LexisNexis®

The fifth annual complimentary guide to understanding Dispute Resolution practices around the world with an Asia-Pacific focus

LexisNexis® Dispute Resolution Law Guide 2019

Including articles from featured contributors:

大成 DENTONS

Conyers Dill & Pearman

LexisNexis® Dispute Resolution Law Guide 2019

Contents

Feature Articles:

Jurisdictional Q&As

Feature Articles

Feature Article: Brief Introduction to Arbitration in China

Firm: Dentons
Authors: Yongming Shen, Youkun Chen, Yan Cui, Lanchun Zhu, Guoqiang Zheng, Fulong Sun, Jiacai Tan, Johnson Zhang and Yinghui Yin

大成 DENTONS

With the initiative of "the Belt and Road" and the promotion of "Chinese Enterprises Going Global" strategy, we are witnessing an era where China fully participates in globalization with its fast-developing trade and economy. However, where there is a transaction, there is a risk for disputes. When it comes to dispute resolutions, most Chinese are relatively familiar with Chinese litigation while a few of them have a comprehensive knowledge of alternative dispute resolutions, including arbitration and mediation, etc. Meanwhile, foreigners have little knowledge of Chinese litigation and arbitration practice. Considering that the Q & A session mainly focuses on court proceedings in China, this article, through short in length, will briefly introduce the practice of arbitration in China.

Whether a dispute falls in the jurisdiction of arbitration commission or that of the people's court is usually subject to the following two factors:

a. whether the subject matter is capable of settlement by arbitration under (/in accordance with) the P.R.C. law; and

b. if it is, whether there is a valid arbitration agreement or arbitration clause executed between/among the involved parties.

Under the P.R.C. law, contractual disputes and disputes involving property rights can be arbitrated, while disputes in relation to marriage, adoption, guardianship, custody, inheritance as well as administrative disputes, which shall be resolved by administrative organs in accordance of the law, cannot be settled by arbitration. In practice, even if the disputes can be arbitrated under the P.R.C. law, a valid arbitration agreement/clause should also be in place before it is filed with the arbitration commission. There are certain circumstances where an arbitration agreement is deemed invalid. For example, an ad hoc arbitration is not allowed in China, so if a dispute is agreed to be settled by ad hoc arbitration in China, the final ad hoc arbitral award rendered by such tribunal in China will not be recognized by the people's court, which also means that it will not be enforced by the court. It is required by the P.R.C. law that parties shall agree on a specific arbitration commission duly organized in China. Usually, if the answer is no to either of the abovementioned factors, the dispute falls in the jurisdiction of the people's court.

Confidentiality is an underlying principle for arbitration in China, which is embodied in all its proceedings. For example, arbitrators or tribunals' secretaries are not allowed to have private contact with either party or its lawyers, nor can they reveal any information in relation to the arbitration. It is worth mentioning that oral hearings in arbitration cases are not open to public, which requires all the attendees to obtain authorizations from the involved parties in advance, even if the attendees are someone working for the parties. On the contrary, litigation is principally heard in public, while, only under exceptional circumstances, is heard in a private session, namely under the circumstances

where the dispute concerns national secrets, individual privacy or other factors as provided by the law. Owing to confidentiality, arbitral awards are not open to any third party. Thus, similar cases could be ruled differently by different tribunals. Contrarily, as judgments made by the people's courts are usually open to public, such situation rarely happens in litigation.

Party autonomy is another underlying principle for arbitration. Under this principle, parties are usually free to tailor their own arbitration proceedings, while things are a little bit different in China. As ad hoc arbitration is not allowed in China, Chinese arbitration center/commission would, in accordance with its own arbitration rules or rules as agreed by parties, play a more administrative role in arbitration proceedings. However, it will usually save much time for arbitrators and parties if the arbitration commission undertakes the administration of arbitration proceedings.

Built on the above principles, arbitration has the characteristics of expertise, customization and efficiency. Therefore, it is favored over other traditional resolutions for dispute in certain cases. First, arbitration proceedings are professional and well-tailored. In China, only the experienced lawyers, scholars and experts can be selected as arbitrators. Both parties can choose their own tribunal, from a list of arbitrators skilled in the relevant areas of law and technology. Unlike judges who are expected to be comprehensive in the whole range of disputes, arbitrators can often bring their professional and technical insight and experience into certain cases. Meanwhile, given the expertise of the arbitrators, the arbitration awards may be more readily accepted by both parties with profound respect and trustful confidence.

Second, with its nature of customization and proficiency, arbitration proceedings can meet the demanding need in civil and commercial matters, especially for urgent situations. With the assistance of the arbitration agency, the parties may tailor the dispute resolution process in accordance with their needs in time period, place, and other features, based on the issues involved, the size and complexity of the dispute. There are multiples ways to adjust the time period, including applying the summary procedures and requesting partial award. For instance, according to the CIETAC Arbitration Rules (2015) adopted by The China International Economic and Trade Arbitration Commission ("CIETAC"), the average time period of summary procedures is about 4 to 5 months. Taken the advantages of their expertise and customization, the arbitration tribunals may be able to narrow the focus of the cases, and concentrate their examinations and cross-examinations on the key issues in the proceedings. In addition, since one arbitration award is final and binding upon both parties, arbitration proceedings may save substantial time and cost for both parties and arbitrators in each case.

Moreover, arbitration has distinguished scope in globalization, which becomes a pivotal factor for the disputed parties to take into consideration while choosing the dispute resolution. As mentioned above, customized tribunals with expert arbitrators are generally keen to show understanding and respect for the different cultural backgrounds related in certain cases, and are able to assimilate international rules or conventions. Most importantly, pursuant to the provisions of the New York Convention 1958, arbitration awards in China shall be more easily enforced internationally than court verdicts.

Subject to the above distinguishing features of arbitration in China, there is still one point this article would like to address, namely the differences between the ways in which tribunals arbitrate a case in China and the methods for which people's courts try a case in China. For litigation in China, the people's court will on its own initiative examine all the facts that are related to the case at hand, even if neither party brings up such claim or defense in this regard. In a case with contractual disputes, the people's court will take the initiative to examine whether the agreement is fair or not, and if it is not, the basis/route for the disputes/claims is invalid, and as a result of that, all rights and obligations generated from the agreement will be invalid as well. However, for arbitration in China, arbitral tribunals will hear a case passively instead of examine a case actively, and it respects more fully the concept of "freedom of contract". Therefore, the tribunal will stick firmly to the agreement executed by the parties. Even if an agreement has yet come into effect or lacking governmental approval according to government regulations, it is still binding to the parties executing it.

About the Authors:

Yongming Shen
Senior Partner, Dentons
E: yongming.shen@dentons.cn

Youkun Chen
Senior Partner, Dentons
E: youkun.chen@dentons.cn

Yan Cui
Senior Partner, Dentons
E: yan.cui@dentons.cn

Lanchun Zhu
Senior Partner, Dentons
E: lanchun.zhu@dentons.cn

Guoqiang Zheng
Senior Partner, Dentons
E: guoqiang.zheng@dentons.cn

Fulong Sun
Senior Partner, Dentons
E: fulong.sun@dentons.cn

Jiacai Tan
Partner, Dentons
E: jiacai.tan@dentons.cn

Johnson Zhang
Senior Partner, Dentons
E: zhang.jian@dentons.cn

Yinghui Yin
Senior Partner, Dentons
E: yinghui.yin@dentons.cn

W: www.dentons.cn
A: 7/F, Building D, Parkview Green
FangCaoDi, No. 9
Dongdaqiao Road
Chaoyang
Beijing, China
T: +86 10 58137799
T: +86 10 58137778

Feature Article: Offshore Litigation in support of Onshore Disputes or Restructuring matters

Firm: Conyers Dill & Pearman
Authors: Nigel K. Meeson Q.C. and Norman Hau

Conyers Dill & Pearman

Introduction

Bermuda, British Virgin Islands and the Cayman Islands are all well-established offshore commercial centres whose courts have a long history and expertise in dealing with international commercial litigation. In each jurisdiction, the final appeal court is the Judicial Committee of the Privy Council. Each jurisdiction has a specialist commercial court with Judges that are very well qualified and with particular expertise in dealing with corporate disputes, insolvency and trust matters, as well as other commercial litigation.

The overwhelming majority of cases involve international business or other cross-border aspects and the Courts are very adept in providing judicial assistance to onshore courts, whether the primary litigation is being conducted in the offshore court or onshore. In each jurisdiction, the law, although based upon English common law principles, may depart from English law ether because of different legislative provisions or because the common law in the offshore jurisdiction has developed in a different way as it has the freedom to do so. It goes without saying that local expertise is a necessity if litigation is being considered which may involve an offshore company, trust or other offshore legal entity. It is important at the outset to understand what jurisdiction the offshore court may have in respect of the particular issue, the remedies which may be available and the likely time needed to obtain appropriate relief. These may differ from an onshore jurisdiction, and in particular, relief may often be available on a shorter timetable offshore than onshore.

Given the popularity of offshore corporate vehicles, cross-border international commercial litigation often concerns corporate structures with one or more offshore entities. As a result, the courts in Bermuda, BVI and the Cayman Islands are often faced with applications for interlocutory relief in support of litigation or arbitration being conducted elsewhere.

Likewise, due to the common use of offshore corporate vehicles in public companies within their corporate structures, cross-border insolvency and restructuring matters often concerns corporate law issues under the laws of these jurisdictions. As a matter of common law conflict rules, the laws of these jurisdictions govern the internal affairs, corporate status and validity of corporate actions of the offshore companies used. Taking Hong Kong as an example, more than half of the listed companies are incorporated in the Cayman Islands, whereas approximately a quarter of them are incorporated in Bermuda. The courts in the Cayman Islands and Bermuda are often faced with insolvency or restructuring proceedings in respect of these onshore listed companies. The onshore and offshore courts are generally keen to co-operate each other with a view to achieving an equitable outcome for the stakeholders involved, namely creditors, shareholders and even employees. The establishment of the Judicial Insolvency Network (known as "JIN") and the introduction of the JIN Guidelines, which provides a framework for customising protocols to facilitate court to court communication and cooperation, are recent milestone developments.

This article aims to discuss:

a. the main offshore tools in aid of onshore litigation or arbitration; and
b. how offshore insolvency or restructuring proceedings assist onshore entities in achieving equitable results in their insolvency or restructuring.

Offshore tools in aid of Onshore Litigation or Arbitration

There are two main tools available in each of these three offshore jurisdictions: a Norwich Pharmacal Order used to obtain information and a Mareva injunction or freezing order used to prevent assets being dissipated or removed from the jurisdiction.

Norwich Pharmacal Relief

Historically it was difficult to find evidence linking an alleged wrongdoer and an offshore corporate vehicle which may have been used by the wrongdoer in the structure of his business. With the increasing requirements for corporate service providers to collect and maintain information concerning the ultimate beneficial owners of the companies which they service, such information is available if it can be obtained from the service providers. BVI companies are typically used as asset holding vehicles whether of direct assets such as foreign property or as a holding company for shares in another company. The BVI courts have therefore had to address this question on a number of occasions. In *JSC BTA Bank v Fidelity Corporate Services Ltd et al [2011]* 2 JBVIC 2101 it was said by the Eastern Caribbean Court of Appeal that:

"by virtue of their very role in providing registered agent services to the companies, a role which is voluntary, cannot on any view be considered as mere onlookers. The companies that they formed are said to have been mere vehicles created for the purpose of defrauding the Bank. The respondents, by incorporating and maintaining those vehicles thereby facilitated, albeit innocently, the commission of the fraud and as such were involved in the fraud perpetrated against the Bank. This renders the respondents under a duty to disclose information through Norwich Pharmacal type proceedings which may assist the Bank as the injured party in discovering the true wrongdoers. An order for discovery against them would permit the Bank to discover not only who had been the person or persons giving the incorporation and bank account instructions, but would provide the necessary protection to the respondents against any charge that might be brought against them that they had been in breach of their duty of confidentiality. Registered agents and registered office service providers who are used by others to create and maintain for them corporate vehicles for the purpose of effecting fraud must expect that in due course the victims will come to them seeking discovery of the names and addresses and other information and documents that will enable the perpetrators to be discovered and the misappropriated assets traced."

It was held in *UVW v XYZ* (2016) that such relief was available post judgment in support of an application to enforce a foreign judgment in BVI and that it was not necessary to establish that the corporate vehicle involved had been established for the purpose of any wrongdoing. It was sufficient "if a corporate service provider involves itself in the life or affairs of a company that is, or becomes, used for wrongful purposes, he can expect to be required to give disclosure of information within its possession."

Freezing Orders

Where there are assets located in an offshore jurisdiction, whether those assets be bank accounts or shares in other companies, it may be necessary to obtain a freezing order in support of proceedings taking place in another jurisdiction. In each of Bermuda, BVI and the Cayman Islands it is possible to obtain an interlocutory injunction in support of substantive proceedings elsewhere.

In the Cayman Islands there is statutory authority in section 11A of the Grand Court Law to order interim relief where there are actual or prospective proceedings outside the Cayman Islands which are capable of giving rise to a judgment which may be enforced in the Cayman Islands even if it is not a cause of action which would be recognised under Cayman Islands law.

In BVI following the 2009 decision of Bannister J in *Black Swan Investment ISA v Harvest View Limited* subsequently approved the following year by the Eastern Caribbean Court of Appeal in *Yukos CIS Investments Limited et al v Yukos Hydrocarbons Investments Limited* a free-standing injunction may be granted in BVI in support of foreign proceedings.

The same reasoning has been applied in Bermuda in *ERG Resources LLC v Nabors Global Holdings II Limited* [2012] Bda LR 30 and in *Gold Seal Holding Ltd & Ors v Paladin Ltd & Ors* [2014] Bda LR 81, although in both cases an injunction was discharged on forum grounds.

Offshore insolvency or restructuring proceedings in aid of onshore insolvency or restructuring cases

Arrangements for the coordination of insolvency or restructuring proceedings by courts in different jurisdictions had been typically made on an ad hoc basis pursuant to the historic judicial assistance regime such as a letter of request. The lack of a protocol on coordination and communication between courts has naturally led to the lack of efficiency in resolving increasingly complex and time sensitive cross-board insolvency and restructuring issues. In October 2016, 11 insolvency judges from 8 jurisdictions (Singapore, Australia, the BVI, Canada (Ontario), the Cayman Islands, England & Wales, Hong Kong and the United States (Delaware and Southern District of New York)) took a giant step in establishing the Judicial Insolvency Network (commonly known as "JIN") and put together the JIN Guidelines which provide a structured protocol for Judges and insolvency practitioners in dealing with complex cross-border insolvencies and restructurings; JIN will further provide a multi-jurisdictional platform for Judges and insolvency practitioners from different jurisdictions to work together and develop the best practice for effective conduct of cross-border insolvency and restructuring cases.

The establishment of JIN was driven by a real demand of a more structured and effective model of judicial cooperation between onshore and offshore courts in international insolvency and restructuring cases. The Hong Kong court's decision in *Re Z-Obee Holdings Ltd (2016: No.183)* is a representative example illustrating such demand and the benefits of effective judicial cooperation between onshore and offshore courts.

Following the Hong Kong Court of Appeal decision *Re Legend Int'l Resorts Ltd [2006] 2 HKLRD 192*, appointment of provisional liquidators under the companies legislation in Hong Kong for the purposes of debt restructuring is not permissible. In contrast, under Cayman Islands and Bermuda laws, "soft touch provisional liquidation" is permissible for debt restructuring purposes. In *Re Z-Obee*, the Hong Kong Court came up with an innovative solution: the Court adjourned the Hong Kong winding up petition so that the Hong Kong provisional liquidators could take out an application in Bermuda for an appointment of themselves as the restructuring provisional liquidators in Bermuda. After the Bermuda Court approved the appointment, the provisional liquidators then applied to be discharged in Hong Kong. Eventually, the same provisional liquidators (now appointed by the Bermuda Court) sought recognition of their capacity in Hong Kong and took out a parallel scheme of arrangement to effect the restructuring in Hong Kong and Bermuda.

The Hong Kong Court also developed a practice of granting recognition of foreign appointment through the letter of request mechanism. For instance, in *Re Centaur Litigation SPC [2016] HKEC 576*, pursuant to a letter of request by the Cayman Court, the Hong Kong Court granted a recognition order containing a provision restraining any person from commencing

proceedings in Hong Kong against companies in liquidation without the Court's leave (effectively an automatic stay provision). This was a more extensive order that what had previously been granted. In *BJB Career Education Co Ltd [2017] 1 HKLRD 133*, the Hong Kong Court made an order recognising foreign liquidators and in addition, requiring the former officers to produce documents, answer interrogatories and attend an oral examination.

Another notable example of how the pragmatic approach adopted by offshore courts assisted to resolve difficult onshore restructuring scenario, is *Re Grand TG Gold Holdings Limited (unreported, FSD 84 of 2016)*, in which the Cayman Court adopted a relatively unusual approach and adjourned a winding up petition filed with the Cayman Court to enable the listing resumption proposal to be advanced further. In that case, the Court found that the Company was unable to pay its debts pursuant to the statutory definition and that the petitioner had standing as a creditor to present the petition. The Court had to carry out a difficult balancing exercise: on one hand, the petitioner is *prima facie* entitled to a winding up order, having established that the company was unable to pay its debt; on the other hand, it found that the resumption proposal credible and had a clear chance of being successful. In granting the adjournment eventually, the Court recognised that a winding up order is a class remedy and taking into account the opposing views of the creditors, it may decline to make a winding up order in exceptional circumstances or for special reasons even if the petitioner has established the insolvency of the company.

In the same spirit, it is observed that the BVI Court is quite ready to assist foreign insolvency representatives (for instance, liquidators and trustees in bankruptcy) in discharging their duties pursuant to Part XIX of the Insolvency Act 2003. This tool is particularly useful given the popular use of BVI vehicles for asset holding purposes. Liquidators and trustees in bankruptcy often faced difficulties in tracing the beneficial ownership behind the BVI vehicles. In a recent unreported matter, the Hong Kong trustees in bankruptcy were successful in obtaining an order in aid of Hong Kong bankruptcy proceedings under Part XIX of the Insolvency Act 2003 requiring the registered agent of a BVI company to disclose any beneficial ownership information they possessed. As expected, the information turned out to be crucial in verifying the beneficial ownership between the bankrupt and the asset in question.

About the Authors:

Nigel K. Meeson Q.C.
Partner, Conyers Dill & Pearman

Normal Hau
Partner, Conyers Dill & Pearman

W: www.conyersdill.com
A: Clarendon House
2 Church Street
Hamilton HM 11
Bermuda

Jurisdictional Q&As

Jurisdiction: Austria
Firm: Oblin Attorneys-at-Law
Author: Dr Klaus Oblin

RECHTSANWÄLTE
ATTORNEYS AT LAW
OBLIN

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

On the first tier, civil proceedings are initiated either before the district court ("Bezirksgerichte") or regional courts ("Landesgerichte").

District courts have jurisdiction in most disputes relating to tenancy and family law (subject matter jurisdiction) and in matters with an amount in dispute of up to € 15,000 (monetary jurisdiction). Appeals on points of fact and law are to be made to the regional courts. If a legal question of fundamental importance is concerned, another final appeal can be lodged with the Supreme Court ("Oberster Gerichtshof"); see below.

Regional courts have monetary jurisdiction in matters involving an amount in dispute exceeding € 15,000 and subject matter jurisdiction in IP and competition matters, as well as various specific statutes (Public Liability Act, Data Protection Act, Austrian Nuclear Liability Act). Appeals are to be directed to the Higher Regional Courts ("Oberlandesgerichte"). The third and final appeal goes to the Supreme Court.

As a general rule, a matter may only be appealed to the Supreme Court if the subject matter involves the resolution of a legal issue of general interest, i.e. if its clarification is important for purposes of legal consistency, predictability or development, or in the absence of coherent and previous decisions of the Supreme Court.

With respect to commercial matters, special Commercial Courts ("Handelsgericht und Bezirksgericht für Handelssachen") only exist in Vienna. Apart from that, the above-mentioned ordinary courts also sit as Commercial Courts. Commercial matters are, for example, actions against businessmen or companies in connection with commercial transactions, unfair competition matters, etc. Other special courts are the Labour Courts ("Arbeits-und Sozialgericht"), which have jurisdiction over all civil law disputes between employers and employees resulting from (former) employment as well as over social security and pension cases. In both commercial (insofar as Commercial Courts in panels) and labour matters, respectively, lay judges and professional judges make decisions concurrently. The Court of Appeal in Vienna decides sitting as the Cartel Court ("Kartellgericht") on the trial level. This is the only Cartel Court in Austria. Appeals are decided by the Supreme Court sitting as the Appellate Cartel Court ("Kartellobergericht"). In cartel matters, as well, lay judges sit on the bench with professional judges.

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

In some proceedings, the tribunal will consist of a panel involving "expert" lay judges, especially in antitrust cases, and "informed" lay judges in labour and public interest matters.

2. Are court hearings open to the public? Are court documents accessible by the public?

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

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

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

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

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

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

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

Limitation periods are determined by substantive law.

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

The statute of limitations must be argued explicitly by one of the parties, and not be taken "ex officio" through the Court's own initiative.

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

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

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

The proceedings are initiated by submitting a lawsuit ("Klage") with the court. The lawsuit is considered officially submitted upon receipt. If the potential defendant does not respond within 4 weeks, an enforceable title is afforded to the claimant, who may proceed to the enforcement stage. If the defendant replies, of course, a regular litigation follows. Most often the first hearing takes place within 6 – 10 weeks from receipt of the statement of defence. On the occasion of such first hearing, the parties are invited to discuss settlement options. If the parties don´t settle, the proceedings continue. Additional briefs are exchanged. Further hearings follow (the duration of which depends on the number of witnesses/experts to be heard). The time between the submission of lawsuit and final judgement usually ranges between 10 and 16 months.

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

If a party manages to show that the opposing party is in possession of a specific document, the court may issue a submission order if either:

a. the party in possession has expressly referred to the document in question as evidence for its own allegations;

b. the party in possession is under a legal obligation to hand it over to the other party; or

c. the document in question was made in the legal interest of both parties,

i. certifies a mutual legal relationship between them, or

ii. contains written statements which were made between them during negotiations of a legal act.

Rules on pre-action disclosure do not exist.

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

A party is not bound to present documents which concern family life

a. if the opposing party violates obligations of honour by the delivery of documents,

b. if the disclosure of documents leads to the disgrace of the party or of any other person or involves the risk of criminal prosecution, or

c. if the disclosure violates any state-approved obligation of secrecy of the party from which it is not released or infringes a business secret (or for any other reason similar to the above).

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

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

Evidence is taken during the course of the litigation, not before. The parties are required to produce the evidence supporting their respective allegations or where the burden of proof is on them, respectively.

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

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

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

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

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

11. What interim remedies are available before trial?

Discovery proceedings do not exist in the Austrian Civil Procedure.

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

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

12. What remedies are available at trial?

The Austrian Civil Procedure Code (ACCP) provides for several remedies that are available during the proceedings. These are available against all court rulings that were made during the course of proceedings and which do not constitute a final judgment or any other form of decision on the merits. Most of these remedies

need to be submitted within 14 days from issuance, some immediately during the hearing.

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

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

If the defendant does not satisfy the claims awarded by the judgment, the claimant may obtain compulsory enforcement.

Judgments are enforceable once they have become final and binding (e.g. if no appeal has been raised within the respective time limit).

The European ("Brussels") Convention and the Lugano Convention are the most relevant multilateral treaties on the recognition and enforcement of foreign judgments. In addition, a couple of bilateral treaties exist.

The enforcement of a domestic court decision requires a court order warranting enforcement which will be granted if the general requirements (admissibility of proceedings, capacity to be a party or to bring proceedings, etc.) are met.

In order to be enforceable, foreign judgments require a formal declaration of enforceability which is to be granted if the title is enforceable in accordance with the provisions of the country of issuance and if reciprocity is guaranteed in state treaties or by way of regulation. District courts are competent to decide ex parte. However, the decision is appealable.

As far as European Union decisions are concerned, recognition proceeds automatically according to the above-mentioned Conventions.

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

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

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

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

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

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

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

Second appeals can be made if the subject matter involves the resolution of a legal issue of general interest, i.e. if its clarification is important for purposes of legal consistency, predictability or development, or in the absence of coherent and previous decisions of the Supreme Court (see 1. above).

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

- the judgment is based on a document that was initially, or subsequently, forged;
- the judgment is based on false testimony (of a witness, an expert or a party under oath);
- the judgment is obtained by the representative of either party, or by the other party, by way of criminal acts (for example, deceit, embezzlement, fraud, forgery of a document or of specially protected documents, or of signs of official attestations, indirect false certification or authentication or the suppression of documents);
- the judgment is based on a criminal verdict that was subsequently lifted by another legally binding judgment;
- the judgment was issued without due regard to a preliminary ruling with prejudicial significance.

Dr. Klaus Oblin

Partner, OBLIN Attorneys-at-Law

Klaus Oblin is Vice Chairman of Euro-American Lawyers Group (EALG), having received both continental and common law legal education (PhD, University of Vienna and LL.M., University of San Diego). He has joined the pool of several prominent arbitral institutions and is a respected member of the Austrian Federal Bar Association. Having acted as chairman, co-arbitrator and counsel in numerous high-profile international disputes in front of domestic and foreign courts as well as arbitral institutions, Klaus has developed exceptional expertise on a wide range of contentious matters, focusing on construction, corporate, energy and natural resources, insurance, distribution, sales and transport. He has given lectures on International Supply

16. Are contingency or conditional fee arrangements permitted between lawyers and clients? Is third-party funding permitted?

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

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

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

Although the ACCP does not contain any provision on class actions, the Austrian Supreme Court held that a "class action with a specific Austrian character" is legally permissible. The ACCP allows a consolidation of claims of the same plaintiff against the same defendant. A joinder may be filed if:

a. the court has jurisdiction for all claims;

b. the same type of procedure applies; or

c. the subject matter is of the same nature regarding facts and law. Another possibility is to organize mass claims and assign them to an institution which then proceeds as a single claimant.

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

See question 15. above.

19. What are the main forms of alternative dispute resolution? Which are the main alternative dispute resolution organizations in your jurisdiction?

The main extra-judicial methods provided for by statute are arbitration, mediation (mainly in family law matters) and conciliation boards in housing or telecommunication matters.

In addition, various professional bodies (lawyers, public notaries, doctors, civil engineers) provide for dispute resolution mechanisms concerning disputes between their members or between members and clients

The Vienna International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC) is Austria's most relevant (international commercial) arbitration institution. The framework for the conduct of arbitration proceedings is referred to as "Rules of Arbitration and Conciliation of the VIAC" ("Vienna Rules").

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

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

The Vienna International Arbitral Centre aims at modernizing and streamlining its rules, which had been first enacted in 1975. In its quest to do so, the rules were reviewed as recently as 2013, simplifying and adding several provisions.

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

Joinder of third parties

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

Consolidation of proceedings

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

Conformation of arbitrators

All arbitrators must be confirmed by the Arbitral Centre´s Secretary General.

Multi-party proceedings

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

Remission

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

Expedited Proceedings

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

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

No.

About the Author:

Dr Klaus Oblin
Partner, Oblin Attorneys-at-Law
E: office@oblin.at
W: oblin.at
A: Josefstaedter Straße 11
1080 Wien
Austria
T: +43 1 505 3705

Jurisdiction: Bermuda
Firm: Conyers Dill & Pearman
Authors: Nigel K. Meeson Q.C. and Norman Hau

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

Bermuda is an overseas territory of the United Kingdom. The court system of Bermuda in respect of civil proceedings comprises the Supreme Court (including a Commercial Court in which specialist commercial judges sit), Court of Appeal and Privy Council.

The role of the judge in civil proceedings is to determine issues of law and/or facts based on evidence adduced and submissions made before him pursuant to the powers vested in him by the legislation.

2. Are court hearings open to the public? Are court documents accessible by the public?

There are three ways for getting automatic access to court records for non-parties:

a. When a case is no longer pending or active because it is finished, a non-party can apply to the Registry for copies of documents;

b. When a case is pending, a non-party can apply to the Registry for copies of any originating process (e.g. a writ, petition or originating summons) or orders made in the case; and

c. When reference is made in the course of a public hearing or in public judgment to any documents on the court file, a non-party has a common law right to apply for copies of the relevant documents(s).

Automatic access to documents in current or pending cases is only available in relation to cases filed on or after 1 December 2015, but not retrospectively. Automatic access is also not available in the following instances on privacy grounds:

- any case where by Order of the Court, public access to such documents has been restricted by a file sealing order;
- divorce proceedings and any other proceedings related to children;
- applications in relation to arbitration proceedings;
- all proceedings in relation to the administration of trusts;
- cases relating to the administration of the estates of deceased persons;
- any other category of case which may be identified from time to time by way of Circular by the Registrar.

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

Only lawyers admitted in Bermuda with a practicing certificate (and senior foreign advocates such as London Queen's Counsel instructed by a local attorney with ad hoc admission) have the right to appear in court and conduct proceedings on behalf of their client.

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

The statutory provisions governing limitation periods can be found in the Limitation Act 1984. Different limitation periods apply to different types of claim. It would not be practicable for the

purposes of this Q&A to set out an exhaustive list. For instance, the limitation period is 6 years for a claim based on simple contract or tort.

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

There is no mandatory "pre-action procedures". Leave must be obtained before effecting service of proceedings on foreign defendants.

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

The procedure is essentially the same as that in the United Kingdom. There are three broad stages:

a. pleadings;

b. disclosure and preparation of factual and expert evidence (if necessary); and

c. preparation for and conducting of trial.

Depending on the particular needs of the case, and bearing in mind the Overriding Objectives set out in the Rules of the Supreme Court 1985 (the "Rules"), the Court would give suitable case management directions to the parties in a summons for directions hearing after close of the pleadings. The parties may take out interlocutory applications at different stages of the proceedings as permitted in the Rules.

After completion of disclosure, filing of statements from factual and expert witnesses and determination of interlocutory matters, a Pre-Trial Review is typically fixed to ensure the matter is ready to be tried. The time needed to bring a matter to trial depends on the complexity of the matter and the court's availability at that time. Typically, a civil matter would take one and a half to two years from commencement of the proceedings to trial.

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

Yes. After the close of pleadings in an action begun by writ, the parties are required by the Rules to make mutual discovery of documents which are or have been in their possession, custody or power relating to matters in question in the action. Under the Rules, a party can take out an application for discovery of a specified document or class of documents. Such application must be supported by an affidavit stating the belief that the party from whom discovery is sought has, or at some time had, in his possession custody or power, the specified document or class of document. The Court should only order specific discovery if necessary for disposing fairly of the cause or matter or for saving costs.

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

Privilege as recognised at common law is a ground for withholding inspection of certain documents in the discovery process. The existence of such privileged documents shall still be disclosed. The Rules also provide that documents can be withheld in the discovery process on the ground that the disclosure of it would be injurious to the public interest. Discovery is a broad topic and it would not be practical to discuss it comprehensively in this Q & A.

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

Witness statements from factual and expert witnesses are exchanged in advance of the trial. Facts required to be proved at the trial of action begun by writ by the evidence of witnesses shall be proved by the examination of the witnesses orally in open court. Such witness statements are usually taken as evidence in chief at trial as a matter of practice. A party has the right to cross-examine witnesses of his opponent at the trial, following which his opponent has the right to re-examine his witnesses.

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

Order 38 and Order 40 of the Rules govern the appointment of experts in civil proceedings. There is no prescribed code of conduct for experts. Generally, an expert witness should be reminded that his duty is owed to the Court in giving genuine opinion in the field of expertise in question, and his duty is not to advocate the case of the party appointing him.

Nigel K. Meeson Q.C.

Partner, Conyers Dill & Pearman

Nigel Meeson is a Partner and Head of the Asia Disputes & Restructuring Group ("ADRG") in the Hong Kong office of Conyers Dill & Pearman. The ADRG provides Bermuda, British Virgin Islands and Cayman Islands litigation advice to clients in the Far East; ensuring they have access to fully coordinated litigation advice and services provided by a seamless and comprehensive team across jurisdictions and time zones.

Nigel joined Conyers in 2007 to start the litigation practice in the Cayman Islands which he has developed into one of the leading Cayman litigation practices. His practice focuses on insolvency and restructuring, trust litigation, corporate and shareholder disputes, insurance, asset tracing and international commercial litigation. He also accepts appointments to act as leading counsel, expert witness, arbitrator and mediator.

Prior to joining Conyers, Nigel practiced for almost twenty-five years at the Bar in London as one of London's top commercial litigators before moving to the Cayman Islands.

Nigel has been described by a client as a "worldclass lawyer and one of the finest litigators I have met – he has incredible business sense and a practical mind."

He has also been described as having a "highly sophisticated" practice and Legal 500 describes Nigel as "very smart" and "always delivers."

Nigel has authored various books and articles for leading industry publications, including International Corporate Rescue and INSOL International.

11. What interim remedies are available before trial?

Interim remedies available include:

- Injunction;
- detention, custody or preservation or inspection of any property which is the subject matter of the cause;
- power to order samples to be taken;
- sale of perishable property;
- recovery of personal property subject to lien;
- interim payment orders; and
- appointment of interim receivers.

12. What remedies are available at trial?

Remedies available at trial include:

- Monetary judgment;
- Specific performance;
- Declaration;
- Restitution;
- Permanent injunction;
- Receivership; and
- Statutory remedies such as a buy-out order or an order governing future conduct of a company in the context of shareholders' disputes.

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

- Writ of fieri facias;
- Garnishee proceedings;
- Charging order/stop order;
- Appointment of receiver;
- An order for committal;
- Writ of sequestration;
- An attachment of earnings order;
- Writ of possession;
- Writ of specific delivery; and
- Oral examination of the judgment debtor.

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

Successful parties, should recover from the opposing party, the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court.

The Judge awarding the costs order can make a summary assessment of the costs order if he thinks fit. It is usually more suitable for costs order of a larger scale, say in respect of a trial, to be assessed separately after the judgment. In that case, if the parties fail to agree on quantum of the costs order, the quantum is to be assessed and determined by the Court in a so-called "taxation proceedings".

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

The highest court of Bermuda is the Privy Council sitting on appeal from the Court of Appeal, whose decisions are binding on all Bermuda courts including the Supreme Court.

Appeal from a final judgment can be lodged as of right. To be successful in an appeal, the appellant must demonstrate that the court below has made an error of law, an error fact or an error in exercising its discretion.

16. Are contingency or conditional fee arrangements permitted between lawyers and clients? Is third-party funding permitted?

Contingency fee arrangements are not permitted save for undefended debt collection matters. Conditional fee arrangements are not permitted.

Third-party funding is permitted, the legitimacy of which is recognised by the Commercial Court. For instance, third-party funding arrangements between liquidators and creditors are typically approved by the Court. However, there are no clear judicial guidelines on the boundaries of legitimacy as yet. Note that third-party funders of litigation can be subject to third party costs order for funding unmeritorious litigation.

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

Pursuant to the Rules, where numerous persons have the same interest in any proceeding, such proceedings may be begun, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them. A judgment or order given in such representative proceedings shall be binding on all the persons being represented, but shall not be enforced against any person not a party to the proceedings except with the leave of the Court.

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

Foreign judgment cannot be enforced directly. Foreign judgment must be translated into a local judgment by the judgment creditor commencing local proceedings based upon the foreign judgment.

There are two routes for seeking enforcement of foreign judgments: (a) under The Judgment (Reciprocal Enforcement Act, 1958 (the "Act") (applicable to the United Kingdom and commonwealth jurisdictions); and (b) under common law.

An application for registration of the Judgment Debt under the Act would be made to a Judge in Chambers of the Supreme Court by Originating Summons in accordance with the Rules and may be made without notice to the Defendant.

The application must be supported by an affidavit in support which exhibits a certified or authenticated copy of the foreign judgment sought to be registered. The affidavit must also state that the judgment creditor is entitled to enforce the judgment and no grounds for defence exist as stipulated under s 4 of the Act. Once the judgment is registered, it is treated in all respects as a judgment of the Supreme Court.

The judgment debtor must be served with a notice of registration within a reasonable time after such registration and prior to enforcement of the judgment. The notice may be served either personally on the judgment debtor or by sending it to his usual place of abode or proper address.

The order will give the judgment debtor a reasonable period within which he can apply to the court to have the registration set aside on certain grounds as listed in s 4 of the Act.

On the other hand, enforcement by way of the common law route involves commencement of a fresh action in Bermuda. The judgment creditor would apply for a Bermuda judgment by way of a default or summary judgment application.

19. What are the main forms of alternative dispute resolution? Which are the main alternative dispute resolution organisations in your jurisdiction?

Arbitration and Mediation. The Bermuda Branch of Chartered Institute of Arbitrators.

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

No.

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

No.

About the Authors:

Nigel K. Meeson Q.C.
Partner, Conyers Dill & Pearman

Normal Hau
Partner, Conyers Dill & Pearman

W: www.conyersdill.com/markets/bermuda
A: Clarendon House
2 Church Street
Hamilton HM 11
Bermuda

Jurisdiction: British Virgin Islands
Firm: Conyers Dill & Pearman
Authors: Nigel K. Meeson Q.C. and Norman Hau

Conyers Dill & Pearman

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

The British Virgin Islands is a British Overseas Territory of the United Kingdom and self-governing in relation to its internal affairs.

The British Virgin Islands is a member territory of the Eastern Caribbean Supreme Court. Its court system comprises the Magistrate's Court, High Court, Court of Appeal and the Judicial Committee of the Privy Council. The Privy Council is the final court of appeal.

The role of the judge in civil proceedings is to determine issues of law and/or facts based on evidence adduced and submissions made before him pursuant to the powers vested in him by the legislation.

2. Are court hearings open to the public? Are court documents accessible by the public?

Court proceedings that take place in open court (such as trials) are open to the public, while matters that take place in a judge's chambers (chamber hearings) are private and generally not open to the public. Any judgment or order made in a proceeding conducted in chambers may be obtained by the public on payment of the prescribed fee. Claim Forms and Notices of appeal can be obtained by non-parties. It is possible to apply for permission to obtain other documents in the court file without notice to the parties. The grant of application is discretionary. A party may seek an order that a court file be sealed (i.e. inaccessible to non-parties) and that hearings be held in private.

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

Only lawyers admitted to the Bar in the British Virgin Islands have the right to appear in court and conduct proceedings on behalf of their client.

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

The statutory provisions governing limitation periods can be found in the Limitation Ordinance, 1961 (Cap.43). Different limitation periods apply to different types of claim. It would not be practicable for the purposes of this Q&A to set out an exhaustive list. For instance, the limitation period is 6 years for a claim based on simple contract or tort. The limitation period for an action brought upon any judgement is 12 years.

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

Generally, there is no mandatory "pre-action procedures". One exception is that leave must be obtained prior to commencing a derivative action. Also, leave must be obtained before effecting service of proceedings on foreign defendants.

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

The procedure is essentially the same as that in the United Kingdom. There are three broad stages:

a. pleadings;

b. disclosure and preparation of factual and expert evidence (if necessary); and

c. preparation for and conducting of trial.

Depending on the particular needs of the case, and bearing in mind the Overriding Objectives set out in the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (as amended) (the "CPR"), the Court would give suitable case management directions to the parties in a "Case Management Conference" after close of the pleadings. The parties may take out interlocutory applications at different stages of the proceedings as permitted in the Rules.

After completion of disclosure, filing of statements from factual and expert witnesses and determination of interlocutory matters, a Pre-trial Review is typically fixed to ensure the matter is ready to be tried. The time needed to bring a matter to trial depends on the complexity of the matter and the court's availability at that time. Typically, a civil matter would take one and a half to two years from commencement of the proceedings to trial.

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

Yes. As a standard direction, the parties would be required by the court to give "standard disclosure", meaning the party must disclose all documents which are directly relevant to the matters in question in the proceedings. A document is "directly relevant" if:

a. the party with control of the document intends to rely on it;

b. it tends to adversely affect that party's case; or

c. it tends to support another party's case; but the rule of law known as "the rule in Peruvian Guano" does not apply.

Under the CPR, a party can take out an application for specific discovery. An order for specific disclosure may be made without an application. When deciding whether to make an order for specific disclosure, the court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs.

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

Privilege as recognised at common law is a ground for withholding inspection of certain documents in the discovery process. The existence of such privileged documents shall still be disclosed. Pursuant to the Rules, a party may apply to the court for an order permitting that person not to disclose the existence of a document on the ground that disclosure of the existence of the document would damage public interest.

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

Witness statements from factual and expert witnesses are exchanged in advance of the trial. Facts required to be proved at the trial of action begun by writ by the evidence of witnesses shall be proved by the examination of the witnesses orally in open court. Such witness statements are usually taken as evidence in chief at trial as a matter of practice. A party has the right to cross-examine witnesses of his opponent at the trial, following which his opponent has the right to re-examine his witnesses.

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

Part 32 of the CPR governs the manner in which expert evidence is to be provided to assist the court. The duty of an expert witness is to help the court impartially on the matters relevant to his or her expertise, and that duty overrides any obligation to the person by whom he or she in instructed or paid. Part 32.4 of the CPR set out in some detail ways in which expert's duty to court is to be carried out.

11. What interim remedies are available before trial?

Interim remedies available include:

- injunction (including a freezing order refraining a party from dealing with the asset or removing assets located in the jurisdiction;
- interim declaration;
- detention, custody or preservation or inspection of the relevant property;
- an order directing a party to prepare and file accounts relating to the dispute;
- an order directing a party to provide information about the location of relevant property or assets, including those are or may be the subject of an application for a freezing order;
- power to order samples to be taken;
- sale of perishable property or property for any other good reason where it is desirable to sell quickly;
- payment of income from relevant property until a claim is decided;
- interim payment orders (including an order for interim costs or an order for payment into court);
- an order to deliver up goods;
- a search order;
- appointment of interim receivers.

12. What remedies are available at trial?

Remedies available at trial include:

- Monetary judgment;
- Specific performance;
- Declaration;
- Restitution;
- Permanent injunction;
- Receivership; and
- Statutory remedies such as a buy-out order or an order governing future conduct of a company in the context of shareholders' disputes.

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

- Garnishee proceedings;
- Charging order;
- Appointment of receiver;
- An order for committal;
- Writ of sequestration;
- An order for the seizure and sale of goods;
- An attachment of earnings order;
- Writ of possession;
- Writ of specific delivery; and
- Oral examination of the judgment debtor.

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

Successful parties are generally able to recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court.

If the parties fail to agree on quantum of the costs order, the quantum is to be assessed and determined by the Court.

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

The British Virgin Islands is a member territory of the Eastern Caribbean Supreme Court. Its court system comprises the Magistrate's Court, High Court, Court of Appeal and the Judicial Committee of the Privy Council. The Privy Council is the final court of appeal.

Appeal of final judgment can be lodged as of right. To be successful in an appeal, the appellant must demonstrate that the court below has made an error of law, an error fact or an error in exercising its discretion.

16. Are contingency or conditional fee arrangements permitted between lawyers and clients? Is third-party funding permitted?

Contingency or conditional fee arrangements are not permitted. It is uncertain whether third-party funding would be permitted as there is no definitive authority on this point. The common law rules against maintenance and champerty remains in force.

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

Under Part 21 of the CPR, the Court can appoint a body having a sufficient interest in proceedings or one or more persons to represent all or some persons with the same or a similar interest. The court can only appoint a representative where five or more persons have the same or a similar interest and the proceedings concern any of the following: the interpretation of a written agreement; the estate of a deceased; or trust property.

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

Enforcement of foreign judgments can be carried out pursuant to common law, The Reciprocal Enforcement of Judgments Act 1922 (Cap 65) (the "1922 Act"), or The Foreign Judgments (Reciprocal Enforcements) Act 1964 (Cap 67) (the "1964 Act").

An application for registration of the Judgment Debt would be made under the CPR Part 72.2 and may be made without notice to the Defendant. There are conceptual difficulties with ascertaining the originating process intended under the CPR, but in a number of cases, the Commercial Court has made orders for registration where a Fixed Date Claim Form (rather than a Notice of Application) has been used as the originating process.

The application must be supported by an affidavit in support which exhibits the judgment sought to be registered, specifies the amount of interest due and identifies the last known place of abode of the judgment debtor. The affidavit must also state that to the best of the information and belief of the deponent that the judgment creditor is entitled to enforce the judgment and, either the judgment has not been satisfied at the date of the application or the amount in respect of which it due remains unsatisfied. The evidence must also state that the judgment may be ordered to be registered for enforcement and that registration would not be liable or be liable to be set aside under any relevant enactment.

The Court will normally determine the application for registration at the first hearing. If the judgment is ordered to be registered, the Court will stipulate in the order the period within which the judgment debtor, once served with a notice of registration, may apply to set aside registration. If the judgment debtor fails to set aside registration within the prescribed period, unless an extension of that period is obtained, then the judgment creditor may proceed to execution.

19. What are the main forms of alternative dispute resolution? Which are the main alternative dispute resolution organisations in your jurisdiction?

Arbitration and Mediation. The BVI International Arbitration Centre.

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

No.

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

No.

About the Authors:

Nigel K. Meeson Q.C.
Partner, Conyers Dill & Pearman

Normal Hau
Partner, Conyers Dill & Pearman

W: www.conyersdill.com/markets/british-virgin-islands

A: Commerce House, Wickhams Cay 1
PO Box 3140
Road Town, Tortola
VG1110, British Virgin Islands

Jurisdiction: Cayman Islands
Firm: Conyers Dill & Pearman
Authors: Nigel K. Meeson Q.C. and Norman Hau

Conyers Dill & Pearman

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

The Cayman Islands is a British Overseas Territory. Its executive and legislative powers are subject to the overriding legislative and executive powers of the United Kingdom. The Cayman Islands legal system is based on English common law.

The highest court of the Cayman Islands is the Privy Council sitting on appeal from the Cayman Islands Court of Appeal, whose decisions are binding on all Cayman Islands courts including the Grand Court.

The role of the judge in civil proceedings is to determine issues of law and/or facts based on evidence adduced and submissions made before him pursuant to the powers vested in him by the legislation.

2. Are court hearings open to the public? Are court documents accessible by the public?

Proceedings before the Cayman Islands court are generally held either in open court or in the judge's chambers. Proceedings in open court are open to the public, whereas proceedings in the judge's chambers are generally private to the parties to the proceedings. Civil trials are ordinarily held in open court. Interlocutory matters are generally dealt with in the judge's chambers.

Unless otherwise ordered by the court, all originating proceedings filed with the court and all judgments and orders issued by the court are available for public inspection upon payment of a prescribed fee. All other documents filed with the court are not publicly available to non-parties. It is however possible for non-parties to apply to the court to have access to the court file. The determination of such application is entirely discretionary.

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

Only lawyers admitted in the Cayman Islands with a practicing certificate (and senior advocates such as London Queen's Counsel instructed by a local attorney with ad hoc admission under the Legal Practitioners Law (2015 Revision)) have the right to appear in court and conduct proceedings on behalf of their client.

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

The statutory provisions governing limitation periods can be found in the Limitation Law (1996 Revision). Different limitation periods apply to different types of claim. It would not be practicable for the purposes of this Q&A to set out an exhaustive list. For instance, the limitation period is 6 years for a claim based on simple contract, tort (excluding libel and slander) or for enforcement of judgments.

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

There is no mandatory "pre-action procedures". Leave must be obtained before effecting service of proceedings on foreign defendants.

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

The procedure is essentially the same as that in the United Kingdom. There are three broad stages: (a) pleadings; (b) disclosure and preparation of factual and expert evidence (if necessary); and (c) preparation for and conducting of trial.

Depending on the particular needs of the case, and bearing in mind the Overriding Objectives set out in The Grand Court Rules 1995 (the "Rules"), the Court would give suitable case management directions to the parties in a "Case Management Conference" after close of the pleadings. The parties may take out interlocutory applications at different stages of the proceedings as permitted by the Rules.

After completion of disclosure, filing of statements from factual and expert witnesses and determination of interlocutory matters, a Pre-Trial Review is typically fixed to ensure the matter is ready to be tried. The time needed to bring a matter to trial depends on the complexity of the matter and the court's availability at that time. Typically, a civil matter would take 1.5 to 2 years from commencement of the proceedings to trial.

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

Yes. After the close of pleadings in an action begun by writ, the parties are required by the Rules to make discovery of documents which are or have been in their possession, custody or power relating to matters in question in the action. Under the Rules, a party can take out an application for discovery of a specified document or class of documents. Such application must be supported by an affidavit stating the belief that the party from whom discovery is sought has, or at some time had, in his possession, custody or power the specified document or class of document. The Court should only order specific discovery if necessary for disposing fairly of the cause or matter or for saving costs.

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

Privilege as recognised at common law is a ground for withholding inspection of certain documents in the discovery process. The existence of such privileged documents shall still be disclosed. The Rules also provide that documents can be withheld in the discovery process on the ground that the disclosure of it would be injurious to the public interest. Discovery is a broad topic and it would not be practical to discuss it comprehensively in this Q&A.

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

Witness statements from factual and expert witnesses are exchanged in advance of the trial. Facts required to be proved at the trial of action begun by writ by the evidence of witnesses shall be proved by the examination of the witnesses orally in open court. Such witness statements are usually taken as evidence in chief at trial as a matter of practice. A party has the right to cross-examine witnesses of his opponent at the trial, following which his opponent has the right to re-examine his witnesses.

Norman Hau

Partner, Conyers Dill & Pearman

Norman is a Partner in the Hong Kong office of Conyers Dill & Pearman. Norman joined Conyers in 2012 from the dispute resolution team of a magic circle firm.

Norman is a seasoned commercial litigator with extensive experience in restructuring and insolvency matters and shareholders disputes in Hong Kong, Bermuda, the British Virgin Islands and Cayman Islands. Norman is a fluent English, Cantonese and Putonghua speaker.

Norman has acted for listed companies, liquidators, private equity houses, fund managers, and high net worth individuals in their contentious matters involving offshore laws.Norman is highly regarded by his clients and peers for his legal skills, commerciality and strategic mindset demonstrated in complex commercial disputes, insolvency and restructuring cases and asset tracing matters, having been recognised in the 2018 Edition of Legal 500 for his "great client management and general litigation strategy" and his ability to provide "sensible and commercial advice".

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

Order 38 and Order 40 of the Rules govern the appointment of experts in civil proceedings.

There is no prescribed code of conduct for experts. Generally, an expert witness should be reminded that his duty is owed to the Court in giving a genuine opinion in the field of expertise in question, and his duty is not to advocate the case of the party appointing him.

11. What interim remedies are available before trial?

Interim remedies available include:

- Injunction;
- detention, custody or preservation or inspection of any property which is the subject matter of the cause;
- power to order samples to be taken;
- sale of perishable property;
- recovery of personal property subject to lien;
- interim payment orders; and
- appointment of interim receivers.

12. What remedies are available at trial?

Remedies available at trial include:

- Monetary judgment;
- Specific performance;
- Declaration;
- Restitution;
- Permanent injunction;
- Receivership; and
- Statutory remedies such as a buy-out order or an order governing future conduct of a company in the context of shareholders' disputes.

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

- Writ of fieri facias;
- Garnishee proceedings;
- Charging order/stop order;
- Appointment of receiver;
- An order for committal;
- Writ of sequestration;
- An attachment of earnings order,
- Writ of possession,
- Writ of specific delivery, and
- Oral examination of the judgment debtor.

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

Successful parties should recover from the opposing party the reasonable costs incurred by them in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court.

If the parties fail to agree on quantum of the costs order, the quantum is to be assessed and determined by the Court in a so-called "taxation proceedings".

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

The highest court of the Cayman Islands is the Privy Council sitting on appeal from the Cayman Islands Court of Appeal, whose decisions are binding on all Cayman Islands courts including the Grand Court.

Appeal from final judgment can be lodged as of right. To be successful in an appeal, the appellant must demonstrate that the court below has made an error of law, an error of fact or an error in exercising its discretion.

16. Are contingency or conditional fee arrangements permitted between lawyers and clients? Is third-party funding permitted?

Contingency fee arrangements are not permitted, whilst appropriately structured conditional fee arrangements can be approved by the Court.

Third-party funding is permissible. The Grand Cayman Court found in a recent case that as a matter of principle, a third-party funding agreement will not be unlawful by reason of maintenance and champerty if it does not have a tendency of corrupt public justice, which in turn depends on whether adequate protections were built into the arrangement. In practice, for prudence, a party intending to enter into a third-party funding arrangement would apply to the Court for its permission.

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

Pursuant to the Rules, where numerous persons have the same interest in any proceeding, such proceedings may be begun, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them. A judgment or order giving in such representative proceedings shall be binding on all the persons being represented, but shall not be enforced against any person not a party to the proceedings except with the leave of the Court.

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

A Foreign judgment cannot be enforced directly. Foreign judgments must be translated into a local judgment by judgment creditor commencing local proceedings based upon the foreign judgment. Cayman Islands courts will normally give a foreign judgment creditor local summary judgment.

There are two routes for seeking enforcement of foreign judgments: (a) under the Foreign Judgment Reciprocal Enforcement Law (1996 Revision) (applicable to Australia and its External Territories only); and (b) under common law.

An application for registration of the Judgment Debt would be made to the Financial Services Division of the Cayman Islands Grand Court. For enforcement pursuant to the Foreign Judgment Receiprocal Enforcement Law (1996 Revision), commencement must be by Originating Summons. For enforcement pursuant to the common law, commencement must be by Writ of Summons setting out the cause of action and details of the claim. Personal service of the writ is required.

Once service is effected, the defendant must file an Acknowledgment of Service and a Defence within the requisite time period. In the absence of such, the claimant may apply for Default Judgment. If the defendant does file an Acknowledgment of Service and Defence, the claimant may apply for Summary Judgment on the ground that there is no real triable defence.

19. What are the main forms of alternative dispute resolution? Which are the main alternative dispute resolution organisations in your jurisdiction?

Arbitration and Mediation. Cayman Islands Association of Mediators and Arbitrators, Chartered Institute of Arbitrators (Caribbean branch).

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

Review of the law relating to conditional fee agreements and contingency agreements.

Consultation regarding the Foreign Judgments Reciprocal Enforcement (Amendment) Bill 2014, which provides for the registration and enforcement of the foreign judgments of a superior court of a scheduled country without the requirement of reciprocity.

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

No.

About the Authors:

Nigel K. Meeson Q.C.
Partner, Conyers Dill & Pearman

Normal Hau
Partner, Conyers Dill & Pearman

W: www.conyersdill.com/markets/cayman-islands

A: Boundary Hall, 2nd Floor
Cricket Square
PO Box 2681
Grand Cayman
KY1-1111
Cayman Islands

Jurisdiction: China

Firm: Dentons
Authors: Yongming Shen, Youkun Chen, Yan Cui, Lanchun Zhu, Guoqiang Zheng, Fulong Sun, Jiacai Tan, Johnson Zhang and Yinghui Yin,

大成 DENTONS

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

From a macroscopic point of view, in general civil cases, the structure of the Chinese People's Court consists of four court levels: the Basic People's Court, the Intermediate People's Court, Superior People's Court and the Supreme People's Court. Chinese Civil Procedure law adopts the system of "two instances" whereby the second instance is the final one. Generally, Basic People's Courts mainly accepts civil cases of the first instance, while Intermediate People's Courts, Superior People's Courts and the Supreme People's Court accept some cases of the first instance under special circumstances. As long as a people's court has rendered a judgement of the first instance, either party may appeal to the higher court of the second instance.

In some special civil cases, there are specialized courts for trial, including: Maritime Courts, Intellectual Property Courts and Internet Courts.

From a microscopic point of view, the general procedures of a civil case are: the filing of a case at the first instance or the second instance, trial supervision procedure and enforcement of the court's judgment. Different stages of the aforementioned procedures will be undertaken by different departments of the People's Court.

Regarding the filing of a case, it is mainly the responsibility of People's Courts' Subordinate Case Filing Divisions. In practice, upon receipt of a case, the Division will decide whether or not a case meets the conditions for filing, and if not, it will dismiss the filing of the case. A case which fulfills the conditions for filing will proceed to the next stage for mediation before litigation. If the mediation fails, the case will enter the substantive trial procedure.

During the substantive trial procedure, according to the nature of the case, it will be assigned to a specific Tribunal of the People's Courts. The People's Courts have several Tribunals for different purposes, including but not limited to the Civil Trial Tribunal, Commercial Tribunal, Intellectual Property Tribunal and Labor Dispute Tribunal.

After the trial is completed and the judgment is in force, for those party(ies) who fail to perform their obligations under the judgment, the winning party could apply to the People's Court for enforcement.

In addition to the above, the Court has a special Trial Practice Management Division, mainly dealing with case-related work, such as property preservation and evidence preservation, delivery of documents, handing-over of case files, documentation, signature and stamps, etc. Meanwhile, it also undertakes the duty to supervise the limitation periods for the trial of a case.

2. Are court hearings open to the public? Are court documents accessible by the public?

According to Article 134 of the Civil Procedure Law of the People's Republic of China, "the Court shall conduct civil cases in public unless it relates to state secrets, personal privacy or other provisions of the law. Where the matter pertains to divorce cases and commercial secrets, if the parties apply for a private trial, the People's Court can use its discretion to decide for the adoption of a private trial." Therefore, court hearings are generally open to the public, but there are exceptions where cases are kept con confidential.

At present, the court judgments and final rulings of the cases made by the People's Courts should be publicized and published on the network platform of the "China Judgements Online". Any person, whether or not having a connection with the case, may read judgments on the platform.

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

In China, a lawyer who holds his/her People's Republic of China (PRC) practicing License and Power of Attorney can act on behalf of the client and deal with matters related to the case. There are no restrictive rules in China for lawyers appearing in court.

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

As for the "limitation periods for commencing civil claims", it is called "limitation of action" in Chinese law. In China, there are three types of "limitation of action": the limitation of ordinary lawsuit, the limitation of short-term lawsuit and the limitation of long-term lawsuit.

According to Article 188 of the General Principles of Civil Law of China, "The limitation of action of an application to a people's court for protection of civil rights is three years, unless otherwise provided by law. The limitation period are calculated from the date on which the right holder knows or ought to be aware of the damage to the rights and the obligor..." Therefore, the period of limitation of ordinary lawsuit is three years.

In addition, the limitation of action in certain specific types of cases is shorter than that of ordinary action. Article 136 of the General Principles of Civil Law provides a time limit of one year for the following types of case:

a. compensation for bodily injury,
b. damages as to breach of terms as to quality of goods;
c. unpaid rental; and
d. property damage or loss.

The limitation of action for certain types of cases is longer, for example, the Contract law of the People's Republic of China Art. 129 stipulates that the limitation of action of an international contract for sale of goods and technology import and export contract is 4 years; the Insurance Law Art. 26 stipulates that the limitation of the claim for insurance payment is 5 years.

In Chinese law, there is a concept of "the longest limitation of action". According to the Civil Law of the People's Republic of China Art. 188, "If it has been more than 20 years since the date of the damage, the People's Court will no longer protect." It could therefore be inferred that "the longest limitation of action" is 20 years.

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

According to Chinese law, there are no particular pre-action procedures for parties to comply with before commencing proceedings, except for cases of labour disputes. In accordance with the Law on Mediation and Arbitration of Labor Disputes of the People's Republic of China Art 5, "The parties may apply to the Conciliation Organization for Mediation when a labor dispute

Yongming Shen
Senior Partner, Dentons

Yongming Shen was graduated from Nanjing University in 1986 with a major in Law. As a senior partner, He is a member of Standing Committee, as well as the director of Nanjing Office. He is competent to handle all kinds of civil and commercial cases, contract disputes involving financial institutions, disposal of banks' troubled assets, and other litigation and non-litigation matters, and in particular, significant and difficult litigation. He has practiced law for 32 years and was successively awarded by Jiangsu Lawyers Association honorary titles "Top Ten Lawyers" and "Distinguished Lawyer" and "Famous Lawyer in Jiangsu".

Youkun Chen
Senior Partner, Dentons

Mr. Youkun Chen formally qualified to practice in the legal profession in 2002. Since then, he has successfully represented more than 600 civil and commercial clients in the fields such as international trade, real estate, cooperative management, equity disputes, and handled nearly 100 cases such as asset restructuring, enterprise restructuring, asset acquisition, corporate bankruptcy, bond issuance, short-term financing bills and medium-term notes, etc. He has been advised more than 50 large and medium-sized companies and government agencies as the legal adviser and served as an independent chairman of a listed company. Mr. Chen is experienced in Corporate M&A and Management, Financial Securities, Construction and Real Estate, International Trade, etc.

arises and the parties do not wish to negotiate, negotiate or reach a settlement agreement. If the parties do not wish to mediate, mediate or fail to perform a conciliation agreement, he may apply to the Labor Dispute Arbitration Commission for arbitration; unless otherwise as provided in this law, a lawsuit may be brought to the People's Court." It is understood that the party's pre-action procedure for bringing a lawsuit to the labor dispute is that the dispute has been first examined by the labor arbitration and the arbitration award has been made.

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

1. We understand that the question of "necessary timetable for civil procedure" in the title refers to the limitation of civil Procedure.

The trial limit of the first instance case according to the Civil Procedure Law of China Art. 149 is as follows:

"Trial of a case for which a People's Court applies general procedures for trial shall be completed within six months from the date of establishment of the case file. Where there is a need for extension of time under special circumstances, the approval of the president of the court is required, an extension of time of six months may be granted; where there is a need for further extension of time, the approval of the higher-level People's Court is required." Article 161 stipulates that: "People's Courts applying simplified procedures to try cases shall complete trial within three months from the date of establishment of case file." The first trial time period limit is usually 6 months, and the individual summary procedure case is 3 months.

The trial period limit of the second instance case is as follows: According to the Civil Procedure Law of China Art. 176, "A People's Court trying an appeal case against a judgment shall complete the trial within three months from the date of establishment of case a case file for the trial of second instance. Where there is a need for extension of time under special circumstances, the approval of the President of the Court is required. A People's Court trying an Appeal case against a ruling shall make a ruling of final instance within 30 days from the date of establishment of a case file for the trial of second instance." It is clear that the time limit of an appeal case against a judgment is 3 months, and the time limit of hearing an appeal against a ruling is 30 days.

For the trial and supervision cases of the examination limit under the Civil Procedure Law of China Art. 204 is as follows: "The People's Court shall conduct examination within three months from the date of receipt of the application form for re-trial, where the application complies with the provisions of this Law, the People's Court shall rule on re-trial; where the application does not comply with the provisions of this Law, the People's Court shall rule that the application be thrown out. Under special circumstances where there is a need for an extension of time, the approval of the president of the court is required." It is known that the trial supervision of the case is limited to three months. At the same time, according to China's Civil Procedure Law Art. 207: "In the event of a case subject to re-trial by a People's Court pursuant to the procedure for trial supervision, where the judgment or ruling which has come into legal effect is made by the court of first instance, the case shall be tried pursuant to the procedure for trial of first instance...where the judgment or ruling which has come into legal effect is made by the court of second instance, the case shall be tried pursuant to the procedure for trial of second instance..."

The trial limits of foreign-related cases; according to the Civil Procedure Law of China Art. 270 reads: "The period for trial of foreign-related civil cases by People's Courts shall not be subject to the restrictions stipulated in Article 149 and Article 176 of this Law." It is clear that there is no definite time limitation on foreign cases.

Yan Cui
Senior Partner, Dentons

Yan Cui's practice involves various aspects of corporate operation, including compliance and risk control, design of equity structure, separation and merger, acquisition reorganization as well as dissolution and liquidation of companies. Moreover, he is able provide customized and multi-faceted litigation and arbitration solutions for major commercial disputes.

He has advised Fortune 500 and China's top 500 companies on domestic commercial litigation and arbitration, and provided personalized advice to large-scale investment firms, real estate construction companies and for commercial disputes in North-West China. He has also been involved in services to safeguard clients' investment rights in Beijing, Shandong, Hebei, and Ningxia, including providing foresight on future trends in clients' business operation, action roadshows and legal technical support. He graduated from Law School of China University of Political Science and Law with a Juris Master degree.

Lanchun Zhu
Senior Partner, Dentons

Lanchun Zhu holds a J.M. degree of Nanjing University and a J.D. degree of Wuhan University.

During his 24 years of practice, Mr. Zhu has undertaken many significant and sophisticated civil litigations in commercial dispute resolution and commercial law. He specializes in high-end business dispute resolution analysis, risk precaution and legal solutions, as well as business transaction modes of legal regulation and risk precaution. Many of these cases have influenced the legal precedents in China.

His book 'Making A Decision': Points and Thinking in the Civil Trials of the Supreme People's Court has won great credits among legal professors. Mr. Zhu dedicates himself to the development in legal theory and has published many academic papers and legal reviews in China's top-tier legal journals such as Civil and Commercial Law Review and Intellectual Property Case Study.

2. There is no such criteria in our law for the "necessary timetable for instituting proceedings". Normally, if the parties comply with the Civil Procedure Law Art. 119 stating that: "Filing of a lawsuit shall satisfy the following criteria:

a. The Plaintiff is a citizen, a legal person or an organization that has a direct stake in the case;

b. There is/are specific Defendant(s);

c. There are specific claim(s) and facts and reasons; and

d. The lawsuit falls under the scope of civil lawsuits by People's Courts and the jurisdiction of the People's Court which accepts the lawsuit,

hen the parties can file a lawsuit, and the court shall file a case.

Of course, when the litigants bring up the lawsuit, they cannot exceed the time-frame for the limitation of action prescribed by law, which is referred to in the answer to the 5th question.

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

Under Chinese law, the Chinese courts do not require a party to submit documents to the other party. However, in the course of the trial, in order to facilitate the identification of facts, the Court may instruct the parties to prove the facts of the case, and if the party with the burden of proof does not provide the evidence, then it needs to bear the negative consequences of the lack of proof.

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

China does not have the relevant legal provisions regarding privileged documents.

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

1. In the course of the trial, the Chinese courts have more flexible forms of evidence exchange. In cases where the evidence is more complex and complicated, the court will require both sides to exchange evidence before the trial. The exchange of relevant evidence may be put forth orally or in writing, and there is no mandatory requirement regarding its formality.
2. In the case of the Chinese courts, there is no oral presentation of evidence. According to our grasp of the status quo of China's trial procedure, the so-called oral presentation of evidence in the subject can be admitted in the following two situations:
   a. The party makes an admission. However, even the expression of the parties concerned will be recorded in writing by the court.
   b. Witness testimony. According to the provisions of the Chinese law, the testimony of the witness shall be in writing.

Therefore, the Chinese Courts during the trial, even if there is oral presentation of the evidence, the evidence, it will be recorded in the form of written text.

3. Both parties have the right to cross-examine the case concerning the relevant witnesses

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

In the field of litigation in our country, there is no special type of "expert designation". But in a similar vein, there is an expert witness system in China. The so-called expert witness refers to a witness who testifies on the special issues involved in the case with persons with specialized knowledge. According to the Supreme People's Court's "Several Provisions on Evidence in Civil Proceedings," Article 61 stipulates an expert witness system: "A party may apply to a people's court for one or two persons with specialized knowledge to appear in the court to explain the special issue of the case. Where the application is allowed, the costs are borne by the party making the application."

In accordance with the foregoing, if the case involves expert witnesses, they should, in addition to complying with the requirements that all witnesses should follow, appear before the court to explain their area of specialization before the Court makes a determination on the expert's opinion.

11. What interim remedies are available before trial?

We understand that the term 'interim remedies' to refer to temporary measures that the Court may take in the course of proceedings. Meanwhile, there are two types of interim remedies in China, which are pre-litigation measures and post-litigation measures. Pre-litigation measures refers to matters before instituting the lawsuit as stated below:

Generally, according to the Civil Procedure Law Art 101: "Where an interested party whose legitimate rights and interests, due to an emergency, would suffer irreparable damage if the party fails to petition for property preservation promptly, may, before instituting a lawsuit or applying for arbitration, apply to the people's court at the locality of the property, the domicile of the party on which the application is made, or the people's court with jurisdiction over the case, for the property preservation measures..."The party fills a security application, requests the Court to determine the preservation of its property, applying to the Court to allow certain acts or prohibiting it from certain acts. However, in practice, the case of property preservation before litigation although allowed is almost non-existent before the interim order to act or prohibit the conduct of acts before the case of action.

In a special area, such as Intellectual Property, according to Civil Procedure Law, several provisions of the Supreme People's Court on the Issues Concerning the Application of Law to Terminating Infringement upon Patent Prior to Litigation and Interpretation of the Supreme People's Court on the Application of Law for Stopping the Infringement upon the Right to the Exclusive Use of a Registered Trademark and Preserving Evidence before Initiating Litigation, allow the parties whose intellectual property (IP) is in danger of being trespassed to apply for pre-litigation interim measurement to protect their rights, including:

1. Pre-litigation injunction (preservation of IP), (such injunctions are used more in IP cases as compared to the general civil and commercial cases),.
2. Pre-litigation evidence preservation; and
3. Pre-litigation asset preservation.

12. What remedies are available at trial?

Where the lawsuit has been initiated, the general remedy are "Preservation of the Lawsuit" and "Prior Enforcement".

For the preservation of the lawsuit, according the Civil Procedure Law Art 100 states, "For cases in which the action of a party to the lawsuit or any other reason causes difficulty in enforcement of a judgment or causes other harm to the litigants, a People's Court may, pursuant to an application by a counter party litigant, rule on preservation of its property or order the counter party to undertake certain acts or prohibit the counter party to undertake certain acts; where the litigants do not make an application, a People's Court may rule that preservation measures be adopted where necessary..." The parties may, after the indictment, bring the lawsuit to the court as a remedy to guarantee the future execution.

Guoqiang Zheng

Senior Partner, Dentons

Guoqiang Zheng graduated from the China University of Political Science and Law in 1988. With his 28 years' experience, he is known as one of the most influential lawyers in Heilongjiang and the three eastern provinces. He served as director of Heilongjiang Bar Association for several sessions, as well as the director of the Professional Committee. He served as visiting professor in Law School of Heilongjiang University and Law School of Harbin University of Science and Engineering. He served as director of Heilongjiang Bar Association and director of Lawyer Award and Disciplinary Committee for several sessions. Mr. Zheng has served as a legal adviser to large enterprises and government departments all the year round, and has a wealth of successful experience in commercial litigation, company law, labor law, and state-owned enterprise restructuring. He has published more than a hundred articles and case articles.

Fulong Sun

Senior Partner, Dentons

Fulong Sun holds the post of the Supreme People's Court and NDRC's lawmaking specialist of the Standing Committee of Provincial People's Congress, decision specialist of legislative bureau of Hebei Province and Finance department, the commissioner of Provincial law Graduate Teaching Guidance Committee, the permanent legal advisor of Provincial Party School, provincial Procuratorate, and Department of Commerce and other posts. And he also associate professor and graduate supervisor in Peking University, Hebei University of Economics and Business, Railway University and so on.

With 25 years experiences, he specializes in real estate, construction industry, financial industry, company, intellectual property and so on which is the major civil and commercial jurisdiction, arbitration, and criminal defense. State-owned enterprise and government's legal service which is the non-litigation business. He has gained an unparalleled reputation and excellent performance on legal affairs.

For prior enforcement according the Civil Procedure Law Art 106: "A People's Court may rule on prior enforcement pursuant to an application of a litigant in the following cases:

a. Recourse of alimony, payment of maintenance, payment of child support, pension, medical fees, etc.;

b. Recourse of labor remuneration; or

c. There is a need for prior enforcement under urgent circumstances."

The cases listed above can only be enforced if the following conditions are satisfied under the Civil Procedure Law Art 106 which states: "The following criteria shall be satisfied for ruling of prior enforcement by a People's Court:

a. The rights and obligations relationship between the litigants is clear, failure to grant prior enforcement shall have a serious impact on the applicant's livelihood or manufacturing and business activities; and

b. The respondent has the capacity for performance."

The parties may apply to the court for enforcement as a means of relief.

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

Where the executed person (judgment debtor) refuses to comply with the judgment, the court may take the following coercive measures (methods)

1. According to the Civil Procedure Law Art 242, the people's Court shall have the right to inquire with the relevant units of the assets such as deposits, bonds, shares and fund shares of the executed person. The people's Court shall have the right to seize, freeze, transfer and change the property of the executed person according to different circumstances.
2. Under the Civil Procedure Law Art 243, the Court may detain and extract from the wages, bonuses, various securities and other lawful income of the executed person the judgment debt of the person to whom the obligation is owed;
3. According to the Civil Procedure Law Art 244, the Court shall have the power to seize, detain, freeze, auction and sell the property of the executed person, but it shall retain the essentials for the executed person and his dependents.

At the same time, the court may impose a fine or detention and submit its personal information to the credit system (blacklist) for refusing to carry out the effective judgment, and may also prosecute in its criminal capacity for refusing to carry out its orders.

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

The winning party shall bear two types of expenses, including:

i. litigation fees that shall be paid by a party to the people's court; and

ii. lawyer's fee and transportation fee.

In terms of the litigation fee, the people's court may determine the amount of the litigation fees for the winning party: where the litigation fee shall be borne by the losing party, it is a proportion of the award given to the successful litigant.

With respect to the lawyer's fee and the transportation fee, generally, the courts are not in favor of the winning party securing these fees from the losing party, but if the case is based on IP, there is a special agreement under the law, or the parties to the contract may have a special agreement on this matter that the litigation fee shall be borne by the losing party.

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

1. China's trial procedure adopts the second instance final trial system. Therefore, in order to obtain the final judgment, after the judgment of the first instance is made, the party concerned shall appeal to the higher-level court in order to obtain the final judgement.
2. The basis conditions for appealing are: there is a judgement from the first instance court; it is still within the limitation period.

16. Are contingency or conditional fee arrangements permitted between lawyers and clients? Is third-party funding permitted?

The Chinese Administrative Measures on Fees for Lawyer Services Art 11 states: "In the handling of a civil case involving property relationship, if the client still requires to implement the risk agency after being informed of the government-guided pricing, the law firm may charge fees on the basis of risk agency, unless it is under any of the following circumstances: (a) marriage and inheritance; (b) claims for social security benefits or minimum living standard security benefits; (c) claims for alimony, allowance, maintenance expenses, pension, relief, work injury compensation; and (d) claims for payment of labor remuneration, etc." and Article 12 states that "Charging of contingency fees shall be prohibited for criminal litigation cases, administrative litigation cases, State compensation cases and collective litigation cases", our country agrees with the risk agency fee arrangement between the client and the lawyer in principle, except for the special case types listed in the above articles".

It is the scope of party and third-party autonomy to allow third-party financing proceedings. Where the parties agree with the third party, the third party may bear the costs of litigation for the parties concerned, and there is no express restriction in the law;

Our law does not provide for allowing such practice, nor is there any precedent, as to whether the grant maker (funder) should be allowed to share in the proceeds of the judgment.

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

Chinese law does not have the concept of "collective action", but the term "joint action" is similar to the collective action under the Chinese Civil Procedure Law.

According to the Chinese Civil Procedure Law Art 52: "Where a party or both parties to a lawsuit comprise(s) two or more persons, and the subject matter of litigation is common, or the subject matters of litigation are the same type, the People's Court deemed that the lawsuit may be tried as a Joint Action, the Court may try the lawsuit as a joint action upon consent by the litigants."

According to Article 53: "In the case of a joint action where there are multiple persons comprising one party to the lawsuit, the litigants may elect a representative to participate in the proceedings. The litigation actions of the representative shall be binding upon the litigants he/she represents; for change of representative, waiver of the claims of the action or confirmation of the claims of the counter-party litigants, settlement, the consent by the litigants he/she represents is required." Furthermore, according to Article 54: "Where the subject matter of litigation is common, there are multiple persons comprising one party to the lawsuit but the number of persons is not confirmed at the time of filing of lawsuit, the People's Court may issue a public announcement, stating the facts of the case and the claims, and notify the rights holders to register with the People's Court within a stipulated period."

Under the above-mentioned law, it is known that in Chinese law, for the same subject or

Jiacai Tan
Partner, Dentons

Jiacai Tan is the founding editor-in-chief of the Dentons Cross-border Dispute Resolution Journal and the director of ASEAN comparative law research centre. He was admitted to the Bar in 2001, and has over 15 years practice experience and a broad background in securities and capital markets, intellectual property and technology, both from a counselling, transactional and litigation perspective. Tan has built a reputation as one of the leading lawyers in International Dispute Resolution and IP transactions as well as cross-border commercial.

He has degrees from Temple University and the Chinese Academy of Social Science. He served as an Adjunct professor of Law at Shanghai University of Political Science as well as an Arbitrator of Hefei Arbitration Commission and Shijiazhuang Arbitration Commission.

Tan is the Chief Author of 'Law and Practice of International Dispute Resolution' and has published numerous law review articles in the area of international arbitration and technology license.

Johnson Zhang
Senior Partner, Dentons

Mr. Zhang Jian has practiced as a professional attorney for 18 years. He has a Master's Degree in Law and a Bachelor of Industrial and Civil Construction. He is an experienced manager and employer of some distinguished constructing and real estate developing enterprises. He has been working on providing professional legal services to the clients of constructing and real estate developing industries. Mr. Zhang Jian is also a writer and researcher for solutions in complex legal matters. He enjoys reading and creative thinking, as well as being involved in various industries. He works well on designing standards for settling conflicts and arguments between clients. He has written about 40 articles of dealing with litigant practices. Mr. Zhang Jian teaches the drafting of legal documents and how to review contracts in a large legal training institution, which has increased his capability and influence in his chosen sphere of law.

subject is the same kind of multi-party lawsuit, called the "joint action". If the number of joint proceedings is higher, the representative may be selected to carry out the lawsuit. When the number of prosecutions is uncertain, it can be registered in the form of a notice.

Public interest litigation is the type of litigation in the joint action. According to the China Civil Procedure Law Art 55, "For acts which harm public interest such as environmental pollution, infringement of the legitimate rights and interests of multiple consumers, etc., the authorities stipulated by the law and the relevant organizations may file a lawsuit with a People's Court. Where a People's Procuratorate discovers in the course of performing its duties any act which compromises public interests, such as damage to the ecological environment and resource protection, infringement upon the legitimate rights and interests of multiple consumers in terms of food and drug safety, in the absence of the authorities or organizations mentioned in the preceding paragraph or where the authorities or organizations mentioned in the preceding paragraph do not file a lawsuit, the people's Procuratorate may file a lawsuit with a People's Court. If the authorities or organizations mentioned in the preceding paragraph have filed a lawsuit, the People's Procuratorate may support the lawsuit."

According to the above law that the law does not provide the right to the lawyer to initiate the joint action. However, it does not exclude the lawyer being as one of the litigants in the common lawsuit, also it does not exclude the lawyer being elected as a representative.

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

A. Conditions for the recognition and enforcement of extraterritorial judgements

1. There are treaties or reciprocal relations

According to the Civil Procedure Law of the People's Republic of China Art. 281 and 282, and the Opinions of the Supreme People's Court on Issues Concerning the Application of the Civil Procedure Law of the People's Republic of China Art. 544, 546 and 548, a foreign judgment can be recognized and enforced in accordance with the judicial assistance agreement and with the principle of reciprocity. Generally, according to these provisions, to recognize and enforce a foreign judgment shall meet the following conditions:

i. Qualified jurisdiction conditions, that is, a foreign court has jurisdiction over the case.

ii. The judgments made by a foreign court are legally binding;

iii. The proceedings are fair and impartial;

iv. The foreign court that rendered the judgement has no "jurisdictional conflict" with the Chinese Court in the matter;

v. The foreign judgement and ruling shall not be contrary to the principle of the Chinese law and the state sovereignty, security and social public interests;

vi. Judicial assistance and reciprocal relations exist in the country of the court where the judgment is made and our country. ^

2. Where there are no reciprocal agreements between the foreign country and China, the recognition and enforcement of divorce judgments in foreign courts requires special conditions which shall be met.

When there is no legal assistance agreement or reciprocal relationship between the country and China, the foreign divorce judgment cannot be recognized and enforced according to the Chinese Civil Procedure Law and other relevant provisions, but an application can be made for recognition and enforcement based on the Provisions of the Supreme People's Court on Relevant Issues Concerning the Accepting of Applications for Recognition of Divorce Judgments by Foreign Courts by People's Courts.

i. Where there is recognition of the content, the Court recognize the verdict only in relation to the identity of the judgement.

   Where there is no mutual legal assistance agreement or reciprocal relationships between the country of the referee and our country, Chinese Courts may only recognize the decision of the foreign Court concerning the relationship between husband and wife in the divorce judgement.

ii. The applicant must be either a Chinese citizen or have a former spouse who is a Chinese citizen.

   When the applicant is a Chinese citizen, the Chinese court does not require the former spouse to be a Chinese citizen, but if the applicant is a foreign citizen, the former spouse must be a Chinese citizen, or the application for recognition will not be recognized or enforced by China.

B. Procedures for the recognition and enforcement of extraterritorial judgements

According to the Civil Procedure Law of China Arts. 281 and 282:

i. The judgments and rulings of our people's courts and foreign courts are to be recognized and enforced in each other's country, and may be applied by the parties directly to the other courts with jurisdiction (in our country, it is the Intermediate People's Court with jurisdiction), or by the court. However, in the case of a court request, according to the provisions of Article 281 of the Civil Procedure Act, it must be based on

Yinghui Yin
Senior Partner, Dentons

An accomplished veteran attorney licensed in 1995, Mr. Yin has handled more than 2000 cases in his successful career. He is currently on retainer by the Hebei Xiong'an New Area Management Committee and several respected private enterprises, providing his clients essential legal consultation services. With a firm comprehension of law, an abundance of litigation experience, a unique point of view, a thorough insight, an avant-garde mentality, eloquent communication skills, and a highly moral and ethical practice, Mr. Yin has promoted, facilitated, and successfully defended his clients' rights and interests. He is praised and widely acknowledged by many organizations, institutions and enterprises in various sectors of society.

a treaty of mutual restraint or reciprocity of existence.

ii. If the foreign judgement and ruling needs to be recognized and enforced by a Chinese court, whether by direct application by a party or through a foreign court, the court shall review the principles of international treaties or reciprocity by which it is jointly bound.

iii. If after examination, the foreign Court finds that the judgment of the foreign court does not violate the basic principles of our law or does not endanger the national sovereignty, security and public interests of our country, the foreign court should recognize its validity and issue an executive order. Otherwise, it will not be recognized and enforced.

19. What are the main forms of alternative dispute resolution? Which are the main alternative dispute resolution organizations in your jurisdiction?

There are two types of mainly alternative dispute resolution in China. One is social mediation, including civil mediation, labor mediation, administrative mediation, parties negotiation, arbitration or labor arbitration; another one is judicial mediation, including litigation mediation and settlement.

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

Currently, there is no reform law and regulation bill on dispute resolution.

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

At present, the main features of the dispute resolution field in China are:

a. The number of dispute resolution cases is very substantial, and the ratio between the number of cases and the disposition of dispute resolution agencies is not coordinated;

b. The dispute resolution is common in public life;

c. The amount of dispute resolution cases is rising;

d. The dispute resolution case processing period is too long, the time taken and the economic cost of dispute resolution are too high;

e. In the dispute settlement case, the litigant has a higher degree of reliance on the lawyer.

About the Authors:

Yongming Shen
Senior Partner, Dentons
E: yongming.shen@dentons.cn

Youkun Chen
Senior Partner, Dentons
E: youkun.chen@dentons.cn

Yan Cui
Senior Partner, Dentons
E: yan.cui@dentons.cn

Lanchun Zhu
Senior Partner, Dentons
E: lanchun.zhu@dentons.cn

Guoqiang Zheng
Senior Partner, Dentons
E: guoqiang.zheng@dentons.cn

Fulong Sun
Senior Partner, Dentons
E: fulong.sun@dentons.cn

Jiacai Tan
Partner, Dentons
E: jiacai.tan@dentons.cn

Johnson Zhang
Senior Partner, Dentons
E: zhang.jian@dentons.cn

Yinghui Yin
Senior Partner, Dentons
E: yinghui.yin@dentons.cn

W: www.dentons.cn
A: 7/F, Building D, Parkview Green
FangCaoDi, No. 9
Dongdaqiao Road
Chaoyang
Beijing, China
T: +86 10 58137799
T: +86 10 58137778

Jurisdiction: India

Firm: Singhania & Partners LLP

Authors: Ravi Singhania, Shambhu Sharan, Madhu Sweta and Yaman Kumar

Singhania & Partners LLP
Solicitors & Advocates

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

The Indian Judicial/Court System is one of the oldest legal systems in the world today. The framework of the current legal system has been laid down by the Indian Constitution and the judicial system derives its powers from it. There are various levels of judiciary in India—different types of courts, each with varying powers depending on the tier and jurisdiction bestowed upon them. They form a hierarchy of importance, in line with the order of courts in which they sit, with the Supreme Court of India at the top, followed by High Courts of respective states with District Judges sitting in District Courts and Magistrates of Second Class and Civil Judge (Junior Division) at the bottom.

Hierarchy of Courts and Judges in India

a. The District Court of India are established by the State Government in India for every district or more than one district taking into account the number of cases, and population distribution in the district. These courts are under the administrative control of the High Court of the State to which the district concerned belongs. The District Court is presided over by one District Judge appointed by the State Government. In addition to the district judge there are many Additional District Judges and Assistant District Judges depending upon the workload.

b. In every state, besides the High Court there are number of judicial Courts to administer justice. These courts function under the complete control and supervision of the High Court. A state has got exclusive Legislative competence to determine the constituent organization and territorial jurisdiction of all courts subordinate to the High Court. The organization of subordinate courts throughout the country is generally uniform. There are two type of law courts in every district; (i) Civil Courts (ii) Criminal Courts

c. The court of the District Judges is the highest civil court in a district. It exercises both judicial and administrative powers. It has the power of superintendence over the courts under its control. The court of the District judge is located at the district headquarters. It has power of trying both civil and criminal cases. Thus, he is designated as both the District and Sessions Judge.

d. Below the court of the District Judge are the courts of Sub-judge, Additional Sub-Judge and Munsif Courts, which are located in the sub-divisional and district headquarters. Most of the civil cases are filed in the court of the Munsif. A case can be taken in appeal from the court of the Munsif to the court of the sub-Judge or the Additional Sub-Judge. Appeals from the courts of the sub-Judges and Additional sub-Judges shall lie in the District-Court. The Court of the District Judge has both original and appellate jurisdiction. Against the decision of the District judge an appeal shall lie in the High Court.

e. Civil Court has been further categorized on the basis of Jurisdiction which is discussed as follows:

i. Subject Matter Jurisdiction: It can be defined as the Authority vested in the court to try and hear cases of the particular type and pertaining to a particular subject matter.

ii. Territorial Jurisdiction: The court can decide within the geographical limits of a court's authority and it cannot exercise authority beyond that territorial and geographical limits.

iii. Pecuniary Jurisdiction: Pecuniary Jurisdiction is related to money, whether a court can try cases and suits of monetary value/amount of the case or suit in question.

iv. Appellate Jurisdiction: It refers to the authority of a court to rehear or review a case that has already been decided by a lower court. Appellate jurisdiction is generally vested in higher courts. In India, both the High Courts and the Supreme Court have appellate jurisdiction to hear matters which are brought in the form of appeal before them. They can either overrule the judgment of the lower court or uphold it.

2. Are court hearings open to the public? Are court documents accessible by the public?

a. Court hearings are open to the public - India has an open court system till the court proceedings are converted into an 'in-camera trail'. Where there is an open court hearing, litigants are entitled to know the progress in their case. The concept of access to justice provides that though a litigant is not in court, they are able to know what is happening in their case inside the court. Barring few exceptions like hearings in a rape case, the courts are open to the public for all hearing and the Supreme Court in order to facilitate this concept has even started to frame appropriate guidelines for allowing live streaming of the proceedings so that the citizens have the right to information and matters of constitutional and national importance can be live-streamed for awareness.

b. Court judgments are public records but not court documents. If a case is heard by a court of India, no one can argue that the opinion should not be published and viewable by all, unless the court itself expressly says it cannot be published or a law says it cannot. The decisions of the Supreme Court are the law of the land, and all citizens can read their decisions. Not just the Supreme Court, courts today are publishing their judgments and orders on the Internet. The Copyright Act s 52(1)(q)(iv) states that publication of court judgments does not constitute an infringement of copyright.

In R. Rajagopal vs State Of T.N on 7 October, 1994 where the Supreme Court defined the scope of the right to privacy, it was stated that publication of court records will not constitute any violation of the right to privacy. It held:

'The rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interests of decency [Article 19(2) an exception must be carved out to this rule, viz., a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being publicized in press/media'

Ravi Singhania
Managing Partner, Singhania & Partners

Ravi Singhania is India's renowned corporate-M&A, lawyer according to the researches by Chambers & Partners, Legal 500 and Asialaw. He is amongst top legal luminaries of India in surveys conducted by Lexis Nexis Publications and Indian Corporate Counsels Association. He provides both hands-on legal advice and overall strategic inputs while drafting and negotiating contracts for complex transactions to serve clients' interests in all the scenarios. Ravi is a board member in CRISIL Ltd., Asset Care Enterprise, McGraw-Hill, American Bureau of Shipping, and National Instruments. He is also a charter member of TiE- Delhi chapter which is an association of start-ups worldwide and was founded in Silicon Valley. Also, he has authored a book titled "Drafting of Contracts- Templates with Drafting Notes" published by Bloomsbury Professionals.

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

A lawyer can appear in any matter on behalf of its client provided such lawyer has filed a vakalt or memo for the same client before the Court of Law. A vakalt or memo is a privileged document signed by the client authorizing only one lawyer or two-lawyers (in case of a firm) to represent his interest before the Hon'ble Court. Any other lawyer will not appear in any matter where another advocate has filed a vakalt or memo for the same party. In such a case, a lawyer who is not able to present the consent of the advocate who has filed the matter for the same party must apply to the court to be allowed to appear on behalf of the client. He shall in such application mention the reason as to why he could not obtain such consent. He shall appear only after obtaining the permission of the Court.

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

The law relating to Law of Limitation to India is the Limitation Act 1859 and subsequently Limitation Act 1963 which was enacted on 5th of October, 1963 and which came into force from 1st of January, 1964 for the purpose of consolidating and amending the legal principles relating to limitation of suits and other legal proceedings. According to the Limitation Act 1963 s 2(j), 'period of limitation' means the period of limitation prescribed for any suit, appeal or application by the Schedule,

Shambhu Sharan

Partner, Singhania & Partners

Shambhu Sharan with an experience of almost two decades is leading one of the dispute resolution teams of the firm. Shambhu is known for his in-depth knowledge on the subject of arbitration and is trusted for saving multimillion dollars of clients by his winning arguments in courts.

Clients repose immense faith in his expert advice and hard work as he has been able to render results in their favor. He is considered a go to man in Alternative Dispute Resolution, bank guarantee disputes, writ petitions, Supreme Court matters, recovery suits, dealership disputes, dishonoring of cheques issues- representing both plaintiffs and petitioners, and due diligence of real estate.

He is currently representing and victoriously leading renowned infrastructure companies like Punj Lloyd and IJM Corporation Berhad, Malaysia in their ongoing arbitration and litigation proceedings in various fora for their projects across India. He is also legal counsel to Technopak Advisers Pvt. Ltd. in an International Arbitration between the client and contractor of Bill and Melinda Gates Foundation for a vaccine delivery initiative program.

Shambhu appears before Arbitral Tribunals (domestic and international) and Appellate Tribunals like Competition Appellate Tribunal (COMPAT) and Debt Recovery Tribunal (DRT) besides National Consumer Dispute Redressal Commission. There are several ministries, public sector undertakings, government authorities, banks, domestic as well as foreign companies amongst his clients. Some of his other notable clients are Ricoh India Limited, Ssangyong Engineering and Construction Co. Ltd., Tata McGrawHill Education India Pvt. Ltd., Railtel Corporation, New Holland Fiat India Ltd., Wimberly Allison Tong & Goo (UK) Ltd, Reckitt Benckiser (India) Ltd.

He has also authored articles for renowned print media publications like Times of India, and Construction World Magazine besides a number of reputed legal journals.

and 'prescribed period' means the period of limitation computed in accordance with the provisions of this Act.

The Law of Limitation signifies to prevent from the last date for different legal actions which can take place against an aggrieved person and to advance the suit and seek a remedy before the court. The limitation periods for commencing civil claims in India are categorized as;

a. The limitation period is reduced from a period of 60 years to 30 years in the case of suit by the mortgagor for the redemption or recovery of possession of the immovable property mortgaged, or in case of a mortgages for the foreclosure or suits by or on the behalf of Central Government or any State Government including the State of Jammu and Kashmir.

b. Whereas a longer period of 12 years has been prescribed for different kinds of suits relating to immovable property, trusts and endowments, a period of 3 years has been prescribed for the suits relating to accounts, contracts and declarations, suits relating to decrees and instruments and as well as suits relating to movable property.

c. A period varying from 1 to 3 years has been prescribed for suits relating to torts and miscellaneous matters and for suits for which no period of limitation has been provided elsewhere in the Schedule to the Act.

d. It is to be taken as the minimum period of seven days of the Act for the appeal against the death sentence passed by the High Court or the Court of Session in the exercise of the original jurisdiction which has been raised to 30 days from the date of sentence given.

e. The Limitation Act 1963 has a very wide range considerably to include almost all the Court proceedings. The definition of 'application' has been extended to include any petition, original or otherwise. The change in the language of the Limitation Act 1963 ss 2 and 5 includes all the petition and also application under special laws.

f. The Act has been enlarged with the definition of 'application', 'plaintiff' and 'defendant' as to not only include a person from whom the application. The plaintiff or defendant as the case may be may also be a person whose estate is represented by an executor, administrator or other representatives.

g. According to the Civil Procedure Code ss 86 and 89, it requires the consent of the Central Government before suing foreign rulers, ambassadors and envoys. The Limitation Act 1963 provides that when the time obtained for obtaining such consent shall be excluded for computing the period of limitation for filing such suits.

h. The Limitation Act 1963 with its new law signifies that it does not make any racial or class distinction since both Hindu and Muslim Laws are now available under the law of limitation as per the existing statute book. In the matter of Syndicate Bank v. Prabha D. Naik AIR [2001] SC 1968, the Supreme Court has observed that the law of limitation under the Limitation Act 1963 does make any racial or class distinction while making or indulging any law to any particular person.

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

As soon as a dispute is imminent, parties need to consider a number of factors which can be regarded as pre-action procedures;

a. One is to issue a forewarning to the other side by issuing a Legal Notice which specifies the cause of action, the quantum of loss if any and intimation to the other party of the alleged wrong-doing. The said Legal Notice which is usually issued through a Lawyer should carry a diligent time-line such that the other party can peruse the same and take corrective measures if any within the said period. The Notice shall also state that

in case of no rebuttal from the other party, a suit shall be instituted in the Court of law.

b. The other factor is to consider if at all, there is a reasonable cause of action because the court will strike out a claim which fails to disclose a reasonable cause of action.

c. The party instituting civil proceedings shall also consider who the proper defendant is and whether it is worth pursuing the defendant at all by checking their financial means. If the defendant does have assets, it may be relevant if these are located out of the jurisdiction and if so, how easy it will be to enforce judgment against these assets.

d. The party instituting civil proceedings may need to consider whether any emergency procedures are required before the claim is commenced, for example to restrain a party from moving assets out of the jurisdiction, or whether other pre-action procedures are necessary, such as making an application for pre-action discovery.

e. The party instituting civil proceedings will also need to establish whether or not the claim is subject to any limitation period.

f. The party instituting civil proceedings shall need to assess the claim amount in case of a recovery suit and accordingly enquire about the amount of the Court fee which shall be required to institute such suit in the Court of law.

g. If the dispute emerges out of a contract between the parties, then the party instituting the civil proceedings needs to check and affirm if any specific pre-action procedure is envisaged in such contract. Usually contracts may envisage mediation or conciliation procedures which are mandatory in nature and compliance of which is necessary for any party before they start to institute such civil proceedings.

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

The typical procedure for trial of a civil case and its different stages is governed as per the provisions of the Code of Civil Procedure 1908 ("CPC") and the Rules of the respective Courts.

A Civil Suit is instituted by filing of a plaint before the Civil Court of competent jurisdiction. At the outset, it is important to ascertain the cause of action, the parties against which the cause of action has arisen and the Court which is competent to hear the matter i.e. the Court where the suit will be instituted.

Typical stages of a Civil Suit as per the provisions of CPC are as under:

a. Institution of suit: As per the CPC s 26(1), a civil suit is instituted by the presentation of a plaint accompanied with an affidavit in support of the facts pleaded therein. The particulars to be contained in a plaint have to be as provided under Order 7 of CPC which states that a plaint shall contain the following:

   i. Name of the Court in which the suit is to be filed;

   ii. Name, description and place of residence of the Plaintiff;

   iii. Name, description and place of residence of the Defendant so far it can be ascertained;

   iv. Where the Plaintiff or Defendant is a minor or person of unsound mind statement to that effect;

   v. Facts constituting the cause of action and when it arose;

   vi. Fact showing that the Court has jurisdiction;

   vii. Relief which the Plaintiff claims;

   viii. Where Plaintiff has allowed a set off or relinquishes a portion of his claim, the amount so allowed for relinquishment; and

   ix. Statement of the value of the subject matter of the suit for purpose of jurisdiction and Court fees.

   The plaint has to be filed with all relevant evidences and documents in support of the claim. It is also important to ensure that the plaint is filed within the statutory period of limitation as applicable, failing which an application seeking an extension of time shall be required to be filed along with the plaint.

b. First hearing/ Admission of case: After filing of the plaint, the case shall be listed for first hearing before the Court. The Plaintiff will typically be required to provide an overview of the case and satisfy the Court that a cause of action exists against the Defendant. If the Court is satisfied, it admits the case and issues summon/ notice under s 27 read with Order V of the CPC to the Defendant to appear and answer the claim. It is important to note that if the Plaintiff fails to appear on the first date of hearing, then the Court may dismiss the suit in default.

c. Service of Summons: Once the summons has been issued by the Court, it will be served by the Court on the address of the Defendant provided by the Plaintiff. It is incumbent upon the Plaintiff to ensure that the address provided to the Court is correct so that the summons is duly served upon the Defendant. The Plaintiff may also seek permission from the Court under Ord. V R 9A to effect service of the summons upon the Defendant on its own to further ensure that the Defendant is duly served.

   In case the address of the Defendant is not traceable, and the Court and the Plaintiff are unable to effect service of summons upon the Defendant after using all reasonable diligence, the Plaintiff may apply to the Court seeking permission to effect service by way of a publication as per Ord. V R 17 and R 20 of the CPC. The service of summon/ notice upon the Defendant is presumed to effectuated by way of such publication and in case the Defendant still does not enters appearance in the case, the suit is proceeded ex-parte.

d. Appearance of Parties: On the day specified by the Court in the summons, the Defendant is required to enter its appearance and file its reply to the plaint and in circumstances where the reply is not filed, request the Court to grant it more time to file the reply.

   In case if the summons/ notices have been duly served upon the Defendant and the Defendant still fails to enter appearance, the Court may either grant another opportunity to the Defendant to enter appearance and re-issue summons or proceed ex-parte against the Defendant noting that it has failed to appear despite reasonable opportunity and thus, closing its right to defend.

e. Filing of Reply by the Defendant: - After service of summons to the Defendant, as per Ord. VIII R 1 of the CPC, the Defendant is required to file its reply (termed as Written Statement) within 30 days from the date of service of the summons on him. However, the Defendant may seek extension of time for filing of its reply and such extension may be granted by the Court at its discretion.

f. Production of Documents: - After filing of the written statement by the Defendant, the next stage of the suit is production of documents. At this stage both parties are required to file the documents in Court which are in their possession or power. If the parties rely on some documents which are not in their possession, they have to apply to the Court for issue of summons to the authority or the persons in whose possession those documents are.

g. Examination of parties by the Court (Order X): At the first hearing of the suit after filing of the written statement by the Defendant, the Court shall ascertain from each party whether it admits or denies such allegations of fact as are made in the plaint or the

written statement. Such admissions and denials shall be recorded. After such recording, the Court shall direct the parties to the suit to opt for one of the following modes of settlement outside the Court;

i. Arbitration

ii. Conciliation

iii. Judicial settlement including settlement through Lok Adalat; or

iv. Mediation.

h. Discovery and Inspection (Order XI): The purpose of discovery and inspection of document and facts is to enable the parties to ascertain the facts to be proved. With the leave of the Court the Plaintiff or Defendant may deliver interrogatories in writing for examination of opposing parties which are required to be answered and which are related to the matter.

i. Admission and denial of documents (Order XII): Either party may by giving notice, call upon the other party to admit within seven days from the date of service of the notice, all documents saving just exceptions and each party shall submit a statement of admissions or denials of all documents disclosed and of which inspection has been completed, within fifteen days of the completion of inspection or any later date as fixed by the Court. The statement of admissions and denials shall set out explicitly, whether such party was admitting or denying:

i. correctness of contents of a document;

ii. existence of a document;

iii. execution of a document;

iv. issuance or receipt of a document;

v. custody of a document.

An Affidavit in support of the statement of admissions and denials shall be filed confirming the correctness of the contents of the statement. In the event that the Court holds that any party has unduly refused to admit a document under any of the above criteria, costs (including exemplary costs) for deciding on admissibility of a document may be imposed by the Court on such party. The Court may pass orders with respect to admitted documents including for waiver of further proof thereon or rejection of any documents.

j. Framing of Issues (Order XIV): The next stage is framing issues. Based on the questions of law arising and the admission-denial of the facts, the issues are framed by the Court in accordance with the provisions of the CPC Ord. XIV R 1 as under:

i. Rule 1 sub rule (1) states, "Issues arise when a material proposition of fact or law is affirmed by one party and denied by the other."

ii. Sub rule (2) states, "Material propositions are those propositions of law or fact which a Plaintiff must allege in order to show a right to sue or a Defendant must allege in order to constitute his defense,"

iii. Sub rule (3) States "Each material proposition affirmed by one party denied by other shall form subject of distinct issues."

- Issues of fact
- Issues of law.

The suit moves for trial after framing of issues.

k. Summoning and Attendance of Witnesses (Order XVI): On the date appointed by the Court and not later than 15 days after the date on which issues are settled parties shall present in Court a list of witnesses whom they propose to call either to give evidence or to produce documents.

l. Hearing of suit and examination of Witnesses (Order XVIII): The Plaintiff is entitled to have the first right to begin unless the Defendant admits the facts alleged by the Plaintiff and contends that either in point of law or on some additional facts alleged by the Defendant, the Plaintiff is not entitled to any part of relief. In such case Defendant has the right to begin.

The Plaintiff has to state his case and submit the evidence filed and marked before the Court. If any evidence was not marked earlier then the same shall not be considered by the Court. The Plaintiff shall carry out examination in chief of its witnesses followed by cross-examination of the witnesses by the Defendant.

The same procedure is followed for the Defendant's witnesses.

m. Arguments: After completion of evidence, final arguments are submitted by both the parties.

n. Judgment (Order XX): Judgment is defined as the statement given by the judge on the grounds of which a decree is passed. The Court after the case has been heard shall pronounce judgment in open Court either within one month of completion of arguments or as soon thereafter as may be practicable, and when the judgment is to be pronounced the Judge shall fix a day in advance for that purpose.

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

Yes, parties to the suit are required to voluntarily disclose all relevant documents relied upon to the Court and the other parties along with their pleadings. In case the Court or any of the other parties object that any relevant document has not been disclosed by the other party, it may move an application before to Court for discovery and inspection of said documents under the CPC 1908, s 30 read with Ord. XI.

a. Under the CPC 1908, s 30, the Court may at any time either on its own motion or on the application of any party make such order as may be necessary or reasonable in all matters relating production of documents, and it may also issue summons to persons whose attendance is required to produce documents.

b. Under Order VII R. 14, where a plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, he shall enter such documents in a list, and shall produce and file a copy of the documents in Court when the plaint is presented by him.

A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

c. Under Order VIII R 1A, where the defendant bases his defence upon a document or relies upon any document in his possession or power, in support of his defence or claim for set-off or counter-claim, he shall enter such document in a list, and shall produce and file the documents in Court when the written statement is presented by him.

A document which ought to be produced in Court by the defendant under this Rule, but, is not so produced shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

d. After the plaint has been presented by the Plaintiff and the written statement by the Defendant in Court, if it appears to the plaintiff or the defendant that all material facts constituting the case of opposite party and all documents in his possession have not been disclosed, it may move an application before the Court seeking directions against the other party to disclose such documents. This is known as discovery of documents.

e. The process of the discovery of documents operates generally in three successive stages, namely:

i. The disclosure in writing by one party to the other of all the documents which he has or has had in his possession, custody or power relating to matters in question in the proceedings;

ii. The inspection of the documents disclosed, other than those for which privilege from or other objection to production is properly claimed or raised: and

iii. The production of the documents disclosed either for inspection by the opposite party or to the court.

f. A party may seek the assistance of the Court for causing production of the document by his adversary or he may independently issue a notice to his adversary requiring production of documents under Order XI r16 CPC.

The Hon'ble Apex Court in the case of *Sasanagouda v. S.B. Amarkhed AIR 1992 SC 1163* held that the Court is very well empowered to direct any of the parties to produce all such documents which are material to the issue at hand. The Hon'ble Court in para 7 of the judgment held as under:

"The Court, therefore, is clearly empowered and it shall be lawful for it to order the production, by any party to the suit, such documents in his possession or power relate to any matter in question in the suit provided the Court shall think right that the production of the documents are necessary to decide the matter in question. The Court also has been given power to deal with the documents when produced in such manner as shall appear just. Therefore, the power to order production of documents is coupled with discretion to examine the expediency, justness and the relevancy of the documents to the matter in question. These are relevant considerations, which the Court shall have to advert to and weigh before deciding to summoning the documents in possession of the party to the election petition."

g. Further, provisions regarding inspection of documents are divided in two categories by virtue of rr15 to 19 of order XI.

i. First one (is it referring to rule 15?) deal with documents referred to in pleadings or affidavits of parties, and

ii. Second one (is it referring to rule 19?) deals with other documents in possession or power of the party but not referred to in the pleadings of the parties.

A party is entitled for inspection in regard to documents of first class only. Since privileged documents are protected from production such as public records, confidential communications and documents having exclusive evidence of parties' title. etc.

h. The order of discovery is binding in nature and therefore non-compliance thereto would lead to penalties mentioned in Order XI Rule 21.

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

a. The term "Privileged Document" has not been defined in CPC however, as per the general understanding, Privileged Documents are those which need not be disclosed to the other party, neither before nor after the commencement of the trial containing such confidential information having protection under law.

b. The Hon'ble Andhra Pradesh High Court in its judgment Rajesh Bhatia & Ors. v. G. Parimala & Anr. 2006 (3) ALD 415 has specified provided an indicative list of grounds based on which protection can be claimed over documents considered as Privileged Documents:

i. legal professional privilege;

ii. that production is contrary to public policy;

Madhu Sweta

Partner, Singhania & Partners

Madhu Sweta has over a decade of experience as a Dispute Resolution Partner and is managing S & P litigation practice for individual and corporate clients. She has successfully counseled clients and argued cases before various forums, commissions and Courts including Supreme Court of India, High Courts and appellate tribunals. Alternative Dispute Resolution before national forums has been one of her area of expertise. She has been entrusted with arbitrations and commercial litigations on a pan India basis.

With her rich legal background, Madhu has specialized in dealing with disputes in Contracts with Government Authorities, Consulting agreements, Construction projects, Energy and Power. She also has been actively advising clients in various complex cases.

In her successful track record, she has counseled Ministries, Banks, Government Authorities including PSUs, Indian and foreign companies. Her prominent clients includes Simplot India LLC, Sig Sauer Inc., Sanmina Corporation, RCI India Pvt. Ltd, IJM (India) Infrastructure Ltd, Sri Maruti Wind Park Developers, Ingram Micro India Ltd, IDBI Bank etc. Her reputable clients also includes National Highways Authority of India, Bureau of Energy Efficiency (BEE) and Security Printing and Minting Corporation of India Limited (SPMCIL) etc.

Madhu frequently speaks in seminars, conferences and her articles have also got published in national and international journals.

iii. that the documents in question may tend to criminate the party or his or her spouse;

iv. that the production is contrary to some statutory provision which imposes secrecy;

v. that production is contrary to some express or implied agreement between the parties; and

vi. that production would, in the circumstances of the particular case, be oppressive.

c. A party who is directed by court to make discovery of documents and who wants to claim privilege over any of the documents has to file an affidavit under Ord. XI R 13 specifying which documents does the party object to produce i.e. the documents on which privilege is sought to be claimed and provide supporting reasons.

d. Where privilege is claimed for any document and the other part questions the claim of privilege, the Court shall have the right to inspect the document for the purpose of deciding the validity of the claim of privilege.

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

a. The parties to the suit exchange written evidence of their witnesses prior to the commencement of trial. The parties to the suit have to provide a list of witnesses they intend to testify to the Court under the CPC 1908, Ord. XVI r 1. The said list of witnesses, if any has to be filed in the Court by the respective parties before the commencement of the hearing of evidence. It is important to note that no party shall be entitled to produce any witness not named in the list of witnesses provided to the Court, without taking permission of the Court in writing and stating the reasons therefor.

   The evidence of the witness is recorded by way of an affidavit and the party conducts examination in chief of its witness. It is mandatory to supply a copy of examination-in-chief to the other party as specified under the CPC Order XVIII, R 4(1).

b. After completion of the examination in chief, the opposite party has the right to cross-examine the witness as per the CPC Order XVIII R 4(2). The cross-examination is recorded by the Court or the Commissioner, as the case may be. The party has a right to undertake re-examination after the completion of cross-examination by the other party.

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

a. Indian Evidence Act 1872 under s 45 defines experts as "When the Court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity handwriting or finger impressions, the opinions upon these points of persons especially skilled in such foreign law, science or art or in questions as to identity of handwriting or finger impressions, are relevant facts. Such persons are called experts."

b. Section 45 of the Evidence Act 1872 makes the opinions of experts admissible. If the subject matter of the suit requires, any party may call a person as an expert witness on showing that the person has made a special study of the subject or has acquired a special experience therein. Refer *State of H.P. v Jai Lal & Ors., (1999) 7 SCC 280.* The appointment of expert may be *suo moto* by way of an order of the Court or if the expert witness is desired to testify by any party, then the expert is named by the said as a witness in its list of witnesses. The expert is then subject to examination in chief and cross examination in the same manner as per the procedure provided under CPC.

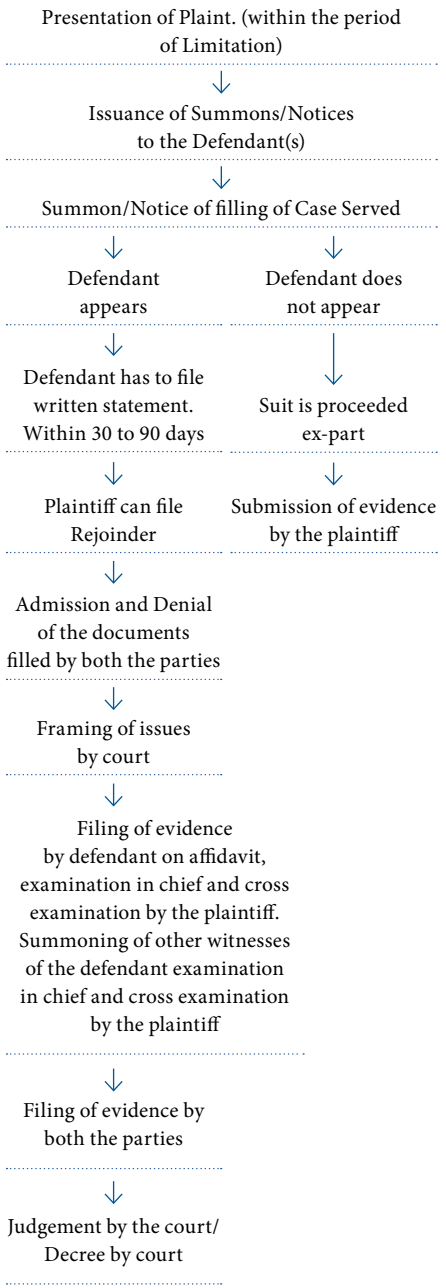
c. The Court considers the reliability of the expert witness based on his education, training, experience, memberships, affiliations, publications etc.

d. However, the opinion of an expert is not binding on the Court. As held in Titli v. Jones, AIR 1934 All 237, the function of the expert is to put before the Court his opinion based on all the materials so that the Court, although not an expert, may form its own judgment by its own observation of those materials.

e. Like other witnesses, the expert witness is also subject to examination and cross examination in the Court. The Apex Court in the case of State of Maharashtra v. Damu s/o Gopinath Shinde & Ors., AIR 2000 SC 1691 held that without examining the expert as a witness in Court, no reliance can be placed on an opinion alone.

f. There is no specific code of conduct for expert witnesses however, for the opinion to be credible and to increase the evidentiary value of the opinion, the expert should provide all relevant data based on which the opinion has been made.

Flowchart representing typical steps of Civil Suit



11. What interim remedies are available before trial?

As regards arbitration, a party can invoke jurisdiction of a court for an interim remedy under section 9 of the Arbitration and Conciliation Act 1996. Section 9 prescribes that a party to an arbitration agreement can invoke jurisdiction of a court prior to an arbitration proceeding and can seek an interim relief mentioned thereunder. However, it is also stipulated that a party cannot enjoy the interim relief for an infinite period and the arbitration in such a case should be invoked within 3 months from the date of order granting any interim relief. As regards the matter when there is no arbitration agreement and the dispute is to be adjudicated by a civil court, for availing any interim remedy, a party has to first file a plaint/petition before the court and only thereafter the interim relief which is deemed appropriate by the court is granted. Order 39 of Code of Civil Procedure, 1908 envisages granting of interim injunction in such cases.

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

As per the provisions of Code of Civil Procedure 1908, after the case has been heard, the Courts pronounce a judgment and, on such judgment, a decree follows. Order XXI of the Code deals with execution of judgment/decrees. A decree may be executed by either the court who passed such decree or by the Court to whom it is sent for execution. The holder of a decree who desires to execute it, shall apply to the court by way of an application as per the form and format given in Schedule I to Order XXI. As regards enforcement of an arbitral award, the party has to invoke the Arbitration and Conciliation Act 1996 s 36 read with Order XXI of Code of Civil Procedure 1908.

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

The Code of Civil Procedure 1908, s 35 governs the aspect of costs incurred by a party in legal proceedings. Section 35 prescribes that the court has the discretion to determine whether cost are payable by one party to another, the quantum of costs and when they are to be paid. Whereas s 35A provides for compensatory costs in respect of false or vexatious claims or defences, s 35B prescribes costs for causing delay. However, the provision being discretionary in nature, by and large the courts adopt a reasonable approach while dealing with the aspect of costs. Mostly costs, if any granted to a party, are not on actuals and only the reasonable costs corresponding to the subject matter of the dispute are granted by the court.

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

The Code of Civil Procedure 1908, s 96 read with Ord. XLI provides for appeal from original decree and s 100 read with Ord. XLII provides for appeal from appellate decree. An appeal from original decree shall lie from every decree passed by any court exercising original jurisdiction to the court authorized to hear appeals from the decisions of such court on no ground except on a question of law. An appeal against appellate decree shall lie to the High Court from every decree passed in an appeal by any court subordinate to the High Court if the High Court is satisfied that the second appeal raises a substantial question of law. A party also has the remedy of filing a special leave to appeal to the Apex Court under the Constitution of India 1949, Art. 136.

The grounds on which a party can assail the decision of the court before the appellate court are as following:

a. if the judgment is contrary to facts;
b. if the judgment is not coherent with the settled legal position;
c. if the judgment is in teeth of a contractual provision;
d. if the judgment is not in conformity with the true and correct interpretation of a contractual or legal provision;
e. if the judgment is based on no evidence;
f. if the judgment is passed in violation of principles of natural justice such as not granting a hearing opportunity to a party

15. Are contingency or conditional fee arrangements permitted between lawyers and clients? Is third-party funding permitted?

No. The Bar Council of India prohibits advocates from charging fees to their clients contingent on the results of litigation or pay a percentage or share of the claims awarded by the Court. The Bar Council of India Rules r 20 of Section II of Chapter II of Part VI, stipulates that an advocate shall not stipulate for a fee contingent on the results of litigation or agree to share the proceeds thereof.

16. May Litigants bring class actions? If so, what rules apply to class actions?

The aspect of class actions or commonly known as representative suits are dealt with under of Code of Civil Procedure 1908, Ord. 1 r 8. Ord. I r 8 of the Code provides that when there are number of persons similarly interested in a suit, one or more of them can with the permission of the court or upon a direction from the court, sue or be sued on behalf of themselves or may defend such suit on behalf of or for the benefit of all persons so interested.

Other statutes that accommodate class actions include–

Companies Act 2013 more particularly ss 245 and 37, Competition Act 2002, s 53(4), Consumer Protection Act 1986 s (12(1)(c) and even the Industrial Disputes Act 1947 makes room for collective bargaining by workers (Employees) represented by a Union.

Yaman Kumar
Associate Partner, Singhania & Partners

Yaman has been associated with the firm for more than a decade now. He has an extensive experience in handling Domestic and International Arbitrations. He has closely worked on arbitrations involving disputes arising out of Highway Construction Agreements, Concession Agreements, Consultancy Service Agreements, Dealership Agreements, Lease Agreements, and Agreements for supplying and laying Optic Fiber Cables etc. also he has wide experience of handling varied litigation matters under different branches of law viz., Civil law, Criminal law, Consumer Protection law, IPR, Tenancy laws, Negotiable Instruments Act, etc.

He has represented clients before various fora for, Writ Petitions, Special Leave Petitions, Disputes related to Bank Guarantees, Recovery Suits, Petitions challenging the arbitration award, enforcement of foreign award, Execution Petitions, Revision Petition before NCDR, Complaints under Section 138 of Negotiable Instruments Act, 1881 etc.

His clients include prominent names in their respective fields, to name a few National Highway Authority of India, IJM Corporation Berhad, IJM (India) Infrastructure Ltd., WSP Consultants India Pvt. Ltd., McGraw Hill Education India Pvt. Ltd., Rewa Tollway Pvt. Ltd., Wimberley Allison Tong & Goo (UK) Ltd., ULMA Manutencion S Coop, Railtel Corporation of India Ltd. etc.

17. What are the procedures for the recognition and enforcement of foreign judgment?

The recognition and enforcement of a foreign judgment is governed by the provisions of Code of Civil Procedure 1908. A foreign judgment is defined under s 2 (6) to mean the judgment of a foreign court. Section 2(5) stipulates that a foreign court means a court situated outside India and not established or continued by the authority of the Central Government.

A foreign decree is defined in the CPC 1908, Explanation II to section 44A as, "Decree" with reference to a superior court means any decree or judgment of such court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, but shall in no case include an arbitral award, even if such an award is enforceable as a decree or judgment.

Foreign judgment or decree to be conclusive

A foreign judgment or decree should be conclusive as to any matter adjudicated by it. The test for conclusiveness of a foreign judgment or decree is laid down in the CPC s 13 which states that a foreign judgment shall be conclusive unless:

- It has not been pronounced by a court of competent jurisdiction;
- It has not been given on the merits of the case;
- It appears, on the face of the proceedings, to be founded on an incorrect view of international law or a refusal to recognize the law of India in cases in which such law is applicable;
- The proceedings in which the judgment was obtained are opposed to natural justice;
- It has been obtained by fraud;
- It sustains a claim founded on a breach of any law in force in India.

Thus, before enforcing a foreign judgment or decree, the courts have to ensure that the foreign judgment or decree passes the seven tests above. If the foreign judgment or decree fails any of these tests, it will not be regarded as conclusive and hence not enforceable in India.

Mode of enforcement of a foreign judgment or decree

There are two ways in which a foreign judgment or decree can be enforced in India depending on whether the judgment or decree has been given by a court in a reciprocating territory or not.

a. Foreign decree of a reciprocating territory be executed as an Indian decree

By virtue of the Code of Civil Procedure 1908, s 44A, a decree of any superior court of a reciprocating territory shall be executed in India as a decree passed by the Indian district court.

A reciprocating territory is defined in Explanation I to section 44A to be any country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating territory for the purposes of this section, and "superior courts", with reference to any such territory, means such courts as may be specified in the said notification.

A judgment from a court of a reciprocating territory can be directly enforced in India by filing an execution application. Section 44A (1) of the Code states that where a certified copy of a decree of any superior court of a reciprocating territory has been filed in a district court, the decree may be executed in India as if it had been passed by the district court (meaning that the entire scheme of execution of decrees as laid down in the CPC Ord. 21 will be applicable).

While filing the execution application, the original certified copy of the decree along with a certificate from the superior court stating the extent to which the decree has been satisfied or adjusted has to be annexed to the application.

b. Filing a suit in case of decrees from non-reciprocating territories

Where a judgment or decree is not of a superior court of a reciprocating territory, a suit has to be filed in a court of competent jurisdiction in India on that foreign judgment or on the original cause of action or both.

A suit on a foreign judgment/decree must be filed within a period of three years from the date of the judgment/decree

18. What are the main forms of alternate dispute resolution? Which are the main alternative dispute resolution organisations in your jurisdiction?

As far as process of arbitration in India is concerned, there are two types- institutional and ad-hoc. Some of the institutes conducting institutional arbitration are as follows:

a. Indian Council of Arbitration;

b. Delhi International Arbitration Centre;

c. Mumbai Centre for International Arbitration

d. London Court of International Arbitration

e. FICCI

Other form of dispute resolution prevalent in India is Lok Adalat. Lok Adalat is an informal court convened to dispose of the matters through amicable settlement

The thirds widely practiced dispute resolution process is the mediation. In mediation, either of the parties can mutually appoint a mediator or the court can refer the parties to mediation. One such centre conducting mediation proceedings is run by Delhi High Court by the name of "Samadhan".

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

After the amendment of the Arbitration and Conciliation Act 1996 in 2015, the Saikrishna Committee Report recommended further amendments on the back of the 2015 amendments. Consequently, the Arbitration and Conciliation (Amendment) Bill 2018 has been passed by Lok Sabha. One of the outstanding feature of Arbitration and Conciliation (Amendment) Bill, 2018 is the establishment of an independent body namely the Arbitration Council of India.

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

In India, disputes are resolved by litigation where Courts adjudicate upon issues from the very inception of the disputes. The Supreme Court is the Apex Court and the Highest Judicial body in the country. The High Courts in their respective States act as the highest adjudicatory institutes at the State level, followed by District Courts at lower levels. Modes of Alternate Dispute Resolution, with minimal Court intervention, recognized by law, include Arbitration, Mediation, Conciliation and Judicial Settlement by Lok Adalats.

About the Authors:

Ravi Singhania
Managing Partner, Singhania & Partners LLP
E: ravi@singhania.in

Shambhu Sharan
Partner, Singhania & Partners LLP
E: shambhu@singhania.in

Madhu Sweta
Partner, Singhania & Partners LLP
E: madhu@singhania.in

Yaman Kumar
Associate Partner, Singhania & Partners LLP
E: witchaphon.t@weerawongcp.com

W: www.singhania.in
www.singhania.cn
A: P-24, Green Park Extension
T: +91-11-4747 1414
F: +91-11-4747 1415

Jurisdiction: Macau
Firms: Rato, Ling, Lei & Cortés – Advogados and MCL Advogados
Authors: Pedro Cortés and Marta Mourão

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

Macau has three levels in the hierarchy of Civil Courts, including the Macau Judicial Base Court (which is the first instance Court), the Second Instance Court and the Last Instance Court.

Generally speaking, civil proceedings begin in the Macau Judicial Base Court. Then, depending on the amount of the claim or the amount assigned to the case as per the civil procedural rules, the losing party may appeal to the Second Instance Court. After a decision being handed down by the Second Instance Court, the losing party can only appeal to the Last Instance Court if the amount of the claim or the amount assigned to the case so allows and if this decision is not a mere confirmation of the decision rendered in the Macau Judicial Base Court.

The judge is responsible for maintaining the order in the procedural acts of the case files he/ she presides over and to take the necessary measures against those who disturb the procedures.

Acting as a referee in the court proceedings, the role of the judge in Macau is reactive during the written phase, where Plaintiff and Defendant present their written pleadings.

Thereafter, the Judge has an important role in making a preliminary decision on the facts that he/ she considers already proved or settled and those still in need to be proven at trial.

During the trial, the Judge lets the lawyers examine the witnesses and only intervenes if and when a decision needs to be rendered, whether on the admissibility of a document or a question to be posed to a witness or on any kind of request made by a party.

After the witnesses are heard, the judge will render a decision based on the facts that he/ she considers duly proved by the party alleging them and finally will issue the decision on the merits of the case.

2. Are court hearings open to the public? Are court documents accessible by the public?

Court hearings of civil cases are open to the public except when the Court decides otherwise, namely to safeguard the dignity of people and public morality and to ensure proper functioning of the court.

Court documents are accessible by the public save when the law specifies differently. Under Macau law, access to court documents will be limited if the disclosure of their content might offend the dignity of people, the intimacy of private life or public morality or if it might jeopardize the effectiveness of the decision to be rendered. Limited access would be imposed, for example, on cases of annulment of marriage, divorce, or cases to establish or challenge paternity. In these cases, only the parties and their lawyers would have access to court documents.

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

All lawyers, after passing the final exams of the Macau Lawyers' Association and finishing the apprenticeship, can appear in court and conduct proceedings on behalf of their client. Macau does not differentiate between barristers and solicitors.

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

There are various limitation periods for commencing civil claims prescribed in the Macau law, depending on the type of claim. The ordinary period is 15 years; the Macau Civil Code also provides for a limitation period of 5 years, namely for claims connected with rental fees, legal or contractual interest, dividends of companies, maintenance/ alimony payments or any other periodically renewable payments. In cases of non-contractual liability (tort, negligence, inter alia), there is a limitation period of 3 years. There are other limitation periods under the Macau Civil Code and other pieces of legislation that also provide for other kinds of limitation periods for commencing civil claims.

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

There are no pre-action procedures with which the parties must comply before commencing proceedings in Macau, although good practice dictates that a letter of demand, judicial notification or the like be sent to the defaulter giving him/ her a time-frame within which to remedy the situation.

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

It is very hard to predict a timetable in a civil procedure (or in any other legal procedure whatsoever) as it depends largely on the court's tight schedule rather than the parties' initiative. Notwithstanding this, the typical procedure commences with an initial petition to be filed in writing by the Plaintiff. Then, if no insurmountable problem or mistake arises at a first glance, the Defendant will be notified to present his/ her defense within 30 days. The Defendant may also present a counter-claim along with the defense.

Depending on the type of procedure, the Plaintiff may be entitled to another round of written pleading and, likewise, the Defendant might be allowed to rebut in certain cases.

Annexed to the written pleadings, parties must submit all documents capable of proving the alleged facts.

Thereafter, the court will issue a decision about the facts presented by the parties, separating the facts considered proven or agreed upon and the facts on which parties shall present evidence during the trial. In this preliminary decision, the court may at that time decide on the merits of some aspects of the case.

After this decision has been notified to the parties and the consequent claims have been filed, the parties must present their witness lists and any other evidences that they may deem convenient, including expert opinions and reports. After the expert or experts issue their reports and the parties present a round of motions, the court will schedule the hearing dates for the trial.

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

Parties are not required to disclose any document to other parties or to the court, except when specifically commanded to do so by the court at its discretion or when the opposing party so requires. In principle a party will only disclose the documents deemed appropriate to prove the facts alleged by it or the documents that may contradict the facts alleged by the other party.

Pedro Cortés

Senior Partner, Rato, Ling, Lei & Cortés – Advogados

Joined Rato, Ling, Lei & Cortés – Advogados in 2003 and is Senior Partner, holding the same position in ZLF Law Office (www.zlflawoffice.com).

His main areas of practice are: Gaming, Banking and Financial, Capital Markets, Real Estate, Commercial and Corporate, Intellectual Property, Labour and Arbitration.

He is a member of the Macau Lawyers Association, Portuguese Bar Association, Brazilian Bar Association (Ordem dos Advogados do Brasil – São Paulo), International Association of Gaming Advisors (IAGA), International Bar Association (IBA) and is also qualified to work as a Lawyer in East Timor and recognized by the Justice Department of Guangdong to work as a Cross-border Macau lawyer. He is Member of the Chartered Institute of Arbitrators (CIArb), of the Hong Kong Institute of Arbitrators (HKIA) and of the Hong Kong Institute of Directors (HKIoD).

Between 2012 and 2016, he was also a part-time lecturer of the Master of Social Science in Global Political Economy Programme in the Chinese University of Hong Kong, lecturing the courses Theories of International Economic Law and Application of International Law in China.

Pedro has been a contributor for several legal and non-legal publications.

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

There are no such rules. However, notwithstanding this being out of ordinary, the court may allow a party to not disclose a document based on its being highly confidential or secret.

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

As mentioned, parties exchange documents as evidence during the written phase. It may also happen that a witness testimony is collected prior to the trial (if, for example, the witness

is likely to be out of Macau when the trial takes place). Nevertheless, the rule is that the witnesses are present in court to give evidence orally.

The witness will first be questioned by the party calling him/ her and will then be cross-examined by the opposing counsel. Finally, the party presenting the witness is entitled to re-examination after the opposing counsel has finished the cross-examination.

The judge has always the power to ask his/ her own questions and to seek for clarifications.

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

The law provides that, where possible, the expert evidence shall be produced by experts in the public service with competence in the relevant matter. Otherwise, the expert(s) shall be appointed by the court among the persons with relevant skills in the matter.

Parties may suggest a person to be appointed as expert witness. If all parties reach an agreement as regards the person to be appointed, the court should appoint that person, unless it has doubts about that person's suitability or skills.

It might be simple expert evidence, with one expert, or collegiate expert evidence, with three experts, if the judge so decides or the parties so request. In this case, if the parties do not reach an agreement in relation to the persons to appoint, each party shall choose one expert and the court will choose the third one.

Experts are obliged to perform their duties diligently and the court might impose a fine or remove them if they do not perform the task at hand with due diligence. The expert shall make a commitment of conscientious performance of the task unless he/ she is a public worker and is acting as expert witness whilst performing his/ her job. There is no code of conduct for experts without prejudice to the duties contained in the code of ethics of each profession.

11. What interim remedies are available before trial?

Parties are entitled to present a common injunction, which shall fulfill the following prerequisites:

a. periculum in mora, i.e., reasonable fear that a third party (the Defendant) may cause to the Plaintiff an irrevocable loss, if not stopped or impeded from pursuing a certain activity, which could not be avoided by presenting a principal action, due to court terms and usual court timetables. A founded fear of damage of the rights.

b. fumus boni iuris, i.e., the probable or likely justification and grounds by the Plaintiff, to present such a measure. The injunction must represent a subsisting and existing indication that there are plausible reasons for presenting the forthcoming civil suit. there should be a serious probability of the existence of the right.

c. summaria cognitio, i.e., the Judge must be simply and quickly convinced by the injunction, as it is a temporary measure that precedes the principal action or the ordinary lawsuit.

d. Presenting a non-nominate injunction (innominate) is possible only if there is no specific injunction foreseen in the Macau Civil Procedure Code, the Macau Commercial Code or the Macau Civil Code.

Finally, the declaration by the Court of the innominate injunction must not cause the Defendant more harm than the measure itself is expected to safeguard.

12. What remedies are available at trial?

It is possible to call expert witnesses and to request the court to seize assets or, among others, to perform inspections to assets or places.

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

A final and conclusive judgment in the courts of Macau under which a sum of money is payable or a certain conduct is imposed would be enforced against the Defendant, upon the filing of the certified judgment with the Macau Judicial Base Court separately or as annex to the proceedings where the judgment was granted, without re-examination of the merits of the case.

The enforcement proceedings have special rules vis-à-vis the effective accomplishment of the decision rendered.

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

Generally speaking, successful parties are awarded with some of their costs and court fees, in accordance with the court fees regulation. Costs are calculated taking into consideration the amount claimed and other factors. The principle of costs following the event does not entirely apply in Macau although the losing party is billed with the majority of the court fees.

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

As mentioned above, Macau Courts have three levels of jurisdiction: Judicial Base Court, Second Instance Court and Last Instance Court. Despite some decisions being final and unchallengeable, namely when the amount of claim is less than MOP 50,000, it is, in principle, possible to appeal from interim or final judgments of the Judicial Base Court or Macau Administrative Court to the Second Instance Court. Appealing parties may challenge based on questions of law or of fact. Whenever a decision on facts is appealed, parties shall indicate the evidence and the points that should have led to a different decision being granted. When appealing to the Last Instance Court, judgments can only be based on questions of law. There are also rules in terms of the minimum amount of the claim that will allow parties to appeal to the Last Instance Court.

There are special appeals whenever the Last Instance Court contradicts its own previous decisions on the same question.

16. Are contingency or conditional fee arrangements permitted between lawyers and clients? Is third-party funding permitted?

Contingency or conditional fee arrangements between lawyers and clients are not permitted in Macau. The code of ethics of the lawyers practicing in Macau specifically forbids quota litis agreements whereby lawyer and client agree that a portion of the benefit obtained by the client in the relevant case will be paid to the lawyer. However, the professional fees of the lawyer may be established taking into account the amount of the matter assigned to the lawyer.

Macau Law is silent in what regards to third-party funding. Normal practice is that parties bear their own costs. If there is a third party funding the judicial costs, this funder is not entitled to recover its costs through court and he/she is not allowed to share in the proceeds awarded.

The Macau Special Administrative Region has a system that financially supports those who do not have sufficient funds to resort to the courts. The applicants must present evidence of the lack of means to bear legal costs, including both court and legal fees.

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

Under the Macau Litigation Administrative Procedure Code, any Macau resident or legal person with competence to defend the public good, may bring class action by means of a contentious appeal against acts affecting fundamental rights such as public health, housing,

Marta Mourão

Partner, MCL Advogados

Graduated in Law from the Faculty of Law of Oporto of the Portuguese Catholic University in 2008; completed the Master's Degree in Private Law Sciences ("Ciências Jurídico-Privatísticas") at the Faculty of Law of the University of Oporto in 2011.

Completed her internship and practiced Law in Portugal until May 2012, with special emphasis on litigation and corporate law. Completed the "INOV Contacto" internship program in Macau at Lektou – Rato, Ling, Lei & Cortés – Advogados between May and October 2012 and joined the office as a Lawyer in November 2012 until February 2016.

In March 2016, Marta started her own practice, focusing mainly on Civil Law, Corporate/ Commercial Law and Intellectual Property Law, Financial and Banking Law, Labour Law, Litigation and ADR.

Admitted to the Portuguese Bar Association (2011), the Macau Lawyers Association (2012) and the Brazilian Bar Association (Ordem dos Advogados do Brasil – São Paulo) (2017) (enabled to practice Law in the three jurisdictions).

Marta is also a Fellow Member of CIArb (Chartered Institute of Arbitrators), a Member of HKIArb (Hong Kong Institute of Arbitrators) and a Member of IBA (International Bar Association).

Between 2014 and 2016, she was also a part-time lecturer of the Master of Social Science in Global Political Economy Programme in the Chinese University of Hong Kong, lecturing the course Application of International Law in China.

She is a regular contributor to several legal and non-legal publications, including the annual LexisNexis DR Law Guide.

education, cultural heritage, the environment, spatial planning, quality of life and, in general, any good in the public domain.

Macau residents are also entitled to file class actions by means of contentious appeals against acts performed by public servants that affect public interests other than the ones mentioned above.

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

In order to have a foreign judgment recognized and enforced, the requisites stated in article 1200, paragraph 1 of the Macau Civil Procedure Code must be fulfilled. Those requisites include the following:

a. There must be no doubt on the authenticity and intelligibility of the decision;

b. The decision should have acquired res judicata force according to the foreign law;

c. Fraud must have not been used for the determination of the exclusive competence of the court that rendered the decision;

d. The decision has to have been rendered on matters not falling within the exclusive competence of Macau courts;

e. There must be no identical suit in respect of the same matter pending before a court in Macau;

f. The Defendant must have been properly served according to the law of the court of origin;

g. The principles of equality and due process of law must have been observed;

h. The decision cannot be against public policy of Macau jurisdiction.

If the aforesaid requisites are fulfilled, according to the laws in force in Macau, validity and formal effectiveness will be attributed to the foreign judgment and it, therefore, can be enforced.

19. What are the main forms of alternative dispute resolution? Which are the main alternative dispute resolution organisations in your jurisdiction?

The main forms of alternative dispute resolution are mediation and arbitration.

The main alternative dispute resolution organizations in Macau are the Macau Chapter of the Chartered Institute of Arbitrators (East Asia Branch), the Arbitration Centre of the World Trade Centre of Macau, the Macau Lawyers' Association Arbitration Centre and the Consumers Dispute Resolution Arbitration Centre.

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

Currently, the Legislative Assembly is analyzing a reform to the Arbitration Law of Macau. This reform has already been approved by the Executive Council.

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

Macau is an Uncitral Model Law jurisdiction, which is still in the early stage of use of alternative dispute resolution forms, despite the recent increase in the number of arbitration proceedings. Recently, we have had interventions from different entities, including the Government and the Macau Lawyers Association in order to enhance Arbitration as a true dispute resolution alternative. Furthermore, the Macau Chapter of the Chartered Institute of Arbitrators (East Asia Branch) was set up a few months ago with a view to enhance the importance of and recourse to arbitration in Macau and to offer training to any interested entity.

As to the court, it is a Civil Law system that has also been facing an increase in the number of court cases challenging the capacity of the courts. We are of the view that our bilingual system will surely be challenged with more and more dispute resolution cases in the future.

About the Authors:

Pedro Cortés
Senior Partner, Rato, Ling, Lei & Cortés – Advogados
E: cortes@lektou.com

A: Avenida da Amizade
555 Macau Landmark
Office Tower 23rd Floor
Macau, Macau SAR
T: + 853 28562322

Marta Mourão
Partner, MCL Advogados
E: marta.mourao@mclmo.com

A: Alameda Dr. Carlos D'Assumpção
n.º 249–263 Edifício Pak Tak
(China Civil Plaza), 7.º andar P
Macau, Macau SAR
T: + 853 28715588

Jurisdiction: New Zealand
Firm: Hesketh Henry
Authors: Nick Gillies, Gennise Luen and Eloise Callister-Baker

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

New Zealand's highest court is the Supreme Court. The Supreme Court was established on 1 January 2004 and replaced the Privy Council (based in the United Kingdom) as the court of final appeal in New Zealand. Appeals to the Supreme Court may only be brought with leave, which can be granted where the subject matter is of general or public importance, a substantial miscarriage of justice has occurred or may occur, or the matter is of general commercial significance. Supreme Court appeals are heard by a bench of five judges.

The Court of Appeal is the second highest court in New Zealand and has jurisdiction to hear appeals from decisions of the High Court and, in some special circumstances, appeals from decisions of District Courts. Most appeals are heard by a bench comprising of three judges.

The High Court functions as both a court of first instance and an appellate court. The High Court's first instance jurisdiction includes claims in excess of NZ$ 350,000 and certain complex claims, such as proceedings under the Companies Act 1993, bankruptcies, disposition of real property (land), administration of trusts and estates, and admiralty. The High Court also has jurisdiction to hear appeals from some lower courts and tribunals, such as the District Court, Family Court and Environment Court.

The District Court has jurisdiction to hear claims between NZ$ 15,000 and NZ$ 350,000. Disputed claims under NZ$ 15,000 (or $ 20,000 by agreement of the parties) are determined by the Disputes Tribunal.

There are a number of specialist courts and tribunals. For example, the Employment Relations Authority and Employment Court, Waitangi Tribunal, Māori Land Court, Tenancy Tribunal and Weathertight Homes Tribunal.

The role of the judge

The role of the judge in civil proceedings in New Zealand is to determine disputes between parties. The process is adversarial, rather than inquisitorial or investigative. Each party has the opportunity to present their case to the judge who fairly and impartially decides the outcome by applying the facts of the case to the relevant law.

As New Zealand has a common law system, the relevant law includes not only the law embodied in statutes and regulations, but also case law principles (judicial precedents). A judge in a lower court is required to take notice of and follow any relevant judicial precedent set by a higher court. On appeal, a judge may overturn a decision of a lower court.

Judges have the power and jurisdiction to ensure that proceedings before them are conducted in accordance with the law. Judges of the High Court have an inherent jurisdiction to make any order that is necessary to ensure the court's effective operation, such as orders to prevent the abuse of the court's processes.

Another aspect of a judge's role is to assist in the development of the law by case law principles. Where a novel situation arises and there is no applicable judicial precedent, the judge's decision may extend the existing law by adding a new judicial precedent to the body of case law.

2. Are court hearings open to the public? Are court documents accessible by the public?

Civil trials are open to the public unless there are reasons for confidentiality – for example, if the subject matter is of a sensitive nature, it is in the public interest, or where there are good reasons to protect the identity of a party or witness.

While most trials are open to the public, not every appearance by a lawyer before a judge is a trial. Many appearances are of an administrative or procedural nature and are not generally open to the public.

Accessibility to court documents

Judgments are accessible by the public, except in exceptional circumstances. In some judgments, the identities of parties and confidential information may be prohibited from publication, but the legal reasoning and outcome of the case will be made available to the public. Judgments of the High Court, Court of Appeal and Supreme Court are routinely made available online by the Ministry of Justice. The availability of judgments to the public is a principal tenet of a common law system.

Other court documents are not made generally available to the public, although an application can be made for access.

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

Yes. A lawyer is a person who holds a current practising certificate as a 'barrister sole' or as a 'barrister and solicitor' (section 6, Lawyers and Conveyancers Act 2006). Either can appear in any of New Zealand's courts and conduct proceedings. Generally, a barrister sole must receive client instructions via an instructing solicitor.

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

The Limitation Act 2010 proscribes the limitation periods for most civil claims, where the cause of action has arisen on or since 1 January 2011. Certain statutes under which proceedings may be brought have their own specific limitation periods. Common types of claims and their applicable limitation periods are as follows:

Type of Claim	Limitation Period
Money claims, includes any claim for monetary compensation, including under contract, tort, equity and most statutes providing for monetary relief	6 years from the date of the act or omission on which the cause of action is based
Claims seeking non-monetary or non-declaratory relief (for example variation or cancellation of a contract or specific performance) under the Contract and Commercial Law Act 2017 Pt 2	6 years from the date of the act or omission on which the claim is based
Action for an account	6 years from the date the matter arose in respect of which the account is sought
Claim for conversion	6 years from the date of the original or first conversion
Action for current, future or equitable interests in land	12 years (unless claimant is the Crown or claiming through the Crown)
Enforcement of a judgment or arbitral award	6 years from the date on which the decision became enforceable (by action or otherwise) in the country in which it was obtained
To have a will declared invalid	6 years from the date of the grant of probate or administration
Action for a beneficiary's interest in a trust	6 years from the date on which the interest in the trust falls into possession or when the beneficiary first becomes entitled to trust income or property
Claims for a share or interest in a personal estate	6 years from the date on which the right to receive the share or interest accrues
Claims relating to building work	10 years from the date of the act or omission on which the proceedings are based (longstop limitation period)
Defamation actions	3 years from the date of the act or omission on which the claim is based
Claims under the Fair Trading Act 1993	3 years from the date on which the loss or damage, or the likelihood of loss or damage, was discovered or ought reasonably to have been discovered

For some types of claims, a "late knowledge" period may apply to extend the ordinary limitation period. Where a late knowledge period applies, a "longstop period" also applies to set a maximum period or end date within which a claim may be brought.

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

No. However, it is common to correspond with the opposing party before commencing proceedings to explore whether a resolution can be reached without resorting to the courts.

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

Each court has a set of Rules which govern the conduct of cases before it.

In a defended civil claim, the procedure and timetable will vary depending on the nature and complexity of the case, subject matter, and other factors. A general guide to case management in an ordinary High Court proceeding is set out in the table below.

Step In Proceeding	Time
Claim commenced by plaintiff by filing a statement of claim in court and serving on the defendant	Varies, depending on plaintiff (and any applicable limitation provisions)
Defendant files and serves a statement of defence	25 working days from service
Parties file memoranda addressing case management matters, including issues and pleadings, further parties, discovery, interlocutory applications, and readiness for trial	Within 20 working days after statement of defence
Judicial officer makes orders requiring parties to take steps to address case management matters	Varies
Parties provide discovery. This involves the listing, exchange and inspection of discoverable documents	Varies, often 20–30 working days after the case management memoranda
Interlocutory applications. A party may apply for pre-trial orders, such as further discovery, particulars of pleadings, interrogatories and other preliminary orders. Applications may be opposed or consented to	Often 20 working days after discovery completed
Parties may be required to attend a second and subsequent case management conference before a judicial officer	
Resolution of interlocutory applications. If an interlocutory application is opposed, a hearing must be convened before a judge to determine the issue	Varies, depending on nature of application, court schedule and judge's determination
Staged exchange of written statements of evidence and documents for trial	Varies, often plaintiff's evidence first, defendant's evidence 10–20 working days following
Final hearing/trial	Varies depending on court

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

Yes, both the District Court and the High Court have processes for initial disclosure upon filing a proceeding. In the District Court, a plaintiff must provide a list of documents relied on, and a defendant may request copies of those documents (which the plaintiff must provide). In the High Court, an initial disclosure bundle must be provided to the other parties at the time the proceeding is commenced.

In addition to initial disclosure, in most civil proceedings, parties are or can be ordered to give 'discovery' of documents. An order for 'standard discovery' requires parties to discover all documents that either support or are adverse to their own or any other parties' case. An order for 'tailored discovery' must be made where the interests of justice require it and allows parties to discover a more limited range of documents, depending on the circumstances of the case.

A party to a proceeding has an obligation to comply with a discovery order, and a failure to do so may be a contempt of court. Furthermore, under the District Court Rules and the High Court Rules, a solicitor has a personal obligation to the court to ensure compliance with discovery orders. A solicitor must take reasonable care to ensure a party for which it acts understands its obligations under a Discovery Order and fulfils those obligations.

Documents obtained during the discovery process may only be used for the purposes of the proceeding and, unless the document has been read in open court, may not be provided to any other person.

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

The Evidence Act 2006 Part 2 subpart 8 sets out the statutory framework for claiming privilege.

Various categories of privilege exist, the most common of which is 'legal professional privilege', which protects confidential communications between legal advisers and clients where legal advice has been obtained or given. 'Litigation privilege' is also common and may be claimed over documents prepared for the dominant purpose of preparing for or defending a proceeding, including communications among the party, its legal advisers and non-parties.

Other categories of privilege include confidential communications made in connection with an attempt to settle or mediate a dispute between parties, communications with ministers of religion, and trust accounting records kept by a solicitor/law firm.

Non-disclosure or limited/restricted disclosure of documents may also be ordered where they contain confidential information (e.g. commercially sensitive information such as trade secrets, personally sensitive information such as medical records, or State secrets where the public interest is not served by disclosing the information).

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

In preparation for trial, parties exchange unsworn, written briefs of evidence. Supplementary briefs may also be provided. The written briefs are then given orally and under oath at the hearing. A witness at the trial must read a brief of evidence before it becomes part of the court record and part of the evidence-in-chief.

In a judge-alone trial, affidavit evidence may be admitted where there is agreement between the parties or if the court orders.

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

Parties are entitled to engage expert witnesses to provide expert evidence. Alternatively, the court may appoint an expert witness to enquire into

and report on any question of fact or opinion. A court-appointed expert may be appointed with the consent or agreement of the parties. If the parties are unable to agree on an expert, the court may make an appointment from nominations given by the parties.

All expert witnesses are required to comply with the Code of Conduct (Schedule 4 to the High Court Rules 2016). This includes experts appearing in a court or tribunal other than the High Court. The Code of Conduct imposes on expert witnesses an overriding duty to act impartially on matters within the expert's area of expertise and for the assistance of the court. Expert witnesses must not act as advocates or give evidence on questions of law. They must state whether their evidence is subject to any limitations or qualifications.

11. What interim remedies are available before trial?

Judges of the High Court have wide powers to make interim orders and grant pre-trial relief. Some interim orders provide temporary relief pending a final determination, whereas other orders are directed to maintaining the status quo or preserving evidence.

Interim injunctive relief can take many different forms, including orders to restrain trade, halt the liquidation of a company, stop the exercise of a mortgagee's powers, restrain publication, halt a nuisance or trespass, or stay an arbitration process. Other types of interim relief include orders requiring the preservation of property or funds, the sale of perishable property and retention of proceeds, the transfer of property and the payment of income.

Freezing orders, previously referred to as Mareva injunctions, prevent a respondent party from dissipating or removing assets outside the court's jurisdiction, where there is an intention to defeat an applicant's interest in the assets. A freezing order prevents a party from dealing with, diminishing or disposing of assets pending trial, so that judgment may be executed or enforced in respect of the asset.

Search orders, previously known as Anton Pillar orders, are invasive orders that allow a party to enter onto the opposing party's property to search for and remove evidence and preserve it for trial. A search order may be granted where there is a risk that evidence might be removed, destroyed or concealed before trial.

12. What remedies are available at trial?

In civil proceedings, the relief granted is usually for the purpose of compensating a wronged party, rather than being of a punitive nature. Remedies available at trial include orders requiring the payment of money (e.g. compensatory damages), specific performance, permanent injunctions, or declarations.

Exemplary damages are available only in exceptional circumstances where the defendant has acted in flagrant disregard of the plaintiff's rights. Awards to date have been nominal in nature.

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

Where a successful party (the judgment creditor) obtains judgment for the payment of money against the unsuccessful party (judgment debtor), but the judgment is unsatisfied, the judgment creditor has a range of enforcement options. The court can make an order allowing a judgment creditor to register a charge against property owned by the judgment debtor, allowing the court to take possession of and/or sell the property registered to the judgment debtor, or requiring an employer to make deductions from the judgment debtor's salary or wages and pay them to the judgment creditor.

Where the judgment debtor is a company, an unsatisfied judgment may be the basis for an application putting the company into liquidation. Where the judgment debtor is an individual, an unsatisfied judgment may form the basis for an application for bankruptcy.

Where an unsatisfied judgment is not for the payment of money, the court has the power to issue an arrest order, which provides for the arrest and detention of the defaulting party by an enforcing officer, so that the defaulting party may be brought before the court.

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

Yes, an award for legal costs is generally made in favour of a successful party for steps taken in a legal proceeding. Because costs are intended to be certain and identifiable by parties at any stage of a proceeding, they are almost always calculated by reference to a scale of costs that specifies the level of recovery for each step in a proceeding. The complexity of a proceeding and the reasonableness of time taken for a step are also factored into the calculation of costs.

Indemnity costs may be ordered if they have been provided for in a contract or agreement between the parties. Increased or indemnity costs may also be awarded if a party has acted unreasonably, unnecessarily or improperly in the conduct of a proceeding.

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

In most cases, where a judicial decision has the effect of finally determining a proceeding, there is a right of appeal to the next highest court. In some exceptional circumstances, a second right of appeal may be granted, but leave is required before a second appeal can be brought.

Generally, a party can appeal a decision on the grounds that there has been an error of fact or law. However, appeal rights from tribunals and specialist courts may be limited. Where a decision involves the exercise of judicial discretion, an appeal may be brought on the grounds that the court below acted on a wrong principle, took into account some irrelevant matter or failed to take into account some relevant matter, or made a decision that was plainly wrong.

16. Are contingency or conditional fee arrangements permitted between lawyers and clients? Is third-party funding permitted?

Contingency fee arrangements, where a lawyer's remuneration is calculated as a proportion of a client's successful outcome, are not permitted in New Zealand.

Conditional fee agreements in civil proceedings are permitted provided certain criteria are met. Under a conditional fee agreement, a lawyer and client may agree that the lawyer will only be remunerated if a successful outcome is obtained. The lawyer's remuneration must be the lawyer's normal fee or the lawyer's normal fee plus a premium (provided the premium is not calculated as a proportion of the outcome). The premium is to compensate the lawyer for the risk of not being paid at all and for the disadvantages of not receiving payments on account.

Third party funding

Third-party funding, also referred to as litigation funding, is permitted in New Zealand. Third-party funding is the payment of the plaintiff's (usual) litigation costs. This includes legal fees, expert costs and other disbursements, security for costs and adverse costs orders.

Litigation funding agreements are only those agreements which provide funding from a party unrelated to the claim and their remuneration is tied to the success of the proceeding and/or they exercise control over the proceeding. It excludes relatives or associated bodies who may fund litigation, solicitors' conditional fee arrangements, and litigation funded by insurance.

The Supreme Court held that New Zealand courts have no general rule regulating the bargains between litigation funders and parties. However, the court will step in to prevent

an abuse of process which arises as a result of litigation funding. An abuse may arise where the process has been used improperly, deceptively or viciously, or where the true effect of a ligation funding agreement is to assign a legal claim to the funder.

Where there is a litigation funding arrangement in place, once proceedings are issued, the identity and location of any litigation funders must be disclosed, and the litigation agreements themselves may be required to be disclosed where it is relevant to an application for third-party costs, abuse of process, or security for costs.

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

There is no specific legislative provision that permits class action suits.

When one or more persons have the same interest in the subject matter of the proceeding, they may sue on behalf of, or for the benefit of, all of those persons through a representative action. The 'same interest' extends to a significant common interest in the resolution of any question of law or fact arising from the proceedings. This has provided an avenue for commercial class action law suits to come before the courts and allowed for the promotion of access to justice, elimination of duplication and a sharing of costs. The court's position has been to provide a liberal and flexible approach without restriction from precedent and allow for the 'exigencies of modern life'.

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

Foreign judgments may be enforced in New Zealand by registration under the Trans-Tasman Proceedings Act 2010, the Reciprocal Enforcement of Judgments Act 1934, the Judicature Act 1908, or an action may be brought at common law.

The Trans-Tasman Proceedings Act 2010 allows for registerable Australian judgments (i.e. certain, final and conclusive judgments given by an Australian court or certain Australian tribunals) to be registered in a New Zealand court and enforced as if given by a New Zealand court.

The Reciprocal Enforcement of Judgments Act 1934 provides for the enforcement of judgments given in the United Kingdom or certain other countries. Other countries include Australia, Belgium, Botswana, Cameroon, Fiji, France, Hong Kong, India, Kiribati, Lesotho, Malaysia (including Sabah and Sarawak), Nigeria, Norfolk Island, Pakistan, Papua New Guinea, Singapore, Sri Lanka, Swaziland, Tonga, Tuvalu, and Western Samoa.

If judgment for a sum of money has been obtained from a Commonwealth country, it is enforceable under the Judicature Act 1908.

To enforce judgments from other countries, an action may be brought at common law. For a judgment to be enforceable in New Zealand under the common law, a foreign court's jurisdiction over a person or an entity against whom the judgment is awarded must be recognised by New Zealand law, the judgment must be final and conclusive and for a definite sum of money.

19. What are the main forms of alternative dispute resolution? Which are the main alternative dispute resolution organisations in your jurisdiction?

Mediation is the most common form of alternative dispute resolution in New Zealand.

First instance courts sometimes provide for the convening of settlement negotiation meetings with the assistance of a judge. Such meetings are known as judicial settlement conferences. This is an alternative to mediation. A judge who participates in a judicial settlement conference is precluded from later determining the substance of the proceeding.

A common alternative to litigation through the courts is private arbitration, which is governed by the Arbitration Act 1996. Parties must agree to submit to arbitration, and commercial contracts often specify arbitration as the applicable dispute resolution forum.

Alternative dispute resolution organisations in New Zealand

The main private alternative dispute resolution organisations in New Zealand include the Arbitrators' and Mediators' Institute of New Zealand (AMINZ), the Resolution Institute (Lawyers Engaged in Alternative Dispute Resolution (LEADR) and Institute of Arbitrators and Mediators Australia combined), and FairWay Resolution.

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

The New Zealand Law Commission is reviewing the need for legislation regulating class action claims.

The Arbitration Amendment Bill 2017, which seeks to amend and update New Zealand's arbitration legislation, is before Parliament. The Bill aims to better align New Zealand and international law by improving protection for confidentiality and strengthening the enforceability of arbitral awards. The Bill also seeks to widen the scope of disputes which may be arbitrated, for example, by upholding the validity of arbitration clauses contained in Trust deeds.

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

New Zealand has a stable democracy and a judiciary that upholds the rule of law. According to Transparency International, it is the least corrupt country in the world.[1] As a result, parties undertaking dispute resolution in New Zealand can have a high degree of confidence that their matter will be determined on its merits, uninfluenced by corruption or other external factors.

[1] Transparency International, 'Corruption by Country/Territory' (www.transparency.org/country/NZL last accessed 27 August 2018)

About the Authors:

Nick Gillies
Partner, Hesketh Henry

Gennise Luen
Senior Associate, Hesketh Henry

Eloise Callister-Baker
Solicitor, Hesketh Henry

E: lawyers@heskethhenry.co.nz
W: www.heskethhenry.co.nz
A: Level 14, PwC Tower
188 Quay Street, Auckland
New Zealand
T: +64 9 375 8700

Jurisdiction: Switzerland
Firm: Prager Dreifuss
Authors: Dr Urs Feller, Marcel Frey and Nina Lim

PRAGER DREIFUSS

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

In principle, Switzerland has a three-tiered court system in private law matters: a District Court acting as a court of first instance, a Court of Appeal or High Court in the second instance and the Federal Supreme Court as the highest body of appeal. Further, some cantons have made use of their competence to set up specialised first instance courts such as Labour Courts or courts dealing with rental matters whilst four cantons (Zurich, St. Gallen, Aargau and Berne) have even set up specialized Commercial Courts that deal solely with commercial disputes. Judgments by these Commercial Courts, which form a part of the cantonal high courts, can be appealed only to the Federal Supreme Court.

In Switzerland, civil litigation is usually preceded by a mandatory conciliation phase. This generally takes place before the local conciliation authority of the commune in which the defendant resides. The Civil Procedure Code prescribes some instances where trial parties may forgo the conciliation phase and lodge their claim directly with the competent court (see question 5).

During the court proceedings, the judges primarily have a case management role. The judge directs the proceedings and issues the required procedural orders. As a rule, in civil litigation the onus is on the parties (and their lawyers) to present (and prove if disputed) the relevant facts to the court. In all proceedings, the judge has the duty to enquire of his/her own accord, if a party's submission is unclear, contradictory, ambiguous or manifestly incomplete. The degree to which this needs to be done depends firstly on the area of law since some legal areas require courts to ascertain the matters of fact ex officio (i.e. in certain areas of family law). Secondly, the extent of the court's own intervention is defined by whether a party is professionally represented, in which case the court's duty to inquire is substantially lower.

As for the application of the law, Swiss judges apply the law ex officio. Once before it, the court deals with claims by either not entering into the matter and not considering the merits or by making a decision on the merits itself and adjudicating the matter.

2. Are court hearings open to the public? Are court documents accessible by the public?

For the most part, civil law proceedings as well as the delivery of judgments are accessible to the public, unless public interests or the legitimate interests of the parties involved are considered preponderant and require the proceedings to be held in camera. However, conciliation hearings as well as judicial settlement hearings are not open to the public. The same applies to the courts' internal deliberations. The parties are not privy to the discussion of the judges.

Copies of judgments by the courts, usually in an anonymised version, may be requested by the public. Most jurisprudence of the high courts and all of the Federal Supreme Court since 2007 are available online (see www.bger.ch/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht.htm). However, the submissions by the parties, including the exhibits, are exempt

from public access. Compared to proceedings in common law jurisdictions, a higher degree of confidentiality is maintained.

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

Under Swiss law, only attorneys registered with one of the cantonal attorney registers have the right to appear in Swiss courts. Once registered, attorneys may conduct proceedings on behalf of their clients in all cantons. Registration requires the candidate attorney passing one of the cantonal bar exams. European attorneys registered in one of the EU/EFTA attorney registers also have the right to appear in Swiss courts on a temporary basis. European legal professionals registered with a cantonal register may appear in court on a permanent basis, provided they make use of their original European professional title. They can even register with a cantonal attorney register after either passing an exam or having worked regularly in practice as an attorney in Switzerland for three years.

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

Limitation periods form part of the substantive civil law. The general statutory limitation period for contractual claims is 10 years if the law does not provide otherwise (e.g. five years for periodic payments). Tort claims and claims for unjust enrichment become time-barred after one year. However, if a tort claim is derived from an offence for which criminal law envisages a longer limitation period, such longer period is also applicable to the tort claim. Usually, the courts observe limitation periods only if pleaded by the parties.

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

If a conciliation hearing is required by law, the parties have to attend this hearing first. The conciliation authority is competent to issue judgments for claims up to an amount of CHF 5,000. The proposed amendment to the Civil Procedure Code would see this amount increased to CHF 10,000 if adopted.

In certain instances, the Civil Procedure Code does away with the requirement of a prior conciliation hearing, i.e. in summary proceedings, some actions in connection with debt enforcement or if a single cantonal instance is competent to hear a matter, such as a commercial court. If the value of the dispute is CHF 100,000 or more, the parties can mutually agree to waive the preceding conciliation hearing. Furthermore, the claimant may waive conciliation and commence direct proceedings in court if the defendant's registered office or domicile is abroad or if the defendant's residence is unknown. If a conciliation hearing is necessary, a party domiciled outside the canton or abroad is exempt from appearing in person and may send a representative.

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

Conciliation hearings, if required by law, should take place within two months of receipt of the claimant's application by the conciliation authority. If no settlement is reached during the conciliation hearing, the conciliation authority grants authorisation, usually to the claimant, to approach the first instance court. The claimant then has three months to file the action with the competent court. If not submitted within three months, the authorisation lapses. This has however no material effect on the claim (no res iudicata). Rather, a claimant is merely required to recommence conciliation proceedings.

If no conciliation hearing is required by law, the matter is brought directly to trial by lodging a submission to the court of first instance, e.g. the district court or the commercial court.

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

Disclosure is narrower under Swiss civil procedure law when compared to similar obligations in proceedings in common law jurisdictions. In principle, trial parties and third parties have a statutory duty to co-operate with the court in the taking of evidence. The production of evidence is either ordered by the court or the parties can produce documents in their possession with their legal brief. A request to the court by a party to order the other party to disclose evidence such as documents will be granted only if the evidence sought is required to prove facts that are legally relevant, the claim has been substantially motivated by the requesting party and the evidence requested (e.g. a specific document) is sufficiently identified. As a rule, parties are well advised to rely on evidence at their disposal than hoping to find evidence in the hands of the counterparty.

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

A party may refuse to co-operate where the taking of evidence would expose a close associate, such as a direct relative or a spouse, to criminal prosecution or civil liability. Furthermore, co-operation may be refused if the disclosure would constitute a breach of professional confidentiality (e.g. attorney-client privilege). Under Swiss law there is currently no attorney-client privilege for in-house counsels, although moves are afoot to change this to some degree in the next revision of the Civil Procedure Code. On the other hand, patent attorneys working as in-house counsels already enjoy attorney-client privilege.

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

As a rule, no evidence is exchanged prior to the trial, neither in written form nor orally. However, Swiss law has the instrument of the precautionary taking of evidence by the court before a matter is actually pending. This is possible if either the law grants the right to do so or the applicant shows credibly that the evidence is at risk or that it has a legitimate interest. If successfully pleaded, a party can obtain certain critical evidence that it can use to determine whether it wants to risk proceedings.

There is no comparable right to cross-examine a witness as in common law jurisdictions. Nevertheless, each party is allowed to put additional questions to a witness through the judge after the judge's initial interrogation. The court's examination of a witness is usually thorough.

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

There are no specific rules governing the appointment of experts by the parties themselves. Where a party introduces findings by an expert of its own choice, they are considered by the court as mere party allegations and the court is free to assess their evidentiary value. A proposed amendment to the Civil Procedure Code would elevate expert reports to the same level as normal evidentiary documents.

If the court believes that expert knowledge is required in a particular matter, it can mandate one or more experts, either of its own accord but normally it is by request of a party. Court-appointed experts are considered experts with an added evidentiary weight as they are subject to similarly strict objectivity requirements and recusal grounds as judges and judicial officers. Court-appointed experts must tell the truth. There are criminal consequences for perjury by

Dr Urs Feller

Prager Dreifuss

Urs Feller is head of Prager Dreifuss' Dispute Resolution team. This team acts for international and domestic clients in a variety of disputes before courts and administrative authorities in Switzerland as well as before international arbitration tribunals. Urs Feller has vast experience in all forms of dispute resolution, including mediation. He regularly advises clients on contractual and commercial disputes, in particular relating to banking, insurance, compliance as well as administrative and judicial assistance. Other areas of expertise include insolvency, restructuring and asset recovery.

He is a member of the executive committee of the International Bar Association's litigation section (and former Vice-chair of the committee). Urs is a member of STEP and regularly advises clients on trusts, foundations and inheritance matters including disputes in that area.

Chambers Europe and Chambers Global refer to him as "very responsive, extremely hard-working and easy to communicate with", and also as "careful, accurate, creative". He is praised for his "prompt and effective reaction" as well as being "co-operative and quick in grasping the essence of the case."

an expert witness. The court instructs the expert and submits the relevant questions to the expert. The court gives the parties the opportunity to respond to the proposed questions put to the expert and may invite them to suggest amendments or additional questions. The expert must submit his/her opinion within the set deadline, in writing or present it orally. If necessary, an expert can also be summoned to the hearing. The parties have the opportunity to ask for explanations and to put additional questions to the expert.

11. What interim remedies are available before trial?

Interim remedies before trial may be divided up between general interim measures, attachment orders under the Debt Enforcement and Bankruptcy Act ('DEBA') and so-called protective letters.

For non-monetary claims, the types of general interim measures available to parties are not limited by law. Rather, the parties are free to request and the court is at liberty to order, whatever measure is deemed necessary. Such orders may take the form of a mandatory or prohibitory interim injunction, such as an order to a bank to freeze certain assets, or a cease and desist order. Further options include orders to take on record entries in a public register, orders to perform or rectify something or orders forbidding the disposal of an object.

If the opposing party provides appropriate security, the court can desist ordering an interim measure. If the principal action is not yet pending when an interim measure is requested, the court sets a deadline within which the applicant must file its principal action (no conciliation hearing required), failing which the interim measure lapses automatically. The court may make the issuing of an interim measure subject to the payment of security by the applicant if it is anticipated that the measures could cause loss or damage to the opposing party.

In cases of special urgency, and in particular where there is a risk that the enforcement of the measure will be frustrated by the other party if it becomes aware of the application in advance, the court can order the interim measure immediately in ex parte proceedings with a first hearing only after the measure has been put in place.

Safeguarding monetary claims must take the form of an attachment order under the DEBA. A disposal or transfer of the assets of the debtor is prohibited by such an order until the creditor's claim has been determined in debt collection proceedings. The applicant may be held to post security for potential damages from an unwarranted attachment. If the creditor has not already commenced debt enforcement proceedings or filed a court action before the attachment proceedings, the creditor must do so within 10 days of service of the attachment order to maintain the safety measure. If the debtor files an objection, the creditor must either apply for the objection to be set aside or file a court action to have the creditor's claim confirmed within 10 days of service of the objection.

The defensive measure in the form of a protective letter can be filed with a court by any person who has reason to believe that an ex parte application for an interim measure, an attachment order under the DEBA or any other measure against that person may be lodged soon. This person can set out their position in such a letter. The party applying for the ex parte interim measure is only served with this letter if it actually initiates the relevant proceedings. Such a letter becomes ineffective six months after it has been filed. The rationale of such letters is to prevent the court from adopting an ex parte interim measure solely on the arguments of the applicant.

With regard to interim measures, the applicant must credibly show that a right to which the applicant is entitled has been violated or that a violation is immediately anticipated and, additionally, that the violation threatens to cause not easily reparable harm to the applicant. When applying for ex parte interim measures, the applicant must furthermore establish that there is special urgency by showing why it is necessary to adopt an interim measure without hearing the other party first.

For an attachment order to be successful under the DEBA, a creditor has to show that it has a mature unsecured claim against the debtor and that there exists one of the statutory grounds for attaching assets. Further, the creditor needs to plausibly demonstrate the existence of assets and their location. The DEBA provides for the following six grounds for the attachment of assets:

a. if the debtor has no fixed domicile;
b. if the debtor is concealing assets, absconding or making preparations to abscond so as to evade the fulfilment of his obligations;
c. if the debtor is travelling through Switzerland or conducts business on trade fairs, for claims which must be fulfilled at once;
d. if the debtor does not live in Switzerland and no other ground for attachment is fulfilled, provided that the claim has sufficient connection with Switzerland or is based on a recognition of debt;

Marcel Frey

Prager Dreifuss

Marcel Frey is a member of Prager Dreifuss' Dispute Resolution and Private Clients teams. He represents local and foreign clients in court and arbitration proceedings. He is regularly involved in mutual legal assistance matters and asset recovery. Marcel is listed in the Dispute Resolution section of Chambers Europe's Leading Lawyers for Business. Clients consider him "very knowledgeable, responsive and user friendly," and appreciate that he is "thorough and has great attention to detail." (Chambers Europe 2016, 2015). According to Chambers Europe 2017 he has "a broad commercial litigation practice frequently assisting clients with asset recovery and mutual legal assistance." Clients describe him as "very proactive, understanding and very pleasant to work with."

He also advises clients with regard to corporate law and enforcement matters.

Marcel Frey is a member of the management committee of the Swiss South African Chamber of Commerce.

e. if the creditor holds a provisional or definitive certificate of shortfall against the debtor; or

f. if the creditor holds a definitive title (i.e. a judgement for a monetary amount) to set aside the objection in enforcement proceedings.

12. What remedies are available at trial?

General interim remedies and attachment orders may also be requested during the trial phase. The same rules apply as for remedies before the trial phase (see question 11).

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

The method of enforcement of domestic judgments depends on whether a monetary or non-monetary judgment is at stake (for the enforcement of foreign judgments, see question 18). In instances of monetary judgments, the issuing of a payment order by the local debt collection office has to be requested. The debtor can object to such a payment order. In such a case, the creditor must request the setting aside of this objection in the enforcement court by reference to the enforceable judgment (or award) obtained.

The enforcement court also decides on the enforcement of non-monetary judgments. The enforceability is examined ex officio and the opposing party can file its comments. The question of whether a judgment is enforceable can be decided either as a preliminary question in the pending proceedings (incidentally) or separately (exequatur).

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

As a rule, costs (court and counterparty as well as own costs) are borne by the unsuccessful party. If no party succeeds fully with its claims, the costs are apportioned in accordance with the outcome of the case. Usually, the court decides on the costs in its final decision.

The claimant is obliged to make a reasonable deposit in the amount of the likely court fees at the beginning of the proceedings. In the final judgment, the court's fees are set off against the advances paid by the parties. Any balance is collected from the person liable to pay, i.e. the unsuccessful party. The unsuccessful party has to reimburse the other party for its advances and must pay the party costs awarded. Note in conclusion, that the risk of insolvency of a counterparty is borne largely by the other party. However, the Federal Council has proposed to change this insofar as the court will collect its fees from the unsuccessful party directly and reimburse the claimant for the advances paid if the claimant was successful (see also question 20).

Unless a treaty (such as the Hague Convention of 1954 on Civil Procedure) provides otherwise, a defendant can also apply for the court to order that the claimant provide security for its party costs if the claimant:

a. has no residence or registered office in Switzerland;

b. appears to be insolvent;

c. owes costs from prior proceedings; or

d. if for other reasons there seems to be a considerable risk that the awarded party costs will not be paid.

The cantons set the tariffs for the costs (both court fees and party costs). These are usually based on the amount in dispute and may be amended based on the complexity of a case and duration of proceedings. The Federal Supreme Court has its own tariffs, also based on the amount in dispute. Similarly, for DEBA proceedings, a federal ordinance governs the fees applicable.

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

A final first instance judgment from a cantonal district court may either be appealed (Berufung) or be subject to an objection (Beschwerde) and brought before the second instance cantonal (high) court. An appeal is admissible if the value of the claim is at least CHF 10,000. It is not admissible against decisions of the enforcement court and with regard to some matters under the DEBA (such as attachment orders which are subject to an objection). An incorrect application of the law or an incorrect establishment of the facts may constitute grounds for review. If a judgment is not eligible for appeal, an objection is admissible. The grounds for an objection are narrower and limited to an incorrect application of the law and a manifestly incorrect establishment of the facts.

Second instance judgments as well as judgments by single cantonal instances (such as commercial courts) can be brought before the Federal Supreme Court if the amount in dispute is higher than CHF 30,000 (with some exceptions such as rental disputes). The grounds for an appeal for civil matters to the Federal Supreme Court are narrow. Usually, only breaches of federal law and/or a manifestly incorrect establishment of the facts may be pleaded.

16. Are contingency or conditional fee arrangements permitted between lawyers and clients? Is third-party funding permitted?

Contingency fee arrangements are not permitted under Swiss law. However, conditional fee arrangements are permitted under specific circumstances, one of which being that the lawyer's base fee covers his/her actual costs and also allows a modest earning. Moreover, such an agreement needs to be made at the very beginning of the matter or after the matter is concluded.

Third-party funding is becoming more popular and is permitted as long as the lawyer acts independently from the third-party funder. Furthermore, the lawyer is not allowed to participate in the funding. Nevertheless, funders are allowed to share in the proceeds awarded.

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

Typical class actions are not yet available in Switzerland. Associations and other organisations of national or regional importance that are authorised by their articles of association to protect the interests of a certain group of individuals are allowed to bring a group action (Verbandsklage) in their own name for a violation of the personality of the members of such group. Organisations, such as environmental protection organisations, are, in limited cases, also allowed to bring an action in their own name based on special laws.

The Swiss Parliament has referred a motion to the Federal Government to revise the current system of collective redress and to introduce class actions. The Federal Council followed this motion and has proposed to introduce a proceeding which allows for companies to find a collective solution for mass claims with effect for all damaged parties. The Federal Council also proposes to allow group actions not only for violation of personal rights (see above) but also for financial claims. However, these proposals are currently undergoing consultations, which are scheduled to end on 11 June 2018 (see also question 20).

Currently, in instances of class action-type scenarios, it is sometimes possible to launch a test case during which some core elements of fact and/or the law can be decided. Other cases with a similar fact pattern are then stayed by the court based on an application by the respective claimants for a suspension. Once the test case is decided, the identical elements in the subsequent cases do not need to be litigated from scratch.

In a recent development, in September 2017, the Swiss Consumer Protection Foundation lodged a group action against Volkswagen and the car importer AMAG by means of which it is attempting to secure damages for VW-car owners who were required to have alterations made to their vehicles owing to the manipulated diesel exhaust emissions. In a first step, the consumer group lodged a claim for a declaratory judgement on the question whether Volkswagen acted fraudulently and deceived its customers. In December 2017, as a second step, the consumer group lodged a substantial damages claim. For this purpose, it has obtained assignments by affected vehicle owners who had paid an inflated price for their cars when taking into account the lower quality exhaust system, the aim being to distribute any damages received among the vehicle owner who assigned their claims.

On July 12, 2018, the Commercial Court of the Canton of Zurich, which is dealing with the two claims, found that with regard to the declaratory action, the consumer protection group had not demonstrated its legitimate interest to obtain such a ruling since in the view of the court, the deceptive practices by VW had been terminated and a declaratory ruling could not be sought to establish the diminished value of the vehicle. The claimant has appealed the judgment to the Federal Tribunal.

Nina Lim
Prager Dreifuss

Nina Lim is a member of Prager Dreifuss' Dispute Resolution and Private Clients teams. She represents domestic and foreign clients in court proceedings and advices entrepreneurs in commercial & corporate matters.

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

The Civil Procedure Code governs the recognition and enforcement of foreign judgments, as long as the Swiss Federal Act on Private International Law (PILA) or an international treaty (such as the Lugano Convention) does not take precedence. The PILA is only applicable if there is no international treaty. The recognition procedure itself is summary in nature and governed by the rules of the Civil Procedure Code.

There are two different ways of enforcing a foreign judgment. Regular enforcement proceedings for judgements by a Lugano Convention signatory state are governed by the Lugano Convention itself. Other state judgements are enforced pursuant to the rules of the PILA. Monetary judgments can be enforced by means of ordinary debt collection proceedings (see question 13). Debt collection proceedings can either be commenced straight away or one can also initiate regular enforcement proceedings first and start ordinary debt collection proceedings after receiving an enforceable judgment. Against a judgment granting enforceability, an objection can be filed (see question 15).

Under Swiss law foreign ex-parte decisions cannot be enforced for lack of adherence to the right to be heard, nor can declaratory judgments be enforced since there are no actual enforcement steps that can be ordered.

19. What are the main forms of alternative dispute resolution? Which are the main alternative dispute resolution organisations in your jurisdiction?

Alternative dispute resolution, other than arbitration in international commercial disputes, is currently of only limited significance in Switzerland.

This is likely due to the active approach taken by Swiss judges to find a suitable settlement solution during the course of the court proceedings. Following the exchange of the statement of claim and the statement of defence, the court frequently makes a preliminary assessment of the matter and approaches the parties in an instruction hearing during which it provides a first-hand view of the procedural strengths and weaknesses of the parties' stances. It then sets out a well-reasoned proposal what a settlement

could look like and encourages the parties to conclude a settlement agreement during the instruction hearing. Frequently, parties agree to conclude a judicial settlement under such circumstances. Such instruction hearings may be ordered at any time during the proceedings. Parties can also ask the court to stay proceedings in order for them to negotiate a settlement agreement inter-partes.

The Civil Procedure Code contains some provisions on mediation. If all the parties so request, the pre-trial conciliation proceedings can be replaced by mediation. The court can also recommend mediation to the parties during the proceedings or the parties may make a joint request for mediation. The parties themselves are responsible for organising and conducting mediation and also bear the costs for mediation. The parties can request that an agreement reached through mediation be approved by the court. Such an approved agreement has the same effect as a state court decision. A court cannot approve a mediation agreement if the parties agree on mediation without pending proceedings in the matter.

As mentioned in questions 1 and 5, a conciliation hearing before the local conciliation authority is usually required before trial. A substantial number of small cases is already settled at this stage.

The following are the main alternative dispute resolution organisations in Switzerland:

a. Swiss Chambers' Arbitration Institution: they have adopted the Swiss Rules of Commercial Mediation (www.swissarbitration.org/files/50/Mediation%20Rules/English%20mediation_20-06-2016_web-version_englisch.pdf);
b. WIPO Arbitration and Mediation Center (www.wipo.int/amc/en);
c. Swiss Chamber of Commercial Mediation (SCCM; www.skwm.ch);
d. Swiss Association of Mediators (SDM-FSM; www.swiss-mediators.org).

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

The proposal by the Swiss Parliament to amend the limitation periods in Swiss liability law has been approved and the limitation period for personal injuries will be changed from 10 years to 20 years. Tort claims and claims for unjust enrichment become time-barred three years after the injured party becomes aware of the claim (see question 4). The changes will enter into force on 1 January 2020.

The Federal Council has proposed a revision of the Civil Procedure Code which has been in effect for seven years. In general, the Federal Council states that the Civil Procedure Code has proven itself. By revising selected provisions, the Federal Council intends to improve the functionality and enforcement of the Civil Procedure Code.

As noted in questions 15 and 17, the changes of the Civil Procedure Code pertain i.a. to collect court fees from the unsuccessful party directly which relieves the claimant from the risk of insolvency of a counterparty and proposals on how to revise the rules on collective redress.

The Federal Council has proposed further changes on the Civil Procedure Code with regard to the following issues: It proposes to reduce the amount of advance on costs at the beginning of the proceedings by half. The government hopes to break down thereby the de facto access barrier to the court and allow parties to assert their claims who would otherwise not have been not able to do so due to the high amount of costs which had to be advanced by the claiming party. The conciliation hearings which have proven themselves useful are set to be expanded and required for other matters which until now could be brought to trial directly (see also question 6). In addition, the Federal Council proposes to facilitate the coordination of proceedings and thus improve the efficient assertion and decision on multiple claims. Moreover, the jurisdiction of the Federal Supreme Court shall be selectively implemented into the Civil Procedure Code for clarification and specification purposes. The consultation period for these proposals by the Federal Council has ended on 11 June 2018 and the results are currently being evaluated.

Changes to the Swiss Federal Act on International Private Law with regard to the framework for international arbitration with the aim of increasing the attractiveness of Switzerland as a place for international arbitration were also proposed. The Federal Council proposes to include the possibility of a revision of an award to the Federal Supreme Court into the act. Further, if no seat is chosen, the Swiss court first seized by a party will be considered competent to determine the seat of the arbitration tribunal. The proposals also provide that an appeal to the Federal Supreme Court against an award may be brought in English. The decision by the Federal Supreme Court will however still be issued in one of the official languages in Switzerland (i.e. German, French or Italian). The Federal Parliament is currently reviewing these proposals.

The Federal Council has also made proposals on how to reform the Swiss Federal Act on International Private Law with regard to the provisions on inheritance law. The reason is the European Union Regulation on Inheritance Matters (Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession). The goal is to ensure the compatibility of Swiss and foreign competences and also to allow a better coordination with foreign proceedings. The consultation period for these proposals has ended on 31 May 2018 and the results are currently being evaluated.

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

Switzerland is known for its neutrality, consistent and high-quality jurisprudence and large pool of multi-lingual legal practitioners. These are some of the reasons why Switzerland is a destination of choice for arbitration. In addition, the Swiss state court system is highly efficient and effective as compared to other countries. Court-initiated settlements are widespread. The commercial courts are especially known for conducting proceedings efficiently and with a high settlement rate and are open to foreign litigants (see also question 19). Recent figures show that about two-thirds of the cases pending at the Commercial Court of the Canton of Zurich are settled with the assistance of the court within a period of six months following the submission of the statement of claim.

About the Authors:

Dr Urs Feller
Prager Dreifuss
E: urs.feller@prager-dreifuss.com

Marcel Frey
Prager Dreifuss
E: marcel.frey@prager-dreifuss.com

Nina Lim
Prager Dreifuss
E: nina.lim@prager-dreifuss.com

W: www.prager-dreifuss.com
A: A Prager Dreifuss Ltd
Mühlebachstrasse 6
CH-8008 Zurich
Switzerland
T: +41 44 254 55 55
F: +41 44 254 55 99

Jurisdiction: Thailand

Firm: Weerawong, Chinnavat & Partners Ltd.
Authors: Warathorn Wongsawangsiri, Jedsarit Sahussarungsi, Yindee Limpives and Witchaphon Techasawatwit

WEERAWONG C&P
WEERAWONG, CHINNAVAT & PARTNERS LTD.

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

Thai Court System

The Thai Courts of Justice adopt a three-tier court system which comprises the Courts of First Instance, the Courts of Appeal and the Supreme Court.

In civil matters, the Courts of First Instance consist of general civil courts and specialized courts. The general civil courts are divided into District Courts (or "Kwaeng Courts"), which have jurisdiction to hear small claims of not exceeding THB 300,000, and Provincial Courts, which have jurisdiction to hear all civil claims, which are not subject to the jurisdiction of other civil courts (i.e. District Courts and Specialized Courts). In general, Provincial Courts will hear claims of an amount exceeding THB 300,000, non-monetary cases and non-contentious cases.

Apart from general civil courts, there are several Specialized Courts which hear disputes concerning certain specialized subject matters, such as labour, tax, and intellectual property. At present, specialized courts include the following:

a. Labour Courts;
b. Juvenile and Family Courts;
c. The Central Intellectual Property and International Trade Court;
d. The Central Bankruptcy Court; and
e. The Central Tax Court.

Generally, a party to a civil case may appeal a judgment rendered by a Court of First Instance to a Court of Appeal (as the second tier of the system), subject to certain conditions as prescribed by law. Similar to the Courts of First Instance, the Courts of Appeal comprise general courts of appeal (including the regional courts of appeal) and the Court of Appeal for Specialized Cases, which have jurisdiction to hear appeals from the Specialized Courts.

A party who wishes to appeal a judgment of a Court of Appeal may do so only by the permission of the Supreme Court. As the highest court of the land, the Supreme Court will grant a permission to appeal when it is satisfied that the issues contained in the appeal are significant and should be considered by the Supreme Court.

Role of Judges

There are four types of judges in the Thai Judiciary, namely career judges, senior judges, lay or associate judges (e.g. in the Juvenile and Family Courts, Labour Courts, etc.) and Kadi (or "Datoh Yutithum").

Each type of judge plays a different role in adjudicating and managing cases that appear before the court. In an adversarial system, such as Thailand, judges in civil proceedings are generally passive in fact-finding and witness examination, although they may be proactive in case management and procedural matters. This is different from the approach adopted by the Thai Administrative Courts and, to a certain extent, Labour Courts (i.e. inquisitorial

system), where judges are heavily involved in the investigation of facts and witness examination.

2. Are court hearings open to the public? Are court documents accessible by the public?

As a general rule, court hearings in civil proceedings are open to the public. However, a court may forbid the public from attending the hearings, either in whole or in part, based on certain grounds, e.g. safeguarding public interest. Under Thai procedural law, only parties to a case, a witness and/or a third party who has a legitimate interest or a reasonable ground may request for access to the documents or pleadings contained in the court case file, although there are some restrictions as prescribed by law.

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

Any lawyer, who has passed the technical examination and obtained a lawyer's license from the Lawyers Council of Thailand, may represent a client in court proceedings in all areas of law, as well as preparing and filing petitions and evidence. To represent a client, a lawyer must submit a deed of attorney or appointment, duly executed by the client, to the relevant court.

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

Under Thai law, prescription or limitation periods for commencing civil claims vary from one month to 10 years, depending on the subject matter and the substance of the claims. Failure to observe the applicable prescription or limitation periods may result in loss of all rights with respect to such claims. However, the issue of limitation periods in civil claims is not considered as relating to public order, if the defendant does not raise this argument in its answer. If the issue is not raised, the courts will proceed further without considering the limitation period.

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

Under Thai civil procedural law, there are no general requirements for a procedural pre-action to be taken prior to the commencement of civil proceedings. However, a person, who wishes to pursue a claim against another person with respect to certain subject matters (e.g. enforcement of mortgage or rescission of contracts), must meet certain requirements as required by a contract or by law (e.g. serving a notice to the counterparty) before filing such claim to the relevant court. In practice, a notice or a demand letter is usually sent to the other party as a pre-action step for proving the commencement of the prescription period or the calculation of relevant interests.

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

In general civil proceedings, once a complaint is filed and accepted by a relevant court, the plaintiff has to request the court to summon and serve a copy of the complaint on the defendant. The time frame required for the defendant to submit an answer (or statement of defense) to the complaint will depend on the means of service, ranging from 15 to 30 days from the date of service.

Extensions of the time frame may be permitted by the court, depending on a reasonable explanation provided by the defendant. Once the answer to the complaint is duly submitted to the court, the court will generally schedule a hearing for the settlement of issues and, in such hearing, schedule the trial hearings. Before the first trial hearing, the court may also schedule mediation hearings to provide an opportunity for the parties to settle the case. The parties are also required to submit the first list of witnesses and documents at least seven days before the first trial hearing.

In practice, the parties will have no control over the timetable and the dates of the trial hearings, although the court may ask the parties about their possible hearing dates and take those dates into consideration.

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

There is no legal obligation imposed on parties to disclose all the relevant documents to other parties or to the court. Thus, the parties have the right to select a list of witnesses and documents, that are helpful to their case. However, upon the request of a party, the court may issue an order to subpoena a document, either from the counter-party or any third parties for the court's perusal. Failure to comply with the order may result in a person possessing such subpoenaed document being subject to criminal liability.

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

In civil proceedings, a party or a person may refuse to disclose to a court certain types of information (e.g. confidential information relating to the affairs of the state or confidential information entrusted or imparted to a lawyer, etc.) However, the court may summon and demand an explanation or grounds of refusal from such party or person. If the court is not satisfied with the explanation or the grounds, it is empowered to order such party or person to disclose such information.

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

If a party submits a request and the other party does not object to such request, subject to the court's discretion, the court may allow the party submitting the request to submit witness statements in lieu of an examination-in-chief. Such request must be submitted with reasons before the date of the settlement of issues or the date of trial hearing (in the case where there is no settlement of issues) and the court will fix the period, within which the relevant party must submit the witness statements to the court. The delivery of a copy of such statements to the other party must be made at least seven days before the trial hearing on such witness. However, such witness must be present at the court for cross-examination, unless exceptions as prescribed by law apply.

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

The Thai Civil Procedure Code allows expert witnesses to be appointed either by the initiation of the court or by the request of a party to the case. The expert witness may provide his or her opinion orally or in writing. There is no particular set of rules or code of conduct under Thai laws governing expert witnesses in civil proceedings.

11. What interim remedies are available before trial?

According to Thai law, interim remedies are available for the plaintiff upon request any time before the court renders its judgment, subject to the conditions as specified by law. These interim remedies include orders for security for costs, seizure or attachment orders, temporary prohibitive orders (or injunctions), orders requiring government authorities to suspend or revoke any registration, orders for provisional arrest or detention, etc.

The defendant is entitled to another interim remedy. In case the plaintiff is not situated in Thailand with no enforceable property in Thailand, or, if the court is convinced that if the plaintiff loses the case, it may not pay the court's fee and expenses, the defendant may request the

court to order the plaintiff to deposit money or any security for the court's fee and expenses. Failing to comply with this order may result in a temporary suspension of the case.

12. What remedies are available at trial?

In addition to the response to question 11 above, a party to the case may, in accordance with the Civil Procedure Code, request for other remedies regarding the taking of evidence, including a court's order for the production or the delivery of documents, the inspection of persons or things, the appointment of expert witness, etc.

Both parties are also entitled to apply to the court for an order to safeguard the interest of the applicant during trial or to secure the execution of the judgment.

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

After the court renders a judgment, the court will issue a decree requiring a party (i.e. the judgment debtor) to make a payment of money, delivery of property or performance of or forbearance from an act (as the case may be and as required by the other party – i.e. the judgment creditor) within a certain period of time.

If the judgment debtor fails to comply with such decree within the specified period, the judgment creditor will be entitled to request the execution by means of seizure of property, attachment of claims against third parties or other execution measures, and request the court to issue a writ of execution appointing the executing officer. Once the writ of execution is issued and the executing officer is duly appointed, the judgment creditor must submit a statement of execution to the executing officer within 10 years from the date of the judgment, in order for the executing officer to commence the execution process.

Upon receiving such statement of execution, the executing officer will commence the execution process and seize the property of the judgment debtor and such property will be sold by public auction. During the execution, if there are reasonable grounds to believe that the judgment debtor has more property than what is known to the judgment creditor, the judgment creditor may request the court to conduct an inquiry and, then, the court may summon the judgment debtor or order the judgment debtor to produce a document listing out its properties to the court.

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

It is a common practice that Thai courts make awards of costs to the successful parties. However, the costs awarded will be subject to the discretion of the relevant court, and the amount is usually nominal. In order to determine the amount of costs, the court will assess the complexity of the case, and the amount of work and time in conducting the case. It is known that the court usually consults its internal guidelines, listing out the levels of fees and costs, before determining the amount of costs to be awarded.

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

The Courts of Appeal and the Supreme Court are courts which consider questions of law and, to a limited extent, questions of fact raised by a party who is dissatisfied with a judgment of a Court of First Instance. Generally, in civil actions involving THB 50,000 or less, no appeal can be made on a question of fact, unless a judge in the court of first instance provides a dissenting opinion, certifies that reasonable grounds exist for the Court of Appeal to consider such question of fact or an approval for appeal had been granted by the Chief Justice of the Court of First Instance. Such question of fact or of law can be relied upon by the litigant only if such question has been expressly stated in the appeal and has arisen in the Court of First Instance.

Warathorn Wongsawangsiri
Partner, Weerawong, Chinnavat & Partners Ltd.

Warathorn Wongsawangsiri is a Partner in the Litigation and Arbitration practice group of Weerawong C&P. He represents clients in domestic and international litigation and arbitration. His expertise includes administrative law, banking, bankruptcy and business reorganization, construction, energy, oil and gas, hotels and real estate, insurance, product liability and telecommunications. He represents clients in the resolution of disputes at the Thai Arbitration Institute (TAI), the Hong Kong International Arbitration Center (HKIAC) and the Singapore International Arbitration Center (SIAC), as well as the enforcement of awards. Warathorn is recognized as a recommended lawyer in Chambers and Partners and The Legal 500 in 2018 and was named in the Asian Legal Business top 40 Under 40 in 2017. He is a guest lecturer at national law schools and the Thai Institute of Directors. He is the author of the Thailand chapters of "The International Arbitration Review", The Law Reviews, 2015–2018 and the "Dispute Resolution Law Guide", LexisNexis, 2018. He obtained an LL.M. degree (Honors) from Northwestern University, USA and an LL.B. degree (1st Class Honors) from Chulalongkorn University.

Moreover, such question must also be the essential matter of the case and worthy of a decision.

As for the final appeal to the Supreme Court, a litigant cannot appeal to the Supreme Court, unless a permission is granted to such litigant by the Supreme Court. The Supreme Court will consider the application submitted by the litigation and see if the issues contained in the appeal are significant and worthy of the Supreme Court's consideration. Such issues include the following:

a. issues relating to public interest or public order;
b. the judgment of the Court of Appeal contains a significant legal issue which contradicts a precedent of the Supreme Court concerning the same issue;
c. the judgment of the Court of Appeal concerns a significant legal issue which is not established as a Supreme Court precedent;
d. the judgment of the Court of Appeal contradicts a final judgment of the other courts; and/or
e. issues which benefit the development of the interpretation of the law.

16. Are contingency or conditional fee arrangements permitted between lawyers and clients? Is third-party funding permitted?

Except for class action lawsuits, according to the decisions of the Supreme Court, a lawyer's fee arrangement cannot be based on the outcome of the case. Lawyers are generally prohibited from having any interest, both monetary and non-monetary, in the outcome of the case since that would be considered an agreement which is contrary to public order or good morals. Therefore, such agreement is void and unenforceable in Thai courts.

Regarding third-party funding, there is no such concept under Thai law. According to the interpretation of the Supreme Court, it is possible that third-party funding arrangement will be deemed as something similar to the concept of maintenance or champerty in common law jurisdictions and contrary to public order or good morals. As a result, such arrangement may be void and unenforceable in Thai courts. The only legally available option for a third person who wishes to share in the proceeds granted by a court judgment is to become a party to the case and join the proceedings as a party to the case.

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

Class action lawsuits were recently introduced in Thailand in 2015 by an amendment to the Thai Civil Procedure Code. Under the provisions of the Code, class actions may be brought by a member of a group of persons, having the same characteristics, against a common defendant with respect to the same rights which derives from common issues of facts or laws.

The relevant court may allow the class action to be conducted only when it is satisfied that the nature of the claims, the reliefs sought, the allegations and the interests are common among the litigants. Moreover, the applicant for class action must also convince the court to the extent that a class action lawsuit is more efficient than the ordinary civil proceedings in such circumstances and the ordinary civil proceedings would be onerous and inconvenient due to the number of the relevant litigants. Should the court decide in favor of the application, a specific chapter in the Thai Civil Procedure Code concerning class action lawsuits will apply.

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

At present, Thailand is not a party to any treaty or convention which requires reciprocal recognition and/or enforcement of judgments between state parties. Moreover, Thai law also does not provide any available means to recognize or enforce foreign court judgments. The only practical option under Thai law for a judgment obligor according to a foreign judgment is to commence new proceedings in the Thai courts.

19. What are the main forms of alternative dispute resolution? Which are the main alternative dispute resolution organisations in your jurisdiction?

The main forms of alternative dispute resolution available in Thailand are out-of-court arbitration, court-annexed arbitration, court-supervised mediation, out-of-court mediation and negotiation.

In addition to Thai courts, the main organizations which facilitate arbitration in Thailand are the Thai Arbitration Institute, Thailand Arbitration Centre, the Office of Insurance Commission, the Office of the Securities and Exchange Commission, and the Department of Intellectual Property. Apart from mediation supervised by Thai courts, the Thailand Arbitration Centre and the Department of Intellectual Property also provide mediation services.

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

At the moment, the following noteworthy draft legislation and amendments are being considered by the relevant authorities:

a. Draft amendment to the Arbitration Act B.E. 2545 (2002) – the issues being considered include issues concerning:
   i. a separation between domestic and international arbitration proceedings;
   ii. performance of duties of foreign arbitrators and foreign representatives to conduct international arbitral proceedings in Thailand; and
   iii. the prescription of the President of the Supreme Court and the Minister as the authorities in charge;

b. New draft legislation on out-of-court mediation – the issues being considered include the definition of out-of-court mediation, the qualifications of the mediator, the mediation proceedings, the enforcement of settlement agreements, mediation in international commercial disputes, mediation in electronic transactions and mediation in criminal cases; and;

c. Draft amendment to the Civil and Procedure Code which was open for public hearing from 30 January to 13 February 2018 and is now being considered by the Office of the Council of State. The draft amendment allows cases in the Supreme Court and the Court of Appeal to be referred to special divisions of the Supreme Court and of the Court of Appeal (as the case may be) and aims to facilitate the convention of the plenary session of the Court of Appeal.

There are public hearings conducted by the relevant authorities for the above draft laws. However, the drafts are not yet considered by the Thai National Legislative Assembly (i.e. the legislative branch of Thailand), and it is unlikely that the draft will be finalized or enter into force in the near future.

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

Since May 2017, the Directive of the President of the Supreme Court on Submitting, Sending, and Receiving Pleadings and Documents via the Electronic Filing System was enacted, allowing the case and case documents to be submitted to the court in electronic form. It also allows the payment of court fees and expenses to be made online.

The system is now available in civil courts located in Bangkok and some parts of Nonthaburi, Pathumthani, Pattaya, and Chiang Mai. Types of case available to be submitted through e-filing are civil cases relating to purchase, lease, mortgage, pledge, loan, hire-purchase, and credit card debt.

About the Authors:

Warathorn Wongsawangsiri
Partner, Weerawong, Chinnavat & Partners Ltd.
E: warathorn.w@weerawongcp.com

Jedsarit Sahussarungsi
Associate, Weerawong, Chinnavat & Partners Ltd.
E: jedsarit.s@weerawongcp.com

Yindee Limpives
Associate, Weerawong, Chinnavat & Partners Ltd.
E: yindee.l@weerawongcp.com

Witchaphon Techasawatwit
Associate, Weerawong, Chinnavat & Partners Ltd.
E: witchaphon.t@weerawongcp.com

W: www.weerawongcp.com
A: 22nd Floor, Mercury Tower 540 Ploenchit Road Lumpini, Pathumwan Bangkok 10330 Thailand
T: +66 (0)2 264–8000
F: +66 (0)2 657–2222

Lexis Advance® Hong Kong

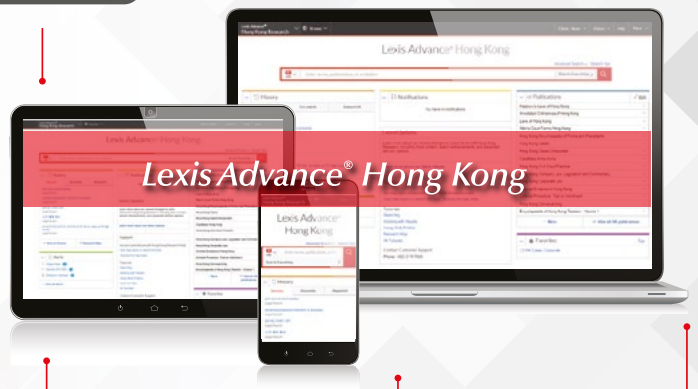
Intuitive Experience | *Legal-Tech Expertise* | *Content Without Boundaries*

Advancing Legal Technology To A New Level

Made in Hong Kong, for Hong Kong

World Class Law Library

Advanced Legal Technology



Legal Content since 1818

Local and International Legal Expertise Connections

All-in-One

Ready to advance your legal research experience?
Request your free trial today!

marketing.hk@lexisnexis.com www.lexisnexis.com.hk/lahk

LexisNexis®

Dispute Resolution Law Guide 2019

from LexisNexis®

The fifth annual complimentary guide to understanding Dispute Resolution practices around the world with an Asia-Pacific focus

The LexisNexis® Dispute Resolution Law Guide 2019 provides you with a detailed review and analysis of the current legislation and regulations that govern dispute resolution practices around the world with a focus on the Asia-Pacific region.

The guide helps you understand dispute resolution practices in unfamiliar jurisdictions through feature articles and Q&A style chapters that can be easily compared with other jurisdictions.

LexisNexis®

www.LexisNexis.com.hk

DPRLGD2019ENG