable to be rejected: (1) whether there is an ‘operational debt’ exceeding 100,000 rupees; (2) whether the documentary evidence furnished with the insolvency application shows that the aforesaid debt is due and payable and has not yet been paid; and (3) whether there is an existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute.

e In M/s Mayavti Trading Pvt. Ltd. v. Pradyuat Deb Burman, the three-judge Supreme Court bench adopted a narrow viewpoint with respect to appointment of arbitrators under Section 11 of the Arbitration Act and held that the Court’s power in an application under Section 11 is confined only to the examination of the existence of a valid arbitration agreement and the Court cannot decide on the arbitrability of a dispute.\(^3\) The Court further held that ‘the preliminary disputes are to be examined by the arbitrator and are not for the Court to be examined within the limited scope available for appointment of arbitrator under Section 11(6) of the Act.’

\(^2\) CA (AT) (Ins) No. 707/2019.
\(^3\) CA (AT) (Ins) No. 707/2019.

28 Civil Appeal No. 21824 OF 2017.

29 Civil Appeal No. 7023 of 2019.
In *R.V. Solutions Pvt. Ltd. v. Ajay Kumar Dixit & Ors.*, the High Court of Delhi held that if a third party has a direct relationship to either signatory party of the arbitration agreement, or has some commonality with regard to the subject matter, or composite transactions in the agreement between the parties, then the third party could be subjected to arbitration.

### 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 three 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.

The Supreme Court in *Wockhardt Limited v. Torrent Pharmaceuticals Ltd. and Ors.* clarified the position by stating that acquiescence cannot be equated with delay. There should not be mere silence or inaction on part of the plaintiff but a refusal or failure to act despite knowledge of invasion and opportunity to stop it.

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.

The CPC was amended by virtue of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act coming into force in 2015. According

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30 2019 SCC Online Del 6531.
32 Schedule I to the Limitation Act 1963.
33 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.
to the amended provisions of Order V Rule 1(1), Order VIII Rules 1 and 10 of the CPC,\textsuperscript{36} a party is granted 30 days to file its written statement and a grace period of 90 days is provided, wherein, a court can, after recording the reasons for delay in filing and after imposing costs, allow a written statement to be taken on record. It was further held by the Supreme Court in the case of \textit{M/s SCG Contracts India Pvt. Ltd. v. K.S. Chamankar Infrastructure Pvt. Ltd. & Ors}\textsuperscript{37} that the failure to file written statements within the statutory time period of 120 days for filing written statements in a commercial suit will result in the forfeiture of the right of the defendant to file a written statement and the court would not be able to use its inherent powers to avoid the consequences emanating from the aforesaid provision. 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\textsuperscript{38} and belated production of documents.\textsuperscript{39}

It is pertinent to note that the Arbitration Act as amended by the 2019 Amendment Act mandates time-bound arbitrations. It now provides that the pleadings in a case be completed within six months from the appointment of arbitrator. An arbitral award is now required to be made within 12 months from the completion of the pleadings in domestic arbitration. The award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of 12 months from the date of completion of pleadings under subsection (4) of Section 23.\textsuperscript{40} Parties may also agree in writing to have their dispute resolved by fast-track procedures, which would require the award to be made within six months from the date of entry of the arbitral tribunal upon reference.\textsuperscript{41} 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.\textsuperscript{42}

The Commercial Court Act has also set a time limit 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 330 days from the insolvency commencement date as the period of the insolvency resolution process that culminates with the submission of a resolution plan to the NCLT.\textsuperscript{43}

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.

\textbf{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.\textsuperscript{44}

\begin{itemize}
\item \textsuperscript{36} Order V, second proviso to Rule 1 of the CPC; Order VIII, proviso to Rule 1 of the CPC; Order VIII, second proviso to Rule 10 of the CPC.
\item \textsuperscript{37} \textit{M/s SCG Contracts India Pvt. Ltd. v. K.S. Chamankar Infrastructure Pvt. Ltd. & Ors}, AIR 2019 SC 2691.
\item \textsuperscript{38} Order VI, Rule 17 of the CPC.
\item \textsuperscript{39} Order VII, Rule 14 of the CPC; Order XII Rule 2 of the CPC.
\item \textsuperscript{40} Section 29A of the 2019 Amendment Act.
\item \textsuperscript{41} Section 15 of the 2019 Amendment Act.
\item \textsuperscript{42} Section 5 of the 2019 Amendment Act.
\item \textsuperscript{43} Section 12 of the IBC.
\item \textsuperscript{44} Order I, Rule 8 of the CPC.
\end{itemize}
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. This provision of the Family Courts Act has now been challenged before the Rajasthan High Court. Further, the Industrial Disputes Act restricts the conditions under which a lawyer can appear before the industrial tribunal. The Advocates Act 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 and the CrPC contain provisions for service out of the territory of India. India has also entered into bilateral treaties and multilateral conventions for these purposes.

Under the CPC, when a defendant resides outside India and no agent in India is empowered to accept service, summons or notice may be sent by courier or post service as 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

45 Section 241 read with Section 244 and Section 245 of the Companies Act 2013. Sections 397, 398 and 399 of the Companies Act 1956.
46 People’s Union for Democratic Rights v. Union of India 1983 SCR (1) 456.
47 Article 22 of the Constitution of India.
50 Section 36 of the Industrial Disputes Act 1947.
51 Section 32 of the Advocates Act 1961.
52 Order V, Rule 25 of the CPC.
53 Section 105 of the CrPC.
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.\(^{54}\) 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\(^{55}\) and 14\(^{56}\) of the CPC.

Section 44 of the Arbitration Act prescribes that a foreign award that arises out of (1) an agreement to which the New York Convention on the Recognition and Enforcement of Foreign Awards (the New York Convention) applies and (2) is made in one of the territories in respect of which the Central Government declares that the New York Convention applies on satisfaction that reciprocal provisions are being made, may be enforced in India. In this regard, the Arbitration Amendment Act has clarified that a foreign arbitration award may be set aside if it violates the public policy of India on the same grounds as described for domestic awards above. However, unlike domestic awards, foreign awards cannot be set aside on the ground of patent illegality.

vii Assistance to foreign courts

Assistance may be given to foreign courts\(^{57}\) 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.\(^{58}\)

54 Section 44A of the CPC.
55 Section 13 of the CPC states:

A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except (a) where it has not been pronounced by a Court of competent jurisdiction; (b) where it has not been given on the merits of the case; (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable; (d) where the proceedings in which the judgment was obtained are opposed to natural justice; (e) where it has been obtained by fraud; (f) where it sustains a claim founded on a breach of any law in force in India.

56 Section 14 of the CPC states:

The Court shall presume upon the production of any document purporting to be a certified copy of a foreign judgment that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

57 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.

58 Section 29 of the CPC.
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. It has been held in a recent Supreme Court judgment that there appear to be no restrictions on a third party funding the litigation and getting repaid after the outcome of the litigation as long as they are non-lawyers.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

The Bar Council of India Rules (the BCI Rules), notified by the Bar Council of India (BCI) under the Advocates Act 1961, impose standards on advocates to ensure that conflicts of interest are avoided. These include:

a a prohibition on appearing for opposite parties in the same matter, and from taking instructions from anyone other than the client and the client’s authorised agent;
b a prohibition on lending to a client, or converting funds in the advocate’s hands to a loan, or adjusting fees against personal liability owed by an advocate to the client;
c a prohibition on bidding for, or acquiring an interest in property of actionable claim involved in litigation;
d a prohibition on appearing in matters where the advocate has a pecuniary interest;
e a prohibition on becoming a party to stir up or instigate litigation;
f a prohibition on representing establishments of which the advocate is a member;
g a prohibition to stand as a surety to the client or certify the soundness of a surety that his or her client requires for the purpose of any legal proceedings;
h a prohibition on appearing in matters where he or she is a witness;
i a prohibition to trade or agree to receive any share or interest in any actionable claim;
j a prohibition to bid in court auction or acquire by way of sale, gift, exchange or any other mode of transfer, any property that is the subject matter of proceedings in which he or she is professionally engaged;

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60 Re KL Gauba AIR 1954 Bom 478; In Re: Mr ‘G’, A Senior Advocate of The Supreme Court AIR 1954 SC 557.
61 Bar Council of India v. AK Balaji, AIR 2018 SC 1382.
a prohibition on appearing in matters in which he or she has reason to believe that he or she will be a witness;

a prohibition on appearing before relatives who are judges;

the obligation to make a full and frank disclosure to client relating to his or her connection with the parties and any interest in or about the controversy likely to affect his or her client’s judgement in either engaging him or her, or continuing the engagement;

the obligation not to disclose information or instructions provided by the client; and

the obligation to fearlessly uphold the interests of his or her client by all fair and honourable means.

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

While there are no specific obligations on lawyers with respect to money laundering, India has a strong legislative framework, including the Prevention of Money Laundering Act 2002, the Income Tax Act 1961, the Foreign Exchange Management Act 1999, the Foreign Contribution Regulation Act 2010, the Companies Act 2013, RBI Directions, and SEBI guidelines on Anti-Money laundering (AML) Standards and Combating Financing of Terrorism (CFT), that serves to detect and prevent money laundering and the proliferation of the proceeds of crime. It is pertinent to note that the Finance Act 2019 has amended eight clauses of the Prevention of Money Laundering Act 2002.

iii Data protection

Data protection in India is primarily governed by the Information Technology Act 2000 and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011 (the IT Rules). These rules define sensitive personal data and information (SPDI) and prescribe the manner in which SPDI may be collected, processed, transferred, disclosed or stored. The IT Act provides for damages in the event that the SPDI is not protected and wrongful loss is caused as a result.

The introduction of the IT Rules has affected how lawyers may collect and use SPDI. To the extent that SPDI is collected directly from the data subject, the consent of the data subject is required for the purpose of using the SPDI or transfer of SPDI.

In the context of due diligence and onward sharing of data with other law firms and LPOs, the levels of compliance appear higher in as much as data sharing agreements usually incorporate the requirements of the IT Rules. Further, if dealing with information of European Union (EU) citizens, law firms are required to comply with the General Data Protection Regulation of the EU.

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62 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.
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.

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

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63 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.

64 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.

65 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.

66 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.

67 There are two statutory exceptions to the rule of client–attorney privilege. First, any communication made in furtherance of any illegal purpose is not protected and second, facts observed by the attorney in the course of his or her employment, showing that any crime or fraud has been committed since the commencement of his or her employment, are not protected.

68 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’.
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’.

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\(^69\) 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\(^70\) in light of the observations of the Supreme Court in Satish Kumar Sharma v. Bar Council of Himachal Pradesh\(^71\) and Shiv Kumar Pankha and Ors v. Honourable High Court of Judicature at Allahabad and Ors.\(^72\)

ii Production of documents

Under the CPC, the court can, at any time during the pendency of any suit, order the production (under oath) of such documents, relating to any matter in question in such suit. Further, the Evidence Act provides that a witness summoned to produce a document must, if it is in his or her possession, bring it to court regardless of any objection to its production or admissibility.\(^73\)

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.\(^74\)

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

Since India has permitted foreign investments in various industries and sectors through its new liberal policies, there is a considerable increase in the number of commercial disputes. As a mechanism to deal with its heavy caseload, India has striven to encourage alternative dispute resolution (ADR) mechanisms. In several areas and even at the level of the High Courts and the Supreme Court, the law has allowed for parties to be directed towards ADR.\(^75\)

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\(^{69}\) AIR 1982 Bom 6.

\(^{70}\) (2003) 114 CompCas 141 (Bom).

\(^{71}\) (2001) 2 SCC 365.

\(^{72}\) (2001) 2 SCC 365.

\(^{73}\) Section 162 of the Indian Evidence Act 1872.

\(^{74}\) See, for instance, the judgment of the Bombay High Court in Larsen & Toubro Limited v. Prime Displays Private Limited (2003) 114 CompCas 141 (Bom).

Arbitration

Apart from the Arbitration Act, the Supreme Court of India in Salem Bar Association v. Union of India\textsuperscript{76} 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 and have been relied on and cited as recently as in 2018.\textsuperscript{77} 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.

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 and recently, the setup of an Arbitration Council in 2019.\textsuperscript{78} 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:

\begin{itemize}
\item the Geneva Protocol on Arbitration Clauses of 1923;
\item the Convention on the Execution of Foreign Awards 1923 (the Geneva Convention);
\item and the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention).
\end{itemize}

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,\textsuperscript{79} the essentials of an arbitration agreement\textsuperscript{80} and the procedure for determining the validity of such an agreement.\textsuperscript{81} It is important to note in this regard that there are limited instances and time-bound procedures for challenging the validity of such an agreement and the arbitral tribunal has the power to determine its jurisdiction. Section 5 of the Arbitration Act specifically provides, with respect to Part I, that no judicial authority may intervene in arbitration except in a case where a stipulation to this effect has been made.

The initial years of the implementation of the Arbitration Act saw regressive interpretation that allowed frequent and wide-sweeping judicial intervention from Indian courts. The judgments of the Supreme Court and High Courts have, however, broken the trend and are serving to restore confidence in India as a potential arbitration destination. The Arbitration and Conciliation (Amendment) Act 2015 has also introduced various provisions that promote arbitration by reducing the timelines and costs involved.

Further, although statistically there are more ad hoc arbitrations conducted in India, the use of institutional arbitration is growing gradually. This has to do in part with the reputed arbitration institutions, such as the Singapore International Arbitration Centre, setting up establishments in India. India's first international arbitration centre, the Mumbai Centre

\textsuperscript{76} AIR 2005 SC 3353.
\textsuperscript{77} V. Rama Naidu and Anr v. Smt. V. Ramadevi, 2018 SCC Online Hyd 210.
\textsuperscript{78} Part 1A, the Arbitration and Conciliation (Amendment) Act, 2019.
\textsuperscript{79} Section 2(1)(f) of the Arbitration Act.
\textsuperscript{80} Section 7 of the Arbitration Act.
\textsuperscript{81} Section 16 of the Arbitration Act.
India

for International Arbitration, was set up in Mumbai in 2016. The High Courts at Delhi, Karnataka, Punjab and Haryana, and Madras, inter alia, have set up arbitration centres with the objective of providing recourse to credible yet affordable arbitration.

On 9 August 2019, the President of India gave his assent to the amendments to the Arbitration and Conciliation Act, 1996 (the Act). Some of the key highlights of the Arbitration and Conciliation (Amendment) Act, 2019 (the Amendment Act) are set out below:

**Arbitral institution**

Section 1(ca) has been introduced to define an arbitral institution as an arbitral institution designated by the Supreme Court or a High Court under the Act. The 2019 Amendment proposes to promote institutional arbitrations and defines arbitral institutions as those institutions recognised by the Supreme Court and the High Courts.\(^82\) This means that under Section 8 of the Act, a dispute can be referred to an institution by the Court and the Court need not take the burden of appointing an arbitrator under Section 11 of the previous regime. Further, with the setup of the New Delhi International Arbitration Centre (NDIAC), arbitration in India is likely to see significant growth.\(^83\)

**Appointment of arbitrators under Section 11**

The Amendment Act empowers the Supreme Court (in the case of international commercial arbitrations) and the High Court (in cases other than international commercial arbitrations) to designate arbitral institutions for the purpose of appointment of arbitrators. Such arbitral institutions shall be graded by the Arbitration Council of India (discussed below). Where a graded arbitral institution is not available, the Chief Justice of the concerned High Court may maintain a panel of arbitrators for discharging the functions and duties of the arbitral institution.

In the absence of a procedure to appoint an arbitrator or failure of such procedure under the agreement, the appointment shall be made by the arbitral institution designated by the Supreme Court or the High Court, as the case may be. The application for appointment of an arbitrator or arbitrators shall be disposed of by the arbitral institution within a period of 30 days from the date of service of notice on the opposite party. The arbitral institution shall determine the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal subject to the rates specified in the Fourth Schedule.

**Arbitration Council**

Part 1A has introduced the concept of an Arbitration Council of India (the Council), which shall be established by a notification by the Central Government. The composition of the Council shall include the following seven persons:

\( a \) Chairperson: either a judge of the Supreme Court, Chief Justice of a High Court or judge of a High Court or an eminent person, having special knowledge and experience in the conduct or administration of arbitration, who shall be appointed by the Central Government in consultation with the Chief Justice of India.

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\(^82\) Section 1(ca) of the Arbitration Act.

\(^83\) The New Delhi International Arbitration Centre Bill, 2019.
b Members: (1) an eminent arbitration practitioner having substantial knowledge and experience in institutional arbitration (domestic and international); and (2) an eminent academician having research and teaching experience in the field of arbitration and alternative dispute resolution laws.

c *Ex officio* members: (1) Secretary to the Government of India in the Department of Legal Affairs, Ministry of Law and Justice or his representative not below the rank of Joint Secretary; and (2) Secretary to the Government of India in the Department of Expenditure, Ministry of Finance or his representative not below the rank of Joint Secretary.

d *Ex officio* member secretary: chief executive officer.

e Part-time member: one representative of a recognised body of commerce and industry.

The Council shall, inter alia, promote and encourage arbitration, mediation, conciliation or other alternative dispute resolution mechanisms and, for that purpose, shall frame policy and guidelines for the establishment, operation and maintenance of uniform professional standards in respect of all matters relating to arbitration. The Council shall also frame policies governing the grading of arbitral institutions and arbitrators and recognise professional institutes providing accreditation of arbitrators.

**Grading of arbitral institutions and arbitrators**

The Council shall grade arbitral institutions on the basis of criteria relating to infrastructure, quality and calibre of arbitrators, performance and compliance with time limits for disposal of domestic or international commercial arbitrations, in such manner as may be specified by the regulations. The qualifications, experience and norms for accreditation of arbitrators shall be such as specified in the Eighth Schedule.

**Timelines under the Amendment Act**

**Completion of pleadings**

Section 23 has been amended to state that the statement of claim and defence shall be completed within a period of six months from the date the arbitrator or all the arbitrators (as the case may be) received notice, in writing, of their appointment.

**Arbitral award**

In cases other than international commercial arbitration, the award shall be made by the arbitral tribunal within a period of 12 months from the date of completion of pleadings. In the case of international commercial arbitrations, the award may be made as expeditiously as possible and endeavours may be made to dispose of the matter within a period of 12 months from the date of completion of pleadings.

**Amendment to Section 45**

Section 45 of the Act, under Part II (power of courts to refer the matter to arbitration unless it finds that the arbitration agreement is null and void, inoperative and incapable of being performed) has been amended to substitute the words ‘unless it finds’, with the words ‘unless it prima facie finds’. 
Qualifications and experience of arbitrators
A person shall not be qualified to be an arbitrator unless he or she is or has been:

a. an advocate within the meaning of the Advocates Act, 1961 having 10 years of practice experience as an advocate;

b. a chartered accountant within the meaning of the Chartered Accountants Act, 1949 having 10 years of experience;

c. a cost accountant within the meaning of the Cost and Works Accountants Act, 1959 having 10 years of experience;

d. a company secretary within the meaning of the Company Secretaries Act, 1980 having 10 years of experience;

e. an officer of the Indian Legal Service;

f. an officer with a law degree having 10 years of experience in the legal matters in the government, an autonomous body, a public sector undertaking or at a senior level managerial position in the private sector;

g. an officer with an engineering degree having 10 years of experience as an engineer in the government, an autonomous body, a public sector undertaking, at a senior level managerial position in the private sector or self-employed;

h. an officer having senior-level experience of administration in the Central Government or state government or having experience of senior level management of a public sector undertaking or a government company or a private company of repute; or

i. a person having educational qualification at degree level with 10 years of experience in a scientific or technical stream in the fields of telecoms, information technology, intellectual property rights or other specialised areas in the government, an autonomous body, a public sector undertaking or a senior level managerial position in a private sector, as the case may be.

The Schedule also prescribes general norms applicable to arbitrators, including:

a. the arbitrator must be impartial and neutral and avoid entering into any financial business or other relationship that is likely to affect impartiality or might reasonably create an appearance of partiality or bias among the parties;

b. the arbitrator shall be conversant with the Constitution of India, principles of natural justice, equity, common and customary laws, commercial laws, labour laws, law of torts, making and enforcing of arbitral awards, the domestic and international legal systems on arbitration and international best practices; and

c. the arbitrator should be capable of suggesting, recommending or writing a reasoned and enforceable arbitral award in any dispute that comes before him or her for adjudication.

Confidentiality of the arbitration proceedings
The arbitrator, the arbitral institution and the parties to the arbitration agreement shall maintain confidentiality of all arbitral proceedings except the award where its disclosure is necessary for the purpose of implementation and enforcement of award.

Application of the Arbitration and Conciliation (Amendment) Act, 2015
It has been clarified that unless the parties otherwise agree, the amendments made to the Act by the Arbitration and Conciliation (Amendment) Act, 2015 shall not apply to the arbitral proceedings that began before the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 (i.e., 23 October 2015). As this provision overruled the position
laid down by the Supreme Court in *BCCI v. Kochi Cricket Pvt. Ltd*, the Supreme Court of India recently struck it down on the ground of ‘manifest arbitrariness’ and it was held to be violative of Article 14 of the Constitution. As a result, Section 26 of the 2015 Amendment stands revived, and the decision rendered in the matter of *BCCI v. Kochi Cricket Pvt. Ltd* will continue to apply as a guiding principle for determining applicability of the 2015 Amendment.

### 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 Civil Procedure Code 1809. To that extent, this might compromise the independence of mediations from court-related procedures and interference. Nevertheless, it gives mediations greater legitimacy and compatibility with the formal dispute resolution processes in society.

Another point to be noted is the growing importance of mediation clauses in commercial agreements. Both mediation and consultation form a mandatory aspect of pre-arbitration procedure. It has also been held by courts that mediation and consultation are a substantial part of the agreement and are to be followed prior to any arbitration being initiated. In the event that the dispute is referred first to arbitration, the tribunal has the power to render the petition inadmissible on the grounds of the pre-arbitration procedure prescribed by the agreement being violated by the parties.

Akin to the Arbitration Rules 2006, the judges of the Salem bench also recommended the adoption of the Civil Procedure Mediation Rules 2006. These rules govern almost the whole of the mediation process starting from the procedure for appointment of the mediator by both the parties from a panel of mediators who have already been formed for this purpose by the district courts. The qualifications and disqualifications for the panel, the venue of the mediation, the removal of a mediator from the panel, their impartiality and independence, the procedures during the mediation itself, confidentiality, privacy, the settlement agreement and many other aspects are governed by these rules.

It is pertinent to note also the popularity of court-annexed mediation whereby mediation centres have been set up by various High Courts including in Delhi, Madras and Bangalore.

In July 2019, India signed the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention), by which India has formally recognised ‘enforceable settlement agreements’ arising out of mediation in international commercial disputes.

The recent amendment to the Commercial Courts Act encourages the parties to undergo mediation.

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India

iv Other forms of ADR

Conciliation has been inserted in Part III of the Arbitration Act and is less formal than
arbitration, but more formal than mediation. To the extent that it requires only mutually
consenting parties and not a formal written document executed to be able to conciliate, it
proves an easier form of dispute resolution. The parties can appoint up to three conciliators.88
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.89 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.90

An interesting mechanism that is an example of this is found in the Micro, Small and
Medium Enterprises Act (the MSME Act), which stipulates that in the event a company
falling within the category of micro, small or medium enterprises has not received payment
or is a victim of default of contract, the aggrieved company may, by making a reference
to the MSME Council established under the MSME Rules, go for mandatory conciliation
proceedings, which if they fail, would then go for arbitration. In fact, during this process, the
civil courts do not entertain such matters and refer them to the Council for adjudication. An
appeal of the award of the Arbitral Tribunal requires a deposit of 75 per cent of the amount
value in the civil court of appropriate jurisdiction.91

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
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

87 Section 62 of the Arbitration Act.
88 Section 63 of the Arbitration Act.
89 Section 64(2) of the Arbitration Act.
90 Sections 73 and 74 of the Arbitration Act.
91 Section 18, Section 19 and Section 21 of the MSME Act, Rules 3 and 4 of MSME Rules, Karnataka.
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.

Confidentiality, a cornerstone of arbitration proceedings, has been formally recognised by the 2019 Amendment by which the arbitrator, the arbitral institution and the parties to the arbitration agreement must maintain confidentiality of all arbitral proceedings except the award where its disclosure is necessary for the purpose of implementation and enforcement of award.92

### 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 47 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.

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92 Section 42A of Arbitration Act.
Chapter 14

INDONESIA

Ahmad Irfan Arifin

I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

i Structure of law

The Republic of Indonesia inherited most of its legal system from the Dutch colonies. Indonesia is a civil law country and is characterised by codified legal provisions, and that written laws and regulations are the primary sources of laws.

The formulation of laws in Indonesia is carried out in accordance with Law No. 12 of 2011 on Formulation of Laws and Regulations as lastly amended by Law No. 15 of 2019. This Law stipulates the type and hierarchy of Indonesian laws and regulations, as follows:

a the 1945 Constitution;
b the Decree of the People’s Consultative Assembly;
c law, or government regulation in lieu of law;
d government regulation;
e presidential regulation;
f provincial regulation; and
g regency or municipality regulation.

The foregoing hierarchy must be understood in conjunction with the principle of *lex superior derogat legi inferiori* (a law higher in the hierarchy repeals the lower one). The purpose of this principle is to ensure conformity with all of the laws and regulations listed in the hierarchy.

Although Indonesia does not acknowledge the binding force of precedents, former precedents that have frequently been referred to in adjudicating similar cases are considered to have a ‘persuasive power’ among the judges. If the judges find such a precedent to be relevant to the case, they will refer to it in the final ruling of the case, and thus the judges have the choice of whether to follow the precedent or not.

Another aspect of precedents in Indonesia is they tend to set a trend in understanding laws and regulations. In some cases, precedents may provide a fully different interpretation of laws and regulations – compared to the one provided by the relevant laws and regulations – on the grounds of equity or public policy. This often provokes concerns on the degree of legal certainty in Indonesia. However, some precedents may also be worthy of appreciation owing to their groundbreaking legal importance.

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1 Ahmad Irfan Arifin is a litigation partner at Lubis, Santosa & Maramis. The author wishes to thank the firm associates Kristian Takasdo Simorangkir and Edgar Christian Martua Raja for their great help in the preparation of this chapter.
In addition, customary laws and shariah law also influence the Indonesian legal system. The above laws are applicable with the following limitation:

a) customary laws only prevail to the extent that they do not contravene prevailing written laws and regulations; and

b) shariah law only prevails for:

- civil matters stipulated under the prevailing laws and regulations (e.g., marriage and inheritance for Muslims); and
- regions stipulated under the prevailing laws and regulations (i.e., the province of Nanggroe Aceh Darussalam).

ii Structure of courts

The judiciary of Indonesia comprises the Constitutional Court and the Supreme Court. The Constitutional Court holds the authority to conduct a constitutional review of laws, which may result in revocation of certain provisions or the whole law if it is found to contravene the 1945 Constitution. As for regulations having hierarchy below the laws, the Supreme Court has the authority to review whether a regulation contradicts certain laws that again may result in certain provisions or the whole regulation being annulled by the Supreme Court.

Aside from the above, the Supreme Court serves as the highest court of appeal for the following judicial bodies:

a) general courts whose jurisdiction encompasses civil and criminal cases;

b) state administrative courts that deal with state administrative disputes;

c) religious courts that have jurisdiction over civil disputes between Muslims, for example, marriage and inheritance law, and economic shariah law; and

d) military courts whose jurisdiction covers military criminal cases and military administrative cases.

Any party conducting a dispute through these Indonesian courts (unless stipulated otherwise under certain laws) should do so in the following order:

a) district courts (first instance);

b) high courts (appeal); then

c) the Supreme Court (cassation).

Judgments rendered by district courts may be appealed to the relevant high courts, whether on the ground of legal issues or factual issues. The disputing parties may also file a petition for cassation against high court judgments; however, the grounds for such petition for cassation are limited to issues pertaining to the application of laws.

Save for cassation judgments, all district court judgments and high court judgments shall not be deemed as final and binding unless all available legal recourse has been exhausted. However, under the procedural laws, even a final and binding decision may also be appealed.

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2 In criminal cases, judgments stating that the defendant is acquitted or discharged from all legal charges may not be appealed to the high court. The available legal recourse for such judgment is by filing for cassation to the Supreme Court. Nevertheless, filing for cassation against a judgment that acquits a criminal defendant was once prohibited by Article 244 of Indonesian Code of Criminal Procedure until the provision was amended under the ruling of Constitutional Court Judgment No. 114/PUU-X/2012 dated 28 March 2013.
through an extraordinary legal recourse (a case review) at the Supreme Court. In this regard, the grounds for filing a case review are limitative and must be submitted within a specific time period, in accordance with the prevailing laws and regulations.

### iii Framework of arbitration and alternative dispute resolution

Alternative dispute resolution (ADR) in Indonesia is mainly regulated through the Arbitration Law.³ The Arbitration Law defines ADR as an institution for the resolution of disputes or differences of opinion through procedures agreed by the parties, namely resolutions outside the courts by:

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The Arbitration Law does not provide detailed rules and procedures of conducting ADR. The disputing parties are at liberty to choose ADR rules and procedures.

Although the same principle applies to virtually every ADR, rules and procedures of court-annexed mediation are strictly regulated under the Supreme Court Regulation.⁴

In Indonesia, the Arbitration Law also serves as lex arbitri. As such, all arbitration proceedings conducted in Indonesia must not contradict the provisions of the Arbitration Law.

Even though Indonesia has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, international arbitral awards⁵ are enforced in accordance with the provisions of the Arbitration Law.⁶

Indonesia has also become a signatory to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) since 1968. However, Indonesia excludes disputes arising from state administrative decisions issued by regencies from the types of dispute that may be settled by ICSID.⁷

### II THE YEAR IN REVIEW

#### i E-litigation: a new development regarding Indonesia’s e-court system

In 2019, the Supreme Court issued a new regulation pertaining to Indonesia’s e-court system, namely Supreme Court Regulation No. 1 of 2019 on Administration of Case and Legal Proceedings in Court via Electronic Means (SC Regulation No. 1/2019); along with its implementing regulation, Supreme Court Decree No. 129/KMA/SK/VIII/2019 of 2019 on Technicalities Guidance of Administration of Case and Legal Proceedings in Court via

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³ Law No. 30 of 1999 on Arbitration and ADR.
⁴ Supreme Court Regulation No. 1 of 2016 on Procedure of Court-Annexed Mediation.
⁵ Under Article 1 Paragraph 9 of the Arbitration Law, international arbitration awards are awards rendered by an arbitration institution or ad hoc arbitration outside the legal jurisdiction of the Republic of Indonesia, or such awards are deemed as international arbitration awards under Indonesian laws and regulations.
⁶ Articles 65–69 of the Arbitration Law.
⁷ President Decree No. 31 of 2012 on Disputes Whose Settlement Shall Not Be Submitted to the Jurisdiction of International Centre for Settlement of Investment Disputes.
Electronic Means (SC Decree No. 129/2019). These new regulations have repealed the previous regulations on a similar matter (i.e., Supreme Court Regulation No. 3 of 2018 on Case Administration in Court via Electronic Means (SC Regulation No. 3/2018) and Supreme Court Decree No. 122/KMA/SK/VII/2018 of 2018 on Guidelines for Registered User of Court Information System (SC Decree No. 122/2018)) and introduced the new concept of electronic proceedings (e-litigation).

Under the concept of e-litigation, the implementation of the e-court system has been broadened. In addition to electronic mechanisms for filing claims, summons, payment of legal cost, and obtaining judgments and stipulations, e-litigation has made it possible for the parties to carry out other substantial legal proceedings via electronic means, such as document exchanges (e.g., the defendant’s response; the plaintiff’s counterplea; the defendant’s rejoinder; the parties’ statement of conclusion)\(^8\) and the evidentiary process.\(^9\,10\) Therefore, e-litigation has allowed the disputing parties to carry out most of the legal proceedings via electronic means without the need for conducting conventional hearings (unless it is deemed necessary).

Another notable update that has been made (under SC Regulation No. 1/2019) is that the disputing parties are allowed to file appeals, cassations and civil reviews through the e-court system.

Despite the foregoing, it is worth noting that e-litigation (including filing of appeals, cassations and civil reviews) may only be implemented upon the agreement of the disputing parties. This agreement is to be obtained by the panel of judges following the failure of the disputing parties to engage in a court-annexed mediation process.\(^11\)

The Indonesian Supreme Court’s effort to implement e-litigation should be appreciated as this may make court proceedings much simpler – insofar as it is agreed to by the disputing parties. Nevertheless, it is important for the Supreme Court to be aware that e-litigation might be prone to cybersecurity issues in relation to the collection and storage of case-related documents.\(^12\) Further, it is important for the Supreme Court to maintain and continue the improvement of this system, in order to optimise this system.

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\(^8\) SC Regulation No. 3/2018 and SC Decree No. 122/2018 did not provide further explanations on the technicalities of document exchanges. However, SC Regulation No. 1/2019 and SC Decree No. 129/2019 have included further explanations pertaining to this matter. For instance, with regard to the submissions schedule, SC Regulation No. 1/2019 and SC Decree No. 129/2019 give the authority to the panel of judges to make the submissions schedule that must be complied by the disputing parties.

\(^9\) Based on Section E.5 of the Appendix of SC Decree No. 129/2019:

\(a\) the disputing parties shall upload their written evidence in the form of duty-stamped electronic documents to the court information system. Nevertheless, the disputing parties are still required to bring the original duty-stamped documents to be verified by the panel of judges in conventional hearings;

\(b\) as for the examination of witnesses and experts, the disputing parties may conduct the hearing remotely by means of audiovisual media communication.

\(^10\) Articles 1 Paragraph 6 and 4 of SC Regulation No. 1/2019 in conjunction with Section E of the Appendix of SC Decree No. 129/2019.

\(^11\) Article 20 of SC Regulation No. 1/2019.

ii Urgency to improve the requirements of the suspension of debt payment obligation (PKPU) under Indonesian laws

Law No. 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligation (the Indonesian Bankruptcy Law) has been known for its lenient standard on the requirements for creditors to file a PKPU petition, as it only requires creditors to foresee that a debtor will not be able to repay a due and payable debt (Article 222 Paragraph (3) of the Indonesian Bankruptcy Law).

In this regard, there are no other requirements to be fulfilled, such as a minimum amount of debt percentage or an insolvency test. That being said, a creditor may file a PKPU petition despite the fact that: (1) the amount of debt to be paid to the creditor is minimal compared to the entire debt of the debtor; and (2) the debtor is not insolvent (i.e., financially healthy) and still capable of settling the outstanding debt to the concerned creditor.

In practice, the above leniency may create a condition where the majority creditors may feel aggrieved for certain reasons, among others, for example if they prefer to have the debt restructured outside the court. This kind of issue has recently occurred in the PKPU case of Duniatex Group (the Duniatex case), whereby six entities of Duniatex Group had been declared to be under PKPU by Semarang Commercial Court based on a petition made by one of its creditors, PT Shine Golden Bridge (PT SGB). The court judgment was rather surprising because prior to the filing of the PKPU petition by PT SGB, there were seven banks who had agreed to restructure Duniatex Group’s debt (e.g., PT Bank Rakyat Indonesia Tbk, PT Bank Mega Tbk, PT Bank BNI Syariah) outside the PKPU mechanism. The accumulation of these seven banks’ debts had represented at least 21.29 per cent of the entire debt; while on the other hand, PT SGB’s debt only constituted 0.009 per cent of the entire debt.

The above case is only one of hundreds of PKPU cases in Indonesia, which signifies the urgency to improve the Indonesian Bankruptcy Law, especially on the PKPU requirements. The main purpose of such improvement is to prevent any abuse of the PKPU process by certain parties to gain unfair benefits (e.g., hampering an ongoing restructuring process outside the court or as means for the debtor to simply circumvent its payment obligation.

14 The decision to perform debt restructuring outside the court is made for many reasons. However, most of them are because the creditor wants to make its own debt restructuring structure without any involvement of other creditors, which is required under Article 281 Paragraph (1) of the Indonesian Bankruptcy Law.
15 Registered under Case No. 22/Pdt.Sus-PKPU/2019/PN Niaga Smg of 11 September 2019.
16 The six entities of Duniatex Group are: (1) PT Delta Merlin Dunia Textile; (2) PT Delta Dunia Tekstil; (3) PT Delta Dunia Sandang Tekstil; (4) PT Delta Merlin Sandang Tekstil; (5) PT Dunia Setia Sandang Asli Tekstil; and (6) PT Perusahaan Dagang dan Perindustrian Damai.
18 The entire debt of Duniatex Group is in the region of 18.79 trillion rupees, while the outstanding debt of PT SGB is only in the region of 1.69 billion rupees (https://nasional.kontan.co.id/news/pkpu-duniatex-dikabulkan). On the other hand, the seven-bank debt is amounting to 4 trillion rupees (https://keuangan.kontan.co.id/news/sebanyak-7-bank-dikabarkan-sepakati-skema-restrukturisasi-dengan-duniatex?page=1).
to large creditors). If the Indonesian lawmakers do not see the urgency, then the current condition may become one of obstructing factors for Indonesia to attract more investment in the future.

III COURT PROCEDURE

i Overview of court procedure

The official language to be used in the court proceedings is Indonesian. A civil court case is commenced by filing a lawsuit that is addressed to the chairman of the relevant district court – in general, the district court whose jurisdiction encompasses the defendant’s domicile. The lawsuit must comprise factual grounds and legal bases, and prayer for relief (where the plaintiff describes the remedies that they seek from the court).

After the filing of lawsuit, the chairman of the district court appoints the examining panel of judges. The panel of judges determines the first hearing date and summons the defendant to appear before the court.

In the first hearing, the panel of judges verifies the parties’ credentials and orders the parties to enter into a court-annexed mediation process. If the mediation process fails, the court will proceed with the pronouncement of the lawsuit and allow the defendant to produce a statement of defence consisting of a demurrer and response to the case merits. The demurrer section may contain a challenge to the court’s competence, the formality of the lawsuit, or both.

At the same time, the laws also provide the defendant with the right to file a counterclaim against the plaintiff.

Afterwards, the plaintiff may file a counter plea against the defendant’s statement of defence and a statement of defence against the defendant’s counterclaim (if any). Subsequently, the defendant is given the right to submit a rejoinder against the plaintiff’s counter plea and a counter plea against the plaintiff’s statement of defence in the counterclaim (if any). For final submissions, the court gives the opportunity for the plaintiff to lodge a rejoinder against the defendant’s counter plea in a counterclaim.

Before proceeding to the evidentiary process, the court shall render an interlocutory judgment over the court competence demurrer. If the court grants the court competence demurrer, then the court shall declare the lawsuit to be inadmissible. Otherwise, the court shall proceed with the evidentiary hearing.

In the evidentiary hearing, the judges will provide the widest opportunity for the parties to submit any and all evidence that the parties deem to be relevant and in support of their argument.

Subsequent to the evidentiary process, the court shall provide the opportunity for the parties to submit a written statement of conclusion. After receiving the statement of conclusion, the panel of judges will adjourn the hearing in order for the judges to prepare the judgment, usually within two to four weeks.

The laws provide the litigants with the right to file an appeal to the district court. If the litigants are not satisfied with the judgment of the appeal court, the litigants may also file a cassation petition to the Supreme Court.
ii  **Time frames**

The Supreme Court has been encouraging the district courts to conclude their proceedings within five months; and the high courts to conclude appeal proceedings within three months.\(^\text{19}\) In practice, however, there have been cases where the district court proceedings take around six to 12 months.

For cassation and case review proceedings, the Supreme Court has determined that such proceedings shall be concluded within 250 days of when the case dossiers are received by the Supreme Court.\(^\text{20}\) Nonetheless, in practice, owing to its load of cases, it is very rare for the Supreme Court to finish case examination within that period.

iii  **Class actions**

Class actions are permissible only if the claim satisfies the following requirements:

\[ a \] there are so many group members that it would be ineffective and inefficient if the lawsuit was separately filed or jointly filed;

\[ b \] there is a similarity of facts or events, legal bases, and types of prayer for relief between the representative of the group and its group members; and

\[ c \] the group representative has the honesty and determination to protect the interest of its group members.

The above requirements will first be assessed by the panel of judges in order to determine whether or not the class action may proceed. Subject to fulfilment of these requirements, the plaintiff will be required to provide a proposal for the notification to the group members. The remaining procedure shall follow the prevailing civil procedural laws.

iv  **Representation in proceedings**

In general, it is the right of the litigants to be represented by lawyers.

All representation, except for the representative in class action proceedings, must be based on power of attorney. If power of attorney is executed outside the territory of Indonesia, then it must be consularised at the embassy of Indonesia and notarised in the country where the power of attorney is executed.

v  **Service out of the jurisdiction and assistance to foreign courts**

Indonesia is not a member of any convention pertaining to judicial assistance, and, to date, Indonesia only has mutual judicial assistance with the Kingdom of Thailand. As such, in general, when Indonesian courts are in need of judicial assistance from foreign court or the other way around, the procedure will be done through a diplomatic channel.

Up to now, there are no laws and regulations regulating the procedure of service out of the jurisdiction. The same applies to matters concerning assistance to foreign courts.

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\(^\text{19}\) Circular Letter No. 2 of 2014 on Resolution of Case in The First Instance Court and Appeal at 4 (Four) Types of Judiciary dated 13 March 2014.

\(^\text{20}\) Decree of the Chairman of Supreme Court Number 214/KMA/SK/XII/2014 dated 31 December 2014.
vi  Recognition and enforcement of foreign court judgments
A foreign court judgment cannot be enforced in Indonesia. If a party would like to enforce its right based on a foreign court judgment then it must file a new lawsuit at a relevant Indonesian district court (relitigate the case). During the court proceedings, the plaintiff may submit the foreign court judgment to the court as documentary evidence.

vii  Access to court files
Indonesian courts have adopted a case tracking system that allows the public to access information regarding ongoing or concluded cases at the relevant court. This includes:

\[ \begin{align*}
   a & \text{ date of case registration;} \\
   b & \text{ classification of case;} \\
   c & \text{ names of the parties;} \\
   d & \text{ prayer for relief;} \\
   e & \text{ hearing schedule; and} \\
   f & \text{ the administrative cost of the case and its disbursement report by the court.}
\end{align*} \]

If the case has been concluded by the first instance court, the case tracking system may publish the names of judges and the substitute registrar of the case.

Members of the public may obtain an unofficial copy of a court judgment or court decree, but court submission or pleading documents or evidence are unavailable for the public in principle.

viii  Litigation funding
Any practice of litigation funding is not recognised by Indonesian laws and regulations. Some law practitioners argue that litigation funding may raise issues of ethics and may violate decency or any other source of unwritten laws in Indonesia.

IV  LEGAL PRACTICE
i  Conflicts of interest and Chinese walls
The Advocates Law\(^1\) does not set forth a rule on conflict of interest. However, the Indonesian Advocate Code of Ethics\(^2\) provides a basic rule that an advocate (lawyer) handling the joint interest of two parties is required to fully resign from handling such interest, if in the future there is a conflict of interest between the relevant parties.

There is no specific provision for explaining this basic rule. Some law practitioners argue that the above rule may be broadly interpreted, and it may depend on the advocate.

Indonesian legal practice does not recognise the concept of Chinese walls, and as such no set of rules provide any definition of Chinese walls.

\(1\) Law No. 18 of 2003 on Advocates.
\(2\) Indonesian Advocate Code of Ethics, ratified on 23 May 2002.
ii  Money laundering, proceeds of crime and funds related to terrorism

For some matters outside litigation or arbitration proceedings, Indonesian advocates are obliged to:

a  provide a report on suspicious financial transactions \(^{23}\) to the Indonesian Financial Transaction Reports and Analysis Center (PPATK); and
b  apply the principle of ‘know your service user’. \(^{24}\)

The matters outside litigation or arbitration proceedings are related to:

a  the purchase and sale of a property;
b  the management of money, stocks or other financial service products;
c  the management of a checking account, savings account, deposit account or stocks account;
d  the operation and the management of a company; and
e  the establishment, purchase and sale of legal entities.

Advocates are obliged to apply the principle of know your service user at the following times:

a  there is a business or commercial relation with its service user;
b  there is a financial transaction in Indonesian rupiahs or foreign currency involving a minimal amount of or equal to 100 million rupiahs;
c  there is a suspicious financial transaction relating to money laundering and terrorism funding; or
d  the advocate has doubts regarding the truth of the information from its service user.

iii  Data protection

The legal framework of personal data protection comprises various laws and regulations. \(^{25}\) The following is considered as protected personal data under Indonesian laws and regulations:

a  Based on the Public Information Disclosure Law:
   •  the history and condition of a family member;
   •  the history, condition, treatment and medication of physical and psychological health;
   •  finances, assets, income and condition of bank account;

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\(^{23}\) Article 1 Paragraph 8 of Government Regulation No. 43 of 2015 on Reporting Party in the Prevention and Eradication of Money Laundering provides that suspicious financial transaction is (1) a financial transaction that deviates from the profile, characteristic or behaviour of transaction pattern of the service user; (2) a financial transaction conducted by the service user that is reasonably considered as having the purpose of avoiding the reporting obligation of the service user under the laws and regulations pertaining to the prevention and eradication of money laundering; (3) a financial transaction that is conducted by or being cancelled to be carried out by using assets that allegedly originated from proceeds of crime; and (4) a financial transaction that is requested by the PPATK to be reported by the advocate because the transaction involves assets that allegedly originated from proceeds of crime.

\(^{24}\) Article 1 Paragraph 3 of PPATK Regulation No. 10 of 2017 on the Application of the Principle of Know Your Service User for Advocates provides that the principle of know your service user is the principle applied by advocates to know the profile and transaction of its service user by implementing certain obligations under the regulation.

• the result of evaluation in connection with the capability and intellectuality recommendation; and
• records concerning the individual with regard to formal education and non-formal education.

b Pursuant to population administration laws and regulations:
• records on physical or mental disability;
• fingerprints;
• iris recognition;
• signatures;
• other data elements regarding a person that are considered unacceptable;
• citizen identification number;
• place and date of birth;
• parent names;
• home address;
• records on marriage, as well as the date and status of marriage;
• religion;
• records on divorce as well as the date of divorce;
• blood type;
• sex;
• records concerning children born outside of marriage;
• records on adoption;
• type of work;
• last education; and
• the ownership of deed of birth or marriage.

Government and private institutions are prohibited from making personal data public information. Specifically for personal data in electronic systems, the Indonesian Minister of Communication and Informatics has issued a regulation that specifies that the protection of personal data includes protection of the acquisition, collection, processing, analysis, storage, appearance, announcement, transmission, dissemination and destruction of personal data.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege
The Advocates Law provides that advocates have the right on confidentiality of relationship with their clients, including protection of materials and documents against seizure or examination measures, and protection against recording or tapping of electronic communications.

The Indonesian Advocates Code of Ethics further provides that letters sent by advocates to other advocates in a case may be presented before the judges unless they are made ‘without prejudice’. Also, advocate-to-advocate correspondence or contents of conversations in the failed attempt of amicable settlement shall not be presented as evidence before the court.

The Advocates Law and Indonesian Advocates Code of Ethics are silent on whether its provisions may also be applied to in-house lawyers.
ii Production of documents in civil proceedings

In principle, a party asserting or rebutting a right or entitlement is obliged to prove it based on the available evidence. The law does not require the disputing parties to produce all documents or evidence relevant to the case; as such, it fully depends on the parties’ strategy and possession of documents.

Indonesian civil procedure laws consider written evidence as primary evidence. To be accepted by the court, the parties must be able to present the original written evidence before the court because, under Indonesian civil procedure law, the power of written evidence lies within its originals.

Indonesian civil procedure law provides that a party may request the judges to order the opponent to submit letters or documents belonging to the disputing parties concerning matters being disputed if such letters or documents are possessed by the opponent. Nonetheless, in practice, the foregoing provision has rarely, if ever, been invoked by Indonesian litigants. As such, in practice, the disputing parties rely on any evidence in their possession to prove their right or to rebut the opponent’s arguments.

VI ALTERNATIVES TO LITIGATION

i Arbitration

In Indonesia, Arbitration is commonly used to resolve commercial disputes involving particular expertise (e.g., construction, capital market, insurance). Meanwhile, the major arbitral institution commonly used in Indonesia is the Indonesian National Board of Arbitration.

The Arbitration Law categorises arbitration awards according to the place where the arbitration award is rendered. If the arbitration award is rendered outside the jurisdiction of Indonesia, it shall be deemed as an international arbitration award. If it is the other way around, the arbitration award shall be deemed a domestic arbitration award.

The Arbitration Law does not recognise the right of appeal against arbitration awards. However, the district court may refuse to enforce the domestic arbitration award for the following reasons:

- the arbitration agreement is absent;
- the dispute is not allowed to be resolved through arbitration; or
- the award violates morality and public policy.

Aside from the above, the newly issued Decree of the Directorate General of the General Judiciary No. 40/DJU/SK/HM.02.3./1/2019 of 2019 on the District Court Execution Guideline has now required the court to verify whether the international arbitration award has been registered within 30 days as of the pronouncement of the award. Unfortunately, the Decree did not come up with any explanation regarding the rationale behind this provision.

The grounds for refusal of recognition and enforcement of international arbitration awards under the Arbitration Law are more limited, compared to the one provided by the New York Convention.

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26 Article 1886 of the Indonesian Civil Code; Article 300 of Civil Procedure Law for Regions Outside Java and Madura.
Moreover, in Indonesia, the disputing parties are entitled to request annulment of the arbitration award on the following grounds:

- letters or documents submitted in the hearing, after the award is rendered, are acknowledged to be false or declared to be forgeries;
- discovery of documents, after the award has been rendered, which are decisive in nature and were deliberately concealed by the opposing party; and
- the award is rendered as a result of fraud committed by one of the parties in the proceedings.

The Arbitration Law does not clearly state that the grounds for annulment are applicable for domestic and international arbitration awards. However, most decisions have declared that Indonesian courts have no jurisdiction to adjudicate matters regarding annulment of international arbitration awards.

### ii Mediation

There are two types of mediation recognised under Indonesian law; namely, court-annexed mediation and voluntary mediation (non-court mediation). While court-annexed mediation has been used since the Dutch colonial era, non-court mediation was introduced in 1999 through the promulgation of the Arbitration Law.

With regard to court-annexed mediation, the Supreme Court has also issued a regulation pertaining to Procedure of Court-Annexed Mediation.  

There are two major differences between court-annexed mediation and voluntary mediation, namely:

- court-annexed mediation is mandatory in nature, thus it must be conducted at the preliminary stage of civil court proceedings. On the other hand, voluntary mediation will only be conducted upon the disputing parties’ agreement; and
- rules and procedures of court-annexed mediation shall comply with the prevailing laws and regulations, while rules and procedures of voluntary mediation fully depend on the agreement between the disputing parties.

Although mediation has long been recognised by law, it has yet to be as popular as arbitration in terms of alternatives to litigation. This might be for several reasons, including:

- the disputing parties are pessimistic that mediation will result in a win-win solution, as their first attempt to negotiate has already been failed;
- the settlement agreement remains vulnerable to any violation by the disputing parties, which later ends up in court or arbitration proceedings; and
- court-annexed mediation still contains shortcomings, such as a relatively short time period for conducting mediation without considering the degree of complexity of the cases (i.e., only 30 business days with a chance to extend the period by up to another 30 business days with the parties’ consent).

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27 Supreme Court Regulation No. 1 of 2016 on Procedure of Court-Annexed Mediation.
VII OUTLOOK AND CONCLUSIONS

In 2019, the Supreme Court has made a concrete effort to modernise the Indonesian civil procedural laws, which is apparent from the implementation of e-litigation under SC Regulation No. 1/2019 and SC Decree No. 129/2019. While there might be some practical issues in its implementation, the newly introduced system is, however, expected to help the court in managing the cases more effectively, while also benefiting litigants in terms of time and cost saved in legal proceedings.

Nevertheless, aside from the above improvement, there is still a big challenge to be faced by the Indonesian government in terms of dealing with more ‘legally substantial’ matter in order for Indonesia to attract more investments in the future. This includes, among others, the long-awaited reform of some old laws that derive from Dutch colonial laws as well as the synchronisation of overlapping regulations, which has been a major problem for foreign investors over the years.
I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

The Constitution of Ireland, enacted in 1937, is the basic law of the state. It provides the framework for the separation of powers between the legislature, executive and judiciary; the courts structure; and the fundamental rights of Irish citizens that are enforceable through those courts in addition to those prescribed by the legislature. Under Article 29 of the Constitution, EU law applies and shall not be invalidated by any provision of the Constitution. Ireland is a common law jurisdiction and the Irish courts are bound by the doctrine of precedent, which means that all courts must follow prior decisions of superior courts and courts of equal jurisdiction.

Civil claims up to €15,000 are dealt with in the District Court; claims up to €75,000 are dealt with in the Circuit Court (€60,000 for personal injury actions); and the High Court has an unlimited monetary jurisdiction.

The Court of Appeal, which was established in October 2014, has the jurisdiction that was previously vested in the Supreme Court and is the default court for all appeals from decisions of the High Court and its decision will, except in certain limited circumstances, be final. Only in exceptional circumstances, and subject to the Supreme Court’s own ‘leave to appeal’ requirements, is it possible to bypass the Court of Appeal and to bring a ‘leapfrog appeal’ directly to the Supreme Court. The Supreme Court continues to exercise the function of an appellate court, where an issue of general public importance arises or where, in the interests of justice, it is necessary to hear an appeal.

The Commercial Court is a division of the High Court dealing with commercial disputes with a value of over €1 million. Intellectual property disputes and appeals (or judicial reviews) of a regulatory decision may be entered into the Commercial Court list regardless of the value of the case. Application for admission is made by way of motion to the Commercial Court, grounded on the applicant’s affidavitt and a certificate from the applicant’s solicitor. There is no automatic right for any case to be admitted to the Commercial Court list.

Statutory tribunals are also in place to deal with specialist disputes and there are various alternative dispute resolution (ADR) mechanisms available, including arbitration, mediation, conciliation, expert determination and adjudication, for resolving disputes either without recourse to the courts or within the context of existing proceedings.

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THE YEAR IN REVIEW

Legal Services Regulation Act 2015

On 7 October 2019, the Minister for Justice and Equality commenced a number of landmark reform provisions under the Legal Services Regulation Act 2015 (the 2015 Act) in relation to legal costs and services, including the following:

- Various functions and powers of the Legal Services Regulatory Authority (LSRA) in relation to complaints and disciplinary matters (Part 2).
- Inspections by the LSRA of legal practitioners (Part 3).
- Protection of clients, including the requirement to have professional indemnity insurance (Part 5).
- Establishment of the Review Committee, the Complaints Committee and the Legal Practitioners Disciplinary Tribunal (Part 6).
- Direct professional access to barristers on non-contentious matters and introduction of Limited Liability Partnerships (Part 8).
- Introduction of the Office of the Legal Costs Adjudicators (which replaces the Office of the Taxing Master) and the maintenance by the new adjudicators of a public register of legal costs determinations (Part 10).

Section 58 of the 2015 Act provides that complaints in relation to legal services and fees must be brought within three years. Time runs from the date when the legal services were provided or the bill was issued; or the date when the client first became aware or should reasonably have become aware that ‘it would be reasonable to consider’ that the services were inadequate or the amount sought in the bill was excessive.

Sections 149 to 161 of the 2015 Act set out the obligations on solicitors and barristers to keep clients informed about the legal costs to be incurred. The requirements under Section 68 of the Solicitors (Amendment) Act 1994 have been replaced with those of Section 150 of the 2015 Act with the result that a solicitor must now provide a notice which discloses the costs that will be incurred, or, if this is not reasonably practicable, the basis on which such costs are to be calculated.

Supreme Court decision on discovery

In Tobin v. Minister for Defence & Ors [2019] IESC 57, the Supreme Court delivered an important judgment in relation to discovery. The Supreme Court decided to hear the case on the basis that it considered ‘an issue of general public importance has been identified which concerns the proper overall approach to discovery in modern conditions and in circumstances where the burden of complying with discovery is likely, on the facts of the case in question, to be significant’. 3

The plaintiff was employed as an aircraft mechanic in the Air Corps. He alleged that he was exposed to dangerous chemicals and solvents during the course of his employment.

In the High Court, the plaintiff filed a motion seeking extensive discovery from the defendant of 15 separate categories of documents, a number of which were agreed before the hearing of the motion. The defendant contested the discovery request on the basis that...
it was estimated that it would take 10 members of staff approximately 220 hours to locate, review and categorise the documents. The defendant contended that the plaintiff should issue interrogatories (questions) requesting the defendant to confirm whether the chemicals identified in the pleadings were used by the Air Corps during the specific periods of time identified by the plaintiff. The High Court granted the plaintiff’s motion, ruling that the categories of discovery were relevant and necessary to the fair disposal of the matters in dispute. The High Court also held that the use of interrogatories would be inappropriate in circumstances where the defendant had denied the allegation that the plaintiff had been exposed to dangerous chemicals and put the plaintiff on full proof of this allegation.

On appeal, the Court of Appeal held that where the discovery sought is likely to be extensive, discovery should not be ordered unless all alternative avenues have been exhausted and shown to be inadequate. The Court of Appeal allowed the appeal in respect of a number of categories of documents on the grounds that the application for discovery was premature and that the plaintiff should, in the first instance, seek the information by means of interrogatories or a notice to admit facts. The Court of Appeal stated that if the interrogatories did not provide what was really necessary or essential to the prosecution of the plaintiff’s case, the application for discovery might be renewed afresh to the High Court.

The plaintiff appealed the decision of the Court of Appeal to the Supreme Court. While the Supreme Court acknowledged two further considerations when a court is considering an application for discovery, namely ‘proportionality’ and first pursuing ‘alternative, more efficient methods of disclosure’, it noted that the key criteria were relevance and necessity. However, it stated that if it could be shown that discovery would be particularly burdensome, a court would have to consider a range of factors in deciding whether discovery was truly ‘necessary’. These factors included:

a. the extent of the burden which compliance is likely to place on the party making the discovery;

b. the extent to which it might reasonably be expected that the documentation concerned would play a reasonably important role in the proper resolution of the proceedings; and

c. the extent to which there may be other means of achieving the same end at a much reduced cost.

The Supreme Court stated that a requesting party did not have to establish that they had exhausted all other procedures available to establish relevant facts before discovery could be sought.

The Supreme Court upheld the appeal. The Supreme Court noted that if the defendant had available the answers to the proposed interrogatories, it was difficult to understand why appropriate admissions could not previously have been made. The Supreme Court also held that it is appropriate for a court to take into account the manner in which a case is pleaded, not only for determining relevance, but also to assess the extent to which a party who objects to making discovery, on the grounds that it is excessively burdensome, has contributed to that situation by the manner in which they have pleaded their case.
iii Personal injury claim changes

Amendments to the Civil Liability and Courts Act 2004 by Section 13 of the Central Bank (National Claims Information Database) Act 2018 shortened the time for issuing a letter of claim and imposed heightened obligations on the courts as regards drawing inferences and fixing parties with costs:

a Section 8 – a plaintiff in a personal injuries claim must serve a letter of claim, which states the nature of the alleged wrong, on the alleged wrongdoer within one month of the cause of action. In the absence of this, the court is now required to draw such inferences as appear proper and where the interests of justice so require, penalise the plaintiff on costs.

b Section 14 – where a party fails to lodge the verifying affidavit in court within 21 days of service of the pleading or such later agreed period, the court is now required to draw such inferences as appear proper and where the interests of justice so require, penalise that party on costs.

The Personal Injuries Assessment Board (Amendment) Act 2019 (the 2019 Act) came into force on 3 April 2019 and introduced a number of new measures, including penalising a party on costs where a Personal Injuries Assessment Board (PIAB) assessor’s requests in respect of any of the following matters have not been complied with:

a the provision of additional information or documents by a party;

b the provision of assistance to retained experts or furnishing information or documents or cooperating with those experts; or

c the submission by the claimant to a medical examination.

Some notable amendments of the Personal Injuries Assessment Board Act 2003 by the 2019 Act include the following:

a Section 50 of the 2003 Act (as amended) provides that where a further respondent or respondents are added to an application which is already with the PIAB, the statutory limitation period for the claim against that respondent(s) stops for the purposes of Section 50 on the date of such addition as opposed to the date of the original application. This addresses the anomaly identified in the case of Renehan v. T & S Taverns [2015] IESC 8 where Section 50 applied to all respondents such that the date of the initial application had the effect of stopping the time for all respondents, regardless of when they were joined to the application.

b Section 54 of the 2003 Act (as amended) provides that the PIAB shall review and update the Book of Quantum at least every three years.

c Section 79 of the 2003 Act (as amended) provides that the PIAB can serve or issue documents electronically or by document exchange service, where consent to such service or issue has been given.

iv Hague Judgments Convention 2019

On 2 July 2019, the 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the 2019 Convention) was adopted. The 2019 Convention will enter into force 12 months after the ratification, acceptance, approval or accession of two states. Uruguay has signed the 2019 Convention and the European Commission indicated that it was starting the process for EU accession to the Convention.
The 2019 Convention aims to facilitate the cross-border recognition and enforcement of judgments made by courts from contracting states. The 2019 Convention complements the 2005 Hague Convention on Choice of Court Agreements (in force in Mexico, Singapore, Montenegro, and the 28 EU Member States (including the UK)) and is wider in scope, including reaching beyond judgments based on an exclusive jurisdiction clause. The 2019 Convention only applies to decisions on the merits, including judicial settlements and determinations of costs. Interim measures of protection are not covered by the 2019 Convention.

Recognition and enforcement of an eligible judgment may only be refused on certain specified grounds, including:

- the defendant was not properly notified, unless the defendant participated in the proceedings without contesting notification;
- the defendant was notified in the requested state in a manner that is incompatible with fundamental principles of service of documents in that state;
- the judgment was obtained by fraud;
- the judgment is manifestly incompatible with public policy;
- the proceedings in the court of origin were contrary to a choice of court agreement;
- the judgment is inconsistent with other judgments between the same parties; or
- the judgment awards damages that go beyond compensating a party for actual loss or harm suffered, for example through the award of exemplary or punitive damages. The requested court must, however, take into account whether such damages serve to cover costs and expenses relating to the proceedings.

The 2019 Convention will only apply where it was in effect in the state of origin and the requested state at the date of the institution of those proceedings (Article 16).

III PROCEEDURE AND PRACTICE

i Overview of limitation periods

The commencement of civil proceedings in the District Court, Circuit Court and High Court is usually preceded by issuing a warning letter to the defendant, setting out the basis of the plaintiff’s claim and requiring an admission of liability.

The time limits within which an action can be brought pursuant to the Statute of Limitations 1957 (as amended) are as follows:

- Actions under contract and tort, and claims for rent arrears: six years from the date on which a cause of action accrues.
- Actions upon an instrument under seal, and for the recovery of land: 12 years from the date on which the right of action accrues.
- Actions for personal injuries under negligence, nuisance or breach of duty: two years from the date on which a cause of action accrues or the date the plaintiff first had knowledge, if later.
- Actions for personal injuries under assault and battery: six years from the date on which a cause of action accrues or the date the plaintiff first had knowledge, if later.
- Actions for defamation: one year from the date of publication of the defamatory statement or two years from that date if the court so directs.
ii Procedures and time frames

The procedures and time frames vary across the courts. The general summary below relates to plenary proceedings in the High Court:

a Actions are initiated by way of plenary summons, which broadly sets out the plaintiff’s claim and the relief being sought. Under the rules introduced in November 2017, a plenary summons may be served on a person by registered post instead of by personal service.

b The defendant then enters an appearance to signal a willingness to defend the claim. This also serves to cure any defects in respect of service. Extended time is given to defendants outside the jurisdiction to enter an appearance. A defendant who wishes to challenge the jurisdiction of the Irish courts to hear and determine the claim files a conditional appearance.

c The plaintiff then delivers a statement of claim setting out the nature of the claim.

d A notice for particulars is usually raised on this statement of claim seeking more detailed information – by way of replies – on the claim.

e The defendant delivers a defence. At this juncture, any application to bring in a third party will usually be made. The plaintiff may deliver a reply to the defence.

f The parties will then commence the discovery process, discussed further below.

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 frame. This has been influenced by the success of the Commercial Court, whose main objective is to hear complex commercial disputes as efficiently as possible, pursuant to Order 63A of the Rules of the Superior Courts (RSC). Parties must comply strictly with the time frames set down by the Commercial Court for the exchange of pleadings, witness statements, case summaries, submissions and agreed booklets of documents. Significant cost penalties are imposed on any party that does not comply with the prescribed time frames. On average it is taking 12 months from entry into the Commercial Court list to judgment. Therefore, depending on the urgency of the case and the number of issues to be dealt with, it is possible to have cases resolved very quickly.

Injunctive relief is available from the High Court and parties may seek prohibitory or mandatory injunctions. The most common 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).

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4 See Rules of the Superior Courts (Conduct of Trial) 2016 (SI No. 254 of 2016), which came into operation on 1 October 2016.
An 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.\(^5\)

### iii Class actions

Recourse to class actions is restricted in Irish law. The courts are wary of allowing plaintiffs to represent large bodies of persons who have not consented to such representation lest their constitutional right of access to the courts be frustrated. There are currently two mechanisms available for multi-plaintiff litigation: representative actions and test cases.

Representative actions are permitted by the RSC. Order 15, Rule 9 of the RSC provides that where numerous persons have the same interest in a cause or matter, one or more of those persons may sue or be sued on behalf of or for the benefit of all interested parties. The representative plaintiff must be duly authorised to sue on behalf of each individual party, and evidence of same must be presented to the court before a representative order will be made. Any decision of the court will, in the absence of fraud or other special circumstance, bind all interested parties to the action. Similar provisions are to be found in the Circuit Court Rules.\(^6\) 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.

The Multi-Party Actions Bill 2017 (the 2017 Bill) reflects a Law Reform Commission paper from 2005, which recommended the facilitation of multiparty litigation. The 2017 Bill provides for class actions to allow multiple plaintiffs to bring one claim arising from common or related issues of fact or law. If a judge decides that proceedings are to be certified as a multiparty action, they will make an order establishing a register that other relevant parties can apply to join. The costs of a multiparty action will be divided equally among the members of the register who are jointly and severally liable. The government has requested the Working Group on Review of the Administration of Civil Justice to examine the Bill.

Separately, the Data Protection Act 2018 provides for a limited form of representative action whereby a ‘data protection action’ may be brought on behalf of a data subject by a not-for-profit body, organisation or association.

### 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.\(^7\) In the Circuit Court the parties will generally only be represented by a solicitor and one junior counsel, whereas in the High Court the parties will also have at least one senior counsel. Alternatively, lay litigants have full rights of audience. In exceptional circumstances, the courts have allowed a lay litigant to be represented by

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\(^5\) See *Merck Sharp & Dohme Corporation v. Clonmel Healthcare Limited* [2019] IESC 65 regarding the Supreme Court’s analysis of the principles to be applied in applications for preliminary injunctions.

\(^6\) Order 6, Rule 10.

\(^7\) *Allied Irish Bank plc v. Aqua Fresh Fish Limited* [2018] IESC 49.
an unqualified advocate but have limited the scope of assistance that can be provided (Re: Applications for Orders in Relation to Costs in Intended Proceedings: Coffey & Ors [2013] IESC 11).

v Service out of the jurisdiction
A party seeking to serve Irish proceedings in another EU Member State does not require leave from the Irish court. However, the service of Irish proceedings in a non-EU Member State requires leave from the Irish court and certain criteria must be satisfied.

Regulation (EC) No. 1393/2007 and the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Convention) provide that service will be effected in accordance with the law of the destination country. Where the destination country is not governed either by Regulation (EC) No. 1393/2007 or the Hague Convention, service is in accordance with Irish procedural rules.

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

vi Enforcement of foreign judgments
Enforcement and recognition of foreign judgments between Member States is governed by Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the Brussels I Regulation) and Regulation (EU) No. 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast) (the Recast Regulation). The Recast Regulation applies to judgments given in proceedings commenced on or after 10 January 2015.8 The Brussels I Regulation continues to apply to judgments given in proceedings instituted before 10 January 2015.9 The Brussels Convention (which the Brussels I Regulation and the Recast Regulation supersede) still applies to territories in Member States that are excluded from the Brussels I Regulation and the Recast Regulation. The Brussels II Regulation10 (see below) 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 as between Member States and members of the European Free Trade Association.

A parallel method of enforcement of Member State judgments and orders is provided by Regulation (EC) No. 805/2004, which creates a European enforcement order for uncontested claims. This allows a party to have a judgment certified as a European enforcement order in a Member State that is automatically recognised and enforced in another Member State without the need for the judgment creditor to take any intermediate steps. Regulation (EC) No. 861/2007 is relevant to cross-border civil or commercial claims that do not exceed €5,000. Regulation (EC) No. 1896/2006 established the European Order for Payment, which provides for simplified procedures in connection with recovering uncontested (unlimited) money debts.

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8 Article 66(1).
9 Article 66(2).
The procedures for enforcing a Member State judgment in Ireland are set out in Order 42A of the RSC. To enforce a judgment from a non-EU or EFTA country for a liquidated sum, new proceedings for the recovery of a simple contract debt must be commenced in Ireland by way of summary summons pursuant to the Irish common law rules of enforcement. There are a number of prerequisites to be met under Irish common law for enforcement of a non-EU or EFTA judgment: the judgment must be (1) for a definite sum, (2) final and conclusive and (3) given by a court of competent jurisdiction. The Irish court may decline jurisdiction if the plaintiff cannot show that there is a solid practical benefit to enforcement in Ireland (Albania Beg Ambient Shpk v. Enel SpA and Enelpower SpA [2018] IECA 46).

vii Assistance to foreign courts

The European Communities (Evidence in Civil or Commercial Matters) Regulations 2013 facilitate the taking of evidence in one Member State at the request of another Member State court. This request must be in the official language of the place where the evidence is to be taken. The requested court must acknowledge the request and execute it within 90 days.


The Foreign Tribunals Evidence Act 1856 governs the taking of evidence in Ireland for use by a tribunal or court in a non-EU Member State.

viii Access to court files

The Courts Service website11 records details of parties in dispute and the stage of the pleadings. Copy pleadings are not made available. There is no such search mechanism for the lower courts.

In terms of completed proceedings, written judgments made available by the Supreme Court, Court of Appeal, High Court, Circuit Court, District Court, Central Criminal Court, Court of Criminal Appeal and Courts-Martial Appeal Court are available on the Courts Service website.

The decision of the High Court in Allied Irish Bank plc v. Tracey (No. 2)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

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11 www.courts.ie.
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 in camera proceedings, which generally relate to family law matters, those involving minors or certain proceedings brought under data protection legislation.

New court rules that were introduced on 1 August 2018 give bona fide members of the media a specific right to access documents referred to in open court. Bona fide members of the media may request that information contained in a court record be disclosed to them. They may (1) inspect the document under the supervision of an officer of the court or Courts Service personnel; (2) take a copy of the document forming part of the court record on the undertaking that they will return the copy on completion of the media report; or (3) be given a press release or other information in oral or written form by an officer of the court or by the Courts Service personnel concerning the proceedings.

### ix Litigation funding

The decision of the Supreme Court in *Persona Digital Telephony Ltd v. Minister for Public Enterprise, Ireland and the Attorney General* [2017] IESC 27 confirmed that maintenance and champerty were still prohibited under Irish law. Maintenance is where an individual, without a legitimate interest, funds the litigation of another. Champerty is a subset of maintenance and arises where an individual provides maintenance in return for a share of the proceeds.

The only form of third-party funding that is acceptable in Ireland is that provided by a third party that has a legitimate interest in the outcome of the litigation. The High Court in *Thema International Fund plc v. HSBC Institutional Trust Services (Ireland) Limited & Ors*, [2011] IEHC 357 (referring to its decision in *Moorview Developments Limited v. First Active plc* [2011] IEHC 117) 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.

The Irish courts have determined that after-the-event insurance does not breach the rules on maintenance and champerty in certain circumstances.

The Supreme Court in *SPV Osus Limited v. HSBC Institutional Trust Services (Ireland) Limited & Ors* [2018] IESC 44 found that the assignment of a right to litigate to an unconnected third party with no legitimate interest in the litigation was trafficking in litigation and was contrary to Irish public policy. The Supreme Court applied the test

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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.


adopted by the House of Lords in Trendtex Trading Corporation v. Credit Suisse [1982] AC 679 that an assignment of the right to litigate is unenforceable unless the assignee had a genuine commercial interest in the assignment.

x Costs
In terms of payment of costs, although the courts have discretion as to how costs are to be awarded following the hearing, the general rule is that costs follow the event, namely that the unsuccessful party will pay the costs of the successful party. Costs are usually awarded on a party and party basis, which means that costs reasonably incurred by the successful party in prosecuting or defending an action are recoverable.

Where a defendant has reason to believe that the plaintiff will be unable to pay its costs if the plaintiff loses the case, the defendant may seek an order for security for costs. This is a court order requiring the plaintiff to provide security (for example, cash lodged in court or a bond) to meet the legal costs that the defendant is likely to incur in defending the case.18

IV 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.19

In Ochre Ridge Limited v. Cork Bonded Warehouses Limited & Anor,20 the High Court ruled that legal advice privilege does not extend to advice of a legal nature provided on business matters. The decision of the Court of Justice of the EU in Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. European Commission21 makes it clear that, in relation to European

21 Case C-550/07 P, ECLI:EU:C:2010: 512.
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. \(^{22}\)

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* \(^{23}\) 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 Mediation Act 2017 (the Mediation Act) defines mediation as ‘a confidential, facilitative and voluntary process in which parties to a dispute, with the assistance of a mediator, attempt to reach a mutually acceptable agreement to resolve the dispute’. Section 7 provides that the ‘agreement to mediate’ shall note that the mediation is to be conducted in a confidential manner. Section 10 contains the specific confidentiality provisions.

The European Communities (Mediation) Regulations 2011 provide that any person involved in a mediation that is governed by these Regulations shall not be compelled to give evidence in civil or commercial proceedings relating to a matter arising out of, or connected with, mediation. Such parties may be compelled to give evidence in situations where non-disclosure of the information would be contrary to public policy. Most communications made in the course of mediations will of course attract without prejudice privilege as well as this added statutory protection.

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23 [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 Limited & Ors v. First Active plc & Ors*. The effect of common interest privilege is that the documents will remain privileged, notwithstanding their release to a third party.

In the case of *Redfern Limited v. O’Mahony*, 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 Haughey* the Supreme Court described the privilege against self-incrimination in the following terms: ‘[I]t is the duty of the judge to warn a witness that he is privileged to refuse to answer any question if the answer would tend to incriminate him.’

Production of documents
Discovery is the process by which one party to civil proceedings obtains the disclosure of documents from another party or from a non-party in advance of a trial. Discovery in High Court actions is governed by the RSC and the obligations are more onerous than those in the Circuit Court and District Court. In High Court actions, however, there is a requirement that parties seeking discovery must specify precise categories of documents that they require and provide reasons why they are relevant and necessary. The High Court in *Walsh v. The Health Services Executive & Ors [2017] IEHC 394* set out a checklist of questions to be deployed by a court in determining discovery applications.

The meaning of what constitutes a ‘discoverable’ document was supplemented by the Rules of the Superior Courts (Discovery) 2009 (the 2009 Discovery Rules) to include documents ‘necessary for disposing fairly of the cause or matter or for saving costs’. A party is obliged only to discover those documents relevant to the categories agreed or the court order that it has or has had in its ‘possession, power or procurement’. The party applying to the court for discovery must show on affidavit that the discovery sought is relevant and necessary to dispose fairly of the matter or to save costs.

The RSC do not prescribe a definition of ‘document’; however, the term has been broadly defined in case law as meaning anything containing information. This includes any document in writing, handwritten notes, maps, drawings, photographs, discs, computerised or electronically stored information.

Relevance of the documents is determined with regard to the pleadings. The courts have expressly reserved the right to decide whether documents are relevant and, if appropriate, the courts will examine the documents to ascertain their relevance. Necessity is also decided.

24 [2008] IEHC 274.
27 See also the Supreme Court decision in *Tobin v. Minister for Defence & Ors [2019] IESC 57* (referred to above).
28 Order 31 Rule 12 (1) RSC as amended by SI No. 93 of 2009.
Ireland

by the courts on the specific facts of each case.\textsuperscript{29} The High Court, in the cases of \textit{Flogas Ireland Limited v. Tru Gas} and \textit{Flogas Ireland Limited v. Langan Fuels Limited},\textsuperscript{30} observed that ‘the courts should exercise special care to ensure that a party is not given free access to [confidential information] without having satisfied the court that there is some basis on which the documentation is likely to be relevant and necessary’. Even so, depending on the documentation involved, the court may decide that the balancing of rights demands an order against discovery.

Pursuant to the 2009 Discovery Rules, a party may seek electronic data from its opponent and a court may order a party to give inspection and search facilities for electronic data on its computer systems. The fact that a document is situated outside the jurisdiction does not preclude it from being discoverable.

It is possible to seek discovery against a non-party. A party seeking such an order should indemnify such person and pay their costs.

V ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

Reference to arbitration is commonplace in commercial contracts. However, as arbitration becomes increasingly formalised and thus more akin to traditional adversarial proceedings, there is an increasing trend towards consent-based non-binding forms of ADR such as mediation and expert determination as more flexible and cost-efficient ADR mechanisms.

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 led to a number of significant changes to the previous regime. In strengthening the integrity of the arbitration process, the 2010 Act abolished the ‘case stated’ procedure, whereby the arbitrator could refer a question of law to the High Court. In addition, the jurisdiction of the arbitrator was increased as they are given the power to review challenges to their appointment and can determine their own jurisdiction. The provisions of the 2010 Act go further to increase Ireland’s attractiveness as a potential destination for commercial arbitration by requiring the arbitrator to give reasons for his or her award, unless the parties have agreed otherwise and also by allowing the parties to agree allocation of costs, whether before or after the dispute has arisen. The 2010 Act also restricts the grounds for setting aside an award to those grounds specified under Article 34 of the Model Law:

\begin{itemize}
  \item [a] a party to the agreement is under some incapacity or the agreement is invalid;
  \item [b] improper notice was given regarding the arbitrator’s appointment or arbitral proceedings;
  \item [c] the award deals with matters outside the scope of the submission to the arbitrator;
  \item [d] the tribunal or procedure was improperly constituted;
\end{itemize}


\textsuperscript{30} [2012] IEHC 259. See also Goode Concrete v. CRH PLC & Ors [2017] IEHC 534 and Word Perfect Translation Services Limited v. The Minister for Public Expenditure and Reform (No.2) [2018] IECA 87 in connection with putting in place a confidentiality ring to protect commercially sensitive information.
the subject matter of the dispute is not capable of settlement by arbitration under the law of the state; or

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*, 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

The Mediation Act came into effect on 1 January 2018. The Mediation Act applies to all civil disputes with some exceptions, including arbitrations, Workplace Relations Commission disputes, applications seeking leave to apply for judicial review and judicial review proceedings.

Under the Mediation Act, solicitors, including in-house solicitors, are required to advise their clients to consider mediation as a form of dispute resolution and make a statutory declaration confirming they have done so. More particularly, a solicitor is required to:

- provide the client with information regarding mediation, including the names and addresses of the people who provide mediation services;
- inform the client of the advantages of ADR and of the benefits of mediation;
- inform the client that mediation is voluntary and, if relevant, that it may not be an appropriate means of resolving the dispute where the safety of the client or their children is at risk;
- inform the client that they (the solicitor) will need to make a statutory declaration confirming that they have complied with their obligations; and
- inform the client that if the statutory declaration is not provided the court will adjourn the legal proceedings.

A party does not have to go to mediation and can proceed directly to court if they wish.

If the parties agree to mediate, time stops running for the purpose of the limitation period in which to bring proceedings on the date when the parties sign the agreement to mediate. Time will recommence 30 days after any termination of the mediation.

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A court may adjourn legal proceedings to afford parties an opportunity to engage in mediation. A party who refuses to engage in mediation without good reason may later be penalised in costs. The Court of Appeal in *Danske Bank & Anor. v. SC* [2018] IECA 117 refused an application to adjourn proceedings to allow the parties to mediate, having regard to the conduct of the litigation, the stage of the proceedings, the potential effect of an adjournment on the proceedings, the likely success of the mediation and the bona fides of the application. The Court of Appeal referred to its decision in *Atlantic Shellfish Limited & Anor v. Cork County Council & Ors* [2015] 2 IR 575 and the principle that a court should only exercise its discretion to invite parties to mediate if it considers it appropriate to do so having regard to all of the circumstances of the case.

iv Other forms of ADR
Conciliation is often used in employment and construction disputes. Expert determination and adjudication have been most often utilised in specialist disputes, for example, construction disputes. Reference to expert determination is usually also included in agreements for lease in the context of rent review disputes.

VI OUTLOOK AND CONCLUSIONS
In terms of outlook generally, we believe that Brexit will create valuable opportunities in Ireland, which will be the only remaining English-speaking common law jurisdiction in the EU. Any withdrawal of the United Kingdom from the EU is considered to likely be a key factor for companies in the EU when it comes to choice of law and choice of jurisdiction clauses in agreements. Ireland will be able to offer these companies all the advantages that are currently available through its continued membership of the EU. The International Swaps and Derivatives Association Inc (ISDA) has already recognised Ireland’s importance after any Brexit by publishing an Irish law version of its 2002 ISDA Master Agreement and certain credit support documents.

The enthusiasm of practitioners and the judiciary to embrace electronic alternatives (e.g., predictive coding, technology assisted reviews, paperless hearings) to traditional paper-based practices is continuing to grow and it is widely considered that these alternatives will have a positive impact on the legal landscape in this jurisdiction.
I

INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

Italy is a civil law country. The law is not created by court decisions, as in common law countries, but through legislative statutes.

Disputes on civil and commercial matters are resolved by either state courts of law or private arbitrators.

The state courts having jurisdiction over civil and commercial disputes are the following: courts of first instance, courts of appeal and the Supreme Court.

i Courts of first instance

There is one justice of the peace and one tribunal in all major municipalities.

The justice of the peace is a single honorary judge, whose competence is limited to specific disputes, including disputes relating to movable goods for a maximum value of €5,000, which will be increased to €30,000 starting from 31 October 2021.

Tribunals, in addition to deciding on appeals against the decisions of justices of the peace, rule on all civil and commercial disputes that fall outside the competence of justices of the peace. Tribunals can be composed of one or three ordinary magistrates, depending on the nature of the dispute.

Certain tribunals have specialised divisions that deal with specific matters (such as employment, bankruptcy, corporate and intellectual property).

ii Courts of appeal

There are 26 courts of appeal in Italy. Courts of appeal are composed of three ordinary magistrates and rule on appeals against decisions of the first instance court and arbitral awards.

Generally, only the claims, objections and evidence submitted by the parties before the first instance tribunal are admissible in appeal proceedings.

If, following appeal, the decision of a court is overruled, the court of appeal also decides on the merits of the dispute and its decision replaces the annulled decision. Particular rules apply in this respect where the court annuls an arbitral award.

iii Supreme Court

There is one Supreme Court in Italy, in Rome. The grounds for recourse to the Supreme Court are strictly established by Article 360 of the Italian Code of Civil Procedure (CCP).

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II THE YEAR IN REVIEW

i Supreme Court, sitting en banc, 11 July 2019, No. 18672

Article 1492 of the Italian Civil Code entitles buyers to terminate the sales contract or obtain a reduction of the price paid if the item purchased has a defect that makes it unfit for use or appreciably reduces its value. In Decision No. 18672, the Court ruled that the one-year limitation period under Article 1495 of the Italian Civil Code can be interrupted not only by legal proceedings being commenced but also by the seller notifying (out-of-court) the buyer that it is in breach of contract.

ii Supreme Court, 31 May 2019, No. 14886

The Court ruled that non-economic damage may be compensated also in class actions whenever the conditions for recoverability are satisfied (i.e., the right in question is granted by the Italian Constitution, the violation of the right is serious, and the damage is not insignificant) and the damage suffered by each claimant is sufficiently similar so as not to require individual assessment.

III COURT PROCEDURE

i Overview of court procedure

The CCP establishes the general rules that govern the first, second and third instance proceedings before state courts relating to civil and commercial disputes. Moreover, it governs enforcement proceedings and special proceedings such as summary proceedings seeking interim protective measures or payment injunctions. It also establishes the general rules that govern arbitration (see Section VI).

The CCP provides for three paradigmatic categories of court procedures: ordinary proceedings, summary proceedings and labour proceedings.

However, there are other laws that govern proceedings before state courts that relate to particular disputes on civil and commercial matters, such as bankruptcy (Royal Decree No. 267/1942), divorce (Law No. 898/1970), and intellectual property (Legislative Decree No. 30/2005).

ii Procedures and time frames

Ordinary proceedings

Ordinary proceedings before the courts of first instance begin with a writ of summons served by the claimant.²

Should the defendant intend to raise counterclaims or objections that only the parties can raise, or call third parties, the defendant must file a statement of defence at least 20 days before the first hearing. If not, the defendant can file its statement of defence on the hearing date.

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.

² Article 163 bis of the 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.

Generally, the court issues decisions within 30 or 60 days of the date of filing the second and final brief, depending on whether the court is composed of one or three judges.

**Summary proceedings**

These proceedings start with an application filed directly with the judge, who then fixes the hearing for the parties’ appearance. After having been served with the notice of application and the judge’s order fixing the hearing, the defendant submits a written reply 10 days before the hearing. During the hearing, if the judge concludes that the parties’ defences can be examined summarily, he or she proceeds in the most appropriate manner and issues an order, which has the same effect as a judgment.

**Interim measures**

The CCP allows a court to grant interim measures in favour of one party, prior to or pending a trial, on one party’s application.

The subject of the interim protective measures varies from case to case. Protective measures range from an order to refrain from interfering with the applicant’s right to freely dispose of its properties, to an order to refrain from calling a first-demand performance bond issued by the applicant’s bank, to a temporary seizure of goods or property held by the defendant, etc.

As a general rule, interim protective measures can only be granted if the applicant provides the court with clear evidence of the existence of both the right that the measure is aimed at protecting and the serious and actual risk that the right be harmed if not temporarily protected pending the trial on the merits. Protective measures can be granted *ex parte* if the circumstances so dictate, subject to confirmation, revision or annulment at a later stage, after a hearing, based on the defences of the other party.

### Class actions

In Italy, class actions were recently reformed by Law No. 31/2019. The new articles (Articles 840 bis to 840 sexiesdecies of the CCP) enter into force on 19 April 2020 and will govern unlawful activities allegedly carried out after that date.

This section therefore examines the legislation currently in force and provides an overview of the most significant upcoming amendments.

Class actions are currently 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 may bring class actions against companies and other entrepreneurs for damage caused by breach of contract, by product liability, and by unfair and restrictive business practices. Only consumers may bring class actions and appear in court, and they may be represented by associations and committees of which they are members (provided that they prove they can adequately represent the interests of each class member). Class actions must be brought before the civil court of the capital of the region the company has its
registered office in; however, certain regional courts have jurisdiction over smaller regions.\(^3\)

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.\(^4\) The order also sets out the means of public announcement to enable interested parties to join the class and the requirements and deadlines for doing so (consumers who join the class need not appoint legal counsel).

A class action is admissible only if: (1) multiple consumers are affected by the alleged violation, and (2) the asserted rights of the consumers 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 instructions set out by the court.

When a court rules in favour of the class, it either orders the losing party \textit{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 (the class must be joined within a limited period of time after the admissibility order). 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.

With the new law, class actions will no longer be restricted to those who qualify as consumers under the Consumer Code; nor will they be restricted to certain types of unlawful activities allegedly carried out (i.e., breach of contract, product liability or unfair and restrictive business practices). Class actions will therefore be available to anyone seeking compensation for damage (for either contractual breach or tort) caused by unlawful activities, on condition that the asserted rights are homogenous and the violation is attributable to a business activity.

Moreover, under the new provisions, class actions can be brought by associations and committees (which so far could only represent the class members) and will have to be brought before the Specialised Division in Business and Intellectual Property of the court of the company’s registered office.\(^5\)

\(^3\) 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 the Trentino-Alto Adige and Friuli-Venezia Giulia regions; the Court of Rome over the Marche, Umbria and Molise regions; and the Court of Naples over the Basilicata and Calabria regions.

\(^4\) The Supreme Court clarified that a court of appeal’s ruling on the admissibility of a claim may not be further challenged (Supreme Court Decisions Nos. 26725 of 23 October 2018, 2610 of 1 February 2017 (sitting en banc) and 23631 of 21 November 2016).

\(^5\) Specialised Divisions in Business and Intellectual Property were established by Legislative Decree No. 168/2003. There are 21 of them, one located in each civil court of the capital of the 20 Italian regions, with the exception of Valle d’Aosta, which is under the jurisdiction of the Business and Intellectual Property Division of the Court of Turin, and of Lombardia and Trentino-Alto Adige, which have both two Business and Intellectual Property Divisions (Milano, Brescia, Trento e Bolzano).
The new provisions maintain the admissibility phase and the opt-in mechanism but significantly extend the time limit for joining the class: a class can now be joined not only right after the admissibility ruling (as in the current legislation), but also after the court has decided on the merits of the case and ruled in the claimants’ favour. The reform also introduces a new stage of proceedings following a court ruling in the claimants’ favour on the merits of the case. The new stage focuses on determining the compensation for everyone who joined the class and – given the potentially high number of parties involved – is modelled after insolvency proceedings.

The reform in general – and the amendments outlined above in particular – is expected to increase the efficacy of class actions brought before Italian courts (and, consequently, the number of class actions and the number of parties who join the proceedings). As a matter of fact, so far very few class actions have progressed beyond the admissibility stage since class actions were introduced in Italy. Moreover, one of the very few class actions that ended with a ruling in favour of the claimants has recently been annulled by the Supreme Court, with Decision No. 14886 of 31 May 2019 (see Section II). The Supreme Court held that non-economic damage can be compensated in class actions but found that there was no proof in the given case as for the homogeneity of the rights of the class members.

Other pending class actions that have progressed beyond the admissibility stage include the following:

a two class actions against two major automobile manufacturers (for unfair and restrictive business practices involving the misrepresentation of vehicle emissions);
b one against a major smartphone and tablet producer (which allegedly misrepresented the storage capacity of its devices); and
c one against a water supplier brought by people who are resident in certain towns in central Italy (the defendant allegedly invoiced undue fees to its customers).

Another type of class action (governed by Legislative Decree No. 198 of 20 December 2009) may be brought against the public administration and public services providers. This type of class action does not seek to obtain damages, but rather to restore the correct performance of a function or a service to the public, and thereby enhance the quality of the public administration.

iv Representation in proceedings

Parties, both individuals and entities, must be represented by a qualified lawyer before state civil courts. However, an individual may stand in trial without counsel before a justice of the peace, provided that he or she is at least 18 years old and is not legally incapacitated, and the value of the case does not exceed €1,100.

v Service out of the jurisdiction

The service from Italy to a Member State of the European Union of judicial and extrajudicial documents relating to civil and commercial matters is governed by EC Regulation No. 1393/2007.

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6 Court of Appeal of Milan, Decision No. 3756/2017 of 25 August 2017. The class was made up of a group of roughly 6,000 commuters, who suffered a series of delays and cancellations of trains in December 2012. 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.
Italy

With regard to the service of documents to a non-Member State, Italy has ratified the Hague Convention of 15 November 1965.

If the state of destination has not ratified the 1965 Hague Convention, but a bilateral treaty is in place, the service method established by the treaty shall apply. In the absence of a bilateral treaty, the service shall be made according to Articles 37 and 77 of Legislative Decree No. 71/2011 (i.e., transmission from and to consular authorities) or, if not possible, according to Article 142 CCP (i.e., transmission by the court’s clerk of two copies, one by mail directly to the addressee and one through the office of the Public Attorney to the Ministry of Foreign Affairs, which will then deliver it to the addressee).

vi Enforcement of foreign judgments

If the judgment has been rendered by the court of a Member State of the European Union, EU Regulation No. 1215/2012 applies and no declaration of enforceability is required.

If the judgment has been rendered by the court of a non-EU state, it will be recognised and enforced according to the specific bilateral treaty between Italy and that state. In its absence, it will be automatically recognised in Italy, under Article 64 et seq. of Law No. 218/1995 (though the counterparty has the right to raise an opposition) if specific conditions are met:

a the court that issued the decision had jurisdiction according to Italian rules on jurisdiction;

b the defendant was served with the writ of summons according to the lex fori and the principle of due process has been complied with;

c the judgment has become res judicata according to the lex fori;

d the judgment does not contradict a judgment issued by an Italian court that has become res judicata;

e there are no proceedings pending before Italian courts between the same parties and on the same dispute that were commenced prior to the foreign proceedings; and

f the judgment is not contrary to public policy.

vii Assistance to foreign courts

The assistance by Italian courts to courts of another Member State of the European Union (other than Denmark) in the taking of evidence in civil or commercial matters is governed by EC Regulation No. 1206/2001.

The assistance by Italian courts to courts of another state that is not a member of the European Union shall take place according to the specific bilateral treaty between Italy and that state. In its absence, it shall take place in accordance with the provisions of Law No. 218/1995, according to which, both a party in a foreign trial and the court before which the trial is held may request the assistance of the Italian courts in the taking of evidence in Italy.

viii Access to court files

The parties and their officially appointed counsel may access the court file at any time.

Third persons may not access the court files. However, unless otherwise provided, the court must grant permission to third parties to make copies of acts or documents contained in the file (Articles 743 and 744 of the CCP).

Courts’ final judgments are public.
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. 7

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. 8

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. 9

If the lawyer acts in situations of conflicts of interest even after having obtained clear and conscious consent from every client, he or she will infringe the ethical rule.

Accepting an assignment against a former client is only possible two years after having completed the former client’s assignment, and provided that the object of the new assignment is unrelated. Furthermore, the lawyer cannot use information acquired on account of the preceding assignment. 10

Article 24(5) of the Code establishes that the lawyer’s duty to refrain from acting in situations of actual or potential conflict of interest applies also where the parties with conflicting interests consult two different lawyers belonging to the same firm or partnership, or working in the same office.

Chinese walls are possible and frequent, but do not necessarily excuse lawyers from complying with their duty to refrain from acting in situations of actual or potential conflicts

7 Article 10 of the Code.
8 Article 28 of the Code.
9 Article 24 of the Code.
10 Article 68 of the Code.
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:

a due diligence measures concerning clients, when participating in financial or corporate transactions, including when providing tax advice; and

b reporting to authorities any suspect transactions.

Furthermore, by virtue of deontological rules, a lawyer must not accept any assignment from a potential client when he or she can reasonably assume that professional services would be connected with an illegal business or transaction, and must not receive from or manage any funds of a client where the client cannot be properly identified.

Lawyers must record and keep all documents and information relating to their client’s transactions for 10 years after the business relationship with the client has ended.

As regards the reporting obligations, on their own initiative lawyers must promptly inform the competent authority where they know, suspect or have reasonable grounds to suspect that money laundering or terrorist financing is being or has been committed or attempted. However, pursuant to Article 35(5) of Legislative Decree No. 231/2007, this obligation does not apply to information acquired by lawyers in relation to any judicial proceedings, or in the course of ascertaining the legal position of a client; therefore, legal advice remains subject to the obligation of professional secrecy.

iii Data protection

On 25 May 2018, the General Data Protection Regulation (GDPR) came into force, repealing Directive 96/95 and forcing national legislators to change domestic law. Thus, Italy's legislative framework for the processing and protection of personal data is now subject to the GDPR and Legislative Decree No. 196 of 30 June 2003, as amended by Legislative Decree No. 101 of September 2018 (the Italian Data Protection Code). The GDPR changed data processing rules and introduced new principles (such as accountability); however, the basic rules and principles remain the same. Thus, the role of privacy information notices has remained the same, as has that of requiring a legal basis for data processing – but consent no longer has a central role: it is now on the same level as the other legal bases required by law.

The legal bases are the following:

a the data subject’s consent;

b the necessity to perform a contract to which the data subject is party or to take steps at the request of the data subject before entering into a contract;

c a legal obligation to process data;

d the necessity to protect the vital interests of the data subject or of another natural person;

e a public interest in processing data or the exercise of official authority vested in the controller; and
a legitimate interest pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject that require protection of personal data.

Thus, the controller’s legitimate interest in processing personal data (i.e., the processing is necessary to carry out an investigation or to exercise or defend a legal claim or right) constitutes an adequate legal basis to do so. As the practice of law generally involves exercising or defending a legal claim or right, a lawyer authorised by client or a private detective hired via a written agreement may carry out processing for this purpose without the data subject’s (i.e., the client’s or a third party’s) consent. The clients themselves may also process the data in these cases, for instance, to audit work email accounts or computers to seek evidence against employees.

The ability to carry out the above type of investigation without the data subject’s consent is confirmed by the Italian Code of Practice Applying to the Processing of Personal Data Performed with a View to Defence Investigations (published in Official Journal No. 275 of 24 November 2008).

The code – which still applies – stresses the importance of respecting the minimisation principle. Indeed, the following applies to lawyers when processing personal data for investigative purposes.

Purpose limitation, data minimisation and non-excessiveness principles shall be applied, the envisaged safeguards shall be assessed as to their substance rather than their form and the quality and amount of the information to be processed shall be taken into account along with the risks.

Similarly, the sharing of personal data between lawyers (whether nationally or internationally) is allowed only if strictly necessary to defend a legal claim or right, and the principles above must be applied.

In any case to lawfully process personal data for investigative purposes, it is necessary to provide the data subject with a specific information notice. A lawyer or a private detective must not provide the information notice if data are collected from third parties or are processed exclusively for as long as may be necessary to establish or defend a judicial claim or for the purpose of defence investigations. It is possible to postpone the information notice provision when a disclosure of the investigative purpose would lead to the detriment of the investigation itself.

Before the GDPR, Article 24(f) of the Italian Data Protection Code/past provisions of the Italian Data Protection Code (Article 24(f)) expressly provided that no consent was needed for legitimate, lawful investigations.

Data may be transferred outside the EU only if a lawful basis for doing so exists and the European Commission has issued an adequacy decision or other appropriate safeguards are in place, in accordance with Article 46 of the GDPR. The GDPR provides derogations in the absence of these conditions: for example, if a transfer is necessary for the establishment, exercise or defence of legal claims. The European Data Protection Supervisor (formerly the Article 29 Working Party) adopted a strict interpretation of the ‘defence’ exception for personal data transfers outside the EU (see Working document on a common interpretation of Article 26(1) of Directive 95/46/EC of 24 October 1995, adopted on 25 November 2005), aimed at avoiding ‘massive’ personal data transfers. In this regard, the processing of personal data for the purposes of defending a legal claim must be necessary.

For example, data is not collected from the data subject if it results from a lawful remote monitoring activity, in particular where such monitoring does not entail any direct interaction with the data subject.
Moreover, the Italian Data Protection Authority, at December 2018, has approved the new ‘Deontological rules relating to the processing of personal data carried out to carry out defensive investigations or to assert or defend a right in court’. These rules foresee guidelines that must be followed by both lawyers and private investigators in order to lawfully process data during investigations.

Finally, the admissibility in civil legal proceedings of personal data processed in breach of data protection rules must be assessed solely based on the CCP – not the Data Protection Code. The CCP does not provide a specific rule for unlawfully collected evidence, but according to most legal doctrine and case law, breach of the Data Protection Code does not preclude personal data being used as evidence in civil proceedings if the evidence is genuine, verifiable by the court and relevant. Conversely, personal data collected through equipment used to monitor employees and processed in breach of data protection rules may not be used as evidence in labour law proceedings.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

The CCP contains no rules relating to correspondence among counsel and parties.

According to Articles 210 and 118 of the CCP, the court may order a party to produce documents, or may order the inspection of specific places if it deems it relevant for the purpose of deciding the case. However, the court may not uphold the request by one party to order the disclosure of documents if this may cause unjustified harm to the other party or violate a professional secret.

Article 48 of the Code establishes that, unless otherwise provided, the correspondence between the parties’ counsel expressly qualified as confidential, or regarding the negotiation of an amicable settlement, cannot be filed nor referred to in the court proceedings.

The Code does not apply to in-house counsel. If the in-house counsel is registered with the Italian Association of In-House Lawyers (AIGI), he or she must abide by the rules of conduct provided by the AIGI’s code. Although this does not contain specific provisions regarding confidential correspondence, it establishes in its Article 7 that in-house counsel must keep confidential all the information of which they become aware by reason of their professional activity, even after termination of their employment.

ii Production of documents in civil litigation

As a general rule, the burden of proof lies on the party asserting a right or entitlement (under Article 2697 of the Italian Civil Code).

According to Article 115 of the CCP, the court might reach a decision not only on the basis of the evidence filed by the parties but also on the basis of the uncontested facts and might even rely on factual elements that are common knowledge.

In the Italian civil judicial system, the key role in the taking of evidence is played by the parties, as they may produce all the documents that prove the facts on which their claims rely, without any prior authorisation by the judge.

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14 As expressly stated in Article 160 bis of the Italian Data Protection Code.
15 Supreme Court Decision No. 7783 of 3 April 2014, confirmed by Supreme Court, Criminal Section, Decisions Nos. 43414 of 13 October 2016 and 33560 of 28 May 2015.
With certain exceptions (e.g., notarised deeds), the court can evaluate any evidence at its cautious discretion,\(^{16}\) 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 Article 210 et seq. of the CCP, subject to certain conditions, the court may order a party or a third person to produce a document that has not been filed.\(^{17}\)

VI ALTERNATIVES TO LITIGATION

i Overview of alternative dispute mechanisms

The law allows civil or commercial disputes to be resolved either directly by the parties (e.g., by a settlement agreement), or by the parties assisted by a third person deprived of decision-making authority but empowered to suggest possible solutions (e.g., mediation) or, if the type of dispute allows it, by a third party entrusted by the parties with decision-making authority (i.e., arbitration).

ii Arbitration

The rules in general

Arbitration on civil and commercial disputes is very common in Italy. Although arbitration is faster and ensures a high level of technical expertise and confidentiality, court proceedings are often preferred as costs can be lower.

The arbitrator’s decision shall be legally binding on the parties and is as enforceable as a state judge’s decision.

The general rules governing arbitration are set out in Articles 806 to 840 CCP. Specific rules are established by Legislative Decree No. 5/2003 for corporate matters, and by Legislative Decree No. 50/2016 for disputes arising out of public procurement contracts.

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.\(^{18}\)

An arbitration clause may also be set out in a contract.\(^{19}\)

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16 Article 116 CCP.
18 Articles 807, 808 and 808 bis CCP.
19 Article 808 CCP.
With the exception of specific cases provided by the law, an arbitrator cannot order interim measures.\textsuperscript{20} Consequently, only the state judge may grant such measures prior to or pending the arbitration proceedings.\textsuperscript{21}

**Arbitrable disputes**

The dispute may be referred to arbitration only when it concerns rights of the parties deriving from a relationship of civil or commercial nature that the parties can dispose of.\textsuperscript{22}

In addition, other specific limits are provided for by the CCP and other laws. For example, individual employment disputes are arbitrable, but only if the collective employment contract or the law so provide. Disputes concerning bankruptcy and other insolvency proceedings are subject to the exclusive jurisdiction of the state courts.

**Domestic and foreign arbitration**

If the arbitration is domestic, the support and verification measures regarding the arbitration will fall within the jurisdiction of the Italian judiciary: Italian judges have jurisdiction to appoint or replace arbitrators,\textsuperscript{23} to decide on challenges against arbitrators,\textsuperscript{24} to issue interim measures and to grant the exequatur of the arbitral award.\textsuperscript{25} The party wishing to enforce the award in Italy must deposit the award within the competent court of first instance, which, after verifying its formal regularity, will declare it enforceable. This rule does not apply if the arbitral award has a contractual nature (non-jurisdictional arbitration, see below). If the place of the arbitration is in Italy, the parties may challenge an arbitral award before the Italian courts.\textsuperscript{26} The annulment proceedings will be governed by Italian law.\textsuperscript{27}

In foreign arbitration, the parties cannot seek support measures from Italian courts. A party seeking recognition and enforcement of a foreign award must apply to the competent court of appeal, which will decide on the basis of the regime set out in Articles 839 and 840 of the CCP (reflecting the criteria established by Articles IV and V of the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards entered into force for Italy on 1 May 1969).

The arbitration can be either ad hoc or administered.\textsuperscript{28} In Italy, arbitration governed by institutional rules (e.g., those of the ICC or the Milan Chamber of Arbitration) is quite common.

**Non-jurisdictional arbitration**

When the parties agree to this type of arbitration, the arbitral award has the effect of a contract between parties. It is debatable whether this contractual determination is subject to the recognition and enforcement rules established by the 1958 New York Convention.

\textsuperscript{20} Article 818 CCP.
\textsuperscript{21} Article 669 quinquies CCP.
\textsuperscript{22} Article 806 CCP.
\textsuperscript{23} Articles 810 and 811 CCP.
\textsuperscript{24} Article 815 CCP.
\textsuperscript{25} Article 825 CCP.
\textsuperscript{26} Articles 829 and 831 CCP.
\textsuperscript{27} Articles 827–831 CCP.
\textsuperscript{28} Article 832 CCP.
The challenge of the award

The arbitral award can be challenged before the court of appeal of the district at the seat of arbitration. The parties to the arbitration may request that the award be annulled or revoked. Moreover, a third party may file an opposition against the award where it causes prejudice to its rights.

Appeal

The appeal for the annulment of the award must be notified to the defendant within 90 days of the day on which the award has been notified to the appellant or, failing the notification, within one year of the day the arbitrator has signed the award.

The grounds for appeal are established by Article 829 of the CCP and there are two types: procedural errors and errors of judgment.

The appeal on the grounds of procedural errors is admissible in any case, even if the parties have agreed that the award is not subject to appeal. The appeal based on errors of judgment is admissible only if expressly provided by the arbitration agreement or by the law.

Revocation

The award can be revoked if it stems from one party’s fraud, or it is based on evidence that is proven to be false after the award, or documents that could not be filed in the arbitration proceedings because of force majeure or the other party’s behaviour are discovered after the award, or the award stems from the arbitrator’s fraud established by a final decision by the judge.

Third-party opposition

An opposition against the award may be filed by a third party if it causes prejudice to its rights, and by one party’s creditors if the award stems from one party’s fraud that is detrimental to them.

iii Mediation

With regard to certain matters (e.g., insurance, financial and banking agreements), Legislative Decree No. 28/2010 provided for a compulsory attempt at conciliation with the assistance of a qualified mediator prior to commencing court proceedings.

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.

29 Articles 828 and 831 CCP.
30 Article 828 CCP.
31 Article 831 CCP by reference to Article 404 CCP.
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

The most important reform implemented in 2019 concerns the introduction of new rules for class actions. As already mentioned, the reform would probably facilitate the access to class actions in Italy.

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 as of 31 December 2009 to 3,312,263 as of 30 June 2019.
I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

Japan is a civil law country influenced by Western legal models. Litigation continues to be the most common dispute resolution mechanism, while various forms of alternative dispute resolution (ADR), including arbitration, have gradually become more popular in recent years.

In Japan, legal professionals typically pursue one of three career paths as a judge, public prosecutor or attorney (in government, private practice or in-house). Applicants must pass the national bar examination and complete mandatory training for one year at the Legal Research and Training Institute governed by the Supreme Court of Japan. In 2004, Japan introduced a US-style post-graduate law school system and students who pass the ‘preliminary bar examination’ are deemed to graduate, and are qualified to sit for the national bar examination. Related legal professionals include patent attorneys, judicial scriveners and administrative scriveners.

Judges are appointed by the Supreme Court for 10-year terms and selected from graduates of the Legal Research and Training Institute. Judges serve as associate judges for the first 10 years of their career, and from the sixth year they are allowed to manage a case alone. The 10-year term is usually continuously renewed until retirement.

A jury system is not utilised in civil cases, although Japan introduced a lay-judge system for serious criminal cases in 2009.

The Japanese court structure consists, in principle, of three tiers of civil courts: district courts, high courts and the Supreme Court. Summary courts have jurisdiction over cases where the amount in controversy does not exceed ¥1.4 million and civil conciliations (regardless of the amount in controversy).

There is no split qualification in Japan, as exists for barristers and solicitors in the United Kingdom, and all attorneys may appear before the court. There are no added requirements for attorneys to appear before the higher courts. Patent attorneys may appear in certain categories of cases related to intellectual property (IP) (extra certification or joint representation with attorneys is needed, depending on the case). Judicial scriveners who are certified by the Ministry of Justice may appear before the summary courts.

Civil cases are usually commenced at the district court as the court of first instance. The district court located at the place where the defendant resides or has its registered main office has personal jurisdiction over the case. Cases are administered by a single judge or a panel of three judges, depending on their nature and complexity. Some large district courts have
special divisions or concentrated divisions for matters such as bankruptcy, administrative, labour, medical, commercial or IP claims. Parties who are not satisfied with the judgment rendered at the district court may file an appeal to the regional high court.

In 2005, the IP High Court, a court specialising in intellectual property cases, was established in Tokyo. Regardless of the territorial jurisdiction of the applicable court of first instance, an appeal of a judgment rendered at the court of first instance involving IP is brought to this specialist court. Further, cases involving the revocation of decisions issued by the Patent Office are handled by the IP High Court.

The most common form of ADR in Japan is the civil conciliation procedure at summary courts under the Civil Conciliation Act. Three conciliators appointed by the court consisting of a judge and two part-time conciliators (not necessarily attorneys) administer the conciliation procedure.

Even after the commencement of the litigation, the court may, if it considers it appropriate, transfer the case to the conciliation procedure. Further, civil conciliation may be required by laws in advance of the commencement of the litigation in certain areas of disputes, such as those concerning the Act on Land and Building Leases.

Other forms of ADR are explained in Section VI.

II THE YEAR IN REVIEW

On 15 June 2018, the Cabinet of Japan approved the Growth Strategy 2018. In this strategy, the government plans to introduce an IT system to civil litigation. The government is considering the following steps:

a Phase I: to commence case management conferences that actively utilise a web-conference system without amendment of the current law from 2019 fiscal year.

b Phase II: to realise the hearings for case management without appearance of the parties with amendment of the current law, aiming to start from around 2022.

c Phase III: to establish an e-filing system with amendment of the current law.

Various meetings and discussions for IT-utilising proceedings were held among the Court, Ministry of Justice and Bar Association in 2019. A new case management conference through the use of Microsoft’s chat software, ‘Teams’, will start from February 2020 at the IP High Court and eight district courts, and five district courts will be added from around May 2020.

III COURT PROCEDURE

i Overview of court procedure

Litigation is commenced by the plaintiff’s submission of a written complaint to the court specifying the relief sought and factual grounds for the claim. After the court’s review of the submitted written complaint from a technical point of view, it serves a copy of the complaint with a summons on the defendant and requests the defendant to submit the answer. If the defendant fails to submit the answer before the date of the first oral hearing without appearance, it is deemed to admit the factual grounds alleged by the plaintiff in the written
complaint. In other words, if the alleged facts in a written complaint are insufficient to satisfy the requirement for the legal claim, even if the defendant fails to respond, a default judgment that awards the full extent of the plaintiff’s relief sought will not be rendered.

The court may hold oral hearings or preparatory meetings in order to identify the factual and legal issues, and the evidence required. In Japan, oral hearings or preparatory meetings are non-consecutive and usually held about once a month. In cases where the parties live far away from the court, the court may hold preparatory meetings via telephone conference. Court procedure in Japan basically follows the adversarial system. On the other hand, judges often actively manage the cases, and encourage the parties to submit further evidence and even to reach settlement.

The jury system does not exist in civil cases and professional judges examine the substance and credibility of evidence. Therefore, the rules of evidence are not complex and in general any evidence is admissible. The court has discretion to determine the necessity of the review of evidence submitted by the parties including adoption of witnesses. The judges tend to put less value on the testimony of a witness than documentary evidence. Therefore, although it depends on the nature of a case, the court is relatively strict about allowing a large number of witnesses for examination at the hearing.

ii Procedures and time frames

Historically, it was not unusual in Japan for civil court proceedings at the court of first instance to take two or three years until completion. In 2003, the Act on the Expediting of Trials was enacted to expedite civil court proceedings. The Act sets out that the objective of expediting trials is to conclude civil court proceedings of the first instance in as short a time as possible within a period of two years. Following the Act, the Supreme Court has conducted comprehensive reviews of the expediting of trials, and published its results every two years. The following are some notable statistics for 2018 from the Supreme Court’s latest report:

a The average duration at the district court (the court of first instance) from the commencement to the end of a civil case was nine months (which was 17.3 months in 1973, 13.4 months in 1983 and 12.9 months in 1990). Cases lasting six months or less accounted for 55.3 per cent of the total, while those requiring two years or more accounted for 6.8 per cent. Cases lasting over five years represented only 0.2 per cent.

b Of the cases concluded in 2018, 41.4 per cent ended in a court-issued judgment (58.4 per cent of which were rendered with the defendant’s appearance), 37.1 per cent reached settlement in court, and in 14.3 per cent, the action was withdrawn (7.3 per cent were categorised as ‘other’).

c The average duration of the cases that ended in a court-issued judgment with the defendant’s appearance was 13.2 months.

d The average number of court hearings or preparatory meetings was five.

e Witness examinations occurred in 14.4 per cent of cases.

f The average number of examined witnesses was 0.9 for witnesses and 1.8 for parties.

g Of the cases ending in a court-issued judgment, 20.2 per cent were appealed.

4 The 8th Report Regarding Observation of the Expediting of Trials.
A party facing imminent harm may request the court for interim relief pursuant to the Civil Provisional Remedies Act. 5 In general, there are three categories of remedies: provisional attachment order, provisional order preserving property and provisional order preserving the status quo of the relationship between the parties, detailed below:

- A provisional attachment order is an order to freeze the respondent’s identified assets, such as bank deposits and registered real estate, in order to secure enforcement of a future monetary judgment. This order is usually issued by the court after the claimant’s *ex parte* meeting with the judge.

- A provisional order preserving property is an order to temporarily prohibit the transfer of the possession or ownership of property that is the subject of the claim. This order is also usually issued by the court after the claimant’s *ex parte* meeting with the judge.

- Provisional orders preserving the status quo of the relationship between the parties (e.g., the labour relationship between the employer and the employee who has been allegedly discharged). This order may be issued only after holding a meeting with judge at which the respondent is given the chance to attend.

As above, some categories of interim measures can be issued via *ex parte* review by the judge when the claimant can establish a prima facie case of the provisional relief sought. This does not necessarily mean that such provisional relief is freely granted because the claimant must prima facie prove the significant difficulty of future compulsory execution, or significant damage or imminent harm to the claimant, and the judge always considers possible counterarguments by the respondent.

The court usually requires the claimant to provide a monetary deposit in advance of the issuance of the provisional order to cover possible damage to the respondent. The court limits the scope of the order only to the extent necessary to cover the claimant’s claim or status. For example, a provisional attachment order on the respondent’s bank deposits is allowed only where the claimant prima facie establishes that the respondent does not own non-pledged real estate assets, because courts are cautious in allowing provisional attachment on liquid assets.

### iii Class actions

In December 2013, the Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers was enacted 6 and came into effect from 1 October 2016. The Act establishes a new lawsuit system (the Collective Recovery System) that allows for a single collective action for compensation for damage by many consumers against a business operator. Thus, this is ostensibly a class action system in Japan. However, it is quite different from the class action system in the United States.

Only specified qualified consumer organisations (SQCOs) that are certified by the government have standing to bring an action to claim collective compensation for consumer damages. A SQCO must be a qualified consumer organisation (QCO) that is certified to

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5 Act No. 91 of 22 December 1989.
6 Act No. 96 of 11 December 2013.
exercise the right to demand an injunction to protect the interests of consumers. According to the Consumer Affairs Agency of Japan, as at June 2019, 21 QCOs have been certified, of which only three are certified as SQCOs.\(^7\)

Collective actions are limited to certain categories of monetary claims by consumers against a business operator.\(^8\) Lost profit damages, damages based on harm to the life or body of a human and damages based on emotional distress may not be claimed under this collective action. Punitive damages are also prohibited.

The Collective Recovery System adopts a two-step, opt-in system. As a first step, an SQCO must seek a declaratory judgment on liability issues that are common between a business operator and consumers (an action for common obligations). The consumers cannot intervene in the action for common obligations raised by the SQCO. After obtaining the court’s declaratory judgment, the SQCO commences an action to claim damages against the business operator on behalf of the consumers who hold claims for monetary payments against the business operator who was found to be liable under the declaratory judgment. The SQCO must then provide notice of the commencement of the second step to the known individual consumers and publicly announce the same to those who are unknown to the SQCO by official gazette. Consumers may then opt in to the collective action.

iv Representation in proceedings

Representation by an attorney is not mandatory in any kind of court proceeding in Japan. The representative person of the legal entity (who must register in the corporate registration under relevant laws) may appear to the court on behalf of the legal entity. Summary courts permit non-attorney representation.

v Service out of the jurisdiction

There are seven ways to deliver judicial documents outside Japan, depending on the applicable treaties and agreements between the states:

a service via consular channels;
b service via a central authority;
c service via a requested authority;
d service through diplomatic channels;
e service via a court in the jurisdiction;
f service via public notice; and
g direct delivery via courier.

\(^7\) [http://www.caa.go.jp/policies/policy/consumer_system/collective_litigation_system/about Qualified_consumer_organization/](http://www.caa.go.jp/policies/policy/consumer_system/collective_litigation_system/aboutQualified_consumer_organization/).

\(^8\) Possible claims are limited to (1) performance of contractual obligation of the contract executed between a consumer and a business operator (the Consumer Contract); (2) unjust enrichment of the Consumer Contract; (3) breach of contract under the Consumer Contract; (4) damages based on a warranty against defects; and (5) damages based on a tort (limited to a claim based on the provisions of the Civil Code).
While important judicial documents such as written complaints must be delivered as ‘service’ by the means listed in points (a) to (g) under Articles 108 and 110 of the Code of Civil Procedure, judicial documents that are not required to be delivered via service may be delivered via courier.

vi Enforcement of foreign judgments

A party seeking enforcement of a foreign judgment must obtain an enforcement judgment at a Japanese court declaring such enforcement pursuant to the Civil Execution Act. The requirements for recognition of a foreign judgment set forth in the Code of Civil Procedure are that:

a the foreign court has jurisdiction over that dispute under laws or regulations, or conventions or treaties;
b the defendant has received proper service (excluding service by publication or any other service similar thereto) of a summons or order necessary for the commencement of the lawsuit, or appeared without receiving such service. Personal service on a defendant within Japan will not usually be valid, unless the defendant has entered an appearance;
c the content of the judgment and the court proceedings are not contrary to public policy in Japan; and
d the courts of the relevant foreign country provide reciprocal recognition of Japanese judgments.

If all of the above requirements are met, the foreign judgment will be effective and enforceable in Japan. The Japanese court does not review the foreign judgment on its merits. The Supreme Court has refused enforcement of a judgment that ordered payment of punitive damages on the ground that it was against public policy in Japan (see point (c) above).

vii Assistance to foreign courts

With respect to civil cases, Japan provides assistance to foreign courts for the service of judicial documents and examination of evidence (including examination of witnesses). Assistance for the service shall be requested via:

a the central authority (the Ministry of Foreign Affairs);
b the requested authority (also the Ministry of Foreign Affairs); or
c the court.

Assistance for the examination of evidence shall be requested via:

a the requested authority (the Ministry of Foreign Affairs); or
b the court.

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9 Act No. 109 of 26 June 1996.
10 Act No. 4 of 30 March 1979.
viii  Access to court files
Any person may review the record of a case including pleadings and evidence, except for records that are subject to a confidentiality order. The right to obtain a copy of the record is limited to the parties to the case and third parties with a legal interest in the case. The court may restrict access to the record if it would be detrimental to preservation of the record or performance of the court’s duties.

ix  Litigation funding
Litigation funding is not common in Japan, although some practitioners have begun discussions on this issue. The Japan Legal Support Centre provides legal aid (advance payment) to economically disadvantage persons. This is largely irrelevant to international commercial disputes because aid may not be provided to legal entities, although it is open to legally domiciled foreign nationals in Japan.

IV  LEGAL PRACTICE

i  Conflicts of interest and Chinese walls
The Attorney Act\(^\text{11}\) sets forth the rules on conflicts of interests of attorneys. Basic Rules on Duties of Practicing Attorneys, issued by the Japan Federation of Bar Associations, also set forth the rules on conflicts of interest. Depending on the nature of conflicts of interest, an attorney may be able to take on a certain case if he or she obtains the client’s approval. A Chinese wall may, depending of the nature of the wall and the case, be regarded as one factor that the attorney belonging to a firm may use to assert that he or she can maintain impartiality.

ii  Money laundering, proceeds of crime and funds related to terrorism
The Japan Federation of Bar Associations amended the Rules Concerning Client Identity Verification and Record Preservation, etc.\(^\text{12}\) on 8 December 2017. Under these rules, an attorney is required to confirm the identification of the client with an identification card or certificate of corporate registration if he or she is requested by the client to manage the client’s money or receives a deposit for not less than ¥2 million; or he or she is involved in certain categories of the client’s transactions such as sales of real estate or corporate M&A. Receiving a deposit for the purpose of court proceedings, such as a filing fee or remittance of the settlement payment, and management activities as a bankruptcy trustee or an executor or the testator’s will, etc., are exempted from such obligation.

\(^{11}\)  Act No. 205 of 10 June 1949.
iii Data protection

The Act on the Protection of Personal Information,\(^{13}\) the Act on the Protection of Personal Information Held by Administrative Organs\(^ {14}\) and the Act on the Protection of Personal Information Held by Incorporated Administrative Agencies, etc.\(^ {15}\) regulate the protection of personal information held by private sectors and governmental organisations.

Pursuant to the Attorney Act, an attorney may, through the bar association to which he or she belongs, make enquiries to a public or private organisation related to the case to which the attorney has been retained. The public or private organisation may, in response to this enquiry based on the Attorney Act, disclose the requested personal information without obtaining advance consent of the principal. Further, under the Family Registry Act\(^ {16}\) and the Act for Basic Register of Residents,\(^ {17}\) certain professionals, including attorneys, are allowed to obtain the certificate of family registration and resident record related to the case to which the attorney has been retained. Attorneys who divulge the personal information to a third party or use the obtained personal information for purposes other than grounds for obtaining such personal information could be subject to disciplinary action.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

The common law concept of attorney–client privilege is not recognised under Japanese law. However, attorneys have an obligation to keep secret information obtained in confidence in the course of their professional duties under the Attorney Act. Therefore, attorneys have the right to refuse to testify at court and are thus exempted from the disclosure obligation under the Code of Civil Procedure. Further, as explained in Section V.ii, documents that are created solely for the purpose of the holder’s internal use are exempted from production in a civil case. Thus, the communication between the attorney and his or her client can be kept confidential to a similar extent as in common law jurisdictions in civil cases.

ii Production of documents

Under Japanese law, in principle, parties have a responsibility to collect evidence to prove their case. The holders of the documents have an obligation to disclose documents in certain categories under the Code of Civil Procedure, such as documents the retaining party has cited in its brief and documents that were created with regard to the legal relationship between the parties. Further, the holders of the documents have a general catch-all obligation to disclose documents that do not fall under the categories of the listed exceptions, such as:

\[\begin{align*}
\text{a} & \quad \text{documents that are created solely for the purpose of the holder’s internal use;} \\
\text{b} & \quad \text{confidential information held by professionals (such as attorneys and doctors); and} \\
\text{c} & \quad \text{public officials’ documents, the disclosure of which would cause harm to the public.}
\end{align*}\]

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\(^{13}\) Act No. 57 of 30 May 2003.  
\(^{14}\) Act No. 58 of 30 May 2003.  
\(^{15}\) Act No. 59 of 30 May 2003.  
\(^{16}\) Act No. 224 of 22 December 1947.  
\(^{17}\) Act No. 81 of 25 July 1967.
The court may assist the party in collecting evidence by ordering the disclosure of documents either by another party to the proceedings or a third party. However, when making a request for disclosure, in principle, the requesting party has to specify:

a. the indication;
b. the purport;
c. the holder;
d. the facts to be proven; and
e. the cause of the obligation of disclosure of the document.

If it would be extremely difficult to disclose the documents, the requesting party is alternatively allowed to present only ‘matters by which the holder of the document can identify the document pertaining to the petition’.

If the other party of the case fails to comply with the court’s order to produce the document, the court can make a negative inference of fact in favour of the requesting party. If the third party refuses to produce the documents ignoring the court’s order, the possible sanction under the Code of Civil Procedure is an administrative fine of no more than ¥200,000.

The court’s order to produce the document is subject to an immediate appeal to the higher court. Because the court proceeding on the merits of the case would be essentially suspended during the period of the appellate court’s review of the immediate appeal, depending on the nature of the application and likelihood of success, the court sometimes suggests that the requesting party limit the scope of the requested documents and that the other party voluntarily produces the entirety or a part of the requested documents.

VI ALTERNATIVES TO LITIGATION

i Arbitration

The Arbitration Act was enacted in August 2003 and came into force in March 2004. This Arbitration Act is applicable to arbitral proceedings whose place of arbitration is in Japan. The Arbitration Act generally adopts the UNCITRAL Model Law (prior to its 2006 amendment) with some deviations.

The JCAA is most frequently used for commercial arbitrations in Japan. The JCAA accepts approximately 20 new cases per year. The Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange Inc (TOMAC) is commonly used for maritime arbitrations. TOMAC accepts approximately 10 new cases per year. There are several other arbitration institutions in Japan, including in the areas of IP and construction.

In recent years, Japanese corporations have gradually become familiar with international arbitration and the number of international arbitrations in which Japanese corporations are involved has seemingly increased.

The parties to an arbitration are not allowed to file an appeal to request a review of the arbitral award. Alternatively, the parties are entitled to file a petition for setting aside the arbitral award to the court. The grounds for setting aside an arbitral award are set forth in the Arbitration Act, which are substantially the same as those set out in the UNCITRAL Model Law.

Under the Arbitration Act, the grounds for setting aside are basically limited to the procedural defect of the arbitration proceeding, such that the arbitration agreement is not valid, that the party was not given the chance to appear before the tribunal and that the
composition of the arbitral tribunal or the arbitral proceedings were not in accordance with the provisions of the laws. In other words, a defect in the arbitral award with respect to the merits of the case does not constitute grounds for setting aside the arbitral award unless it amounts to violation of public policy in Japan. Incorrect application of substantive law or disregard of applicable law itself is not sufficient for setting aside the arbitral award. Further, the court has discretion not to set aside the arbitral award even if it had grounds for setting it aside. In this regard, the standard of the judicial review on the merits of a case is deferential to the arbitral award.

The party must file a petition for setting aside the arbitral award to the court within three months of the date of the receipt of the copy of the arbitral award. The court must hold at least one hearing before rendering its decision.

A party may file a petition for enforcement of the arbitral award to the court. A copy of the arbitral award, which must be identical to the arbitral award, and a Japanese translation of the arbitral award must be submitted in conjunction with the petition for the enforcement. The standard for review and grounds for recognition and enforcement are substantially the same as those contained in the UNCITRAL Model Law.

Japan is a signatory to the 1958 New York Convention subject to the reciprocity reservation. In addition, Japan is also a signatory to the Geneva Convention on the Execution of Foreign Arbitral Awards. Further, Japan has bilateral treaties with multiple countries. These treaties guarantee the enforcement in Japan of arbitral awards made in other treaty countries.

Following the Basic Policy on Economic and Fiscal Management and Reform 2017 approved by the Cabinet of Japan, which stipulated that the government would promote the development of total legal support and reliable judicial systems, including a foundation to stimulate international arbitration, with the cooperation of the public and private sectors, in February 2018, the Japan International Dispute Resolution Centre (JIDRC) was established. Subsequently, in May 2018, the Japan International Dispute Resolution Centre (Osaka) (JIDRC-Osaka) opened as the first set of facilities specialised for international arbitration hearings or other types of ADR in Japan. JIDRC-Tokyo will start its operation as one of the best facilities for a hearing of international arbitration or other types of ADR in March 2020.

### ii Mediation

The Japan Association of Arbitrators has established the Japan International Mediation Centre in Kyoto (JIMC-Kyoto) and commenced operations from 20 November 2018. The JIMC-Kyoto offers a dispute resolution mechanism combining mediation and arbitration by providing parties with options such as:

- **a** filing for mediation, but if the parties fail to reach a settlement in mediation, then moving on to an arbitration proceeding (med-arb); and

- **b** filing for arbitration, moving to a mediation proceeding, but if the parties fail to reach a settlement, then moving back to the arbitration proceeding (arb-med (-arb)), etc.

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iii Other forms of alternative dispute resolution

The Act on Promotion of Use of Alternative Dispute Resolution was enacted in 2007 as a basic law concerning ADR. Since then, civil dispute settlement procedures that do not rely on the courts have been rapidly expanding. With respect to financial instruments, the Financial ADR System was adopted on 1 October 2010 to facilitate disputes between customer and financial business operators. Commencement of the designated dispute resolution organisation’s procedures has the effect of a bar to the statute of limitations. If a lawsuit is filed within one month of the termination of the procedures of the Financial ADR System owing to failure of mediation, the statute of limitation shall be deemed to have been barred at the time of the filing of the petition to the Financial ADR System.

Owing to the Great East Japan Earthquake of 11 March 2011, radioactive material was emitted from Fukushima No. 1 and No. 2 nuclear power plants over a broad area. As a result, many residents were forced to evacuate or to abandon business activities. The Dispute Reconciliation Committee for Nuclear Damages Compensation, which was established based on the Act on Compensation for Nuclear Damages, formulated a guideline for settling damages disputes associated with the nuclear accident and established the Conflict Resolution Centre for Disputes over Nuclear Damages Compensation (the Centre) on 1 September 2011. As a result, victims now have three methods to pursue a claim:

a petition to the Centre;
b direct request for compensation against the Tokyo Electric Power Company (out of court); or
c file a lawsuit with the court.

Bar associations organise various forms of ADR including mediation and arbitration. There are multiple ADR centres specialised for particular areas such as the Japan Intellectual Property Arbitration Centre and Council for Construction Disputes.

VII OUTLOOK AND CONCLUSIONS

Court proceedings (and judges) in Japan are considered fair and reliable. In the past, Japanese corporations generally preferred litigation in court to arbitration. Recently, however, the importance of ADR has been considered, particularly for the resolution of international disputes, and several ADR schemes and facilities have become available in Japan. Japan is a pro-arbitration country and a recent high court decision confirmed an extremely cautious attitude towards the setting aside of arbitral awards.

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19 Act No. 151 of 1 December 2004.
20 Act No. 147 of 17 June 1961.
21 Decision of Tokyo High Court dated 1 August 2018, the Financial and Business Law Precedents No. 1,551, page 13.
INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

The judicial system in Korea operates under a three-tier system that primarily consists of the following:

- district courts as the courts of first instance;
- high courts as the courts of second instance; and
- the Supreme Court of Korea.

While district courts mainly handle cases involving civil and criminal law matters, there are also specialised courts such as the Patent Court for matters involving patents, family courts for family law matters, and the Administrative Court, which deals with matters involving administrative law. As the pinnacle of the judicial system, the Supreme Court has the competence to make final and binding decisions on given cases, and its interpretation of the law in effect binds the lower courts. Separate from the Supreme Court, there is also the Constitutional Court of Korea, which has jurisdiction over cases involving questions of constitutionality of statutes.

The most distinguishing characteristic of Korean law is that Korea is a civil law country that relies primarily on statutes enacted by the Korean National Assembly. Nonetheless, the courts still play an equally important role in interpreting and developing the law. Although Korea does not recognise the common law principle of stare decisis, the Supreme Court’s decisions still have very strong precedent value on lower courts, as lower courts’ decisions are most likely to be overturned in the appeal process if they stray from the Supreme Court’s interpretations.

In addition to the courts, arbitration as an alternative dispute resolution method has become increasingly important in Korea. Notably, the demand for international arbitration in Korea has been growing, reflecting the fact that countless Korean companies carry on dealings every day on an international level.

THE YEAR IN REVIEW

In 2018, Korean courts made a great effort to be more ‘international’. Namely, on 1 July 2018, the amended Court Organisation Act entered into force. In accordance with Article 62-2 of the amended Court Organisation Act, court proceedings for certain categories of cases,
such as those cases under the jurisdiction of the Patent Court, can now be conducted in a foreign language with the parties’ consent. In such cases, the usual requirement to provide an interpretation and attach a translation when a foreign language is used does not apply.

III COURT PROCEDURE

i Overview of court procedure

Civil court procedures can be divided into litigation procedure; provisional attachment and provisional disposition procedure; enforcement procedure; and property specification procedure comprising statement of property, debt defaulter roster and property inquiry. The litigation procedure is prescribed by the Civil Procedure Act (CPA), and the provisional attachment and provisional disposition procedure is prescribed by the Civil Execution Act (CEA).

ii Procedures and time frames

A civil litigation proceeding commences when the plaintiff files a complaint to the court of first instance. Upon receipt of such written complaint, the court serves a copy of the complaint to the defendant. Private deliveries are not permitted. Once the defendant receives the copy of the complaint, he or she must submit a written defence within 30 days of the date of such receipt. Should the defendant fail to file a defence within the designated time period, the court may rule without a hearing.

In general, after the defendant has filed a written defence, the court then schedules the first hearing. During the hearing, the parties make oral pleadings regarding the aforementioned written claims, submit evidentiary documents and conduct witness examinations. The hearings are typically held once a month, and although there is no limit to the total number of hearings, there can be as few as two or as many as eight hearings. As such, it is usual for the court of first instance to take about six months to one year to complete its proceedings and render its judgment; generally, a court decision is rendered one month after the final hearing.

The unsuccessful party may file an appeal within two weeks of the date of receiving the court’s service of written judgment. In a common appellate procedure at the court of second instance (usually at the high courts), the unsuccessful party first submits a written brief with the statement of appeal, to which the counterparty submits its reply. Then the court designates a date for the hearings. Since an appellate procedure at the court of second instance is considered as a continuation of the hearing from the court of first instance, the parties are able to submit additional briefs with new arguments and introduce additional factual evidence. Similar to the proceedings at the court of first instance, the hearings at the court of second instance also usually take place once a month. Although there is no limit to the number of hearings, normally fewer hearings are involved at the court of second instance, unless a new evidence has been introduced. As such, court proceedings at the court of second instance will normally take four to six months.

The unsuccessful party may further appeal the appellate court’s judgment to the Supreme Court within two weeks of the date of receiving the appellate court’s written

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2 Article 256(1) of the CPA.
3 Article 257(1) of the CPA.
4 Article 396(1) of the CPA.
judgment. Appealing to the Supreme Court does not require any approval from the court. The Supreme Court is only able to rule on questions of law, and therefore, no hearing date is designated and all proceedings are conducted in writing.

However, if no reasonable grounds for appeal are presented, the Supreme Court may dismiss the proceedings by a decision without further examination. The Supreme Court must render its decision to dismiss within four months of the date it received the record of the case from the lower court. In such cases, the Supreme Court is not required to state any reasoning for its decision to dismiss.

After the four-month period, the Supreme Court must designate a date to render its verdict, then announce its judgment on that date. However, it is very difficult to predict how long it will take the Supreme Court to actually render its judgment, since there is a large number of ongoing cases that it must deal with. From the initial filing of an appeal until the rendering of the final judgment, it may take five to six months or as long as three to four years.

Aside from the court litigation procedure, there is also a separate provisional attachment and provisional disposition procedure. Provisional attachment is a provisional remedy whereby the debtor’s right to dispose of a property in advance is temporarily seized, which means its assets to secure the execution of the creditor’s monetary claims are preserved. Provisional disposition prevents the object of dispute from being disposed of, thereby securing the status quo until the execution of the judgment.

The provisional attachment or provisional disposition proceeding also commences when the plaintiff submits a written application. Generally, provisional attachment or provisional disposition cases are decided without hearings, and they normally take two to three weeks from the filing of an application to the court’s ruling.

iii Class actions

Class actions are not generally permissible in Korea, and there is no single statute that sets out a procedure for class actions. However, there are certain areas of law, such as securities law, that provide for class actions.

First, under the Securities-related Class Action Act, a class action may be filed in cases of claims for damages caused by false documentation of securities registration statements and business reports by investors.

Second, under the Framework Act on Consumers, when a business directly infringes on consumers’ rights and interests with respect to their lives, bodies or properties, and when such infringement persists, consumer organisations that meet certain requirements may file a class action seeking prohibition and suspension of such infringement.

Lastly, under the Personal Information Protection Act, if a business that possesses and controls the personal information of its consumers rejects or does not accept the results of a collective mediation, then the consumer organisations may bring a class action to court and seek prohibition and suspension of the infringement.

iv Representation in proceedings

In Korea, both persons and corporations have the capacity to stand trial. Any association or foundation, provided it is not a corporation, is allowed to file a lawsuit under its name to the extent that it is represented by its representative or administrator. A foreigner’s capacity to
stand trial is also generally not limited by law. Even where the foreigner does not have such capacity pursuant to the laws of his or her home country, he or she has the capacity if it is provided under Korean law.

Meanwhile, other than the above-mentioned class actions pertaining to securities-related actions, consumer rights and personal information protection rights, representation by an attorney is not required for legal proceedings. However, in principle, only lawyers are eligible to represent others in litigation procedures.

v Service out of the jurisdiction
The CPA prescribes that ‘service to be effected in a foreign country shall be entrusted by the presiding judge to the Korean ambassador, minister or consul stationed therein or the competent government authorities of such country’. The method of ‘entrustment to the competent government authorities of such country’ shall be divided into entrusting to a foreign competent court through a diplomatic channel (the competent court method) and entrusting to a foreign central authority through a non-diplomatic channel (the central authority method). The common practice seems to be to entrust the case to the relevant foreign competent government authority.

Meanwhile, the Hague Service Convention and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, to which Korea is a signatory, follow the central authority method. Therefore, the central authority shall be entrusted where such conventions apply; otherwise, the foreign competent court shall be entrusted (Articles 3, 5(1) and 6 of the Act on International Judicial Mutual Assistance in Civil Matters).

Under the CPA, court documents can also be serviced to the place of business or an office in addition to a person’s domicile or residence (Article 26 of the CPA) and, therefore, if the place of business or office is located within the territory of Korea, no service abroad is necessary.

vi Enforcement of foreign judgments
A foreign judgment that satisfies the requirements for recognition and enforcement under Article 217 of the CPA is accorded the same effect as a final and conclusive judgment in Korea. Pursuant to Article 26(1) of the CEA, compulsory execution based on a foreign judgment may be carried out in Korea once it has been formally recognised through an enforcement judgment by a Korean court. The above-mentioned requirements for an effective foreign judgment are as follows:

a the international jurisdiction of the foreign court is recognised under the principle of international jurisdiction pursuant to the statutes or treaties of Korea;
b the defendant who lost the case must have been served with the complaint and the summons or any order in a lawful manner in advance so that he or she had sufficient time to prepare a defence;
c the recognition of the judgment must not be contrary to the public policy of Korea;

5 Article 191 of the CPA.
6 For example, a lower court ruled that, in cases where damages awarded by a foreign judgment are considered to be grossly excessive, the court may limit the recognition of the foreign judgment that
there must be a guarantee of reciprocity between South Korean and the foreign country to which the foreign court belongs.

The enforcement proceeding is initiated by application to the court by the party seeking compulsory execution based on a foreign judgment. In general, the application for an enforcement judgment shall be filed to the district court located at the counterparty’s general forum, such as a person’s domicile. The same rules that govern court proceedings for domestic judgments apply to the enforcement proceedings of foreign judgments. In principle, foreign judgments that are appropriate for recognition and enforcement are those that contain orders for defendants to perform, but declaratory judgments may also be enforced to the extent that there is legal interest to do so. The court shall not examine the merits of the foreign judgment during the enforcement proceedings.

vii Assistance to foreign courts

For the purpose of mutual assistance in civil matters, Korea is a Member State of the Hague Service Convention and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, and has entered into a number of bilateral treaties with certain countries.

Meanwhile, Article 12 of the Act on International Judicial Mutual Assistance in Civil Matters states that ‘Any judicial cooperation with respect to an entrustment by a foreign court may be given only when it conforms to the following requirements’:

a a judicial cooperation treaty is concluded with the country to which the entrusting court belongs, or there is a guarantee as provided in Article 4;

b it will not be detrimental to public peace and order, and good public morals in the Republic of Korea;

c the entrustment is made through a diplomatic channel;

d the entrustment of service is made in writing specifying the name, nationality, address or residence of the person to be served;

e the entrustment of evidence examination is made in writing specifying the party, summary of case, methods of evidence or the name, nationality, address or residence of the person to be inquired and matters to be inquired, in a case of witness inquiry;

f a translation in the Korean language is appended; and

g the country to which the entrusting court belongs guarantees the payment of expenses needed for implementing the entrusted matters.

viii Access to court files

In principle, a party or a third party that has prima facie proven its interest in a given case may, as prescribed by the Supreme Court Regulations, file a request to the court to peruse and make copies of the records.

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exceeds the amount that would have been awarded by a Korean court in a similar case on the grounds that recognising such excessive part would be contrary to the public policy of Korea. (Seoul Eastern District Court decision 93GaHap19069, 10 February 1995.)

7 Article 26(2) of the CEA.

8 Article 27 of the CEA.

9 Article 162(1) of the CPA.
Moreover, anyone may apply to peruse records of final and conclusive judgments for the purposes of protecting and pursuing one’s rights, carrying out academic research or promoting public interest. However, even in such cases, the records of cases that the courts have ordered to be conducted in private cannot be revealed. Also, the court shall not allow perusal of the cases if the relevant interested parties do not consent to it at the time of the application.\textsuperscript{10}

Notwithstanding the above, any person may peruse or duplicate a written judgment that is final and conclusive by using electronic methods. However, perusal or duplication may be restricted for those written judgments of which the courts have prohibited disclosure. In such cases, court administrative officers shall take protective measures prescribed by the Supreme Court Regulations before such perusal and duplication to ensure that personal information, such as names, stated in a written judgment is not revealed.\textsuperscript{11}

\textbf{ix  Litigation funding}

There is no specific law or regulation regarding litigation funding that allows a third party with no interest in a certain case to bear the cost of litigation and reserve the rights to parts of the damage award.

However, those who have difficulty affording legal services can apply to the courts for litigation aids or seek legal aid services from the Korea Legal Aid Corporation. With regard to litigation aid, the CPA provides that ‘a court may grant a litigation aid, either \textit{ex officio} or upon request of a person who is unable to pay for the costs of a lawsuit’ (Article 128 of the Civil Procedure Act). The Korea Legal Aid Corporation provides legal aid to persons with low income with or without service charges (Articles 1 and 8 of the Legal Aid Act).

\textbf{IV  LEGAL PRACTICE}

\textbf{i  Conflicts of interest and Chinese walls}

Conflicts of interest are regulated by the Attorney-at-law Act (the Attorney Act) and the Code of Ethics prescribed by the Korean Bar Association (KBA). The key provision is Article 31(1) of the Attorney Act, which restricts the acceptance of certain legal cases. According to this provision, no attorney shall provide services with respect to a case that falls under any of the following:

\begin{itemize}
  \item[a] a case brought by the opposing party for which the attorney has already provided consultation and accepted to handle (or represent) the case;
  \item[b] a different case brought by the opposing party of a case that the attorney is currently handling (or representing); or
  \item[c] a case that the attorney handles or has come to handle in his or her capacity as a public official, mediator or arbitrator.
\end{itemize}

However, with regard to point (b), the attorney may take the case if the client the attorney is currently representing gives consent. In the application of points (a) and (b), any law office in which two or more attorneys represent or handle cases or jointly operate with a

\textsuperscript{10} Article 162(2), (3) of the CPA.

\textsuperscript{11} Article 163-2(1), (2) of the CPA.
uniform organisation while sharing profits and expenses, even though it is not a law firm (legal person), limited liability company or partnership, shall be considered as one entity (Article 31(2) of the Attorney Act).

If one begins his or her practice as a lawyer after retiring as a judge, a prosecutor or a public official, for one year after his or her retirement, he or she shall not accept cases that are related to or being handled by a state agency, such as a court, a prosecutor's office, the Financial Services Commission and the Fair Trade Commission, as the case may be, in which he or she has worked for one year prior and up to his or her retirement (Article 31(3) of the Attorney Act).

There is no express mention of Chinese walls in either the Attorney Act or the KBA Code of Ethics for attorneys. However, to the extent that the Attorney Act allows, there are several cases in practice in which a Chinese wall is arranged in the process of handling cases with the consent of the client.

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

Although, there is no specific provision with respect to lawyers' responsibilities in connection with money laundering and proceeds of crime, laundering of proceeds of crime in general is regulated by the Act on Regulation and Punishment of the Concealment of Criminal Proceeds. Also, under Article 24 of the Attorney Act, as a general rule in performing his or her duties, a lawyer is prohibited from concealing the truth or making false statements. Furthermore, the Code of Ethics provides that a lawyer shall not collaborate in any criminal acts or any other illegal activities committed by clients. In the event that the lawyer finds that the client's activities amount to criminal acts or other illegal activities, he or she shall promptly suspend the collaboration (Article 11(1) of the Code of Ethics).

As for funds related to terrorism, the Act on Prohibition Against the Financing of Terrorism and Proliferation of Weapons of Mass Destruction prohibits the provision of funds for the purpose of acts of terrorism, directly or indirectly via a third person. Additionally, Article 3(3) of the Act on Real Name Financial Transactions and Confidentiality prescribes that 'no person shall perform financial transactions under the real name of another person for the purposes of concealing illegitimate property, money laundering or financing of terrorism and evading compulsory execution, and other evasions of the law'.

iii Data protection

According to Article 17(1) of the Personal Information Protection Act, an entity that controls personal information (a personal information controller) may provide (or share) someone's (the information owner's) personal information to a third party under the following circumstances:

a where consent is obtained from the information owner; and
b where the personal information is provided within the scope of purposes for which it was collected pursuant to Article 15(1)2, 3, and 5.

Article 17(2) of the Personal Information Protection Act prescribes matters that need to be addressed when obtaining consent under the above-mentioned paragraph, such as the recipient of the personal information, the purpose of the information, particulars of the information to be provided, and the time period for which the recipient retains and uses such information.
According to Article 18(2) of the Personal Information Protection Act, where necessary for the investigation of a crime, indictment and prosecution, or for the court to proceed with the case, etc., a personal information controller may use personal information or transfer it to a third party for purposes other than those intended, unless it is likely to unfairly infringe on the interest of the information owner or the third party.

Meanwhile, Article 12 of the KBA Code of Ethics sets forth that ‘a lawyer must act with prudence in protection of personal information in his or her conducts’. However, no further provision is provided in detail.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege
Unlike the United States, in Korea, attorney–client privilege is not expressly stated in the law. Under Korean law, no statute expressly provides for the client’s right to refuse disclosure of the communication he or she exchanged with the lawyer.

However, according to Article 26 of the Attorney Act, no lawyer or former lawyer shall disclose any confidential information that he or she has learned in the course of performing his or her duties. A lawyer may disclose such confidential information only when there is a special provision in statutes that compels or allows for the disclosure. In this respect, the CPA allows an attorney to refuse to testify as a witness (Article 315) and refuse to produce documents for which a confidentiality obligation has not been waived (Article 344(1)(3)(c)). Similarly, the Criminal Procedure Act allows the attorney to refuse to testify as a witness (Article 149) and resist seizure of articles held in his or her custody or possession as a consequence of the mandate he or she has received in the course of the work and that relates to confidential information of other persons (Article 112).

Where the admissibility of evidence is at issue with a legal memorandum, the Seoul High Court had ruled that for ‘an exchange of confidential communication between a client and an attorney while the client was seeking a legal advice, it is deemed that such a client reserves the right to refuse the disclosure thereof’. However, the Supreme Court rejected the Seoul High Court’s ruling and decided that ‘privilege cannot be accorded to the legal opinion exchanged between an attorney and a client under normal circumstances, where such a person has not yet been designated as the accused or the defendant of an official criminal procedure such as investigation, indictment or prosecution thereof’.

ii Production of documents
In comparison to common law-style discovery, Korean courts allow for somewhat limited production of documents as set out in the CPA. According to Article 343 of the CPA, when a party intends to offer any documentary evidence, he or she shall submit a document or file a request for a court order to make the person in possession of the document submit it. Once ordered by the court to submit the document, the person ordered is generally (with some exclusions) obligated to submit the document under any of the following circumstances (Article 344 of the CPA):

12 Seoul High Court decision 2008Noh2778, 26 June 2009.
13 Supreme Court decision 2009Do6788, 17 May 2012.
a when the person possesses the document that the party has referenced in the court proceedings;
b when the applicant holds a legal right to ask the holder of the document to transfer or show it to him or her; and
c if the document has been prepared for the benefit of the applicant or prepared in relation to the legal relationship between the applicant and the holder of the document.

Following a party’s document request pursuant to Article 345, the court may, if deemed necessary for such request, order the other party to submit a list of documents it possesses in relation to the party’s document request or a list of documents containing descriptions of the document it intends to submit in response to the document request (Article 346 of the CPA).

With regard to the burden of proof, the Supreme Court has ruled that ‘for the court to render an order to submit the documents, the burden of proof is on the applicant to prove that such documents exist and are in possession of the other party’. Furthermore, in relation to whether the court should accept or reject the applicant’s document request, the Supreme Court has decided that ‘if the court deems that the document requested is an unnecessary exhibit, then such motion for a document production order may be dismissed’. Additionally, such dismissal may be given when there is no direct connection between the claim and the fact to be substantiated by the document requested. A video file shall not be subject to document production orders.

When rendering a document production order, the court may offer the counterparty an opportunity to state its opinion. Once the counterparty states its opinion on whether it possesses such document and whether such document has relevance to the case, the court shall examine the document’s existence, possession and necessity as an exhibit, and whether the counterparty is obligated to produce the document. When the court finds that there is reasonable cause to render a document production order, the court shall render such an order in the form of a judgment (Article 347(1) of the CPA). However, in practice, the court first advises the counterparty to provisionally furnish the document. The judgment by the court may be immediately appealed (Article 348 of the CPA).

Meanwhile, the court may order the person holding such document to furnish the document if the court deems it necessary to determine whether the document falls under Article 344 (i.e., a document that the holder is obligated to produce). In this case, the court shall not allow other persons to view the document (Article 347(4) of the CPA).

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

There are various forms of alternative dispute resolution (ADR) mechanisms in Korea such as settlement, negotiation, arbitration, mediation and conciliation. Among them, the most frequently used method is arbitration, both for domestic and international disputes. Korea is a country with heavy emphasis on trade with foreign countries, and this reality has been well

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14 Supreme Court decision 2007Ma725, 14 April 2008.
15 Supreme Court Decision 2014Ma2239, 1 July 2016.
16 Supreme Court decision 2009Ma2105, 14 July 2010.
17 When rendering an order of submission to a third party, such third party or a person designated thereby must be examined (Article 347(3) of the CPA).
reflected in the constant inflow of international arbitration cases seated in Korea in recent years. To further facilitate international arbitration in Korea, the Korean Arbitration Act was amended in 2016 to adopt the key provisions of the 2006 UNCITRAL Model Law on International Commercial Arbitration (the UNCITRAL Model Law), which reflect the most up-to-date norms regarding arbitration.

ii Arbitration

The bedrock of arbitration in Korea is the Korean Arbitration Act, which was first promulgated in 1966 and went through a major change in 1999, when Korea adopted the 1985 UNCITRAL Model Law. It went through another major amendment in 2016 to reflect the 2006 UNCITRAL Model Law.

The Korean Commercial Arbitration Board (KCAB) is the major arbitral institution used by domestic and international parties in Korea. The KCAB was established as an independent arbitration institution in 1970 and, as a designated commercial arbitration institution by the Minister of Trade, Industry and Energy, it receives substantial subsidies and assistance from the government. It has separate arbitration rules for domestic and international arbitrations. The KCAB International Arbitration Rules underwent a significant change in 2016, adopting many of the most up-to-date international practices. Most notably, the rules introduced an emergency arbitration procedure and procedures for a multi-party arbitration.

In 2017, the KCAB administered 385 arbitration cases, of which 307 were domestic arbitrations and 78 were international arbitrations. Within Asia, Korean companies are some of the most active in utilising arbitration as the method of dispute resolution.

If an arbitration is seated in Korea, then a party may file an application to set aside its award in accordance with Article 36 of the Korean Arbitration Act. The grounds for setting aside is largely similar to those provided in Article 5 of the New York Convention. For an arbitration seated in a foreign country that is a signatory to the New York Convention, a party may seek to refuse enforcement of the award at the enforcement stage on the grounds provided in Article 5 of the New York Convention.

Korean courts have abundant experience in dealing with issues related to arbitration and there is a large reservoir of court precedents. For many controversial issues, Korean courts have taken a favourable view towards arbitration, respecting the parties’ intention to arbitrate. For example, with regard to the existence of a valid arbitration agreement, the Supreme Court has held that where an arbitration agreement shows clear intention for arbitration to settle disputes, the requirements for a valid arbitration agreement are fulfilled and the agreement does not need to state the place of arbitration, the governing law or the arbitral institution.18

The most notable recent development in relation to arbitration was the 2016 amendment to the Korean Arbitration Act. A few of the most significant changes were as follows. First, the scope of arbitrable disputes was broadened to cover disputes concerning economic interests as well as non-economic interests. Second, the requirements for valid arbitration agreements were mitigated by allowing the agreement to be concluded orally, by conduct or by other means other than writing. Third, the efficacy of arbitration was strengthened by adopting interim measures from the 2006 UNCITRAL Model Law and simplifying the award enforcement procedure. Instead of a court judgment, there is now

a court decision, which requires simpler procedures and is enough for enforcement of an award. Finally, the court assistance in taking evidence was improved by allowing tribunals to participate directly in the court evidence examination process.

Arbitration in Korea is becoming an important method of ADR with help from both the courts and the legislature.

### III. Mediation

Common law-style mediation seems to be somewhat less common in Korea. The more common method of ADR is conciliation administered by courts pursuant to the Judicial Conciliation of Civil Disputes Act.

Conciliation may be initiated by an application or by a decision of the court. Conciliation cases are normally handled by the conciliation judge, and cases may be conciliated by the conciliation judge or a conciliation council composed of three commissioners. During a conciliation proceeding, the conciliation judge actively participates and tries to draw out an agreement between the parties. In that respect, the conciliation judge is given wide discretion to decide on how to proceed with the conciliation. A conciliation process is completed by writing the terms of agreements between the parties in the court record. The conciliation has the same effect as a settlement in court.

### VII. OUTLOOK AND CONCLUSIONS

In 2018, the judicial system in Korea took a big leap towards becoming more international with the amended Court Organisation Act, which allows court proceedings to be conducted in a foreign language at the Patent Court, and the planned amendment to the Korean Private International Law Act, which would introduce detailed provisions regarding international jurisdiction for greater predictability and stability.

Along with these developments, Korea has also pushed to promote ADR by enacting a new law, the Arbitration Industry Promotion Act, and establishing a new arbitral institution, the Asia-Pacific Maritime Arbitration Centre, which is dedicated to maritime arbitration cases.

With important amendments to key legislation such as the Korean Arbitration Act and the Korean Private International Law Act, it will be interesting to see the courts interpret the changes in law and develop their jurisprudence.
I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

The Liechtenstein court system and procedural laws were both largely copied from the Austrian model. The Liechtenstein legal system is a civil law system. The laws relating to dispute resolution are the Civil Procedure Law (ZPO), the Jurisdiction Act (JN) and the Execution Code (EO). Non-contentious proceedings are governed by the Special Non-Contentious Civil Proceedings Act (AussStrG).2

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 Act 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 Swiss 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 Negele-Vogt are associates at Marxer & Partner Attorneys-at-Law.
2 Liechtenstein laws are promulgated in the Legal Gazette (LGBl). All Liechtenstein laws are available at www.gesetze.li (in German only).
significance, because they provide an interpretation of the statutory framework. For the sake of legal certainty, an existing interpretation is only changed if there are new and convincing arguments justifying a decision different from the precedent.

The most important alternative dispute resolution paths are arbitration (governed by the ZPO) and mediation proceedings (governed by the Law regarding Mediation in Civil Law Matters (ZMG)).

II THE YEAR IN REVIEW

i Legal aid for legal entities

According to Section 63(2) ZPO, legal aid may only be granted to a legal entity if in addition to the legal entity also all parties economically involved in the proceedings conducted by the legal entity are unable to bear the costs of litigation. The StGH decided that it is not the legal relationship of the third party to the legal entity that is decisive; rather, it is whether the outcome of the proceedings has a significant effect on the financial situation of the third party. Thus, major creditors who would not be able to recover their claim from the legal entity without the proceedings have to disclose their financial situation before legal aid is granted to the legal entity.3

ii Non-appealability of all decisions of the OG on costs

The OGH decided that all decisions of the OG in which in some way, substantively or procedurally, the OG decides on costs (including decisions with which the OG rejects an appeal on costs for procedural reasons) are non-appealable to the OGH.4

iii Consultation of defendant in case of an interim injunction

In this decision, the OGH came to the conclusion that the court of first instance must give an explicit explanation if it decides not to hear the defendant before issuing the interim injunction. The presence of the conditions provided for by the law for the issuance is not sufficient to refrain from the consultation of the defendant. Rather, it is required that there is special urgency based on the specific circumstances of the case.5

III COURT PROCEDURE

i Overview of court procedure

International jurisdiction is given once the jurisdiction of the Liechtenstein courts is established.6 National jurisdiction is given either where the general jurisdiction applies or one of the ‘special jurisdictions’7 is given. If a defendant is resident in Liechtenstein, general jurisdiction is established.8 For practical purposes, the special jurisdiction based on assets

3 StGH 4 February 2019, StGH 2018/124.
5 OGH 7 June 2019, 7 CG.2018.222.
6 OGH in LES 2009, 167; OGH in LES 2006, 480.
7 The LG, for example, has exclusive jurisdiction over disputes regarding immovable property located in Liechtenstein pursuant to Section 38 JN.
8 See Section 30 et seq. JN.
is of particular importance. This means that monetary claims may be pursued against an individual or legal entity that does not have its domicile in Liechtenstein if that party has assets within Liechtenstein; for example, in the form of a deposit with a Liechtenstein bank or a claim against a debtor resident in Liechtenstein. Besides this, the parties may also submit themselves to Liechtenstein jurisdiction by express agreement (prorogation). ⁹

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, ¹⁰ it serves the legal action on the defendant ¹¹ and at the same time sets a date for the first hearing. At the first hearing, the defendant may invoke formal objections ¹² and must apply for the order of a security for costs, if the prerequisites are given. ¹³ Persons who have no residence in Liechtenstein ¹⁴ or who lose such during the legal proceedings and are plaintiffs or appellants in a Liechtenstein court are in most cases obliged, if so required, to furnish the defendant or respondent with a security for the costs of the proceedings. Likewise, legal entities that do not have sufficient property on which execution can be levied may also be required to furnish a security for the costs of the proceedings.

Natural persons who are not able to bear the costs of litigation without detriment to the necessary maintenance may apply for legal aid in civil matters with the LG. Likewise, legal persons may apply for legal aid if the means necessary to cover the costs of litigation cannot be borne by the legal person itself or the persons economically involved in the proceedings. Legal aid is only granted if the litigation is not considered vexatious or futile (Section 63 ZPO). If legal aid is granted, the party may also be (and in general is) freed from the payment of court fees and from the provision of a security for costs (Section 64 ZPO).

In cases where the claimant is ordered by the court to deposit a security for costs, the defendant is invited by the court to submit a reply to the statement of claim, if such a security for costs is deposited in time. Thereafter, depending on the complexity of the case, the court usually sets a hearing to decide on the evidence that will be taken. The matter is then heard in one or more oral hearings where the parties may plead their case, witnesses are examined, etc. Once the judge is satisfied and finds that the factual basis of the case is duly presented and the matter ready for taking a decision, he will close the hearing and then deliver the written judgment. As a general rule, further factual pleadings and new evidence may be put forward or offered by the parties to support their pleadings until the closure of the oral hearing. ¹⁵

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

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⁹ It should be noted that free choice of forum is restricted, for example, in consumer cases and in insurance law cases.

¹⁰ Where the court concludes that its jurisdiction is not given, the action is normally dismissed ex parte.

¹¹ Defendants not residing in Liechtenstein are normally served by way of letters rogatory to the competent court where they reside.

¹² For example, the lack of jurisdiction.

¹³ This defence has to be raised.

¹⁴ Or in Austria and Switzerland because of the bilateral recognition and enforcement treaties in place with these two countries.

¹⁵ However, the court may refuse to accept the pleadings or take further evidence if it concludes that the new pleadings or evidence have not been brought forward earlier owing to gross negligence, and if their admission would considerably extend the proceedings (Section 179(1) ZPO).
for the examination of witnesses, experts and the production of evidence.\textsuperscript{16} He or she is also obliged to discuss the factual and legal pleadings with the parties (Section 182a ZPO) and may not base his or her decision on any legal ground that one of the parties obviously was not aware of unless he or she discussed it with the parties (Section 182a ZPO).

**Ordinary appeals**

The Liechtenstein civil procedure distinguishes between judgments and orders.

Each judgment passed by the LG may be appealed to the OG within four weeks. In appellate proceedings, the OG gives its decision either by confirming the judgment of the LG or by setting it aside and referring the matter back to the LG, or by itself amending the contents of the judgment. The OG in general does not conduct an oral hearing on the appeal. An oral hearing only takes place by specific request by one of the parties or if the OG considers it necessary because of the specific circumstances. To specify the grounds for avoidance, new facts and evidence may be submitted as long as the claim remains identical (novation is not prohibited before the second instance court). However, the court may refuse to accept new pleadings or take further evidence if it concludes that the new pleadings or evidence have negligently not been brought forward in first-instance proceedings (Section 452(3) ZPO). Moreover, the parties may also contest procedural errors or the LG’s factual and legal findings. Procedural errors regarding the form of procedural measures, however, may only be contested if they have already been contested in first instance right after the violation happened (Section 196 ZPO).

Judgments of the OG may, in general, be appealed to the OGH within four weeks. An appeal to the OGH is, however, not possible and the judgment of the OG is final in the following cases:

1. small-claims proceedings (values in dispute up to 5,000 Swiss francs; Section 471(1) ZPO in connection with Section 535(1) ZPO); and
2. generally\textsuperscript{17} cases with values in dispute up to 50,000 Swiss francs in which the OG has confirmed the decision of the LG.

The OGH conducts a non-public hearing and is solely concerned with legal errors. Fact-finding by the lower level courts can, therefore, no longer be contested (novation is prohibited). Accordingly, the parties may only raise points of law on material or procedural issues, but new evidence or pleadings are not allowed.

Most orders by the LG, such as the order to lodge a security deposit for costs and fees or the refusal to accept jurisdiction, may be appealed to the OG within two weeks. Decisions by the OG may be appealed to the OGH in general as follows: an order overturning the decision of the LG may be appealed to the OGH within 14 days. Where an order of the OG confirms an order of the LG, no further appeal to the OGH is possible. Pursuant to the revised ZPO, there are, however, certain exceptions from this general rule with respect to orders concerning the sequence of the proceedings which can, in any event, only be appealed to the OG and not to the OGH (also in cases in which the OG does not confirm the decision of the LG, but overturns it).

\textsuperscript{16} An order regarding the production of documents is not enforceable by the court. But the court may of its own discretion take into consideration a party’s non-compliance with such an order in the weighing of the evidence pursuant to Section 307(2) ZPO.

\textsuperscript{17} Some exceptions apply.
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 or the OG that are final and ultimately determine a matter (i.e., which are, for example, not merely referring a matter back to the lower instance) may be appealed to the StGH within four weeks for alleged violation of fundamental rights granted by the Constitution or by international conventions such as the European Convention on Human Rights. An appeal to the StGH does not have the effect of staying the judgment, unless such stay is specifically granted by the StGH, acting through its president, upon request of one of the parties. The StGH can only quash the challenged order or judgment; it cannot pass a new decision on the merits. The ordinary courts are, however, bound to the legal considerations of the StGH and have to revise the quashed decision in accordance with the same.

**ii Procedures and time frames**

The duration of proceedings before the first instance obviously depends on the subject matter and complexity of the case at hand. If extensive evidence has to be taken, for example, by hearing a large number of witnesses or if the court needs to appoint an expert witness for special questions of fact or if a witness needs to be heard abroad via letters rogatory, the duration of the oral proceedings before the LG may take up to one year and in complex cases even longer. As a general rule, a decision of the LG may be expected within one year. A final decision that may only be obtained from the OGH can take up to three years. If a matter is of great complexity and if decisions of the lower instances are lifted and the matter handed down to the lower instance for a new decision proceedings may also take considerably longer.

Both prior to the opening of a lawsuit and during litigation, and even during the execution proceedings, interim injunctions may be issued (Article 270 EO). They serve to secure the right of the party complainant if, in the absence of a protective injunction, there is the risk that a future execution will be prevented or made difficult; for instance, if a claim has to be enforced outside Liechtenstein. Interim injunctions may take the form of a protective order to secure money claims, or of an official order to secure other claims. The applicant must furnish prima facie evidence both of his or her claim and of the risk that may 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

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18 To avoid delays, the revised ZPO provides for the opportunity of hearing a witness in a video conference instead of hearing the witness abroad via letters rogatory (Section 283(4) ZPO).

19 In urgent matters, Article 272 EO provides for the possibility to issue provisional security measures. The applicant has to apply for an interim injunction at court within two days of being notified of the security measure (Article 272(4) EO).

20 The court may order the provision of a security if, for example, it does not consider the prima facie evidence for the alleged claim to be sufficient (Article 283 EO). According to Article 287 EO, the applicant has to reimburse any pecuniary loss suffered by the defendant if, for example, the applicant loses the main proceedings.
defendant shall be heard prior to the passing of the interim injunction. Under Liechtenstein law, it is not possible to obtain a free-standing\textsuperscript{21} injunction.\textsuperscript{22} 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.\textsuperscript{23}

iii Class actions

Generally, class actions are not included in Liechtenstein procedural laws. Section 11 et seq. ZPO contain provisions regarding the joinder of parties (either as joined plaintiffs or joined defendants). Pursuant to these provisions, several persons may act as joint claimants or joint defendants if their rights are based on the same legal and factual grounds. The Liechtenstein Consumer Protection Act (KSchG) enables certain consumer protection organisations to claim on behalf of several individuals, for example, against terms and conditions of businesses that are disadvantageous to consumers (Article 41 et seq. KSchG). However, these are not class actions in the strict sense.

iv Representation in proceedings

The civil procedure law of Liechtenstein does not provide for compulsory representation: irrespective of the amount claimed or the object in dispute or the instance, every person may represent himself or herself or be represented. In practice, however, it rarely occurs that parties act without representation before the courts.

v Service out of the jurisdiction

Although Liechtenstein is not a member of the Hague Treaty on International Service, service on foreigners is regularly performed 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.

\textsuperscript{21} The term ‘free-standing injunction’ refers to an injunction granted by a court pending the resolution of a dispute before a foreign court.

\textsuperscript{22} According to new case law, it is possible to obtain a free-standing injunction, if a lawsuit is pending in Austria and Switzerland and the decision rendered there could be recognised in Liechtenstein (see Section III.vi).

\textsuperscript{23} Article 284(4) EO.
The few bilateral and multilateral treaties concluded by Liechtenstein and the enforcement of foreign judgments in the absence of an enforcement treaty are discussed below.

### Bilateral treaties


Both treaties require all of the following conditions to be met in order to recognise a judgment:

- Recognition of the judgment must not be contrary to public order of the state in which the judgment is asserted and a plea of res judicata must not be possible;
- The judgment must have been passed by a court with jurisdiction relating to the subject matter according to the principles set out in the treaty;
- The judgment must have entered into legal force according to the law of the state where it has been passed; and
- In case of a default judgment, the writ of summons, by which proceedings are instituted, must have been served on the party in default personally or on a proper representative.

### Multilateral treaties


The Liechtenstein Parliament consented to the signing of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 on 19 May 2011. The New York Convention was then ratified and entered into force on 5 October 2011.24


### 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.25 On the account

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24 LGBl. 2011 No. 325.
25 Articles 49–53 Liechtenstein Code of Securing Legal Rights (RSO).
of the Rechtsöffnung, the creditor who has obtained a default summons\textsuperscript{26} or other decision within summary proceedings\textsuperscript{27} may have the debtor's opposition or legal proposal annulled by the court, if the claim he or she has put forward is based on a Liechtenstein or foreign public instrument.\textsuperscript{28} The respondent in such proceedings may avoid an enforceable instrument only by bringing an action for denial.\textsuperscript{29} Once an action for denial has been brought, the merits of the case are decided upon in contentious proceedings before a court of law. In practice, this means that if the opponent does not want a foreign judgment to be validated by Rechtsöffnung, the whole case has to be re-tried on the merits before the Liechtenstein courts.

\textit{vii} Assistance to foreign courts

The provisions of Section 17 et seq. JN provide assistance to foreign courts. Pursuant to Section 27 JN the LG has to grant legal assistance unless the requested act does not fall within the competence of the LG or if an act is requested that is prohibited by Liechtenstein law or if reciprocity is not given. Where the LG doubts the existence of reciprocity, it has to obtain a binding declaration from the OG in this respect.\textsuperscript{30}

The most common cases of legal assistance for a foreign court in civil proceedings are the service of documents and the examination of witnesses. The court has to provide legal assistance in accordance with the Liechtenstein procedural laws pursuant to Section 28(1) JN.

\textit{viii} Access to court files

As a rule, court hearings in civil cases are open to the public. However, in specific cases, where the public interest or the protected interests of a person are directly affected, the public may be excluded. Written submissions in civil proceedings are not made available to the public. Therefore, non-parties are not granted access to the court file, unless the parties of the lawsuit agree to grant information to the third party or such third party can prove some legal interest (for example, if the information is required for a lawsuit) and is granted access through a court decision. Judgments may be requested by anyone, but are only made available in anonymised form.

\textit{ix} Litigation funding

There are no rules in Liechtenstein regarding litigation funding by disinterested third parties. It is in principle up to the litigating parties how they fund their litigation.\textsuperscript{31} Parties may 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).

\textsuperscript{26} Zahlbefehl according to Section 577 et seq. ZPO.
\textsuperscript{27} Rechtsbot according to Section 592a et seq. ZPO.
\textsuperscript{28} Article 49(1) RSO.
\textsuperscript{29} Aberkennungsklage according to Article 53 RSO.
\textsuperscript{30} Section 27(2)(3) JN.
\textsuperscript{31} A limitation exists only as regards lawyers in Article 23(3) RAG, which provides that \textit{quota litis} agreements or the assignment or pledging of the disputed claim or object are not permitted.
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 Act on Lawyers (RAG). Where a lawyer has represented the opposing party in the same matter or in a matter connected thereto, he must not accept the mandate. Likewise, a lawyer may not advise both parties in the same case. These duties are specified in the Professional Conduct Guidelines. Section 18 of the Professional Conduct Guidelines provides that a lawyer must not advise, represent or defend more than one client in the same matter if a conflict of interest or the immediate danger of a conflict of the interest of these clients exists. If such a conflict arises or if there is a danger of a violation of the duty of secrecy or if the lawyer’s independence is at risk, the lawyer has to lay down his mandate with regard to all clients. Pursuant to Section 19 of the Professional Conduct Guidelines, a lawyer must not accept a mandate if the danger of a violation of his duty of secrecy in respect of information entrusted by a former client or the knowledge of the affairs of a former client could present a disadvantage to the former client or an unjustified advantage for the new client. The same obligation to avoid conflicts of interest applies to different lawyers of the same law firm, who are, for this purpose, regarded as one and the same lawyer.32 The duty of a lawyer to exercise his profession independently is of utmost importance as the client needs to be sure that he is being advised independently and in a manner free from conflicts of interest.33 With a view to this duty and the rules relating to the avoidance of conflicts of interest, Chinese walls are not permissible in Liechtenstein.

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

To the extent that lawyers provide tax advice to their clients or assist in the planning and execution of financial or real estate transactions concerning:

a  the buying and selling of undertakings or real estate;

b  the management of client funds, securities or other assets of the client;

c  the opening or management of accounts, custody accounts or safe deposit boxes;

d  the procurement of contributions necessary for the creation, operation or management of legal entities; or

e  the management of trusts, companies, foundations or similar legal entities, 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;
- identify and verify the identity of the recipients of distributions of legal entities established on a discretionary basis and of the beneficiaries of life assurance policies and other insurances with investment-related objectives;
- 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

32  Section 19(2) Professional Conduct Guidelines.
33  Article 11 RAG and Section 4 Professional Conduct Guidelines.
any transaction unless refraining in such a manner is impossible or would frustrate efforts
to pursue a person suspected of being involved in money laundering, predicate offences of
money laundering, organised crime or terrorist financing. The representation of a client in
litigation or arbitration matters is not subject to the SPG.

### iii Data protection

By a decision of 6 July 2018, the European Economic Area (EEA) Joint Committee
announced the incorporation of the General Data Protection Regulation (Regulation (EU)
of natural persons with regard to the processing of personal data and on the free movement
of such data, and repealing Directive 95/46/EC; GDPR) into the EEA Agreement, making
the GDPR directly applicable to Liechtenstein as of 20 July 2018. Besides this, the Data
Protection Act (DSG) applies, which has been completely revised. The new DSG entered
into force on 1 January 2019.

In short, personal data obtained through any professional activity has to be kept secret
without prejudice to other legal secrecy obligations, unless there is a legally permissible
reason for the transmission of the entrusted data. It follows from this that the strict secrecy
obligations stipulated by the RAG provide complete protection of personal data provided by
the client to the lawyer. Therefore, a lawyer can neither grant access to data that may contain
personal data of a client to any third party, nor can he or she share such data with other law
firms.

The violation of the strict professional secrecy obligations that cover all aspects of the
lawyer’s relationship with his client provided in the RAG is punishable pursuant to Section
121 of the Criminal Code and represents a disciplinary offence.

### V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

#### i Privilege

The legal privilege of lawyers is stipulated in Article 15 RAG. The lawyer is obliged to keep
confidential all affairs entrusted to him, and all other facts that have become known to him
or her in his or her professional capacity and that have to be kept secret in the interest of his
or her client. The law provides that the lawyer has a right to this professional secrecy privilege
in all court and other official proceedings in accordance with the applicable procedural laws.
The procedural laws contain provisions allowing the lawyer to preserve secrecy. In particular,
Section 321(1)(4) ZPO provides that the lawyer is entitled to refuse to testify as a witness
regarding information entrusted to him or her by his or her client. This privilege must not
be circumvented by other means; for example, the examination of employees of the lawyer
(Article 15(2) RAG).

The legal privilege extends, in particular, to correspondence between the lawyer and
the client, irrespective of where and in whose possession this correspondence covered by the
professional secrecy protection is (Article 15(3) RAG).

In-house lawyers are not protected because they are not lawyers in the sense of the
RAG. A lawyer who is admitted to a foreign Bar may invoke professional secrecy obligations
in the same way as a Liechtenstein lawyer, and therefore the same level of legal privilege
applies to such lawyers.

In a regulatory context, the lawyer has to provide information only to the Financial
Market Authority, the FIU and the Office of Justice and only when the lawyer carries on
activities that are subject to the SPG. The information the lawyer has to provide is limited to information and documents that the regulatory authorities require to fulfil their tasks (Article 15(4) RAG). Since the representation of a client in a dispute resolution matter or, more specifically, in court proceedings is not an activity subject to the SPG, this provision is not of great significance in dispute resolution practice.34

**Production of documents**

There is no disclosure process or pretrial discovery in Liechtenstein. And yet, in specific and narrowly defined circumstances, the taking of evidence as a form of precautionary measure prior to trial is possible. While third parties or authorities must produce relevant documents in their possession, unless they have a right to refuse to testify under Liechtenstein law, there is no effective means of asking the court to order disclosure of documents from a party for use in the proceedings.35

That is because according to Section 307(2) ZPO, even in relation to documents the production of which has been ordered by the court, a defendant cannot be forced effectively to produce such documents. If he or she refuses to present the documents, the court, in its discretion, may only take this into consideration in the weighing of evidence. The difficulty a plaintiff faces in this respect is that he or she often does not know what documents that might assist his or her case are in the hands of the defendant.

**VI ALTERNATIVES TO LITIGATION**

**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.

**Arbitration**

Liechtenstein passed new legislation regarding arbitration proceedings with effect from 1 November 2010.36 The new arbitration legislation generally follows the Austrian model, which again is based on the Model Law on International Arbitration (UNCITRAL Model Law). However, Liechtenstein arbitration law departs in certain aspects from its model to make it more attractive and effective.

The new arbitration law practically37 permits the submission of all types of disputes in relation to trusts, foundations or companies to arbitration, including, in particular:

- the removal of trustees (or foundation council members);
- the challenging of resolutions of trustees (or the foundation council); and
- the appointment of extraordinary auditors.

34 See Section IV ii.
35 Section 304 ZPO.
36 Sections 594–635 ZPO; LGBl. 2010/182.
37 Exceptions are matters falling within the public supervision of foundations (Government Report No. 53/2010, p. 13) and, in general, proceedings that are initiated *ex officio* or by a public authority (i.e., the LG, the Foundation Supervision Authority (STIFA) or the Attorney General) and based on mandatory law (Section 599(3) ZPO).
The advantages of arbitration are the following:

- the composition of the arbitration tribunal and the appointment of its members may be freely determined; 38
- the seat of the arbitration tribunal and the language of the arbitration proceedings may be freely determined; 39
- speedy proceedings, as there is only one instance and the arbitral award may only be challenged before the OG on very limited formal grounds; 40
- arbitration proceedings are confidential; and
- special provisions have been enacted to provide for extra confidentiality of the proceedings before the OG in case the arbitral award is challenged. 41

iii Mediation

The rules governing mediation in Liechtenstein are contained in the ZMG. The commencement and proper continuation of mediation suspends the statute of limitations in relation to the rights and claims subject to mediation (Article 18(1) ZMG). The suspension of the statute of limitations is effective if one of the parties files a legal action with the LG within 14 days from the termination of the mediation (Article 18(3) ZMG). A settlement reached in the mediation is not binding on the parties and cannot be enforced. Mediation is available for all types of civil law matters. Mediation procedures are of minor importance in Liechtenstein, since Liechtenstein lawyers usually attempt to bilaterally settle a case (without the involvement of a mediator), before formal proceedings are initiated.

iv Other forms of alternative dispute resolution

Another form of alternative dispute resolution available in Liechtenstein is the Conciliation Board, with one mediator. It has been created to deal with conflicts between clients and various financial service providers such as asset management companies, banks, professional trustees and others. The Conciliation Board is regulated in the Ordinance Regarding the Extrajudicial Conciliation Board in the Financial Services Sector (FSV). It is up to the parties to refuse the conciliation proceedings or to abandon them at any time (Article 13 FSV). The conciliation proceedings come to an end if the motion is repealed, the parties reach an agreement, the Conciliation Board makes a proposal for a settlement, the rejection of the motion is obviously abusive or if a court or arbitration tribunal is seized of the matter. If no agreement is reached between the parties, they have to be referred to ordinary legal proceedings (Article 19(2) FSV). In practice, such conciliation proceedings do not play an important role. This is, among other reasons, probably due to the fact that parties may practically decide to abandon the proceedings at any time.

Furthermore, Liechtenstein implemented the EU Directive on Consumer ADR (Directive 2013/11/EU) in the Act on Alternative Dispute Resolution in Consumer

38 Sections 603 and 603 ZPO.
39 Sections 612 and 613 ZPO. This allows the appointment of, for example, English trust law experts as arbitrators or the use of English language documents.
40 Section 628 ZPO. Theoretically, the decision of the OG may be challenged with the extraordinary remedy of an appeal to the StGH for alleged violation of constitutional rights.
41 Section 633(2), (3) and (4) ZPO. This was necessary as the proceedings before the OG are generally public. In this respect, it should be noted that, for example, supervisory court matters are generally heard in private to protect the privacy of the involved parties.
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Matters (ASrG). According to that, participation in such proceedings is voluntary. However, companies domiciled in Lichtenstein are obliged to inform consumers about the opportunity of ADR proceedings if they cannot reach an agreement in case of a dispute.

VII OUTLOOK AND CONCLUSIONS

On 1 January 2019, the revised ZPO aiming to facilitate and accelerate proceedings entered into force. Principally (with quite a lot of exceptions), the new rules also apply to proceedings already pending at the time of the entry into force. The following are the key points of the reform:

a limiting the appealability of orders and judgments of the OG to the OGH (see Section III.i);
b tightening the conditions for new pleadings and evidence in the course of the proceedings (see Section III.i, and in particular footnote 15); and
c changes with regard to the taking of evidence (e.g., making use of new technologies, lifting the subsidiarity of the hearing of the parties).

Time will tell whether the new rules in their entirety will really facilitate and accelerate the proceedings.

Generally, no substantive changes in the legislation governing dispute resolution in Liechtenstein are envisaged in the near future. Because of the liberal legislation relating to companies, foundations and trusts, cases involving foundations and trusts play an important role, in general, as do commercial and company law cases in Liechtenstein. The attractive arbitration law in combination with the New York Convention on the Recognition and Enforcement of Arbitral Awards makes Liechtenstein an attractive place for arbitration.
I  INTRODUCTION TO THE 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’ judicial system, which heard and disposed of more than 1,400 cases in 2018. The Mediation Division of the Supreme Court has also been actively involved in facilitating the settlement of ongoing civil and commercial disputes. However, there has been a drastic drop in the number of civil cases received at the Mediation Division of the Supreme Court – from 31 in 2017 to 28 in 2018.

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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Mediation and arbitration procedures are also available at the level of the Mauritius Chamber of Commerce and Industry (MCCI) and the Mauritius International Arbitration Centre (MIAC) as an independent arbitration centre.

i  The MCCI
The MCCI has, since 1996, had its own permanent court of arbitration, the MCCI Arbitration and Mediation Center (MARC). Under the Mediation Rules or Arbitration Rules of MARC, individuals, private-sector entities and public sector organisations can initiate arbitral proceedings in relation to both domestic and international commercial disputes.

ii  The Mauritius International Arbitration Centre
The LCIA-MIAC Arbitration Centre, which was established in 2011 as a joint venture between the government of Mauritius and the London Court of International Arbitration (LCIA), ceased to operate on the 27 July 2018 and its operations have been taken over by a new arbitration centre, the MIAC. It was mutually agreed that the LCIA will administer arbitrations and mediations arising out of agreements referencing the LCIA-MIAC Arbitration Centre that have already been concluded. The MIAC will perform under the legal framework for international arbitration in Mauritius, which includes the International Arbitration Act 2008 and the Permanent Court of Arbitration’s role thereunder. Besides this, the MIAC has set up new arbitration rules stemming from the UNCITRAL Rules 2010 and will also follow the tested provisions of the Mauritian Arbitration Act for arbitral appointments and challenges.

II  THE YEAR IN REVIEW

i  Case law affecting ADR
*Kosi Meubles Ltee v. Alliance Building Contractors Ltd*

A dispute arose in connection with an unpaid amount from the defendant for the design, supply and installation of aluminium openings pursuant to a contractual agreement entered into by the plaintiff with the defendant. The plaintiff entered a plaint with summons before the Supreme Court of Mauritius, and during the proceedings, the defendant raised a preliminary objection in law to the effect that the Court seized has no jurisdiction to hear the matter as the contractual agreement between the parties included an arbitration clause for the settlement of disputes under the agreement.

The plaintiff, however, argued that upon construction of the arbitration clause, the dispute should have been submitted to arbitration only after a written notice specifying in detail the dispute or difference that arose between the parties was served on the other party. Since no such notice was served, it was not mandatory that the dispute that arose should be resolved by way of arbitration. The plaintiff submitted that the use of the word ‘may’ in the arbitration clause means that referral of the dispute to arbitration was discretionary and not mandatory.

The issue the Court had to determine was whether the wording of the arbitration clause ousted the jurisdiction of the Court. The Court agreed with the submission of the plaintiff and held that the word ‘may’ was only permissive and indicated that issuing a notice prior to

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2 2019 SCJ 113.
Mauritius

arbitration was optional. It is only if any dispute has not been amicably settled by the parties within 210 days after the notice has been issued that the dispute ‘shall’ finally be settled under the rules set out for arbitration. The Court thus held that it was only once the notice was issued that referral to arbitration became mandatory and no such notice was served by either party in that case. The Court therefore held that the wording of the arbitration clause did not oust the jurisdiction of the Court to entertain a dispute relating to a contractual agreement between the parties. The preliminary objection in law was therefore set aside.

**Luc et Luc Ltd v. Societe Lazuli & Anor**

The petitioner petitioned to the Supreme Court for a winding up order against respondent No. 2. Respondent No. 1, however, moved for a stay of the proceedings pending the determination by arbitration of the substance of the dispute between the parties. The petitioner objected to the motion for the stay of the winding up proceedings pending the determination of the dispute between the parties by an arbitrator.

While pronouncing on the above issue the Court took into account, inter alia, the fact that the parties could not get along anymore, that there was a deadlock on future issues arising, that the winding up was being sought against a backdrop of solvency issues, that most of the conflicting issues were not within the remit of the arbitrator to pronounce and that the parties before the Court were agreeable that the winding up petition did not necessarily warrant a stay of the arbitration proceedings such that the arbitration proceedings did not necessarily warrant a stay of the winding up petition. The Court also highlighted the fact that respondent No. 1 asked for a stay of the winding up proceedings pending the determination by arbitration of the substance of the dispute between the parties without having put before the Court the nature of that dispute. The Court therefore ruled that no stay should be granted.

**State Trading Corporation v. Betamax Ltd**

A dispute arose between the parties in respect of the termination of their contract of affreightment (CoA). The matter was referred for arbitration to the Singapore International Arbitration Centre and the arbitrator ordered the applicant to pay to the respondent damages and costs that amounted to around US$120 million excluding interest. Further to the award, the respondent obtained an *ex parte* provisional order from the Supreme Court of Mauritius for the recognition and enforcement of the award.

The applicant sought to set aside the arbitral award on three grounds: first, that the subject matter of the dispute was not capable of settlement by arbitration under Mauritius law; second, that the arbitration agreement was not valid under Mauritius law; and third, that the award was in conflict with the public policy of Mauritius. The applicant also sought to set aside the provisional order obtained by the respondent for the recognition and enforcement of the award pending determination of the first application on the same grounds. Both applications were heard together and a single judgment was delivered.

A preliminary issue was raised by the respondent to the effect that the application to set aside the provisional order was time-barred as it was made beyond the 14-day time limit under Rule 15(7)(a) of the Supreme Court (International Arbitration Claims) Rules 2013 (the Rules). The Court held that the effective date of such an application was the

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3 2019 SCJ 159.
4 2019 SCJ 154.
date on which it was officially lodged with the Court’s registry and not the date when the respondent made a motion in open court. Independently of the above, the Court stated that even if the application was made outside the time limit, the respondent should still not be precluded from pursuing its application as (1) the delay would be minimal as the time limit would have been exceeded by one day only; (2) there was no indication of any consequential prejudice to respondent that arose as a result of the matter being called before the court one day later; (3) the applicant had done what was necessary to lodge the application within the Court’s registry within the time limit; and (4) there is nothing in the Rules which indicated that compliance with the time limit of 14 days must be construed as being imperative or obligatory and any failure to comply with the time limit is fatal.

The Court, while analysing the merits of the three grounds raised by the applicant, highlighted that the question as to whether the CoA was entered in breach of the Public Procurement Act (PPA) underpinned the three grounds for setting aside the arbitral award. The first pivotal issue, therefore, that had to be determined was whether the CoA is governed by the PPA or by the Public Procurement Regulations 2009 (the PP Regulations) and as a result of which the procurement process for awarding the CoA to the respondent would be prescribed by the PPA. The Court then had to determine whether the PP Regulations made the applicant an ‘exempt organisation’, which excluded the applicant from the application of the PPA.

The Court held that the subject matter of the CoA, which was essentially in respect of freight as a service incidental to the supply of petroleum products therefore fell directly and squarely within the definition of ‘goods’ under the PPA and hence brought the CoA within the ambit of the PPA. The parties were therefore legally bound to act in conformity with the requirements laid down in the PPA in respect of a procurement contract. Since the CoA failed to comply with the requirements of the PPA, the Court held that the CoA was to all intents and purposes a contract that had been illegally awarded in breach of the PPA.

The Court went on to analyse whether the arbitral award was against the public policy of Mauritius. The Court held that the notion of public policy was more restricted when applied against enforcement of international arbitration awards. The breach of the legal provisions must be flagrant, actual and concrete. The threshold was quite high; it should be the breach of a fundamental legal principle, a breach that disregarded the essential and broadly recognised values that formed part of the basis of the national legal order, and a departure from which will be incompatible with the state’s legal and economic system. The Court therefore held that the PPA is a public procurement law with very stringent conditions designed to achieve the highest standards of integrity, transparency and fairness in the public procurement process of Mauritius. The enforcement of an illegal contract of such magnitude, in flagrant and concrete breach of public procurement legislation enacted to secure the protection of good governance of public funds, would violate the fundamental legal order of Mauritius. Such a violation broke through the ceiling of the high threshold that may be imposed by any restrictive notion of public policy. The Court further held that the public policy of Mauritius prohibited the recognition or enforcement of an award giving effect to such illegal contract, which shook the very foundations of the public financial structure and administration of Mauritius in a manner that unquestionably violated the fundamental legal order of Mauritius.

The Court therefore concluded that the arbitral award was contrary to public policy within the meaning of Section 39(2)(b)(ii) of the IAA, and the award as well as the provisional order for the recognition and enforcement of the award were accordingly set aside.
Luc et Luc Ltd v. Lakaz Chamarel Ltd

The applicant, who is a minority shareholder in the respondent company, brought forth an application under Section 170 of the Companies Act 2001 for leave to bring proceedings in the name and on behalf of the respondent company against the co-respondents. The co-respondents raised an ‘exception d’instance’ as a preliminary objection on the ground of jurisdiction to contest and challenge the Court’s competence to determine the issues and claims set out in the application.

The co-respondents argued that the substance of the dispute between the parties fell within the purview of the arbitration clause stipulated in the Sales Subscription and Shareholders Agreement (SSSA) entered into by the applicant, respondent and co-respondent, so that it was not open for the applicant to seize the jurisdiction of the Court. The applicant should have had recourse to the contractually agreed dispute resolution mechanism contained in the SSSA.

The Court had to effectively decide whether the dispute fell within the ambit of the SSSA and which are covered in the SSSA. The Court held that from a reading of the clause that the disputes that fell within the ambit of the SSSA are disputes in connection with the validity, interpretation, execution and termination of the SSSA.

The basis of the application for leave was in relation to alleged breaches of the duties of the co-respondents Nos. 2 and 3 as executive directors of the respondent company. The Court found that the SSSA did not contain any clause dealing dealing specifically with the management of the company nor did it address the duties and obligations of the directors.

The Court held that a reading of the arbitration clause revealed that it was limited in scope. The arbitration clause covered only disputes regarding ‘the validity, interpretation, execution or termination of the Agreement’. It did not address breaches of the directors’ duties. Therefore, since the complaints levelled against co-respondents Nos. 2 and 3 did not fall within the ambit of the arbitration clause, the Court held that the exception d’instance is not applicable and accordingly set aside the preliminary objection.

Ramasawmy & Ramasawmy Co Ltd v. Valoris Ltd

An application was made before the judge in chambers under Articles 1003 and 1005 of the Code of Civil Procedure for the appointment of a sole arbitrator to adjudicate on a claim. The ground of objection raised by respondent purported to the fact that the alleged dispute concerned an independent third party (TDA) which was not bound by the clause compromissoire contained in the contract, so that the clause was insufficient and could not be invoked in the application.

The respondent argued that it had to be determined whether the dispute was between the applicant and the respondent, or whether the TDA was a third party to the contract and the dispute is one which is strictly between the applicant and the TDA so that the clause compromissoire invoked is insufficient for its application in the case. The Court highlighted that the argument of the respondent was in contradiction with the clear terms of the contract which referred to the TDA as the respondent’s agent. The Court further held that any attempt

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5 2019 SCJ 207.
6 2019 SCJ 247.
at going ‘contre et outre’ the terms of the contract, even for the purposes of interpretation, cannot be resolved by the judge in chambers whose functions are not to try and resolve complex questions of law requiring ‘detailed argument and mature considerations’.

It was not contested, however, that there was in effect a dispute between the parties, if only concerning their disagreement on whose liability should be engaged in relation to the applicant’s claim. On that score, the Court held that the terms of the clause compromissoire were very broad since they cater for ‘any dispute or difference concerning this Contract’ being referred to arbitration. For all these reasons, the Court found that the dispute should be referred to an arbitrator, in accordance with the terms of the contract, for the arbitrator to resolve the issues arising under the said contract. The Court therefore proceeded to appoint an arbitrator to adjudicate on the dispute that has arisen between the parties.

*GFIN Corporate Services Ltd & Ors v. Bhargava* 7

The respondent brought an action before the Commercial Division of the Supreme Court for breach of duties and obligations of applicants No. 1–3 under the law as officers of applicant No. 4 and for payment of damages for prejudice suffered as a result of their wrongful acts and omissions. The applicants challenged the jurisdiction of the Court to hear the case on the ground that the issues raised before the Court can only be determined by arbitration pursuant to an arbitration agreement and should therefore, according to Section 5(1) of the International Arbitration Act (IAA), be transferred to the designated judges of the Supreme Court (Adjudicating Court) for determination.

The Commercial Court (Referring Court), after hearing the parties, stayed its proceedings pending determination of the Adjudicating Court as: (1) its task under the IAA was only to ascertain whether the procedural requirement for a referral claim under Section 5(1) of the IAA has been satisfied; if this is the case, the Referring Court has to automatically transfer the action to the Adjudicating Court provided the claim for referral is made at the very outset before any pleadings on the substance of the case; (2) the referral claim of the applicants complied with Section 5(1) of the IAA as well as Rules 13(1) of the Supreme Court (International Arbitration Claims) Rules 2013 (Rules); and (3) the case must pursuant to Rules 13(2) of the Rules be referred for determination to the Adjudicating Court in accordance with Section 5 of the IAA.

The respondent is resisting the application that the Adjudicating Court should refer the matter to arbitration pursuant to Section 5(2) of the IAA on the following grounds:

a The respondent is in a position to satisfy the Adjudicating Court, on a prima facie basis, that there is a very strong probability that the arbitration agreements relied upon by the applicants may be null and void, inoperative or incapable of being performed.

b The Referring Court was never presented at any time with a Section 5 claim that was compliant with the Rules.

c There has not been a proper referral by the Referring Court to the Adjudicating Court pursuant to Rule 13(3) of the Rules.

While dealing with the second and third ground, the Court held that the Section 5 claim made by the applicants before the Referring Court substantially complies with the relevant requirements laid down in Section 5 of the IAA and Rule 13 of the Rules 2013.

7 2019 SCJ 332.
Indeed, the Court noted that there was a clear and concise contention that the whole of the respondent’s action was the subject of an arbitration agreement which required that the disputes between the parties should be referred to arbitration and the request was made in the proper timing as the request was made by the applicants when they submitted ‘their first statement on the substance of the dispute’.

The Court clearly stated that it was not incumbent upon the Referring Court to decide upon or determine the challenge as regards the applicability or validity of the arbitration agreements. It was indeed outside the purview and jurisdiction of the Referring Court to delve into or adjudicate upon the merits of any objection relating to the applicability or existence of an arbitration agreement.

Therefore, once the conditions for referral as laid down in Section 5 of the IAA are met, the referring court has to mandatorily transfer the action to the Supreme Court.

While dealing with the first ground, the Court stated that following a referral under Section 5 of the IAA, it is incumbent upon the adjudicating court to determine whether the parties should be referred to arbitration. The Adjudicating Court, in its initial assessment under Section 5(2) of the IAA, has to decide whether there exists a ‘very strong probability’ that the arbitration agreement is null, void, inoperative or incapable of being performed. The Court does so on a prima facie basis. The Adjudicating Court carries out a summary prima facie assessment in the course of which the Court examines the evidence, including the affidavits and witness statements placed before it, in order to decide whether the objecting party has been able to show that there is a very strong probability that the arbitration agreement is null and void or inoperative or incapable of being performed. The Adjudicating Court does not engage for that purpose into a full trial, or even a mini trial on the merits. The Court is only saddled with the responsibility to determine, by making an assessment on a prima facie basis, whether the party contesting the validity or applicability of the arbitration agreement has been able to show that there is a very strong probability that it is invalid or inoperative. The court is not called upon at that juncture to embark into any conclusive decision quoad the validity of the arbitration clause or agreement and does not make any final finding as to whether the arbitration clause is valid or not.

The burden of proof that there is no valid and operative arbitration agreement lies on the party seeking to impugn the arbitration agreement.

It is therefore necessary to examine and ascertain, albeit on a prima facie basis, the precise nature of the respondent’s court action to determine whether there is a strong probability that it falls within the ambit of a binding arbitration agreement.

From an examination of the respondent’s plaint with summons and its contentions and claims, the Court held that it was strikingly apparent from the averments of the respondent that the court action raises issues, disputes and claims, relating to or arising out of the company constitution and/or the restructuring and shareholders’ arbitration agreements. The Court held that all of the issues raised by the respondent, whether in tort or contract, may well fall within the ambit of arbitrable disputes arising out of, or relating to, the constitution of the company and/or one of the arbitration clauses contained in the shareholders’ agreement.

The respondent was therefore unable to establish on a prima facie basis that there is a very strong probability that his allegations and contentions, as set out in the plaint with summons, do not fall within the purview of the arbitration agreements and are not arbitrable disputes.
The Court accordingly referred the parties to arbitration in accordance with Section 5(2) of the IAA.

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.

The IAA also puts in a place a system of six designated judges to hear all international arbitration matters in Mauritius, thus ensuring that all applications under the IAA or the New York Convention Act are heard by specialist judges.

III COURT PROCEDURE
Evidential and procedural rules in Mauritius are inspired by English law. Litigation in Mauritius courts is based on an adversarial system.
Overview of court procedure

The Supreme Court

Generally, the procedure to be followed before the Supreme Court is provided for under the Supreme Court Rules 2000.

Civil and commercial proceedings before the Supreme Court sitting in its original jurisdiction (other than the Bankruptcy Court), are initiated by way of plaint with summons. It must be noted that an action may be initiated by way of motion supported by affidavit, namely when such an action is for a prerogative order or if the circumstances require urgency.

The judge in chambers

An action before the judge in chambers is initiated by an applicant by way of praecipe and affidavit. Upon receiving this, the respondent may reply by filing a counter-affidavit, which the applicant can reply to with a second affidavit. The respondent has a final right of reply to the second affidavit. No further exchanges of affidavits will be allowed unless leave of the judge in chambers is obtained.

Where the judge in chambers is satisfied that all incidents of exchanges of affidavits have been dealt with and a case is ready to be argued before him or her on the merits, the case is fixed for the merits on such a date as the judge in chambers thinks fit.

The judge in chambers has the jurisdiction to deal with injunctive relief and urgent applications.

It must be noted that under Article 806 of the Code of Civil Procedure, the judge in chambers can sit as a judge of civil proceedings. The summary procedure is for those matters that require celerity, that is, where an order from the judge in chambers is required to prevent an imminent peril.

Apart from summary jurisdiction, the judge in chambers also has original jurisdiction in certain matters, such as for the granting of a writ *habere facias possessionem.*

Court of Civil Appeal

If a civil case is heard at first instance by a judge of the Supreme Court, an appeal lies to the Court of Civil Appeal within 21 days of the date of the judgment. The appeal must be lodged by way of notice of appeal in writing, and the grounds of appeal must be given in detail.

If the respondent wishes to resist the appeal, he or she must serve on the appellant and file in the Registry a notice of his or her intention to do so not later than two months after the date of service.

The appellant must, not less than 45 days before the date of the hearing of the appeal, serve on the other parties to the appeal and lodge in the Registry skeleton arguments and submissions on the grounds of appeal.

The respondent must, not less than 30 days before the date of the hearing of the appeal, serve on the other parties to the appeal and lodge in the Registry skeleton arguments and submissions on the grounds of appeal.

An appeal against an interlocutory judgment or order also lies to the Court of Civil appeal with leave of the judge giving the judgment.8

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8 Section 3 of the Court of Civil Appeal Act 1963.
Appeal to the JCPC

An appeal to the JCPC from a decision of the Court of Appeal or the Supreme Court may be as of right or with the leave of the Supreme Court.

An application to the Supreme Court for leave to appeal to the JCPC must be made by motion or petition within 21 days of the date of the decision to be appealed from, and the applicant must give all other parties concerned notice of his or her intended application.

The JCPC may also grant special leave to appeal from the decision of the Supreme Court in any civil or criminal matter. The procedure for appeal to the JCPC is governed by the Mauritius (Appeals to Privy Council) Order 1968.

Appeals to the JCPC can only be made against final decisions from the Court of Appeal or the Supreme Court. A final judgment is one that disposes finally of a suit; puts the plaintiff in the impossibility of moving further or proceeding with the hearing of his or her action on the merits; finally determines or concludes the rights of the parties; and puts an end to the main dispute.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 of the date of the judgment. The computation of the 21 days excludes the day the judgment is delivered for subordinate courts.

ii Procedures and time frames

The applicable procedures and time frames vary depending on the intricacy of the case, the sum or matter in dispute and the availability of all parties involved.

Generally, matters dealt with at the district court level (generally covering claims of up to 250,000 rupees) last for a minimum of six months.

District courts also have a small-claims jurisdiction for civil actions where the sum claimed or the matter in dispute does not exceed 100,000 rupees. The small-claims procedure is a simplified one where the strict rules pertaining to the lodging of a case before district courts do not have to be adhered to.

Matters before the Intermediate Court (for sums of 250,001 to 2 million rupees) can be determined within one year, depending on the complexity of the case.

Matters before the Supreme Court (covering money claims of more than 2 million rupees) may take more than one year to be determined, depending on the intricacy of the case.

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.

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9 Seebun v. Doomun 2013 SCJ 428.
It must be noted that in urgent matters, applications can be made to the judge in chambers and may be disposed of, for example, in relation to an application for an interim injunction, within one day or a couple of days.

iii Class actions

Class actions are provided for under Mauritian laws in respect to companies inasmuch as a shareholder of a company can bring proceedings against the company or director of the company by representing all or some of the shareholders having the same or substantially the same interest in relation to the subject matter of the proceedings.\(^{10}\)

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 (CCP), which provides that the leave of the judge in chambers must be sought before the applicant can serve documents outside Mauritius. Such leave can be granted in specific cases provided for under the CCP. In this respect, the applicant must make an application to the judge in chambers by way of praecipe supported by affidavit. Where service is effected out of Mauritius it must be effected in the same way as actions are required to be served in that foreign country.

vi Enforcement of foreign judgments

The procedure for enforcing a foreign judgment varies depending on whether such a judgment has been obtained in England and Wales or outside England and Wales.

For a judgment obtained from countries other than England and Wales, the law relating to the recognition and enforcement of foreign judgments in Mauritius is to be found in Article 546 of the Code of Civil Procedure.

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:

1. the foreign court that rendered such a judgment had jurisdiction to hear the claim;

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\(^{10}\) Section 177 Companies Act 2001.
b the foreign court applied the proper law applicable to the determination of the claim against the Mauritius entity;
c the judgment of the foreign court was not rendered in breach of any rule of procedural or substantive public policy applicable in Mauritius;
d the judgment of the foreign court had not been obtained by fraud, or is not upon its face founded in error, or considered irregular and wrong by the law of the place where it is awarded;
e the Mauritius entity had been summoned to attend the proceedings before the foreign court in accordance with the procedures set out in the rules of the foreign court; and
f the judgment of the foreign court is still valid and capable of execution in the jurisdiction of the foreign court.

The procedure for enforcing the foreign judgment is made by way of motion supported by affidavit before the Supreme Court of Mauritius. The application must be supported by certain documents, duly apostilled, to certify the authenticity of the foreign judgment, including:
a a photocopy of the foreign judgment sought to be enforced will be sufficient. Each page of the judgment must bear the seal of the foreign court delivering the judgment and the last page is to be signed by the Chief Registrar of the foreign court; and
b a certificate issued by the foreign court stating that there has been no appeal against the said judgment.

In cases of a judgment obtained from England and Wales, the judgment creditor may apply to the Supreme Court of Mauritius within 12 months of the date of the judgment, or such longer period as may be allowed by the Supreme Court, to have the judgment registered. However, such a judgment will not be registered where:
a the original court acted without jurisdiction;
b the judgment debtor, who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court;
c the judgment debtor, the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he or she was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court;
d the judgment was obtained by fraud;
e the judgment debtor satisfies the Supreme Court either that an appeal is pending, or that he or she is entitled to and intends to appeal against the judgment; or
f the judgment was in respect of a cause of action that for reasons of public policy or similar could not have been entertained by the Supreme Court.

vii Assistance to foreign courts

Assistance to foreign courts is generally provided for in criminal and related matters. The Mutual Assistance in Criminal and Related Matters Act 2003 (MACRMA) provides for mutual assistance between Mauritius and a foreign state or an international criminal tribunal in relation to serious offences.
Under the MACRMA, a foreign state or an international criminal tribunal may make a request for assistance to the Attorney General of Mauritius in any proceedings commenced in the foreign state or before the international criminal tribunal.

The Attorney General may, in respect of a request from a foreign state, either promptly grant the request, in whole or in part, or refer the matter to the appropriate authority for prompt execution of the request; or refuse the request, in whole or in part.

Where the request has been granted, the Attorney General needs to apply to a judge in chambers for an evidence-gathering order or a search warrant for the search of a person or premises and the removal or seizure of any document or article; or for an order for the taking of the virtual evidence of the person, among others.

viii Access to court files

Pursuant to the CCP, a general cause list of cases pending before the Supreme Court is posted in a conspicuous place in the court house before the commencement of each term. Members of the public can thus ascertain when a case is coming for mention, trial or disposal. Details of cause lists for cases before the subordinate courts and the Supreme Court are also found on the website of the Supreme Court. In addition, the clerks of the different registries of the courts can be contacted by the parties to a case to know when the matter has been fixed before the courts.

Access to court files and papers is limited. Pleadings and evidence with respect to ongoing proceedings are generally not publicly available to non-legal practitioners or parties who do not have an interest in the matter at stake. However, for judgments that have been rendered in any subordinate court, the Supreme Court and the JCPC, members of the public can have access to those judgments that are posted on the website of the Supreme Court of Mauritius.

ix Litigation funding

There is no specific provision of the law on third-party funding of litigation in Mauritius.

IV LEGAL PRACTICE

i Conflicts of interest and professional conduct

The professional conduct of barristers, attorneys and notaries (law practitioners) in Mauritius is regulated by the Mauritius Bar Association, the Mauritius Law Society and the Chamber of Notaries, and their relevant codes of ethics. Under these codes of ethics, conflicts of interest are not allowed.

Under the Law Practitioners Act 1984 (LPA), law practitioners belonging to the same law firm must not appear for different parties in respect of any litigation where there is a conflict or significant risk of conflict between the interests of those parties.

The Attorney-General has the power to enquire into any act done by a law practitioner. If he or she is of the opinion that it is of such a nature as to call for the institution of disciplinary proceedings, he or she will report the matter to the Chief Justice. The Supreme Court has exclusive jurisdiction to deal with matters of professional misconduct; the law practitioner risks, inter alia, suspension or erasure of his or her name from the roll of law practitioners.
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.

In fact, new Anti-Money Laundering Counter Financing Terrorism (AML/CFT) Guidelines for Law Firms have been issued under Section 19H(1)(a) of the FIAMLA by the Attorney General’s Office. All legal professionals and other staff in a law practice who are involved in AML/CFT compliance have an obligation to abide by the Guidelines. As the Guidelines apply across the entire legal sector, the term 'legal professional' has been used to include legal professionals working in law firms, foreign law firms, joint law ventures and foreign lawyers as defined in the Law Practitioner’s Act 1984.

Additionally, following recent changes, according to the First Schedule of the FIAMLA, the regulatory body for law firms, foreign law firms, joint law ventures and foreign lawyers is the Attorney General’s Office for anti-money laundering (AML) and counter-financing terrorism (CFT) and proliferation purposes.

Under subsection 2(b) of Section 19H of the FIAMLA, where a barrister, an attorney or a notary has failed or is failing take such measures as are required under the FIAMLA or the United Nations (Financial Prohibitions, Arms Embargo and Travel Ban) Sanctions Act 2019, or any regulations made or guidelines issued under those Acts, the FIU shall, pursuant to Section 13 of the Law Practitioners Act, report the matter to the Attorney General. Thereafter, on receipt of a report, the Attorney General shall take such measures as are required under Section 13 of the Law Practitioners Act.

Data protection

A new Data Protection Act 2017 (DPA) was enacted on 15 January 2018. According to the DPA, a controller or a processor must, before keeping or processing of personal data, register himself or herself with the Data Protection Commissioner (the Commissioner). The controller or processor shall also maintain a record of all processing operations under his, her or its responsibility.

A controller is statutorily defined as a person who or a public body that, alone or jointly with others, determines the purposes and means of the processing of personal data and has decision-making power with respect to the processing. Under the DPA, a processor is someone who or a public body that processes personal data on behalf of a controller.
The DPA provides for several instances where personal data processed for specific purposes is exempt from certain parts of the DPA and lays out some principles relating to processing of personal data. As such, every controller or processor must ensure that personal data are lawfully and fairly processed in relation to any data subject. It is also a requirement under the DPA to ensure that personal data collected for explicit, specified and legitimate purposes are not further processed in a manner incompatible with those purposes and that the data collected are adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed.

The DPA further requires the controller and processor to obtain authorisation and consultation from the Data Protection Office prior to processing personal data in order to ensure compliance of the intended processing with the law, and in particular to mitigate risks involved for the data subjects where a controller or processor cannot provide for the appropriate safeguards in relation to the transfer of personal data to another country.

The DPA also allows a controller or processor to transfer personal data to another country under circumstances as specified therein.

iv Other areas of interest

The LPA was amended in 2008 to allow a law firm in a foreign country to make an application to the Attorney General for the registration of a local office. Similarly, a foreign lawyer may apply to the Attorney General for registration and the right to provide legal services within a law firm, foreign law firm or joint-law venture.

A foreign lawyer may provide legal services in relation to arbitration proceedings, for conciliation, mediation and such other forms of consensual dispute resolution as may be prescribed by tendering legal advice in relation to foreign law or international law, among others.

In addition, a foreign law firm and a local law firm can form a joint law venture and provide legal services in respect of both local law and foreign law.

The LPA has also been amended to provide for the continuing professional development programme applicable to every law practitioner and legal officer in Mauritius.

Pursuant to the 2011 amendments to the Law Practitioners Act 1984, a Mauritian citizen who has a professional qualification entitling him or her to practise as a barrister in England and Wales, Australia, New Zealand, Canada or France can apply for admission to practise law in Mauritius.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

Mauritius follows the same principles of legal privilege as English common law. In Mauritius, professional privilege is provided under Section 300 of the Criminal Code, which makes it a criminal offence for certain persons including lawyers to divulge confidential information entrusted to them in their professional capacity. Generally, communications between a lawyer and his or her client are privileged; that is, the lawyer cannot disclose the information without the consent of the person who gave him or her the information. However, such privilege does not apply in the case of furtherance of a crime. The rules of privilege apply similarly to both local and foreign lawyers.
With regard to law firms, the LPA provides that law practitioner–client privilege shall exist between a law firm and its clients in the same manner as it exists between a law practitioner and his or her clients and extends to every law practitioner who is a partner, director or employee of the law firm.

ii Production of documents

The Mauritius law of evidence is based on English law. In civil proceedings, a party who asserts facts must produce documentary evidence proving such facts in court. For example, a party who asserts that he or she is the owner of a certain premises must produce the title deed showing that he or she is the owner of such premises. The relevance of the documents produced will be analysed in relation to the fact in issue, to determine whether such documents will be admissible in court.

Documents may be authentic deeds or deeds under private signature. Documents that may be produced during a trial include copies of public documents such as the contents of any record, book deed, map, plan or other document in the official custody of the Supreme Court, the Conservator of Mortgages, a government department, the Intermediate Court, a district court or any notary.

It must be noted that statements produced by computers are also admissible as evidence in civil proceedings under certain conditions as provided for under the Courts Act 1945. Under the Civil Code of Mauritius, electronic documents may also be produced in court. Furthermore, a person relying on a digital signature as evidence must also rely on a valid certificate containing the public key by which the digital signature can be verified.

It must be noted that for an affidavit that emanates from a foreign country to be admissible in Mauritius courts it will need to be apostilled or legalised.

For matters relating to the law of evidence not specifically covered by any Mauritian laws the Courts Act 1945 provides that Mauritius courts should follow English law of evidence.

VI ALTERNATIVES TO LITIGATION

i Arbitration

The use of arbitration as a means of dispute resolution is currently common in business and commercial circles, the local construction industry, and insurance and investment sectors in Mauritius.

Arbitration is not new to Mauritius. Since 1865, the Supreme Court has declined to review an arbitration award where the parties had expressly agreed that the decision of the arbitrator would be final and non-appealable. The intention of the parties to renounce the right to appeal must be clear and unequivocal.

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.

11 Robert v. Martin 1865 MR 140.
12 The Central Electricity Board v. La Compagnie Usinière de Mon Loisir Limitée 2005 SCJ 1.
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.

With regard to appeals, under Paragraph 2 of the First Schedule to the IAA, a party may appeal to the Supreme Court on any question of Mauritius law arising out of an award, upon leave being granted by the Supreme Court. The Court will not grant leave unless it considers that, having regard to all the circumstances, the determination of the question of Mauritius law concerned could substantially affect the rights of one or more of the parties.

Mauritius is a signatory member of the New York Convention 1958 (the New York Convention), which has been implemented in the local law by the Convention on Recognition and Enforcement of Foreign Arbitral Awards Act 2001. Foreign arbitration awards are thus enforceable in Mauritius subject to the qualifications set out in the New York Convention.

Mauritius courts will thus recognise and enforce an arbitral award given against a Mauritius entity without re-examination of the merits of the case subject to the party supplying the duly authenticated original award or the original arbitration agreement or duly certified copies of same.

Currently Mauritius courts may refuse to recognise or enforce an award where:

- the Mauritius entity was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present his or her case;
- the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;
- the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties;
- the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made;

13 ‘Question of Mauritius law’ is defined under the IAA as follows:

(a) includes an error of law that involves an incorrect interpretation of the applicable law (whether or not the error appears on the record of the decision); but (b) does not include any question as to whether (1) the award or any part of the award was supported by any evidence or any sufficient or substantial evidence; or (2) the arbitral tribunal drew the correct factual inferences from the relevant primary facts.
the 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.

According to the Annual Report of the Judiciary 2018, the number of civil cases received at the Mediation Division of the Supreme Court has again significantly decreased from 97 in 2016 to 31 in 2017 and to 28 in 2018. In 2018, agreement was reached in 19 cases before the Mediation Division and seven cases were referred back to the Supreme Court for determination. The number of outstanding cases at the end of 2018 further dropped from 11 in 2017 to only two at the end of 2018.

As announced in the government Budget speech of 2018–2019, the Chief Justice had on 22 March 2019 made the Intermediate Court (Mediation) Rules 2019, which came into operation on 1 July 2019. The primary purpose of mediation under the Intermediate Court (Mediation) Rules, is for the parties, in all good faith, to dispose of the civil suit, action, cause or matter by a common agreement, or to narrow down the issues in dispute.

Under the Intermediate Court (Mediation) Rules, the mediation magistrate have all necessary powers to facilitate mediation between and among the parties to the dispute in order to enable them to reach an agreement so as to dispose of the civil suit, action, cause or matter pending between the parties. In conducting mediation sessions, the mediation magistrate shall regulate the proceedings in such manner as he or she thinks fit while adopting an informal and flexible approach.

Where the parties have reached a formal agreement, the mediation magistrate shall record the settlement agreement in the form of a memorandum setting out the terms of the agreement. The memorandum shall be signed by the mediation magistrate and by the parties to the agreement and, thereupon, the agreement embodied in the memorandum shall be executed in the same manner as if it were a judgment of the court by consent of and between the parties who have signed it.

iii  Other forms of alternative dispute resolution

Parties to an agreement may agree contractually to submit any dispute arising out of the agreement to an expert chosen by the parties. The agreement may provide that if the parties cannot agree on the choice of a common expert, each party will have the right to choose one expert, who will in turn choose a third expert for the settlement of disputes. This is usually resorted to in construction matters.
VII OUTLOOK AND CONCLUSIONS

Despite the fact that the joint venture between the government of Mauritius and the London Court of International Arbitration has been terminated, the government remains fully committed to develop Mauritius as an arbitration centre to resolve international conflict, especially conflict involving Africa. After having benefited from its association with the LCIA since 2011, as well as gaining goodwill and practical experience from the leading institution, the MIAC is now in a position to stand on its own feet and proceed independently of the LCIA. In fact, the government gave full support to the termination of the LCIA cooperation at this level so as to allow the MIAC to further define its own distinctive identity to take full advantage of its position between Africa and Asia and to cooperate with a wider group of partners, including the Permanent Court of Arbitration. Henceforth, having the government as its backbone, the MIAC will continue to devote itself to the emergence of Mauritius as the regional hub for investment into Africa and to the diplomatic status of Mauritius as a state committed to the African continent and to its development.

The MARC adopted new arbitration rules in 2018. The new rules are meant to reflect best international practice and consist of a comprehensive tool kit of tried and tested provisions as well as several innovative provisions. An emergency arbitrator procedure has been introduced pursuant to which an arbitrator can be appointed within 24 hours and decide urgent interim and conservatory relief.

The MARC Advisory Board consists of 14 internationally renowned experts in the field of arbitration, and has fully operated since November 2017. During 2018, MARC has also been very active in organising training programmes, promotional events and activities both in Mauritius and abroad. MARC has also recently recruited a new head.
Chapter 21

MEXICO

Miguel Angel Hernández-Romo Valencia

I INTRODUCTION TO THE 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

There have been no recent changes to the law or legal developments in Mexico.

In January 2017, the Commerce Code suffered several amendments, the most important being the following:

a 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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New requisites were added to the lawsuits: the taxpayer ID number of the plaintiff; the Entity Registry Code (CURP); and the evidence.

A new chapter was 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:

- **l**awsuit;
- **a**nswer to the lawsuit;
- **e**vidence period;
- **a**llegations; and
- **f**inal judgment.

The rules governing court procedure vary from state to state and according to the nature of the conflict (civil or criminal).

#### ii Procedures and time frames

The procedures and time frames of the courts depend on two basic issues: the complexity of the case and the jurisdiction where the litigation takes place.

If the litigation takes place in a major city, the procedure can take between one and three years to be resolved. In some cases it may take more or less time, but such a case would be the exception.

**Commercial proceedings**

Commercial proceedings take place when the issue to be resolved has a commercial nature or when one of the parties in the relationship is a merchant.

Commercial proceedings are regulated in the Commerce Code and they can be one of four types: ordinary proceedings, executive proceedings, special proceedings and oral proceedings. Each type has its own set of rules.

**Ordinary proceedings**

Commercial proceedings begin with a lawsuit. After the lawsuit is accepted by the court, the court orders the serving of summons to the defendant and grants the defendant 15 days to answer the lawsuit, oppose exceptions and defences and file a counterclaim (if any). After the lawsuit is answered, if the defendant files a counterclaim, the court gives the defendant in the counterclaim nine days to answer the counterclaim. In any case, claim or counterclaim, the court grants the plaintiff three days to determine what it deems appropriate with respect to the exceptions and defences lodged by the other party, as well as for naming the witnesses that
have any knowledge regarding the answer and for mentioning the documents that relate to
the answer. Afterwards the court, *ex officio* or by request of the parties, will open the evidence
period, of 40 days in most cases; the first 10 days to offer the evidence and the next 30 to
take the evidence offered. The court can open an evidence period of a shorter duration. If
the evidence has to be taken outside the jurisdiction where the litigation is taking place, the
court may grant an extension of up to 60 days to take such evidence if it has to be gathered
in Mexico, and up to 90 days if it has to be gathered abroad.

Such an extension has to be requested during the first 10 days of the evidence period.
In such a request, the complete names of the parties or witnesses to be deposed have to be
inserted, and the questionnaire under which they will be deposed must be attached. In the
event that documents have to be reviewed or copied, it should be established where the
private or public archives are that hold the documents.

If the court grants such an extension, it will require the party that requests the extension
to deposit a certain amount of money, so that if the evidence is not taken that amount will be
given to the other party. The amount to be deposited cannot be, under any circumstance, an
amount less than the value of 60 days of the minimum daily wage in Mexico City. The judge,
when determining the amount to be deposited, will take into consideration the amount of the
litigation and other circumstances that he or she deems appropriate. The amounts requested
have to be deposited within three days. If the party requesting the extension does not deposit
this amount within those three days, the judge will not admit the evidence offered.

If the judge admits the evidence to be taken outside his or her jurisdiction, he or she
has to prepare letters rogatory for the foreign judge, and these will be given to the party that
requested the extension, thus the party takes responsibility for obtaining the evidence, either
via the central authority of Mexico or directly through the appropriate authorities where the
evidence is to be gathered.

After the evidence period is over, the court grants the parties three days to file their
allegations, and after those three days have elapsed the court gives notice to the parties that it
is ready to enter judgment, which shall be rendered within the following 15 days.

Once the judgment is entered, any of the parties in the litigation, or even a third party,
can appeal against the final judgment. The party against whom the judgment is entered can
appeal if it believes that such a judgment was entered against the applicable laws. The party
that won the litigation can also appeal against the final judgment if it did not obtain the
restitution of products, indemnity for damage and loss of profits or costs. The party that
won the litigation can also adhere to the appeal made by the losing party, at most within
the three days following notification of the appeal filed by the losing party (when adhering
to the appeal, the party submits more arguments to sustain or reinforce the opinions of the
judge). A third party with a legitimate interest can also appeal if the resolution harms his or
her rights.

An appeal can only take place in those cases where the principal amount of the litigation
is more than 1 million pesos without taking into consideration interest or any other amount
claimed.

Appeals have to be filed within a period of nine days after the notification of the
final judgment is considered to be in full force and effect. The period for appealing interim
judgments or any other court order is six days. In both cases the parties have to state the legal
violations they consider the judgment to have. In the event that the appeal is such that it will
be resolved along with the appeal against the final judgment, the time to file such an appeal is three days, and the parties are not required to make a statement of the order’s legal violations until required to do so in respect of the final judgment.

Once the parties have appealed the final resolution, the court will grant the other party six days to answer the writ of appeal filed by the appealing party.

After the six-day period has elapsed, with or without the answer of the party that did not appeal, the court will send the judicial docket to the court of appeal, which studies it and issues a final judgment. When studying appeals, the court of appeal first has to study the procedural violations claimed, and if it finds the existence of such violations and considers that they are fundamental to the merits of the case, it will issue a final judgment ordering that the final judgment issued by the lower court be invalidated so that the proceeding can be restored and a new judgment issued.

With respect to appeals that have to be resolved immediately because they involve execution over assets and could, therefore, cause irreparable (or severe) harm to the appealing party, the court can accept such an appeal. Such an acceptance suspends the proceedings in the lower court if the appealing party requests it and explains why such a request is made. If the request is accepted, the court would require the appealing party to post a bond or guarantee within the following six days for the suspension to take effect. The amount of the bond or guarantee will be determined by the judge, taking into consideration the importance of the litigation, but will never be less than 6,000 pesos and will be at the discretion of the court. If the party that requests the suspension does not post the guarantee, then the appeal will not suspend the proceedings carried out before the lower court.

**Executive proceedings**

Executive proceedings are those that are based on an executive title (examples of executive titles are: promissory notes; judicial confession of a debtor; invoices duly signed and judicially acknowledged by the debtor). They begin with the lawsuit, and the executive title has to be attached to such a lawsuit. In these kinds of proceedings the plaintiff has to offer his or her evidence in the lawsuit. After the lawsuit is accepted by the court, the court will issue an order requesting the debtor to pay, and the date of the summons will be served to the debtor or defendant. The court clerk will first request the debtor for payment of monies. If the debtor does not pay, the court clerk will proceed to seize assets from the debtor (the debtor will be the first to name the assets to be seized and, in the event that he or she does not do so, such a right will be transferred to the plaintiff or creditor), and once assets have been seized the debtor will be served with summons and granted eight days to answer the lawsuit, oppose exceptions and defences. In executive actions only very few exceptions are admitted by the court. In the same answer to the lawsuit the defendant has to offer evidence. After the defendant answers the lawsuit, the court grants the plaintiff three days to determine what it deems appropriate with respect to the exceptions and defences lodged by the other party, as well as for offering evidence related to the answer to the lawsuit. Afterwards, the court will open an evidence period of 15 days, during which all the evidence can be taken; the court can accept evidence after those 15 days when it deems this appropriate.

After the evidence period is over, the court grants the parties two days to file their allegations, and after those two days have elapsed, the court gives notice to the parties that it is ready to enter judgment, which shall be rendered within the next eight days.

With respect to appeals, the same rules mentioned for the ordinary proceedings apply to executive proceedings.
Once the judgment is entered and the merits of the case have been decided in a final instance, if the plaintiff proved its action the judge will declare that the assets seized should be sold at a public auction. Once such a declaration is made by the judge, the parties will appoint experts in appraisal, and in cases where the value of the assets made by the experts differ by more than 20 per cent, the judge will appoint a third expert. Once the value of the assets is obtained, the court will announce the legal sale of the goods, via publication in a newspaper two times in three days if the assets to be sold are not real estate; in cases of real estate, the publication will be made during a period of nine days. Five days after the publications are made, the goods will be sold at a public auction.

**Special proceedings**

The special proceedings contemplated by the Commerce Code are:

- the extrajudicial execution of guarantees granted through a pledge without transmission of the asset and guarantee trust; and
- the judicial execution of guarantees granted through a pledge without transmission of the asset and guarantee trust.

**Oral proceedings**

This type of proceedings will only be available when the amount of the claim is less than 1 million pesos for 2018 (just the principal amount, without taking interest into consideration).

If a special proceeding has to take place, an oral proceeding will not be applicable, notwithstanding the amount of money of the claim.

The claim, answer to the claim and counterclaim have to be filed in writing.

There is a preliminary hearing for the purposes of ‘cleaning the proceeding’ (i.e., where the judge will review whether the parties have an interest in the litigation, and any of the defences or exceptions lodged by the parties that relate to the proceeding); conciliation or mediation of the parties; agreement of the non-controversial issues; admission of evidence; and notifying the parties for the main hearing.

In the main hearing the evidence will be taken. Any ancillary issues (that do not have a specific way of being carried out) should be made orally and the other party has to answer in such a hearing. If possible, the judge should resolve such ancillary issues in the same hearing. After the evidence has been taken, allegations will be made and the judge will call the parties to a new hearing within the next 10 days, where it will issue the final judgment.

The basic principles of these types of proceedings are that most of the proceedings will be carried out orally; hearings should not be suspended because of a lack of preparation of evidence.

For the executive oral proceeding, the amount of the claim should be no less than 500,000 pesos and no more than 4 million pesos.

**Civil proceedings**

Civil proceedings are regulated both in the Federal Code of Civil Procedure and in the code of civil procedure of each state, and they can be of different types: ordinary proceedings, executive proceedings, special proceedings, enforcement proceedings and oral proceedings. Each type has a different set of rules. A brief overview of the proceedings regulated in the Code of Civil Procedure of Mexico City is provided below.
Ordinary proceedings

Civil proceedings begin with a lawsuit. After the lawsuit is accepted by the court, the court orders the serving of summons to the defendant and grants the defendant 15 days to answer the lawsuit, oppose exceptions and defences and file a counterclaim (if any). After the lawsuit is answered, if the defendant files a counterclaim, the court gives the defendant in the counterclaim nine days to answer the counterclaim. In any case, claim or counterclaim, the court grants the plaintiff three days to determine what it deems appropriate with respect to the exceptions and defences opposed by the other party. Afterwards the court will call the parties to a preliminary hearing. In such a hearing the judge will review the standing of the parties in court and will try to get the parties to solve their differences through conciliation. In the same hearing the judge will review the procedural exceptions lodged by the parties. If the parties do not enter into a settlement, the court will open the evidence period on the day of the hearing or at most the following day, ex officio or by request of the parties, for 10 days for the parties to offer their evidence. After the evidence is offered by the parties, the judge will determine which evidence he or she accepts or rejects and will call the parties for a hearing, which will take place in the next 30 days, so that the evidence may be taken by the court. If all the evidence cannot be taken by the court at that hearing, then the court will call the parties for another hearing, which will take place within the next 20 days, to finalise taking the evidence offered by the parties. If the evidence has to be taken outside the jurisdiction where the litigation is taking place, the court may grant an extension of up to 60 days to take such evidence if it has to be gathered in Mexico, and up to 90 days if it has to be gathered abroad.

Such an extension has to be requested during the term when evidence has to be offered. In such requests, the complete names of the parties or witnesses to be deposed have to be inserted, and the questionnaire under which they will be deposed must be attached. In the event that documents have to be reviewed or copied, it should be established where the private or public archives are that hold the documents.

If the court grants such an extension, it will require the party that requests it to deposit a certain amount of money, so that if the evidence is not taken, the amount will be given to the other party. If the party requesting the extension does not deposit this amount, the judge will not mention anything with respect to the admission of such evidence.

If the judge admits the evidence to be taken outside his or her jurisdiction, he or she has to prepare letters rogatory for the foreign judge, and these will be given to the party that requested the extension, thus the party takes responsibility for obtaining the evidence, either via the central authority of Mexico or directly through the appropriate authorities where the evidence is to be gathered.

At the hearing where the evidence is taken by the court, after all the evidence is taken the court will finish the evidence period and open the allegations period, whereby the parties can render their oral allegations (the parties can file written allegations before the evidence hearing). After the allegations period is over, the judge has to issue the final judgment in the same hearing. In practice, final judgments are not usually rendered in such a hearing.

Once the judgment is entered, any of the parties in the litigation, or even a third party, can appeal against such a final judgment. The party against whom the judgment is entered can appeal if it believes that such a judgment was entered against the applicable laws. The party that won the litigation can also appeal against the final judgment if it did not obtain the restitution of products, indemnity for damage and lost profits or costs. The party that won the litigation can also object to the appeal made by the losing party, at most within the
three days following notification of the appeal filed by the losing party (when adhering to the appeal, the party that adheres to the appeal submits more arguments to sustain or reinforce the opinions of the judge). A third party with a legitimate interest can also appeal if the resolution harms his or her rights.

An appeal can only take place in those cases where the principal amount of the litigation is more than 212,460 pesos without taking into consideration interest or any other amount claimed.

Appeals have to be filed within 12 days after the notification of the final judgment is considered to be in full force and effect. The period for appealing interim judgments or any other court order is eight days. In both cases the parties have to state the legal violations they consider the judgment has. In the event that the appeal is such that it will be resolved along with the appeal against the final judgment, the time to file such an appeal is three days, and the parties are not required to make a statement of the order's legal violations until required to do so in respect of the final judgment (within the 12 days granted to appeal against the final judgment).

Once the parties have appealed the final resolution, the court will grant the other party six days to answer the writ of appeal filed by the appealing party.

After the six-day period has elapsed, with or without the answer of the party that did not appeal, the court will send the judicial docket to the court of appeal, which studies it and issues a final judgment. When studying appeals, the court of appeal first has to study the procedural violations claimed in relation to legally offered evidence not admitted or taken by the court. If the court of appeal finds the existence of such violations, it will declare the appeal valid and will order the lower court to admit the evidence or take it and issue the appropriate order. In the event that the procedural violation is not related to evidence, if the violation can be repaired and is of such importance that it will impact the merits of the case, then the court of appeal will repair the violation claimed. Once the evidence is admitted and taken or the violation is repaired by the lower courts, the court of appeal will issue the final judgment with respect to the appeal filed against the final judgment. This judgment is appealable via an *amparo* proceeding. The time frame within which to issue a final judgment is 20 days, which can be extended to 30 days in the event that there are more than six interim appeals to be resolved together with the final judgment.

With respect to appeals that have to be resolved immediately because they can be executed and could, therefore, cause irreparable harm (or harm that is very difficult to repair) to the appealing party, the court can accept such an appeal, suspending the proceedings in the lower court if the appealing party so requests and explains the reasons for such a request. The court would require the appealing party to post a bond or guarantee within the following six days for the suspension to take place. The amount of the bond or guarantee will be determined by the judge taking into consideration the importance of the litigation, but will never be an amount less than 7,500 pesos. If the party that requests the suspension does not post the guarantee, then the appeal will not suspend the proceedings carried out before the lower court.

After the court of appeal issues its final judgment, any of the parties can resort to the *amparo* proceedings, which are constitutional proceedings, whereby violation of constitutional rights are claimed.
Executive proceedings

Executive proceedings are those that are based on an executive title (examples of executive titles are: the first copy of a public deed issued by the judge or notary public; judicial confession of a debt made before the competent judge by the debtor or its representative; and agreements made in a litigation before the judge, either made by the parties or third parties acting as depositaries or guarantors). The rules of executive proceedings are the same as for ordinary proceedings. Executive proceedings have two different sections:

a the first section, which contains the lawsuit, answer to the lawsuit, preliminary and final judgment; and

b the second section, which contains the order for the execution and everything related to the execution.

Special proceedings

The Code of Civil Procedure of Mexico City regulates the following special proceedings: loss of parental authority of minors that have been sheltered by public or private institutions of social assistance; mortgage proceedings; torts arising out of the use of motor vehicles; and the reissuance of certificates based on the reassignment of sex or gender.

Enforcement proceedings

These kinds of proceedings can only take place when the issue to be dealt with relates to the execution of a judgment, or relates to an agreement made in court or that arises from the agreement made by the parties before the judge or from an express agreement by the parties stating that rescission of the agreement does not require judicial intervention.

The nullity of concluded proceedings

The proceedings of nullity of concluded proceedings can only take place when a final judgment or court decision has been issued that cannot be revoked or reversed by any ordinary means and that falls within either of the following categories:

a the judgment or order was based on evidence that has been acknowledged or declared false after the judgment or order was issued, and that the party that lost ignored; and

b there is evidence of complicity or other fraudulent manoeuvres of the litigating parties against the plaintiff.

Oral proceedings

Such proceedings will only be available when the amount of the claim is less than 500,000 pesos (just the principal amount, without taking into consideration interest and other accessories). This amount is modified annually.

If special proceedings have to take place, the oral proceedings will not be applicable, notwithstanding the value of the claim.

The claim, answer to the claim and counterclaim have to be filed in writing.

A preliminary hearing is carried out so that the judge can review the whole judicial docket and if he or she finds that there are any defences, lack of proper representation or any other administrative mistakes or errors, he or she will review such defences and errors and ensure that the proceeding is in such a position that no one might claim such errors in the future; for conciliation or mediation of the parties; for agreement of the non-controversial issues; for the admission of evidence; and to notify the parties for the main hearing.
Evidence will be taken in the main hearing, and any ancillary issues (that do not have to be carried out in a specific way) should be made orally; the other party has to answer in this hearing. If possible, the judge should resolve such ancillary issues in the same hearing. After the evidence has been taken, allegations will take place and the judge will call the parties to a new hearing within the following 10 days, at which it will issue the final judgment.

The basic principles of these types of proceedings are that most of the proceedings will be carried out orally; hearings should not be suspended because of a lack of preparation of evidence.

**Amparo**

*Amparo* is the constitutional review of the decisions issued by the trial court or the court of appeal.

*Amparo* is considered the last instance in litigation, and is usually decided by the collegiate courts. Collegiate courts are comprised of three judges, and their scope of review is the violation of constitutional rights or guarantees. Sometimes *amparo* proceedings are resolved by the Supreme Court of Justice in cases when (1) the Supreme Court decides to take up the case, (2) the collegiate court determines that the Supreme Court of Justice should be the one to decide the case or (3) the Attorney General requests the Supreme Court of Justice to take up a specific case. In cases (2) and (3) the Supreme Court of Justice can deny the request.

*Amparo* proceedings are resolved by federal courts (district judges or collegiate courts or the Supreme Court of Justice).

To avoid execution of judgments or orders issued by lower courts, the parties requesting the *amparo* can request the suspension of the order that is contested through the *amparo* proceedings, so that the subject matter of the *amparo* is not changed, modified or terminated.

The purpose of the *amparo* is to restore the party requesting the *amparo* to the same status that he or she had before the constitutional violation took place. This restoration of the status quo is achieved by issuing a new judgment or order complying with the applicable laws. Under the new *Amparo* Law, the *amparo* court is very specific when ordering the authority to issue a new judgment or order. The judgment issued by the district court is not a final judgment since it can be modified through the review process, which is decided by the collegiate court or the Supreme Court of Justice.

**Urgent or interim applications**

The only urgent or interim applications that can be granted according to the Commerce Code are the order to a person to stay where litigation is taking place, and confinement of assets.

**Order to a person to stay where litigation is taking place**

The order to a person to stay where litigation is taking place will only be granted when there is reasonable fear that the person against whom a lawsuit will be initiated, or has been initiated, will leave the jurisdiction of the judge or will hide.

When a request is made that a person stay in the jurisdiction of the judge, it has to be demonstrated that the requester has the right to request such a measure. The Commerce Code establishes that proof of such a right might be established through documents or witnesses.

If the request is made before filing the lawsuit, the party that requests such a measure will have to guarantee payment of damages and lost profits if the lawsuit is not filed.
If the request is made when filing the lawsuit, the request of the plaintiff and the guarantee will be sufficient for the measure requested to be granted.

The order to a person to stay where litigation is taking place means that such person cannot leave the jurisdiction of the judge where the litigation takes place unless he or she leaves a representative with instructions and duly funded to comply with the judgment, if any.

If the person requested not to leave the jurisdiction of the judge violates the prohibition, he or she will be responsible for a felony according to the Criminal Code, regardless of whether enforcement measures are taken to return that person to the place where the judgment is taking place.

**Confinement of assets**

Confinement of assets will take place when there is reasonable fear that the assets given as guarantee, or against which an action *in rem* will be executed, will be disposed of, hidden, dissipated, transferred or be insufficient; or when exercising a personal action, if the person against whom such an action is brought has no other assets except those against which the action will be executed, and there is reasonable fear that they will be disposed of, hidden, dissipated or transferred.

The judge will always grant the request of confinement of assets if the party that so requests (1) demonstrates that he or she has credit that has matured; (2) expresses the value of the claims or the things claimed, giving specific details of the things claimed; (3) claims under oath the reasons why he or she has reasonable fear that the assets given as guarantee, or against which the action *in rem* will be executed, will be disposed of, hidden, dissipated, or transferred; (4) in personal actions, states under oath that the debtor has no other known assets different from those against which the action will be brought; he or she will also state the reason why he or she has reasonable fear that the debtor will hide, dissipate or transfer the assets, unless it is cash or a deposit made with credit institutions or other assets dissipated that can easily be replaced; and (5) guarantees damages and lost profits that the measure could produce for the debtor if the lawsuit is not filed in the following three days or, if the lawsuit is filed, the other party is acquitted.

**Interim measures**

Interim measures can be granted either before the proceedings or during the proceedings. If requested before the proceedings, the measure will be granted without hearing from the other party, if all the requisites are met. If requested after the proceedings have commenced, the judge will notify the other party of the request and will give him or her the right to answer to such a request.

**iii Class actions**

Class actions are duly regulated in Mexico in the Code of Civil Procedure.

- The main guidelines for class actions are as follows:
  
  - The competent courts to review class action claims are federal courts;
  - Class action claims can only be brought with respect to relations of consumers of goods or services, private or public and environmental;
  - The entities or persons that can bring a class action are very limited;
  - There are only three types of class action: ‘diffuse’ class actions, class actions ‘in the strict sense’ and class actions of an ‘individual homogeneous nature’.
diffuse class actions are indivisible and are brought to claim diffuse rights, and the holders of such rights are an undetermined collectivity with the purpose of claiming the repair of the damage caused to a group of persons;

- class actions in the strict sense are indivisible and are brought to claim rights and collective interests, and the holders of such rights are a determined or determinable collective with the purpose of claiming the repair of the damage caused to individuals within such a group; and

- actions of an individual homogeneous nature are divisible and are brought to claim rights and individual interests that have a collective incidence, with the purpose of obtaining from a third party forceful compliance with an agreement or its rescission;

e class actions can be of a declarative, constitutive or condemnatory nature;

f in class actions interim measures can be requested; and

g the judges have the right to issue interim measures.

iv Representation in proceedings

Anyone can act by himself or herself, or through an attorney in fact, in proceedings as long as he or she has legal capacity to do so. In the case of corporations or legal entities, they have to be represented either by their legal representatives, which could be their directors, or by anyone with sufficient powers granted by such a corporation.

v Service out of the jurisdiction

Any person may be served with documents outside the jurisdiction, as long as their domicile is located outside the jurisdiction of the competent court that will hear the case at stake.

In such cases, the requesting party should inform the court that the address of the defendant is outside its jurisdiction, provide to the court the address of the defendant and request the court to issue a formal written request to the competent judge to serve summons to such a party.

vi Enforcement of foreign judgments

The Federal Code of Civil Procedure establishes that foreign judgments can be enforced in Mexico if they comply with the following:

- 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 fulfilment of such a contract;
b the law requires it;
c it is a barrier to judicial or administrative acts related to tax obligations, the investigation of crimes and updating of administrative sanctions;
d it is necessary to protect the legal interests of the owner;
e it is necessary for the purposes of public interest;
f it is necessary to fulfil a legal obligation of the owner; or
g it is being used in a specific treatment for the purposes of prevention or medical diagnosis, or health issues, as long as such a treatment is made by a health professional subject to secrecy.

Transfer or sharing of personal data with third parties, national or foreign, can be made without the consent of the owner of such information in the following cases:

a when such a transfer is established in a law or treaty to which Mexico is a party;
b when such a transfer is necessary for the prevention of disease or for medical diagnosis, sanitary aid, medical treatment or sanitary services;
c when such a transfer is made to controlling companies, subsidiaries or affiliated companies under common control of the responsible individual or a flagship company or any other company of the same group of the individual responsible for the information that operates under the same principles and internal policies;
d when such a transfer has to be made by virtue of an agreement entered into or that will be entered into by the owner, the person responsible or a third party;
e when such a transfer is necessary and legally requested for the purpose of maintaining a public interest or for the administration of justice;
f when such a transfer is necessary for the recognition, exercise or defence of certain rights in judicial proceedings; or
when such a transfer is needed to maintain and fulfil a legal relationship between the individual responsible for the information and its owner.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege
As a general rule all documents may be considered as privileged, understanding such a concept in the sense that parties have no obligation to give such documents to another party, unless so requested by an authority.

ii Production of documents
Even though parties are not obliged to open their files to other parties, this general rule has an exception. This exception exists where one of the parties requests specific documents from the other. The request has to be very clear; that is, establishing date, sender, recipient, etc.

Therefore, if parties in litigation do not have in their possession certain documents (documents that are the basis for their claim or defence), they can request certified copies of such documents from the person that has them in his or her possession. Once such a request has been made, if the requesting party can prove to the court that it has requested a document but the document has not been delivered by the other party, the court can order the other party to give the certified copy requested.

Full discovery is not permitted in Mexico.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation
Mexico accepts and to some extent encourages alternative dispute resolution (ADR) procedures to alleviate pressure on the courts from the overwhelming number of cases that have to be resolved.

ii Arbitration
Arbitration is very widely used in important commercial transactions. The Commerce Code has a specific chapter dealing with arbitration, and incorporates the UNCITRAL Model Law.

Awards issued by arbitrators are unappealable in Mexico, but the parties to arbitration may seek to nullify awards issued by arbitrators if any of the following occur:

a the party that requests the nullity proves:

• one of the parties to the arbitration agreement is affected by some legal incapacity, or the arbitration agreement is invalid by virtue of the law to which the parties have submitted it, or Mexican law;
• it was not duly notified of the appointment of an arbitrator or of the arbitration proceedings, or has not been able, for whatever reason, to assert its rights;
• the award refers to a dispute not contemplated in the arbitration agreement or contains decisions that exceed the terms of the arbitration agreement;
• the composition of the arbitral award or the arbitral proceeding does not comply with the agreement executed by the parties; or
the judge verifies that under Mexican law the subject matter of the dispute cannot be agreed through arbitration or that the award is contrary to public policy.

The statute of limitations for filing the nullification of an award is three months counted from the date the award was notified to the parties. The time frame for a nullity action is around one year.

Enforcement of arbitral awards can be denied in Mexico if the party against whom the award will be enforced demonstrates any of the causes for nullifying an award.

The general trend is that arbitral awards are enforced in Mexico.

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.
I INTRODUCTION TO THE 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. Parties can appeal from most district court decisions to the courts of appeal, which can review the case de novo, limited only by the grounds of appeal. In certain cases, parties cannot apply to the district court but must apply to the court of appeal: an application to set aside an arbitral award must be made to the court of appeal. The Supreme Court rules on appeals against decisions of courts of appeal, but does not assess facts. The Supreme Court also has special competence to decide on lower courts’ preliminary questions of law.

Bigger cases are usually handled by district court panels of three judges, while a single judge typically resides over smaller cases and cases in summary proceedings. The Dutch judiciary consists mostly of trained judges and, to some extent, former practitioners. It is renowned for its competence, integrity, independence and impartiality. The Dutch court system does not feature any juries, nor does it provide for any discovery or disclosure phase prior to initiation of the proceedings on the merits.

Specialised divisions of the courts deal with specific types of disputes. Most corporate disputes are handled by the Enterprise Chamber of the Amsterdam Court of Appeal (e.g., inquiry proceedings and squeeze-out proceedings). The district and appeal courts in The Hague have exclusive competence to deal with certain patent and trademark cases. The Amsterdam Court of Appeal has exclusive jurisdiction to declare class action settlements binding. The Netherlands Commercial Court (NCC), a specialised chamber of the Amsterdam District Court and Amsterdam Court of Appeal, deals with international disputes and allows parties to conduct proceedings entirely in English. The NCC is intended to bolster 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 jurisdiction of the NCC is based on a forum choice by parties to a contract or by parties selecting the court on an ad hoc basis (which also may be for alleged tort claims). The rules of the Dutch Code of Civil Procedure also apply to NCC proceedings. The NCC has its own procedural court regulations, which are tailored to the complex international disputes it aims to resolve.

The 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, where the Permanent Court of Arbitration has its seat, often being a venue of
Netherlands

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 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

On 1 January 2019, the aforementioned NCC opened its doors. The NCC aims to be a court of preference for international commercial matters. In establishing the NCC, the government recognised that, in the globalised economy, English has become the primary business language and that there is an increasing demand for dispute resolution in English, particularly in 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 is aimed to add to the Netherlands’ favourable international business climate. The first cases rendered by the NCC were judgments in summary proceedings, showing that parties know to find the NCC also for immediate injunctive relief.2

In the past year Dutch courts handled numerous high-stake arbitration-related proceedings (setting aside and enforcement proceedings), a trend that has been present for some years. This is largely due to the Netherlands increasingly being recognised as an attractive neutral seat for commercial and investor-state arbitrations. Also, the Netherlands is the seat of holding companies of many of the world’s largest corporates and several foreign state-owned enterprises. This makes the Netherlands an attractive venue for enforcement proceedings, particularly in view of the robust legal framework for freezing shares and assets.

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 2000,3 non-US investors that suffered losses from purchases on non-US securities exchanges sought out different venues to settle class actions with foreign issuers. The Netherlands proved a suitable jurisdiction. Ever since, various global class action settlements have been declared binding by the Amsterdam Court of Appeal, and, also recently, litigation funders and US plaintiff firms have set up several vehicles that seek to bring global litigation to the Dutch jurisdiction (e.g., regarding Dieselgate and BP Deepwater Horizon) with an aim to ultimately reach binding class actions settlements (see, on the legal framework for class actions generally, Section III.iii).

In 2019 new class actions were allowed to proceed. Cartel class actions are often initiated after the European Commission has issued an infringement decision. Several cartel cases highlight the liberal approach Dutch courts adopt in asserting jurisdiction and declaring Dutch law applicable in international class action suits. In recent rulings regarding follow-on class action proceedings, two Dutch district courts have declared Dutch law applicable in international cases for infringement of competition law. In the Air Cargo follow-on cases, the

2 See https://www.rechtspraak.nl/English/NCC/Pages/judgments.aspx.
3 US Supreme Court, 24 June 2010, No. 08-1191, Morrison v. National Australia Bank Ltd.
District Court of Amsterdam decided that the governing law in the cartel damage cases is the law of the place where the cartel affected competition between the parties. Because, in this case, the cartel affected competition worldwide, the court decided that effectiveness and due process dictated the case to be governed by Dutch law.4

The seemingly liberal approach in asserting jurisdiction and application of Dutch law should not be mistaken for a bias towards class action claimants. Recent judgments show that courts do not waiver in requiring claimants to substantiate mass claims. Both the Rotterdam District Court and the Amsterdam District Court ruled that the bundled claims from a litigation vehicle needed further substantiation. In proceedings regarding an elevator cartel, the court held that the claimants vehicle did not submit sufficient evidence of assignment of the individual claims and did not substantiate its claim with sufficiently detailed data, such as information proving the original claimant had purchased services or products of the defendants in the applicable period, nor that they individually suffered damages.5 Such case law is in line with the judgment of the Court of Appeal Arnhem in a case involving litigation vehicle East-West Debt.6 In that case, the Court held that East-West Debt had neglected to indicate on which specific contracts it had based its damages claims, thus failing to substantiate its claim. Further, in the Truck cartel follow-on proceedings, the Amsterdam District Court held that bundling of claims does not affect the defendant’s obligation to substantiate the individual claims.7

III COURT PROCEDURE

i Overview of court procedure

The CCP contains most rules of civil procedure, though several important procedural rules have been developed or further defined in case law. The courts’ procedural regulations set out rules and guidelines of a more practical nature (e.g., rules for filing submissions, deadlines and extensions). Rules applicable to court of appeal proceedings are fairly similar to those for district court proceedings.

A Dutch court may only base its decision on facts or rights that are undisputed by the parties, or which are proven during the proceedings. Statements made by a party that are not sufficiently disputed by the other party will be considered as undisputed facts. In general, the burden of proof will be on the party that invokes the legal consequences of the facts or rights alleged by it. Evidence may be presented by all possible means such as deeds, documents, judgments, witnesses, expert reports or a court inspection of certain premises. The court is generally free in its assessment of the evidence introduced by the parties.

Historically, civil proceedings in the Netherlands have been focused on documentary evidence, rather than on presentation of evidence during a hearing and witness examinations before the court. Today, there is still no discovery or disclosure phase at the onset of litigation; however, there is an increased emphasis on early case management by the court. In addition, the use of the motion to seize evidence and the motion for disclosure has proliferated, with some courts progressively supporting a wider use of those.

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5 Rotterdam District Court 23 October 2019, ECLI:NL:RBROT:2019:8230.
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 on; (2) to preserve the quality of a testimony (memories tend to fade); or (3) to assess the chances of success of the proceedings. The court may refuse to allow a preliminary witness hearing in the event that it holds that the request for such hearing or report is a misuse of procedural rights. This ground is rather narrow. Generally, a person who has been called as a witness must testify. The court itself will examine the witnesses. Parties as well as counsel may pose questions after the court has examined the witnesses, but there is no system of cross-examination. The procedure for expert hearings is similar.

The government has drafted a proposal for modernisation of the rules of evidence, proposing inter alia a stronger focus of evidence gathering at the beginning of litigation. It is not expected that the proposal will become law any time soon, if at all (see also Section VII).

ii Procedures and time frames

**Standard procedure**

Under Dutch law, the standard procedure is initiated by a writ of summons. After service of the writ, it is sent to the court. The writ contains information on the parties, the claim and its legal grounds, evidence supporting the legal grounds and offer of witness evidence, the basis for the court’s jurisdiction, and a rebuttal of the known defences against the claim. Subsequently, the court sets a time limit (usually six weeks) for the defendant to submit a statement of defence, including all defences, motions and counterclaims. After the statement of defence (or after the statement of defence in counterclaim, if a counterclaim is filed), the court usually orders a personal appearance of the parties – to provide information or to attempt to reach a settlement. The court may also provide the parties, upon request, with an opportunity to plead the case during such a hearing. Timing of the hearing primarily depends on how busy the court docket is. It usually takes at least several months after the last submission for a case on the merits, but hearing dates can be set more efficiently by reserving dates up front (using active early-case management). In a standard procedure the hearing is followed by a final judgment or an interim judgment. An interim judgment may deal with a part of the claim or instruct a party to prove certain points and produce certain evidence. It generally takes between three and six months for the final judgement to be rendered, even though most courts strive to render judgment faster.

The completion of proceedings on the merits in a district court usually takes a year, but may also take substantially longer depending on the procedural complexities, such as the number of submissions, motions and extensions of time limits. The losing party will be ordered to reimburse the winning party for its court costs and legal fees. The order for reimbursement is not for actual costs but for a fixed amount, dependent only on the interest at stake and the complexity of the litigation. The fixed amount is usually a small percentage of the actual costs incurred by the winning party.

**Appeal**

A party can lodge an appeal against a final judgment within three months of the date of the challenged judgment (four weeks, if against a judgment in summary proceedings). The court of appeal may assess the case based on both the facts and the applicable law.
An appeal in cassation can be brought before the Supreme Court within three months of the judgment in appeal. A Supreme Court appeal may only be based on misapplication of the law or non-compliance with essential procedural requirements. An appeal suspends the enforceability of the challenged judgment, unless the judgment was declared provisionally enforceable.

Motion practice

Certain motions are expressly mentioned in the CCP, such as the motion to dismiss for lack of jurisdiction, the motion for the production of evidence, the motion for security and the motion to summon a third party to appear in the proceedings (e.g., for indemnification). Parties may also lodge motions that have no specific basis in the CCP. There are no general motions to dismiss a case for lack of stating sufficient facts to support the legal grounds, or for not passing the statute of limitations, or on any summary basis. However, the court may decide on its own initiative or on the application of a party to deal with certain issues first, in the interests of procedural efficiency (e.g., it deals first with the defence that the claim is time-barred).

Motions can be made by parties in the writ of summons or in a written statement, depending on the stage of the proceedings. Motions usually suspend the case on the merits. However, the court may determine otherwise – for instance, when it deems that a motion is apparently used to unduly delay the proceedings on the merits.

Urgent or interim relief

A plaintiff may apply to the summary proceedings section of the district court to obtain provisional measures against another party. The plaintiff will have to demonstrate an urgent interest in obtaining such provisional measure. Designated procedural rules ensure that proceedings can quickly lead to a decision. Summary proceedings may be initiated regardless of whether proceedings on the merits have been or will be opened. The court hearing the main proceedings is not prejudiced by the summary judgment. Summary proceedings are initiated by service of a writ of summons. A hearing, normally supported by written briefs, can take place within a few days or a few weeks after service of the writ. The decision of the court is normally rendered one to two weeks after the hearing. As a result, the entire proceedings normally take only a few weeks. In exceptional circumstances, a decision may be obtained within a few days or even within a few hours.

Summary proceedings can be used for a wide variety of provisional measures. They are often used to order a party to act or stop acting in a certain way (usually reinforced by penalties). For example, to obtain an order forcing the defendant to resume performance of a continuing contractual obligation, or to obtain an injunction against infringement on an intellectual property right. Summary proceedings may also be used to obtain payment, when the obligation to pay is not in dispute (but the debtor simply cannot pay) or there is no reasonable defence against the claim for payment (there should be a high probability that
the claim would be awarded in a case on the merits). Summary proceedings are popular and widely used, as they enable a party to quickly get resolution of the dispute. All injunctions are normally immediately enforceable notwithstanding appeal.

**Conservatory or pre-judgment attachments**

An effective means to secure and preserve assets until a final resolution of a dispute is the pre-judgment attachment. It prevents the debtor from frustrating recovery and ensures that, at the end of the proceedings, there are at least still the attached assets to secure payment. If substantial assets are frozen, this sometimes may be sufficient commercial leverage to settle the dispute. A pre-judgment attachment is made by first requesting the district court, *ex parte*, to grant leave for a pre-judgment attachment. Usually this means the claimant will have to show a draft writ of summons, which sets out the reasons for the claim. Any party who appears to have a justified claim may request a pre-judgment attachment, and in practice this is nearly always granted. A debtor can object to an attachment in summary proceedings or proceedings on the merits. The court will typically allow the debtor’s objections and lift the attachment if the claim for which the attachment is made appears to be unjustified or the debtor provides sufficient security for the claim. If assets are successfully located and frozen in the Netherlands, this may create jurisdiction for the district court in which the assets are located (unless there are other means to secure an enforceable title, for example, on the basis of the Brussels I *bis* Regulation, or of a treaty). A pre-judgment attachment on intellectual property rights is possible in case of alleged infringement of intellectual property rights, in order to preserve relevant evidence.

After assets are frozen, the party who has successfully done so must start litigation or arbitration proceedings on the merits within the period ordered by the court, unless court proceedings have been already initiated. The party lodging the attachment, if its claim is ultimately rejected, is liable for damages caused by the attachment. However, if the claimant is successful and obtains a final enforceable judgment, then the pre-judgment attachment is converted into an executory attachment. That enables the plaintiff to finally execute against the assets of the defendant.

As of January 2017, a European cross-border pre-judgment attachment can also be used, based on the European account preservation order (EAPO). The EAPO allows a creditor, located in an EU Member State, to attach funds of its debtor in a bank account located in another Member State by using leave provided by the courts of the Member State that will have jurisdiction to rule on proceedings on the merits. To protect the debtor, the court can require the creditor to provide security. An EAPO can be executed within the EU without any special procedure or declaration of enforceability.

**Inquiry proceedings**

Inquiry proceedings are an effective, quick and relatively cheap tool for shareholders to address perceived mismanagement in a Dutch company (BV or NV). The proceedings are frequently used, often by shareholder activists who seek to influence the policy of a listed company. Also, it is typically the venue where takeover battles are adjudicated, especially since

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Dutch companies can deploy various protective measures against hostile takeovers, which can be scrutinised by the Enterprise Chamber. The right of inquiry entitles shareholders (provided they meet statutory threshold requirements) to request the Enterprise Chamber of the Amsterdam Court of Appeal to investigate the affairs of a Dutch company (BV or NV). The court will order an investigation if there are well-founded reasons to doubt the correctness of the policy or course of action of a company (e.g., not respecting shareholders’ legal rights, conflict of interests, deadlock situations, inadequate or incorrect provision of information). The Enterprise Chamber can also order immediate temporary measures (e.g., prohibition on taking certain actions, suspension of directors, appointment of a temporary director or supervisory director with exceptional powers, suspension of a corporate resolution, suspension of voting powers, change of authorities of the company’s bodies or transfer of shares). Immediate relief requests are popular and may be very effective, and the court often handles them before the inquiry request itself. If the court has ordered an investigation and the investigators’ report has been made, the shareholders can request the Enterprise Chamber to determine that mismanagement has taken place and ask to take definitive measures (e.g., dismissal of directors, suspension or annulment of a corporate resolution). The Enterprise Chamber does not deal with liability of directors against the company or against shareholders. If mismanagement is established, shareholders usually file a civil liability suit in the district court to seek to obtain damages.

iii Class actions

As briefly mentioned above (see Section II), the Netherlands is well known for facilitating both class actions and the settlement of mass claims on an opt-out basis. It is important to distinguish the rules on class actions (also referred to as ‘collective actions’)
 and those on the settlement of mass claims (Act on the Collective Settlement of Mass Claims).

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), which has as its stated purpose the protection of common or similar interests of prejudiced parties, may seek declaratory relief on behalf of such persons. Typically, the declaratory relief sought is a judgment holding the defendant liable for certain acts or omissions. Until 1 January 2020 damages could not be awarded in class action litigation. But a judgment holding the defendant liable for damages (without actually awarding damages) could 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. On 1 April 2019, a bill was adopted by Parliament that abolishes the existing ban on recovering monetary damages through class action; it entered into effect on 1 January 2020. The bill also increases eligibility requirements for interest groups that wish to start a class action. To prevent an unnecessary burden or jeopardy for the party being sued when multiple interest groups wish to start a class action on the same subject, the bill allows

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9 Governed by Article 3:305a Civil Code.
10 Articles 7:907-7:910 Civil Code and Articles 1013-1018a CCP.
the court to designate one group to act as principal in the procedure. The judgment rendered in a class action suit on monetary damages can be declared binding for Dutch residents, unless they opt out, and for non-Dutch residents, if they opt in.

**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.\(^\text{11}\)

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. Examples are the *Shell Reserves* case\(^\text{12}\) and the *Converium* case.\(^\text{13}\) Both cases also illustrate the international scope of Dutch mass claims settlements. In its decision of 29 May 2009, the Amsterdam Court of Appeal declared the settlement in the *Shell Reserves* case binding (shareholders had argued they suffered damages because of misleading statements of oil reserves in Shell’s accounts). The settlement was made between the Dutch and English Shell entities and a Dutch foundation representing mostly non-Dutch shareholders residing in dozens of jurisdictions all over the world. In the *Converium* case (also involving shareholders that alleged damages due to misleading statements), none of the potentially liable parties were Dutch and only a very limited number of potential claimants were domiciled in the

\(^{11}\) 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)


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).

In 2018, one of the biggest class action settlements in Europe to date was resolved. 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. An initial settlement made a distinction between active and non-active claimants, which distinction the Amsterdam Court of Appeal did not find reasonable. Having adjusted the settlement, the parties again requested the court to declare their settlement binding on the class, on an opt-out basis. The Amsterdam Court of Appeal did so in its judgment of 13 July 2018. An amount in excess of €1.3 billion was made available for shareholders of Fortis who held shares between 28 February 2007 and 14 October 2008. Ageas had the option to terminate the settlement if the compensation amount represented by opt-out notices exceeded 5 per cent of the total settlement amount, but it decided not to invoke that option given the very limited number of opt-out notices received, thus finally ending a decade-long legal battle arising out of alleged misleading statements surrounding the takeover by Fortis of ABN AMRO Bank in 2007.14

The jurisdictional basis for approving mass claims settlements should be distinguished from the jurisdictional basis of the Dutch court in class action suits. For class action suits (collective actions), the common basis for jurisdiction is typically the domicile of the defendant or place where the harmful event occurred. The Petrobras and Steinhoff cases show how the Netherlands can be used as a venue for cross-border class actions by including Dutch companies as defendants or co-defendants, which is significant as many multinationals use Dutch companies as holding or finance companies within their group, thus creating potential class action jurisdiction in the Netherlands. The judgments further illustrate how Dutch courts are willing to take on cases even when similar proceedings are pending in other jurisdictions. For cases to which the new law, effective 1 January 2020, applies, stricter jurisdictional requirements apply regarding substantive connection with the Netherlands.

In the Petrobras case, the Rotterdam District Court declared that it had jurisdiction over a claim submitted by investors from different countries against Brazilian oil company Petrobras and its Dutch affiliates, where claimants claimed to have suffered losses owing to corruption within Petrobras.15 Investors who were excluded from a prior US class action settlement of almost US$3 billion joined forces in a Dutch stichting16 and started legal proceedings against Petrobras and several Dutch subsidiaries that had issued Petrobras-secured bonds. The Court ruled that the allegations against Petrobras and the allegations against its Dutch affiliates involved the same fact pattern and same claims, and therefore also assumed jurisdiction regarding the Brazilian company. Petrobras argued that proceedings in the Netherlands should be stayed because of pending litigation in both the United States (for investors that had opted out of the class action settlement) and Brazil regarding almost identical claims. The court rejected that argument on the basis that there was too much uncertainty about the further course and timing of those proceedings.

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16 A Dutch legal entity with no members or share capital, that exists for a specific purpose.
The Amsterdam District Court ruled that it was competent to hear claims against Steinhoff by a group of investors that had allegedly suffered losses owing to accounting fraud by Steinhoff.\textsuperscript{17} Steinhoff argued that the Dutch court lacked jurisdiction in view of pending litigation in Germany, and (alternatively) that the legal proceedings in the Netherlands should be stayed pending the decision of the German court. An investor had started prior litigation against Steinhoff in Germany, and an application had been made to the German Higher Regional Court to have the case considered under the Capital Markets Model Case Act (KapMug). Steinhoff argued that as the KapMug could lead to the setting of a precedent that would also apply to the claimants in the Dutch case, the Dutch court should give precedence to the German proceedings. The Amsterdam District Court considered that the proceedings in Germany did not involve the same claimant, since the investor who started the proceedings in Germany was not represented in the Dutch proceedings, and that in view of various limitations inherent to KapMug proceedings a stay in favour of those proceedings was not appropriate.

The \textit{BP Deepwater Horizon} case is an example of a Dutch court refusing to assert jurisdiction in a class action suit. The Amsterdam Court of Appeal dismissed a collective action lodged by the Dutch shareholders' association VEB, which had sought a declaratory judgment for liability against BP on behalf of a certain group of shareholders relating to the Deepwater Horizon accident in the Gulf of Mexico.\textsuperscript{18} 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 \textit{Universal Music} judgment of the European Court of Justice.\textsuperscript{19} 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 action settlement binding, is structured differently. The parties to the settlement ask the Amsterdam Court of Appeal to declare the settlement binding on the entire class – that is, 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,

\textsuperscript{17} Amsterdam District Court 26 September 2018, ECLI:NL:RBAMS:2018:6840.


\textsuperscript{19} 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.'
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.  

**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. To serve a legal document on someone in another EU Member State, the sender submits the document to the Dutch transmitting agency. The agency will send the document to the receiving agency of the EU Member State. The receiving agency will, in turn, serve the document on the recipient. Furthermore, the Netherlands is a party to the Hague Service Convention, which applies to the service of judicial and extrajudicial documents in civil or commercial matters. Under this Convention, the sender can submit a legal document to the competent Dutch authority, which will then forward the document to the designated central authority in the other contracting state. The central authority ensures that the documents are served on the recipient. With regard to the service of documents in EU Member States, the EU Regulation prevails over the Hague Service Convention. When neither the EU Service Regulation nor the Hague Service Convention applies, common service rules of the Code of Civil Procedure provide roughly for the same procedure as under the Convention. However, instead of sending the document to a central authority, the Dutch authorities send it to a diplomatic or consular official in the receiving state.

**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. 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

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20 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.


are met: (1) the foreign court’s jurisdiction was based on an internationally generally accepted ground; (2) due process was observed in the foreign proceedings; (3) recognition does not violate Dutch public policy; and (4) the judgment is not inconsistent with any other judgment that is capable of recognition in the Netherlands. 24 Ground (3) of this test has increasingly become a ground for litigation on refusal of recognition and enforcement, particularly where the circumstances surrounding the foreign court’s judgment are suspicious. 25

**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. 26 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. 27 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 – for example, for reasons of public policy or state security. A copy of a court decision (of which the operative part has been declared in public) can be requested from the court, irrespective of whether the proceedings are completed or ongoing. Many court decisions are published on the website of the judiciary 28 on which party names are anonymised if they involve natural persons.

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24 Supreme Court, 26 September 2014, ECLI:NL:HR:2014:2838 (Gazprombank).
25 For instance, the Amsterdam Court of Appeal refused recognition of the Russian judgment in which Yukos Oil Company was declared bankrupt (Amsterdam Court of Appeal, 9 May 2017, ECLI:NL:GHAMS:2017:1695 (Supreme Court appeal is pending). The Court found that the Russian authorities did not levy and enforce tax claims in an orderly and legitimate manner, but rather unlawfully aimed to bankrupt Yukos Oil Company. The Court ruled that the Russian authorities’ actions were both procedurally and substantively contrary to Dutch public policy, and therefore refused recognition of the bankruptcy judgment. Two other Russian court judgments surrounding the bankruptcy of Yukos Oil were also denied recognition as those decisions were not reached in independent procedures covered by adequate safeguards (Amsterdam District Court, 5 December 2018, ECLI:NL:RBAMS:2018:8618 and ECLI:NL:RBAMS:2018:8653). Similarly, the Amsterdam Court of Appeal ruled that an Albanian court judgment was substantively arbitrary and manifestly unreasonable and therefore could not be recognised in the Netherlands, as this would violate Dutch public order (Amsterdam Court of Appeal, 17 July 2018, ECLI:NL:GHAMS:2018:3008).
28 www.rechtspraak.nl.
**Litigation funding**

Third-party litigation funding is allowed under Dutch law, and is not bound by specific legislative or regulatory provisions, but a pending legislative proposal on class action reform contains restrictions on funding of interest groups (see Section VII). Parties are under no obligation to disclose their source of funding. As class actions are specifically suitable for litigation funding, the aforementioned Claim Code stipulates that associations and foundations acting as a representative should be non-profit based. However, that only applies to the association or foundation itself. Discussions on the proper reimbursement of litigation funders are particularly prevalent in mass claim settlements. For instance, in the *Converium* case, the Amsterdam Court of Appeal held that lawyers’ fees amounting to 20 per cent of the total amount of the settlement were not unreasonable, also in view of standards developed in US case law on what is common and reasonable. According to their professional rules of conduct, Dutch lawyers may not agree to a ‘no win, no fee’ arrangement or similar arrangements.

**IV LEGAL PRACTICE**

i **Conflicts of interest and Chinese walls**

Conflicts of interest are governed by the professional rules of conduct that apply to all lawyers admitted to the Dutch Bar Association. Lawyers must refrain from representing the interests of more than one party, if such interests are in conflict or are likely to conflict. If clients share a common or similar interest, lawyers are allowed to represent more than one party. A lawyer who represents parties with conflicting interests is required to withdraw from the case as soon as the conflict arises, unless they are capable of immediate resolution. An exception to this rule applies where parties are well-informed by their lawyer or law firm about a (potential) conflict of interest and they have given consent to that lawyer or firm to act for both parties. It is also in this context of mutual consent that firms in practice sometimes act for parties that may have conflicts of interest, but are in agreement with the firm acting for both clients subject to using Chinese walls.

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

The Dutch Criminal Code prohibits acts of money laundering and has a broad scope. Most intentional acts with reference to assets that are directly or indirectly derived from a criminal act can be qualified as money laundering. The Anti-Money Laundering and Anti-Terrorist Financing Act obliges lawyers under certain circumstances to perform stringent client due diligence and to report unusual financial transactions, including those by clients, to the Financial Intelligence Unit-Netherlands. The implementation of the Fourth Money Laundering Directive (Directive 2015/849) into Dutch legislation has limited the circumstances under which mere simplified client due diligence is permissible. Conversely, enhanced client due diligence will apply in more situations. In practice, these changes will mean that companies will be required to give more and more detailed information about the company and its ultimate beneficial owners to law firms who act for those clients.

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iii Data protection

The General Data Protection Regulation (EU Regulation 2016/679; the GDPR) that entered into effect on 25 May 2018 introduced a stricter legal regime for the protection of personal data throughout the EU. The GDPR applies directly in all EU Member States, including the Netherlands. In the Netherlands, it is implemented by the GDPR Implementation Act, which supersedes the Dutch Act on the Protection of Personal Data. The GDPR is similar in some ways to the previous legal framework on data protection, but adds a number of stricter rules and provides additional powers to supervisory authorities and higher sanctions (up to €20 million or 4 per cent of annual worldwide turnover, whichever is higher). 30

The GDPR applies to the processing of personal data (meaning data relating to an identified or identifiable natural person). ‘Processing’ is a broad term; it refers to the act of performing any operation or group of operations on personal data, including collection, recording, storage, transfer and use. The GDPR has a broad extraterritorial reach. It covers not only personal data processing in the context of activities of a company’s establishment in the EU, but also processing taking place outside the EU by companies not established in the EU if they (1) offer goods or service to individuals in the EU, or (2) monitor the behaviour of individuals in the EU.

Processing of personal data is only permissible based on a valid legal ground and for a clearly defined purpose. There may be a valid legal ground if processing is necessary, for example, for the performance of a contract, for compliance with a legal obligation, or for the purposes of the legitimate interests pursued by the controller or by a third party (except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject that require protection of personal data). Data processing is also permissible if the data subject has given consent to use data for a specific purpose. The GDPR sets strict rules for such consent, which must be explicit and it will only be valid if sufficient information is provided to the data subject prior to his or her consent. 31 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 litigation against an employee who has behaved unlawfully. After deliberation with their lawyer, the company starts to gather evidence on the unlawful behaviour by reviewing the employee’s emails. Such gathering of evidence entails processing personal data. This data

30 Rules of the GDPR not discussed here, but which may also be relevant for data processing in the context of dispute resolution, include rules regarding the information to be provided by the controller to the data subject (Articles 13 and 14), regarding rights of the data subject to access (Article 15), rectification (Article 16), erasure (Article 17), restriction of processing (Article 18), data portability (Article 20), object to processing of personal data (Article 21), regarding actions to be taken in case of data breaches (Article 33ff) and regarding the appointment and duties of data protection officers (Article 37ff).

31 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.
can generally be processed based on the legitimate interests of the company. It is hardly ever based on consent, as this might not be appropriate or given, and moreover employee consent is generally not considered ‘freely given’ owing to the fact there is a relationship of authority. When processing data, the processing methods must be proportional to the purposes of the gathering of evidence and the least privacy-invasive methods must be used (e.g., when performing email review, searching with key words – rather than looking at each email individually – is better in terms of proportionality and subsidiarity).

When evidence containing personal data is used for purposes of establishing facts in the context of a dispute, the client who has such data is generally responsible for the processing of personal data (the data controller). In the event that lawyers gather evidence for the company, they are likely to be considered as separate controllers independent from the company. The GDPR introduces various requirements on maintaining internal records of data processing. In practice, this means law firms that use personal data will have to keep and update records of processing activities, just as their clients will have to do. Shortly after the GDPR took effect, the Dutch Data Protection Authority (DPA) checked the data processing registers of 30 big companies from 10 sectors, including some law firms. The Dutch DPA sees the data processing register as a first point of reference for a company’s compliance with the GDPR.

In court proceedings, the court may grant a request for disclosure of evidence that contains personal data. Such a request for access to personal data may be admissible based on the parties’ legitimate interests. If processing or giving access to the information in litigation involves transfers of personal data to countries outside the European Economic Area (EEA), this is only allowed under specific circumstances. The GDPR generally prohibits transfers of personal data to recipients located in a country that has not been deemed by the European Commission to provide an adequate level of data protection. The GDPR provides for an exemption from this rule for litigation purposes. This exemption is available for occasional transfers of personal data necessary for litigation purposes; this means that it cannot be relied on for transfers of personal data for the purpose of conducting data selection activities. To transfer personal data for such purpose to a non-EEA recipient a company must agree on EC model contract clauses with such a recipient and implement additional data protection safeguards.

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32 Legitimate interests can include alleged wrongdoing by an employee, preparation for litigation or compliance with foreign legal obligations.


34 According to Article 843a CCP a party can request (access to) certain documents in order to prepare its litigation. In the case Den Bosch Court of Appeal, 14 October 2013 (ECLI:NL:GHSHE:2003:AM7927) it was decided that a request for documents containing personal data under Article 843a CCP should be judged as a request to process data under the then prevailing Act on the Protection of Personal Data (similar reasoning would apply under the GDPR). The court ruled that such a request can be complied with based on legitimate interests of that party, namely the finding of the truth, which were not outweighed by the privacy interest of the data subjects.

35 Countries that have been deemed by the European Commission to provide an ‘adequate level’ of data protection include Andorra, Argentina, Canada, Faroe Islands, Guernsey, Israel, the Isle of Man, Jersey, New Zealand, Switzerland, Uruguay, and the United States of America (limited to the Privacy Shield framework).
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 a 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 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 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 their registration as a lawyer with the Bar when employed as in-house legal counsel. Under Dutch national rules, in-house counsel admitted to the Bar have legal privilege to the same extent as external lawyers. The European Court of Justice confirmed in its *Akzo* ruling of 14 September 2010 that communications between a company and its in-house lawyer are not protected by professional legal privilege in EU competition investigations. In 2012, the Dutch Supreme Court ruled that – apart from the EU competition investigations – in-house lawyers do have legal privilege. The court held that in view of Dutch practice and the safeguards applicable to the professional practice of Dutch in-house lawyers by virtue of the Dutch Bar regulations, an in-house lawyer cannot be denied professional legal privilege solely because of the fact that he or she is employed by the company.  

Foreign lawyers who are admitted to the Dutch Bar have legal privilege. This will mostly concern lawyers from other EU Member States whose professional qualifications have to be recognised in the Netherlands pursuant to the implementation of Directive 2005/36/EC on the recognition of professional qualifications. Legal privilege should also be upheld if invoked by foreign lawyers who are not admitted to the Dutch Bar, but who are requested to give evidence in Dutch courts.

ii Production of documents

Dutch law provides for certain disclosure obligations, although 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 actual or 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 party requesting disclosure must state a direct and concrete interest by indicating to which extent the requested documents can support its legal position or

36 Supreme Court 15 March 2013, ECLI:NL:HR:2013:BY6101.
37 In recent criminal proceedings, the Rotterdam District Court held that foreign in-house counsel working in the Netherlands could not invoke legal privilege because their independence was not sufficiently guaranteed. The court held that the company failed to show that the independent professional practice by these in-house counsel was guaranteed. This ruling, however, is not final; appeal has been lodged.
claim(s). Parties can only request specific records, which prevents them from being able to engage in fishing expeditions: the records must be specified sufficiently to determine whether a legitimate interest exists in those specific records. The request may pertain to information stored on any sort of device, including electronic devices or cloud storage. Some courts find it sufficient if a party identifies a specific category of documents (e.g., ‘all correspondence between parties A and B pertaining to topic X in the years Y through Z’). A request can be made in separate summary proceedings, or as a motion in ongoing litigation. When the request meets the criteria of Article 843a CCP, it can be denied only on limited grounds, such as the existence of a duty of confidentiality relating to the requested documents, or for certain compelling reasons that outweigh the interests of the requesting party. 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.

Courts also have wide-ranging means to order disclosure of evidence. In civil proceedings, a court can order a party to submit all documents, which the court deems relevant to the case. A party can only refuse this order for compelling reasons. The court will decide whether those reasons are justified, and, if not, it may draw any conclusion from the refusal as it deems fit. However, courts generally do not use their wide-ranging powers to order disclosure of evidence, and rules allowing the court to order evidence do not confer on a party the right to demand that the court use such powers (save for the request based on Article 843a CCP).

A more specific rule applies to the books and records that a party is required to keep in accordance with the law (such as a company’s accounts). A court may order, at the request of a party or ex officio, that a party submits its books and records. If the party refuses to do so, the court may again draw conclusions from this refusal as it deems fit.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

In the Netherlands, the most frequently used forms of alternative dispute resolution are arbitration, mediation and binding advice.

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.

38 For instance, because records encompass confidential personal or corporate material, or medical, financial or national security information.

39 Supreme Court 13 September 2013, ECLI:NL:HR:2013:BZ9958.
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 in public international law and commercial arbitrations.

The general legal climate in the Netherlands is characterised as arbitration-friendly and benefits from the consistent support of the Dutch government. Also, the Supreme Court is reluctant to approve or condone intervention in arbitral proceedings and awards. Recourse against a final arbitral award is only possible in proceedings to set aside the arbitral award (provided for in Articles 1064–1067 CCP) or to revoke the award (Article 1068 CCP). To increase the efficient and timely resolution of the dispute, the proceedings for the setting aside and enforcement of arbitral awards are limited to one fact-finding instance: the Court of Appeal (and subsequently only subject to Supreme Court appeal, which by its nature is limited to errors of law).

Parties to an arbitration agreement may obtain interim relief from the arbitral tribunal on the merits, if it has already been constituted. It is also possible that parties agree that a separate arbitral tribunal has the power to award interim relief (e.g., by selecting arbitration rules that provide for such a separate tribunal, such as the ICC Arbitration Rules or the NAI Arbitration Rules). Interim measures can also be obtained through state court proceedings, if the requested measure cannot be obtained in arbitration, or at least not fast enough. 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 a 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 reason 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: it is not possible to appeal 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 of the 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 provides proof that: (1) the arbitration agreement was not valid or not validly entered into; (2) the award...
debtor was not properly notified of the arbitral proceedings or not able to present his case; (3) the award deals with issues not submitted to arbitration; (4) the composition of the arbitral authority or the arbitral procedure was contrary to the parties’ agreement or to the law of the arbitration venue; or (5) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. Recognition and enforcement of an arbitral award may also be refused if the court in the country in which enforcement is sought finds that (1) the subject matter of the difference is not capable of settlement by arbitration under the law of that country, or (2) the recognition or enforcement of the award would be contrary to the public policy of that country. If there is no applicable treaty concerning recognition and enforcement of the award, the award made in a foreign state may be enforced in the Netherlands on the basis of the CCP, which contains similar grounds for refusal to grant leave for enforcement as the New York Convention.

iii Mediation

Mediation – the structured process in which a third party is asked to help parties reach agreement – is well established as one of the standard forms of alternative dispute resolution in the Netherlands. Dutch law has no statutory provisions requiring parties to mediate or determining how mediations must be conducted. The perception is often that mediation is used primarily in family and employer–employee relationships, and less frequently for the resolution of commercial disputes. While it is certainly true that mediation is often used in those types of cases, and although business mediation may not be as frequently used as in certain common law jurisdictions, it is nonetheless used regularly in high-stakes disputes between large corporates, both national and international, with often favourable outcomes. Because of its confidential nature, there is limited public information available about these mediations. A recent example of the successful use of mediation in a major corporate dispute is the Fortis class action settlement, mentioned above (see Section II), in which agreement had been reached through the use of mediation (both in regard to the first settlement, rejected by the Amsterdam Court of Appeal, and in regard to the amended settlement, that was approved by the Amsterdam Court of Appeal).

In keeping with its voluntary nature, there are very few mandatory rules that apply to mediations conducted in the Netherlands. In business mediation, parties often prefer not to have to negotiate mediation terms on an ad hoc basis and therefore opt for a set of predetermined rules – such as the mediation rules of the ICC, of the Netherlands Arbitration Institute, or of the Netherlands Mediation Institute (NMI).

Directive 2008/52/EC of 21 May 2008 (on certain aspects of mediation in civil and commercial matters, which applies to cross-border disputes within the EU) is implemented into Dutch law almost verbatim, and is restricted to EU cross-border mediations. Parties to an EU cross-border mediation can request the court to make the content of a written agreement resulting from mediation enforceable. Also, the mediator and persons involved in the mediation can recuse themselves from having to testify in court about what occurred in the mediation, provided confidentiality of the mediation has explicitly been agreed upon. Since there is no Dutch statutory rule compelling mediators and parties involved in a mediation to maintain confidentiality, it is important that parties explicitly agree on confidentiality. To promote mediation, Dutch substantive law provides that a mediation interrupts a limitation period.
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 that advice is in breach of contract. In view of its aim of providing certainty and finality, an agreement on binding advice can be vacated only on limited grounds (such as mistake, undue influence, duress or misrepresentation). A binding advice agreement does not preclude the possibility of requesting relief in summary proceedings. Except for general due process and contractual requirements, there are no specific procedural rules concerning binding advice.

The Financial Services Complaints Tribunal (Kifid) is the most well-known institute that resolves disputes on the basis of binding advice and has been explicitly recognised by the Minister of Finance for that purpose. Consumers who are dissatisfied with services of a bank, insurer or another financial institution can turn to Kifid to have their claim resolved. The Act on Financial Supervision requires financial institutions to submit to dispute resolution by Kifid.

VII OUTLOOK AND CONCLUSIONS

Events to look out for in 2020 will be the first cases dealing with the class actions legal framework, the reform of the law of evidence, and the government initiative for an overhaul of the Dutch bilateral investment treaty network.

The proposal for amendment of the current legal framework for class actions has been adopted by Parliament and entered into force on 1 January 2020. The bill includes the availability of monetary damage claims in class actions, the possibility for the court to appoint a principle claimant to represent all interest groups relating to the same subject of a class action, the tightening of eligibility requirements (governance, representativeness and funding) for interest groups wishing to start a class action, and the introduction of the court’s authority to declare the resolution of a class action law suit binding on all prejudiced parties. These amendments would increase the efficiency and effectiveness of litigating class actions in the Netherlands.

The government has drafted a proposal amending the law of evidence that includes, for example, provisions on providing evidence relevant to the dispute at an earlier stage, on increased involvement of the court in establishing facts and on the use of written witness testimony. The proposal is likely to be submitted to Parliament in 2020, but in view of the substantial criticism it has received from practitioners and academics, it is uncertain what the proposal will look like and when it will be proposed to Parliament.

The Netherlands has played a significant role in the field of resolution of international investment disputes and is likely to continue doing so over the next few years through an initiative aimed at modernising its investment treaty network. The Netherlands has an extensive network of 79 bilateral investment treaties (BITs) in force with countries outside the EU, that protect investments made into those countries by companies incorporated in the Netherlands (and vice versa). The Dutch treaty network is internationally particularly relevant as many investors have structured investments through Dutch companies. Dutch BITs are the second most frequently invoked BITs in the world, second only to the United States, and they are renowned for the protection they offer. The Dutch government intends to renegotiate and modernise its BITs and has drafted a Model BIT that is intended to serve as the basis for those negotiations. It is likely to take at least one or two years before
the first renegotiated BITs, based on the new Model BIT, take effect, and existing BITs will continue to be in effect for existing investments for a certain period, depending on the transitional regime. Dutch BITs are well known for offering robust protection for investors. Following the global debate about alleged disparities in investment treaties, the new draft Model BIT aims to rebalance the rights and duties of states and investors. The new draft Model BIT introduces stricter eligibility requirements for investors to qualify for protection, and also contains some other restrictions on investment protection. However, improvements that are beneficial to investors are included too, for instance on the efficiency of arbitration proceedings and on the standards of state behaviour. Developments in investment treaty renegotiations will be closely followed by businesses structured through the Netherlands that wish to rely on the protection offered by the Dutch BITs, and they are advised to monitor negotiations regarding the BIT relevant to their investment.

In 2019, a bill was sent to the Parliament to amend the restructuring law. The bill features elements of the UK Scheme of Arrangements and the US Chapter 11 procedure. Under the proposal, a debtor may offer an extrajudicial restructuring plan to all or some of its creditors and shareholders. When the plan is confirmed by the court, it is binding on all affected parties. If this bill becomes law, it is expected that it will lead to more litigation in restructuring matters.
INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

The Norwegian legal system is based on written statutory law, which constitutes the backbone of the legal framework. However, the text in the acts often leaves room for interpretation. Case law from the Supreme Court, with interpretation of the written acts, is therefore also an important source of law. Preparatory works makes up another important secondary source of law, carrying weight through shedding light on the rationale underpinning the statutes in force.

The Norwegian courts are organised in a three-tier system. The initial level is comprised of 60 district courts. Decisions from the district courts can be appealed to one of the six appeal courts. Judgments from the appeal courts can be appealed to the Supreme Court. However, the Supreme Court decides itself which cases it will hear and focuses on disputes that possess potential legal value as precedent.

The ordinary courts in Norway are generalist courts that hear all types of cases, both civil and criminal. The judges have different backgrounds: some are from the public sector such as ministries, the Attorney General or council solicitor, some from the prosecution authority and some are lawyers from private law firms.

Norway is not a member of the EU; however, Norway is closely related to the EU through the EEA Agreement. As part of the EEA Agreement a lot of EU law is implemented into Norwegian law.

Furthermore, the Norwegian state is under a constitutional obligation to uphold and fulfil recognised human rights. Through a separate Act of 1999 several human rights conventions were formally transposed into Norwegian law, for example the Council of Europe Human Rights Convention of 1950.

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1 Carl E Roberts is a partner and Fredrik Lilleaas Ellingsen is a senior lawyer at Advokatfirmaet Selmer AS.
2 According to the Supreme court’s annual report for 2018 only 12.2 per cent of civil judgments appealed were admitted to hearing in the Supreme Court.
3 The EEA Agreement stands for the Agreement on the European Economic Area. This agreement entered into force 1 January 1994 and brings together the EU Member States and the three EEA EFTA States – Iceland, Liechtenstein and Norway – in a single market, referred to as the Internal Market.
4 For further information about what is included in the EEA Agreement and what it not see for instance the homepage of EFTA: https://www.efta.int/eea/eea-agreement.
5 The Norwegian Constitution of 17 May 1814 Part E.
6 Act No. 30 of 21 May 1999.
II THE YEAR IN REVIEW

Highlights from the past year include three cases from the Norwegian Supreme Court.

i Access to electronic evidence (HR-2019-997-A)

Norwegian company Felleskjøpet Agri SA had been ordered by the Court of Appeal to present an extensive body of digital evidence in the appeal case against the global software company Infor, in connection with a substantial compensation claim exceeding 300 million kroner following the collapse of an IT project.

The Supreme Court disagreed with the Court of Appeal’s view that it would be easy to seek and sort out the referenced documents. Nor were the requirements for relevance, specification and proportionality under the Norwegian Dispute Act correctly interpreted by the Court of Appeal, according to the Supreme Court.

The Supreme Court stated it would take far more time and effort to comply with the order than the Court of Appeal had assumed. The joint and very brief reasoning for the relevance of the evidence was not sufficient. The Court of Appeal should also, by its own initiative, have considered limiting the order. The documents were not sufficiently specified, and the order had to be regarded as disproportionate.

The Supreme Court maintained that the request for evidence under the Norwegian Civil Procedural Rules must be specified as far as possible, although this may be difficult in cases with an extensive body of electronically stored material. The Supreme Court thus accepted the argument from Felleskjøpet that if a petition for access to evidence is not sufficiently specified, the result would be a legal system equivalent to the US rules of evidence for discovery.

ii Special venue according to the Lugano Convention (HR-2019-2206-A)

A number of European truck manufacturers were subject to extensive fines by the European Commission for price cooperation. Posten Norge AS with Norwegian and foreign subsidiaries had purchased a significant number of trucks from these manufacturers, including a Norwegian subsidiary. This subsidiary was not covered by the Commission decision. Nevertheless, Posten Norge AS and its subsidiaries initiated a case before the Oslo District Court against all manufacturers together with the Norwegian subsidiary, citing Article 6(1) of the Lugano Convention on special venue. It was alleged that the defendants were jointly and severally liable for loss the price cooperation had inflicted on the plaintiff.

The Supreme Court stated that the condition in Article 6(1) of the Lugano Convention – that the requirements must be closely linked for the provision to apply (the ‘affiliation requirement’) – presupposes that the same legal and factual situation presents a risk of different judgments if decided in separate cases. The plaintiff has the burden of proof that the conditions for cumulation are fulfilled. According to the Supreme Court, a detailed assessment must be made of whether the requirements are so closely linked in law and in fact that it is desirable to combine them for joint handling. The plaintiff must demonstrate a certain likelihood that the affiliation requirement is met.

The fact that the Norwegian subsidiary was not covered by the Commission decision did not prevent the company from being made an anchor defendant. Nor could it be required that the company should have participated on an equal footing with the addressees of the
decision. The procedural requirement in Article 6(1) of the Lugano Convention was fulfilled also regarding the foreign plaintiffs. Subsequently, the Supreme Court ruled that Norwegian courts had jurisdiction for all claims against all foreign defendants.

iii Security of legal costs for foreign nationals in securing of evidence cases (HR-2018-2164-U)

According to Section 20-11 of the Dispute Act, persons or entities who are sued by foreigners in Norway can demand that the foreign plaintiff provide security for case costs. In a case that was decided by the Supreme Court in late 2018, the question was whether this also applies to securing of evidence cases according to Chapter 28 in the Dispute Act. The main rule in Norwegian civil procedure law is that a possible plaintiff cannot use the courts to demand documents or other evidence from a possible defendant before a writ is filed. However, in certain circumstances it is possible to claim access to potential evidence from potential defendants before a writ is filed. The conditions for this are rather strict. The main rule regarding petitions for securing of evidence is that the one who demands access to evidence before a writ is filed has to pay the case costs incurred upon the defendants regarding the evidence dispute.

In the case at hand the Russian citizen Alexander Tugushev filed a petition for securing of evidence to Oslo District Court in August 2017 towards several persons. The defendants objected to the claim for securing of evidence and demanded that Tugushev provided security for their case costs for this procedural dispute. Oslo District Court did not grant security for case costs as it found that securing of evidence cases was outside the scope of Section 20-11 of the Dispute Act. This decision was appealed to Borgarting Appeal Court. The majority in Borgarting Appeal Court found that Section 20-11 was applicable and ordered Tugushev to provide 7 million kroner as security for case costs. One judge agreed with the District Court. Tugushev then appealed to the Supreme Court. However, the Supreme Court dismissed the appeal and confirmed that Section 20-11 also applies to securing of evidence cases where the defendants are made aware of the claim for securing of evidence and there is a dispute regarding whether the conditions for securing of evidence are fulfilled or not.

The Supreme Court also confirmed that the application of Section 20-11 in such cases is not contradictory to the Hague Convention of 1 March 1954 on Civil Procedure.

III COURT PROCEDURE

i Overview of court procedure

Norwegian civil court proceedings are governed by the Dispute Act of 2005, which entered into force in 2008. The Dispute Act is supplemented by the Court Act of 1915 and special procedural rules according to, for example, the Enforcement Act and the Bankruptcy Act.

The Dispute Act is based on the principles of orality, proportionality, concentration, contradiction, immediacy and the parties’ right of free disposition. The principle of immediacy

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7 There are exceptions to this main rule, for instance if the plaintiff is from a country that is party to the Lugano Convention.
8 Act No. 90 of 17 June 2005.
9 Act No. 5 of 13 August 1915.
11 Act No. 58 of 8 June 1984.
entails that the court may only base its judgment on what has been said or argued during the main hearing.\textsuperscript{12} According to the principle of orality, all written evidence and witnesses must be presented to the court by reading of documents and testimony by witnesses before the court.

The principle of free disposition implies, inter alia, that the court’s judgment must fall within the scope of the parties’ request for relief and the court may only base its ruling on the grounds for the request for relief that have been invoked. The parties also have the primary responsibility for presenting evidence.

All communication between counsel and the courts of all instances is performed electronically through a digital litigation platform, which from 2019 is mandatory for all counsel. This has also led to court hearings being based on digital extracts of the written evidence uploaded through the platform, enabling counsel and judges to work digitally throughout the case.

The Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, including protocols and annexes, adopted in Lugano on 30 October 2007 (the Lugano Convention 2007), applies as statutory law in Norway.

\section*{ii Procedures and time frames}

A lawsuit before Norwegian courts is initiated by filing a statement of claim with the competent district court or conciliation board. The statement of claim must meet certain content requirements set forth in the Dispute Act.\textsuperscript{13}

\textbf{Conciliation board proceedings}\textsuperscript{14}  

Before an asset claim can be heard by the district court, it must be heard by the conciliation board unless the amount in dispute is at least 125,000 kroner and both parties have been represented by a lawyer. The procedure before the conciliation board shall assist the parties in achieving a simple, swift and inexpensive resolution of the case through mediation or judgment.

However, the conciliation board may only pass judgment at the request of one of the parties if the case concerns an asset claim and the amount in dispute is less than 125,000 kroner. Judgments of the conciliation board may be appealed to a district court, within one month of the conciliation board’s judgment.

\textbf{Court proceedings}  

After receipt of the statement of claim, the district court will order the defendant to file a statement of defence, which should normally be filed within three weeks. Any objection to the court’s jurisdiction or other grounds for dismissal must be mentioned in the statement of defence. If the defendant fails to file a statement of defence within the time limit set forth by the court, the court will normally award a judgment in absentia based on the plaintiff’s presentation of the case and the claim.

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\textsuperscript{12} A main hearing is usually held in all cases. Procedural matters are normally solved through written submission.
\textsuperscript{13} Dispute Act Section 9-2.
\textsuperscript{14} The conciliation board is made up of laymen.
\end{flushright}
Depending on the circumstances of the case and amount in dispute, the procedure will follow either the small claims track or the normal procedure. The small claims procedure encompasses all cases where the amount in dispute is less than 125,000 kroner.

After receipt of the statement of defence, the court will schedule a preparatory meeting. During the preparatory meeting, important procedural questions and dates are clarified, including the time of the main hearing and whether a judicial mediation meeting should be scheduled. The main hearing shall be scheduled not more than six months after the receipt of the statement of claim, unless special circumstances necessitate this.

At each stage of the case, the courts shall consider the possibility of a full or partial amicable settlement to the legal dispute through mediation or judicial mediation, unless the nature of the case or other circumstances suggest otherwise. Judicial mediation is court-assisted mediation where a judge or a court-appointed expert acts as mediator. This service is quite often used by parties, particularly in commercial disputes.

Following the conclusion of the preparation phase, the parties must prepare a summary of submissions. After the date of these submissions, the parties may no longer submit new claims, new legal arguments, written evidence or witnesses without either the other party or the court consenting to this.

The main hearing may be divided into three subphases:

- the opening statement, which includes presentation of written evidence;
- testimony from the parties and hearing of witnesses, including expert witnesses; and
- the closing statements.

During the opening statement, the claimant’s counsel shall present the case in a focused manner and review documentary evidence and other evidence that will not be given in the course of testimony or at an on-site inspection. The defendant’s counsel will then be given the opportunity to present the defence. The opening statement shall be of a more objective nature and less argumentative than the closing statement.

The second subphase consists of testimonies from both parties and witnesses. The claimant shall testify first unless special reasons suggest otherwise. Then the court will hear witnesses, including private and court-appointed expert witnesses.

Finally, the parties’ counsel shall be permitted to address the court twice by way of closing statements.

The judgment shall be pronounced within four weeks after the main hearing or appeal hearing is concluded. If the case is heard by a single judge at the district court level, the time limit is two weeks.

A judgment or procedural order by the district court can be appealed to the court of appeal. Further appeal to the Supreme Court is possible, but the Supreme Court will only hear disputes that possess potential legal value as precedent, or if the dispute is of particular interest to one or more of the parties involved.

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15 Cfr. the Dispute Act Section 8-1(1).
16 However, there is no formal sanction if the time limit is not met by the court.
iii Class actions

The possibility of class actions was introduced in Norway in 2008 through Chapter 35 of the Dispute Act. The conditions for class actions are that (1) several legal entities have a claim or obligation based on the same or substantially the same factual and legal basis; (2) the claims can be decided by the court according to the same procedural rules; (3) the class action is the most suitable way of handling the case; and (4) it is possible to designate a group representative according to the regulations in the Dispute Act Section 35-9. The group representative will be responsible for case costs. There is possibility for both opt-in and opt-out variations of a class action.

Although the class action possibility has existed for 12 years now, there have not been many class action cases in Norway. Nevertheless, there have been some, for instance class actions towards banks. One case that received a great deal of public attention was a case led by the Norwegian Consumer Council on behalf of 180,000 persons against Norway’s largest bank, DNB, regarding a claim for repayment of charges for administration of funds the bank had charged its customers. DNB won the case in the district court, but the consumers won the case in the appeal court. DNB has appealed to the Supreme Court and the case is yet to be decided there.

Another well-known class action case was a case launched by property owners in Oslo against the Municipality of Oslo regarding property valuation tax. The case went all the way to the Supreme Court in 2019 and the property owners partly won the case.

iv Representations in proceedings

Natural persons have the right to represent themselves in court proceedings. Employees may represent legal entities. Beyond this, the main rule is that only lawyers and authorised assistant lawyers may act as counsel in legal proceedings.

If a party who is not represented by counsel is unable to present the case in a comprehensible manner, the court may order the party to engage legal counsel.

A foreign lawyer may act as counsel if the court finds no objections to this in view of the nature of the case and other circumstances.

v Service out of the jurisdiction

Norway accepts service of documents in civil matters outside of the jurisdiction to persons who have a known address abroad, if and to the extent this is accepted by the relevant local law. The main regulation is the Court Act Section 180 and Regulation No. 1810 of 11 October 1985 on Postal Service, supplemented by relevant treaties.

The most important treaty regarding service out of the jurisdiction in civil matters that Norway has ratified is the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. This convention

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17 Dispute Act Section 35-2.
18 Case reference is LB-2017-34099 regarding the conditions for class action and LB-2018-43087 regarding substance.
19 Case reference is HR-2019-1198-A.
applies between Norway and the signatory states. For service within the Nordic countries, the Nordic Convention on Mutual Legal Assistance in Service and Taking of Evidence of 1974 applies.\textsuperscript{21}

The main rule is that service out of the jurisdiction to Norwegian citizens is done through the Norwegian embassy or other Norwegian foreign service mission. Otherwise, service is performed according to applicable treaties and relevant local law.

Norwegian authorities can serve through the post service to the extent this is accepted by other states through treaties.\textsuperscript{22}

In cases where Norway has no treaty with a state regulating service in that state, a request for service can be sent through the Norwegian Ministry of Justice. The Ministry of Justice will then send it via the relevant Norwegian foreign mission, which will pass it on to the relevant state’s Ministry of Foreign Affairs. Experience shows that service often is obtained through such procedure even though there is no treaty between the states.

\textbf{vi Enforcement of foreign judgments}

Civil claims that have been decided in a foreign state by way of a final and enforceable ruling passed by that state’s courts or administrative authorities or by way of arbitration or in-court settlement shall also be legally enforceable in Norway to the extent provided by statute or agreement with the said state.\textsuperscript{23}

The most important treaty regarding enforcement is the Lugano Convention of 2007. There are few bilateral agreements between Norway and other states regarding enforcement.

Final and enforceable rulings on civil claims rendered by a foreign court are also enforceable in Norway if foreign jurisdiction has been agreed between the parties.\textsuperscript{24}

As for arbitration rulings, they are enforceable in Norway in accordance with the Convention of the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention).

\textbf{vii Assistance to foreign courts}\textsuperscript{25}

Assistance to foreign courts is regulated in the Court Act Section 46 supplemented by treaties. A main principle is that a request for assistance shall be sent through the Ministry of Justice. Norway only has agreements regarding direct contact with local courts with the Nordic countries and Germany.

Important treaties which are ratified by Norway regulating assistance to foreign courts include the Hague Convention of 1 March 1954 on civil procedure, the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

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\textsuperscript{21} Treaty of 26 April 1974 between the Nordic countries regarding mutual legal assistance.

\textsuperscript{22} Regulation No. 1810 of 11 October 195 on Postal Service was amended in 2001 to allow for this.

\textsuperscript{23} Dispute Act Section 19-16(1).

\textsuperscript{24} Dispute Act Section 19-16(2).

\textsuperscript{25} Guidance on assistance to foreign courts is given in the Ministry of Justice’s Circular Letter G-04/2007 Section 3.
viii  Access to court files
The public is entitled to access court hearing protocols, protocols from judicial mediation, judicial rulings and statements of costs.

In cases that are subject to an oral hearing, the public is also entitled to access closing statements, submissions, evidence that has been invoked during the oral hearing and supporting documents.

With some exceptions, all court hearings are open to the public.

ix  Litigation funding
Generally litigants will have to fund their own litigation or by means of insurance. There is an Act on legal aid which gives right to free (or partly free) legal assistance in certain cases. However, the criteria are strict (e.g., very low income).

Third-party litigation funding is legal in Norway. However, historically there has not been a tradition for that. Nevertheless, over the past few years third-party litigation funding has increased and Therium Nordic AS has emerged as probably the most notable player in the Norwegian litigation funding market.

IV  LEGAL PRACTICE
i  Conflicts of interest and Chinese walls
Conflicts of interest are regulated in the Bar Association’s Code of conduct for lawyers, which is incorporated into a regulation to the Court Act. Section 3.2 of the Code of conduct deals with conflict of interest issues. The main rule is that a lawyer should not take an assignment if there is a risk of breach of the lawyer’s loyalty towards a client or if there is a risk of breach of the lawyer’s duty to act independently. Chinese walls are not accepted.

ii  Money laundering, proceeds of crime and funds related to terrorism
Measures against money laundering are regulated in the Anti-Money Laundering Act of 1 June 2018. The Act implements the Fourth EU Directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

The Act applies to lawyers in several cases, for instance when assisting clients with financial transactions. However, assistance of clients in disputes is generally exempted from the scope of the Act.

iii  Data protection
A new Act on Data Protection entered into force on 20 July 2018. This Act incorporated the EU General Data Protection Regulation into Norwegian law. Hence, Norwegian law is compliant with the harmonised EU rules on data protection.

26 Dispute Act Chapter 14.
27 Act No. 35 of 13 June 1980.
28 Regulation No. 1161 of 20 December 1996 to Act No. 5 of 13 August 1915. The Code of conduct rules are found in Chapter 12 of the Regulation.
29 The Fourth EU Directive was implemented into the EEA Agreement in December 2018.
30 Act No. 38 of 15 June 2018 on handling of personal data.
V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege
Communication between lawyers and their clients is subject to legal privilege. The same applies to in-house counsel and foreign lawyers.

According to the Supreme Court's practice, everything a lawyer obtains or gains access to on behalf of the client as part of a client relationship is subject to legal privilege. This also covers the existence of a client relationship, the client's identity and other information that can directly or indirectly provide the basis for conclusions about the contact the lawyer has or has had with the client and others in connection with the assignment.

ii Production of documents
Norwegian rules on the production of documents are more restricted than, for example, the US rules on discovery. The parties shall provide such accounts and present such evidence as are necessary to fulfil their duties according to the Dispute Act, and they have a duty to give testimony and access to evidence. A party shall also disclose the existence of important evidence that is not in the party's possession and of which the party has no reason to believe that the opposite party is aware.31

Normally petitions for access to evidence is made by informal 'provocations' set forth in pleadings by either party. If the counterparty does not comply, the court shall, however, give an order as to whether the party must present the requested evidence. A formal petition for access to evidence must meet requirements for relevance, specification and proportionality under the Dispute Act.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation
Although most disputes are settled in the ordinary courts, both arbitration and mediation are common methods of settling disputes in Norway.

Arbitration has traditionally been mostly ad hoc arbitration. However, this might be on the brink of changing. The Arbitration and Dispute Resolution Institute of the Oslo Chamber of Commerce (the OCC Institute) has revitalised its rules to make them more attractive and at the end of 2017 a new arbitration institute, the Nordic Offshore & Maritime Arbitration Association (NOMA), was established. The main purpose of NOMA is to facilitate international arbitration in the Nordic countries, and it has already been used in several cases.

Mediation is offered by all courts but can also be arranged privately outside of court.

31 Dispute Act Section 21-4.
All arbitration that takes place in Norway – both domestic and international – is governed by the Norwegian Arbitration Act No. 25 of 14 May 2004 (NAA). The NAA is based on the UNCITRAL Model Law, and applies to all types of cases, small and large, professional parties and consumers.

Since the NAA applies also to all domestic arbitration cases, the build-up and content of the NAA is somewhat different from the Model Law. Hence, the NAA is more detailed than the Model Law. Some issues that can be highlighted are as follows.

**Confidentiality and public access**

According to Section 5 of the NAA, the arbitral proceedings and the arbitral award are not confidential unless the parties have specifically agreed to this regarding the specific case at hand. An agreement on confidentiality has to be entered into after the dispute has arisen. It is not sufficient to agree to this beforehand in the agreement containing the arbitration clause. The Model Law does not have such a clause.

**The arbitration agreement**

NAA Section 10 has provisions regarding the arbitration agreement. It does not require the arbitration agreement to be in writing, although this is most common. According to NAA Section 10 second paragraph, an assignment of a contract also includes assignment of an arbitration clause if the opposite has not been agreed by the parties.

**Evidence**

NAA Section 28 has regulations regarding evidence. The parties have the responsibility for presenting the evidence in the case and parties have the right to submit whatever evidence they wish. However, the arbitration tribunal may refuse evidence that clearly is not significant to the case. Further, the arbitration tribunal may limit the submission of evidence if the amount of submitted evidence is disproportional to the significance of the dispute for the parties or the significance the evidence can have for the decision of the dispute.

**Application of law**

If the parties have not decided on any substantial law, the arbitration tribunal shall apply the Norwegian conflict of laws rules. The arbitration tribunal can only make its decision based on reasonableness if the parties have explicitly agreed to this.

**Costs**

Chapter 8 of the NAA (Sections 39–41) have regulations regarding determination of costs to the arbitration tribunal (Section 39), allocation of the determined costs to the arbitration tribunal and the parties’ case costs between the parties (Section 40) and provisions regarding security for costs (Section 41). Such provisions are not found in the Model Law.

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32 A more thorough review is given by Carl E Roberts and Norman Hansen Meyer in *The International Arbitration Review*, Norway chapter, 2019.
According to Section 39, the arbitration tribunal determines its own remuneration and expenses to be covered, if nothing else has been agreed between the arbitral tribunal and the parties.

The parties are jointly liable for the costs to the arbitration tribunal, but, upon request from one of the parties, the arbitration tribunal can divide the costs of the arbitration tribunal between the parties as the arbitration tribunal finds appropriate. According to NAA Section 41, the arbitration tribunal can demand that the parties provide security for the costs of the arbitration tribunal, if the opposite has not been agreed between the arbitration tribunal and the parties.

Upon request from one of the parties, the arbitration tribunal can decide that the other party must cover all or part of the costs of the opposing party to the extent the arbitration tribunal finds this appropriate.

**Consumer protection**

According to NAA Section 11, arbitration agreements entered into before the dispute materialised are not binding on the consumer. However, a consumer can agree to arbitration after the dispute is a fact. In this case, the arbitration agreement where the consumer is a party must be in writing in a separate document signed by both parties.

The above said, in general it is fair to say that the deviations from the Model Law are immaterial. It is also possible for the parties to contract out of the provisions of the NAA, and hence adjust deviations from the NAA if desired.

Regarding composition of the arbitration tribunal, the main rule is a tribunal of three arbitrators. In smaller cases, it is quite common for the parties to agree on a single arbitrator. Where the tribunal is to consist of three members the main rule is that the parties try to agree on all three arbitrators and that the whole tribunal is appointed jointly by the parties without getting to know which of the parties nominated each of the arbitrators. The fall back, if the parties do not agree to the full composition of the arbitration tribunal, is that each party nominates one arbitrator and these two jointly appoint the chairperson.

**iii Mediation**

There has been quite a lot of focus on mediation in recent years in Norway. All courts offer in-court mediation, which is regulated by the Dispute Act Chapter 8. However, it is up to the parties if they want to accept in-court mediation. A substantial number of disputes are mediated in the courts each year, especially at the district court level. Out of the disputes that are mediated in court, a high percentage are resolved during the mediation process or shortly thereafter. The mediation in court is led by a judge who acts as a mediator. The parties are free to leave the mediation at any point in time. If the dispute is not resolved through the in-court mediation, the case will be handed over to another judge for adjudication. There is full confidentiality of everything that has been said in the mediation, so the new judge who will decide the case does not receive any information on what the parties’ positions have been in the mediation process.

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33 NAA Section 39 second paragraph.
34 NAA Section 40 first paragraph.
The Dispute Act also has rules in Chapter 7 on out-of-court mediation, which the parties can agree to follow if they prefer. It is also possible for parties to have a private mediation without following the rules set out in the Dispute Act Chapter 7. There has been an increase in private mediations over the past few years, particularly in large construction disputes. The Norwegian Bar Association has recently established a certification programme for mediators.

VII OUTLOOK AND CONCLUSIONS

The current Dispute Act entered into force in 2008. One of the main goals was to make the procedure for handling of civil cases more effective, cost-efficient and proportional. The court was imposed with a stricter duty to be more hands on regarding the administration of each case also before the main hearing. In general, the Dispute Act has been well received. However, the Ministry of Justice has evaluated the effects of the Act and proposed some changes to make the Act even more efficient. The proposals were sent for public hearing in July 2018.\textsuperscript{35} The Ministry of Justice is still evaluating the input from the hearing and it remains to see what changes will ultimately be proposed to Parliament.

From 2019 all correspondence between lawyers and the court in civil matters must be electronic through the web-portal ‘Aktørportalen’. It remains to be seen to what extent this will enhance the efficiency of the handling of civil cases.

\textsuperscript{35} Hearing Letter from the Ministry of Justice of 12 July 2018 (Snr. 18/3837).
Chapter 24

PORTUGAL

Francisco Proença de Carvalho and Madalena Afra Rosa

I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

In Portugal, judicial litigation is the most widely used type of dispute resolution. In fact, the majority of conflicts are resolved by the national judicial system, through its large court network, subject to specific and complex procedural rules. However, owing to the lack of efficiency of the Portuguese judicial system, the importance of arbitration and other alternative dispute resolution methods has been increasing significantly.

There are three levels of judicial jurisdiction in Portugal: first and second instance courts and the Supreme Court. Within the first instance there are specialised courts for specific matters, such as civil, criminal, commercial, labour, family, competition and intellectual property rights courts. Recently, the Appeal Court of Lisbon has also created specialised and autonomous sections for appeals concerning specific matters such as commercial, competition and intellectual property rights litigation.

Since the length and duration of judicial proceedings are still the main problem of dispute resolution in Portugal, during recent years the state has been actively amending the legal system. In order to address the growth of judicial litigation and to improve the effectiveness and the level of specialisation of the courts and judges, the state has not only implemented procedural rules but also improved its infrastructures (building new courts, implementing new technologies) and modified the structure of the judicial organisation.

As was the case in 2017 and 2018, 2019 was a year of stabilisation and consolidation of the legislation that has been in force since 2013 and 2014. Progress has been made and the duration of declarative proceedings has decreased exponentially from an average of 20 months in 2013 to an average of 13 months in 2018.

II THE YEAR IN REVIEW

In 2019, there have been no major judicial reforms as the year was marked by the general election of October 2019.

Nevertheless, in the past year, digital access to courts and pending proceedings has improved further from 2018.

Previously, only the parties had digital access and they could only electronically submit the pleadings regarding civil proceedings pending in the first instance courts. However, since 2018 all the judicial proceedings, including those pending in appeal courts, are digitally

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available, except for the pretrial stage of the criminal proceedings. Since 2019, the Civil Procedure Code establishes that trials may be recorded by video or audio and witnesses may be heard by videoconference from different locations (i.e., not from court), such as the premises of the municipality or parish where the witness lives. In addition, citizens may consult court cases, obtain information, request certificates and file documents or pleadings in any court (i.e., it need not be the court hearing the case). These measures are expected to decrease costs, promote a more efficient and expedited resolution of conflicts, and to bring citizens closer to the judicial system.

The resolution measures applied by the Bank of Portugal to Banco Espírito Santo (which was one of the biggest Portuguese private banks) in 2014 and to Banif (a Portuguese private bank) in 2015, respectively, are still contributing to an increase in the number of client, shareholder and bondholder disputes.

Litigation costs have continuously increased in recent years. According to the Litigation Costs Regulation, parties involved in court proceedings are obliged to pay court fees. The exact amount to be paid depends on the value of the claim, which means that the higher the value of the claim, the more court fees will be charged. However, in cases where the value of the claim is above €275,000, the losing parties may request the court to relieve them of the payment of a large percentage of the court fees. The high cost of litigation has been under discussion and the government may take some measures to make the cost more reasonable and fair.

Although this trend has slowed down in recent years, the economic crisis (2010–2014) is still influencing the upsurge in lawsuits and insolvency proceedings of a heightened level of complexity and value. The Insolvency Law was amended (and came into force on 20 May 2012) to introduce fast-track court approval procedures for restructuring plans, which have proved to be successful. In particular, the Special Recovery Procedure seeks to provide borrowers with some leeway in negotiating recovery plans with their creditors in the event of imminent insolvency.

The Special Recovery Procedure was recently amended and the major change is that it is no longer applicable to any debtor facing a situation of insolvency. It is now only applicable to companies. That being said, a new special procedure was also created, which is applicable to natural persons, with the difference of being much more simplified than the Special Recovery Process.

Another legislative novelty was the implementation of extrajudicial regulation for the recovery of companies (RERE), which replaced the extrajudicial system of company rehabilitation (SIREVE). This new regulation allows a debtor facing economic and financial struggles to negotiate with its creditors in order to reach a free and confidential restructuring agreement. This is an extrajudicial process, which means that it takes place without the intervention of the courts.

Along with the implementation of RERE, other legislative changes included the creation of a regulation for the conversion of credits into capital, a regulation regarding the mediator of the companies’ recovery and a regulation on the appropriation of a pledged asset in the context of commercial pledges.

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2 Decree-Law No. 97/2019 of 26 July.
III  COURT PROCEDURE

i  Overview of court procedure

Both civil and criminal proceedings include different stages. Generally, proceedings are initiated by the parties submitting pleadings, followed by a stage in which evidence is provided. The Civil Procedure Code establishes that all witnesses must be indicated in the claim at the time it is submitted. Subsequently, the trial takes place and the court issues its decision. Finally, provided that specific conditions are met, the parties can appeal the judgment.

ii  Proceedings and time frames

There are two kinds of civil proceedings: declarative and enforcement. Through the former, the court’s decision has res judicata effect. According to the Civil Procedure Code currently in force, the court decides on issues raised by the parties. The court may only take decisions on facts that were not raised by the parties if those facts are instrumental, complementary or noticeable. The court can only convict the defendant to the extent required by the claimant.

Enforcement proceedings may serve three purposes:

a  the payment of an amount;

b  the delivery of a specific object; or

c  forcing the counterparty to carry out a certain action.

Said enforcement proceedings are filed based on an enforcement title that can be a previous court decision or certain documents established at law (for instance, some contracts, mortgages or deeds provided that the documents are signed before a notary public\(^3\) or certified by the same, and also cheques).

Usually it takes one to three years for a final court decision to be issued in ordinary declaratory proceedings, while enforcement proceedings tend to take from one to two years.

To avoid damages resulting from the delay in court decisions and to ensure the effectiveness of the final decision, a claimant may request that the court issues an adequate preliminary injunction, which are urgent proceedings that can take from three to six months.

The above-mentioned time frames are indicative, as the proceedings may be longer or shorter, depending on the workload of the court before which the claim is filed and the particular circumstances of the case, as well as the arguments put forward.

Since 2014, it has been possible to launch pre-enforcement extrajudicial proceedings\(^4\) that allow the claimant to verify whether the defendant has any attachable assets before filing a claim.

Unlike civil proceedings, where the parties play a major role (although courts play an increasingly important role under the new Civil Procedure Code), in criminal proceedings the court has total control of the case and the duty to seek the truth. In this respect, the

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\(^3\) Before the new Civil Procedure Code entered into force (on 1 September 2013), private documents signed by the debtor were considered to be an enforceable title. Under the new provisions of the Civil Procedure Code, this was deemed no longer to be the case. On 23 September 2015, the Constitutional Court held that it was unconstitutional for such provisions to operate retroactively regarding private documents. Thus, private documents signed before 1 September 2013 still constitute an enforceable title (Judgment No. 340/2015).

\(^4\) Law No. 32/2014 of 30 May and Ministerial Order No. 233/2014 of 14 November.
court may order the execution of any proceedings required to uncover the truth. Generally, ordinary criminal proceedings in Portugal take almost two years, but in specific cases, such as white-collar crimes, proceedings tend to take longer. Once again, the duration of the proceedings provided here is also merely indicative.

As an attempt to reduce the length of criminal proceedings, the amendment to the Criminal Procedure Code\(^5\) of 2016 expanded the range of crimes that can be prosecuted under a summary procedure.

### 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:

- 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
- guarantee the defence of state property, the property of the autonomous regions or of the local authorities (e.g., municipalities).

Class or group proceedings can be brought by individuals, associations and foundations created for the defence of relevant interests (regardless of their direct interest in the case), and local authorities regarding the interests of their residents, within their respective areas.

### iv Representation in proceedings

In civil proceedings, parties must be represented by a lawyer whenever the value at stake exceeds €5,000, or when the proceedings are taking place before the higher courts.

In criminal proceedings, individuals considered formal suspects must be assisted and represented by a lawyer at several stages. Therefore, the assistance of lawyers is mandatory, among other matters, during interrogation, trial and appeal. As regards the representation of victims, specific acts must also be carried out together with the assistance of lawyers, such as filing personal claims or appeals. Conversely, witnesses may also be assisted by lawyers, but only to ensure that they know their rights.

### v Service out of the jurisdiction

Pursuant to the Civil Procedure Code, when a defendant’s domicile is located outside the Portuguese jurisdiction, the initial summons or other notices requesting attendance to court will be served by post, by means of a registered letter with acknowledgement of receipt, unless applicable international treaties or conventions provide otherwise.

Other notices will be served to the lawyer appointed by the party. Service of judicial and extrajudicial documents in civil and commercial matters within the European Union is

\(^5\) Law No. 1/2016 of 25 February.
Portugal

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governed by Council Regulation No. 1393/2007 of 13 November, in which the particular formalities are set out, especially concerning the obligation to serve notice through the public authorities of the addressed state and to comply with specific rules of the relevant jurisdiction.

In criminal proceedings, notices for parties whose domicile is outside the Portuguese jurisdiction will be served according to the rules set out in international treaties and conventions. Portugal is a party to the Convention on Mutual Assistance in Criminal Matters established between Member States of the European Union of 29 May 2000. Pursuant to this Convention, as general rule, each Member State sends procedural documents directly to the persons who are in the territory of another Member State, by post. 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. Pursuant to this Convention, documents will be served by means of letters rogatory sent to the competent entities of the state concerned.

vi Enforcement of foreign judgments

Within the EU, Council Regulation No. 1215/2012, 12 December 2012 sets out the conditions under which a judgment (concerning civil and commercial matters) issued in a Member State can be enforceable in another Member State.

Therefore, pursuant to this Regulation, a judgment issued in a Member State and enforceable in that Member State may be enforceable in Portugal when, upon filing of a judicial application by the interested party, the court has recognised the enforceability of the judgment. The application of enforceability is filed before the competent superior court. Without prejudice to the international conventions and treaties in force (for instance, the Lugano Convention), under Portuguese law, it is generally possible to enforce foreign civil judicial judgments upon a prior confirmation procedure before a Portuguese court. This confirmation will be granted whenever:

a there are no well-grounded doubts concerning either the authenticity of the submitted documents or the fairness of the decision;

b the decision is final according to the law of the country where the judgment was rendered;

c the object of the decision does not fall within the exclusive international jurisdiction of Portuguese courts and the jurisdiction of the foreign court has not been determined fraudulently;

d there are no other pending proceedings between the same parties, based on the same facts and having the same purpose, and no ruling on the same case has been issued by a Portuguese court;

e the defendant was duly notified of all the proceedings according to the law of the country where the judgment was rendered;

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6 As amended by Council Regulation No. 17/2013, 13 May.
7 Article 5.
f. the foreign court proceedings complied with the procedural law requirements and each party received an adequate opportunity to present their case fairly; and

g. the acknowledgement of the decision is not patently incompatible with the public policy of the Portuguese state.

vii Assistance to foreign courts

Portuguese courts can provide assistance to foreign courts when required by means of letters rogatory, unless the execution of the requested proceedings violates Portuguese public policy, the letter rogatory is not duly legalised, the execution of the requested proceedings compromises national sovereignty or security, or the execution of the requested proceedings leads to the execution of a foreign court decision subject to confirmation by the Portuguese courts.

viii Access to court files

The Civil Procedure Code, as a general rule, provides that court files may be accessed by the parties, lawyers or any person with a relevant interest in the proceedings; however, the examination of court records is more restricted when the disclosure of information may cause damage to a person's dignity or privacy, is contrary to public values (e.g., adoption or divorce proceedings) or may harm the effectiveness of the decision to be issued by the court, such as, for instance, in interim application proceedings. According to a recent amendment to the Civil Procedure Code, access to a case file may be restricted in compliance with the General Data Protection Regulation if the personal data derived from the proceedings is not relevant for the subject matter of the dispute.

In addition, the Criminal Procedure Code, as a general rule, provides that parties and lawyers are allowed to access the court records. Nevertheless, the examination of court records at the investigation stage always requires the public prosecutor's or the judge's authorisation. Third parties who have relevant interests in the proceedings may also request authorisation to access court files, unless the proceedings are confidential. This occurs whenever the public prosecutor or judge forbids the parties and their respective lawyers from accessing such records during the investigation stage, since their disclosure could interfere with the investigation or cause damage to any of the parties.

ix Litigation funding

Third-party litigation funding is not regulated or prohibited by Portuguese law.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

Conflicts of interest are currently a central issue in the Portuguese legal system, which promotes the prevention or prohibition of any conduct that may lead to such a conflict by a lawyer or law firm.

The regime seeks both to protect and to promote the dignity and independence of a lawyer in his or her role as an active participant in the administration of justice and to ensure the relationship of trust that must be established between a lawyer and his or her client.

The main sources of law regarding conflicts of interests for lawyers are the Regulations of the Portuguese Bar Association (the Regulations), the regulations of law firms and the
Criminal Code. These sources are complemented by the opinions and decisions of the Portuguese Bar Association. Finally, the provision of legal services in Portugal by lawyers from the European Economic Area is also subject to the Code of Conduct for Lawyers in the European Union, as approved by the Council of the Bars and Law Societies of Europe.

The Portuguese Bar Association is primarily responsible for supervising and ensuring compliance and enforcement of the law, and it has disciplinary power over its members. The decisions of the Bar Association can be appealed before the administrative courts. Furthermore, the courts are responsible for the enforcement of the law in any proceedings other than disciplinary proceedings.

Article 370.2 of the Criminal Code establishes that specific acts of misconduct related to conflicts of interest by lawyers are criminal offences. Thus, a lawyer who acts under a conflict of interests, with the intention of harming his or her client, will either be penalised with up to three years of imprisonment or with a fine.

The Regulations establish the duties that lawyers are obliged to comply with in their relationships with clients. Article 99 deals specifically with possible causes of conflicts of interest, establishing several duties upon lawyers to prevent them.

The lawyer's wilful or negligent violation of the foregoing rules may give rise to disciplinary liability, which is independent of any potential civil or criminal liability.

It is particularly worth noting that Portuguese law is moving towards the exclusion of Chinese walls or ‘firewalls’ as valid mechanisms to overcome limitations imposed upon law firms, but the practical application of the law has yet to be fleshed out by case law, opinions or decisions of the Portuguese Bar Association. While it is unlikely that new legislation on this subject will be approved, it is foreseeable that future decisions will detail and clarify the limits that ought to be respected by lawyers and law firms.

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

The European Parliament and the Council decided to create special rules to prevent and punish money laundering within EU territory. For that purpose, the relevant EU bodies passed two important directives: Directives Nos. 2005/60 and 2006/70.

The aforementioned Directives were transposed into the Portuguese legal system through Law No. 25/2008 of 5 July. From this date on, financial institutions and a large number of service providers, such as notaries and civil servants, are bound, among other matters, not to participate in any suspicious or criminal activities relating to money laundering and to report such activities to the public prosecutor and the Unit of Financial Information.

The EU bodies have continued to produce new legislation regarding this matter, in the form of Directives Nos. 2015/849 and 2016/2258, which were partially transposed into Portuguese law by Law No. 83/2017, which revoked Law No. 25/2008 of 5 July. The new law is more extensive than its predecessor, as it is applicable to a larger number of entities. Lawyers, among others, are now bound by the same duties to not participate in any suspicious or criminal activities relating to money laundering.

Obviously, confidentiality issues arise when legislators decide to extend such obligations to service providers like lawyers who are bound by the rules of secrecy.

### iii Data protection

On 25 May 2018, the General Data Protection Regulations (EU) 2016/679 entered into force and superseded Data Protection Directive 95/46/EC. Overall, the General Data Protection Regulation is applicable if the data controller (the organisation that collects data from EU
residents) or processor (an organisation that processes data on behalf of the controller) or the data subject (the person) is established in the EU. For the lawful and fair processing of personal data, unless the data subject has provided informed consent, the data can only be processed if one of the following grounds is met:

a. the data subject gives consent to the processing of its data;
b. the fulfilment of contractual obligations with the data subject or tasks requested by the data subject who is in the process of entering into a contract, require the processing of its data;
c. compliance of the controller's legal obligations requires the processing of data;
d. the protection of the vital interests of a data subject or another individual requires the processing of data;
e. the performance of a task in the public interest or by a public authority requires the processing of data; or
f. the protection of the legitimate interests of a data controller or a third party, unless these interests are overridden by the interests of the data subject, requires the processing of data.

These general rules also apply to the activities of law firms that involve the processing, access or transfer of personal data. The General Data Protection Regulation was implemented in Portugal by Law No. 58/2019 of 8 August.

iv. Actions for damages regarding infringements of the provisions of competition law

On 5 August 2018, Law No. 23/2018 of 5 June entered into force, which sets out the rules governing actions for damages for infringements of the competition law provisions, and that transposed Directive 2014/104/EU into the Portuguese legal system.

According to this Law, the infringements that may give rise to an action for damages for infringements to the competition law provisions are:

a. the prohibition of agreements and conduct that restricts competition;
b. the prohibition of the abuse of a dominant position; or

c. the prohibition of the abuse of economic dependence.

This Law provides special rules for the compensation for competition law infringements that facilitate the application of competition law for disputes arising between individuals (private enforcement). This source of enforcement of competition law is independent from the enforcement promoted by public entities such as the Competition Authority or the European Commission, with a sanctioning purpose (public enforcement).

Other relevant provisions of this Law include:

a. the joint liability of co-infringers (with some limitations regarding small and medium-sized companies or leniency applicants);
b. the joint liability of infringers and the parent companies;
c. the wide access to evidence to support a possible compensation request (except for cases involving leniency applications or transactions);
d. the implementation of a new period of limitation of five years for these compensation actions;
e. the establishment of a specialised court to decide on disputes regarding action exclusively based on claims for damages arising under the infringement of competition law;
the possibility to resort to class action; and

the incentive to resort to extrajudicial forms of alternative dispute resolution.

The Portuguese Competition Authority has recently been especially active and has imposed fines for violations of competition rules (e.g., in September 2019, 14 banks were fined €225 million for concerted practices). Therefore, we expect to see more of these procedures in the future.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

The Portuguese legal system acknowledges that some professions of social importance cannot exist without confidentiality, as people only feel comfortable disclosing personal or troubling facts if they are certain that those facts will remain secret.

In light of the above, lawyers, priests, doctors, journalists, chartered accountants, civil servants, public officials and corporate bodies of financial institutions, among others, have, in broad terms and as established by law, the right not to testify in court or not to comply with orders issued by any private or public entities to disclose or provide information or documentation, whenever the disclosure regards facts or documents relating to their professional activity.

In some cases, this prerogative also entails special protection against searches and seizures. For instance, searches inside law firms must be conducted by a judge, unlike most other cases where the presence of the district attorney suffices. Evidence obtained in criminal matters pursuant to illegal searches or seizures will be considered void and illegitimate in court.

Notwithstanding this, the scope of protection granted under Portuguese law differs according to the professional’s particular practice. Priests and lawyers, for instance, benefit from a broader and stricter protection, while employees and corporate bodies of financial institutions do not. In fact, while financial secrecy can easily be waived with the consent of the interested client, the disclosure of facts by lawyers always depends on the intervention of the Portuguese Bar Association.

However, privilege is not an absolute right and, in most cases, excluding religious matters, it is possible to break it, albeit through a complex procedure. The key rule on this issue is found in Article 135 of the Portuguese Criminal Procedure Code, which establishes that only superior courts may decide whether privilege should be broken and thus consequently force the disclosure of protected facts.

The existence of this rule does not jeopardise the general protection granted to professional privilege in Portugal, as the superior court’s decision must always be taken according to the principle of the most important prevailing interest, which binds the court, among other matters, to consider the seriousness of the crime and the interests pursued in the criminal procedure.

The application of this principle has driven courts to decide that, for instance, it is not permissible to break privilege to investigate minor offences.

Although Portuguese law widely respects this privilege, in recent years there have been some troubling court decisions limiting the scope of the privileged protection of lawyers.
Finally, under Portuguese law, the scope of rights and duties granted to Portuguese lawyers applies to any foreign lawyers as long as they comply with the Portuguese Bar Association’s procedures. Under these conditions, foreign lawyers are also subject to the rules of privilege.

ii Production of documents

When a party intends to gain access to a document held by the other party, it may request the court to order the production of the document within a particular term. If the order is ignored, the court may consider the party’s refusal for probative value and impose the reversal of the burden of proof.

There are, however, some documents that parties do not have to produce in litigation, such as correspondence between the lawyer and the counterparty or between the parties’ lawyers themselves. Furthermore, in relation to the latter, this cannot be considered as evidence by the courts. In relation to correspondence between the lawyer and the counterparty, it is also considered to be privileged and a protected professional secret. In such cases the party can claim a lawful excuse. The court may only deny the lawful excuse if it decides that the document is indispensable for the statement of facts and if the importance of the case overrides the requirement for the protection of professional secrecy. This statutory regime is also applicable to state secrets and to civil servants.

When a relevant document is held by a third party (e.g., a parent company), a party may request that the court order the third party to produce it.

Foreign deeds have the same legal value as those executed in Portugal, provided that some legal conditions are duly complied with. We note that the public official’s signature of the official deed has to be recognised by a Portuguese diplomatic or consular agent in the relevant state, and this signature has to be certified with the relevant consular seal. In addition, in judicial acts, documents must be written in Portuguese. Therefore, when the document required is stored overseas it must be translated and duly certified.

The rules applicable to electronic documents are substantially the same as those applicable to any other document. In all cases, the law sets out several restrictions on the production of documents in relation to general correspondence, letters or any other type of mail, which are protected by law, based on the principles of the protection of privacy. Furthermore, the Portuguese Constitution expressly forbids any intrusion into correspondence from the authorities. In conclusion, if a party is notified to produce correspondence in court that is not related to the case in question, it can claim this legal protection. There is, however, an exception in the Portuguese Constitution and in the Criminal Procedure Code related to authorised police searches.

If a party is asked to produce electronic documents that are no longer accessible, that party can argue that it is unable to do so. Nevertheless, in criminal proceedings the judges may order a search of the home or other premises of the defendant and in such cases evidence may be found through the reconstruction, or backup, of deleted documents.
VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

The greatest flaw of the Portuguese legal system is the length of time that proceedings take. According to the latest data from the Portuguese National Institute of Statistics, the average duration of a civil action at trial is 13 months (this represents a positive development compared to past statistics). Civil appeals take approximately four months.

In light of the foregoing, both the wider civil society and the government have been encouraging the promotion of alternative dispute resolution (ADR), namely, arbitration, mediation, conciliation and resolution by justices of the peace. In 2001, the government created the Cabinet for Alternative Dispute Resolution, a department of the Ministry of Justice exclusively dedicated to ADR.

ii Arbitration

In recent years, arbitration has been flourishing in Portugal. Parties have progressively added arbitral clauses to contracts and there is a general sense that Portugal may become a privileged forum for arbitrations between companies based in Portuguese-speaking countries such as Brazil, Angola and Mozambique.

On 15 March 2012, a new Law on Arbitration entered into force, replacing the former Portuguese Arbitration Law.

The Arbitration Law is rather innovative, drawing inspiration from the 2006 version of the UNCITRAL Model Law, and introduces provisions intended to grant more flexibility with regard to the formal validity of an arbitration agreement, making it simpler to comply with the written form requirement.

It is now legitimate to state that the Law has increased flexibility in Portuguese arbitration and facilitated the increasing number of arbitral clauses included in contracts.

Among its most important innovations, the Arbitration Law:

a contains a major change in the analysis of arbitrability;
b expressly sets out that independence and impartiality are not only required for the appointment of arbitrators, but that the arbitrators must comply with those requirements throughout the proceedings;
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 provides that an award will not be subject to appeal, unless otherwise expressly established by the parties in the arbitration agreement (without prejudice to the applicable procedures to set aside the award, which cannot be waived in advance).

The leading Portuguese arbitral centre is the Arbitration Centre of the Portuguese Commercial Association. Law No. 74/2013 of 3 September created the Sports Arbitration Court, which became operative in October 2015.

As regards foreign arbitration, Portugal is party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; however – and although Portuguese jurisprudence is arbitration-friendly, narrowly interpreting the grounds for refusal...
of recognition or enforcement of foreign arbitral awards – the interested party may also appeal against the decision of the first instance court that recognises or declares the foreign arbitral award enforceable before the Supreme Court, provided that the aforementioned requirements as to the value of the action are met. Thus, parties should always seek adequate guarantees to secure fulfilment of the contracts they enter into, or to secure compensation for the breach of such contracts.

Tax arbitration is becoming increasingly common and some decisions have already been handed down.

Also, consumer arbitration has increased following the transposition of Directive 2013/11/EU (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 subject of transactions by the parties may be submitted to mediation.

Another important provision establishes that private mediation settlement agreements are, under specific circumstances, enforceable directly, without the need to obtain from a court or the obligation to execute extrajudicial settlements in mediation centres supervised by the Ministry of Homologation Justice.

The specific circumstances are as follows:

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. Most public mediation claims settled related to labour and family matters.

iv Other forms of alternative dispute resolution

Besides arbitration, mediation and conciliation, the most popular form of ADR is conducted by a justice of the peace, which is governed by Law No. 78/2001 of 13 July 2001 (as amended by Law 54/2013 of 31 July, which broadened the scope and jurisdiction of justices of the peace) and numerous centres have been created under the supervision of a special commission. Justices of the peace are only available to settle disputes between individuals and they have
jurisdiction on civil matters concerning small claims (up to €15,000). Under the new legal framework on justices of the peace, legal persons may now resort to mediation (except in class actions), and preliminary injunctions are now available.

Between 2005 and 2018, approximately 108,600 claims were heard (with a success rate in 2018 of 105 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.\(^\text{10}\) While justices of the peace are proving useful in simple disputes, strong suspicion still remains about the quality of their decisions on the merits of the cases concerned.

**VII  OUTLOOK AND CONCLUSIONS**

All in all, the current year, much like the previous one, has not seen many legislative reforms to the judicial system.

Although the filing of financial and banking litigation proceedings has decreased, it is still one of the most significant areas of litigation and one of the subjects that is keeping the Portuguese courts occupied.

During the first half of 2019, there was a reduction of 7.7 per cent in the number of the pending actions before the Portuguese civil courts compared with the end of 2018, which means that the number of proceedings that were concluded was higher than the number of actions filed.\(^\text{11}\)

The average length of civil actions at trial has also decreased. No direct correlation can be established between this decrease and the recent reinstatement of the first instance courtrooms and the improvement of the digital access to court proceedings, since this decrease has taken place over the past few years. The reduction of pending judicial proceedings and of their duration may be due to a number of factors, including the increasing resort to ADR, the high costs of litigation and also the country’s economic stabilisation.

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\(^{11}\) This statistical analysis was carried out by the Portuguese Directorate-General for Justice Policy and is available at https://estatisticas.justica.gov.pt/sites/siej/pt-pt.
I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

Singapore law is based on the principles of common law, similar to the legal systems of other commonwealth jurisdictions. In the more than 50 years since Singapore achieved full self-rule and government from Great Britain, its legal system has undergone substantial legislative and procedural changes. The objective behind these changes were to streamline the legal system so that fair, efficient and cost-effective legal processes could be achieved. To date, this objective has been realised to a very large extent. The fine tuning of the legal system and processes in Singapore is a continuous process intended to keep the system abreast and in line with modern technological advances and an ever-changing legal landscape. At the time of writing, further legislative proposals to streamline legal processes in Singapore are presently afoot and are at the public consultation stage.

The Singapore court system consists of state courts, the Supreme Court and family justice courts. The state courts comprise magistrates’ and district courts, which deal with civil claims where the quantum of the claim does not exceed S$60,000 and S$250,000 respectively. These courts also deal with criminal cases, for which offences carry a maximum of five years’ imprisonment or a fine in magistrates’ courts, and a maximum of 10 years’ imprisonment or a fine in district courts.

With effect from 1 November 2019, where the quantum of the claim does not exceed S$20,000, the dispute may be tried before a small claims tribunal, which provides a quick and inexpensive forum for the resolution of small claims commonly arising between consumers and suppliers. The limit can be raised to S$30,000 if both parties agree and file a memorandum of consent online. Such claims must be filed within two years of the date of the claim arising.2 Lawyers are not permitted to represent parties in proceedings before small claims tribunals.

The Supreme Court consists of the High Court and the Court of Appeal. The High Court hears civil cases where the claim sum exceeds S$250,000, and appeals from the state courts. In addition, probate matters where the value of the estate exceeds S$5 million and ancillary matters in family proceedings where the value of assets are above S$1.5 million will be heard by the High Court. The High Court also hears capital criminal cases, such as prosecutions against murder and drug trafficking. At present, the Court of Appeal continues to hear appeals of both civil and criminal matters from the High Court. On 7 October 2019,

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1 Subramanian Pillai, See Tow Soo Ling and Venetia Tan are partners at CNPLaw LLP. The authors would like to thank and acknowledge Lim Shu-Yi, Benita Koh and Ervin Roe, all of whom are associates at CNPLaw LLP, Singapore, for their invaluable assistance in the preparation of this chapter.

2 Sections 2(1) and 5(3) of the Small Claims Tribunal Act.
the Singapore Ministry of Law announced that to maintain efficiency in court proceedings, a new appellate division of the High Court will be set up. The High Court will therefore consist of the General Division and the new Appellate Division. Appeals arising from a decision of the General Division will be distributed between the Appellate Division and the Court of Appeal. The Court of Appeal will hear all criminal appeals, prescribed categories of civil appeals\(^3\) and appeals that are made to the Court of Appeal under written law, while the Appellate Division will hear all civil appeals not allocated to the Court of Appeal.

The family justice courts hear the full suite of family-related matters, including divorce, family violence, youth court cases, adoption and guardianship, applications for deputyship under the Mental Capacity Act and probate and succession matters.

II THE YEAR IN REVIEW

i Legislative reforms to several areas of Singapore Law

Following from last year’s Select Committee hearings on Deliberate Online Falsehoods, the Singapore Parliament has since passed the Protection from Online Falsehoods and Manipulation Act 2019 (POFMA) to prevent the electronic communication in Singapore of ‘false statements of fact’.\(^4\) Under the POFMA, any minister may issue a correction direction or a stop communication direction if there is a false statement of fact and the minister is of the opinion that it is in the public interest to issue the said direction.\(^5\) Any appeal against the minister’s decision may be appealed to the High Court.\(^6\) Aside from a correction or stop communication direction, a minister, may also, under the POFMA, issue a targeted correction direction, a disabling direction or a general correction direction to an intermediary where the alleged false statement of fact has been published.\(^7\) Any appeal against the minister’s decision may also be appealed to the High Court.\(^8\)

Last year, amendments to Singapore’s Civil Law Act\(^9\) allowed third-party funders to fund certain dispute resolution proceedings.\(^10\) Generally, these proceedings are connected with international arbitration proceedings. Moving on from that, the Ministry of Law is now setting up a public consultation for feedback on conditional fee arrangements in Singapore for ‘international and domestic arbitration proceedings, as well as certain prescribed proceedings in the Singapore International Commercial Court, including mediation proceedings arising out of or in any way connected with such proceedings’.\(^11\)

\(^3\) The prescribed categories will be stated in the upcoming Sixth Schedule of the SCJA.
\(^5\) Sections 2 and 10(1) of the POFMA.
\(^6\) Section 17(1) of the POFMA.
\(^7\) Sections 2, 20 – 23 of the POFMA.
\(^8\) Section 29(1) of the POFMA.
\(^9\) Section 5B, Civil Law Act.
\(^10\) Civil Law (Third-Party Funding) Regulations 2017, Regulation 3.
The year 2019 was also significant in that 46 states gathered in Singapore to ink an international treaty on mediation, titled the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention).  

In the field of arbitration, the Singapore Ministry of Law is considering certain amendments to the arbitration regime in Singapore. Of particular significance is the Ministry’s recommendation to ‘allow a party to arbitral proceedings to appeal to the High Court on a question of law arising out of an award made in the proceedings, provided parties have agreed to opt in to [that] mechanism’. The Ministry of Law is also seeking views as to ‘whether parties should have the option to limit or waive by agreement, the annulment grounds set forth in Section 24(b) of the IAA and Article 34(2)(a), but not to the annulment grounds in Section 24(a) and Article 34(2)(b)’. It would be of note that Section 24(b) of the IAA relates to setting aside an arbitral award by reason of breach of the rules of natural justice and Article 34(2)(a) of the Model Law relates to several grounds for setting aside an award on the basis of incapacity of parties, improper notice, etc.

iii Significant decisions in court

In 2019, the Singapore Court of Appeal had to decide whether the Singapore Court has the power to grant a Mareva injunction against a defendant to Singapore proceedings where, at the time the injunction is sought, the plaintiff intends to pursue foreign proceedings against that defendant so that there is a possibility that it will be foreign proceedings, rather than the Singapore proceedings, that terminate in a judgment. The Singapore Court of Appeal decided that provided the court otherwise had the power to grant a Mareva injunction against the particular defendant, the plaintiff’s intention to pursue foreign proceedings could not negate such power.

Further, following from last year’s case of Rakna Arakshaka Lanka Ltd v. Avant Garde Maritime Services (Private) Limited, the Singapore Court of Appeal has now decided in Rakna Arakshaka Lanka Ltd v. Avant Garde Maritime Services (Pte) Ltd [2019] SGCA 33 that a respondent who fails to participate in the arbitration proceedings and therefore does not avail itself of the appeal route provided by Article 16 can, nevertheless, raise the jurisdictional objection before the supervisory court in setting-aside proceedings after the issue of the final award.

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16 Section 24(b) of the International Arbitration Act.
17 Article 34(2)(a) of the Model Law.
18 Bi Xiaoqiong (in her personal capacity and as trustee of the Xiao Qiong Bi Trust and the Alisa Wu Irrevocable Trust) v. China Medical Technologies, Inc (in liquidation) and another [2019] SGCA 50.
19 [2018] SGHC 78.
III COURT PROCEDURE

Civil procedure in Singapore is premised on the Supreme Court of Judicature Act, the State Courts Act, the Rules of Court, the Supreme Court Practice Directions and the State Courts Practice Directions and case law.

i Procedures and time frames

Apart from commencing an action in court, in a limited number of cases, the claimants may find recourse at the Small Claims Tribunal (SCT). The SCT has jurisdiction to hear and determine claims relating to a dispute arising from any contract for the sale of goods or the provision of services, claims in tort in respect of damage caused to any property other than the tort of interference with enjoyment or use of place of residence, and claims relating to a dispute arising from any contract for the lease of residential premises not exceeding two years. Claims must be filed at the SCT within two years of the date on which the cause of action accrued. Parties are not legally represented before the SCT.

Most civil claims are commenced by either writ of summons or by originating summons, in the magistrates’ court, district court or High Court, depending on the value of the claim. Proceedings are begun by writ of summons when there are likely to be substantial disputes of fact. A writ of summons must be endorsed with either a statement of claim or a concise statement of the nature of the claim made, or the relief or remedy required. The writ of summons must give sufficient information to enable the defendant to identify when the cause of action occurred. Within eight days of the writ being served, the plaintiff must file its memorandum of service.

The defendant has eight days from the date of service of the writ to make an appearance (21 days if service of the writ is out of jurisdiction), failing which the plaintiff may apply for judgment to be entered in default of appearance. The defendant then has 14 days after the expiration of the time to enter an appearance or 14 days after the date of service of the statement of claim, whichever is later, to file their defence and counterclaim (if any).

If the plaintiff is of the view that the defendant has no defence to the claim, they may decide at this point to make an application for summary judgment. An application for summary judgment must be accompanied by an affidavit containing all necessary evidence in support of the claim. The defendant has 14 days to file an affidavit opposing the summary judgment application, and the plaintiff has a final right of reply by way of an affidavit. The court may enter judgment for the whole or part of the claim to which the application relates, or grant the defendant conditional or unconditional leave to defend.

If the matter is to proceed to trial, the plaintiff will file its summons for directions. At the hearing for the summons for directions, the court will consider and make appropriate orders or directions to simplify and expedite proceedings, including setting timelines for the filing and exchanging of witness’ affidavits of evidence-in-chief (AEICs), the period to set down the action for trial and an estimate of the length of the trial.

Not less than five days before the trial, the following must be filed: the originals of the AEICs, the bundle of documents that will be relied on and referred to by the parties, and the parties’ opening statements (if the trial is in the High Court).
The Court takes an active role in encouraging parties to consider alternative dispute resolution (ADR) at an early stage. The Court may refer cases commenced in the State Courts to an appropriate court dispute resolution (CDR) or ADR process as it deems appropriate. In exercising its discretion as to costs, the Court may take into account the parties’ conduct in relation to unreasonable refusal to engage in ADR, especially where ADR may save costs and achieve a quicker resolution of the disputes.

For personal injury claims, non-injury motor accident claims, defamation actions, and business-to-business debt claims, the State Courts Practice Directions prescribe pre-action protocols with which parties must comply, or risk costs being awarded against them.

ii Class actions

Strictly speaking, the Singapore courts do not expressly recognise class actions. However, under Order 15 Rule 12 of the Rules of Court (O 15 R 12), where numerous persons have the same interest in any proceedings, proceedings may be begun by one or more person representing the others. A judgment or order in such a proceeding shall be binding on all persons being represented.

The Singapore Court of Appeal dealt with O 15 R 12 in the case of Koh Chong Chiah and others v. Treasure Resort Pte Ltd. In this case, the Court stated that O 15 R 12 operates in two stages: there must first be satisfaction of the jurisdictional stage, whereby it must be proven that the claimants have the same interest in the proceedings; then the court will turn to the second stage, which is discretionary, to determine whether the proceedings should continue as a representative action.

Whether an action should be commenced as a representative action under O 15 R 12 or as an ordinary action under O 15 R 4 of the Rules of Court largely depends on how similar the claims are as a matter of fact or law. The Court normally decides whether to proceed an action as a representative action as a matter of case management and whether proceeding as such will prejudice the defendant’s defence. In a representative action under O 15 R 12, the represented persons are not obliged to discover documents related to the claim and the defendant will not be able to cross-examine or seek costs against the represented persons in the event that the defence is successful.

iii Representation in proceedings

Any natural person may begin and carry on legal proceedings in person. The general rule for a body corporate is that it may not begin or carry on legal proceedings other than by a solicitor. Likewise, a defendant to an action begun by writ that is a body corporate may not enter an appearance in the action or defend it other than by a solicitor.

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20 Paragraph 35B of the Supreme Court Practice Directions and Paragraph 35 of the State Court Practice Directions.
21 Order 59 Rule 5(c) of the Rules of Court (Cap 322) and Paragraph 35B of the Supreme Court Practice Directions.
22 Paragraphs 37, 38 and 143 of the State Court Practice Directions.
24 Rules of Court Order 5 Rule 6(1).
25 Rules of Court Order 5 Rule 6(2).
26 Rules of Court Order 12 Rule 1(2).
The court may, on an application by a company or limited liability partnership, give leave for an officer of the company or limited liability partnership to act on its behalf in any relevant matter or proceeding to which it is a party, if the court is satisfied that the officer has been duly authorised by the company or limited liability partnership to do so, and if it is appropriate to give such leave in the circumstances of the case.²⁷

iv Service out of the jurisdiction

Documents can be served on persons outside Singapore, with the leave of court. Three major requirements must be met before leave will be granted for service out of the jurisdiction:

a. the claim must come within the scope of at least one of the paragraphs of Order 11 Rule 1 of the Rules of Court;

b. the claim must have a sufficient degree of merit; and

c. Singapore must be the forum conveniens.

Service of an originating process out of Singapore should be by way of personal service as long as it does not contravene the law of the country in which service is effected. Where an originating process is to be served in Malaysia or Brunei, service by a private agent is valid.

v Enforcement of foreign judgments

A foreign judgment may be enforced at common law or by statutory enforcement.

Under common law, a foreign judgment will be recognised if it is the final and conclusive judgment of a court that, according to the private international law of Singapore, had jurisdiction to grant the judgment, and if there is no defence to its recognition. A defence to recognition may be where the foreign judgment would conflict with an earlier judgment in the forum, or where the foreign judgment had been obtained by fraud or in breach of principles of natural justice.

Two statutory regimes under which foreign judgments may be enforced are the Reciprocal Enforcement of Commonwealth Judgments Act (RECJA) and the Reciprocal Enforcement of Foreign Judgments Act (REFJA). A foreign judgment to which the RECJA or REFJA applies can be recognised and enforced in Singapore upon its registration, without the need for the underlying dispute to be re-litigated. The RECJA applies to judgments obtained from the superior courts in the United Kingdom and a number of Commonwealth countries. The REFJA applies to judgments given in foreign countries that afford reciprocal treatment to judgments given in Singapore. Non-monetary judgments cannot be enforced under the RECJA and REFJA.

In addition, the Choice of Court Agreements Act 2016 (CCAA) was enacted in April 2016 to implement the Hague Convention on Choice of Court Agreements (the Hague Convention). The RECJA and REFJA will not apply to a foreign judgment that ‘may be recognised or enforced’ under the CCAA.

The CCAA applies where parties have entered into an exclusive choice of court agreement that designates a contracting state (i.e., a state that is a party to the Hague Convention) to hear their dispute, to the exclusion of the jurisdiction of any other courts. A party seeking to have a foreign judgment recognised and enforced in Singapore may apply for an order under...
Section 13(1) of the CCAA. Generally, a foreign judgment will be recognised and enforced if it has effect and is enforceable in the state in which the judgment originated, subject to mandatory and discretionary grounds for refusal.

vi Assistance to foreign courts

Singapore is a contracting state to the Hague Convention. Where parties have agreed upon a court of a contracting state as the exclusive choice of court for their dispute, the chosen court must hear the case when proceedings are brought before it. Any other court, including the Singapore courts, before which proceedings are brought must refuse to hear them. After the judgment is given, the successful party may apply to a court of a contracting state for its recognition and enforcement. The merits of the judgment may not be reviewed by another court of a contracting state and such other court will be bound by the findings of fact of the chosen court. In fact, the court may not refuse to recognise or enforce the judgment except in limited circumstances as set out in Article 9 of the Hague Convention.

Until recently, there were diverging views as to whether the Singapore court had the power to grant *Mareva* injunctions in support of foreign proceedings.28 That was until the Court of Appeal in the case of *Bi Xiaoqiong (in her personal capacity and as trustee of the Xiao Qiong Bi Trust and the Alisa Wu Irrevocable Trust) v. China Medical Technologies, Inc (in liquidation) and another* [2019] SGCA 50 confirmed that the Singapore court has the power to grant a *Mareva* injunction in support of foreign proceedings, subject to two prerequisites: (1) that the Court has in personam jurisdiction over the defendant in question; and (2) that the Plaintiff must have a reasonable accrued cause of action against the defendant in Singapore. The Court of Appeal further clarified that the cause of action on which the injunction is premised need not terminate in a judgment in Singapore, in order for the Singapore courts to grant a *Mareva* injunction.

vii Access to court files

Members of the public can search for information maintained by the Supreme Court Registry without leave of court upon payment. To search, inspect or copy any document filed in the Registry, a request to inspect documents can be made by way of an application to court stating the reasons for the request. Upon approval from the court and payment of the prescribed fee, members of the public can inspect the documents and may retain a soft copy if they so wish.

viii Litigation funding

Singapore currently does not provide for third-party funding in litigation. However, the Civil Law (Amendment) Act 2017 has been passed, providing for third-party funding in arbitration-related proceedings. The Civil Law (Amendment) Act 2017 declared that no person is, under the law of Singapore, liable for any conduct of it being maintenance or champerty, except when it is contrary to public policy or otherwise illegal.

Despite the apparent flexibility now afforded to litigation parties for third-party funding, they are to be done within the ambit of the provisions provided under Singapore law. Section 5B of the Civil Law Act (Cap 43, Rev Ed 1999), read with the Civil Law (Third-Party

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Funding) Regulations 2017, provides that only prescribed dispute resolution proceedings, being those related to international arbitration proceedings, may be funded by a qualifying third-party funder. The Civil Law (Third-Party Funding) Regulations 2017 even provide for the qualifications for being a ‘qualifying third-party funder’. In addition to the above, those who are interested in third-party funding should also bear in mind the guidelines issued by the Singapore Institute of Arbitrators, Singapore International Arbitration Centre and the Law Society of Singapore.

Since the amendments that allowed third-party funding in arbitration-related proceedings, the Singapore Ministry of Law is now considering steps to extend the framework of third-party funding for both international and domestic arbitration proceedings, and certain prescribed proceedings in the Singapore International Commercial Court, including mediation proceedings arising out of or in any way connected with such proceedings.29

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

Legal practitioners are subject to the Legal Profession Act (Cap 161) and the Legal Profession (Professional Conduct) Rules 2015. Duties of loyalty and confidentiality are owed to each of the solicitor’s clients before, during and after his or her engagement.

Where a solicitor intends to act for two or more parties and a diversity of interests exists or may reasonably be expected to exist between them, he or she must communicate to the parties how their interests diverge or may diverge. Where one party may be disadvantaged in the transaction, the solicitor must explain that party’s position before the transaction. Solicitors must advise each party to obtain independent legal advice. Otherwise, written confirmation or a record detailing that the party had declined independent legal advice must be sought and obtained.

Throughout the course of the retainer for the matter, the solicitor must be vigilant and inform each party of a conflict or potential conflict that arises. If the solicitor has difficulty dealing with a party’s diverging interests, he or she must cease to act, unless he or she ceases to act for all other relevant parties and all other relevant parties have given their informed consent in writing for the solicitor to continue to act in the matter.

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

There are several statutory provisions that impose an obligation on legal practitioners to protect against money laundering and financing of terrorism. Generally, where a legal practitioner knows or has reasonable grounds to suspect that any property may be directly or indirectly connected to a criminal activity, or a client may be engaged in money laundering or the financing of terrorism, the legal practitioner is required to file a suspicious transaction report to the Suspicious Transaction Reporting Office as soon as reasonably practicable. The failure to make a suspicious transaction report may constitute an offence and disciplinary proceedings may be taken against the legal practitioner.

Legal practitioners are also required to perform customer due diligence measures as prescribed in the Legal Profession (Prevention of Money Laundering and Financing of

Terrorism) Rules, such as identifying and verifying the identity of the client. Additionally, all documents relating to each matter and material obtained from customer due diligence measures must be kept for at least five years after the completion of the matter. The Council of the Law Society of Singapore has the powers to carry out an inspection either on its own motion or upon receiving a complaint, to ensure that the rules for prevention of money laundering and financing of terrorism are being complied with.

iii Data protection

The Personal Data Protection Act 2012 (PDPA) is the main source of data protection law in Singapore. The scope of the PDPA is wide – it governs the collection, use and disclosure of individuals’ personal data by organisations, including storage and processing of data. Personal data is defined as any data, whether accurate or not, about an individual who can be identified from that data, or from that data and other information to which the organisation has or is likely to have access, whether stored electronically or non-electronically.

Organisations are required to develop and implement policies and processes to meet the following obligations of the PDPA:

a Under the Consent Obligation, an organisation may only collect, use or disclose personal data for purposes for which an individual has given his or her consent. The individual may withdraw his or her consent at any time with reasonable notice.

b Under the Purpose Limitation Obligation, an organisation may collect, use or disclose personal data about an individual, only for the purposes that a reasonable person would consider appropriate in the circumstances, and for which the individual has given consent.

c Under the Notification Obligation, organisations are required to inform individuals of the purposes for which they are intending to collect, use or disclose their personal data on or before such collection, use or disclosure of personal data.

d Under the Access and Correction Obligation, organisations are required to provide upon request by an individual the personal data of that individual, and information about the ways in which his or her personal data has been or may have been used or disclosed by the organisation within a year of the date of the request.

e Under the Accuracy Obligation, organisations are required to make a reasonable effort to ensure that personal data collected by them or on their behalf is accurate and complete, if it is likely to be used by the organisation to make a decision that affects the individual to whom the personal data relates, or if it is likely to be disclosed to another organisation.

f Under the Protection Obligation, organisations must protect personal data in their possession or under their control, by making reasonable security arrangements to prevent unauthorised access, collection, use, disclosure, copying, modification, disposal or similar risks. Many breaches of the PDPA have involved organisations’ ignorance of the Protection Obligation and the failure to take adequate or proactive steps to protect personal data.

g Under the Retention Limitation Obligation, organisations are required to cease to retain their documents containing personal data, when it is reasonable to assume that the purpose for which that personal data was collected is no longer being served by retention of the personal data and retention is no longer necessary for legal or business purposes.
Under the Transfer Limitation Obligation, if organisations are transferring personal data to a country or territory outside Singapore, they must do so in accordance with the requirements under the PDPA to ensure the standard of protection of the personal data will be comparable to that under the PDPA.

Under the Openness Obligation, organisations are to make information about their data protection policies, practices and complaints process available on request.

The PDPA also requires that every organisation designate an individual (known as the data protection officer) to oversee the practices and policies of the organisation, and who is responsible for ensuring that the organisation complies with the PDPA. The importance of the role of the data protection officer has been stressed by the PDPC; failure to appoint one is a breach of the PDPA.

Individuals have a right of private action against organisations that are in breach of the obligations in the PDPA, but enforcement of the PDPA is largely a complaint-based regime involving the PDPC’s exercise of its powers conferred by the PDPA. If an organisation is found in breach of the PDPA, it may be fined up to S$1 million. The PDPC also has the power to make directions, give warnings, make advisory notices and accept undertakings from organisations to take a certain course of action.

The PDPA establishes the national Do Not Call Registry. Individuals may register their local telephone numbers to opt out of receiving telemarketing calls or text messages.

The main authority administering and enforcing the PDPA is the Personal Data Protection Commission (PDPC), which issues advisory guidelines to supplement and aid the interpretation of the PDPA. Since September 2019, stricter guidelines have been put in place to protect the personal data of Singaporeans. Organisations are barred from the collection, use and disclosure of National Registration Identity Card (NRIC) numbers, including collecting its full number or making a copy of the NRIC. Organisations may still legally request to sight an individual’s NRIC to verify the person’s age or identity, as long as no personal data is retained.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

Generally, between solicitor and client, there are two kinds of privilege in Singapore: legal advice privilege and litigation privilege.

Legal advice privilege is generally governed by Section 128 of the Evidence Act, which provides that nothing shall be disclosed that was given to the advocate and solicitor in the course of his or her employment. The rules that apply with regard to legal advice privilege extend to in-house lawyers by virtue of the recent amendments to the Evidence Act. It must be noted that there are circumstances by which privilege does not operate, where the communications are made in furtherance of an illegal purpose and where the solicitor becomes aware of a crime or fraud after engagement.

Litigation privilege is relied upon to protect information provided for the purpose of pending or anticipated court proceedings.
ii  Production of documents

Under Singapore Law, a party to a court proceeding is under an obligation to make and serve on the other party a list of the documents that are or have been in their possession, custody or power. The list of documents has to be verified by an affidavit. The documents that may be ordered to be discovered are documents on which the other party relies or will rely, documents that could affect his or her own case, adversely affect another party's case or support another party's case. This obligation to continue to give discovery remains until the conclusion of proceedings. Parties must also be aware that it is the duty of a litigant to preserve documents relevant to proceedings. Destroying documents could result in detrimental circumstances, such as dismissal of the action or striking out the defence.

If a party is not satisfied with the documents provided in discovery, it may make an application under the Rules of Court for a document that the other party has or has not had in his or her possession, custody or power. This is often referred to as a request or application for specific discovery. In this regard, this could be broader than the general discovery obligations referred to in the preceding paragraph given that a party can seek a document that may lead to a line of inquiry, which provides information that adversely affects its own case or the other party's case, or support the other party's case. Even so, the court may find that the discovery is not necessary for disposing fairly of the cause or matter, or for saving costs.

The rules governing e-discovery are not set out in the Rules of Court, but are set out in the practice directions produced by the Singapore courts. The practice directions provide for parties to consider using e-discovery when the claim or counterclaim exceeds S$1 million, where the documents discoverable exceed 2,000 pages, or where the documents discoverable substantially comprise electronic mail or electronic documents.

VI  ALTERNATIVES TO LITIGATION

i  Arbitration

A common alternative to litigation is arbitration, because it is a private method of dispute resolution, thus allowing for procedural flexibility and confidentiality of proceedings. However, there has recently been concern that arbitration is getting increasingly expensive.

The Singapore International Arbitration Centre (SIAC) is the main arbitration institution in Singapore and administers most cases under the SIAC Rules adopted by the parties in their arbitration agreement, or the UNCITRAL arbitration rules. The costs of the arbitration operate on an ad valorem system, where it is calculated based on the value of the claim.

Depending on whether the arbitration is international or domestic, the International Arbitration Act or the Arbitration Act will apply. Domestic arbitrations refer to arbitrations between local parties that do not have any international elements. One of the main distinctions between the two regimes lies in the degree of court intervention in the arbitral process. The general rule is that there can be no appeal against an award issued in an international arbitration. The only recourse is an application to set aside the arbitral award. On the other hand, where domestic arbitrations are concerned, a party may appeal an award on a question of law arising out of the award by agreement of the parties or leave of court. An application to appeal an arbitral award must be brought within 28 days of the date of the award. On appeal, the court may confirm, vary or remit the award to the tribunal in whole or in part, for reconsideration in light of the court's determination, or set aside the award in whole or in part. Notwithstanding that, parties may agree to exclude their rights to appeal.
The arbitral award may, by leave of the High Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect and, where leave is so given, a judgment may be entered in terms of the award. Being a contracting state to the New York Convention allows for ease of enforcement of arbitral awards internationally. Foreign arbitral awards are recognised in the same way as domestic awards, as long as the award was made in a country that is also a party to the New York Convention.

Singapore welcomed third-party funding for international arbitration in Singapore in early 2017 and it appears to be an area for growth and expansion in the next few years. The primary sources of legislation and regulations include the Civil Law Act and the Civil Law (Third-Party Funding) Regulations 2017. Riding on the trend of third-party funding, the Singapore Ministry of Law is taking steps to extend third-party funding to domestic arbitration, certain proceedings in the Singapore International Commercial Court and mediations connected with these proceedings.

When negotiating a third-party funding contract (the Contract), the funder should take reasonable steps to ensure that it has met the requirements as a qualifying third-party funder as set out in the Regulations, advised the party interested in funding to obtain independent legal advice on the terms of the Contract and has satisfied itself that there are no circumstances arising from the funding that might give rise to any foreseeable conflict of interest.

The Singapore Ministry of Law has also launched a public consultation to seek feedback on the proposed amendments to the International Arbitration Act (IAA). The proposals involve amendments to: (1) introduce a default mode of appointment of arbitrators in multi-party situations; (2) allow parties to, by agreement, request the arbitrator to decide on jurisdiction at the preliminary stage; (3) recognise that an arbitral tribunal and the High Court has powers to enforce obligations of confidentiality in an arbitration; (4) allow parties to appeal to the High Court on a question of law arising out of an award made in the proceedings provided parties have agreed to opt in to this mechanism; (5) allow parties to agree to waive or limit the annulment grounds under the Model Law and IAA; and (6) provide that the Court shall have power to order costs in certain arbitral proceedings.

**ii Mediation**

Mediation is an integral part of the legal system in Singapore. The use of mediation is fast gaining traction at a time when parties are increasingly looking beyond the traditional adversarial (and expensive) court-based model to resolve their disputes.

The courts encourage parties to consider alternative dispute resolution, including mediation, at the earliest possible stage. Mediation services are provided for free at the state courts for claims filed with the magistrates’ courts, pursuant to the State Courts Practice Directions.

The Singapore Mediation Centre, which was set up in 2014, provides commercial mediation services, dealing with most types of disputes, including cross-border commercial disputes.

The recent push for mediation as a dispute resolution mechanism of choice is evident by the introduction of the Mediation Act 2017. The Mediation Act seeks to promote,
encourage and facilitate the resolution of disputes by mediation. Prior to the Mediation Act, a party seeking to enforce a mediated settlement agreement had to do so by instituting court proceedings, incurring costs and losing time in the process. Under the Singapore Mediation Act, mediated settlement agreements entered into in Singapore can be recorded and enforced as an order of court.

Singapore achieved another milestone in its journey to become the leading dispute resolution hub in Asia when it hosted, and signed, the Singapore Convention on Mediation (the Singapore Convention) on 7 August 2019. The Singapore Convention establishes a harmonised legal framework for international mediated settlement agreements. Under the Singapore Convention, parties may enforce and invoke international settlement agreements resulting from mediation across borders in another contracting state. To date, the Singapore Convention has been signed by 51 states (as at 21 November 2019), including the US, China, India and South Korea.

iii Other forms of dispute resolution
Neutral evaluation and neutral determination are private processes where parties can refer their dispute to a ‘neutral’, who will provide a summary evaluation of the dispute or a temporary determination for the matter. The ‘neutral’ will be a neutral third party appointed by the President of the Law Society of Singapore from the panel of neutrals, which consists of experienced lawyers. The benefits of neutral evaluation and neutral determination are that they are speedier and more cost-efficient than litigation or arbitration. In addition, the result is not permanent, thus parties can subsequently assert their rights through formal dispute resolution methods. An evaluation is the opinion of the neutral and is not binding on parties except for a costs decision, while a determination will be binding on parties until the dispute if finally determined by an arbitrator, or a court or other body of competent jurisdiction.

VII OUTLOOK AND CONCLUSIONS
Singapore is striving towards becoming a leading hub for the resolution of cross-border disputes and the provider of legal solutions to international parties in South East Asia. Parties seeking to resolve their disputes in Singapore are presented with a choice of the dispute resolution forums including the Singapore International Commercial Court, the Singapore International Arbitration Centre and the Singapore International Mediation Centre.

Singapore is a party to the New York Convention and Hague Convention on Choice of Court Agreements. It seeks to be a centre where legal solutions not only have to be quick and efficient but also effective in terms of result.

Users of Singapore’s legal framework should strive to be well advised, not only of the procedures in the local court system but also of the wide variety of solutions that are on offer.
SPAIN

Ángel Pérez Pardo de Vera and Francisco Javier Rodríguez Ramos

I INTRODUCTION TO THE 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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Laws
Parliament, composed of two chambers, the Congress and the Senate, passes legislation on matters reserved by the Constitution to the state. When a law affects fundamental civil rights and liberties, it is denominated a ‘basic law’ and is enacted through a special procedure requiring an absolute majority in Congress. Ordinary laws require simple majorities.

Each of Spain’s 17 autonomous regions has its own parliament, which may pass legislation on delegated matters.

The relationship between laws (national or regional) is not based on a hierarchical principle but on a material one: different matters or different territorial scopes require different laws.

Decree laws and legislative decrees
Decree laws are approved by the government. They regulate exceptionally urgent matters and must be ratified by Congress.

Parliament may occasionally authorise the government to make and enact legislative decrees, which have the same rank as law. Legislative decrees are generally used to consolidate and redraft existing laws.

Decrees, ministerial orders and resolutions
Legislation, both national and regional, is developed through these three types of provisions. Decrees are issued by the government, ministerial orders by the relevant minister and resolutions by administrative bodies or authorities. In the event of conflict, laws prevail.

Custom
In the absence of applicable law, custom has the force of law, provided that it is substantiated and is not contrary to moral standards or public policy. Custom is considered as the primary source of law under the special civil legal framework in the region of Navarre.

General principles of law
In the absence of legislation and custom, general principles of law apply. They are unwritten principles underlying the legal system based on concepts such as fairness and logic.

Case law
Law is never created by court decisions, but case law issued by the Supreme Court is highly valued as a source of interpretation and application of the law.

ii Court system
The Spanish court system is an independent power within the state. The courts forming the judicial system are structured in five jurisdictions: civil and commercial, criminal, administrative, labour and military. At the top is the Supreme Court, featuring five chambers, one for each jurisdiction.

Civil and commercial courts
The civil and commercial jurisdiction deals with contractual claims, tort law, family law, inheritance and, in general, any matter that does not fall under the other jurisdictions. The courts of first instance are the core of this jurisdiction.
Specialised commercial courts were created in some of the largest Spanish cities. They deal with claims lodged in relation to insolvency of companies and businesspersons; unfair competition; antitrust, industrial property, intellectual property (IP) and advertising matters; corporate law; international or national regulations on transport matters; maritime law; collective actions regarding general contracting conditions; and appeals against specific decisions issued by the Directorate General for Registries and Notaries. If a commercial court does not exist in a particular judicial district, the corresponding matters remain under the jurisdiction of the courts of first instance.

Decisions of courts of first instance (or commercial courts) are subject to appeal before the civil chambers of the provincial courts. A provincial court’s decision can, in certain cases, be appealed to the Supreme Court (see Section III.ii).

**Criminal courts**

Criminal cases are investigated by a judge, assisted by the police. The public prosecutor is a party to the criminal proceedings. Victims (including the state – e.g., in a tax fraud case) may also be a party to the proceedings as private accusers. Any person or legal entity can also become a party to criminal proceedings, even if they have not been a victim of the crime, by exercising a ‘popular action’.\(^2\)

Except for minor offences, cases are always heard by a court other than that in charge of the investigation. Offences punished with penalties of up to five years’ imprisonment are heard by criminal courts (one judge), whereas cases involving more severe offences are heard by the criminal chamber of the corresponding provincial court (each chamber being formed by three judges).

The decision can always be appealed before a higher court: if the case is heard by a criminal court, the appeal must be filed before the corresponding provincial court; if the case is heard by the latter, the appeal must be filed directly with the Supreme Court.

**Labour courts**

A wide range of employment disputes are heard in this area of law, including claims regarding work shifts, holiday entitlement, discrimination in the workplace, the right to strike or challenge disciplinary measures and, more usually, claims for unfair dismissal. In addition to the individual exercise of labour-related actions by employees, trade unions can also act on behalf of their members.

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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.
At first instance, claims are heard by labour courts. Subject to statutory requirements, judgments issued by labour courts can be appealed before the High Court of Justice of the corresponding autonomous region. Likewise, under certain circumstances, judgments issued by a High Court of Justice can be appealed to the Supreme Court.

**Administrative courts**

Cases related to resolutions issued by public authorities, the challenge of general provisions with lower hierarchical standing than a law or legislative decrees, appeals against a public authority's failure to act, and claims linked to the liability of the public authorities and their staff are heard by administrative courts.

This jurisdiction is the legal channel through which companies can challenge, inter alia, decisions of the regulators of the financial, telecommunications or utilities sectors, and competition decisions.

Contentious administrative courts are the equivalent to the civil courts of first instance in administrative law. Their decisions may be appealed to the High Court of Justice of the relevant autonomous region and, under certain circumstances, to the Supreme Court.

**Territorial organisation**

The whole territory is divided into judicial districts covering one or more municipalities. There is always at least one court of first instance and one criminal investigation court in the ‘capital’ of each judicial district (although in small judicial districts there may only be one judge with dual responsibility).

Labour courts, criminal courts and contentious-administrative courts are located in the capital of each of Spain’s 50 provinces and in certain larger cities.

Courts of appeal are distributed regionally and include the provincial courts, the High Court of Justice of each autonomous region and the Supreme Court.

There is also a central court, the National Court, which combines various levels of jurisdiction. The National Court is based in Madrid but has nationwide jurisdiction on matters regarding offences with considerable implications (e.g., terrorism and organised crime), and labour and administrative matters of special importance.

**The Constitutional Court**

The Constitutional Court is not part of the court system, but rather an independent national institution that resolves disputes between the state and autonomous regions, disputes related to the constitutionality of laws and violations of constitutional rights.

**The General Council of the Judiciary**

The General Council of the Judiciary is in charge of the organisation and inspection of Spanish courts. Its functions are supervising judges and courts, selecting and training judges and magistrates and assigning them to a court, and electing its own president and the president of the Supreme Court from among its members. It also names two judges to the Constitutional Court.
II THE YEAR IN REVIEW

i Legislation

Among others, the following legislative developments are noteworthy.

**Law 5/2019, of 15 March, regulating real-estate-loan contracts**

On 16 June 2019, Law 5/2019, regulating real estate loan contracts, entered into force. The law introduces a set of rules that apply to loan contracts meeting the following requirements:

- **a** the lender is a natural or legal person who intervenes in the financial-services market on a business or professional basis (or who intervenes occasionally with an exclusively investment purpose).
- **b** the borrower or guarantor is a natural person; and
- **c** the purpose of the contract is to (1) grant a loan secured by a mortgage or other security right attached to residential real estate; or (2) grant a loan for the purpose of acquiring or retaining ownership rights in land or real estate, provided that the borrower or guarantor is a consumer.

The main novelties under the regulation include detailed pre-contractual requirements and transparency rules to provide the borrower with the information needed to make an informed decision (the requirement of pre-contractual information is reinforced, the content of credit advertising is regulated, the inclusion of floor clauses is prohibited, new functions are attributed to notaries to ensure compliance with these transparency obligations); rules governing the distribution of expenses deriving from the loans; a limit on interest in arrears; and the prohibition of tied sales (i.e., the sale of specific financial products with the loan contract that must be agreed by the borrower as a condition for the granting of the loan).

Also noteworthy is the new framework on the early termination of loan contracts established in Article 24 of Law 5/2019. Under the prior Law 1/2013, of 14 May, on measures to protect mortgages, a minimum of three unpaid instalments was required in order to accelerate the termination of the loan. Under Law 5/2019, the requirements for the lender’s early termination will be the following:

- **a** a request of payment granting the borrower a term of at least one month for the payment to be made; and
- **b** an outstanding payment amount that exceeds (1) 3 per cent of the total loan amount or 12 monthly instalments (if the default is in connection with the first half of the loan’s term); or (2) 7 per cent of the total loan amount or 15 monthly instalments (if the default is in connection with the second half of the loan’s term).

**Royal Decree Law 7/2019, of 1 March, on urgent measures relating to housing and rental matters**

Royal Decree-Law 7/2019 consists of four titles, the first of which is designed to make flexible and promote the housing-rental market, updating the lease-contracts framework. It introduces, among others, the following amendments to Law 29/1994, on Urban Leases:

- **a** the mandatory-renewal period is extended from three years to five or even seven years (depending on whether the landlord is a natural or legal person); once the mandatory
renewal period has ended, the contract will be renewed for annual periods up to a maximum of three years, provided that neither party notifies the other of the decision to terminate the contract;\(^3\)

\(b\) the scope, operation and form of the security deposit is regulated more clearly;

\(c\) the registration of the lease contract with the land registry is no longer a requirement to produce third-party effects; and

\(d\) the parties’ freedom to agree on mechanisms to review the rent is retained, although a limit to the rent increase is introduced: the increase in rent may not exceed that which would result from applying the variation in CPI on the date of the rent review.

Title II amends Law 49/1960, of 21 July, on horizontal property and is aimed at promoting the performance of works to create better accessibility of buildings and address the tourist-apartments phenomenon.

Title III amends Law 1/2000, on civil procedure, regarding the eviction procedure for vulnerable tenants. Finally, Title IV introduces reforms of a fiscal nature that aim to the lease of housing.

**Royal Decree-Law 17/2019, of 22 November, adopting urgent measures to adapt the remunerative parameters of the electricity system**

In the early 2000s, Spain adopted a set of incentives to promote renewable-energy production. In 2007, various legislative measures were enacted to reform the former remuneration scheme, reducing the incentives granted. Spain has been involved in various legal proceedings, both before ordinary courts and arbitration tribunals, as a result of those regulatory changes.

Royal Decree-Law 17/2019, of 22 November, updated the remuneration parameters for renewable facilities before the beginning of the subsequent regulatory period (1 January 2020) while seeking to terminate those ongoing legal proceedings and avoid the initiation of new proceedings.

This provisions set the regulated rate of return for renewable energy facilities for the 2020–2025 regulatory period. However, renewable-energy plants entitled to feed-in tariffs that were in operation before mid-July 2013 are entitled to freeze their regulated rate of return at a higher level for the next two regulatory periods – i.e., until the end of 2031 – provided that any legal proceedings brought by such plants (or their shareholders) against the Kingdom of Spain regarding regulatory changes since 2007 are dropped.

**ii Court practice**

Among others, the following noteworthy decisions were handed down in 2019.

**The Supreme Court’s judgment of 18 July on the application of rebus sic stantibus**

In the underlying case, the question was raised as to whether the legislative modifications made to the regulatory framework of solar energy allowed the voiding or modification of the guarantees of the mortgage loans taken to finance a photovoltaic project.

\(^3\) Royal Decree-Law 7/2019 also amends the term of the said notice which is extended from one month in advance to the termination of the contract to four months (in the landlord’s case) or two months (in the tenant’s case).
Spain

The claimants (loan guarantors) invoked the application of the *rebus sic stantibus* clause, claiming that changes in legislation constituted an unforeseeable alteration of the circumstances as they existed at the time they agreed to guarantee the loan, distorting the basis of the business and its effects, affecting their consent and the object of the contract itself.

The Supreme Court dismissed the claim, stating that the occurrence of a legislative modification is a risk that must fall on the guarantors and that the cause of the guarantee contract is precisely to increase the security of the creditor’s credit collection. The Supreme Court held that the risk of a debtor’s inability to pay is a typical risk of a guarantor and that, in the specific case, the guarantee was not conditional on the preservation of the legislation existing at the time of the guarantee’s granting.4

The Supreme Court’s judgment of 27 June 2019 on standing in an action for annulment of the purchase contract of shares due to flawed consent

The Civil Chamber of the Supreme Court, meeting in plenary session, has for the first time examined the question of whether, in relation to the purchase of shares on the official secondary market (after their issuance), in which the entity issuing the shares acts as an intermediary, it has standing in an action for annulment of the purchase contract due to flawed consent.

The Supreme Court held that, together with the traditional parts of the sale contract (seller and buyer), the specific regulations of the stock market require the necessary intervention of a financial entity acting as intermediary (and a central counterparty entity and a liquidation entity); however, that does not mean that those entities are party to the sale contract. Therefore, against the buyer’s exercise of a nullity action in connection with the purchase of shares, standing corresponds exclusively to the seller, not the entity issuing the shares even though it has acted as an intermediary in the purchase.

The Supreme Court’s judgment of 23 January 2019 on opening commissions for mortgage loans

In the present case, the validity or abusiveness of opening-commission clauses in mortgage loans signed with consumers was discussed in light of the regulations and jurisprudence emanating from Directive 93/13/EEC on unfair terms in consumer contracts and the Law for the Protection of Consumers and Users.

The Supreme Court held that (1) the opening commission forms part of the consideration of the loan contract, as well as the remuneration interest, therefore the clauses establishing the commission will not be abusive as long as they pass the transparency control; and (2) the transparency control of the opening commission clauses will, in practice, be very limited, to the extent that their knowledge is widespread among consumers, these clauses are usually one of the elements discussed in financial institutions’ advertising and are paid in cash at the time of hiring.

The Supreme Court stated that all these circumstances contribute to the average consumer paying special attention to these stipulations.

4 Apart from this ruling, the Supreme Court handed down several rulings in 2019 limiting the application of the *rebus sic stantibus* clause on cases of different nature (see, e.g., Supreme Court judgments 5/2019 of 9 January; 19/2019 of 15 January; and 41/2019 of 22 January).
In the same ruling, the Supreme Court ruled on the effects of the declaration of nullity of the clause regulating the distribution of certain expenses of the mortgage loans. However, the effect of the distribution of expenses identified by the Supreme Court has been limited by the mandatory distribution rules established in Law 5/2019.

### III COURT PROCEDURE

#### i Overview of court procedure

All civil, criminal and labour proceedings may have written and oral phases. Administrative proceedings are mainly conducted in writing.5

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.

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5 As from 1 January 2016, all legal professionals, judicial bodies and public prosecutors must use existing electronic systems – mainly, the Lexnet system – for filing briefs and documents and making judicial communications (Law 42/2015 amending the Spanish Civil Procedure Law).
ii Procedures and time frames

Civil and commercial claims must be resolved through either ordinary or oral proceedings.

Ordinary proceedings

Economic claims exceeding €6,000 and some specific matters set out in the Civil Procedure Law regardless of their economic value (most significantly, challenge of corporate resolutions and protection of honour, personal image and privacy) are resolved through ordinary proceedings.

Once the defendant has answered the complaint and, as the case may be, the claimant does the same with the counterclaim, or the corresponding terms to answer have elapsed, the court will summon both parties to a preliminary hearing to try to settle the dispute by agreement or, if not possible, preparations for trial will begin, allowing both the claimant and the defendant to specify, clarify or rectify their allegations, raise procedural objections and propose evidence.

In the preliminary hearing, the court will decide on the procedural objections raised, accept the corresponding means of evidence and set a trial date.

In the trial, the evidence will be produced (examination of the parties, the witnesses and the experts) and the parties will orally present their closing statements summarising the facts in dispute and the evidence supporting their allegations.

Following the trial, the court will render its judgment.

Oral proceedings

Oral proceedings are used to resolve complaints with a value or economic interest not exceeding €6,000, as well as other actions such as specific injunctive relief actions for the protection of collective and diffuse interests of consumers, some disputes over lease agreements, vacant possession actions, maintenance claims, actions for the rectification of inaccurate harmful data and those related to matters not included among those reserved for ordinary proceedings.

As in the case of ordinary proceedings, oral proceedings are initiated by filing a complaint with the court. Claims must be answered in writing and may be followed by a hearing when so requested by either party and accepted by the court. Counterclaims in oral proceedings are only accepted in limited cases. If the hearing does not take place, the court will render its judgment directly. If the hearing does take place, it will include the submission and production of evidence and eventually the presentation of oral conclusions if so requested by the parties.

Summary proceedings

Monitory proceedings are a special type of proceeding available for the repayment of economic debts of any amount. It is a fast-track procedure through which parties seek to obtain an enforceable resolution quickly.

If the debtor does not submit a challenge and fails to pay, the court will issue an order declaring the termination of the summary proceedings, allowing the creditor to seek enforcement and payment of the amount owed. If the debtor submits a challenge, proceedings will continue as ordinary proceedings, except if the amount does not exceed €6,000, in which case they will continue as oral proceedings and the parties will be summoned to a hearing before the court.
EC Regulation 1896/2006 provides for monitory proceedings at the European level. This fast-track procedure is applicable to civil and commercial matters in cross-border cases in which at least one of the parties is domiciled or habitually resident in a Member State (except Denmark) other than the country hearing the action.

Law 15/2015 provides for notarial monitory proceedings for claims of specific economic debts involving any amount (not applicable for claims involving debts arising from a contract between a consumer and a businessperson or professional). At the creditor’s request, the corresponding notary public will order the debtor to pay the amount due within 20 working days. If the debtor cannot be located or the debt is challenged, the notarial proceedings will end without prejudice to the creditor’s right to claim the debt through judicial proceedings. If the order is made and the debtor fails to pay without challenging the debt, the notarial proceedings will be terminated and the notarial act obtained will constitute an enforceable instrument.

**Interim relief**

The Civil Procedure Law regulates interim relief, allowing Spanish courts to admit any kind of interim measure in order to ensure the enforcement of a potential judicial ruling in favour of the petitioner.

The court may allow the requested interim measure provided that (1) the claimant is able to show that there is a reasonable probability of success on the merits of the case; (2) in its absence there is a real risk that a judgment in favour of the claimant might not be executed (for instance, the assets might be taken abroad or otherwise removed); (3) the measure is appropriate for securing the effectiveness of the resolution; and (4) there are no less harmful measures that may be equally effective in securing the pending final determination of the proceedings.

If the court ultimately allows the measures, the petitioner must provide a bond in order to cover any potential damage that the adoption of the interim measure may cause to the defendant. The Spanish system on interim measures establishes a strict liability regime, meaning that if the petitioner loses on the merits, he or she will be liable for any damages arising as a result of harm suffered by the defendant because of the measures adopted.

The Spanish Civil Procedure Law does not contain an exhaustive list of these measures, so the petitioner may call for the adoption of any interim measure that will be useful to secure the future judgment.

The request for interim measures is usually submitted to the court together with the complaint, but they may also be requested prior to the filing of a lawsuit. In this case, the petition for interim measures must be filed within 20 working days of the granting of the measures with the court with jurisdiction to render a judgment in the main proceedings. Nevertheless, petitions for interim measures may be admitted after the filing of the lawsuit under exceptional circumstances. If the interim measure is revoked, the petitioner will be ordered to make restitution for any harm caused to the defendant by implementing the measure. The court may allow the defendant to substitute the interim measure for alternative security.

The parties may appeal the court order accepting or rejecting the interim measure. If the order accepts the measure, filing the appeal will not prevent the measure from being enforced.
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**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.

- **d** Extraordinary appeal owing to procedural infringements: this appeal allows parties to file an appeal to the Supreme Court challenging final rulings issued by provincial courts owing to an infringement of procedural formalities based on one of the following grounds:
  - breach of rules relating to the court’s jurisdiction;
  - breach of procedural rules regulating the form and content of judicial decisions;
  - breach of rules regulating procedural guarantees if the breach implies the invalidity of the judicial act or has caused a lack of a defence; or
  - a violation of the fundamental rights contained in Article 24 of the Spanish Constitution.

- **e** Cassation appeal: by lodging this appeal with the Supreme Court, parties challenge final rulings issued by provincial courts when:
  - the value or economic interest at stake exceeds €600,000;
  - the proceedings concern fundamental rights other than those established in Article 24 of the Spanish Constitution; or
  - the appellate decision has reversal interest.  

- **f** 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.

- **g** Complaint: this allows parties to challenge a court’s decision to reject admission of a remedy of appeals, an extraordinary appeal owing to procedural infringements or a cassation appeal. The complaint is heard by the court with jurisdiction to hear the rejected appeal.

**Judicial fee**

The payment of a fixed fee is required from legal persons in order to initiate specific proceedings in civil or commercial courts.

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6 The decision contradicts the Supreme Court’s case law, the case relates to a matter on which there is conflicting case law among the provincial courts or it applies laws that have been in force for less than five years and there is no relevant case law from the Supreme Court in relation to previous laws of identical or similar content.
iii 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.

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);
the possibility of amending foreign judgments concerning matters that, by their own nature, can be modified (e.g., resolutions establishing child support payments or protective measures for minors and legally incapacitated adults);

the recognition, enforcement and registration of foreign judgments and public documents containing measures not recognised in the Spanish legal system through adaptation to other measures recognised in domestic legislation with equivalent effects and for a similar purpose; and

d the recognition and enforcement of foreign judgments issued in class action proceedings.7

vii Assistance to foreign courts

Assistance to foreign courts is governed by several different sets of rules, including the following:

a EC Regulation 1206/2001 of 28 May 2001 on Cooperation between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters. The Regulation provides a swift procedure for the transmission of requests for the taking of evidence directly between the courts of all the Member States of the European Union, with the exception of Denmark.

b The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. The system provided in this Convention differs essentially from that outlined in Regulation (EC) No. 1206/2001 in that such requests are not transmitted directly from the requesting court to the required court, but to the central authority of the state where the evidence is sought. In Spain, that central authority is the Ministry of Justice’s General Subdirectorate for International Legal Cooperation.

c Spain is also party to many bilateral and multilateral treaties, including the Inter-American Convention on Letters Rogatory.

d When no convention or treaty applies, assistance to foreign courts is governed by Law 29/2015 on international legal cooperation in civil matters. Cooperation will be granted pursuant to this framework under the following conditions: the request is not contrary to Spanish public policy; the request is addressed to the Spanish court with authority to perform the taking of evidence; Spanish courts do not have exclusive jurisdiction over the proceedings where evidence sought is intended to be used; the request meets certain content and information requirements established by law; and the Spanish government has not ordered non-cooperation with the requesting country (because it may have repeatedly refused to cooperate or this is expressly prohibited in its legal system; see Section III.v).

viii Access to court files

In principle, access to court files is restricted to the parties, their lawyers and their court representatives. As a general rule, attendance at trial and access to the judgments is public, except if there are reasons to protect privacy.

7 The resolution will not be applicable to those affected in Spain who have not expressly adhered to the foreign class action if (1) it has not been communicated or published in Spain by means equivalent to those provided for in the Spanish Civil Procedure Law; or (2) those affected in Spain have not had the same opportunities to participate in or to opt out of the proceedings in the foreign state.
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:

- 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

- they act on behalf of their clients in any financial or real estate transaction.

Money laundering is deemed to exist regarding any goods derived from any criminal activity, regardless of the punishment foreseen for such activity.

There are three levels of due diligence measures to be adopted depending on the type of client, business relationship, product or transaction, as well as certain other obligations that must be fulfilled.

Law 10/2010 was developed by Royal Decree 304/2014 (which establishes stronger due diligence measures and expands the information duties imposed on lawyers and other professionals) and has recently been amended by Royal Decree 11/2018 (which transposes Directive 2015/849/EU of 20 May 2015, establishing additional duties and measures to improve supervision and sanction of infractions, such as the obligation to the private parties
subject to the law to create internal procedures so that their employees, managers and agents can communicate – including anonymously – relevant information on potential breaches of this legislation).

From a criminal law standpoint, it is a criminal offence to acquire, process or transfer property in the knowledge that it was obtained as a consequence of a crime, or to commit any other act to conceal its unlawful origin, or to assist any person involved in the acts with the aim of avoiding the corresponding legal consequences. It is also a criminal offence to carry out these actions recklessly. Law 10/2010 also makes express reference to evaded tax debts as likely to be used for money laundering. This implies that tax fraud can constitute the illegal origin of money laundering offences and, consequently, the benefits of said tax fraud can constitute the object of a money laundering offence.

iii Data protection

Data protection in Spain is regulated by the General Data Protection Regulation (EU Regulation 2016/679) and Basic Law 3/2018 on Data Protection and Digital Rights. It is necessary to provide information to data subjects before the implementation of personal data processing and to base the processing on a legal basis recognised by the applicable regulations (such as prior consent or the existence of a legitimate interest).

Current data protection regulations (1) recognise the accountability principle, which imposes a proactive responsibility obligation that obliges organisations to establish measures guaranteeing and enabling the demonstration of compliance with the regulations; (2) focus on internal-recording obligations implying that, unless one of the legally established exceptions applies, companies must maintain an internal, written record of the processing activities carried out; and (c) in addition to the traditional rights of access, rectification, cancellation and opposition, the regulations recognise and regulate rights such as the right to data portability, the right to be forgotten and the right to oppose profiling activities.

When personal data is to be transferred to a country outside the European Economic Area in which regulations have not been identified by the EU authorities as ensuring an adequate level of protection, the controller must adopt additional safeguards (such as the use of EU Standard Contractual Clauses for data transfers or to obtain the data subjects’ specific consent for the transfer).

For legal professionals, it is important to fulfil the obligations under data protection regulations since the provision of legal services implies the processing of personal data.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

Confidentiality of information exchanged between lawyers and clients is established in the Judiciary Law and in the General Regulation of the Law Profession.

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8 In May 2018, the two-year transitory period established in the General Data Protection Regulation ended; as from that time, its provisions became directly applicable in Spain. Following the Regulation’s direct applicability, the new Basic Law 3/2018 on Data Protection and Digital Rights was enacted on 6 December 2018.
All lawyers must keep confidential all the facts or information acquired as a result of their professional activity and cannot be required to testify with regard to such facts or information. There are, however, no express regulations governing ‘privileged’ or ‘without prejudice’ documents or communications, as may be the case in common law jurisdictions.

Confidentiality is therefore both a privilege and a legal obligation, encompassing all facts and documents known or received in the exercise of the legal profession. A breach of this obligation could lead to criminal liability as well as sanctions from the Bar Association.

According to the ECJ’s decision in *Akzo Nobel Chemicals Ltd v. Commission*, the confidentiality and secrecy of communications for in-house counsel is not applicable, at least in relation to antitrust investigations initiated by the European Commission.

**ii Production of documents**

Under Spanish law, parties may be required to produce any document considered relevant or useful by the court. The Civil Procedure Law establishes that a party may require the counterparty to produce documents unavailable to the former and related to the subject matter of the dispute or to the effectiveness of the means of evidence.

The test performed by Spanish courts is usually rigorous and the requested document must be directly connected with the dispute. Spanish courts expect the document requested to be specific; in other words, the requesting party must be certain of its existence and it must refer to that specific, identifiable document and to no other document that relates to the general issue.

Naturally, criminal investigation courts operate under different standards and often request the parties or third parties (banks, telecommunications companies, airlines, etc.) to provide information and documents. This can be done either at the initiative of the investigating judge or following a request by the public prosecutor, the police or any party to the proceedings.

Decree Law 9/2017 specifically regulates the production of documents only applicable to procedures of claims for damages derived from antitrust infringements. It entitles claimants to request that the judge order the counterparty or third parties to grant access to specific sources of evidence necessary to substantiate the claim. This regulation is governed by the principle of proportionality and does not permit indiscriminate searches of information. The production of documents may be requested before the proceedings commence, at the time of the submission of the claim or while the proceedings are underway. In all cases, production will only be ordered after the claimant has presented sufficient facts and evidence to justify the viability of the claim for damages. The claimant will bear all expenses derived from the proceedings and damages that may rise from an inappropriate use of the sources of evidence obtained by this means or if no claim is filed following the completion of the disclosure.

**Pretrial proceedings**

The Spanish Civil Procedure Law allows parties to obtain the information necessary to file an action through pretrial proceedings. The basis for these proceedings is that in some cases the future claimant may find it impossible to obtain all the information necessary to file an action without the assistance of judicial authorities. According to the Civil Procedure Law, pretrial proceedings are limited to the following issues:

- the production of documents or evidence of facts regarding capacity;
- representation and legal standing;
Spain

c the disclosure of items in possession of the respondent, and upon which the trial will be based;
d the disclosure of wills and other testamentary documentation;
e the disclosure of accounting documentation of companies and owners associations;
f the disclosure of insurance policies;
g the disclosure of medical records;
h the determination of the members of the group that initiate legal actions for the defence of the collective interest of consumers; and
i the disclosure of information regarding the origin and distribution of merchandising networks pertaining to disputes involving industrial and IP matters.

In any event, the petitioner must lodge a sufficient guarantee to cover any hypothetical damage that may occur if no action or claim is filed following the completion of pretrial proceedings.

Taking of evidence in advance

The Civil Procedure Law also allows the parties to request that evidence be taken in advance (even before the initiation of legal proceedings) when there is justifiable fear that, owing to the activity of persons or owing to the circumstances, the evidentiary acts may not be carried out at the usual procedural moment.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

Arbitration and other alternative dispute resolution means are increasingly becoming a real and effective channel for settling commercial disputes in Spain. This section provides a brief outline of the current status of extrajudicial mechanisms in Spain, focusing on arbitration, mediation and expert determination.

ii Arbitration

The Spanish Arbitration Law passed in 2003 established a very favourable legal framework for arbitration. Its main goal was to provide economic agents with an efficient and flexible dispute resolution mechanism, both in the domestic and the international arena. It was hoped that this would have two positive effects for the legal system: from a domestic perspective, it should relieve the courts of a significant number of cases for which the flexibility of the procedure and the specialisation of the arbitrators proves to be a more appropriate alternative; and from an international perspective, it should promote Spain as a seat of international arbitrations. In general, it can be said that the Arbitration Law has fulfilled those expectations.

Spanish awards are immediately enforceable, even if a request to set aside the award has been filed. The Arbitration Law provides that Spanish awards may only be set aside on the following grounds: the arbitration agreement does not exist or is void; the party challenging the award has not been given proper notice or opportunity to present its case; the arbitrators have ruled on questions not submitted for their consideration; the composition of the arbitral tribunal or the arbitration proceedings have been irregular; the arbitrators have decided on questions that cannot be settled by arbitration; or the award is contrary to public policy. The action to set aside the award is not an appeal and therefore does not entail a review of the
merits of the case. Spanish case law is consistent with this approach, making clear that the scope of review in proceedings to set aside an award is strictly limited to verifying that the essential principles of due process have been observed during the arbitration.

The enforcement of foreign awards in Spain is governed by the New York Convention. Since Spain made no reservation as to its scope of application, the New York Convention governs the enforcement of any foreign arbitration award, even if the place of arbitration is located in a non-signatory state. Spanish courts favour simplicity and expeditiousness when enforcing foreign awards.

The Arbitration Law represents a real breakthrough in developing Spanish arbitration as an efficient alternative to litigation and promoting Spain as an attractive seat for international arbitrations, especially in connection with investments and transactions relating to Spanish-speaking countries. Spanish arbitration institutions and practitioners are fully committed to this active arbitration process, leading initiatives to encourage recourse to arbitration in Spain.

Law 11/2011 was passed to amend the Arbitration Law. Two features of the amendment stand out. First, the amended Law retains the fundamental pillar of arbitration, that of party autonomy. Second, in order to unify case law and guarantee greater legal certainty, the – limited – competence for judicial control of arbitration was concentrated in the High Courts of Justice. It falls within their authority to hear actions for annulment of arbitral awards rendered in arbitrations where Spain is the seat of arbitration and to hear the requests for recognition of foreign awards. The role of supporting arbitration (except the judicial appointment of arbitrators) falls to first instance courts: they continue to assist in the taking of evidence, the judicial granting of interim measures and the enforcement of awards.

iii Mediation


It is applicable to civil and commercial matters, including cross-border disputes, except as regards rights and obligations that are not at the parties’ disposal under the relevant applicable law. This regulation is not applicable to criminal mediation, mediation with public authorities, labour mediation or mediation in consumer matters.

The final agreement or settlement ultimately reached by means of mediation is binding on the parties. It can cover all or only part of the matters subject to mediation. If the parties wish it to be enforceable, the agreement must be converted into a public deed.

On 13 December 2013, Royal Decree 980/2013 was approved, developing specific aspects of Law 5/2012.

iv Other forms of alternative dispute resolution

Apart from arbitration and mediation, expert determination is considered a valid alternative to litigation in Spain. Expert determination is a flexible procedure for the resolution of disputes based on the decision of an independent third party: the expert. Expert determination is regarded as especially suitable for factual disputes.
Recourse to expert determination is also common in disputes in which a high degree of technical knowledge is required, such as those resulting from construction contracts.

VII OUTLOOK AND CONCLUSIONS

The year 2019 has been marked by the holding of two national elections (the first in April and, after it was not possible to form a government in the wake of the first elections, a second set of elections in November) and, finally, the formation in January 2020 of a new coalition government headed by the Socialist party. Those events, the lack of a stable parliamentary majority and the limited functions of the caretaker government have led to a reduction in legislative activity. In any case, an increase in legislative measures is expected after the formation of the new government.

The Supreme Court has continued to review an array of doctrines and legal concepts. European Union law continues to have more influence on national law, mainly through decisions of the European courts issued in the context of preliminary rulings. Judicial activity has been steady, although less active than in the early years of the crisis, when they reached historic levels (there has nevertheless been an increase in civil proceedings, for instance in procedures related to ‘floor clauses’ included in mortgage loan contracts and other issues related to these contracts, which has led to the temporary specialisation of 55 courts of first instance to hear those disputes).

International arbitration’s growth marches on (in both commercial and investment arbitrations), making Spain a reference in the field, especially in disputes involving Latin American parties.

During the past year, the Spanish Court of Arbitration, Madrid Court of Arbitration, the Civil and Mercantile Court of Arbitration and the Madrid Bar Association have continued to work on the unification of their arbitral activities. This collaborative work has culminated in the constitution in October 2019 of the new Madrid International Arbitration Centre. It will begin operations in 2020. It will only handle arbitrations that have an international character (in accordance with Article 3 of Spanish Arbitration Law) derived from (1) agreements of arbitration that designate the Madrid International Arbitration Centre as the handling institution; and (2) arbitration agreements that designate any of the four promoter entities as an handling institution, provided they are signed as of 1 January 2020.
Chapter 27

SWEDEN

Cecilia Möller Norsted and Mattias Lindner

I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

The Swedish legal system is based on the civil law tradition. The main source of law is statutes, which are enacted by the Swedish parliament upon suggestions from the government. Important secondary sources of law are preparatory works, case law and legal doctrine, which are all often referred to by Swedish courts. Since Sweden is a member of the European Union, legislation from the institutions of the European Union and case law from the Court of Justice of the European Union are also important sources of law in Sweden.

There are three types of courts in the Swedish court system; general courts, administrative courts and specialist courts. The general courts include district courts, courts of appeal and the Supreme Court. The general courts handle both criminal and civil cases. There are, however, certain types of civil cases over which a specialist court, and not the general courts, has jurisdiction. One such example is certain labour disputes, which are tried by the Labour Court as first and last instance. The administrative courts include administrative courts of first instance, administrative courts of appeal and the Supreme Administrative Court. Cases before these courts are normally initiated by an individual appealing a decision by a public authority, in matters regarding, for example, tax, social insurance, compulsory care and migration.

Commercial disputes may be brought before the general courts but larger commercial disputes are more commonly resolved through arbitration. The leading arbitration institute in Sweden, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), is one of the world’s leading arbitration institutions. The SCC handles both international and domestic commercial disputes. It is also the world’s second-largest institute for investment disputes, after the International Centre for Settlement of Investment Disputes. In addition to its arbitration rules (regular arbitration and expedited arbitration), the SCC also has its own mediation rules. The Swedish Arbitration Act has recently been modernised and a revised version came into force on 1 March 2019.

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2 https://sccinstitute.com/about-the-scc/.
II THE YEAR IN REVIEW

i Modernisation of the Swedish Arbitration Act

On 1 March 2019, a revised version of the Swedish Arbitration Act came into force. One of the main purposes of the revision was to make the Act more accessible for foreign parties and attract international arbitrations to Sweden. Another main purpose was to further enhance the efficiency and legal certainty of arbitration proceedings.

The revisions include, inter alia:

- a possibility to challenge an arbitral tribunal’s decision that it has jurisdiction before the Svea Court of Appeal as proceedings are ongoing, within 30 days from such decision;
- excluding the possibility for other parties than consumers to initiate a declaratory action regarding the arbitral tribunal’s jurisdiction before Swedish courts, during ongoing arbitration proceedings;
- an adjustment of the Act to multiparty arbitrations;
- introducing an express requirement that an excess of mandate must probably have affected the outcome of the case in order for the award to be set aside;
- shortening the time period to initiate challenge actions before Swedish courts, from three months to two months; and
- an extended possibility to use the English language for the hearing of evidence in challenge proceedings.

ii Challenges to arbitral awards

Challenge cases relating to the CJEU’s decision in Achmea

In March 2018, the Court of Justice of the European Union (CJEU) issued its judgment in the Achmea case. The question before the CJEU concerned an arbitration clause in a bilateral investment treaty between the Netherlands and Slovakia. The clause allowed an investor from one of the contracting parties to initiate arbitration proceedings against the other contracting party, regarding an investment in the latter. The CJEU held that the arbitration clause was incompatible with Articles 267 and 344 of the Treaty on the Functioning of the European Union (TFEU).

Following Achmea, a debate has arisen regarding the impact of the judgment on other intra-EU investor-state disputes. One debated issue is whether the CJEU’s conclusions in Achmea cover intra-EU disputes under the Energy Charter Treaty (ECT).

Under the ECT, an investor may choose between different dispute resolution mechanisms and one possible choice is arbitration under the Arbitration Rules of the SCC. Consequently, a number of investor-state awards under the ECT have been rendered in Sweden under the SCC rules.

As of November 2019, five challenge cases are pending before Swedish courts in which, for example, Achmea is raised as a basis for an invalidity/set-aside action. All five cases concern intra-EU investment disputes, one under a bilateral investment treaty and four under the ECT. Four of the cases are still pending before the Svea Court of Appeal. In the fifth case, the challenge action was rejected by the Svea Court of Appeal in February 2019.

3 Slovakische Republik v. Achmea BV (C-248/16). ECLI:EU:C:2018:158.
5 Svea Court of Appeal’s judgment on 22 February 2019, in Cases Nos. T 8538-17 and T 12033-17.
invalid, referring to Achmea. However, since the Member State (Poland) had, according to the Svea Court of Appeal, not objected to the tribunal’s jurisdiction in due time, Poland’s action was rejected. The judgment has been appealed to the Supreme Court where it is currently pending. In December 2019, the Supreme Court decided to make a request for a preliminary ruling from the CJEU.

The Supreme Court’s judgment in the Belgor case
In a judgment dated 20 March 2019, the Supreme Court interpreted the scope of an arbitration clause in a contract between a Belarussian company and a Turkish company regarding construction works. The issue in the challenge action was, inter alia, whether claims relating to additional works based on separate contracts were covered by the arbitration clause in the original contract.

The Supreme Court held that when determining whether a dispute is covered by an arbitration clause, the arbitral tribunal must sometimes make an in-depth review of the parties’ relationship, and that in such cases, there is reason to assume that parties to a commercial relationship wish to have disputes within the scope of their relationship settled by one single forum. The Supreme Court then held that when a court shall review the arbitral tribunal’s decision on jurisdiction, regard should be made to the fact that, typically, the arbitral tribunal is best positioned to determine the issue of its own jurisdiction. Therefore, according to the Supreme Court, the starting point for the court’s review should be that the arbitral tribunal’s interpretation and evaluation of evidence is correct.

This case has attracted much attention in Sweden, for example, due to the statements made by the Supreme Court regarding the starting point for the court’s assessment of the arbitral tribunal’s decision on its own jurisdiction.

III COURT PROCEDURE

i Overview of court procedure
The Swedish Code of Judicial Procedure came into force in 1948 and governs the procedure in civil and criminal cases in the general courts. The procedure is based on the principles of immediacy, orality and concentration. According to the principles of immediacy and orality, a judgment may only be based on what has been orally presented to the court by the parties at the main hearing. This includes that witnesses must appear in person to give testimony; written witness statements are consequently not used. The principle of concentration entails that a main hearing shall continue without interruption until the entire case has been heard.

In terms of evidence, the principle of free evaluation of evidence applies. According to this principle, the courts are given a wide discretion when assessing the value of the presented written and oral evidence. This principle also entails that there are no rules regarding inadmissibility of evidence due to, for example, that the evidence was unlawfully obtained or subject to privilege. It is generally considered that the principles of immediacy, orality and concentration facilitate the application of the court’s discretion in terms of assessing the value of evidence.

6 NJA 2019, p. 171.
The parties must identify the evidence on which they rely prior to the main hearing, and as a main rule parties are not allowed to introduce new evidence at the main hearing. There is a limited possibility to introduce new evidence on appeal.

A district court’s ruling can be appealed to a court of appeal and, further and finally, to the Supreme Court. As from 2008, leave to appeal in civil cases is required not only in the Supreme Court but also in the courts of appeal. This general requirement for leave to appeal in civil cases was introduced by the Swedish legislator as a means to achieve faster proceedings and a more efficient use of resources at the court of appeals. The idea was that the main part of the judicial administration shall take place in the district courts and that the higher courts shall focus on cases where there is a reason to believe that the district court’s judgment is incorrect.

ii Procedures and time frames

Civil proceedings are initiated by the claimant filing an application for summons with the court. Provided that all formal requirements of the application for summons are fulfilled, the district court will issue a summons against the respondent. The respondent is normally given three to four weeks from being served to submit an answer. Thereafter, further submissions may be exchanged. Unless it is deemed unnecessary considering the nature of the case, a preparatory hearing is held after the initial submissions have been exchanged. The purpose of such hearing is, for example, to clarify the parties’ respective claims and objections and to what extent the parties differ regarding the facts of the case. At such hearing, the court will also investigate the possibilities of a settlement between the parties and discuss case management. As from 2008, the court is under an obligation to produce a timetable for the proceedings.

The exchange of written submissions and the preparatory hearing is referred to as the preparation phase of the proceedings. The Code requires that the district courts proceed with the preparation phase with the aim of a speedy adjudication of the case and the Code provides the courts with a variety of tools to achieve this. For example, the court may in civil cases under certain circumstances issue a default judgment against a party not complying with the court’s instructions to, for example, submit a written answer to the claimant’s summons application, or against a party failing to appear before the court for the preparatory or main hearing.

When the case is sufficiently prepared, and provided that the parties have not reached a settlement, a main hearing is held where each party, pursuant to the principles mentioned above, presents the circumstances and the evidence on which it relies.

The time period for civil cases before district courts and courts of appeal vary depending on the complexity of the case and the courts’ workload. Generally, civil cases take around 12 to 18 months before the district court and a corresponding time before the courts of appeal.

A claimant may apply for interim measures in order to preserve its rights. Sequestration is one of the most common forms of interim measures used in Swedish proceedings but a claimant can also, for example, request that the court prohibits the respondent from taking certain actions under penalty of a fine. To obtain an interim measure, the claimant must show probable cause for the claim and further show that it is reasonable to suspect that the respondent will compromise the claimant’s alleged rights.

Should the claimant ultimately be unsuccessful in the dispute, the claimant is liable for any damages incurred by the respondent as a result of the interim measure. To preserve
the respondent’s right to damages, the claimant, as a main rule, must provide security for the possible damage. An interim measure may be obtained ex parte, if delay places the claimant’s claim at risk.

If the interim measure is sought (and granted) prior to court or arbitration proceedings, the claimant must initiate such proceedings within one month from the court’s order. Failing to do so will result in the interim measure lapsing immediately.

In cases where a party has a claim for payment and has reason to believe that the claim will not be contested, a summary procedure may be initiated before the Swedish Enforcement Agency. If the claim is not contested, the Enforcement Agency may issue a payment order which can be enforced as a court judgment. This procedure is considerably faster than court proceedings and is preferable for undisputed, often smaller, claims. If the respondent contests the claim and the claimant wishes to pursue the claim, the dispute will be referred to a district court.

### Class actions

Class actions may be brought before the general courts under the Swedish Class Actions Act. A class action is defined as an action brought by a claimant on behalf of, and with legal effect for, a group of class members who are not parties to the action. Any claim that may be tried by a general court in a civil action may be subject to a class action, provided that the other requirements for a class action are met.

There are three forms of class actions under Swedish law: private, public and organisational class actions. In addition to the specific requirements applicable to each of the three forms of class actions, certain general requirements must be met for all types of class actions. One such requirement is that a class action may only be brought if the action is based on circumstances which are mutual (or at least similar) for the entire group of class members. Another requirement is that the claimant must be deemed appropriate to represent the group of class members considering, inter alia, his or her financial conditions.

When the Class Actions Act was introduced in 2003, it was predicted that approximately 15 to 20 cases would be initiated each year. This prediction has not come true. Instead, only approximately one to two cases have been initiated each year since the Act came into force and there is still no trend towards more class actions. Many of the initiated cases have been settled and a number of cases have been dismissed for not fulfilling the formal requirements.

### Representation in proceedings

In Sweden, parties to court proceedings are not required to be represented by counsel and very few formal requirements are imposed on persons who act as counsel. One such requirement is that a counsel must master the Swedish language and, as a main rule, reside in Sweden, another state within the European Economic Area or Switzerland. Further, the court may dismiss a person as counsel if he or she is not deemed suitable to act as counsel in the matter. In practice, even though there are no formal requirements regarding, for example, legal education, it is uncommon for counsel not to be legally educated.

In commercial disputes the parties’ counsel are normally members of the Swedish Bar Association.
v Service out of the jurisdiction

The EU has adopted legislation facilitating the service of documents within the EU in matters of civil or commercial nature (Regulation (EC) 1393/2007). In accordance with this Regulation, Swedish courts and agencies may apply to the competent authority of another Member State to assist with the service. Likewise, authorities in other Member States may request that the competent authority in Sweden (the Stockholm County Administrative Board) assist with service of documents in Sweden.

In addition to these rules facilitating the service of documents within the EU, a Swedish court may order a party who does not reside in Sweden to retain a counsel who resides within the European Economic Area or Switzerland and who is authorised to receive services on behalf of the party. Therefore, Swedish courts seldom need to serve documents outside the European Economic Area or Switzerland.

vi Enforcement of foreign judgments

A foreign judgment is only enforceable in Sweden if it is covered by an international convention on enforcement or relevant EU regulations.

If a judgment was rendered in an EU Member State and the proceedings preceding the judgment were initiated before 10 January 2015, the original version of the Brussels I Regulation 7 is applicable. If the proceedings were initiated after this date, the enforceability of the judgment is instead regulated by the recast version of the Brussels I Regulation. 8

Although both versions of the Brussels I Regulation provide that judgments rendered within the EU 9 are enforceable in Sweden, the enforcement procedure differs slightly between the two versions.

Pursuant to the recast version, a judgment rendered in another Member State which is enforceable in that state is enforceable in Sweden without any declaration of enforceability being required. Thus, the party seeking enforcement can apply for enforcement directly with the Swedish Enforcement Agency. The party against whom enforcement is sought may apply for a refusal of recognition before the Svea Court of Appeal. Such refusal may be obtained, for example, if the judgment is manifestly contrary to Swedish public policy.

Under the original version of the Brussels I Regulation, enforcement is first subject to an exequatur procedure before the Svea Court of Appeal. The Svea Court of Appeal shall immediately declare the judgment enforceable, subject to certain formal requirements being met, without subjecting it to any review with respect to, for example, public policy. Upon appeal the declaration of enforceability may be revoked, for example, on grounds of public policy.

If the judgment was rendered in a state outside the EU, and if there are no applicable instruments regulating the enforceability of the judgment, the judgment will not be enforceable in Sweden. Such foreign judgment may, however, still serve as a basis for a Swedish court judgment, which is in turn enforceable.

8 Regulation (EU) 1215/2012.
9 It should be mentioned that neither the original nor the recast version of the Brussels I Regulation apply in relation to Denmark. However, Danish judgments are, according to other instruments, enforceable in Sweden.
vii Assistance to foreign courts
Pursuant to Regulation (EC) 1206/2001, a court situated in another Member State may make a request for the taking of evidence in Sweden. The Regulation provides two alternative procedures for this purpose. A foreign court may ask a Swedish court for assistance (i.e., ask that a Swedish court take evidence on behalf of the foreign court). Such a request shall be transmitted to a Swedish district court. A foreign court may also ask to take evidence directly in Sweden (i.e., ask for permission to take evidence in Sweden without the involvement of a Swedish court). Such requests shall be transmitted to the Swedish Ministry of Justice.

Sweden assists foreign courts in the taking of evidence also where Regulation (EC) 1206/2001 does not apply, for example under the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.

viii Access to court files
The principle of public access to information is fundamental in Swedish law. When it comes to court proceedings, this principle entails that court files and court hearings are as a main rule open to the public. However, there are certain exceptions stipulated in the Swedish Public Access to Information and Secrecy Act. Court records containing trade secrets may for example be kept secret. Furthermore, if it can be assumed that information to which secrecy applies will be presented at a court hearing, the court may under certain circumstances direct that the hearing is held behind closed doors.

ix Litigation funding
Litigation is normally funded by the parties themselves or by insurance companies. There are no rules on third-party funding and there is no developed market for such funding in Sweden.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls
According to the Code of Conduct of the Swedish Bar Association a mandate may not be accepted if there exists a conflict of interest or a significant risk of a conflict of interest. A mandate must further be declined if a conflict of interest arises after the mandate is accepted. The absence of a conflict of interest is considered to preserve the lawyer’s duties of independence, loyalty and secrecy towards his or her clients. Chinese walls are not accepted.

ii Money laundering, proceeds of crime and funds related to terrorism
The Swedish Act on Measures against Money Laundering and Terrorist Financing implements the Fourth EU Money Laundering Directive\(^\text{10}\) and entails certain obligations for members of the Bar Association and their associates. Such obligations include identifying and conducting reviews of clients, monitoring ongoing mandates and separate transactions, discovering deviant activities and deepening the examination of circumstances that may indicate money

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laundering. Matters such as disputes are, however, generally excepted from these obligations. The obligations under the Act also include an obligation to report suspected cases of money laundering or funding of terrorism to the Financial Police.

iii Data protection

In 2018, the General Data Protection Regulation,\(^{11}\) which applies throughout the EU, came into force. The Regulation sets forth a number of fundamental principles that apply to processing of personal data. For example, personal data may only be collected for specific, explicitly stated and legitimate purposes and there must be a lawful basis for the processing under the Regulation. The Swedish Data Protection Agency may fine violators of the Regulation up to €20 million or 4 per cent of the company’s global annual revenue, whichever is greater. On 20 August 2019, the Swedish Data Protection Agency issued Sweden’s first fine for violation of the Regulation. The decision has been appealed.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

The relationship between a member of the Swedish Bar Association and his or her client is privileged in different ways. The correspondence between a lawyer and the client may not be subject to an order for production of documents. Further, a lawyer and his or her associates may, as a main rule, refuse to testify before a court on issues relating to the client-attorney relationship.

Communications with and information specifically entrusted with someone acting as counsel in court proceedings are privileged even if the counsel is not a member of the Swedish Bar Association. There are no specific rules applicable to in-house counsel, and communications with in-house counsel as such are not privileged under Swedish law.

ii Production of documents

Upon request by a party, the court may order a counterparty or a third party to produce documents. To obtain such an order, the party requesting the production order must explain what circumstance the documents shall prove and identify the documents concerned to a reasonable degree. If the requesting party cannot identify the documents due to lack of information, the party may request that a hearing is held with the potential holder of the documents or other persons.

Certain types of documents (e.g., documents containing trade secrets) may, in general, not be subject to a production order.

Only the entity holding the documents in question may be ordered to produce the documents. In general, the entity that owns the documents or has the right of disposition to them is considered as the holder of the documents.

The aforementioned rules in the Code came into force before documents were stored digitally. On 2 September 2019, the Supreme Court gave leave to appeal in a case concerning

\(^{11}\) Regulation (EU) 2016/679.
the question whether someone can be ordered to produce digitally stored information in digital form (and not just in printed form). The Supreme Court has not yet rendered its judgment.

VI Alternatives to Litigation

i Overview of alternatives to litigation

Arbitration is a frequently used alternative to litigation in Sweden. Larger commercial disputes are generally resolved through arbitration rather than in court. Other forms of ADR such as mediation or expert determinations are not widely used.

ii Arbitration

Arbitrations seated in Sweden are governed by the Swedish Arbitration Act of 1999. As discussed in Section II above, a revised Arbitration Act came into force on 1 March 2019. The Act is based on party autonomy and contains very few mandatory rules. The parties are thus to a large extent free to agree on the conduct of the arbitration. Although the Act does not follow the UNCITRAL Model Law as to its form, it is very similar in content.

As already mentioned, the SCC is one of the world’s largest arbitration institutes. In 2018, the Institute registered a total of 152 cases and around 50 per cent of these cases were international disputes. The total value in dispute for all cases commenced in 2018 amounted to approximately €13.3 billion. Most of these proceedings were governed by the Arbitration Rules of the SCC.12

Since 2010, the Arbitration Rules of the SCC contain rules on emergency arbitrators. These rules allow for parties to obtain a swift interim relief from an arbitrator before an arbitral tribunal has been constituted. The SCC appoints an arbitrator within 24 hours from the application and a decision shall, as a rule, be rendered within five days.

Swedish arbitral awards cannot be appealed on the merits. An arbitral award may be declared invalid if it includes determination of an issue which under Swedish law may not be decided by arbitrators, or if the award, or the manner in which it was rendered, is evidently contrary to Swedish public policy. Further, an award may be challenged and set aside if, for example, the award is not covered by a valid arbitration agreement or if the tribunal has exceeded its mandate in a manner that probably influenced the outcome of the case.

Claims for a declaration of invalidity and challenges to an award shall be brought before the Svea Court of Appeal. A claim for a declaration of invalidity may be brought without any limitation in time. A claim for setting aside the award must be brought within two months from the date when the party received the award, unless the award was rendered in proceedings which were commenced before 1 March 2019, in which case the previous three months time limit applies.

An arbitral award rendered in Sweden may be enforced by the Swedish Enforcement Agency as a court judgment. Sweden is party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and foreign awards are thus enforceable in Sweden. The grounds for refusing enforcement set out in Article 5 of the New

York Convention have been incorporated into the Swedish Arbitration Act. Before seeking enforcement with the Swedish Enforcement Agency, the party must apply for a declaration of enforceability with the Svea Court of Appeal.

### Mediation

Mediation may be agreed upon by the parties after a dispute has arisen. The SCC has its own set of mediation rules, revised in 2014, which parties may choose to apply. In commercial disputes before a general court, the court may decide to appoint a mediator if the parties agree. The courts sometimes also conduct more informal settlement negotiations. In such cases, the judge who has conducted the settlement negotiation will not act as judge if the dispute is not settled.

In an attempt to facilitate mediation as a dispute resolution method the Swedish Code of Judicial Procedure was revised in 2011 and a new statute was introduced. The new statute, which implements the Mediation Directive,\(^{13}\) provides that settlement agreements concluded after mediation may be enforced directly by the Swedish Enforcement Agency. However, despite these efforts, mediation is still not widely used to settle commercial disputes in Sweden.

### Other forms of alternative dispute resolution

Expert determination is sometimes used to settle certain disputes under construction contracts or share purchase agreements. This procedure is generally expedited and results in a decision that is normally binding on the parties as new contract content.

### OUTLOOK AND CONCLUSIONS

A general current trend that is expected to continue in the coming years is the strive for ever more efficient legal proceedings. This relates both to court proceedings and arbitral proceedings. The introduction of the general requirement for leave to appeal in the Court of Appeal is one example of this trend. The courts’ obligation to set a timetable for the proceedings at an early stage of the preparation phase is another example. Along the same lines, the modernisation of the Swedish Arbitration Act has as one of its main purposes to enhance the efficiency of arbitral proceedings. Facilitating multiparty arbitrations is one example of trying to achieve this; shortening the time period for challenges is another.

Another focus in recent years has been digitalisation and the acknowledgement that the legal system must adapt to a new digital environment. In Swedish courts, submissions in commercial disputes are generally filed digitally and communications between the courts and parties are normally made by electronic means. In 2019, the SCC launched the SCC Platform, which is a secure digital platform for communication, planning and file sharing between the parties and their counsel, the arbitral tribunal and the SCC.\(^{14}\) This digital platform further strengthens the SCC and Sweden as a modern hub for resolving commercial disputes through arbitration.

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\(^{13}\) Directive (EC) 2008/52.
Chapter 28

SWITZERLAND

Daniel Eisele, Tamir Livschitz and Anja Vogt

I 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 Procedure2 (CCP) prescribes the principle of double instance for the judiciary of the cantons, which means that each canton must, besides a court of first instance, establish an appeal instance with full power of review. Decisions of the appeal court may then be appealed to the Swiss Federal Tribunal – the highest court in Switzerland – where the grounds for appeal are ordinarily limited to violations of federal and constitutional law. The proceedings before the Swiss Federal Tribunal are governed by the Federal Act on the Swiss Federal Tribunal.3

As an exception to the aforementioned principle of double instance at the cantonal level and deriving from the cantonal power to organise its judiciary (e.g., the functional and subject matter jurisdiction of the courts), the cantons are given the right to establish a specialised court as the sole cantonal instance to hear commercial disputes, whose decision may only be appealed to the Swiss Federal Tribunal. So far only four cantons (Zurich, Berne, St Gallen and Aargau) have made use of this right and have established a specialised commercial court.

In certain specialised fields of law such as intellectual property, competition and antitrust law, claims against the Swiss government and disputes relating to collective investment schemes, federal law requires the cantons to designate a court of exclusive first instance jurisdiction. Moreover, for disputes relating to patents the Federal Patent Court is competent to hear the case and the proceedings are governed by the Federal Act on the Federal Patent Court.

The principle of double instance furthermore does not apply in arbitration matters, be it domestic or international. The sole instance of appeal in domestic arbitration proceedings is the Swiss Federal Tribunal, unless the arbitrating parties explicitly agree on a cantonal court as sole appeals instance. Similarly, in international arbitration proceedings the Swiss Federal Tribunal is the sole instance of appeal.

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Switzerland

Tribunal acts as the sole appeals instance for arbitral awards, unless the possibility to appeal has been excluded by the arbitrating parties, which is, however, only admissible if none of the arbitrating parties is domiciled in Switzerland.

II THE YEAR IN REVIEW

In the past year, the Swiss Federal Tribunal has rendered a number of notable decisions. Namely, in a landmark decision it held that contracts may consist of multiple characteristic (non-monetary) obligations and thus multiple places of performance with each being able to establish jurisdiction (see Section II.i). Furthermore, and for the first time, the Swiss Federal Tribunal found that its previous case law on the extension of an arbitration clause to non-signatory third parties in relation to Article 178 of the Private International Law Act\(^4\) (PILA) was also applicable within the scope of Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards\(^5\) (the New York Convention) (see Section II.ii). Moreover, the Swiss Federal Tribunal clarified the requirements of the contractual exclusion of the provisions governing Swiss domestic arbitration in favour of the provisions governing Swiss international arbitration (see Section II.iii). Finally, it considered that when an attorney changes law firms the new law firm is required to resign the mandates on which such attorney had worked in the previous law firm and held that ‘Chinese walls’ did not provide adequate protection against conflicts of interest (see Section II.iv).

i Local jurisdiction in case of multiple characteristic obligations under one contract

In a landmark decision dated 13 March 2019, the Swiss Federal Tribunal ruled that contracts may consist of multiple characteristic (non-monetary) obligations, with each of such obligations being able to establish local jurisdiction at the respective place of performance.

The underlying dispute concerned an orally concluded contract between the claimant, a Swiss petrol station operator, and the respondent, a Swiss entity specialised in the construction and maintenance of petrol stations, in relation to the planning, site management and supervision of the construction of a petrol station in the canton of Berne. Shortly before the final acceptance of the newly constructed petrol station, a fire broke out at the construction site. After the building insurance declined coverage for the damages caused by such fire, the claimant filed a damage claim against the respondent with the commercial court of Berne arguing that the respondent had breached its duty to take out a building insurance. The Berne commercial court held that the contract between the parties – consisting of elements of both, a contract for work and services (planning of the construction of the petrol station) as well as of a mandate agreement (supervision of the construction of the petrol station) – was mixed in nature and consisted of multiple characteristic, non-monetary obligations. Since it was the respondent’s obligation to supervise the construction on-site in Berne, the Berne commercial court affirmed its local jurisdiction to hear the claimant’s claim in an interim decision. Such interim decision was appealed against by the respondent to the Swiss Federal Tribunal.

The Swiss Federal Tribunal elaborated, in a first step, on the contents of Article 31 CCP (i.e., the provision applicable in the case to be decided by the court), as well as of

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Article 113 PILA, which, provides for a similar wording. Both provisions stipulate that the court at the domicile or registered office of the respondent or, alternatively, at the place where the characteristic obligation is to be performed has jurisdiction to hear claims related to contracts. Whether an obligation of a contract qualifies as characteristic is to be decided by taking into account Article 117(3) PILA, which expressly stipulates the characteristic – typically non-monetary – obligation of certain types of contracts. With regard to mandate agreements and contracts for work and services as in the present case, Article 117(3) PILA stipulates that the service to be provided is deemed the characteristic obligation.

In a second step and considering that the contract between the parties consisted of multiple non-monetary obligations of which one alone did not appear to be characteristic without further ado, the Swiss Federal Tribunal considered the different views of Swiss legal scholars and finally agreed with the majority’s opinion that a contract could indeed consist of multiple characteristic obligations which in turn provide for a multitude of places of performance.

In conclusion and in confirming the findings of the commercial court, the Swiss Federal Tribunal resolved that the contract between the parties consisted of multiple characteristic obligations and, thus, multiple places of performance each being able to establish local jurisdiction as per Article 31 CCP. As one of such places of performance (i.e., the obligation of site management and supervisions) was located at the place of the petrol station in Berne, the Swiss Federal Tribunal affirmed the local jurisdiction of the Berne commercial court.

In relation to the respondent’s argument that the Berne commercial court wrongfully affirmed its jurisdiction taking into account a place of performance of an obligation which was not the subject matter of the dispute, the Swiss Federal Tribunal found that such question needed not be determined in the present case, as the characteristic obligation that was at issue between the parties was also to be performed by the respondent in Berne and, therefore, equally established the local jurisdiction of the Berne commercial court. The Swiss Federal Tribunal acknowledged that certain legal scholars promulgate that, in the event that there are several characteristic obligations, only the one in dispute should be taken into account when determining the place of performance and, thus, the local jurisdiction. However, it stated (obiter) that within the scope of Article 31 CCP (and Article 113 PILA) it was in principle not decisive which obligation was the subject matter of a legal proceeding in question but rather which obligation qualifies as characteristic.

ii Extension of arbitration agreement to non-signatory third parties under the New York Convention

On 17 April 2019, the Swiss Federal Tribunal rendered a decision on the question of whether under Article II(2) New York Convention an arbitration agreement may be extended to a non-signatory third party.

The decision concerned a dispute between a Slovenian and a Swiss company that maintained a distribution relationship over several years. After the Slovenian company initiated state court proceedings against the Swiss company before the commercial court of Aarau requesting payment of an outstanding amount, the latter objected to the commercial court’s jurisdiction and raised an arbitration defence based on an arbitration clause included in a written distribution agreement. While the existence of the distribution relationship between the parties per se was not contested, it was disputed whether the Swiss company was a party to a written distribution agreement with the Slovenian company that contained an arbitration clause or whether such distribution agreement had been validly concluded only
between the Slovenian party and a sister company of the Swiss entity. After the commercial court declined its jurisdiction and referred the parties to arbitration, the Slovenian company appealed against such decision to the Swiss Federal Tribunal.

The Swiss Federal Tribunal dismissed the appeal against the commercial court’s decision and found that the commercial court correctly declined its jurisdiction (however, based on improper reasoning). It held that by continuous intervention in the performance of the distribution agreement, the Swiss entity accepted to be bound by the arbitration clause contained in such agreement. The Swiss Federal Tribunal reiterated that it had confirmed the extension of an arbitration agreement to a non-signatory third party by its conduct already on several occasions. Albeit such case law related to Article 178(1) PILA, the Swiss Federal Tribunal held that the formal requirements in Article II(2) New York Convention correspond to those in Article 178(1) PILA and, therefore, it deemed it justified to apply such established case law also in the context of Article II(2) New York Convention. As per its case law in relation to Article 178(1) PILA, the Swiss Federal Tribunal held that the formal requirements of Article II(2) New York Convention, namely that the arbitration agreement is to be ‘signed by the parties’, apply only to the initial signing of the contract and not to non-signatory third parties.

Finally, the Swiss Federal Tribunal found that the requirements for a binding transfer of rights and obligations to a third party are determined by the applicable substantive law, in the present case Slovenian law, and neither by Article 178 PILA nor Article II(2) New York Convention. It concluded that the question of whether the parties were bound by the arbitration clause in the distribution agreement was therefore a question of substantive law and not related to the formal requirements of the arbitration agreement and held that the Slovenian company had not demonstrated that such an extension of the arbitration clause to a third party would not have taken place under Slovenian law.

iii Requirements for opting out from Swiss domestic arbitration provisions into Swiss international arbitration provisions

In Switzerland, an arbitration is deemed international and governed by the Chapter 12 of the PILA if at least one party to the arbitration agreement had its domicile or habitual residence outside Switzerland at the time of the conclusion of the arbitration agreement. Domestic arbitration in turn is governed by Article 353 et seq. CCP. In any case, parties that are subject to the domestic arbitration provisions of the CCP may choose to exclude such provisions in favour of the international arbitration provisions set forth in the PILA and vice versa.

Contrary to the CCP, the PILA does not provide for an arbitral award to be challenged on the ground of its arbitrariness. Consequently, the main motive for opting out of the CCP provisions in favour of the provisions of the PILA constitutes the limitation of grounds to appeal against an arbitral award before the Swiss Federal Tribunal.

In the case to be decided by the Swiss Federal Tribunal, the parties that were both domiciled in Switzerland at the time of the conclusion of the arbitration agreement submitted their dispute to the Court of Arbitration for Sport (CAS). For such purpose, the parties signed an order of procedure which, inter alia, explicitly stated that any dispute was to be referred to the CAS and that the provisions of the PILA governing international arbitration were to be applied. After a CAS tribunal rendered the award, one of the parties filed an appeal with the Swiss Federal Tribunal challenging the validity of the opting out as agreed in the
order of procedure and argued that the wording of such order of procedure (‘to the exclusion of any other procedural law’) failed to explicitly exclude the application of the provisions of the CCP in favour of the PILA.

In its decision of 7 May 2019, the Swiss Federal Tribunal elaborated on the prerequisites for excluding the CCP provision in favour of their international equivalent in the PILA. It summarised that the following prerequisites needed to be fulfilled to validly opt out of the provisions of the CCP into the provisions of the PILA: (1) the provisions of the CPC have to be explicitly excluded by the parties; (2) the exclusive application of the provisions of the PILA has to be explicitly agreed on by the parties; and (3) both of such declarations have to be in writing. In relation to the first prerequisite, the Swiss Federal Tribunal reasoned that any wording used by the parties must exhibit the clear intention of the parties to explicitly exclude the provisions of the CCP. In this regard, it particularly held that the parties are not obliged to specifically cite the provisions the application of which they wish to exclude, but must merely clearly indicate their common will to submit their dispute to the provisions of the PILA. It concluded that in the present case, the wording ‘to the exclusion of any other procedural law’ included in the order of procedure was sufficiently clear to express the parties’ will to exclude the application of the provisions of the CCP.

In addition, the Swiss Federal Tribunal clarified that such an opting out of the provisions of the CCP into the PILA could be agreed upon by the parties at any point during the arbitral proceedings, up until the award is rendered, but did not definitively state whether such a change of the applicable procedural law would also require the approval of the arbitral tribunal, in case the latter has already been constituted.

iv Insufficient protection against conflicts of interests by ‘Chinese walls’

In its decision of 14 March 2019, the Swiss Federal Tribunal particularly considered the effectiveness of ‘Chinese walls’ set up in law firms to avoid problems related to conflicts of interest. The underlying dispute concerned the entity X that was being represented by two attorneys of the Swiss law firm A in a criminal proceeding against a former employee of the entity X. The former employee in turn was represented by the Swiss law firm B. In 2015, when the law firm B was mandated by the former employee, attorney Y was employed by law firm B, and it was undisputed between the parties that attorney Y had access to and became aware of the file concerning the representation of the former employee in the aforementioned criminal proceeding. In early 2017, attorney Y changed from law firm B (i.e., the law firm representing the former employee) to law firm A (i.e., the law firm representing the entity X). In the course of the criminal proceeding, the former employee, who was in the meantime represented by a new attorney, alleged that a conflict of interest existed within the law firm A due to the engagement of attorney Y and requested the competent public prosecutor’s office to prohibit the two attorneys from the law firm A from representing the entity X. After the public prosecutor’s office dismissed the former employee’s request, on appeal, the cantonal criminal appeal court prohibited the two attorneys and all other attorneys working for law firm A from advising or representing the entity X in the criminal proceedings against the former employee. The entity X as well as the two attorneys from the law firm A filed an appeal against such decision with the Swiss Federal Tribunal.

The Swiss Federal Tribunal recalled its previous case law in relation to the ‘cardinal rule’ of the legal profession (i.e., the statutory duty of an attorney to avoid any conflict of interest). It noted that the purpose of such duty was first and foremost to protect the interests of the client and, moreover, to help to ensure the proper functioning of the administration of
justice. It then reiterated that according to its case law, the inability of an attorney to represent someone also extends to such attorney’s partners in the same law firm and, accordingly, an attorney’s personal conflict of interest extends to the partnership of law firms or offices in their entirety and, thus, to all the attorneys working in this partnership of law firms or offices. It held that this applies irrespective of the status of the attorney (partner or employee) and the difficulties encountered by law firms of a certain size in complying with the requirements arising from the rules of the legal profession.

After pointing out the different views in scholarly writing on how to deal with conflicts of interest that arise in connection with the change of employed attorneys from one law firm to another, the Swiss Federal Tribunal agreed with the majority opinion and held that if conflicts of interest arose due to the engagement of an attorney, the new law firm ought to resign the affected mandate(s). Particularly, the Swiss Federal Tribunal refused to hear the argument put forward by the appellants that the law firm A had adopted internal rules and measures (i.e., ‘Chinese walls’) to prevent access by attorney Y to the file concerning the former employee. It held that such barriers were generally unsuitable to prevent the problems that arise in connection with conflicts of interest, in particular because they cannot prevent all exchanges (e.g., oral exchanges) between the attorneys of the same law firm. In addition, the Swiss Federal Tribunal expressed its doubts that the declared intention of the law firm A to not involve attorney Y in any affected matter provided the necessary guarantees for protection against conflicts of interest. It stressed that the former employee who had disclosed confidential information to the law firm B was exposed to a risk that such information could be used against him and, furthermore, that he was unable to verify whether the law firm A and/or the employed attorneys complied with their professional obligations. While the Swiss Federal Tribunal acknowledged that its decision could have consequences for the scope of reviews and/or restrictions on the employment of lawyers, it deemed such restrictions justified by the importance of the prohibition of conflicts of interest.

III COURT PROCEDURE

i Overview of court procedure

The main statute governing civil procedure in Switzerland is the CCP. Besides civil procedure, the CCP equally governs debt collection proceedings in relation to non-monetary matters as well as domestic arbitration proceedings, unless the arbitrating parties opt out of its application.

Monetary debt collection matters are governed by the Federal Debt Enforcement and Bankruptcy Act (DEBA), whereas the recognition and enforcement of foreign judgments and foreign arbitral awards is predominantly regulated by the PILA as well as all relevant bilateral and multilateral agreements to which Switzerland is a party; the most important of these are the Lugano Convention and the New York Convention, respectively.

Predominantly, civil proceedings in Switzerland are governed by the principle that it is up to the parties to decide how, when, for how long and to what extent they wish to submit claims as plaintiffs, whether they wish to accept or contest such claims as defendants, or whether they wish to lodge or withdraw appeals. In the same vein, it is generally up to the parties to submit the factual allegations relevant to decide the dispute, and the court when assessing the matter may not take into account facts that have not been argued by the
parties. In contrast thereto, certain proceedings – in particular (but not limited to) family law matters – are governed by the principle that the court has a certain obligation to collect and determine relevant facts to resolve the dispute.

Irrespective of any principle that may apply, Swiss civil proceedings are governed by the principle of *iura novit curia* (i.e., it is up to the court to apply the substantive law *ex officio* regardless of whether or not a party has invoked certain provisions of law). Put differently, when rendering a decision, a court may base its decision on legal provisions that the parties did not invoke at all. Of course, it goes without saying that the court would do so only after having heard the parties.

In proceedings before the Swiss Federal Tribunal acting as the last instance of appeal to review violations of, among others, fundamental rights, federal and cantonal or inter-cantonal law, and acting as sole instance of appeal in domestic and international arbitration proceedings, the principle of *iura novit curia* does not apply. Rather, these proceedings are governed by a principle requiring the parties to point out explicitly and demonstrate what provisions of law are violated by the decision they appeal.

In terms of duration, a period of between three and seven years may be taken as a benchmark for a full litigation appealed through all instances up to the Swiss Federal Tribunal, depending on the court seized, the nature of the proceedings and whether or not an extensive procedure of taking of evidence is required.

### ii Procedures and time frames

The three principal types of proceedings foreseen by the CCP are the ordinary, simplified and summary proceedings. Claims must be submitted under an ordinary proceeding unless the law expressly provides otherwise.

Ordinary proceedings can generally be split up into three phases:

a. the pleading phase, where the parties must present and substantiate the factual basis of their claims and defences, and offer evidence for them;

b. the evidentiary phase, where the courts hear and review the evidence presented by the parties; and

c. the post-hearing phase where the parties may comment on the outcome of the evidence proceedings and the court renders its decision.

Generally, and subject to a number of exceptions, state court civil proceedings in Switzerland are commenced by lodging a request for a conciliatory hearing, which is ordinarily a prerequisite for the filing of legal action in civil matters before state courts. In practice, the settlement rate for such conciliatory hearings can exceed 50 per cent (e.g., in the city of Zurich the conciliation authorities settled 64.5 per cent of the cases in 2017). However, in particular if the value in dispute is high, conciliatory hearings only rarely lead to a settlement of the dispute. Consequently, in cases where the value in dispute exceeds 100,000 Swiss francs, the CCP foresees a possibility for the parties to consensually waive the holding of such a conciliatory hearing. A plaintiff may furthermore waive the holding of a conciliatory hearing if, among other things, the defendant is domiciled outside Switzerland or if its whereabouts are unknown. The parties can agree to revert to mediation in lieu of holding a conciliatory hearing. However, should the mediation process fail, the plaintiff will have to request the issuance of a writ permitting them to file the claim from the body that would have held the conciliatory hearing had it not been replaced by the mediation process. In this
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respect, for multiple reasons not many parties have in the past opted for mediation instead of a conciliatory hearing. Nonetheless, it appears that mediation as such is gaining more and more attention including in commercial disputes.

Simplified proceedings govern disputes with a value in dispute not in excess of 30,000 Swiss francs. Additionally, certain actions relating to very specific issues such as gender equality, aspects of tenancy law or data protection law are also to be brought under simplified proceedings irrespective of their value in dispute.

Simplified proceedings, like ordinary proceedings, are commenced by lodging a request to hold a conciliatory hearing as elaborated above. In the same way as ordinary proceedings, simplified proceedings are complete proceedings (i.e., there is no reduced scope of court review nor do any limitations as to adducing evidence apply). Rather, simplified proceedings generally provide for a facilitation of the pleading phase, where, for instance, the court supports the parties in their substantiation of the claim based on extended interrogation duties and with a view to supplement any incomplete facts of the case or to adduce adequate evidence. In addition, certain matters to be decided by means of the simplified procedure, such as certain tenancy and employment matters, require the court to collect the relevant facts of the dispute. Lastly, in terms of the duration of the proceedings, the court will work towards resolving the dispute during or following the first hearing of the case.

Summary proceedings are fast-track proceedings. No holding of a conciliatory hearing is necessary. The main characteristics of summary proceedings are that the parties may not avail themselves of all otherwise available means of claim and defence. In particular, the means of evidence admitted are, in principle, significantly restricted, while the standard of proof is reduced (generally to a standard of ‘reasonable certainty’).

Legal actions such as motions for interim relief (preliminary measures or injunctions) and claims where the facts are undisputed or immediately provable, and where the law is clear, are to be brought in summary proceedings. Furthermore, the CCP foresees the applicability of summary proceedings to certain specific proceedings, such as particular debt collection and bankruptcy proceedings or proceedings under Swiss company law (e.g., proceedings regarding special audits).

The DEBA fast-track proceedings for monetary debt collection matters addressed above also apply to the enforcement of monetary debts certified by domestic and foreign state court judgments as well as to domestic and foreign arbitral awards (where, with regard to foreign judgments and arbitral awards, the provisions of international agreements and treaties, such as the Lugano Convention or the New York Convention, are additionally taken into account).

iii Class actions

Swiss civil law procedure does not permit class actions. Thus, typically, claims must be brought by individual plaintiffs. However, a number of procedural tools under the CCP allow for multiple parties in civil law proceedings to act jointly, be it on the plaintiffs’ or the defendants’ side.

Under certain circumstances, a group of plaintiffs must lodge their claims or be sued jointly (a ‘mandatory joinder of parties’). Generally, this will be the case if the relationship between the members of the group is of a kind that does not allow for differing decisions as to the individual members of the group. Also, if rights or duties of multiple parties stem from similar circumstances or legal grounds, Swiss law allows for such multiple parties to lodge
their claims jointly. However, and in contrast to a mandatory joinder of parties set up, the joint action is made available as an option rather than as a mandatory requirement ('simple [or voluntary] joinder of parties').

Depending on whether or not the plaintiffs are required by law to proceed together, the effect of the plaintiffs’ legal actions on the other joint parties varies. In the case of a mandatory joinder of parties, all procedural measures taken by one of the parties are, as a rule, effective for all other joint parties. Furthermore, if in the case of a mandatory joinder of parties not all parties are made part of the legal action, the plaintiffs or the defendants may lack standing, which will lead to the dismissal of a claim. In contrast, in the case of a voluntary joinder of parties, each of the joint parties may act independently, and a judgment rendered will only bind the parties having joined the proceedings as voluntary joint parties and the judgment may vary as to each individual of the joint parties.

As a further kind of group action, Swiss law permits associations and organisations of national or regional importance to file claims on behalf of their members, if their statutes authorise them to protect the interests of their members, which is predominantly limited to remedial action for violations of their members’ personality rights. Actions seeking monetary relief are, however, excluded and need to be pursued individually by the person or persons concerned.

Although the above reflects the current situation in Switzerland with respect to class actions, political efforts are under way to improve the tools for collective legal protection; in particular, in the areas of consumer protection, personality rights and data protection. However, the Federal Council, Switzerland’s executive branch, decided not to include a previously discussed Swiss-style class action in the new Financial Services Act, which would have facilitated investors’ access to courts in financial matters. Instead, the Federal Council indicated that the introduction of general group settlement proceedings, as well as the extension of the above-mentioned group action, will be suggested as part of future revisions of the CCP in the coming years.

In March 2018, the Federal Council initiated the consultation process for the revision of the CCP and particularly suggested two major amendments with regard to collective legal protection aiming at facilitating actions for damages for large groups through the existing mechanism of group actions through associations or other organisations that protect collective interests as well as by introducing a new group settlement procedure. Though, as per the current legislation, associations and other organisations protecting collective interests may solely bring non-monetary actions, the suggested amendment proposes to also allow for reparatory actions, such as actions for damages and restitution of profits. In addition, the new settlement procedure proposed by the Federal Council allows for associations and organisations that protect collective interests to enter into settlement with a damaging party, which, following the approval of such settlement by the competent court, will be declared binding for all injured persons. The legislative procedure was initiated by the Federal Council by means of these proposed amendments and it is not yet foreseeable if and to what extent these proposals will ultimately be adopted. The amendment procedure of the CCP is expected to take several years.
iv  Representation in proceedings

As a rule, a representation in proceedings is always permitted in Switzerland. Exceptions to this rule may apply in conciliatory hearings and certain family law proceedings where the parties must appear in person. That said, Swiss law does not require a party to be represented in court proceedings, unless such a party is deemed incapable of acting in the proceedings, in which case the court will require such a party to arrange for legal representation.

Other than in civil and criminal matters before the Swiss Federal Tribunal, legal representation of a party in court proceedings needs not be, but ordinarily is, taken over by a lawyer. However, a person wishing to professionally represent parties in court proceedings must be qualified to practise in Switzerland.

Apart from the duty to protect their clients’ interests and their duty of care, Swiss attorneys are subject to confidentiality and professional secrecy obligations, a violation of which constitutes a criminal law offence.

v  Service out of the jurisdiction

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.

vi  Enforcement of foreign judgments

Barring any bilateral or multilateral agreement that may apply, the general rules regarding the enforcement of foreign judgments in Switzerland are regulated in the PILA. To enforce a foreign judgment under the PILA, a party must submit to the enforcing court a complete and authenticated copy of the decision; a confirmation that no further ordinary appeal is available against the decision; and in the case of a default judgment, official documentation evidencing that the defendant has been duly summoned and has been given the chance to enter a defence.
For a foreign judgment to be recognised under the PILA, the party seeking enforcement must, in particular, demonstrate the competence of the foreign court having rendered the decision. The party objecting to the recognition and enforcement is entitled to a hearing and to adduce evidence. This notwithstanding, interim relief, such as freezing orders or attachments, is available in the enforcement proceedings for the party seeking recognition and enforcement to protect its legitimate interests.

With regard to European judgments, Switzerland is a signatory state of the Lugano Convention, whose provisions apply to the recognition and enforcement of judgments in civil and commercial matters rendered in another signatory state of the Lugano Convention. Compared with the enforcement regime foreseen by the PILA, the Lugano Convention provides facilitations both in terms of the conditions for recognition and enforcement and in terms of the applicable procedure. As regards the conditions to be met for recognition and enforcement of a foreign judgment, under the Lugano Convention the enforcing court is, in particular, not permitted to verify whether the foreign court, having rendered the decision, was competent to do so in the first place. A party seeking to enforce a foreign judgment must provide the court with the original or an authenticated copy of the judgment and a certificate rendered in accordance with the provision of the Lugano Convention confirming the enforceability of the decision. Notably, no evidence as to due process standards having been met must be adduced. In addition, provisional measures issued by a signatory state of the Lugano Convention (other than *ex parte* decisions) may be enforceable in Switzerland (in contrast to provisional measures issued by another state, which pursuant to the PILA are not enforceable in Switzerland). In terms of procedure, the enforcing court must decide on the enforcement request in an *ex parte* procedure (i.e., without hearing the party against which enforcement is sought). The latter will only be heard in the appeals stage should it appeal the *ex parte* enforcement decision.

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, although not identical, is fairly similar to the procedure required under the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters of 18 March 1970. Since the latter replaces the former, a requesting state being signatory to both treaties will have to submit its request under the procedure foreseen by the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970.

Generally, the Swiss authorities have in recent years proven to be very amenable to judicial assistance requests from foreign authorities.

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. Although written submissions in civil proceedings are not made available to the public, copies of judgments may be requested by anyone. In such cases, the judgments are generally made available in anonymised form only. Additionally, many higher cantonal and federal courts have, in recent years, started to publish most of their judgments in anonymised form on their websites.

ix Litigation funding
Litigation in Switzerland is usually funded by the litigating party itself. Ordinarily, the prevailing party may recover its legal costs. However, depending on the canton where litigation is conducted, the cost amount that may be recovered does not equal the actual legal fees paid (the difference, depending on the canton, may be quite substantial).

If a party cannot afford the costs of the proceedings or legal representation in such proceedings, a party may apply for free proceedings and to be provided with legal representation, the costs of which will be covered by the state.

The funding of litigation by third parties is, in principle, admissible, albeit not very popular. Nevertheless, the Swiss Federal Supreme Court confirmed said admissibility and even held that an attorney might have a duty to inform his or her client about the possibility of litigation funding. However, as with all contractual relationships, the contractual terms of a funding agreement must be in line with Swiss mores and must in particular not constitute
profiteering in accordance with Article 157 of the Swiss Criminal Code (sanctioning, inter alia, the exploitation of a person in need). Furthermore, the funding by a third party must not cause any conflict of interest on the level of the attorney–client relationship (i.e., notwithstanding any third-party funding, the lawyer must still be instructed by the litigating party and will owe its contractual duties (including its duty of care) in relation to the litigant only). The attorney, therefore, cannot at the same time represent the client and be an employee of such third party.

Although the client and its attorney are generally free to agree on the remuneration for the legal services rendered, in contentious matters the professional rules of attorney conduct do not allow for pure contingency fees. In contentious matters, legal services are, therefore, generally charged on an hourly basis. It is, however, in principle, admissible to agree on reduced hourly rates and provide for an additional success fee. The inadmissibility of pure contingency fee arrangements in litigation may be a major reason why litigation funding in Switzerland has not gained popularity thus far.

IV LEGAL PRACTICE

i Conflicts of interest

Pursuant to the Freedom of Movement for Lawyers Act, Swiss attorneys are subject to a special fiduciary duty in relation to their clients, pursuant to which any real conflict of interest – as opposed to the mere appearance of a conflict of interest – must be avoided between the lawyer’s clients and persons with whom the lawyer has private or professional contact. If a conflict of interest arises in the course of the provision of legal services, the attorney affected must, in principle, terminate its involvement. In certain instances, the professional rules of conduct even prohibit a lawyer from accepting a mandate in the first place.

Conflicts of interest may in particular arise in three instances:

a if an attorney has personal interests contradicting the client’s interests;

b if an attorney represents two or more clients with contradicting interests; or

c if an attorney acts against a former client.

The latter case is particularly likely to cause a conflict of interest if the matter in relation to which the lawyer is to act against the former client concerns matters and knowledge the lawyer was exposed to during his or her past representation of the former client.

The obligation to avoid conflicts of interests applies equally to different attorneys of the same law firm. In this respect, the different attorneys of a law firm are regarded as one and the same lawyer.

In contentious matters, it is thus prohibited for different lawyers of the same firm to represent clients with conflicting interests, notwithstanding any Chinese walls that may be in place (see Section II.iv, above). In non-contentious matters, however, the representation of clients with conflicting interests is admissible if all parties involved consent. In practice, this can be observed for instance where a law firm represents multiple clients in auctions related to acquisitions or also when multiple clients (as creditors) are represented by one and the same law firm in bankruptcy proceedings.

A representation of several clients with aligned interests is admissible, be it in contentious or non-contentious matters.
ii Money laundering

For financial intermediaries, there are verification obligations as to the identity of the contracting counterparty, the ultimate beneficial owner and the reasons behind the commercial transactions such a contractual counterparty engages in pursuant to the Federal Act on Combating Money Laundering and Terrorist Financing in the Financial Sector. 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) and personality profiles are also subject to enhanced legal protection under the DPA, which may, for example, include the requirement of an explicit consent to the collection and the processing where such consent is required and certain duties of registration with the Federal Data Protection and Information Commissioner (FDPIC).

A person whose data is processed in a way that unlawfully infringes its privacy can sue for correction or deletion of the data, prohibition of disclosure and damages. Accordingly, for

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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.\(^7\)

In practice, although not Swiss law, compliance with the GDPR in data protection matters will be important for Swiss domiciled entities with a nexus to Europe.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

Pursuant to Article 321 of the Swiss Criminal Code and Article 13 of the Federal Lawyer’s Act any lawyer admitted to the Bar (or otherwise authorised by law to represent clients before the courts) and who works in independent practice is subject to a duty of professional secrecy. A lawyer subject to professional secrecy obligations may (or normally must) invoke legal privilege when it comes to the giving of testimony or the production of documents falling within the scope of the professional secrecy obligations.

The scope of such secrecy obligations is rather broad and includes everything conveyed to a lawyer in connection with the (prospective) attorney–client relationship. Most notably, this also includes the attorney’s own assessments, proposals, memoranda and information gathered, learned or that otherwise comes to his or her attention in the course of performing his or her mandate. Although it is of no relevance from whom the lawyer learned the 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.

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ii Production of documents

Contrary to other—predominantly common law—jurisdictions, the CCP does not, basically, impose any obligations on the litigating parties in terms of pre-action conduct. Hence, litigating parties in Switzerland are not subject to a litigation hold. This should, however, not be misunderstood as permission to destroy evidence. Such conduct could result in adverse inferences by a court assessing the case. Moreover, the CCP provides for specific rules based on which a party may request the court to take evidence before initiating ordinary court proceedings (precautionary taking of evidence), in particular if such party shows that the evidence is at risk.

In state court litigation, a court may during the procedure order the parties of the dispute or third parties to produce documents and may even enforce such orders with coercive means. Refusal to obey a court’s production order is only possible on the basis of a statutory refusal right (i.e., legal privilege, incrimination of a party of close proximity).

In practice, the production of documents in state court litigation has been shown to be of limited value. In particular, parties engaging in ‘fishing expeditions’ in an attempt to extract a wide array of unspecified or only very vaguely specified information will generally not be entertained by Swiss courts. Based on case law, the documents to be produced must be described with sufficient specificity and their significance and appropriateness to prove factual allegations being in dispute must be shown. Furthermore, the information requested must be shown to be in the possession or under the control of the party to whom the production request is directed.

Given such rather stringent prerequisites, in practice it is not an easy task to obtain an order for the production of documents. A request for the production of documents will ordinarily require the requesting party to have concrete knowledge about the existence of a specific document (not necessarily, however, about its content), which in many instances proves to be the main obstacle for successful production requests.

If the type of information one seeks to obtain relates to own personal data or information connected therewith, the owner of such data may be able to obtain such data on the basis of data protection regulations. In international arbitration proceedings in Switzerland the standard adopted for the production of documents will generally be in line with the IBA Guidelines for the Taking of Evidence in International Arbitration.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

In Switzerland, arbitration is seen as the main alternative dispute resolution mechanism to ordinary state court litigation. Mediation proceedings have gained some popularity, but are yet to have a major practical impact.

ii Arbitration

Switzerland is seen as one of the traditional and most popular places for international arbitration proceedings. Thanks to the arbitration-friendly and very liberal approach adopted in Swiss legislation and the extensive court practice when it comes to international arbitration, Switzerland is one of the preferred countries for institutional arbitration proceedings conducted under the auspices of the International Chamber of Commerce.
The procedural rules – the *lex arbitri* – applicable to international arbitration proceedings seated in Switzerland are set out in the PILA (in particular Chapter 12). These rules together with the case law of the Swiss Federal Tribunal in particular ensure the following.

The rules contain a broad definition of what matters are deemed arbitrable. They extend to proprietary matters, which notably include proprietary matters pertaining to disputes in employment, antitrust and non-competition, family law, shareholder and real estate matters, as well as intellectual property law.

The procedural rules ensure a wide party discretion to agree on procedural rules to govern the arbitral proceedings, such a discretion being limited by the core principles pertaining to fair proceedings and public policy only.

The rules give protection from unwarranted interference by both domestic state courts and foreign courts. This supports the efficiency and independence of arbitration proceedings seated in Switzerland; on the one hand, Swiss legislation expressly excludes the application of rules on lis pendens to Swiss arbitration proceedings, as a result of which any parallel proceedings initiated outside Switzerland will not be able to interfere with Swiss arbitration proceedings. On the other hand, protection from unwarranted interference is also ensured by settled case law granting arbitral tribunals seated in Switzerland a preference over domestic state courts to review the validity of an arbitration agreement and thus the arbitral tribunal’s competence to hear a case (also referred to as the negative effect of competence-competence).

Furthermore, the rules ensure a readily available support for arbitration proceedings by domestic state courts when it comes to the ordering of interim relief requested by arbitrating parties or when it comes to the enforcement of interim relief ordered by arbitral tribunals.

The rules provide a straightforward and rather expedient appeals procedure, where arbitral awards in international arbitration can be appealed to one instance only, the Swiss Federal Tribunal. The grounds for appeal are restricted to:

a. the arbitral tribunal having been constituted improperly or an arbitrator lacking impartiality and independence;

b. questions of jurisdiction;

c. the arbitral tribunal deciding *ultra or extra petita* (i.e., beyond a matter, on a request not made by the parties or failing to decide on a request made by the parties);

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 sports-related 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 Institution8 and
the Rules of Arbitration of the International Chambers of Commerce. In sports matters, the
majority of arbitration proceedings are conducted under the rules of the Court of Arbitration
for Sport (CAS) in Lausanne, whereas many intellectual property disputes are conducted
under the arbitration rules of the World Intellectual Property Organization (WIPO) in
Geneva.

Compared to the extensive international arbitration practice, domestic arbitration in
Switzerland is of less relevance. The procedural rules applicable to it are set forth in the CCP;
the parties are given the opportunity to opt out and choose their arbitral proceedings to be
governed by the PILA instead.

### 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. The partial revision is directed at:

a implementing and converting into law the developments in international arbitration
since the PILA entered into force back in 1989 driven by the case law of the Swiss
Federal Tribunal;

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b strengthening the party autonomy; and

c making the provisions of Chapter 12 of the PILA more user-friendly.

The revised draft Chapter 12 of the PILA includes, inter alia, new codified provisions on the revision, rectification, explanation and correction of awards, and the possibility to make submissions to the Swiss Federal Tribunal in English. The consultation on the preliminary draft bill of the revised Chapter 12 of the PILA was concluded in May 2017. On 24 October 2018, after having taken into account the comments submitted in the course of the consultation process, the Swiss Federal Council submitted the official message on the revision of Chapter 12 of the PILA, together with the final legislative proposal to the Swiss parliament for approval.

A consultation on the complete revision of the DPA was initiated at the end of December 2016. The objective of such revision is to strengthen the protection of personal data, as well as to adapt Swiss data protection legislation to the revised Convention 108 for the Protection of Individuals with Regard to the Processing of Personal Data of the European Council and Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016. On 15 September 2017, the Swiss Federal Council approved the proposal concerning the complete revision of the DPA. In September 2018, the Swiss parliament took the decision to, in a first step, adapt certain data protection rules in criminal law to the EU Directive 2016/680, which is part of the Schengen acquis. The Swiss Parliament adopted the bill in January 2019 which entered into force on 1 March 2019. The second step concerns the complete revision of the DPA and will be addressed on a separate basis. The final vote in the Swiss Parliament on the completely revised DPA is not expected before the end of 2020.

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.
I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

i Sources of law
Taiwan is a civil law country. The legal system is hierarchical. The Constitution provides the basic rules of fundamental rights and duties, government organisation (including President, executive yuan, legislative yuan, judicial yuan, examination yuan and control yuan), powers between the central and local governments, system of local government, procedure to amend the Constitution and fundamental national policies.

The civil law system is characterised by codified legal provisions. Although in theory court precedents are not binding, they play a predominant role over the court’s judgments.

The procedures of litigation are governed by the Code of Civil Procedure (CCP) while the procedures of arbitration are governed by the Arbitration Law. The procedures of mediation are provided in the CCP and other laws, depending on the nature of the dispute.

ii Litigation
Taiwan is a country with 21 prefectures and one judicial system, which has three tiers. The Taiwanese judicial system comprises five types of courts: the Supreme Court, one High Court with five branches, 22 district courts, one Juvenile and Family Court, and one Intellectual Property Court.

The Supreme Court is the highest appellate court in Taiwan. All the judgments rendered by the High Court, except for claims worth less than NT$1.5 million, can be appealed to the Supreme Court. Nevertheless, the Supreme Court decides only the issue of law, and does not examine the issue of facts.

The High Court has jurisdiction over appeals from district courts as well as the Juvenile and Family Court. The High Court decides both legal and factual issues.

The district courts are generally the courts of first instance, except for cases within the exclusive jurisdiction of other courts as stated below. They also perform as appellate courts for rulings and decisions under summary proceeding (for cases where the claim is worth less than NT$500,000 or other types of case specifically provided by the CCP)2 and small-claim proceedings (for cases where the claim is worth less than NT$100,000).3

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1 Simon Hsiao is a partner at Wu & Partners, Attorneys-at-Law.
2 Article 427 of the CCP.
3 Article 436-8 of the CCP.
The Juvenile and Family Court acts as the court of first instance for cases involving juvenile delinquency and family affairs. This court is located in Kaohsiung, southern Taiwan. Cases of juvenile delinquency and family affairs not within the area of Kaohsiung shall fall under the jurisdiction of a regular district court.

The Intellectual Property Court is a special court that, as the court of first instance and second instance, presides over disputes concerning IP infringement and, as the court of second instance, presides over criminal cases of IP infringement. This court also performs as the first instance of administrative actions related to disputes concerning IP validity.

Unlike common law countries, there are no jury trials and lay judges in the civil litigation cases.

### 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.

### THE YEAR IN REVIEW

**The balance between preservation of the debtor's rights and the realisation of the creditor’s rights**

Considering that part or all of the debtor’s salaries or other continual payment claims against a third party (‘debtor’s claims’) can be maintaining the living of the debtor and his or her relatives living with him or her, in practice the court, when issuing an enforcement order, reserves a certain amount of debtor’s claims for that purpose. However, usually there is insufficient information for the court to judge an appropriate reserved amount before executing the enforcement. Given this, Article 115-1 of the Compulsory Enforcement Act was amended in May 2018, providing that the extent of the enforcement order against debtor’s claims shall not exceed one-third of the amount of each instalment of such debtor’s claims.

### COURT PROCEDURE

#### Overview of court procedure

The main law governing civil court procedure is the CCP. In terms of types of action, it governs the proceedings for both general commercial disputes and disputes regarding ‘personal affairs’ (i.e., marriage, parent–child relationship, interdiction and declaration of death). In terms of types of procedure, in addition to the general court proceedings, it also provides the basic requirements and rules for provisional remedies and judgment enforcement, and the details of execution are provided in the Law of Compulsory Enforcement.
Other supplemental regulations (e.g., the Enforcement Rules of the Code of Civil Procedure, the Notes for Civil Procedure, and the Guidelines for Handling Civil Actions) are applicable to civil court procedure.

**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 occasionally submit to the court their briefs, stating and providing the facts, arguments, contentions and supporting evidence. When all the preparatory work is done, the judge will set a date for an oral hearing. Although in theory the oral hearing is for the judge to hear the parties’ oral argument, usually it goes quickly because the parties have substantively debated on all issues in each preparatory hearing. Should the parties have no further evidence to submit and the judge feel comfortable with the collection of the facts, evidence and issues, the judge will set a date for announcing his or her judgment. Normally, the announcement date is three weeks after the oral hearing.

The losing party may file an appeal with the High Court. If the district court renders a judgment partially favourable to the plaintiff, both parties may appeal against the unfavourable part respectively. The proceedings in the High Court are similar to those in the district court. When rendering a judgment, the High Court may either sustain the district court’s judgment (i.e., dismissing the appeal) or revoke the district court’s judgment and render its own judgment.

Except for cases where the amount in dispute is less than NT$1.5 million, the losing party in the High Court proceedings may file an appeal with the Supreme Court. The Supreme Court does not look into the facts of the case but only reviews the legality of the High Court’s judgment (i.e., whether the High Court’s judgment is in contravention of the laws and regulations).⁴ Both parties may occasionally submit briefs to the Supreme Court. In practice, the Supreme Court only reviews the parties’ briefs without holding any hearing. However, recently the Supreme Court is inclined to hold oral hearings.

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 cases specified by the CCP (e.g., a labour dispute arising from an employment contract with an employment term of less than one year; a dispute over fixing of the boundaries or the demarcation of a real property; a dispute arising from claims in a negotiable instrument) are subject to the summary proceedings. Summary proceedings are almost the same as ordinary proceedings but with simplified procedures and documentation and the appeal against the district court’s judgment must be filed with the same district court. The appeal against the judgment of the second instance to the Supreme Court is more restrictive than that in ordinary proceedings.

**Small-claim proceedings**
Where the action is for the payment of money, other replaceable objects or securities, and the price or claim value is not more than NT$100,000, such action is subject to the small-claim proceedings. Compared with ordinary proceedings and summary proceedings, small-claim proceedings are much more simplified. The appeal against the district court’s judgment must be filed with the same district court and the grounds for appeal are limited to the issue of the contravention of the laws and regulations by the district court’s judgment. The judgment of the second instance is not appealable.

**Interim measures**
The CCP provides three categories of interim measures: provisional attachment (PA), provisional injunction (PI) and injunction maintaining a temporary status quo (TI).

The purpose of PA is to secure the enforcement of a judgment on monetary claims (e.g., claim for a sum of money) or on claims exchangeable for monetary claims (e.g., claim for delivery of a car, which can be changed to a claim for a sum of damages if delivery is unavailable). In other words, PA is to seize the defendant's assets provisionally so that the plaintiff's claims for money as later upheld by a final judgment may be satisfied through the auction of the seized assets.

The purpose of PI is to secure the enforcement of a judgment on non-monetary claims (e.g., claim for delivery of goods or claim for actions to be taken). In other words, PI is to ensure the plaintiff's non-monetary claims remain intact so that such claims as later upheld by a final judgment may be satisfied through the enforcement of the judgment.

Where there is a legal relation in dispute and where it is necessary to prevent material harm or imminent danger, an application for TI may be made. Obtaining a TI, the plaintiff's rights can be temporarily realised and the defendant shall temporarily perform its obligations.

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5 Article 427 of the CCP.
**Time frame**

No law governs the time limit for the court to complete a case of litigation, interim measures or appeal. In practice, it takes six to 12 months for the district court to render a judgment, six to 12 months for the High Court and one to two years for the Supreme Court. However, the duration for completion varies, depending on the complexity of a case, and in some cases may take longer.

As for the interim measures, the normal time frame of obtaining the interim measures is three weeks for PA and two months for PI and TI.

iii **Class actions**

No typical class action is provided in the CCP but it outlines similar actions. Multiple parties, who have common interests, may appoint one or more persons from among themselves to sue or to be sued on behalf of all of the parties. Multiple parties who have common interests and are members of the same incorporated charitable association may appoint the association to sue on behalf of them. An incorporated charitable association or a foundation may initiate, subject to some requirements, an action for injunctive relief prohibiting specific acts of a person who has infringed the interests of multiple persons.

In addition to the CCP, other laws provide class actions. Under the Securities Investor and Futures Trader Protection Act, the Consumer Protection Act (CPA) and the Personal Information Protection Act (PIPA), a protection institution may, empowered by 20 or more investors, consumers and individuals who are damaged owing to a single cause, initiate arbitration or an action on their behalf.

iv **Representation in proceedings**

In all levels of courts, natural persons and legal entities may represent themselves in the proceedings. If the litigant is a legal entity, its legal representative is entitled to represent the entity without further authorisation from the entity. Besides this, unincorporated associations can be a party to the litigation so long as they have a representative or an administrator.

Unless prohibited by the presiding judge, any person who is not a licensed lawyer may act as an advocate. However, in the following two proceedings, a licensed lawyer is required to be the advocate:

- under the CCP, only a licensed lawyer can file the appeal with the Supreme Court on behalf of the appellant; and
- under the CPA and PIPA, class actions must be filed by a licensed lawyer.

v **Service out of the jurisdiction**

Article 145 of the CCP provides that (1) where service is to be made in a foreign country, it shall be effectuated by the competent authorities of such country by letters rogatory or the relevant Taiwan ambassador, minister envoy or consul, or other authorised institutes or organisations in that country, and (2) if such service is not available, the service may also be effectuated by registered and receipt-requested mail through the post office. If the place

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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.
where service shall be made is unknown or the service to be effectuated in accordance with the above Article 145 is likely to prove futile, according to Article 149 of the CCP the court may, on motion, permit service to be effectuated by ‘constructive notice’.

The above rules of service are applicable to both a natural person and a legal entity. However, there are alternatives for service on a legal entity outside the jurisdiction. If the manager of a legal entity is in Taiwan and if the action is related to the legal entity’s business, service may be effectuated upon the manager. 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. 11

All of the above rules of service are applicable to both the documents initiating proceedings and the subsequent documents.

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:

a where the foreign court lacks jurisdiction pursuant to Taiwanese laws;
b 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;
c where the performance ordered by the judgment or its litigation procedure is contrary to Taiwanese public policy or morals; and
d where there exists no mutual recognition between the foreign country and Taiwan.

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.

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:
a the country of the requesting foreign court shall declare reciprocal support to Taiwan in a similar case; and

10 Article 131 of the CCP.
11 Article 128 of the CCP.
the letter rogatory issued by the foreign court shall expressly indicate the name, nationality, domicile, address or office of the party to be served.

Service by Taiwanese courts will be effectuated in accordance with the CCP and the Code of Criminal Procedure, respectively.

For judicial assistance in the examination of evidence for civil or criminal proceedings, the above foreign country’s declaration and letter rogatory are needed as well. The letter 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:

- 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
- 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 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;
- 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;
- other matters in which the parties are adversaries of the client in a current matter that he or she has accepted;
- other matters that are commissioned by an adversary in a current matter that he or she has accepted;
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;

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;

the same matter or a matter having a substantial connection with a matter in which the adversary’s appointed lawyer is his or her spouse or a blood relative within the second degree or a relative by marriage;

a matter that is commissioned by several clients having a conflict of interest among themselves;

other matters that are in conflict with his or her current, existing obligations to other clients, former clients or third persons;

a litigious matter where he or she concurrently accepts appointment from both parties or from several persons who are a party in the matter but who have a conflict of interest among themselves; or

a matter in which he or she has served as a witness and now he or she wants to act as an agent or pleader.

**Chinese walls**

The Attorney Regulation Act provides a simple rule regarding Chinese walls: an attorney is prohibited from accepting representation where he or she or another attorney in his or her firm has previously accepted employment from a party which is a respondent party to his or her or their potential client, or else he or she or they had given counsel to or otherwise rendered assistance to said respondent party.

Again, Article 32 of the Code of Ethics for Lawyers provides further restrictions: where an attorney is subject to a conflict of interest restriction in accordance with Article 30, other attorneys who are in the same law firm as him or her shall also be subject to the same restriction.

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

Money laundering is governed by the Money Laundering Control Act (MLCA). In addition to the financial institutions such as banks, trusts and investment corporations, insurance companies, securities brokers, futures brokers, etc., which are required by the MLCA to submit the financial transaction, the customer’s identity and the transaction records to the Investigation Bureau, the newly amended MLCA also requires attorneys to do so. However, Article 33(2) of the Code of Ethics for Lawyers provides that a lawyer shall strictly keep confidential the matter he or she has accepted to handle for his or her client, except where there is a need to prevent or mitigate serious damage that may be caused to the property of another person by the client’s criminal intent, plan or criminal act. Given the above, should a matter be related to money laundering or terrorism, the attorney shall be under no obligation to keep it confidential.

**Data protection**

The PIPA has comprehensive protection of personal data. Generally, the collection, processing and use of personal data are prohibited unless otherwise permitted by this Act. As the attorney can be the ‘non-government agency’ collecting, processing and using personal data as set
forth in this Act, the attorney, when dealing with personal data, is subject to this Act. No specific laws govern the collection, processing and use of personal data for the purpose of court proceedings.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

Attorney–client privilege is protected under Taiwanese laws. Article 33 of the Code of Ethics for Lawyers provides that an attorney shall strictly keep confidential the contents of an accepted matter and may not, with very limited exceptions, disclose the same to any third party without having obtained the client’s consent. However, Article 307 of the CCP provides that a witness may refuse to testify if (1) the witness is to be examined with regard to a matter which he or she is obliged to keep confidential in the course of performing his or her official duties or conducting business, or (2) the witness cannot testify without divulging his or her technical or professional secrets. Article 348 of the CCP provides that the foregoing Article 307 is applicable to a third party’s duty to produce documents. Together with the above provisions of the CCP and the Code of Ethics for Lawyers, an attorney is obligated to keep his or her client’s cases confidential and may refuse to provide testimony and produce documents in connection with such cases.

The above attorney–client privilege is applicable to a foreign lawyer.

No rules regarding the attorney–client privilege are provided to an in-house lawyer. And, so far, there has been no precedent in this regard. However, the majority are of the opinion that attorney–client privilege is applicable to an in-house lawyer as well.

ii Production of documents

Documents required to be produced

In addition to a document voluntarily produced by one party, other documents held by such party may be required to be produced. Any party may move the court to order the opposing party to produce a document held by such opposing party. The motion shall specify, among others, the reason why the opposing party has a duty to produce such document. Where the court considers that the disputed fact is material and that the motion is just, it shall order the opposing party to produce such document.\(^\text{12}\)

Notwithstanding the foregoing, a party has the duty to produce the following:\(^\text{13}\)

\(a\) 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.

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\(^{12}\) Articles 342 and 343 of the CCP.

\(^{13}\) Article 344 of the CCP.
Documents held by a third party
Where a document identified to be introduced as documentary evidence is in a third party’s possession, a party may move the court to order such third party to produce the document. The motion shall also specify, among others, the reason why the third party has a duty to 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.14 With limited exceptions,15 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 disobey 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.16 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.17

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.

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14 Articles 346, 347 and 343 of the CCP.
15 Articles 306–310, 344I(2)–(5) and 344II of the CCP.
16 Articles 345 of the CCP.
17 Articles 349 of the CCP.
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:

- where the recognition or enforcement of the arbitral award is contrary to the public order or good morals of Taiwan;
- where the dispute is not arbitrable under the laws of Taiwan; or
- 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:

- 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;
- 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;
- 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;
- 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;
- 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
- 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.

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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, the following matters shall be subject to mediation by the court before the relevant action is initiated:

a. disputes arising from a relationship of adjacency between real property owners or superficiaries, or other persons using the real property;

b. disputes arising from the determination of boundaries or demarcation of real property;

c. disputes among co-owners of real property arising from the management, disposition or partition of a real property held in undivided condition;

d. disputes arising from the management of a building or of a common part thereof among the owners of the shared, divided title or persons using the building;

e. disputes arising from an increment or reduction or exemption of the rental of real property;

f. disputes arising from the determination of the term, scope and rental of a superficies;

g. disputes arising from a traffic accident or medical treatment;

h. disputes arising from an employment contract between an employer and an employee;

i. disputes arising from a partnership between the partners, or between the undisclosed partners and the nominal business operator;

j. disputes arising from proprietary rights between spouses, lineal relatives by blood, collateral relatives by blood within the fourth degree of relationship, collateral relatives by marriage within the third degree of relationship, or head of the house or members of the house; and

k. other disputes arising from proprietary rights where the price or value of the object in dispute is less than NT$500,000.

Nevertheless, in practice a regular lawsuit may be filed with the court although the matter at issue is one of the above compulsory mediation matters. Receiving the complaint, the court would conduct the mediation proceedings first. Should the mediation fail, the regular litigation proceedings will commence.

If the matter at issue is not subject to the compulsory mediation, any party may also apply for mediation before initiating the relevant action.

The court would seek mediation at any time irrespective of the phase of the proceedings and irrespective of compulsory or optional mediation.

The settlement in the mediation is at will. A successful mediation is reached upon the agreement of the parties. A successful mediation shall take the same effect as a settlement in litigation, meaning that a mediation transcript made based on the parties’ settlement

22 Article 406 of the CCP.

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

To facilitate litigation proceedings regarding business disputes, in July 2019, the Judicial Yuan proposed the draft of the Business Case Adjudication Act (BCAA) as well as an amendment to the Intellectual Property Court Organisation Act, under which a Business Tribunal will be established in the existing IP Court. Thus, the IP Court will be turned into the IP & Business Court. The Business Tribunal, constituted by professional and well-trained judges, will have exclusive jurisdiction for business cases. Mandatory legal representation by attorneys has been introduced into the BCAA: parties shall engage attorneys to represent them to conduct the litigation procedure. However, mediation shall be carried out before commencement of a trial. The mediation shall be held by a judge or an expert with professional knowledge. The parties may engage expert witnesses to provide their professional opinion, and may also raise inquiries against the professional opinion provided by the other party. We expect that the two draft Acts may be passed in the near future.
Chapter 30

UKRAINE

Olexander Droug, Olena Sukmanova and Oleksiy Koltok

INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

Ukraine has a civil law system with all its major features such as a written constitution and codified legislation. Ratified international treaties constitute part of Ukrainian law, and generally prevail over the national legislation.

Court precedent is not recognised as a source of law in Ukraine. However, decisions of the European Court of Human Rights (ECHR) constitute an exception. Ukrainian courts should apply those decisions as a source of law. In addition, conclusions of the Supreme Court on the application of a particular legal provision are binding for public authorities of Ukraine and should be taken into account by the lower instance courts.

Ukraine has a three-tiered court system based on the principles of territoriality and specialisation. It is composed of the local courts (first instance courts), courts of appeal and the Supreme Court. In addition, the High Anti-Corruption Court and the High Intellectual Property Court are vested with the jurisdiction to consider particular types of cases as the courts of the first and appellate instances.

The local courts consist of general courts (dealing with civil and criminal matters and administrative offences), commercial courts (dealing with commercial cases and bankruptcy proceedings) and administrative courts (dealing with claims against state bodies and officials). The courts of appeal are based on the same principle of specialisation. The Supreme Court is composed of four separate chambers dealing with civil, commercial, administrative and criminal cases respectively. In addition, the Supreme Court includes the Grand Chamber tasked with resolution of the most important and complicated cases.

There is also the Constitutional Court of Ukraine, which operates separately from other courts. It has the principal task of deciding whether the laws of Ukraine comply with the Constitution of Ukraine, as well as providing official interpretation of the Constitution of Ukraine. In addition, following the recent judicial reform in Ukraine, the Constitutional Court decides upon a separate application by a party to a court case (after exhaustion of all available domestic appeal procedures) whether the legislative act applied by a court in a particular case contradicts the principles laid down in the Ukrainian Constitution.

1 Olexander Droug and Olena Sukmanova are partners and Oleksiy Koltok is a counsel at Sayenko Kharenko. The authors would like to thank Andriy Stetsenko, Olena Solonska, Sergey Protyven, Vadym Slesarchuk, Alina Danyleiko, Vladlena Lavrushyna, associates at Sayenko Kharenko, and Iryna Ostashuk, junior associate at the firm, for their contribution to this chapter.

2 Formation of the High Intellectual Property Court is still in process. The Court is expected to commence its work in 2020.
In relation to alternative dispute resolution (ADR), both international and domestic arbitration is recognised in Ukraine. Ukrainian law allows both institutional and ad hoc arbitrations. The International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (ICAC), and the Maritime Arbitration Commission at the Ukrainian Chamber of Commerce and Industry (UMAC) are two major international arbitration institutions operating in Ukraine.

Agreements to mediate are not legally binding and enforceable in Ukraine. There is no legal framework concerning mediation proceedings. However, the parties can conduct arbitrations in practice and sign the resulting mediation settlement agreements, which are enforceable as a matter of contract.

II THE YEAR IN REVIEW

In recent years, Ukrainian legislation, as well as court practice, have significantly developed. In particular, in the course of 2019 the courts rendered a number of landmark decisions, which may also be of interest outside Ukraine.

For instance, following the approach established by the Supreme Court in 2018, the courts often apply the contra proferentem rule stating that disputable provisions of the contract should be interpreted against the interests of the party that created, introduced or requested that provision to be included into the contract. 3

In other cases, the Supreme Court highlighted the duty of good faith applying the principle of *venire contra factum proprium* (also known as estoppel in common law jurisdictions). The Supreme Court emphasised the prohibition of inconsistent behaviour by a party to the contract. In particular, the court stated that a party to the contract may not challenge its existence after such party has entered into the additional agreement to such contract. 4

Relying on the duty of good faith, the Supreme Court also took the view that a party has waived its right to challenge the arbitral award based on disagreement with the composition of the arbitral tribunal, if this party has never raised that issue while the arbitral tribunal was hearing the case. 5

Another notable decision appeared at the beginning of 2019. Contrary to the previous court practice, the Supreme Court applied a 'restrictive' view of foreign states’ sovereign immunity (even though Ukrainian law expressly recognises the ‘absolute immunity’ approach). In particular, the court concluded that by entering into a bilateral investment treaty (BIT) providing for an obligation to recognise the finality and binding effect of an arbitral award rendered in any dispute under that BIT, the foreign state *ipso facto* waived its jurisdictional immunities. 6

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3 The Resolution of the Supreme Court dated 30 July 2019 in Case No. 910/14179/18 is one of the examples of such court practice.
4 Resolution of the Supreme Court dated 10 April 2019 in Case No. 390/34/17.
5 Resolution of the Supreme Court dated 6 February 2019 in Case No. 761/5425/16-ц.
III COURT PROCEDURE

i Overview of court procedure

In December 2017, the new procedural codes came into force. In particular, these are the Civil Procedure Code of Ukraine (the Civil Procedure Code), the Commercial Procedure Code of Ukraine (the Commercial Procedure Code) and the Administrative Procedure Code of Ukraine (the Administrative Procedure Code). The codes govern civil, commercial and administrative proceedings respectively.

These new sets of procedural law were aimed, in particular, at acceleration of the litigation process. In addition, more flexible rules on taking evidence were introduced.

Bankruptcy proceedings are governed by a separate piece of legislation. In particular, in October 2019, the Bankruptcy Code of Ukraine came into effect. It provides for more transparent rules on sale of the debtor’s assets, fair conditions for treatment of secured creditors and the possibility to initiate bankruptcy proceedings in respect of private individuals.

Each lawsuit should be filed with a proper court following the procedural rules of territorial and subject matter jurisdiction. Choice of court clauses are not yet enforceable in Ukraine.

The general courts have jurisdiction over civil cases. These usually concern disputes between private individuals or disputes between a company and a private individual. Commercial courts handle commercial cases – that is, disputes between companies arising out of business contracts, corporate disputes, bankruptcy proceedings, etc. In relation to administrative courts, their jurisdiction covers claims against state bodies and public officials.

The procedural legislation prescribes for the adversarial proceedings. However, in administrative cases the burden of proof is reversed and lies with the public authorities, whose actions or decisions are challenged. The courts resolve cases based on the evidence presented by the parties and have limited powers to gather evidence.

A party has a right to lodge an appeal with the competent appellate court against any court decision on merits if such a party believes that the decision is unlawful or unfounded. Further cassation appeal with the Supreme Court is limited to particular types of court decisions. In relation to the challenge of courts’ procedural rulings, procedural law limits the types of rulings that can be challenged.

There are certain categories of cases where the courts of appeal consider cases as the courts of the first instance, and the Supreme Court hears appeals against respective court decisions as a court of appeal. In particular, this concerns cases on recognition and enforcement of foreign arbitral awards, as well as proceedings regarding setting aside of arbitral awards.

Ukrainian procedural law also prescribes for the possibility to reconsider the case upon newly discovered or exceptional circumstances. For example, these may be significant facts, which neither parties to the dispute nor the court knew or could have been aware of at the moment of hearing the case by the court.

At the enforcement stage, the court may also become involved. For example, upon the request of an enforcement officer or judgment creditor, a court may change the method of enforcement of the court’s decision.
ii  **Procedures and time frames**

There are three types of procedures for hearing cases under the Commercial Procedure Code: general, expedited (summary) and writ proceedings. The Code prescribes defined time limits for each of them.

Most of the cases are tried within the general procedure that should take 125 days for the first instance court. The expedited proceedings are generally applied to small-claim cases, and may not require parties’ participation in court hearings. In those circumstances, the first instance court shall consider the case within 65 days. However, certain types of cases cannot be considered in the expedited proceedings (for instance, corporate disputes and bankruptcy proceedings). In relation to writ proceedings, those are aimed at collection of minor debts and are possible only if no dispute on merits exists (i.e., debts arising out of written contracts). The first instance court has 25 days to issue the writ of execution.

The law also prescribes for time limits for the review of court decisions. The whole procedure in general proceedings, including appeal courts and the Supreme Court, should take no longer than 300 days.

In practice, due to case overloads, the courts often do not meet these time requirements. For example, it may take around six to 12 months for the first instance court to consider the case in general proceedings.

The general proceedings are commenced once the statement of claim is submitted with the court and the court issues procedural ruling on acceptance of the statement of claim and opening of the proceedings. Further, the court starts considering the case at the preparatory hearing. At that hearing, the court, in particular, identifies the facts of the case and the evidence the parties intend to present to prove their positions. Once the preparatory stage is over, the court moves to hearing the case on merits. Usually, it takes several court hearings for the court to hear the case and render a final decision.

The time frames in civil cases are slightly different. The Civil Procedure Code also prescribes for additional types of procedures such proceedings in absentia, and separate proceedings used to establish the existence of facts.

The courts, both commercial and general, may grant injunctive relief either prior to or after the commencement of the proceedings in a case. In particular, the courts may freeze the respondent’s assets, order the respondent to take certain actions or refrain from taking certain actions, order third parties to refrain from taking actions with regard to the property in dispute, or grant any other measures to provide effective protection of the claimant’s rights.

The party seeking injunctive relief shall apply to the court with the motion and provide the court with sufficient explanation why a certain interim measure is necessary. The motion shall be considered by the court within two days following its submission. Upon the request of the opposite party or in its own discretion, the court may also order the applicant to provide security to cover potential damages that might be caused by unjustified interim measures.

iii  **Class actions**

Ukrainian law does not prescribe for either opt-in or opt-out models of class actions. The closest equivalent exists under the consumer protection laws. Public consumer associations have the right to file lawsuits in the interest of an unidentified number of consumers against

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\footnote{In this section, we limit the information to the commercial and civil procedures. The administrative procedure has its distinct features and is not covered within this section.}
the sellers or producers of the goods seeking to recognise their actions as unlawful. However, from a practical standpoint, decisions rendered against sellers or producers in such cases may not be an unconditional ground for granting each particular consumer’s claim. Hence, each consumer should further initiate litigation against the seller or the producer of certain goods in order to protect their infringed right.

In addition, although strictly not a class action, there is a special procedure for consideration of typical cases in administrative courts. Those are cases against the same public authority, based on the same grounds and claims regulated by the same legal rules. The Supreme Court is entitled to consider one of the typical cases and render a decision. That will constitute a model case being the ‘guidelines’ for the lower instance courts in the rest of the typical cases.

iv Representation in proceedings

Both private individuals and companies are entitled to represent themselves before the courts in civil and commercial cases. A company may participate in the case through its CEO, a member of the executive board or another employee authorised to act on behalf of such company in accordance with the law, employment agreement or constituent documents.

Alternatively, a party can engage legal counsel for representation in the case. Currently, only licensed attorneys may represent parties before Ukrainian courts. The only exceptions are small-claim and labour cases in which any person may act as a representative.

v Service out of the jurisdiction

Ukraine is a party to the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Convention). In addition, certain issues of document service are regulated by the regional treaties, namely the 1993 Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (the Minsk Convention) and the 1992 Kiev Treaty on Settlement of Disputes Related to Commercial Activity (the Kiev Treaty), as well as bilateral treaties with particular states. At the level of Ukrainian law, the rules of service out of jurisdiction are found in the Civil Procedure Code.

The Hague Convention applies to all cases in civil and commercial matters where there is an occasion to transmit a judicial or extrajudicial document for service abroad. The Ministry of Justice of Ukraine is the central authority responsible for dealing with requests for service coming from the contracting states. At the same time, if a Ukrainian court needs to serve the document abroad, it should forward the request for service of documents directly to the central authority of the respective foreign state.

Ukraine made several reservations under Article 10 of the Hague Convention. In particular, Ukraine does not accept the service of documents to judicial officers or other competent persons directly by mail or through interested persons.

The Minsk Convention and the Kiev Treaty, in which the issue of service of documents is regulated as well, are of regional character and apply only to post-Soviet states. Those Conventions contain rather limited rules on document service but formally prevail over the Hague Convention.

The Civil Procedure Code regulates the situation when it is necessary to serve documents or conduct other procedural action in a foreign state, which is not a party to the Hague
vi Enforcement of foreign judgments

In Ukraine, enforcement of foreign judgments takes place either on the basis of (1) an international treaty with particular state(s), which is ratified by the Ukrainian parliament and provides for recognition and enforcement of court judgments; or (2) in the absence of such treaty, under the reciprocity principle.

If there is an international treaty in place, the conditions for the foreign judgments’ enforcement as well as the grounds for refusal of the enforcement are usually stated in such treaty. If there is no international treaty between Ukraine and the country where the respective judgment was rendered, the applicable legal framework is set out by the Civil Procedure Code.

In particular, under the Civil Procedure Code, the reciprocity between Ukraine and the respective country is deemed to exist, unless proven otherwise by the opposing party. However, the Civil Procedure Code does not provide for any clear rules on application of the principle of reciprocity. In practice, Ukrainian courts would enforce a foreign judgment if there is no evidence that national courts of the country where the respective foreign judgment was rendered refuse to recognise and enforce judgments of Ukrainian courts on similar legal matters.

The Civil Procedure Code also establishes an exhaustive list of grounds on which Ukrainian courts can refuse enforcement of a foreign judgment. Those are, for instance, if a judgment concerns matters that fall within the exclusive jurisdiction of Ukrainian courts or if a party against which a judgment was rendered had not been properly served with the proceedings.

Upon consideration of an application for enforcement of a foreign judgment, the competent Ukrainian court issues a writ of execution, which is a ground for initiating enforcement proceedings in competent enforcement authorities of Ukraine. The judgment of the Ukrainian court on recognition and enforcement of a foreign judgment is subject to the appellate and cassation review.

vii Assistance to foreign courts

In Ukraine, assistance to foreign courts is mainly regulated by the Hague Convention and the 1970 Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Evidence Convention). The regional treaties, namely the Minsk Convention and the Kiev Treaty, as well as bilateral treaties with particular states, also regulate certain aspects of assistance to foreign courts.

In particular, according to the Hague Evidence Convention, a foreign judicial authority is entitled to send the request to the Ministry of Justice of Ukraine, which is a designated body responsible for receiving requests from foreign competent authorities to obtain evidence and perform certain other judicial acts in Ukraine. The letter of request is then forwarded by the Ministry of Justice for execution to the Ukrainian court within jurisdiction of which the requested judicial act should be performed.

The Minsk Convention and the Kiev Treaty state that the contracting parties provide each other with assistance by performing procedural actions, namely, compiling and sending documents, conducting searches, sending and delivery of exhibits.
On the national level, the Civil Procedure Code establishes that Ukrainian courts may assist foreign courts with witness examination, conducting expert examination, etc. However, such assistance should be denied if it may cause the infringement of Ukraine’s sovereignty, threaten its national security or is outside the jurisdiction of the court.

viii Access to court files

Each party to the case has full access to court files. In particular, a party may file a motion with the court requesting the review and photocopying of court files.

Members of the public, who are not parties to the particular case, do not have a right to access the files of that case unless they prove that respective case directly relates to their rights, interests, freedoms or obligations. Basic information about the pending cases in various courts can be accessed online by the general public. Such information concerns identities of the parties to the dispute, subject matter of the dispute and court hearing dates. The court hearings are public, unless the court decides to hear case in camera to protect confidential or other sensitive information.

At the same time, final court decisions on merits as well as various procedural rulings are publicly accessible online in the Unified State Register for Court Decisions. This database contains electronic versions of all decisions renders by the Ukrainian courts of all levels starting from approximately mid-2006.

However, owing to the data protection rules, the mentioned electronic versions of court decisions hide names and another personal data of individuals, such as information on bank accounts, addresses and vehicle registration numbers. Persons seeking to obtain an undisclosed court decision must prove to the court that such decision directly relates to their rights, interests, freedoms or obligations.

ix Litigation funding

Third-party funding is not regulated in Ukraine. Accordingly, there are no limitations or prohibitions on funding the claims in the civil and commercial proceedings before the Ukrainian courts and in arbitration proceedings seated in Ukraine. However, in practice third-party funding is not actively used in Ukraine.

In the event that a party wishes to use third-party funding in Ukraine, the Rules of Professional Conduct contain a requirement that an attorney practising in Ukraine, when representing a client, may not take into account instructions from other parties. Furthermore, an attorney intending to share any privileged documents or information with a third party (i.e., funder) shall obtain the client’s consent.

Although strictly not third-party funding, there is a rather common practice in Ukraine for lawyers to handle cases under conditional fee agreements. The Rules of Professional Conduct expressly allow such way of structuring the payment to an attorney.

Recently, however, the Supreme Court stated that a provision of a contract between a client and an attorney allowing a conditional fee is void. In view of the Supreme Court, court decisions may not be the subject of a legal services contract.8

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8 Resolution of the Supreme Court dated 12 June 2018 in Case No. 462/9002/14-it.
Ukrainian procedural rules for civil and commercial litigation, as well as the Arbitration Rules of the ICAC, provide for the standard rule of ‘costs follow the event’, which can help reduce the financial burden suffered by the party to the dispute.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

The Rules of Professional Conduct emphasise that attorneys shall follow the principles of confidentiality and avoid conflicts of interest.

Under the Rules of Professional Conduct and rules of procedure, an attorney cannot represent two or more clients if there is, or potentially may be, a conflict of their interests. A conflict of interest also exists if the attorney has a personal interest in or owns information obtained from one of the clients that could be used for the benefit of another client.

In all those circumstances attorneys have to inform the clients on the conflict of interest. An attorney would be allowed to proceed with legal assistance only upon the client’s written consent.

Ukrainian law firms often apply Chinese walls in the event of parallel instructions from different clients who are parties to the same or related cases. Normally, however, the firm would be allowed to proceed with both instructions only if there are written consents from each of the involved clients. It also depends on the particular status of each client in the case. For instance, it would be rather questionable if clients of the firm are opposite parties to the same case, even though the attorneys working on each case are separated by the Chinese wall.

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

In Ukraine, the legal framework against money laundering and terrorism financing is mainly imposed by the Law of Ukraine ‘On Preventing and Counteracting Legalisation (Laundering) of the Proceeds of Crime, Terrorist Financing, and Financing Proliferation of Weapons of Mass Destruction’, which was enacted on 6 February 2015. The Law requires attorneys to identify and verify their clients as well as detect and keep the records of suspicious financial transactions providing state authorities with information thereof.

The above obligation is, however, imposed upon attorneys only if they provide certain specific types of services. For instance, those concerning purchasing and selling real estate, managing the client’s assets or a bank account, incorporating companies, as well as selling and purchasing shares. In all other cases, attorneys are not allowed to disclose any information about their clients to third parties.

iii Data protection


Personal data usually constitutes confidential information and may be processed or transferred only if the particular conditions prescribed for by the law are fulfilled. Those are consent of the personal data subject as well as the requirement to protect vital interests of the personal data subject, etc. The controller of the personal data shall ensure its protection.
International transfers of personal data are allowed to the countries that provide adequate state protection of said personal data. Under the general rule, the personal data shall not be transferred and shared internationally for any other purpose than that for which it was initially collected.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege
The Law of Ukraine ‘On Attorneys’ Activity’, as well as the Rules of Professional Conduct, determine that any information or documents the attorney obtains from the client, the facts of any communication with the client, substance of client’s advice, as well as any document created by the attorney at the client’s request, are protected by attorney-client privilege. Attorneys, their assistants, and any other attorneys’ employees shall keep the respective information secret.

Generally, attorneys may not testify regarding the information constituting privilege or disclose it any other way, unless they have obtained the client’s permission for such disclosure. The courts may not order examination or seizure of any documents containing privileged information. Attorney-client privilege also applies to foreign attorneys, but only if they have become members of the bar association at their place of residence in Ukraine. The rules of privilege equally apply to in-house lawyers, provided that they are licensed attorneys and have entered into legal services agreements with their employers.

ii Production of documents
Generally, the parties are obligated to prove the facts they rely upon, and submit the respective evidence together with the first pleading on the merits of the dispute. If a party does not have the required evidence in its possession, such party may request the court to order production of this evidence.

The motion on production should include reference to particular evidence, the disclosure of which is sought, its relevance to the case, as well as measures the party took by itself in order to obtain the respective evidence. Either before or after the first statement on the merits of the dispute, a party may also ask the court to take measures aimed at securing evidence. In particular, the court can grant the production of documents if there is a risk that the evidence will be lost, or its production will be impossible or difficult in future.

In commercial and civil procedures, the court may gather evidence only if it has doubts about the good faith exercised by the parties in performance of their procedural rights or compliance by the parties with their duty to prove their case.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation
International and domestic arbitrations are recognised ADR methods in Ukraine. Mediation, expert determination and other ADR procedures are less common in Ukraine, although they can be used in practice in relation to certain types of transactions.
ii Arbitration

In Ukraine, international commercial arbitrations with their seat in Ukraine are mainly governed by the 1994 Law of Ukraine ‘On International Commercial Arbitration’ (based on the original 1985 version of the UNCITRAL Model Law, without all amendments introduced in 2006). Domestic arbitrations are regulated by the 2004 Law of Ukraine ‘On Arbitral Courts’.

The ICAC and the UMAC are the only international arbitration institutions established in Ukraine. There are also numerous domestic arbitration institutions.

Overall, Ukraine is an ‘arbitration-friendly’ jurisdiction. Resolving disputes through arbitration is quite common in commercial transactions involving a foreign party. At the same time, domestic arbitration is not widely popular in Ukraine.

Ukraine is a party to the 1958 New York Convention. Hence, recognition and enforcement of foreign arbitral awards in Ukraine is conducted under its provisions. In relation to setting aside of the awards issued by the tribunals seated in Ukraine, it is possible only based on an exhaustive list of grounds established in the Law of Ukraine ‘On International Commercial Arbitration’. Such grounds basically mirror those provided in the UNCITRAL Model Law.

Any application on recognition and enforcement of a foreign arbitral award in Ukraine should be submitted to the Kiev Court of Appeal. Its ruling on granting or denying recognition and enforcement of the foreign award can only be challenged before the Supreme Court.

There were a number of notable rulings regarding recognition and enforcement of foreign arbitral awards under the 1958 New York Convention issued by the Supreme Court over the past year. In LLC Everest Estate and others v. the Russian Federation, the Court ruled that the foreign state ipso facto waived its jurisdictional immunities prescribed in the BIT by entering into that BIT providing for an obligation to recognise the finality and binding effect of an arbitral award rendered in any dispute arising thereof.9

The Supreme Court also dealt with interpretation of public policy in the context of military conflict between Ukraine and the Russian Federation. In the case Avia FED Service vs SJSHC Artem the Supreme Court reached a conclusion that the fact that recognition and enforcement of the foreign arbitral award is sought by a company incorporated in the Russian Federation, which is recognised by Ukraine as an aggressor-state, cannot amount to public policy violation under the 1958 New York Convention since private law legal relations are independent from the current political situation.10 There were a number of further rulings issued by the Supreme Court in which the Court came to the same conclusion.

iii Mediation

Mediation is not extensively regulated in Ukraine. In particular, there is no legal framework to enforce agreements to mediate. The parties, however, can take part in mediation procedures voluntarily, and subsequently enter into mediation settlement agreements. Such agreements, if properly executed, can be enforced as ordinary commercial contracts.

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9 Resolution of the Supreme Court dated 25 January 2019 in Case No. 796/165/18.
10 Resolution of the Supreme Court dated 5 September 2018 in Case No. 761/46285/16-т.
At the same time, Ukraine is taking steps aimed at the promotion and expansion of mediation. For instance, the Strategy for Reforming of the Judiciary, the System of Justice, and Ancillary Legal Institutions for 2015–2020 provides for the development of alternative dispute resolution, including mediation.

On 7 August 2019, Ukraine signed the Singapore Convention on International Settlement Agreements Resulting from Mediation. The Convention promotes mediation as an alternative and effective method of resolving trade disputes. To implement the provisions of the Convention, the Ministry of Justice of Ukraine established a working group on developing steps towards the ratification of the Convention and introducing relevant amendments to the national legislation.

Separately, there is the concept of judicial mediation introduced into the Ukrainian procedural codes at the end of 2017. Under such judicial mediation procedure, the parties can reach an amicable settlement of the dispute with the assistance of a judge. The parties, however, do not have an obligation to attempt to engage in the judicial mediation procedure.

If requested by either party, the mediation is carried out before the start of the trial on merits. If the settlement is successful, the respective agreement between the parties is ratified by the judge and becomes binding.

**iv Other forms of alternative dispute resolution**

Currently there are no rules governing the process and enforceability of expert determination procedures in Ukraine. However, expert determination is frequently included in the contracts for construction of large infrastructure objects or providing complex consultancy services, as well as in public-private procurement agreements. For instance, the FIDIC forms of contracts that are commonly used in large infrastructure projects implemented in Ukraine provide for a multi-stage dispute resolution process that includes mediation, dispute adjudication (adjudication/avoidance) board (DAB) and arbitration.

In Ukraine, however, the DAB’s decision may be unenforceable in the event one of the parties wishes to challenge it. Even if the parties have agreed that the expert determination will be final and binding, it may be possible to overturn the DAB’s decision in courts or arbitration, unless the parties duly sign the amendments to their contract reflecting relevant DAB’s decision.

In relation to referees, this concept is virtually unknown to the Ukrainian legal system. The closest procedure to the referee option in Ukraine is the pretrial settlement of the dispute with the participation of the judge, as discussed above. The same applies to other procedures of alternative dispute settlement. Early neutral evaluation, adjudication, conciliation and facilitation are unregulated in Ukraine and hence are rarely used by parties in practice.

**VII OUTLOOK AND CONCLUSIONS**

The new Civil and Commercial Procedure Codes introduce new possibilities of expedited and effective judicial proceedings in Ukraine. Further amendments improving procedural rules are expected in the near future. In the area of alternative dispute settlement, the improved framework on recognition and enforcement of arbitral awards, as well as the revised Arbitration Rules of the ICAC, make international arbitration a fully workable and reliable option in Ukraine.

The recent examples of jurisprudence produced by the Supreme Court show that the Ukrainian judiciary has started to overcome the previously predominant restrictive and
formalistic approaches in application and interpretation of the law. Instead, the courts have become accustomed to applying internationally recognised principles of public and private law, as well as relying upon the practice of the ECHR.

Introduction of the Bankruptcy Code of Ukraine in 2019 is another landmark event. In particular, the Code makes possible bankruptcy proceedings in respect of private individuals, as well as providing for more transparent rules on sale of assets.

In relation to the significant pending cases, the Ukrainian legal community is awaiting the result of the case related to squeeze-out. The Grand Chamber of the Supreme Court will be considering the challenge by the minority shareholders of a joint-stock company of the deeds ordering them to sell their shares.
I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

i The legal system

The United Arab Emirates (UAE) is a federation of seven emirates: Abu Dhabi (the capital), Ajman, Dubai, Fujairah, Ras Al Khaimah, Sharjah and Umm Al Quwain. The UAE adopts a dual civil and Islamic shariah legal system, influenced by French, Egyptian and Roman principles. The primary source of law in the UAE is the UAE Constitution (as amended), which provides that the official religion of the federal union is Islam. In practice, however, like other civil law jurisdictions, legislation in the UAE is codified in federal codes that have been promulgated pursuant to Article 121 of the UAE Constitution.

The principal federal codes currently in force are the Civil Transactions Law, the Commercial Transactions Law, the Companies Law, the Labour Law, the Civil Procedure Law and the Federal Arbitration 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

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1 Nassif BouMalhab and John Lewis are partners at Clyde & Co LLP. Salma Hajhusein, a professional support lawyer in Clyde & Co LLP’s dispute resolution group, has contributed to the updates made to this chapter for 2019.

2 Constitution of the United Arab Emirates, 2 December 1971 (as amended) (the UAE Constitution).

3 Article 7 of the UAE Constitution.


6 Federal Law 2 of 2015 on Commercial Companies (the Companies Law).

7 Federal Law 8 of 1980 regulating Labour Relations (as amended) (the Labour Law).


10 Article 1 of the Civil Transactions Law.
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 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, personal status courts and execution courts.

The personal status or shariah courts are largely limited to hearing personal status and family matters and follow shariah principles for marriage and divorce, succession, personal status and inheritance.

Financial Free Trade Zones

There are various financial free trade zones that have been established in the UAE that allow for, inter alia, 100 per cent foreign ownership of companies incorporated within the free zone. These free zones are governed by their own framework of regulations and laws, subject only to the UAE Constitution, UAE Penal Code\(^\text{11}\) and international treaties entered into by the UAE.

Some of the most common free zones in the UAE include the Ras Al Khaimah Free Zone, the Jebel Ali Free Zone, Dubai Media City, the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM).

The DIFC and ADGM have a unique set-up as these free zones operate as autonomous common law jurisdictions with an independent judiciary within the emirate in which they are geographically situated.

The DIFC was established in 2004 by Federal Decree No. 35 of 2004. The DIFC has a number of independent bodies, including a DIFC Judicial Authority and Dubai Financial Services Regulatory Authority (DFSA), which was established by Dubai Law No. 9 of 2004. A DIFC Court of First Instance and DIFC Court of Appeal have been established\(^\text{12}\) to have

\(^{11}\) Federal Law 3 of 1987 promulgating the Penal Code (as amended) (the Penal Code).

\(^{12}\) Dubai Law No. 12 of 2004: The Law of the Judicial Authority at Dubai International Financial Centre (as amended).
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, Small Claims Tribunal and the DIFC Small Claims Leasing Tribunal.13

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 alternative dispute resolution procedures
The increasing number of international companies operating within the UAE, legal reforms in the region, including the enactment of the Federal Arbitration Law, and the heavy caseload of the onshore UAE courts are the driving forces behind alternative dispute resolution (ADR) mechanisms becoming more prevalent and accepted in the UAE. These ADR mechanisms range from arbitration, mediation and other adjudicative services offered by different federal authorities and ministries.

Arbitration is a recognised method of dispute resolution that has grown in popularity since the UAE’s accession to the New York Convention14 in 2006. In June 2018, the Federal Arbitration Law came into effect. The Federal Arbitration Law is based on the UNCITRAL Model Law and repealed the previous provisions of the UAE Civil Procedure Law15 that governed arbitrations seated in the UAE (outside the DIFC and ADGM).

There is no formal legislation that governs the enforcement of decisions of conciliation boards or mediators and ADR procedures are considered contractual arrangements entered into between parties. Mediation and conciliatory services are becoming more prevalent in the UAE with these services being promoted by government authorities and ministries to assist with pre-litigation resolution of disputes.

II THE YEAR IN REVIEW
In June 2016 a Judicial Tribunal for the Dubai Courts and DIFC Courts16 (the Judicial Tribunal) was established to resolve conflicts in jurisdiction and judgments between the DIFC Courts and the onshore Dubai Courts. Recently, the Judicial Tribunal has rendered a number of decisions that reinforce the jurisdictional gateways provided by Article 5(A) of Law 12 of 2004 (as amended) in respect of the Judicial Authority at Dubai International Financial Centre,17 placing particular emphasis on the parties’ active participation in proceedings before the Dubai Courts or DIFC Courts without challenging jurisdiction as grounds on which to establish jurisdiction.

13 See DIFC Courts Order No. 5 of 2019 in respect of the DIFC Courts Small Claims Leasing Tribunal.
15 Articles 203–218 of the UAE Civil Procedure Law.
16 Decree No. (19) of 2016 establishing the Dubai-DIFC Judicial Tribunal.
17 For details of decisions of the Judicial Tribunal, see: https://www.difccourts.ae/judgments-and-orders/joint-judicial-committee-decisions/.
This year was also marked by the practical application of the 2018 Executive Regulations of the Civil Procedure Law. The Executive Regulations of the Civil Procedure Law have modernised, and increased efficiencies in, the onshore UAE Courts’ process by adopting procedures which include, for example, providing an expedited framework for the service of court proceedings (including by way of recorded voice call, SMS on mobile phones or any similar means of modern technology);\(^8\) the requirement for civil, commercial and labour claims valued at less than 1 million dirhams to be heard by summary procedure without recourse to the Court of Cassation;\(^9\) provisions relating to the immediate enforcement of payment orders;\(^10\) and provisions limiting challenges to the enforcement of foreign judgments, orders and instruments, via petition to the enforcement judge,\(^11\) without prejudice to grounds prescribed in international treaties to which the UAE is a party.

III COURT PROCEDURE

i Overview of court procedure

The Civil Procedure Law, together with the Executive Regulations of the Civil Procedure Law, is the key code that governs civil procedure and the litigation process in the UAE. The Civil Procedure Law and the Executive Regulations of the Civil Procedure Law apply to disputes brought before the onshore UAE Courts.

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, a first hearing is held where the defendant will usually request an adjournment to submit a statement of defence.

Provided service of process has been effected by a method permitted by the law, a case will proceed against a defendant in absentia. The plaintiff will still be required to prove its case.

During the hearings, written pleadings are submitted by advocates (typically UAE nationals) appearing on behalf of the parties. There is no set number of written pleadings prescribed in any given case. Submissions will be exchanged by the parties in turn until such time as it adjourns the case for judgment and declares the hearing closed. While a form of examination of witnesses and oral advocacy are technically permitted, in practice there is no oral advocacy or witnesses heard at hearings. Cases are determined with reliance on documentary evidence (including expert reports as referred to below) and the parties’ respective legal submission.

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\(^8\) See Article 6 of the Executive Regulations of the Civil Procedure Law.
\(^9\) See Article 23 of the Executive Regulations of the Civil Procedure Law.
\(^10\) See Articles 62 to 68 of the Executive Regulations of the Civil Procedure Law.
\(^11\) See Articles 85 to 88 of the Executive Regulations of the Civil Procedure Law.
It is common for certain aspects of a dispute to be referred to an ‘expert’ for assistance. The court often delegates analysis of liability and quantum issues to an expert, who is appointed from among experts listed on a court-maintained register. The court will in most cases adopt the expert’s findings.

A judgment in the court of first instance is usually issued within nine to 12 months from when the proceeding was commenced. Complex cases can take up to 18 months. The appeal stages typically take less time, with the court of appeal stage taking about six to nine months to render judgment and the Court of Cassation taking about three to six months. Overall, it can take in excess of 24 months to reach a final unappealable judgment in the Court of Cassation.

Pursuant to the Executive Regulations of the Civil Procedure Law, certain cases may now also be heard by way of a single hearing, by summary procedure. A judge presiding on summary matters can hear civil, commercial and labour claims valued at up to 100,000 dirhams, claims for signature authenticity verification and claims for unpaid wages, salaries and the like valued at up to 200,000 dirhams. Generally, such cases will be listed for hearing within 15 days of the statement of claim being filed. Judgments rendered in summary proceedings will be final and not subject to appeal if the value of the claim is up to 50,000 dirhams (or 20,000 dirhams for labour claims). 22

**DIFC Courts**

Proceedings are commenced in the DIFC Courts by filing a claim form. There are three types of claim forms:

a. The Small Claims Tribunal (SCT) claim form (Form P53/01) for claims that fall under the jurisdiction of the SCT where the amount of the claim does not exceed 500,000 dirhams, the claim relates to employment and all parties elect that it be heard by the SCT, or the amount of the claim does not exceed 1 million dirhams and all parties elect in writing that the case be heard by the SCT.

b. The Part 8 claim form (Form P8/01) for claims where the claim is unlikely to involve a substantial dispute of fact or where there is a rule or practice direction that permits or requires the use of a Part 8 claim form.

c. The Part 7 claim form (Form P7/01), the most common method for commencing a claim, for claims that do not fall under the jurisdiction of the SCT and do not require the use of a Part 8 claim form.

The Part 7 procedure, being the most common procedure, requires the claim form to be served within four months of the claim being filed. Thereafter, the claimant is required to file an acknowledgement of service and particulars of claim. The defendant is required to file a defence within 28 days of the particulars of the claim being served. The reply to defence is served by the claimant within 21 days of the service of the defence. Following the exchange of pleadings, the court registry will schedule a case management conference where the remaining timetable will be agreed. The timetable will usually provide for document production, witness statements, expert reports and the exchange of skeleton arguments. A hearing is ordinarily

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22 See Article 23(2) of the Executive Regulations of the Civil Procedure Law.
scheduled within six to nine months after the claim form is filed with the judgment issued within one to three months after the hearing. If the judgment of the court of first instance is appealed, it can take a further 12 months for a judgment of the court of appeal.

**ADGM Courts**

As with the DIFC Courts, proceedings before the ADGM Courts are also commenced by filing a claim form. The ADGM Courts have six types of claim forms.

Form CFI-1 is the standard claim form required for most claims filed before the Civil Division of the Court of First Instance. Upon filing, the claim form must include the particulars of the claim. Service of the claim form is required to be completed within four months of the claim being filed. The defendant is then required to file an acknowledgement of service within 14 days of receiving service of the claim form, and such acknowledgement must also be served on the claimant. The defendant is required to file a defence within 28 days of service of the claim. The reply to the defence is required to be filed by the claimant within 21 days of service of the defence.

Separate claim forms are required for claims filed (1) before the Small Claims Division (Form CFI-2), where the value of the claim does not exceed US$100,000 or an employment claim that both parties agree should be treated as a small claim; (2) where the claim is unlikely to involve a substantial dispute of fact, known as the 'Rule 30 Procedure' (Form CFI-2); (3) in which the claimant is seeking judicial review of an ADGM decision or enactment (Form CFI-4); (4) for the enforcement of an arbitration award (Form CFI-5); and (5) in respect of derivatives claims.

**Urgent or interim remedies**

In the onshore UAE courts, the DIFC Courts and the ADGM Courts there are a range of interim remedies available to claimants to preserve assets and prevent defendants from fleeing the country. There is also a mechanism by which a claimant can seek summary judgment.

**Onshore UAE courts: travel bans**

A claimant can apply for a travel ban against an individual defendant before filing a substantive claim if three conditions are satisfied. First, there must be serious reasons to believe that the defendant will flee the country. Second, the debt must be known, due for payment and unconditional. Third, the debt must not be less than 1,000 dirhams where the substantive claim has been filed or 10,000 dirhams where the substantive case has not yet been filed.23

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.

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23 See Articles 329 to 330 of the Civil Procedure Law as supplemented by Articles 188 to 189 of the Executive Regulations of the Civil Procedure Law.
Onshore UAE courts: precautionary attachments

A claimant can seek a precautionary attachment order (essentially a freezing order) to prevent any disposition or dissipation of assets while the attachment remains in place.

The process for obtaining a precautionary attachment is to apply to the court without notice to the defendant (ex parte) setting out the nature and basis of the substantive claim. The court must be persuaded that there is a real risk of the defendant dissipating its assets before judgment, or that the claimant’s rights against those assets may otherwise be prejudiced if the attachment is not granted.

The application must also specifically identify the assets against which the claimant is seeking attachment. A signed undertaking to indemnify the opposing party in the event that the order is obtained on fraudulent grounds must accompany the application.

It can take three to five days to obtain a precautionary attachment order. If the order is granted, the claimant must commence substantive proceedings within eight days of the order to confirm the order. If substantive proceedings are not commenced within the prescribed time limit, the precautionary order expires.

DIFC and ADGM Courts

Both the DIFC and ADGM Courts have power to grant interim orders prior to the commencement of proceedings and without notice to the respondent (ex parte). The types of interim remedies that can be granted by the DIFC Courts are listed at Rule 25 of the Rules of the DIFC Courts and Rule 71 of the ADGM Court Procedures Rules. In both cases, the interim remedies include: interim injunctions (DIFC Rule 25.1(1)) and ADGM Rule 71(1) (a); freezing orders (DIFC Rule 25.1(6)) and ADGM Rule 71(1)(f); disclosure orders (DIFC Rule 25.1(7) and ADGM Rule 71(1)(g)); and search orders (DIFC Rule 25.1(8) and ADGM Rule 71(1)(h)).

The procedure for seeking an interim order before either the DIFC Courts or the ADGM Courts is to make an application by filing an application notice with the court (DIFC Rule 23.2 and ADGM Rule 64(3)). An application for an interim order can be made at any time, including before a claim has been commenced. The application can be made without notice if there are good reasons for doing so, such as urgency, secrecy or tipping off or an increased risk of dissipation of assets. If an application is made without notice the evidence in support of the application must state why it is being made without notice.

Class actions

There is no provision under UAE federal law for class actions or collective actions. Each claim must therefore be filed separately, although it is possible to join additional defendants to a claim. With respect to actions within the DIFC\(^\text{24}\) and ADGM,\(^\text{25}\) it is possible to obtain a Group Litigation Order (GLO) on application in circumstances where there are, or are likely to be, a number of claims giving rise to GLO issues.

\(^\text{24}\) See, inter alia, Rule 20.72.
\(^\text{25}\) See, inter alia, Rule 63.
**Representation in proceedings**

**Onshore UAE courts**

Only advocates licensed by the Ministry of Justice have rights of audience before the onshore UAE courts. The advocate must, however, be authorised by a notarised power of attorney to appear before the courts on behalf of the party he or she represents.

In practice, international law firms and foreign legal consultants licensed to advise on UAE law are actively involved in the litigation. They will instruct the advocate and work with the advocate to prepare pleadings for the advocate to submit.

Any party can represent itself in court.

A company can be represented by the chairman of the board unless the articles of association of the company provide that the general manager shall represent the company before the courts. If the proceedings reach the Court of Cassation or the Federal Supreme Court stage, an advocate licensed by the Ministry of Justice must represent the company as it is a requirement that the cassation appeal is accompanied by a declaration that is signed by that advocate.

**DIFC Courts**

In the DIFC Courts, with the exception of the Small Claims Division (which are conducted by litigants in person without the assistance or attendance of practitioners or counsel), only practitioners who are authorised by their firm and listed under Part I of the Academy of Law’s Register of Practitioners[^26] can issue and conduct proceedings by signing statements of truth; corresponding with the Registry regarding a case or the progression of a case; and corresponding with opposing counsel. Only practitioners who are admitted to Part II can appear and plead before a judge at hearings.

**ADGM Courts**

Individuals who have been practising or employed as a lawyer for a continuous period of five years immediately prior to appearing before the Court have the right to appear at hearings and plead before a judge.[^27] The exception to this is appearances before the Small Claims Division, where any person may appear subject to compliance with the ADGM Rules of Conduct.

**Enforcement of foreign judgments**

Foreign judgments can be enforced in the UAE in three ways: under a bilateral treaty; under the provisions of the Executive Regulations of the Civil Procedure Law; or through the DIFC Courts or ADGM Courts.

[^26]: See: https://registrations.draacademy.ae/.

[^27]: Rule 219 of the ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015.
Bilateral treaties

The UAE is party to a number of bilateral and multilateral conventions that provide for the reciprocal enforcement of judgments. Examples include the Paris Convention, 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.

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.

Executive Regulations of the Civil Procedure Law

Where the UAE does not have a treaty in place with the country whose judgment is being enforced, Article 85 of the Executive Regulations of the Civil Procedure Law applies to the enforcement of foreign judgments in the UAE (i.e., onshore).

Article 85(2)(a) of the Executive Regulations of the Civil Procedure Law provides that an order for enforcement will be made if it is verified that the UAE Courts did not have exclusive jurisdiction to determine the dispute determined by the foreign judgment. Enforcement of foreign judgments onshore is liable to being refused if the UAE Courts consider that they had exclusive jurisdiction to determine the dispute in the first instance.

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, among other things, that the foreign court had exclusive 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.

DIFC and ADGM

It is possible to enforce foreign judgments by utilising the conduit jurisdiction of the ADGM or DIFC Courts even where the defendant has no assets in the ADGM or DIFC (as applicable), although, with respect to the DIFC Courts, recently, there have been limitations on seeking the subsequent enforcement against assets located onshore (i.e., outside of the DIFC).

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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 Court judgment, it is possible to have it executed by the Dubai Courts onshore through a summary process set out in the Judicial Authority Law.

It has become increasingly common for defendants/debtors to initiate parallel proceedings in the Dubai Courts resulting in the referral of the matter to the Judicial Tribunal to determine the court retaining jurisdiction to enforce the foreign judgment.

In a similar manner to the DIFC Courts, in order to enforce a foreign judgment in the ADGM Courts, a claim must be filed before the ADGM Courts seeking a declaration of enforceability. Once the ADGM Courts have issued such declaration, the judgment may then be enforced onshore through the Abu Dhabi Courts, without a further review of the merits of the claim, in accordance with the relevant memorandum of understanding.

With respect to the ADGM, the memorandum of understanding entered into between the ADGM Courts and the Abu Dhabi Judicial Department and the Ras Al Khaimah Courts should resolve issues arising from any conflict of jurisdiction. The Judicial Tribunal’s jurisdiction to determine conflicts of jurisdiction is limited to the Emirate of Dubai. As such, in other Emirates, conflicts of a jurisdictional nature are determined by the Courts seized of the matter.

**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, Egypt, 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.

Neither the Civil Procedure Law nor the Executive Regulations of the Civil Procedure Law 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 where there is no bilateral agreement or treaty between the UAE and the requesting country (i.e., the country in which the serving party is located) in relation to service of foreign proceedings in the UAE. These requests are generally required

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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, and notwithstanding the Executive Regulations of the Civil Procedure Law, the commonly used method of effecting service in the UAE of proceedings issued in England under the relevant treaty is as follows:

\[\begin{align*}
\text{a} & \quad \text{documents are submitted to the Foreign Process Section of the Royal Courts of Justice;} \\
\text{b} & \quad \text{the documents will be forwarded to the Foreign and Commonwealth Office in London;} \\
\text{c} & \quad \text{the documents will be sent to the British Embassy in the UAE;} \\
\text{d} & \quad \text{the documents will be passed to the UAE Ministry of Foreign Affairs;} \\
\text{e} & \quad \text{the UAE Ministry of Foreign Affairs will pass the documents to the UAE Ministry of Justice for the purposes of arranging service by the court bailiff or courier company.}
\end{align*}\]

**Access to court files**

In the onshore UAE courts, the public cannot access the court file or obtain copies of the pleadings or evidence filed during the proceedings. These records are only accessible by the parties to the proceedings and their authorised legal representatives.

DIFC and ADGM Court proceedings on the other hand are public and pleadings are accessible from the Registry or the e-Registry. The exception to this is arbitration claims, which are confidential.

**Litigation funding**

Third-party funding of litigation or arbitration is not prohibited under UAE law and the UAE is becoming a more attractive jurisdiction for litigation funders, particularly in view of opportunities to fund claims in the ADGM and DIFC Courts.

Legal professionals cannot however offer contingency fee arrangements that are on a 'no win, no fee' basis.\(^{35}\)

In March 2017, the DIFC Courts issued Practice Direction No. 2 of 2017 on Third Party Funding in the DIFC Courts, which sets out the requirements to be observed by funded parties.\(^{36}\)

On 16 April 2019, the ADGM Courts enacted Litigation Funding Rules 2019, being a set of rules applicable to litigation funding agreements.\(^{37}\)

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\(^{35}\) UAE Federal Law No. 23 of 1991 regarding the Regulation of the Legal Profession.


IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

Onshore UAE

The legal profession in the UAE is regulated by Federal Law No. 23 of 1991 (the Legal Profession Law). Each emirate also has its own independent body which governs the legal profession. For example, in Dubai, firms must be licensed by the Dubai Legal Affairs Department (DLAD) and in Abu Dhabi firms must be licensed with the Executive Affairs Authority.

Article 40 of the Legal Profession Law prevents a local advocate from acting against a client in a dispute in which he or she has already provided advice. Advocates are also prohibited from disclosing information they have obtained in the course of acting for a client. There is no express prohibition against an advocate acting against a client for whom he or she has previously acted, provided the advocate does not breach confidentiality and he or she has not acted for the same client in a dispute.

The DLAD is in the process of implementing the Charter for the Conduct of Advocates and Legal Consultants in the Emirate of Dubai. The current draft of this Charter prohibits lawyers from accepting instructions on a new matter or continuing to act on a matter in the event that a conflict of interest arises. Certain exceptions to this rule are provided.

Most international law firms operating in the UAE are subject to regulations in their country of origin, such as the Solicitors Regulatory Authority in England and Wales. Complaints regarding the conduct of a local advocate or legal consultant can also be made to the regulating body in each emirate, such as the DLAD, or the Public Prosecutor in the event of a breach of the Legal Profession Law.

DIFC and ADGM

The DIFC has in place the Mandatory Code of Conduct for Legal Practitioners in the DIFC Courts (the DIFC Code). The DIFC Code provides for practitioners in the DIFC with a benchmark for best practice and professional standards.

The DIFC Code regulates situations whereby there may be the potential of a client conflict. The Code prohibits lawyers from acting for another client where there may be a conflict and comprehensively sets out the circumstances where a lawyer must cease to act in the event of a conflict of interest.

Complaints in the event of a breach of the Code are to be made in writing to the Director of the DRA Academy of Law.

The ADGM Court Rules of Conduct 2016 (the ADGM Rules) apply to lawyers appearing before the ADGM Courts. The ADGM Rules contain mandatory provisions governing the duties owed by lawyers to the courts and clients and the ADGM Courts are able to order costs sanctions in circumstances of breach. 38

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38 Pursuant to Rule 203 of the ADGM Court Procedure Rules (ADGM Rules, Article 10).
ii Money laundering, proceeds of crime and funds related to terrorism

Lawyers are subject to the UAE's federal anti-money laundering (AML) and combating the financing of terrorism (CFT) regime. Lawyers in some of the UAE’s financial free zones, such as the DIFC or ADGM, may be subject to additional AML/CFT regulation by the relevant free zone authorities.

Among other things, the AML/CFT regime imposes obligations on lawyers to conduct client due diligence to specified standards, confirm the source of wealth of politically exposed foreigners and report suspicious transactions to the Financial Information Unit of the Central Bank. Criminal and regulatory sanctions, including jail sentences and fines, may be imposed on firms and lawyers who commit any of the primary AML/CFT offences, or secondary offences such as failure to report suspicious activity or ‘tipping off’.

iii Data protection

Onshore UAE

There are currently no specific privacy laws which apply ‘onshore’ in the UAE. Similarly, there is no clear definition of what will constitute ‘personal information’ under UAE law. The provisions that do exist under UAE law in relation to privacy and data protection are very general in their nature. These are rights enshrined in the UAE Constitution and the Penal Code.

The UAE is in the process of establishing a federal data privacy commission and assessing the need for a specific UAE data protection law. Any such law, if enacted, is likely to include provisions relating to storage, transfer and permitted use of personal data. It is not currently clear when the data protection law will be enacted.

In 2012, the UAE enacted a Cyber Crime Law. The law criminalises the use of information technology to commit a wide range of offences including breach of privacy and disclosure of confidential information. These offences are punishable by a fine or imprisonment or both.

DIFC and ADGM

The DIFC Data Protection Law and the ADGM Data Protection Regulations 2015 (as amended) apply to entities registered in the DIFC and ADGM (respectively), including law firms. Law firms must implement systems and safeguards to ensure that the personal data of the individual to whom the personal data relates is secure.

Law firms should obtain written consent prior to transferring any personal data outside of the DIFC or ADGM (as applicable). Personal data should not be retained for longer

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40 UAE Cybercrime Law No. 5 of 2012.
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 and ADGM

There is no specific legislation in the DIFC or ADGM that deals with privilege although the concept is referred to in a number of laws and regulations applicable to both DIFC and ADGM Courts. For example, under the Rules of the DIFC Courts, privilege is recognised as a ground to withhold production of disclosable documents where it is available under the legal or ethical rules determined by the court to be applicable (a similar provision exists in the ADGM Rules). It would therefore be an issue for the DIFC Court to determine the rules of privilege that apply and whether they apply to in-house counsel.

ii Production of documents

Onshore UAE

There is only limited scope to request disclosure of inter party documents in the exhaustive circumstances listed in Article 18 of the Law of Evidence. There is no discovery in the onshore UAE courts. Parties are only required to file documents on which they wish to rely and are not required to disclose documents that may be adverse to their case.

If an expert is appointed by the court, the expert can request certain documents such as accounts and ledgers. The expert cannot, however, compel a party to comply with such a request, but failure to disclose a requested document may result in an adverse inference or finding.


43 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.
**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 or outside of the DIFC (i.e., onshore in the UAE), 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, backup systems and other devices.

**ADGM Courts**

Proceedings before the ADGM Courts require disclosure of all documents to be relied upon during the hearing, referred to as ‘standard disclosure’. The exceptions to standard disclosure are claims before the Small Claims Division, Rule 30 proceedings and judicial review, where the obligation does not apply.

A party may apply for further or specific disclosure by virtue of an application notice. The application notice must identify the documents sought and provide an explanation as to why they would assist in the determination of the proceedings. Disclosure of documents may be objected to if a party can justify its failure to disclose. However, the ADGM Rules are not prescriptive as to the grounds upon which a party may rely on.

The court retains discretion to make orders for disclosure or inspection of documents if it considers it appropriate to do so. The duty to disclose is limited to documents that are or have been in the control of the party being requested to produce.

Parties are required to cooperate at an early stage in relation to electronic documents and, in circumstances in which the volume of documents is particularly large, parties are encouraged to exchange preliminary production requests to facilitate electronic data searches.
VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

Arbitration is the most commonly used method of ADR and has increased in popularity following the UAE’s accession to the New York Convention; the enactment and implementation of the Federal Arbitration Law for proceedings seated onshore (i.e., outside of the DIFC or ADGM); and a number of arbitration-friendly developments in the region, including the establishment of international arbitration centres.

ii Arbitration

The rules governing arbitration

The recent implementation of the Federal Arbitration Law, based on the UNCITRAL Model Law, provides a framework pursuant to which arbitrations seated ‘onshore’ in the UAE (i.e., outside the DIFC or ADGM) are conducted.

Major arbitral institutions

The major arbitral institutions in the UAE are the Dubai International Arbitration Centre (DIAC), Abu Dhabi Conciliation and Arbitration Centre (ADCAC), Sharjah International Commercial Arbitration Centre (Tahkeem) and Dubai International Financial Centre-London Court of International Arbitration (DIFC-LCIA). The rules of the DIFC-LCIA closely mirror the rules of the London Court of International Arbitration.

International arbitral institutions are also commonly used by parties in the region particularly in construction disputes. The International Chamber of Commerce (ICC) is the institution of preference in the majority of construction disputes. The ICC has recently opened a representative office in the ADGM to facilitate ICC-administered arbitration proceedings in the region.

Popularity

The growth in the number of arbitration institutions has contributed to the popularity of arbitration in the region. The UAE’s accession to the New York Convention; the enactment of the Federal Arbitration Law; and 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.

Total cases registered with DIAC amounted to 169 in 2017 and are in the range of 200 per year since then.45

The DIFC-LCIA confirmed that in 2018, 68 disputes were referred to the DIFC-LCIA Arbitration Centre comprising 64 arbitrations and four mediations. By contrast, the total number of cases reported by the DIFC-LCIA in 2017 was 58, comprising 51 arbitrations, six mediations and one application to the DFSA Financial Markets Tribunal.46

44 Federal Law No. 6 of 2018.
Diversity in the types of matters that are being submitted to arbitration, which includes maritime, telecommunication, finance and banking, media and general commercial, also demonstrates an increasingly established acceptance of arbitration across a variety of business sectors.

Certain disputes, however, are not capable of resolution by arbitration including family matters, criminal matters, matters of public policy and any other matters that must be referred to the UAE courts as provided for in the applicable law (e.g., agency disputes in the automotive sector).

Rights of appeal

The most significant reforms brought about by the Federal Arbitration Law address the enforceability of arbitration awards seated in the UAE (outside the DIFC or ADGM) and the approach of the UAE onshore courts with respect to the application of the UAE Federal Arbitration Law has been positive; reducing the period in which challenges to, and the enforcement of, arbitration awards are concluded.

An UAE arbitration award is binding upon the parties to the award enforceable as a judgment of the UAE courts. An arbitration award should be executed voluntarily by the parties. Failing voluntary execution of an award by the parties, forced execution of an award against a party requires an order of a UAE court of appeal.

The Federal Arbitration Law sets out an exhaustive list of grounds to challenge an arbitral award inspired by Article 34 of the UNCITRAL Model Law and consistent with international standards, supplemented by additional grounds that include, for example, lack of capacity to enter into or exercise rights pursuant to the arbitration agreement as determined under the law governing his or her capacity; or procedural irregularities affecting the ability of parties to present their cases; or the award.

Article 54 of the Federal Arbitration Law provides a 30-day time limit for a party to challenge the validity of a final arbitration award before the relevant UAE Court of Appeal.

It is possible to appeal against an order of the Court of Appeal ratifying an award and declaring it enforceable. The appeal must be made within 30 days of the Court of Appeal’s notification of the order.

Similarly, DIFC and ADGM seated arbitral awards cannot be appealed to the DIFC and ADGM Courts (respectively), but they can be set aside on the limited grounds which are set out in the DIFC Arbitration Law and the ADGM Arbitration Regulations 2015, which mirror the UNCITRAL Model Law. Any application to set aside an award before the DIFC Courts must be made within three months of the date the award was received by the party making the application.

Article 41(2)(a)(i) to (iv) of the DIFC Arbitration Law provides that the DIFC Court can set aside an award where the party seeking to set aside the award demonstrates that: (1) there was lack of capacity of parties to conclude the arbitration agreement or the arbitration agreement is not valid; (2) there was lack of notice of appointment of an arbitrator or of the arbitral proceedings or inability of a party to present his case; (3) the award deals with

47 Article 52.
48 Article 53(c).
49 Article 53(d).
50 Article 53(g).
matters not contemplated by submission to arbitration; and (4) the composition of the arbitral tribunal or conduct of arbitral proceedings was not in accordance with the agreement of the parties.

These grounds for setting aside an award are mirrored in Article 51(1)(a) of the ADGM Arbitration Regulations.

Article 41(2)(b)(ii) of the DIFC Arbitration Law and Article 51(1)(b) of the ADGM Arbitration Regulations provides that the DIFC and ADGM Courts respectively can set aside the award where it finds that the subject matter of the dispute is not capable of settlement by arbitration under DIFC or ADGM Law (as applicable), or the award conflicts with the public policy of the UAE. The DIFC Court may also set aside the award where the dispute is expressly referred to the jurisdiction of another tribunal or body under the applicable law.

iii Enforcement of arbitration awards

Domestic awards

Enforcement proceedings commence directly before the UAE federal or local court of appeal, not before the courts of first instance (i.e., the previous position under the Civil Procedure Law). Under the Federal Arbitration Law, an application to a court of appeal seeking ratification and enforcement of a UAE arbitration award shall be determined within 60 days of the date of the application.51

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.52

In a number of subsequent cases, the Dubai Court of Cassation held that the Civil Procedure Law has no application to foreign arbitral awards and has ratified and enforced foreign awards on the basis of the New York Convention.

It is also anticipated that the Civil Procedure Law, as amended by the Executive Regulations of the Civil Procedure Law, will strengthen and formalise the enforcement of foreign awards within the UAE in accordance with international norms.

Recent developments and trends

The coming into force, and application by the onshore Courts, of the Federal Arbitration Law and subsequent reforms to the arbitration landscape, including the additional certainty provided by the decisions of the Judicial Tribunal concerning the limitations to the conduit

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51 Article 55(2).
iv Mediation
While mediation is not recognised as a formal process as it is in other jurisdictions, the UAE court system is facilitating mediation through a range of committees that are available to parties prior to formally litigating a matter.

The Dubai courts, for example, have established a Centre for the Amicable Settlement of Disputes. The Centre considers certain disputes, including disputes relating to commonly owned property or where a debt does not exceed 50,000 dirhams. If a settlement is reached, a settlement agreement is entered into by the parties that is a legally enforceable agreement and attested by a judge.

Alternative dispute resolution is also provided for in the DIFC Court Rules. A judge can invite parties to consider resolution at any stage in proceedings, where appropriate. Where disputes fall under the jurisdiction of the Small Claims Tribunal of the DIFC Courts, the parties will be invited to attend a consultation at the court for the purposes of attempting settlement.

The lack of recognition of the ‘without prejudice’ principle, however, often tempers the willingness of parties to mediate disputes prior to commencing formal litigation.

v Other forms of alternative dispute resolution
Cost pressures and the need for greater efficiencies in the resolution of disputes have led to the innovation of other ADR processes in the UAE.

The Chambers of Commerce of each of the emirates offers an arbitration and conciliation service to its members. For example, the Dubai Chamber of Commerce and Industry offers a mediation service for the amicable resolution of disputes provided that at least one of the disputing parties is a member of Dubai Chamber. The Dubai Chamber of Commerce and Industry also has the ability to conduct such mediations in English. There is, however, no specific mechanism to enforce these decisions.

The UAE Insurance Authority recently established a body known as the Insurance Disputes Settlement and Resolution Committee to attempt to resolve insurance disputes between insurers and their insureds, whatever their value, as a mandatory pre-litigation step. Given the infancy of this development, it is unclear at present what dispute resolution procedures these Committees will administer to resolve insurance disputes, although it is expected that a conciliation service will be offered.

VII OUTLOOK AND CONCLUSIONS
Civil procedure in the onshore UAE Courts has been supplemented, and in certain key respects has been revised by the Executive Regulations of the Civil Procedure Law, signalling continued enhancement of the onshore legal process in order to provide a streamlined, modern procedural framework to facilitate the efficient resolution of disputes before the Courts. Although recently enacted, it is anticipated that these amendments will provide an increasingly attractive litigation process relevant to all businesses with a presence, or commercial interests in, the UAE.
The UAE continues to take steps in the right direction with a number of reforms to the ADR arena, particularly in onshore (i.e., non-DIFC and non-ADGM) seats. The Federal Arbitration Law enacted in 2018 is the most significant reform to the UAE’s dispute resolution landscape in over a decade. It is based on the UNCITRAL Model Law and provides a modern framework to support arbitration subject to the supervision of the UAE Courts (i.e., outside the DIFC and ADGM) and provides strict time limits and limited grounds on which parties are able to seek to frustrate arbitration proceedings by filing, for example, challenges to the appointment of the Tribunal; challenges to the jurisdiction of the Tribunal; challenges to the enforcement of interim awards; and challenges to the enforcement of any final award.

As with all new legislation, consistency in the interpretative approach taken when applying the Federal Arbitration Law will be fundamental to achieving its intended purpose, particularly in the absence of the doctrine of stare decisis in the UAE law. Recent experience suggests a marked shift towards the efficient dismissal of spurious challenges and a tendency by the UAE Courts to promptly enforce arbitration awards. It is expected that the reform introduced by the Federal Arbitration Law and the consistent implementation of its provisions promoted by channelling arbitration related matters through the Court of Appeal will result in increased confidence in the UAE’s legal system and thus strengthen the UAE’s position as a hub for international arbitration in the Middle East.

53 Articles 14 and 15.
54 Articles 19 and 20.
55 Article 39.
56 Articles 53–55.
Chapter 32

UNITED STATES

Timothy G Cameron and Sofia A Gentel

I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

The United States court system comprises a federal system and 50 state systems. Within each of these systems, the courts are generally divided into three levels: trial courts, intermediate appellate courts and courts of last resort.

i The federal court system

Article III of the US Constitution allows only certain kinds of cases to be heard by the federal courts. In general, these courts are limited to cases that involve issues of US constitutional law, certain disputes or suits between citizens of different states, disputes or suits between US citizens and non-US citizens, and issues that involve federal law.

The trial court level comprises 94 district courts. There is at least one federal district court in each state. Some less populous states, such as Alaska, have only one district court. More populous states, such as California and New York, have multiple district courts within the state. Within each district court there are multiple district court judges. Bankruptcy courts are separate units of the district courts. There are also two special trial courts that have nationwide jurisdiction over certain types of cases: the Court of International Trade, which hears cases involving international trade and customs issues; and the Court of Federal Claims, which hears cases involving claims for money damages against the United States, disputes over federal contracts, unlawful ‘takings’ of private property by the federal government and a variety of other claims against the United States.

Decisions of the federal district courts are appealed to a federal circuit court of appeals. There are 13 circuit courts of appeal. Each federal circuit court of appeals hears appeals from multiple district courts. For the most part, courts of appeal comprise districts that are geographically close to one another. The exception is the Federal Circuit Court of Appeals,

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1 Timothy G Cameron is a partner and Sofia A Gentel is an associate 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 28 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.
6 For example, the Court of Appeals for the Ninth Circuit generally encompasses districts in the western portion of the United States.
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.\(^7\) 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.\(^8\)

District court judges, courts of appeal judges and Supreme Court justices are nominated by the President of the United States and, after hearings by the Senate Judiciary Committee, confirmed by the United States Senate.

ii State courts

Each state has its own court systems, governed by its state Constitution and its own set of procedural rules. As a result, it is very important, in practice, to check each state’s rules and procedures, as they may vary from state to state in significant respects.

As in the federal system, cases in state court begin at the trial court level. Many states have specialised trial courts that hear cases related to a very specific area of the law. These courts can include probate courts, family law courts, juvenile courts and small claims courts.

In many states, the next level in the court system is the intermediate court of appeals, which hears appeals from the trial courts. Some states have a Supreme Court that provides the final review of the decisions of the trial court.\(^9\)

Unlike federal judges, who are appointed, many state court judges are elected for a set term by the voters of the district in which the court resides. Thus, state court judges, in an election year, must campaign for re-election and win the election to retain their judgeship.\(^10\)

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

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\(^7\) For example, the Supreme Court has original jurisdiction over disputes between two or more states.

\(^8\) During the 2017 term, for example, the Supreme Court heard argument in 69 cases. https://www.supremecourt.gov/publicinfo/year-end/2018year-endreport.pdf.

\(^9\) Even the nomenclature varies from state to state. New York, for example, has a three-tier court system. But the lowest level, the trial court level, is called the Supreme Court, the intermediate appellate level is called the Appellate Division and the court of last resort is the New York Court of Appeals.

\(^10\) In 2009, the Supreme Court held, in *Caperton v. Massey*, 129 S Ct 2252 (2009), that the due process clause of the US Constitution may require a judge to recuse himself or herself under certain circumstances, including in the context of an election campaign. The Court found ‘that there is a serious risk of actual bias – based on objective and reasonable perceptions – when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent’. id. at 2263 and 2264.
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.

### Alternative dispute resolution procedures

Alternative dispute resolution (ADR) mechanisms include arbitration and mediation. ADR mechanisms are used by mutual agreement of the parties. They are discussed in more detail in Section VI.

### THE YEAR IN REVIEW

Notable decisions of 2019 include the following cases.

#### Apple, Inc. v. Pepper et al.\(^\text{12}\)

In *Apple*, the US Supreme Court considered who has standing to sue for antitrust violations under Section 4 of the Clayton Act, which provides that ‘any person who shall be injured in his business or property’ as a result of an antitrust law violation may bring an action under the statute.

Several iPhone owners who had purchased apps from Apple's App Store sued Apple, alleging that Apple had unlawfully monopolised the iPhone apps aftermarket.\(^\text{13}\) The App Store is the only way iPhone owners can purchase apps, and app developers must contract with Apple in order to make their apps available to iPhone owners through the App Store. Apple keeps 30 per cent of all app sales.\(^\text{14}\) The plaintiffs argued that this arrangement locked iPhone owners into buying apps only from Apple and paying Apple’s 30 per cent ‘pure profit’ commission, even if the iPhone owners wanted to buy apps elsewhere.\(^\text{15}\)

The district court held that the plaintiffs did not have standing to sue Apple under the Clayton Act.\(^\text{16}\) The district court relied on *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) in which the US Supreme Court held that only ‘direct purchasers’, as opposed to purchasers that are two or more steps removed from the seller in a distribution chain, have standing to sue antitrust violators.\(^\text{17}\) The district court did not consider the app purchasers direct purchasers from Apple, because the app developers, not Apple, set the consumers’ purchase price. The Ninth Circuit reversed, finding that the plaintiffs were direct purchasers as they purchased the apps directly from Apple.\(^\text{18}\)

The US Supreme Court affirmed the Ninth Circuit’s reversal. In the decision the Court pointed to the broad language of Section 4 of the Clayton Act (‘any person’ that has been ‘injured’ by an antitrust violator) and consistent precedent holding that ‘the

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\(^{11}\) Many commercial contracts, for example, contain express provisions to submit any claims arising from the contract to arbitration, rather than court litigation.

\(^{12}\) 139 S.Ct. 1514.

\(^{13}\) id. at 1519.

\(^{14}\) id.

\(^{15}\) id.

\(^{16}\) id.

\(^{17}\) id.

\(^{18}\) id. at 1519-20.
immediate buyers from the alleged antitrust violators’ may sue.\textsuperscript{19} Furthermore, the Court agreed with the Ninth Circuit that the plaintiffs were direct purchasers: unlike in \textit{Illinois Brick}, the plaintiffs were not ‘consumers at the bottom of a vertical distribution chain who are attempting to sue manufacturers at the top of the chain’; instead, the plaintiffs paid the alleged overcharge directly to Apple, the alleged antitrust violator.\textsuperscript{20} Finally, the Court did not agree with denying the consumers standing to sue Apple merely on the basis that Apple did not set the price for the apps, as Apple’s alleged conduct was nevertheless such that could have caused consumers to pay higher-than-competitive prices and therefore constitute unlawful monopolistic conduct.\textsuperscript{21}

\textbf{ii Food Marketing Institute v. Argus Leader Media}\textsuperscript{22}

In \textit{Food Marketing Institute} the US Supreme Court considered what ‘commercial or financial information’ provided by private sector entities to a government agency constitutes ‘confidential’ under the Freedom of Information Act (FOIA), such that the FOIA requirements to disclose such information in response to a request by a member of the public do not apply.

Argus Leader, a South Dakota newspaper, filed a request under the FOIA for certain data collected by the US Department of Agriculture (USDA), including certain store-level financial and sales data of all retail stores in the US that participate in a national foodstamp programme.\textsuperscript{23} The USDA declined to provide the data, invoking Exemption 4 of the FOIA, which shields from disclosure ‘trade secrets and commercial or financial information obtained from a person’.\textsuperscript{24} Argus sued the USDA, which provided testimony that retailers use the data at issue to model consumer behaviour, to help choose new store locations and to plan sales strategies, and that disclosure of the data would threaten the stores’ competitive positions.\textsuperscript{25} The district court ordered the disclosure of the information, noting that while it could result in some competitive harm, it would not rise to the level of causing ‘substantial competitive harm’, and the Eighth Circuit affirmed.\textsuperscript{26}

The US Supreme Court reversed and held that the information was confidential as a matter of pure statutory interpretation, and that no competitive harm resulting from disclosure needed to be demonstrated.\textsuperscript{27} The Court considered the ordinary meaning of the word ‘confidential’ (i.e., ‘private’, ‘secret’) and held that commercial or financial information is confidential at least where it is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy.\textsuperscript{28} The Court found that the retailers’ desire to keep the information from public disclosure, as well as the fact

\textsuperscript{19} id. at 1520.
\textsuperscript{20} id. at 1521.
\textsuperscript{21} id. at 1521-1524.
\textsuperscript{22} 139 S.Ct. 2356.
\textsuperscript{23} id. at 2361.
\textsuperscript{24} id.
\textsuperscript{25} id.
\textsuperscript{26} id. at 2361-62.
\textsuperscript{27} id. at 2366.
\textsuperscript{28} id.
that the government had assured the retailers that it would keep the information private, rendered it sufficiently private and secret to constitute confidential information under FOIA Exemption 4 such that it did not need to be disclosed. 29

iii Iancu v. Brunetti 30

In Iancu, the US Supreme Court considered whether the prohibition in the Lanham Act, which governs the registration and enforcement of trademarks, on registration of ‘immoral or scandalous’ trademarks violates the free speech protections of the First Amendment of the US Constitution.

Under the Lanham Act, the US Patent and Trademark Office (PTO) administers a federal registration system for trademarks. While registration is not required to use a trademark, registration provides benefits in, for instance, enforcing the mark against infringers. Eric Brunetti, an artist and an entrepreneur, attempted to register the trademark FUCT for his clothing line. 31 The PTO found that the trademark, a ‘form of a well-known word of profanity’, was prohibited under Section 1052(a) of the Lanham Act, applying to marks that ‘[c]onsist[. . .] of or comprise [. . .] immoral[. . .] or scandalous matter’, and refused to register it. 32 Brunetti challenged the refusal on free speech grounds.

The US Supreme Court found in favour of Brunetti. The Court described as the ‘core postulate of free speech law’ the notion that the government may not discriminate against speech based on the ideas or opinions it conveys. 33 Consequently, if the ‘immoral or scandalous’ prohibition discriminated between trademarks on the basis of the viewpoints expressed by the trademarks, the prohibition could be allowed under First Amendment doctrine. 34 The Court found that the prohibition was viewpoint-discriminatory, because it ‘permits registration of marks that champion society’s sense of rectitude and morality, but not marks that denigrate those concepts.’ 35 In other words, maintaining the prohibition would have enabled the government to discriminate between marks that accord with the society’s sense of decency and those that defy it. 36 Since the Court found that the Lanham Act prohibition was aimed at the suppression of expression on the basis of viewpoint, it invalidated it. 37

iv Lamps Plus Inc. v. Varela 38

In Lamps Plus, the US Supreme Court considered whether an ambiguous arbitration agreement can provide a sufficient basis under the Federal Arbitration Act (FAA) to conclude that the parties to the agreement submitted to class-wide, as opposed to individual, arbitration.

Frank Varela filed a putative class action against his employer Lamps Plus after a hacker had tricked Lamps Plus to disclose tax information of approximately 1,300 company

29 id. at 2363.
30 139 S.Ct. 2294.
31 id. at 2297.
32 id. at 2297-98.
33 id. at 2299.
34 id.
35 id.
36 id.
37 id. at 2302.
38 139 S.Ct. 1407.
Relying on the arbitration agreement in Varela’s contract of employment, Lamps Plus successfully moved to compel arbitration. Lamps Plus further sought to dismiss the suit on the basis that Varela’s contract of employment did not permit class-wide arbitration, as it did not either expressly permit or foreclose the availability of class-wide arbitration.

The district court and the Ninth Circuit disagreed with Lamps Plus, and held that any ambiguity in the contract regarding the availability of class-wide arbitration should be construed against Lamps Plus under a state law doctrine known as ‘contra proferentem’, which counsels that contractual ambiguity must be construed against the drafter of a contract. The Ninth Circuit further noted that the contract was a contract of adhesion (i.e., a contract between two parties where the terms are set by one party to the contract on a ‘take it or leave it’ basis), and that the doctrine applied with ‘peculiar force’ in such a context.

The US Supreme Court reversed. The Court noted that under the FAA, courts must ‘enforce arbitration agreements according to their terms’. While that can ordinarily be accomplished with the assistance of state law principles regarding contractual interpretation, state law is pre-empted to the extent it prevents the execution of the objectives of the FAA. The Court stated that the key idea underlying arbitration under the FAA is consent and that the task of the courts interpreting arbitration agreements is to give effect to the intent of the parties. Therefore, the availability of class-wide arbitration was strictly a matter of the parties’ consent. The Court found that a ‘default rule’ such as contra proferentem was not a rule of interpretation intended to uncover the parties’ intentions, and could not be used to substitute the requisite contractual basis demonstrating parties’ affirmative agreement to class-wide arbitration, as required by the FAA. The Court thus concluded that the ambiguous agreement between Varela and Lamps Plus did not provide a basis for class-wide arbitration.

III COURT PROCEDURE

This section focuses on the procedures applicable in federal courts.
United States

Overview of court procedure


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 defenses 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

50 In addition, each individual federal district may promulgate rules to supplement, and in some instances to modify, the Federal Rules of Civil Procedure (FRCP), and each individual judge within each district may promulgate rules governing proceedings in his or her courtroom.

51 Each Circuit Court of Appeals may promulgate its own rules to supplement the Federal Rules of Appellate Procedure.

52 See FRCP 3.

53 See FRCP 4.

54 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.

55 See FRCP 12(b).

56 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.

57 See FRCP 34.

58 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').

59 Recently adopted amendments to the FRCP attempt to reduce the burden of discovery by, among other things, scaling back the scope of permissible discovery by adopting the 'proportionality rule', pursuant to which the scope of discovery sought must be proportional to the needs of the case, considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. The amendments also limit the use of depositions (FRCP 30) to reflect the 'proportionality rule' of FRCP 26.
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.\textsuperscript{60}

Following the completion of discovery, including discovery related to expert witnesses, if any, a case proceeds to trial. Depending upon the type of claims involved, the trial may be conducted before a judge or jury. The right to a jury in civil cases is provided by the Seventh Amendment to the US Constitution, which preserves the right to a jury for ‘suits at common law’. Generally speaking, suits at common law involve claims for monetary damages, as opposed to claims for equitable, non-monetary damages, such as injunctions.

The length of any given lawsuit from time of filing to start of trial varies widely depending on a number of factors, including type of action (civil or criminal), complexity of the issues in the action and the judge to whom the action is assigned. In federal court, the median time from filing to disposition of a civil case was 10.8 months in 2018–2019.\textsuperscript{61} For civil cases that proceed to trial, however, the median time from filing to trial was 27.8 months in 2018–2019.\textsuperscript{62}

Prior to a trial, the FRCP provide for forms of interim relief upon a proper showing by the moving party. Under FRCP 65, a court may issue a preliminary injunction, prior to a full trial on the merits, where a plaintiff shows that it will sustain irreparable harm (i.e., harm that cannot be remedied by monetary compensation) if an injunction does not issue.

\section*{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.\textsuperscript{63} 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.

\section*{iv Representation in proceedings}
The right of self-representation is long-standing.\textsuperscript{64} The US Judiciary Act, the Code of Conduct for United States Judges, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence and the Federal Rules of Appellate Procedure address the rights of the self-represented litigant in several places. In some situations, self-represented appearances are not allowed. For example, although an owner may represent a solely owned business or partnership, only a licensed attorney may represent a corporation.

\begin{itemize}
  \item \textsuperscript{60} 28 USC Section 1407(c).
  \item \textsuperscript{61} See https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0930.2019.pdf.
  \item \textsuperscript{62} id.
  \item \textsuperscript{63} See FRCP 23.
  \item \textsuperscript{64} See \textit{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.’).
\end{itemize}
Service out of the jurisdiction

FRCP 4 governs the service of a complaint upon a defendant, including service upon defendants located outside the United States. FRCP 4(f) sets forth that:

 Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed may be served at a place not within any judicial district of the United States:

(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:

(A) as prescribed by the foreign country’s law for service in that country in an action in its courts of general jurisdiction;

(B) as the foreign authority directs in response to a letter rogatory or letter of request; or

(C) unless prohibited by the foreign country’s law, by:

(i) delivering a copy of the summons and of the complaint to the individual personally; or

(ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or

(3) by other means not prohibited by international agreement, as the court orders.

Rule 4 of the FRCP applies to natural persons as well as corporations.

The Hague Convention typically provides the exclusive means for service of US process in signatory states. Article 1 of the Convention states that it ‘shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad’. 65

Enforcement of foreign judgments

The United States is not a signatory to any treaty that requires the recognition or enforcement of foreign judgments. 66 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


66 However, many of the individual 50 states in the United States have adopted the Uniform Foreign Money-Judgments Recognition Act.
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.  

Procedurally, the holder of a foreign judgment or decree may file suit before a competent
US court, which will determine, in accordance with the principles of international comity,
whether to recognise and enforce the judgment.

vii Assistance to foreign courts

Litigants in foreign countries that are parties to the Hague Convention may obtain evidence
in the United States pursuant to the procedures contained in the Convention. Federal courts
provide international assistance to foreign courts pursuant to 28 USC Section 1782, under
which parties or other interested persons involved in international proceedings can make a
request to a federal district court for an order compelling discovery from a person or entity
that resides or is found in the district in which the court sits. District courts have broad
discretion in determining whether to grant discovery requests under Section 1782.  

viii Access to court files

There is a presumption of public access to court records. 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.

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. 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. 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.

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recognise, and in some instances expand, this right.
72 See FRCP 26(c) (protective orders).
73 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.
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. Although still not common, third-party litigation financing – the practice of providing money to a party to pursue a potential or filed lawsuit in return for a share of any damages award or settlement – is becoming more prevalent in the United States. Under these arrangements, litigation-financing companies may provide financing for a variety of litigation costs, including attorneys’ fees, court fees and expert-witness fees. The rules governing these financial arrangements vary from state to state, with some states still strictly prohibiting such arrangements.

IV LEGAL PRACTICE

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

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74 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.

75 MRPC 1.1.
76 MRPC 1.3.
77 MRPC 1.6.
78 MRPC 1.7–1.11.
79 MRPC 1.7.
80 MRPC 1.7(b)(4).
are typically disqualified because of a current client conflict if any lawyer is disqualified.\textsuperscript{81} 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).\textsuperscript{82} The BSA and the USA Patriot Act cover ‘financial institutions’ and require such entities to have anti-money laundering programmes and customer identification programmes.

Lawyers are not expressly covered by the USA Patriot Act or the BSA. However, criminal laws prohibiting the laundering of money apply to all individuals, including lawyers. A lawyer or law firm (like any other business) may be required to report large payments of cash or currency (i.e., payments in excess of US$10,000) made by clients.\textsuperscript{83}

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.’\textsuperscript{84} The policy underlying this privilege is encouragement of open and honest communication between lawyers and their clients, ‘thence promoting broader public interests in the observance of law and administration of justice’.\textsuperscript{85} 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.\textsuperscript{86} The privilege extends only to communications, not to the underlying facts.\textsuperscript{87} When the client is a corporation, the privilege is commonly viewed as a matter of corporate control.\textsuperscript{88} 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.\textsuperscript{89}

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

\textsuperscript{81} 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.’

\textsuperscript{82} 31 USC Section 5311 et seq.

\textsuperscript{83} 26 USC Section 6050I.


\textsuperscript{85} id.

\textsuperscript{86} See McCormick on Evidence Section 87, n.19 (7th ed, June 2016).

\textsuperscript{87} 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.’

\textsuperscript{88} Upjohn Co, 449 US at 395, 396.

\textsuperscript{89} See McCormick on Evidence Section 87.1 (7th ed., June 2016).
attorney–client privilege is not absolute; an exception to the privilege applies when the corporation’s shareholders wish to pierce the corporation’s attorney–client privilege. In addition, if two parties are represented by the same attorney in a single legal matter, neither client may assert the attorney–client privilege against the other in subsequent litigation if the subsequent litigation pertains to the subject matter of the previous joint representation. This latter exception is known as the ‘common interest’ exception. Another important consideration is that of waiver: privileged communications that are disclosed to third parties are often deemed ‘waived’ and no longer protected from disclosure to others.

In addition, certain other communications between an attorney and a client may not fall within the privilege because they do not pertain to legal advice. For example, the general nature of the services performed by the lawyer, including the length of the retention, are generally not immune from disclosure.

Complications may arise with respect to communications with in-house counsel. A communication relating to corporate legal matters between a corporation’s in-house counsel and the corporation’s outside counsel is normally protected by the attorney–client privilege. 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’.

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92 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.’).
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.93 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’.94 That documents are located in a foreign country does not bar their discovery. Rather, it is the determination of the ‘control’ issue that dictates the outcome. If a domestic parent corporation, for example, is deemed to control its foreign subsidiary (because, for example, the parent controls the board of directors of its subsidiary), then the domestic parent may be compelled to produce documents located at its foreign subsidiary’s offices.

FRCP 34 expressly applies to electronically stored information.95 Limits on discovery (and e-discovery in particular) generally turn on whether ‘the information is not reasonably accessible because of undue burden or cost’.96 In the context of e-discovery, courts have articulated various formulations of this standard.97

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.98 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’.99

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. 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:

a. the significance of the discovery and disclosure to issues in the case;

b. the degree of specificity of the request;

c. whether the information originated in the jurisdiction from which it is being requested;

d. the availability of alternative means of securing the information sought in the discovery request; and

e. the extent to which non-compliance would undermine the foreign sovereign’s interest in the information requested.

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 ADR 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

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100 See FRCP 37.
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 *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA LLC* the Court will decide whether the doctrine of equitable estoppel allows a non-party to an arbitration agreement to compel arbitration under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In *U.S. Patent and Trademark Office v. Booking.com B.V.*, the Court will determine whether an otherwise generic (and thus unregistrable) term can become a registrable and protectable trademark by adding a generic top-level domain, such as ‘.com’, to the generic term. In *Liu v. Securities and Exchange Commission*, the Court will assess whether the SEC can seek and obtain a disgorgement of profits as equitable relief from a violator of securities laws when the Court has previously held that such a disgorgement constitutes a penalty and not a remedial measure.

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103 There are numerous private organisations that offer mediation services.
I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

Delaware courts resolve many of the United States’ highest-profile commercial and corporate disputes, which often involve foreign individuals or entities. Businesses and legal practitioners throughout the United States and abroad hold Delaware state and federal courts in high regard, based on the sophistication of the judges and the ability of the courts to move as quickly as necessary to grant meaningful relief.

Delaware is the site of one federal district court, the US District Court for the District of Delaware. A disproportionate number of the patent cases in the United States are heard in the US District Court for the District of Delaware. Appeals from the US District Court are heard by the US Court of Appeals for the Third Circuit and, if warranted, by the US Supreme Court. There is also a US Bankruptcy Court in the District of Delaware.

The Delaware state court system is a two-tier system, meaning that decisions of the state’s trial courts – the Superior Court and the Court of Chancery – are appealed directly to the Delaware Supreme Court. In contrast, many of the states in the United States have an intermediate appellate court between the trial courts and the highest state court of appeal.

The Court of Chancery is a court of equity, conferred with statutory jurisdiction to hear and determine all matters and causes in equity. It also has jurisdiction to interpret, apply, enforce or determine the validity of corporate instruments and to hear actions relating to limited liability companies (LLCs) and partnerships, including limited partnerships. Seven judges – one chancellor and six vice chancellors – sit on the Court of Chancery. Two Masters in Chancery assist the chancellor and vice chancellors in adjudicating and managing disputes before the Court of Chancery. There are no juries in Court of Chancery proceedings, and the Court does not hear criminal cases.

Based on the Court of Chancery’s statutory jurisdiction to hear corporate disputes, and the fact that Delaware is the domicile of many major corporations, the Court of Chancery hears numerous business and corporate disputes of wide significance. Over the past decade, with the increased popularity of LLCs and other ‘alternative entities’, the Court of Chancery has heard a growing number of cases relating to such entities. In addition, because it is a court

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1 Elena C Norman is a partner, Lakshmi A Muthu is a senior associate, and Michael A Laukaitis II is an associate at Young Conaway Stargatt & Taylor, LLP.
2 10 Del. C. Section 341.
3 8 Del. C. Section 111.
4 6 Del. C. Section 18-111.
5 6 Del. C. Section 15-122.
6 6 Del. C. Section 17-111.
of equity, litigants frequently apply to the Court of Chancery for preliminary injunctions and status quo orders pending final resolution of a matter. Many cases in the Court of Chancery are tried on an expedited schedule, particularly when the parties seek preliminary equitable relief.

The Superior Court is a court of law where litigants have the right to elect trial by jury. The Superior Court has original jurisdiction over criminal cases and civil cases other than equity matters and domestic relations matters (which are heard by the Delaware Family Court). Absent certain exceptions, where such a civil case involves an amount in controversy of US$1 million or more, it will generally be assigned to the Superior Court’s Complex Commercial Litigation Division (CCLD). CCLD litigants may receive priority in setting trial dates and, if requested, expedited case schedules. Since its establishment in May 2010, the CCLD has become an increasingly popular forum for filing business disputes where legal remedies are sought.

II THE YEAR IN REVIEW

The past 12 months witnessed several Delaware decisions regarding the ability of litigants to pursue claims in Delaware involving foreign actors. These decisions provided insight into Delaware courts’ application of constitutional principles concerning foreign policy determinations by the United States President and acts by foreign governments; their application of the doctrine of forum non conveniens (a common law doctrine that gives courts discretion to decline jurisdiction over an action when a defendant demonstrates that it would face overwhelming hardship and that another jurisdiction is a more appropriate place for the action to be heard); and their consideration of issues subject to foreign laws, including foreign jurisdictional regulations.

In Jiménez v. Palacios, the Delaware Court of Chancery addressed the question of who comprised the rightful boards of Venezuela’s state-owned oil company – Petróleos de Venezuela, SA (PDVSA) – and its directly and indirectly owned Delaware subsidiaries. The parties agreed that ‘the President of Venezuela had the power to appoint the members of the board of PDVSA and, indirectly, determine the composition of the boards’ of the subsidiaries, but disagreed as to who held the title of President of Venezuela. That disagreement arose out of a controversial 2018 presidential election. Venezuela’s then President, Nicolás Maduro, sought a second term as President, ‘disqualified the opposition parties from participating’ in the election, and then claimed to win the election. In January 2019, Venezuela’s National

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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$75,000, and a Justice of the Peace Court, which has jurisdiction over civil cases involving debt, trespass and replevin where the amount in controversy does not exceed US$15,000.


10 Jiménez v. Palacios, 2019 WL 3526479, at *1 (Del. Ch. 2 August 2019), as revised (12 August 2019). The plaintiffs have appealed the Court of Chancery’s ruling in Jiménez to the Supreme Court of Delaware.

11 id. at *1.

12 id. at *3.
Assembly declared Maduro’s presidency illegitimate, and the National Assembly’s president, Juan Guaidó, was named the Interim President of Venezuela. That same day, the US President recognised Guaidó as the Interim President of Venezuela. In February 2019, the Guaidó government appointed directors to the board of PDVSA, who in turn reconstituted the board of PDVSA’s subsidiaries through written consents. Before the Court of Chancery, the plaintiffs, who were appointed as directors to the boards of PDVSA’s subsidiaries during Maduro’s first term, challenged the appointments made under the Guaidó government.

Applying US constitutional law doctrines, the Court of Chancery ‘accept[ed] as binding the US President’s recognition’ of the Guaidó government and assume[d] the validity of the Guaidó government’s appointments to the PDVSA board. In so ruling, the Court first applied the political question doctrine which provides that recognising a foreign sovereign is a function exclusively of the Executive Branch and is non-justiciable. Next, the Court applied the act of state doctrine which presumes the validity of official acts taken by a foreign government when the act performed occurs on that foreign government’s own territory. The Court noted that although the dispute between the parties concerned the validity of the boards of PDVSA’s Delaware subsidiaries, the official act of the Venezuela government was the appointment of the PDVSA board. The resulting appointments of directors to PDVSA’s subsidiaries outside Venezuela did not preclude the application of the act of state doctrine.

While finding the Guaidó government’s appointments to the PDVSA board valid, the Court did not immediately resolve the question of whether the resulting appointments of directors to PDVSA’s subsidiaries were also valid. Instead, the Court provided the plaintiffs an opportunity to point to any deficiencies in the written consents reconstituting the boards of PDVSA’s subsidiaries. The plaintiffs ultimately did not point to any deficiencies, and the Court ruled that the boards of PDVSA’s subsidiaries had been lawfully reconstituted.

In AlixPartners, LLP v. Giacomo Mori, the Court of Chancery analysed the interplay between the Court’s subject matter jurisdiction, contractual forum selection clauses requiring certain disputes to be heard in Delaware, and foreign laws requiring similar disputes to be heard in a foreign jurisdiction. A dispute arose between an employee located in Italy and his employer, an Italian subsidiary of a Delaware entity. An employment agreement governed the employee’s employment, while a partnership agreement and equityholders’ agreement governed aspects of the employee’s compensation. The employment agreement contained an Italian choice of law provision and did not contain a forum selection clause. The partnership and equityholders’ agreements contained Delaware choice of law provisions and Delaware forum selection provisions. The Italian employer, its parent company and their affiliate filed suit against the employee in the Court of Chancery for downloading confidential company information and other activity in violation of the employment agreement, the partnership

13 id.
14 id. at *4.
15 id. at *1.
16 id. at *9-11.
17 id. at *11-20.
18 id. at *18-20.
19 id.
22 id. at *1-2.
23 id. at *1.
agreement, and the equityholders’ agreement. The plaintiffs specifically asserted claims for breach of contract, misappropriation of trade secrets, and conversion. The employee moved to dismiss the lawsuit, primarily on the ground that ‘a European Union regulation and an Italian procedural law require Italian employers to bring proceedings concerning all employment-related disputes exclusively in Italian courts, thus divesting this Court of subject matter jurisdiction.’24

The Court of Chancery denied the employee’s motion to dismiss, ruling that the foreign laws at issue did not divest the Court of subject matter jurisdiction.25 The Court explained that ‘[t]he laws of a foreign country cannot unilaterally deprive an American court of the power to hear a dispute’ and that ‘[t]here are only limited circumstances in which Delaware courts will not exercise subject matter jurisdiction over a dispute that is predicated on foreign law where the foreign state has vested jurisdiction exclusively in its own courts.’26 For example, where a claim derives solely from a remedy conferred by a foreign statute and the foreign statute requires the claim to be filed in the corresponding foreign jurisdiction, the Court of Chancery may lack subject matter jurisdiction. In contrast, where a claim is ‘transitory in nature’ – meaning that ‘the right and the remedy [are] not so inseparably united as to make the right dependent upon its being enforced in a particular tribunal’ – a foreign state cannot destroy the right to sue on that transitory claim in any court having jurisdiction.27 Applying these principles, the Court held that the common law rights the plaintiffs sought to enforce were transitory in nature and ‘not the sort of statutorily-created rights so inseparably united with statutorily-created remedies that they must be enforced in a particular tribunal.’28

Despite ruling that it had subject matter jurisdiction over the plaintiffs’ claims, the Court stayed claims related to the employee’s employment agreement on forum non conveniens grounds. The employee had argued that the forum non conveniens doctrine supported dismissal of all of the plaintiffs’ claims. The Court rejected the application of the forum non conveniens doctrine to claims arising out of the partnership and equityholders’ agreement, finding that it had been displaced by those agreements. The Court explained that the employee had ‘bound himself to the Delaware forum selection provisions in the [partnership] [a]greement and [e]quityholders’ [a]greement’ and therefore ‘unconditionally accept[ed] the jurisdiction and venue of the Delaware Court of Chancery with respect claims arising out of those agreements.’29 However, the Court’s analysis differed for the claims arising exclusively from the employment agreement, which did not contain a Delaware forum selection provision. Applying the forum non conveniens doctrine to the employment agreement claims, the Court held that the facts of the case warranted a stay of the employment agreement claims in favour of litigation in Italy. In support of this ruling, the Court noted that the employment agreement had an Italian choice of law provision, Italy had the most substantial relationship to the facts, the issues, and witnesses, and that the Court may not be able to compel witnesses.

24 id.
25 id. at *5-9.
26 id. at *6 (internal quotation marks omitted).
27 id. at *7.
28 id. at *8 (internal quotation marks omitted).
29 id. at *12 (internal quotation marks omitted).
Recognising a potential for significant overlap between the stayed claims and the sustained claims, the Court directed the parties to meet and confer as to a practical way to stage proceedings to promote efficiency in both Delaware and Italy.\(^{31}\)

In *Lynch v. Gonzalez*,\(^{32}\) the Court of Chancery considered whether an employee had a right to privacy over emails sent using an email server owned by his employer's affiliate. Critical to the Court's analysis was an Argentine law governing privacy expectations over corporate emails.

Plaintiff Carlos Eduardo Lorefice Lynch was an employee of Grupo Belleville Holdings, LLC (Belleville), a Delaware limited liability company. Employees of Belleville and its subsidiaries were given email accounts for professional use that were hosted by an affiliate of Belleville, defendant Televideo Services, Inc (Televideo). Lynch used his Televideo-hosted email account to communicate with his lawyers regarding the acquisition of 65 per cent of Belleville's membership interests.\(^{33}\) Lynch and his attorneys 'all understood that the [a]ttorneys were acting as Lynch's personal attorneys' and not on behalf of Belleville.\(^{34}\) Lynch and his attorneys stopped using the Televideo-hosted email accounts in early 2018 and thereafter, Belleville migrated its employee's email from Televideo's servers to another company's servers.\(^{35}\) This migration rendered Lynch unable to access the emails he sent using his Televideo-hosted email account.

A dispute arose in the Court of Chancery as to whether Lynch properly acquired a 65 per cent stake in Belleville. It was undisputed that before that litigation began, a member of Belleville, defendant R Angel Gonzalez, searched Lynch's Televideo-hosted email account. Lynch contended that 'by searching and then refusing to turn over the [Televideo-hosted] emails, defendants violated plaintiffs' attorney-client privilege under Delaware and Argentine law.'\(^{36}\) Defendants countered that 'Plaintiffs did not have any expectation of privacy' in emails they sent and received on Televideo's server, knowing that Gonzalez and Televideo could access and control those emails.\(^{37}\)

Noting that use of a company's email system does not, without more, destroy privilege, the Court conducted a four-factor analysis to determine whether Lynch had a reasonable expectation of privacy in work emails.\(^{38}\) The four factors considered by the Court included: (1) does the corporation maintain a policy banning personal or other objectionable use, (2) does the company monitor the use of the employee's computer or e-mail, (3) do third parties have a right of access to the computer or e-mails, and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?\(^{39}\) The Court found that the factors suggested that the Televideo-hosted emails were 'not confidential to

\(^{30}\) id. at *14.

\(^{31}\) The Court reserved the right to revisit its *forum non conveniens* analysis in the event the parties were unable to agree upon a mode of staging the potentially competing cases.

\(^{32}\) 2019 WL 6125223, at *1 (Del. Ch. 18 November 2019).

\(^{33}\) id. at *3.

\(^{34}\) id.

\(^{35}\) id.

\(^{36}\) id. at *4.

\(^{37}\) id.

\(^{38}\) id. at *6.

\(^{39}\) id. (quoting *In re Info. Mgt. Servs. Inc. Derivative Litig.*, 81 A.3d 278, 286-87 (Del. Ch. 2013)).
Lynch. 40 But the Court’s inquiry did not end there. The Court noted that ‘[i]f a controlling jurisdiction has a statute on the confidentiality of work emails, that statute may alter the common law results’ of the [four-factor] analysis. 41

Finding that ‘Televideo conduct[ed] its business, at least in relevant part, in Argentina[,]’ the Court concluded that ‘Argentine law must be the source of any statutory override.’ 42 The Court further concluded that Argentine law provides a statutory override: ‘Plaintiffs have demonstrated that the Argentine Constitution and other Argentine laws establish that an individual has a broad right of privacy in his written correspondence, especially when the individual would assume that the correspondence would remain private or when another’s interception of the correspondence would be improper.’ 43 Thus, the Court held that ‘Defendants may not access pre- and post-migration emails between Lynch and his counsel that related to Lynch’s personal legal matters, such as his Belleville acquisition.’ 44

As shown in the above described cases, over the past year, Delaware courts have provided insight into how they will review and analyze foreign policy determinations by the Executive Branch and acts of foreign states, clarified what claims Delaware courts can and cannot adjudicate in the face of foreign laws requiring such claims to be heard in a foreign jurisdiction, and refined the doctrine of forum non conveniens to permit flexibility in balancing the potential overwhelming hardship faced by a foreign defendant in a Delaware proceeding with the availability of an alternative forum. Further, the courts have clarified the potential for a foreign statute to impact electronic discovery disputes pending in Delaware.

III COURT PROCEDURE

i Overview of court procedure


Of particular importance to business and commercial law practitioners are the rules of the Court of Chancery and the rules of the Superior Court. Both courts regularly update their procedures to address the needs of practitioners.

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40 id.
41 id.
42 id. at *7.
43 id. at *10.
44 id. at *11.
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 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.

Delaware state courts have recognised the importance of electronic discovery. Effective 1 January 2013, the Court of Chancery amended its discovery rules to specifically address electronically stored information (ESI). Opposing parties and their counsel should confer

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48 Ct. Ch. R. 8(a); Super. Ct. Civ. R. 8(a). However, when pleading fraud, negligence, or mistake, the pleader must state the circumstances constituting such claims with particularity. Ct. Ch. R. 9(b); Super. Ct. Civ. R. 9(b).
52 The Superior Court rules do not mandate that compulsory alternative dispute resolution occur at any particular stage of litigation. Instead, litigants typically negotiate a date by which they will conduct alternative dispute resolution and include such date in proposed scheduling orders presented to the Superior Court.
55 Ct. Ch. R. 26(b)(1); Super. Ct. Civ. R. 26(b)(1). See, e.g., Sokol Hldgs, Inc v. Dorsey & Whitney LLP, 2009 WL 2501542, at *9-10 (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 WL 1152159, at *3 (Del. Super. 13 April 2007) (limiting discovery to make it ‘reasonable and without undue burden’).
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. 57

**Trial**

Delaware has an adversarial system of trial in which the opposing parties have the responsibility and initiative to find and present proof. 58 Lawyers are expected to act as zealous advocates for their clients’ positions. 59 In particular, courts view adequate cross-examination as critical. 60 Trials are presided over by a single judge and, in some instances, may be before a jury in addition to a judge. In the Superior Court, any party may demand a trial by jury of either six or 12 jurors. 61 In the Court of Chancery, however, there are no juries, and a party therefore does not have a right to a trial by jury. 62 In jury trials, jurors make findings of fact while judges make findings of law. 63 In non-jury trials, judges make findings of both fact and law. 64

**Judgment**

There are numerous ways to obtain a judgment in Delaware state courts. One is a judgment entered after a trial. In addition, a party can seek judgment from the court by making a motion for judgment on the pleadings after the pleadings are closed but within such time as not to delay the trial. 65 Alternatively, a party can move for summary judgment. 66 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’. 67 In the Superior Court a party can move for a directed verdict, which is also known as a judgment as a matter of law. Specifically, ‘if during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the Court may determine the issue against the party’. 68

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59 Del. Lawyers’ R. Prof’l Conduct pmbl.
65 Ct. Ch. R. 12(c); Super. Ct. Civ. R. 12(c).
66 Ct. Ch. R. 56; Super. Ct. Civ. R. 56. When deciding whether to grant a motion for summary judgment, a Delaware court can consider matters outside of the pleadings. See Ch. Ct. R. 12(c); Super Ct. Civ. R. 12(c).
67 Ct. Ch. R. 56(c); Super. Ct. Civ. R. 56(c).
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 the Court of Chancery has questioned such settlements. Though, in *BVF Partners LP v. New Orleans Employees' Retirement System*, 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.

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70 Supr. Ct. R. 42(a).
72 Ct. Ch. R. 23(b); Super. Ct. Civ. R. 23(b).
73 Ct. Ch. R. 23(b); Super. Ct. Civ. R. 23(e).
75 59 A.3d 418 (Del. 2012).
76 id. at 436–37.
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. Legal entities cannot represent themselves.

v Service out of the jurisdiction
Natural persons and legal entities may be served with legal process outside Delaware. Delaware’s primary vehicle for service of process outside the state is its long-arm statute. This statute authorises service of process outside Delaware on any individual or entity that:

- a transacts any business or performs any work or service in Delaware;
- b contracts to supply services or things in Delaware;
- c causes tortious injury in Delaware by an act or omission in Delaware;
- d causes tortious injury in or outside of Delaware by an act or omission outside Delaware if the person or entity engages in a persistent course of conduct in Delaware or derives substantial revenue from services or things used or consumed in Delaware;
- e has an interest in, uses or possesses real property in Delaware; or
- f 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.

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’.

Second, a party can utilise Delaware’s Uniform Foreign-Country Money Judgments Recognition Act. This Act applies to foreign judgments that grant or deny recovery of money and are final, conclusive and enforceable under the law of the country where rendered. To
seek enforcement of a foreign-country judgment under this Act, a party must file an action seeking recognition of the foreign-country judgment. If a court finds that the foreign-country judgment is entitled to recognition, then, to the extent that the foreign-country judgment grants or denies recovery of a sum of money, the foreign-country judgment is conclusive between the parties and enforceable in the same manner and to the same extent as a judgment rendered in Delaware.

vii Assistance to foreign courts

The rules of the Delaware state courts do not include specific provisions on assisting foreign courts. However, Delaware courts have acknowledged that 28 USC Section 1782, a federal statute, exists to provide foreign tribunals with assistance from American federal courts in obtaining discovery in the United States. Under 28 USC Section 1782(a), “The district court of the district in which a person resides or is found may order [that person] to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal”.

viii Access to court files

Members of the public have the general right of access to ongoing judicial proceedings and to records thereof. Delaware courts, however, will sometimes limit access to judicial proceedings and records regarding sensitive information. The Court of Chancery emphasised the importance of the public’s right of access to information about judicial proceedings by adopting Court of Chancery Rule 5.1. Court of Chancery Rule 5.1 makes clear that most information presented to the Court should be available to the public. Rule 5.1 accomplishes this by, among other things, reducing the categories of information that are entitled to protection and making it clear that if a public version of a confidential document is not filed in a timely manner, the confidential document will lose its confidential status.

ix Litigation funding

The law on third-party litigation funding is sparse, but evolving, in Delaware. Questions have arisen as to whether any protection from discovery may apply to communications between a party to litigation and litigation-funding companies that the party is considering retaining.

83 10 Del. C. Section 4809(a).
84 10 Del. C. Section 4810(1) and (2).
86 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).
87 See, e.g., NewRadio Grp LLC v. NRG Media LLC, 2010 WL 935622, 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 WL 422633, at *1 (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’).
88 See Kronenberg, 872 A.2d at 605.
For example, in *Leader Technologies Inc v. Facebook Inc*\(^9^0\) the US District Court for the District of Delaware held that attorney–client and work-product privileged information will lose its protection from discovery if it is shared with litigation-funding companies that have not yet been retained.\(^9^1\)

### 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.\(^9^2\) 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’.\(^9^3\) 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.\(^9^4\)

Where a lawyer is associated with a firm, a lawyer’s conflicts of interest are generally imputed to the other members of that firm.\(^9^5\) 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’.\(^9^6\) Also, subject to certain conditions, a member of a firm can avoid such an imputation by obtaining the informed consent of the former client.\(^9^7\)

#### 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.\(^9^8\) 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.\(^9^9\)

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\(^9^0\) 719 F. Supp. 2d 373 (D. Del. 2010).
\(^9^1\) See id. at 376.
\(^9^2\) Del. Lawyers’ R. Prof’l Conduct 1.7(a).
\(^9^3\) Del. Lawyers’ R. Prof’l Conduct 1.7(a)(1) and (2). Other types of conflicts of interest are outlined in Rule 1.8 of the Delaware Lawyers’ Rules of Professional Conduct.
\(^9^4\) Del. Lawyers’ R. Prof’l Conduct 1.7(b)(1)-(4), 1.9(a)-(b)(2).
\(^9^5\) Del. Lawyers’ R. Prof’l Conduct 1.10.
\(^9^6\) Del. Lawyers’ R. Prof’l Conduct 1.10(c)(1) and (2).
\(^9^7\) Del. Lawyers’ R. Prof’l Conduct 1.10(d).
\(^9^8\) Del. Lawyers’ R. Prof’l Conduct 1.16(b)(3).
\(^9^9\) Del. Lawyers’ R. Prof’l Conduct 1.6(b)(2) and (3).
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. 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. Additionally, parties can redact confidential information from public court documents.

iv Other areas of interest

Delaware court procedure requires lawyers from outside Delaware who want to practise in Delaware courts to associate with lawyers admitted to the Delaware Bar. 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. 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. 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, and must continue to make all filings with the court. These requirements for 'local' counsel are stricter than those of many other jurisdictions within the United States.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

The attorney–client privilege is a common-law protection for communications between an attorney and his or her client made for the purpose of rendering legal advice. Delaware law codifies the attorney–client privilege in Delaware Rule of Evidence 502. Under this privilege rule, an attorney 'is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation'. The Delaware Supreme Court amended Rule 502 to clarify that it 'shall include persons who are employed or engaged by

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101 Ct. Ch. R. 26(c); Super Ct. Civ. R. 26(c).


103 See Ct. Ch. R. 170(b); Super Ct. Civ. R. 90.1(a).

104 Ct. Ch. R. 170(b); Super Ct. Civ. R. 90.1(a).

105 Ct. Ch. R. 170(c); Super Ct. Civ. R. 90.1(b).


107 DRE 502(a)(3).
a business entity, to serve as “in house” counsel to that entity and/or to any of its wholly owned or controlled affiliates.¹⁰⁸ 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.¹⁰⁹ The privilege is not, however, accorded to communications that render business advice as opposed to legal advice.¹¹⁰ 

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.¹¹¹ 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'.¹¹² 

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.¹¹³ 

Delaware courts also recognise the attorney work product doctrine (protecting information prepared in anticipation of litigation)¹¹⁴ 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').¹¹⁵ 

**ii Production of documents** 

During the course of discovery, parties may obtain non-privileged documents and electronically stored information that are ‘relevant to any party’s claim or [defence] and proportional to the needs of the case’.¹¹⁶ 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

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¹⁰⁹ See also *Grimes v. LCC Int'l Inc*, 1999 WL 252381, at *3 (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).
¹¹¹ See *Kirby v. Kirby*, 1987 WL 14862, at *7 (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.’).
¹¹² 2013 WL 1668205, at *4 (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 *5.
more probable or less probable than it would be without the evidence’. 117 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’. 118
The request must specify where, when and how the documents should be produced. 119

When a document request seems oppressive or unduly burdensome to a party, the party
can object to that request. A Delaware court will limit or narrow the document request if it
determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other
source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery
has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the
discovery sought is not 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. 120

Delaware courts often adjudicate disputes where the evidence is located outside Delaware and
require parties to produce documents located in foreign jurisdictions. 121 The United States' status as a party to the Hague Convention on the Taking of Evidence Abroad in Civil or
Commercial Matters helps facilitate the collection of evidence from foreign jurisdictions. 122
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. 123 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”’. 124

117 DRE 401.
118 Ct. Ch. R. 34(a); see also Super. Ct. Civ. R. 34(a).
119 Ct. Ch. R. 34(b) & (d); Super. Ct. Civ. R. 34(b).
120 Ct. Ch. R. 26(b)(1).
122 US Dep't of State, Obtaining Evidence, available at https://travel.state.gov/content/travel/en/legal/
124 In re Asbestos Litig, 929 A.2d 373, 384 (Del. Super. 2006).
A party must produce all documents that are responsive to a proper document request and in its ‘possession, custody or control’.

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.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

Parties seeking to resolve a dispute outside the courtroom may do so through arbitration and mediation. As noted above, the Superior Court has a compulsory alternative dispute resolution (compulsory ADR) programme. Every civil case filed in the Superior Court is subject to this compulsory ADR programme. The programme permits parties to choose the format of the ADR, which may include one of the following options: arbitration, mediation and neutral assessment. If parties cannot agree upon a format, the default format is mediation. In addition, in the Court of Chancery, judges are authorised to sit as mediators in disputes that are pending in the Court of Chancery or have been filed for the purpose of court mediation. Finally, the Delaware Rapid Arbitration Act provides Delaware business entities with a streamlined and cost-effective process by which to resolve business disputes through voluntary arbitration. 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

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126 See Dawson v. Pittco Capital P’rs L.P., 2010 WL 692385, at *1 (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 WL 15479, at *1 (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 WL 411795, at *2-3 (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’).
127 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).
129 10 Del. C. Section 349.
130 10 Del. C. Section 5802.
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.\textsuperscript{132} 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.\textsuperscript{133} Parties to a DRAA arbitration may select their arbitrator by agreement or petition the Court of Chancery to appoint one or more arbitrators.\textsuperscript{134} The arbitration 'can be held anywhere in the world'\textsuperscript{135} and is a confidential proceeding in the absence of any agreement to the contrary.\textsuperscript{136} 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.\textsuperscript{137} This aspect of the DRAA limits parties' ability to delay arbitration by raising challenges in the courts. For example, parties to a DRAA arbitration 'may not seek a determination in the courts about the scope of the disputes that may be arbitrated; only the arbitrator may make that determination'.\textsuperscript{138}

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.\textsuperscript{139} The Supreme Court 'may only vacate, modify, or correct the final award in conformity with the Federal Arbitration Act',\textsuperscript{140} 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.\textsuperscript{141} 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 resolution/. The DRAA was enacted as an alternative to a Court of Chancery arbitration programme struck down as unconstitutional in 2012. The now-defunct programme allowed Court of Chancery judges to conduct confidential arbitrations. The US District Court for the District of Delaware found that the programme violated the First Amendment to the US Constitution because a Court of Chancery arbitration was sufficiently like a civil trial and therefore should not be closed to the public and press. \textit{Del Coal for Open Gov't v. Strine}, 894 F. Supp. 2d 493, 503-04 (D. Del. 30 August 2012), aff'd, 733 F.3d 510, 521 (3d Cir. 2013). The Supreme Court of the United States declined to review the constitutionality of the programme. See B Kendall & P Brickley, 'Supreme Court Declines to Revive Delaware Arbitration Program', \textit{Wall Street Journal}, 24 March 2014, available at www.wsj.com/articles/SB100014240527023041 79704579459200411054082.

\textsuperscript{132} 10 Del. C. Section 5808.
\textsuperscript{133} See 10 Del. C. Section 5803(a).
\textsuperscript{134} 10 Del. C. Section 5805.
\textsuperscript{136} See Delaware Rapid Arbitration Rule 5.
\textsuperscript{137} See 10 Del. C. Section 5804.
\textsuperscript{138} Delaware’s Options for Alternative Dispute Resolution, available at https://corplaw.delaware.gov/ alternative-dispute-resolution/.
\textsuperscript{139} 10 Del. C. Section 5809(b).
\textsuperscript{140} 10 Del. C. Section 5809(c).
\textsuperscript{141} 10 Del. C. Section 5809(d).
on the fifth business day following the expiry of the challenge period. After a final award has been confirmed, the parties can apply to the Court of Chancery or the Superior Court depending on the nature of the award for a final judgment in conformity with the award.

In addition to the DRAA, the Superior Court’s compulsory ADR programme continues to offer parties to a Superior Court action an opportunity to agree to undergo arbitration. The parties may select the arbitrator by agreement or, if no such agreement can be reached, the Superior Court will appoint an arbitrator. Further, the parties can agree to make the arbitrator’s decision binding. If the parties agree to binding arbitration, the matter will be removed from the Superior Court’s docket. The arbitration process itself consists of the arbitrator reviewing evidence, hearing arguments from the parties, and rendering a decision based on the facts and the law. ‘Every party has trial de novo appeal rights if they are not satisfied with the arbitrator’s decision.

The rules of the Delaware courts do not contain specific provisions regarding the enforcement of foreign arbitral awards. However, the United States District Court for the District of Delaware has heard and granted motions to confirm foreign arbitral awards pursuant to the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). iii Mediation

Mediation is available as an alternative to litigation in both the Superior Court and the Court of Chancery. In the Superior Court, under the compulsory ADR programme, mediation is the default format for ADR. The parties may select the mediator by agreement from the Superior Court’s approved Mediator Directory, which ‘consist[s] of members of the Delaware Bar and others who have completed [the] Superior Court’s 20-hour mediation training’, 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’. 155

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’. 156 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 party 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. 157

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. 158 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. 159 These mediation programmes are highly regarded as they provide parties with the assistance of current members of the Court of Chancery at a fraction of the cost of litigation and with the added benefit of confidentiality. 160

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’. 161 The neutral assessment process consists of the parties providing the neutral assessor with confidential statements and participating in a confidential neutral assessment hearing. ‘The neutral assessor may use mediation and/or arbitration techniques to aid the parties in reaching a settlement.’ 162 Moreover, the parties can agree to make the neutral assessment outcome binding.

157 10 Del. C. Section 347(a)(1)–(5).
159 id.
160 See id. at 4.
162 id.
VII OUTLOOK AND CONCLUSIONS

Delaware courts are at the forefront of complex litigation in the United States, including overseeing complex litigation involving foreign individuals and entities. In the coming year, one can expect increasing numbers of decisions involving foreign litigants and cross-border issues, as well as more cases from the Court of Chancery, the Superior Court and the Delaware Supreme Court involving alternative entities.
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Mr Aninat’s practice focuses on complex commercial litigation, transnational litigation, recognition and enforcement of foreign judgments, and arbitration. He has participated in multiple judicial proceedings before Chilean, Argentine, Ecuadorian and American courts, as well as in international arbitrations. Mr Aninat’s experience in dispute resolution has been recognised by The Legal 500 and Chambers and Partners.

Before joining Bofill Escobar Silva as partner, Mr Aninat worked for four years at Jones Day as a member of its global disputes practice in the Washington, DC, office and before that as legal fellow at the World Bank, and as associate at Barros Letelier & Gonzalez and Aninat & Co. Mr Aninat has been a speaker at three conferences of the American Bar
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Henning Bälz, born in 1968, studied law in Tübingen, Berlin and Bayreuth. After his studies he worked as a law apprentice with the Higher Regional Court of Berlin and as a university assistant. He received his doctorate in law from the Freie Universität Berlin in 2001 with a thesis on information rights of shareholders in a stock corporation. Mr Bälz joined the Berlin office of Hengeler Mueller in 1999, and worked for one year as a foreign associate at Simpson Thacher & Bartlett in New York (2000 to 2001) and for almost one year in the Frankfurt office of Hengeler Mueller (2001 to 2002). Mr Bälz became a partner in 2004 and is a member of the dispute resolution group of Hengeler Mueller dealing with both litigation and arbitration cases for national and international clients. The focus of his work is on post-M&A matters and general contract cases as well as matters regarding infrastructure projects or involving technical expertise in general.

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Nassif practises corporate and commercial litigation and arbitration with an emphasis on shareholder, agency, management, distribution, banking, finance and real estate disputes, and financial crimes.

Nassif represents a wide range of businesses, including financial institutions and leading multinational companies in the leisure and hospitality, energy, transport and defence logistics sectors.

In 2017, Nassif was one of 12 members of the task force that advised the Sharjah International Commercial Arbitration Centre (Tahkeem) on the reform of its arbitration rules. In November 2017, Nassif was named to the executive committee of the Tahkeem.
Nassif has appeared as party counsel in over 35 international arbitration proceedings administered under a wide range of rules, including the AAA, DIAC, DIFC-LCIA, ICC, LCIA and UNCITRAL. He has been appointed as sole arbitrator or chairman of the tribunal in a number of DIAC and DIFC-LCIA proceedings.

*The Legal 500* ranked Nassif among eight leading individuals for dispute resolution in the United Arab Emirates and reported that he is ‘detail-oriented and extremely proactive’.

Nassif was listed among Asian-MENA Counsel’s External Counsel of the Year 2013 for the United Arab Emirates as voted by the in-house community, where in-house counsel is reported to have said ‘[Nassif] is the best arbitration lawyer’.

Nassif is a Canadian national. He is fluent in English and French, and is Arabic-speaking. *Who’s Who Legal* says: ‘Nassif BouMalhab draws effusive praise from peers, who commend his ability ‘to provide pragmatic advice aligned with commercial goals’.

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Timothy G Cameron is a partner in Cravath’s litigation department. His practice encompasses a broad range of litigation that, in recent years, has included: general commercial litigation; securities litigation; shareholder derivative litigation; arbitration (domestic and international); alien tort claims and international torts; and tax litigation.

Mr Cameron has particular expertise representing non-US clients in a wide variety of litigation (including class actions) in federal and state courts in the United States, and in arbitration. He has extensive experience dealing with complicated cross-border issues that can arise involving non-US defendants, including jurisdictional issues, reconciling a defendant’s document preservation, collection and production obligations with the potential application of local (non-US) law, class certification issues involving foreign putative class members and the difficulties of obtaining testimony from witnesses located outside the United States.

Mr Cameron was born in Auckland, New Zealand. He received his LLB (Hons)/BCom degree in 1994 from the University of Auckland, New Zealand; an MComLaw degree with first-class honours in 1997 from the University of Auckland, New Zealand; and an LLM degree in 1998 from the University of Chicago Law School.

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Vamilson José Costa is a partner at Costa e Tavares Paes Advogados in Brazil, a law firm with offices in São Paulo, Rio de Janeiro and Brasília.

He is a former partner of two Brazilian law firms and is well known for advising local and foreign conglomerates in a variety of disputes and transactions, as well as family-owned companies and their shareholders in mergers and acquisitions and dispute resolutions.

He is recommended by several respected industry publications in his areas of practice.

He holds a law degree from Alta Paulista School of Law (1984) and a postgraduate degree in consumer affairs from the Catholic University of Sao Paulo – PUC-SP. He is a member of the Brazilian Bar and practises in the areas of arbitration, shareholders disputes, corporate law and M&A, insolvency matters, contract law pharmaceutical matters and compliance.

He speaks Portuguese, English and Spanish.

PAOLO DI GIOVANNI

*BonelliErede*

Paolo Di Giovanni is a partner at BonelliErede. He graduated with honours from the LUISS University in Rome in 1998, and was admitted to the Italian Bar in 2002. He focuses on domestic and international litigation and arbitration that mainly concern disputes arising out of M&A transactions, construction and a wide range of commercial contracts and is a member of the construction and engineering, environmental law and international arbitration focus teams. He worked as a visiting foreign lawyer at Slaughter and May and 20 Essex Street (Chambers of Iain Milligan QC).

OLEXANDER DROUG

*Sayenko Kharenko*

Olexander Droug specialises in dispute resolution and restructuring with a focus on international arbitration and cross-border commercial litigation. His experience includes advising local and foreign clients at all stages of complex multi-jurisdictional proceedings involving the BVI, Cyprus, the Netherlands, Switzerland, Ukraine, the UK and other fora, as well as commercial and investment arbitration under the arbitration rules of all major international arbitration institutions (LCIA, ICC, SCC), CIS-based arbitration institutions, ICSID Arbitration Rules and UNCITRAL Arbitration Rules. Mr Droug also advises clients on obtaining and implementing interim relief, including in support of arbitration proceedings and litigation, as well as on recognition and enforcement in Ukraine of arbitration awards and foreign court judgments.

Mr Droug has represented clients in proceedings relating to banking, financial services, securities, M&A, shareholders, trade, telecommunication, construction, energy, aviation, and product liability, as well as sports-related disputes. He also has significant experience representing both lenders and borrowers in financial restructuring and related disputes. In March 2017, Olexander was added to the list of arbitrators elected to settle disputes arising in financial restructuring procedures.

Mr Droug regularly contributes to key legislation in the areas of arbitration, litigation and restructuring.
About the Authors

DANIEL EISELE
Niederer Kraft Frey

Daniel Eisele is a partner in the dispute resolution team of Niederer Kraft Frey. He has specialised in large and complex litigation and arbitration proceedings.

Having more than 25 years of professional experience, Daniel Eisele has represented clients in more than 300 disputes involving parties and projects from more than 50 countries and on all five continents. These procedures concern all types of industries, namely banking, finance, construction, oil, telecommunications, commerce and sports, and mostly relate to commercial contracts (e.g., purchase, work, delivery, production, licensing, construction, M&A, equity, marketing and television). He has special expertise in the field of sports.

Daniel Eisele has acted as counsel in many national and international proceedings conducted pursuant to the Swiss Rules, the ICC Rules or the TAS/CAS Rules. He has also been involved in civil, administrative and criminal proceedings in most cantons of Switzerland and has advised clients in many foreign procedures. He regularly represents clients before the Swiss Federal Court in Lausanne and before other Swiss federal courts and authorities.

Daniel Eisele won the Client Choice ILO Award in 2014, 2015, 2016, 2018 and 2020 for the litigation category in Switzerland. Chambers Global and Chambers Europe both rank Daniel Eisele as a leading lawyer for litigation and arbitration counsel in Switzerland. They state that he is ‘determined and target oriented’. The Legal 500 ranks Daniel Eisele as a Leading Individual in Switzerland. Benchmark Litigation Europe considers him a Dispute Resolution Star.

FREDRIK LILLEAAS ELLINGSEN
Advokatfirmaet Selmer AS

Fredrik Lilleaas Ellingsen works with dispute resolution across Selmer’s practice areas and advises clients on corporate investigations and inquiries.

Fredrik advises clients in connection with potential disputes and regularly appears as counsel at the ordinary courts and in arbitration, in addition to mediating commercial disputes. He has built up his expertise through handling of numerous complex disputes within a wide range of civil matters, including IT contracts, intellectual property rights, insurance contracts, claims for damages and court trial of administrative decisions. Fredrik’s experience also encompasses several cases regarding preliminary injunction, arrests and securing evidence outside lawsuits.

In 2019 he passed a qualifying test case before the Supreme Court of Norway on a principal issue regarding access to digital evidence.

As a former defence lawyer and deputy judge, Fredrik also has solid expertise in criminal law and criminal procedure, including experience with investigations, enforcement measures and hearing of major financial criminal cases. In Selmer, he provides advice and assistance to international enterprises related to corporate investigations, fact finding, board responsibilities and corporate criminal liability.

Fredrik is also affiliated with the University of Oslo as a university lecturer, where he regularly lectures in civil procedure, criminal law and criminal procedure.
TOMMASO FAELLI

BonelliErede

Tommaso Faelli is a partner at BonelliErede. He practises IP, unfair competition and data privacy law, focusing on negotiation and litigation before the courts, and assistance with independent supervisory authorities. He also deals with risk management matters in internal audits and litigation. In BonelliErede, he is leader of the digital innovation focus team and a member of the insurance and family companies focus teams. He is the author of several publications and has a PhD in commercial law – intellectual property and competition. Since 2005, Mr Faelli has been an adjunct professor of intellectual property law at the faculty of law at the University of Como and Varese.

SOFIA A GENTEL

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Sofia A Gentel is an associate in Cravath’s litigation department.

Ms Gentel was born in Espoo, Finland. She received an LLB degree with first-class honours from the University of Edinburgh in 2014 and a JD with honours from Columbia Law School in 2018. Ms Gentel joined Cravath in 2018.

CARLOS HAFEMANN

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Carlos Hafemann received his law degree from Pontificia Catholic University in Chile, summa cum laude, and holds a certificate in economic and commercial law from the same university.

Mr Hafemann concentrates his practice on civil and commercial dispute resolution, with a special focus in complex disputes and litigation related to construction contracts and public works concessions. He has participated in several different proceedings before both jurisdictional and administrative entities, and constantly advises clients in pretrial disputes.

Before joining the firm, Mr Hafemann worked at Morales & Besa with the litigation and arbitration team.

MIGUEL ANGEL HERNÁNDEZ-ROMO VALENCIA

Foley Gardere Arena

Professor Miguel Angel Hernández-Romo Valencia obtained his JD from Escuela Libre de Derecho in 1992, receiving special awards for his thesis and his solution for the case given for study and resolution. He obtained his master’s degree in law from the University of Texas at Austin in 1994.

He worked as a summer associate at Fulbright & Jaworski in Houston, Texas, and at Hogan & Hartson in Washington, DC.

He is a partner at Foley Gardere Arena, which is an international law firm. Miguel Angel Hernández-Romo Valencia joined Foley Gardere Arena (then Gardere Wynnse Sewell) in October 2017 as the head of the litigation practice in Mexico specialising in complex local and cross-border litigation matters, dealing mainly in civil, commercial, insurance and family litigation, as well as arbitration and the annulment of arbitral awards.

He has been appointed as an expert witness before US courts and is the author of several articles dealing with the Mexican legal system and with insurance matters.
He teaches the ‘Introduction to the Mexican Legal System’ and ‘Civil Procedure’ courses at the School of Law of the Universidad Iberoamericana.

Professor Hernández-Romo Valencia speaks fluent Spanish and English.

**SIMON HSIAO**  
*Wu & Partners, Attorneys-at-Law*

Simon Hsiao is a partner at Wu & Partners. His area of practice ranges widely from international commercial transactions, including cross-border M&A, to domestic dispute resolution, including general commerce, IP, corporation and labour disputes.

He graduated from the National Chung Hsing University (LLB, 1982), Soochow University School of Law (LLM, 1989) and Cornell University (LLM, 2000). He has worked as a litigation and non-litigation lawyer and a patent agent for more than 20 years since he was admitted to the Taipei Bar Association in 1994. He is now also teaching business law at the College of Management of the National Taiwan University.

**MONICA IACOVIELLO**  
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Monica Iacoviello is a partner at BonelliErede. She graduated with honours from Milan’s Catholic University in 1994 and was admitted to the Italian Bar in 1997. She served as an assistant both in the bankruptcy law department and in the private law department at Milan’s Catholic University and at the University of Bicocca in Milan. She focuses on civil litigation, corporate and insolvency matters and is a member of the banks and construction and engineering focus teams.

**AHMAD IRFAN ARIFIN**  
*Lubis, Santosa & Maramis*

Ahmad Irfan Arifin is a partner in the dispute resolution practice group of Lubis, Santosa & Maramis. He graduated from Parahyangan Catholic University (LLB) in 2005 and obtained his master’s degree (LLM) from the Boalt Hall School of Law, University of California at Berkeley, United States, in 2013, where he received an award for Best Advocacy for Legal Research and Writing.

Ahmad Irfan Arifin specialises in commercial, criminal and administrative litigation arising across a range of sectors, including infrastructure/construction, natural resources, technology and manufacturing. He is also experienced in advising and representing clients before arbitration institutions such as the Badan Arbitrase Nasional Indonesia, Singapore International Arbitration Centre and London Court of International Arbitration.

Over the years, he has been known as a leading lawyer and entrusted to lead the firm’s legal team in managing many high-profile cases involving international corporations, including the firm’s recent success in defending a Japanese major contractor in a joint venture dispute worth US$1.4 billion, which is recorded as one of the biggest civil claims ever brought against a Japanese investor before Indonesian courts.

In addition to his professional activities, he is also active as a speaker in various seminars and training events held by a number of Indonesian law schools, government agencies and international organisations.
TIINA JÄRVINEN  
*Merilampi Attorneys Ltd*

Tiina Järvinen is a specialist counsel in Merilampi Attorneys Ltd's dispute resolution team. She primarily counsels clients in commercial litigations and domestic and international arbitrations. She is also experienced in employment law-related disputes and white-collar defence.

She obtained a master of laws degree (LLM) from the University of Helsinki in 1997. She has been a member of Finnish Bar Association from 2004 to 2008 and since 2011.

JAE MIN JEON  
*Shin & Kim*

Jae Min Jeon is a partner at Shin & Kim and member of the firm’s international dispute resolution practice group. Mr Jeon has represented major corporate clients in international commercial arbitration cases and multi-jurisdictional litigations arising out of cross-border M&A transactions and inbound and outbound investments.

JOO HYUN KIM  
*Shin & Kim*

Joo Hyun Kim’s main practices include litigations and legal advice in connection with securities, finance, administrative cases and international disputes. Mr Kim is a licensed attorney in the State of New York and, as a litigation lawyer, settles international disputes on behalf of foreign corporate clients.

OLEKSIY KOLTOK  
*Sayenko Kharenko*

Oleksiy Koltok has extensive experience practising law in dispute resolution on a variety of matters, including both local and cross-border litigation.

Oleksiy specialises in defending local and multinational clients in complex litigation projects across a variety of sectors including banking, insurance, real estate, energy, construction and other industries.

Relying on his substantial experience, Oleksiy advises and effectively represents clients at all stages of court proceedings in Ukrainian courts of all instances and specialisations as well as before arbitral tribunals, including disputes with state and municipal authorities, contractual and corporate litigations, consumer protection, real estate disputes, labour litigations, debt collection, enforcement proceedings and firm bankruptcy.

Oleksiy also has significant experience in out-of-court dispute resolution, including advising clients on settlement agreements as well as assistance in negotiations.

MICHAEL A LAUKAITIS II  
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Michael A Laukaitis II is an associate in the corporate counselling and litigation section at Young Conaway Stargatt & Taylor, LLP in Wilmington, Delaware.
Mr Laukaitis is a graduate of Widener University, Delaware Law School, where he was an articles editor for the *Delaware Journal of Corporate Law*. He holds a BA in political science and criminal justice from the University of Delaware. He served as a clerk for the Honourable Eric M Davis of the Superior Court for the State of Delaware.

**ANDY LENNY**  
_Arthur Cox_

Andy Lenny is a partner in the litigation and dispute resolution group. He advises on a wide range of commercial disputes to be resolved through mediation and arbitration as well as litigation. His practice areas include disputes relating to banking and financial services, professional negligence of accountancy firms and other financial service providers, company acquisitions and sales, joint ventures, significant commercial contracts, and insurance and reinsurance contracts. He also has considerable experience in advising clients on investigations carried out under the Companies Acts (by authorised officers and high court inspectors), industry regulators, including the Financial Regulator and the FSA, statutory tribunals and company investigations undertaken by boards of directors.

**JOHN LEWIS**  
_Clyde & Co LLP_

John Lewis is a partner in Clyde & Co’s Middle East dispute resolution group and has practised commercial dispute resolution in the Middle East since 2006 based in Clyde & Co’s Dubai office. John’s practice focuses on commercial litigation and international arbitration with an emphasis on corporate, commercial, real estate, transport and logistics disputes, and professional negligence claims.

John acts for a wide variety of local and international businesses in court and arbitration proceedings administered by a range of international institutions, including DIAC, ICC, LCIA and the DIFC-LCIA, providing pragmatic commercial and strategic legal advice on contentious issues.

John has appeared as counsel in several arbitration proceedings and has been appointed as sole arbitrator and co-arbitrator in a number of DIAC arbitration. He is a member of the DIFC Pro Bono Panel and an officer of the DIFC-LCIA Users’ Council.

**MATTIAS LINDNER**  
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Mattias Lindner is an associate in Vinge’s dispute resolution group in Stockholm. He holds a Master of Laws (LLM) from Uppsala University and is a member of Young Arbitrators Sweden. Mattias’ experience includes arbitration and commercial litigation in various industries, such as insurance and construction.

**TAMIR LIVSCHITZ**  
_Niederer Kraft Frey_

Tamir Livschitz is a partner in the dispute resolution team of Niederer Kraft Frey.

Tamir Livschitz is an expert in litigation and arbitration with a particular focus on cross-border disputes in the financial, commodities, construction and sports industries. Tamir
has extensive experience representing clients in white-collar crime matters both in respect of
internal investigations and in investigations conducted by Swiss and non-Swiss authorities. In
addition, Tamir regularly advises clients in contractual matters and negotiations, in particular
in connection with sale and purchase, distribution, agency, supply and manufacturing
agreements in a variety of sectors as well as in sports-related matters.

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 four next generation litigation lawyers in Switzerland by *The Legal 500* and
*Who's Who Legal: Arbitration* lists Tamir as a future leader in arbitration and litigation.

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**

*Bedell Cristin*

Kai trained as a solicitor with the London office of US firm Cadwalader LLP before joining
Beachcrofts, then subsequently Appleby’s Jersey office for six years (where he qualified as a
Jersey advocate) and represented large institutional banks and trust companies including
RBSI, Barclays, Schroder and Royal Bank of Canada.

Since joining Bedell Cristin in 2012, Kai’s core practice has involved general commercial
litigation, insolvency and restructuring, commercial property litigation and regulatory work.

Kai is also a Jersey Advocate, having been called to the Jersey Bar in 2012, giving him the
ability to offer valuable advice and insight on a variety of cross-border offshore matters. His
professional memberships include the Law Society of England and Wales (non-practising),
the Society of Trust Practitioners (STEP), the Cayman Islands Law Society, INSOL and
RISA. Kai is also a member of the Cayman STEP Council and the RISA legal and technical
committee.

**EELCO MEERDINK**

*De Brauw Blackstone Westbroek*

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.
ZIA MODY
AZB & Partners

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: Business Lawyers 2013*. She was also listed by *Forbes India* as one of India's ‘10 most-powerful women’ in 2013.

CECILIA MÖLLER NORSTED
Advokatfirman Vinge KB

Cecilia Möller Norsted, a partner at Vinge in Stockholm, specialises in commercial dispute resolution. She has over 15 years’ experience of domestic and international arbitration and Swedish civil proceedings. Her experience covers disputes relating to a number of different industries, including energy, telecommunications and real estate. She has also acted in several cases regarding challenges of international arbitral awards before Swedish courts.

LAKSHMI A MUTHU
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Lakshmi A Muthu is a senior associate in the corporate counselling and litigation section at Young Conaway Stargatt & Taylor, LLP in Wilmington, Delaware.

Ms Muthu is a graduate of New York University School of Law where she was a staff editor for the *New York University Journal of Law & Liberty*. She holds a BA in international studies from Johns Hopkins University in Baltimore, Maryland and studied abroad in Bolivia and Peru. She served as a clerk for the Honourable Kathaleen St Jude McCormick of the Court of Chancery of the State of Delaware.

LAURA NEGELE-VOGT
Marxer & Partner Attorneys-at-Law

Laura Negele-Vogt, born in 1990, studied law at the University of Lucerne and the Northwestern Pritzker School of Law (student exchange programme). She 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.

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.

ANTONIO TAVARES PAES, JR
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Antonio Tavares Paes, Jr is a partner at Costa e Tavares Paes 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 practices 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.

RICHARD PARRY
Bedell Cristin

Richard trained as a solicitor in the UK at Eversheds (now Eversheds Sutherland). He qualified into the financial services litigation team where he represented many of the world’s leading banking, investment and insurance institutions, including Lloyds Banking Group, Barclays, HSBC, Merrill Lynch, Deutsche Bank and Legal & General.

Since joining Bedell Cristin in 2016, Richard’s practice centres on general commercial litigation, with a focus on professional liability, insurance disputes, fund litigation and commercial property disputes. He also has experience in commercial transactions, insolvency, regulatory compliance and litigation funding.

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. His 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, RISA and IAPP.
CHRISTOPHER PEASE
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Chris Pease is a member of the firm’s litigation, restructuring and insolvency practice in the BVI. He advises on all aspects of commercial disputes and insolvency matters, with a particular specialism for disputes concerning fraud and bribery; asset recovery; applications for interim injunctive relief; and applications for pre-action and third-party disclosure.

Prior to joining Harneys, Chris was a managing associate in the dispute resolution team at Linklaters in London.

In his UK practice, Chris specialised in advising on complex fraud and contractual disputes as well as large-scale contentious regulatory matters, internal investigations and crisis management. As part of this practice, Chris advised on several successful settlement negotiations, including at mediation.

Chris was heavily involved in the civil recovery work undertaken by the Attorney General of the Turks and Caicos Islands in the wake of findings of a Commission of Inquiry into fraud and corruption concerning public officials, which were published in 2009.

In 2019, Chris was recognised as a ‘Rising Star’ in The Legal 500 Caribbean directory.

ÁNGEL PÉREZ PARDO DE VERA
Uría Menéndez

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.

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 (Who’s Who Legal 2019), and in both the litigation, and arbitration and mediation areas (2013, 2014, 2015, 2016, 2017, 2018, 2019 and 2020) by Best Lawyers.

SUBRAMANIAN PILLAI
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Subramanian Pillai is a partner at CNPLaw LLP, where he heads the construction, engineering and infrastructure projects practice and the international arbitration practice. His practice has been primarily in the field of commercial litigation and arbitration with particular emphasis on construction and engineering disputes.

As an accredited arbitrator and experienced arbitration counsel, Mr Pillai has advised and represented clients in several international arbitrations under the SIAC, ICC and UNCITRAL Rules of Arbitration, and before the High Court and the Court of Appeal and other tribunals.
Mr Pillai has also received several accolades from renowned legal publications such as being a market-leading lawyer in *Asialaw Profiles* since 2014, a leading lawyer in disputes and energy and infrastructure practice in *IFLR1000* 2016 as well as a recommended lawyer in dispute practice for *The Legal 500 Asia Pacific* since 2016.

KYRIAKOS PITTAS
*Soteris Pittas & Co LLC*

Mr Kyriakos Pittas obtained his LLB in 2017 from the University of Newcastle, United Kingdom. Subsequently, he completed in 2018 his LLM from Queen Mary University of London with a Distinction, specialising in the area of corporate and commercial law.

Kyriakos Pittas started his career by undertaking his training at the law firm of Soteris Pittas & Co LLC and upon completing the Bar exams in Cyprus in 2019, he continues as an advocate in the litigation department of the above law firm.

Kyriakos is an author of various articles on dispute resolution and corporate matters and he is a member of the Cyprus Bar Association.

His main areas of practice are in the field of corporate and commercial litigation, as well as international commercial arbitration, trust law, conflict of laws, mergers and acquisitions and insolvency law.

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 Associates in April 2002 as a partner and 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 has been acting as 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.

TIM PORTWOOD
*Bredin Prat*

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.

FRANCISCO PROENÇA DE CARVALHO

Uría Menéndez – Proença de Carvalho

Francisco Proença de Carvalho joined Uría Menéndez – Proença de Carvalho in April 2010 following the merger of the firm Proença de Carvalho & Associados with Uría 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 firm 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 regarding economic and legal issues.

NELLI RITALA

Merilampi Attorneys Ltd

Nelli Ritala is an associate in Merilampi Attorneys Ltd’s dispute resolution team.

Ms Ritala advises clients in proceedings relating to litigation, arbitration and alternative dispute resolution in domestic and international disputes.

She obtained a master of laws degree (LLM) from the University of Helsinki in 2016 and is a licensed legal counsel.

CHRISTIAN RITZBERGER

Marxer & Partner Attorneys-at-Law

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 Triesen with a Dr iur degree in 2016. In 2017, he was awarded the qualification Liechtenstein Fiduciary Expert by the University of Liechtenstein, Vaduz. In 2018, he earned a Certificate in National and International Tax Law from the University of Liechtenstein. 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.
CARL E ROBERTS
Advokatfirmaet Selmer AS

Carl E Roberts is an expert on dispute resolution, contract law and administrative law.

Roberts advises clients in connection with potential disputes and regularly appears as counsel at all court levels, and in arbitration cases. He has extensive experience from large and complex cases within a wide variety of legal areas and industries.

Roberts’ experience includes the handling of disputes within sectors such as fisheries and aquaculture, technology, renewable energy, offshore, real estate and aviation, as well as the public sector. He has litigated several cases involving contract law issues, including disputes related to share purchase agreements and construction contracts, and within the law of torts, including trade-secret issues. From his previous employment in the Legislation Department of the Ministry of Justice, Roberts has particular expertise in public law matters. Roberts was also a deputy judge before starting his career as a lawyer. He has handled several cases in the interface between the private and the public sector, including matters involving various ministries, the Financial Supervisory Authority and the Stock Exchange Appeals Committee.

In addition to dispute resolution, Roberts also advises clients on contractual issues, property law and public law. He is also experienced in investigations and in criminal procedure in connection with corporate penalties. Roberts is a frequent speaker on procedural law issues, both for fellow lawyers within the dispute resolution community and for students. Roberts is also one of few lawyers in Norway certified as a mediator by the Norwegian Bar Association.

FRANCISCO JAVIER RODRÍGUEZ RAMOS
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See Tow Soo Ling is a partner at CNPLaw LLP, where she is the deputy head of the dispute resolution practice and heads the intellectual property practice. Soo Ling has over 28 years of legal experience and has been with the firm since 2006. Her practice experience consists of a diverse range of matters, including building construction, company law, commercial law, disciplinary proceedings, employment law, family law, intellectual property, property law, probate, and administration and shareholder disputes.

She is a recommended lawyer for dispute resolution practice in Legal 500 Asia Pacific 2019 as well as a leading intellectual property professional for prosecution and strategy in World Trademark Review 2018.
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Smriti Sriram 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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Olena Sukmanova heads Sayenko Kharenko’s litigation practice. Boasting over 20 years of professional experience, she specialises in the comprehensive resolution of complex disputes and conflicts. Olena gained valuable practical experience in debt collection, land dispute resolution and anti-raiding, business and foreign investment protection.

Experience in both business and public sectors allows Olena to deeply understand the needs of each client and accompany the most complex projects, providing clients with practical solutions and high-quality integrated services.

Prior to joining Sayenko Kharenko, Olena held senior positions in the legal departments of major banks and industrial holdings, where she gained unique experience in implementing projects in the banking, real estate and investments sectors, and worked for two years in public service as Deputy and First Deputy Minister of Justice of Ukraine.

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Naoko Takekawa is an associate at Momo-o, Matsuo & Namba. She has been engaged in complex litigation, including financial and corporate law disputes, bankruptcy and insolvency, general corporate law, antitrust and M&A. Ms Takekawa graduated from the University of Tokyo in 2011 and the University of Tokyo, School of Law in 2013. She was admitted to the Dai-ichi Tokyo Bar Association in 2014 and joined Momo-o, Matsuo & Namba in 2015.
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Venetia Tan is a partner at CNPLaw LLP. Her practice experience includes international arbitration, litigation and advisory work on international and local commercial disputes, in particular disputes relating to foreign investments and joint ventures, financing, distributorships and jurisdictional challenges.

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DAMIAN TAYLOR

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Damian Taylor is a partner in the dispute resolution group 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 competition law, 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 competition law, 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.

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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.
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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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Before joining Niederer Kraft Frey, Anja worked at a law firm in Zurich. She has also worked as a foreign associate at the London offices of a large US firm. She is a member of the Zurich, the Swiss and International Bar Associations, as well as a member of the Swiss Arbitration Association and the International Association of Young Lawyers.

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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.

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Peter Woods is a senior associate in the litigation and dispute resolution group and advises on various commercial disputes, including disputes relating to banking and financial services, public procurement and competition, and is frequently involved in matters listed before the Commercial Court and the Competition Court. He also has experience in resolving disputes through ADR and is on the Committee of the Young Practitioners Arbitration Ireland. Mr Woods has completed postgraduate studies in commercial litigation.
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