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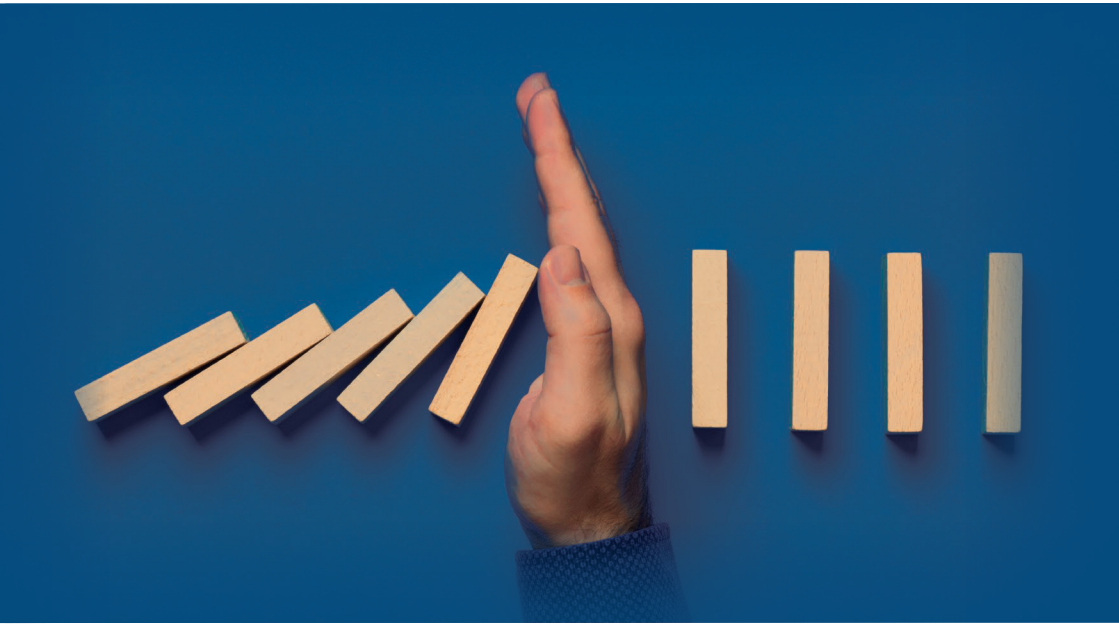

Jurisdictional Q&As

Jurisdiction: **AUSTRALIA**

Firm: **Bartley Cohen Litigation Lawyers**
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1. What is the structure of the court system in respect of civil proceedings? What is the role of the judge in civil proceedings?

Australia is governed by Federal and State systems of law, with multiple courts of superior and inferior record, and specialist courts and tribunals.

Where a dispute is heard will depend on which court or tribunal has jurisdiction to hear the matter. Jurisdiction may be prescribed by legislation. For example, section 190 of the *Trade Marks Act* 1995 (Cth) gives the Federal Court, the Federal Circuit Court, and State and Territory Supreme Court's jurisdiction over certain trade mark disputes. Jurisdiction may also be prescribed by: legislation establishing a court; the Federal, State and Territory Constitutions; and common law doctrines, such as inherent jurisdiction.

High Court of Australia

At the apex of Australia's court system is the High Court of Australia (**HCA**). The judicial power of the Commonwealth is vested in the HCA, which exercises both original and appellate jurisdiction. The HCA is Australia's final court of appeal and can hear appeals from the Supreme Courts of each State and Territory, the Federal Court or courts exercising federal jurisdiction, and judges of the HCA exercising original jurisdiction. To appeal a decision, special leave of the HCA is required.

Federal Court

Australia's Federal Court system is constitutionally enshrined and is an entirely statutory jurisdiction. It is comprised of the Federal Court, the Federal Circuit Court and the Family Court of Australia.

State and Territory Courts

Each of Australia's six States (New South Wales, Victoria, Queensland, Tasmania, South Australia and Western Australia) and two territories (Australian Capital Territory and Northern Territory) have their own court systems, which include superior and inferior courts of record.

Queensland, for example, has 13 courts and tribunals, including the Supreme, District and Magistrates Courts, and the Queensland Civil and Administrative Tribunal. As in all States and Territories, the Supreme Court of Queensland is a superior court of record. It has a trial and appellate division (the Court of Appeal), and jurisdiction to hear both common law and equitable claims.

Judges

Australia's legal system is adversarial, meaning that parties will argue their case before a judge, who will impartially determine the issues. Judges do not have an inquisitorial role. They decide proceedings on what is put before them by the parties and their legal representatives.

Judges also play a role in case management. The extent of the court's involvement will depend on the court or tribunal hearing the matter, and/or the allocation of the particular proceeding to a list of matters supervised by the court.

The Federal Court, for example, operates on a docket list system. Matters are allocated to a particular judge at commencement. That judge (usually) manages the matter to and through trial.

In the Queensland Supreme Court, there is no docket system and no procedure for case

management from inception of a proceeding. Rather, various "lists" exists. Parties can apply (by agreement or otherwise) to have cases of certain types, sizes or complexity placed on those lists, providing the court a role in their management and progression. For example, complex, lengthy, multi-party and/or commercial matters may be managed in the Supervised Case List or the Commercial List. Matters which do not advance expeditiously are often placed on the Case Flow Management list.

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

Australia has an open court system, predicated on principles of open justice. Justice must be done, and must be seen to be done. That Australia's *"court proceedings should be subjected to public and professional scrutiny, save in exceptional circumstances"* is a rationale the High Court has consistently endorsed.

The court does retain power to make suppression or non-publication orders, or to close the court. That only occurs in exceptional circumstances. Such orders may be made to enable a fair trial which might otherwise fall foul of public prejudices, or to protect vulnerable litigants or witnesses such as children.

Court Documents

The extent to which court documents are accessible by the public varies from jurisdiction to jurisdiction, and from court to court.

For example, in the Federal Court, Division 2.4 of the *Federal Court Rules* 2011 (Cth), govern access to documents. A party may inspect any document in a proceeding except where: a claim for privilege has been made, and no decision has been made by the court or a decision has been made that privilege exists; or the court has ordered the document is confidential. Rights of access are more limited for non-parties.

In Queensland, records of court documents that have been filed can be seen electronically via the court website. However, except in certain types of matters (for example, those matters on the Commercial List; and those in Planning and Environment Court proceedings), they cannot be accessed electronically. Rather, an application may be made to search, inspect and copy certain court documents (having been filed and forming part of the public record). If the applicant is a non-party, a fee is payable. Under the *Uniform Civil Procedure Rules* 1999 (Qld) ("**UCPR**"), the Registrar of the Supreme Court is obliged to comply with a request to search and inspect a document in a court file unless a court order has been made restricting access to the file or the document, or the file or document is required for use by the court.

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?

Although the terms "lawyer" and "solicitor" are often used interchangeably, the right to appear in court and practice as a solicitor or barrister is regulated by each State and Territory, and differs between them.

Until a person is admitted to practice as a solicitor or barrister in the Supreme Court of an Australian State or Territory and holds a practicing certificate issued in an Australian jurisdiction (as opposed to being a "lawyer" in the broad sense that they have a law degree), they have no right to appear in court as a solicitor or barrister, to practice as a solicitor or barrister, or to hold themselves out as such. They could, however, appear as an advocate for themselves in proceedings or as a non-solicitor / non-barrister advocate.

As to the structure of the profession, that varies between States and Territories. For example, in Queensland and New South Wales, there is a distinction between barristers and solicitors. Both have the right to appear in court. However, more regularly, the solicitor will undertake the day to day conduct of proceedings (including appearing in court, usually on less adversarial or complex appearances), with the barrister making appearances in court as the advocate (instructed by the solicitor). Ordinarily, a barrister can only be engaged by a solicitor

and not directly by a client. In South Australia, Victoria, Western Australian, Tasmania, the Northern Territory and the Australian Capital Territory all practitioners are admitted as both barristers and solicitors, although can elect to practice solely as barristers.

Once a practitioner is entitled to appear in the Supreme Court of a State or Territory, they may apply to be entered on the High Court Register of Practitioners. Once registered, they are eligible to appear in the High Court and Federal Courts.

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

Limitation periods vary between the States and Territories and/or depending on the subject of the dispute and/or claim made. Limitation periods also vary depending on the type of claim made.

In Queensland, a breach of contract claim must be brought within 6 years of the date of the breach. A negligence claim must also be brought within 6 years, but the period is calculated from the date the alleged loss is suffered. A personal injuries claim must be brought within 3 years. A defamation claim must be made within 1 year of the date of publication of the defamatory material. A judgment must be enforced within 6 years. There are limited circumstances in which limitation periods can be extended. In Queensland, at a State level, limitation periods are governed predominately by the *Limitation of Actions Act* 1974 (Qld). Similar time limits apply in New South Wales. In most State and Territory jurisdictions, contractual and negligence claims not involving personal injury attract a six-year limitation period.

Federally, specific pieces of federal legislation may impose limitation periods. For example, under the *Competition and Consumer Act* 2010 (Cth) *Sch. 2 (Australian Consumer Law)*, a six year limitation period applies for misleading and deceptive conduct claims, and for product liability claims in actions for damages, excluding personal injuries (ss 236 and 237); for product liability claims against manufacturers and importers of goods for breaches of consumer guarantees a 3 year limitation period applies from the date the consumer became aware or ought to have reasonably became aware the consumer guarantee had not been complied with (s 273).

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

The type of claim, cause of action and/or jurisdiction in which the claim is brought, will dictate the pre-action procedures that must be undertaken.

For civil claims brought in the Queensland Supreme Court, there are generally few pre-action procedures. However, there are exceptions. For example, claims for personal injuries are governed by strict statutory schemes such as the *Motor Accident Insurance Act* 1994 and the *Personal Injuries Proceedings Act* 2002. By those Acts, extensive pre-trial procedures must be followed within defined time limits before a proceeding can be commenced.

In relation to the Federal Court and the Federal Magistrates Court, generally *The Civil Dispute Resolution Act* 2011 (Cth) places an obligation on parties to take genuine steps to resolve a dispute (being a sincere and genuine attempt) prior to commencing civil proceedings. It is mandatory requirement of the Act that an applicant file a "genuine steps statement" at the time of filing proceedings detailing the steps taken or, if none, why not. Legal practitioners are obliged to advise their clients of the requirement and assist in meeting it. Failure to do so may have costs consequences.

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

The civil procedure and timetable vary from jurisdiction to jurisdiction and, sometimes, depending on the type of claim. The below deals with an "ordinary" civil claim brought in the Supreme Court of Queensland (for example, one for negligence, breach of contract, or misleading and deceptive conduct).

In Queensland, the UCPR dictates the steps and time periods necessary to bring a civil matter to trial. Once a proceeding is ready for trial, the availability of judges and trial dates often means a trial will still be many months away. Depending on the size, type and nature of the proceeding, the attitude of the parties to its progression, and court availability, it may take years for a proceeding to be ready and come on for trial.

In matters initiated in the Supreme Court of Queensland by claim (where questions of fact and law must be decided), the following steps must be taken:

(a) Pleadings:

(i) The plaintiff/s must file a claim and statement of claim. The claim will remain in force for one year and, unless an extension is granted, must be served on the defendant/s within that period;

(ii) Once served with a claim and statement of claim, the defendant/s must file and serve a notice of intention to defend and defence within 28 days;

(iii) Once served with the defence, the plaintiff/s may file and serve a reply within 14 days;

(iv) Pleadings close either on service of a reply or, if none is served, 14 days after service of the defence;

(b) Disclosure must occur 28 days after the close of pleadings;

(c) Disclosure may also be sought of relevant documents from persons / entities not parties to the proceeding by issuing notices of non-party disclosure;

(d) Interrogatories may be requested at any time. The court's leave is required to issue interrogatories. Leave is almost never granted;

(e) Applications may be brought before the court by either party at any time before a request for trial date is filed, seeking orders for the conduct of the proceedings. This might include orders that: the statement of claim or defence be struck out in whole or part; summary judgment be entered; further and better particulars of the matters pleaded; or for orders regarding disclosure;

(f) Directions may be made by the court at any time. If the proceeding is placed on a court list for supervision and management, regular reporting and/or appearances before the court will be required to see the matter progressed expeditiously and directions made to that end;

(g) The Supreme Court encourages alternative dispute resolution. As to that:

(i) Negotiations may be entered into at any time;

(ii) The court may order that the dispute be referred to an ADR process. Ordinarily, the court's orders will provide a timeframe within which ADR needs to occur. If a mediator is appointed, the mediation must be completed within 28 days after the appointment (rule 324) unless a different order is made;

(iii) The court may also make orders for case appraisal.

Apart from matters on the Commercial List, a proceeding almost certainly will not be assigned a trial date without ADR first having been undertaken.

(h) Trial:

(i) When a party is ready for trial, it may sign and submit to the opposing party a "request for trial date". That party may, if it is also ready for trial, sign and return the request, which is then filed with the court. The parties identify dates suitable to them for trial;

To be ready for trial, a party must have: complied with duties of disclosure including orders made; complied with orders requiring particulars to be given; answered any interrogatories; taken all necessary steps preliminary to trial; and ensured witnesses are available for trial;

(ii) The trial will occur on a date allocated by the court.

The procedure is different for matters on the Commercial List or Supervised Case List, already being managed by a judge.

(i) Appeal: Following judgment, parties have 28 days to file any appeal. Most appeals proceed expeditiously and will,

usually, be heard within approximately 6 months.

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

Disclosure obligations vary from court to court.

In the New South Wales Supreme Court, for example, there is no right to or obligation of disclosure without order of the Court. It is the same in the Federal Court.
In Queensland, for example, there is a duty to complete disclosure unless a contrary order is made by the court. Practice Direction 18 of 2018 encourages parties to seek to limit the scope of disclosure.

In Queensland, disclosure (being the delivery or production of documents, along with a list of those documents to the opposing party), is a necessary, and sometimes onerous and expensive, aspect of proceedings. Parties have an ongoing duty to disclose each document (whether hard copy or electronic): in their possession or under their control and directly relevant to an allegation in issue on the pleadings or in the proceedings. That extends to all types of documents. The solicitor with conduct of the proceeding will, prior to trial, be required to certify to the court that the duty of disclosure has been explained to their client.

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

In Queensland, a document will be exempt from disclosure where:

(a) There is a valid claim for privilege over it. Common privileges which may be claimed include: legal professional privilege; privilege against self-incrimination, forfeitures and penalties; oppression; public interest; and without prejudice communications;

(b) The document is only relevant to the credit of a witness; or

(c) Where an additional copy of the document has already been disclosed, and the document does not contain any change, obliteration, or other mark or feature likely to affect the outcome of the proceeding.

Documents relevant only to the issue of loss and damage are only required to disclosed if the opposing party asks for those documents.

Parties may be relieved from undertaking disclosure in the following ways:

(a) A notice being given by the opposing party that documents relating to a specific question, or a specific class, are not to be disclosed until requested;

(b) The court ordering that: a document, or a class of documents, need not be provided; disclosure be deferred; or, that a party be relieved from disclosure in the entirety or to a specified extent. In making these orders, the court will have regard to factors such as the likely time, cost and inconvenience of disclosing documents compared with the amount involved in the proceeding.

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

The procedure varies from jurisdiction to jurisdiction.

In Queensland, as a starting proposition, evidence in a civil trial commenced by claim is to be given orally; and evidence in a trial commenced by application is to be given by affidavit. However, that is rarely the practice. More regularly, evidence is given, in either case, by affidavit. Parties can agree and/or the court can make directions as to how evidence is to be given at trial. Practice Direction 18 of 2018 encourages discussion and agreement between parties and their legal representatives on such matters prior to trial.

Where a witness will not provide evidence in written form prior to trial and/or it is necessary compel the witness to appear and give evidence by way of subpoena, evidence will be given orally.

There is a right to cross-examine witnesses.

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

The procedure and rules vary from jurisdiction to jurisdiction.

Queensland's expert evidence provisions (UCPR Chapter 11, Part 5) are both prescriptive and restrictive.

It is the stated preference in the UCPR and the Supreme Court Practice Directions that expert evidence be given on an issue by a single expert agreed by the parties or appointed by the court (if practicable and without compromising the interests of justice). The practical reality, however, is that a single expert is rarely appointed. More commonly, one party will appoint its own expert, with the opposing party obtaining a responsive report.

Chapter 11, Part 5 sets out the duties of experts. It notes, for example, an expert's duty is to assist the court and overrides any obligation to a party or any person liable for his/her fees. This is no general code of conduct that governs experts.

Chapter 11, Part 5 also sets standards for the substance and form of the expert evidence. For example, expert witnesses may only give evidence in chief by a written report. The expert must be available for oral cross-examination. An expert's report must meet certain requirements, including: providing his/her qualifications; stating all material facts relied upon; and referencing all material relied upon. An expert must state certain matters at the end of the report, including that he/she understands the duty to the Court and has complied with it. Expert reports (even drafts) are disclosable in proceedings.

In the Federal Court, expert witnesses are bound by the *Harmonised Expert Witness Code of Conduct*.

11. What interim remedies are available before trial?

Remedies potentially available prior to trial, and which would avoid trial altogether include:

(a) Default judgment. An application for default judgment can be made when a party is required to take a step under the UCPR or comply with an order of the court in a stated time, but fails to do so. This is particularly useful where a notice of intention to defend and defence is not filed in the required time;

(b) Summary judgment. An application for summary judgment can be made when a party has no real prospects of defending the entirety, or part, of a claim and there is no need for a trial on that aspect of the matter.

Parties may also apply for various equitable remedies prior to a trial. That includes:

(a) Interim injunctions;

(b) Mareva orders, allowing for the inspection, detention, custody or preservation of property in order to preserve property for the proceedings;

(c) Anton Piller orders, allowing premises to be searched and evidence secured and seized.

The court also has the ability, on application by a defendant and in certain circumstances, to make orders that a plaintiff provide security for the defendant's costs (UCPR Chapter 17). If not provided in the time required by the court, the proceeding will be stayed and cannot be advanced until payment is made. This is particularly important for corporations and for plaintiffs who reside outside Australia, against which security is more readily ordered.

12. What remedies are available at trial?

There are three general classes of remedies: (i) monetary awards; (ii) proprietary remedies; and (iii) remedies affecting the parties' rights between themselves.

What is available depends on the cause of action brought. Plaintiffs are free to pursue multiple remedies. But, if the plaintiffs are successful on all, they must choose one if those remedies would result in double-recovery or are mutually inconsistent.

Monetary awards

Monetary remedies are most commonly sought. Principally, a court awards a sum to compensate the plaintiff. But, the method of calculation of damages differs for each cause of action. For civil wrongs such as misleading or deceptive conduct or negligent misstatement, damages place the plaintiff in the same position as if the conduct had not occurred. For breaches of contract, damages place the plaintiff in the same position as if the contract had been performed.

Proprietary remedies

Proprietary remedies are those affecting rights of property between the parties. For example, courts can:

(a) award a trust over assets or profits;

(b) order delivery up, or forced transfer or sale, of chattels or property; or

(c) order the destruction of material infringing a plaintiff's intellectual property.

The court assesses whether such an order is just and reasonable. If not, a court could award an alternative, for example a monetary sum.

Remedies inter se

These remedies usually require a finding that monetary compensation would be insufficient. They are rare and require exceptional circumstances. The most common is an injunction. Other forms of such remedies include: a declaration; orders to make good assumptions which have been relied upon; rescission of contracts induced by fraud, misrepresentation or common mistake; and declaring contracts void for illegality.

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

Procedures are available in most jurisdictions to assist a plaintiff to identify property available to satisfy a judgment debt. For example, in South Australia, an investigation hearing can occur into a defendant's financial position, and a defendant is required to complete a form detailing their financial situation. Similar procedures exist in other States and Territories.

The most common form of enforcement is forced seizure and sale of real and personal property. Each of the State and Federal courts have powers to assist in this process. That is usually achieved by seeking a warrant once a judgment has been made and relevant property identified. Proceeds of the forced sale sufficient to satisfy the judgment go to the plaintiff (after payment of any secured creditors and administrative fees).

Other forms of enforcement include:

(a) Orders that a debt be paid in instalments;

(b) Charging orders, creating a charge over property, giving the plaintiff priority over the proceeds of sale if the assets if sold (behind secured creditors);

(c) Garnishee orders, which redirect income to the plaintiff;

(d) Warrants for redirection of debt or funds where a non-party (e.g. a bank) holds money on behalf of the defendant, or redirection of earnings;

(e) Appointment of a receiver to a corporate defendant or placing a corporate defendant in liquidation;

(f) Bankruptcy proceedings in the case of a personal defendant.

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

Australian courts have complete discretion in making orders as to costs. That said, the usual principle is the losing party will be ordered to pay the costs of the successful litigant.

The usual order made is that *"costs be awarded on a standard basis"*. This, however, is not a complete reimbursement of legal costs incurred. Costs regimes differ between each jurisdiction. But, generally, each jurisdiction has a statutory "scale of costs" against which the "standard costs" will be calculated. Each scale operates differently, but identifies how costs awarded are to be calculated.

In Queensland, the court has the discretion to fix the amount of costs. But, that discretion is rarely exercised. As such, the usual method to calculate costs is by application for a cost assessment, if an agreement cannot otherwise be reached between the parties on the amount. That process requires, in general terms:

(a) The party awarded costs to prepare and file a costs statement detailing work done and costs claimed against the relevant court scale;

(b) The party against which costs have been awarded to prepare and file a notice of objection detailing items objected to, the basis for objection and the proposed reductions. Steps (a) and (b) can be done with the assistance of a legal practitioner practising in the area of costs;

(c) The party awarded costs to then apply for a costs assessment. A court appointed cost assessor will determine the costs based on the above material. An order will be made specifying the amount of costs;

(d) If a party is dissatisfied, written reasons can be requested. The assessment of costs can also be challenged.

As a general rule of thumb, a successful party who obtains an award of standard costs in their favour can expect to receive around 50% to 60% of their actual legal costs.

A court can make an award of "indemnity costs". Generally, a party who obtains an award of indemnity costs can expect to receive around 90% of their actual legal costs. The order gives an entitlement to recover all costs incurred by a party provided they have not been unreasonably incurred or are not of an unreasonable amount. Awards of indemnity costs are rarely made, usually only in circumstances of misconduct (for example, where a party has acted in bad faith, maintained an action with no prospects or for an ulterior purpose, or deliberately made false allegations).

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

Rights and avenues of appeal differ from jurisdiction to jurisdiction, and between courts and tribunals. In some cases, leave to appeal will be required.

For most civil claims dealt with in the Supreme Courts, a right of appeal lies as of right to the Court of Appeal. An appeal is not a retrial or a new hearing. In most cases, the appeal court will only hear arguments about specific errors of law or fact, and no new evidence will be permitted. A court may take into account changes in the law. Some jurisdictions may admit additional evidence by leave. Appeals allow the court to make new factual inferences drawn from the existing evidence. If the first instance decision involved the use of judicial discretion, a party must show the judge acted on a wrong principle, allowed extraneous or irrelevant materials to affect the decision, mistook facts, or failed to take into account a material consideration.

For the majority of cases, the initial appeal to the relevant appellate court is the final step. However, a party may also seek leave to appeal to the High Court of Australia. Its function is to *"develop and clarify the law" and "maintain procedural regularity"* in the lower courts. The High Court's appellate jurisdiction is discretionary. Parties are first required to seek leave to appeal. In deciding whether to grant leave, the court considers: the public importance of any question of law; the need to resolve judicial difference of opinion on the state of the law; the general significance of the question of law; and whether the administration of justice requires permission to appeal.

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

Contingency fee agreements are prohibited in Australia.

Conditional fee arrangements

Conditional fee arrangements, where the payment of legal fees is conditional on a successful outcome, are permitted. Generally, under these agreements, solicitors also have the right to charge an "uplift" on their usual fees.

There are specific legislative requirements and obligations around such arrangements. For example, in Queensland, conditional fee arrangements must:

(a) be in plain language;

(b) be signed by the client;

(c) contain a statement that the client has been informed of the right to seek independent legal advice; and

(d) contain an additional cooling-off period.

Contingency fee agreements must also set out what constitutes a "successful outcome". Such arrangements are not permitted in criminal or family law proceedings. In claims for personal injuries, there are statutory restrictions on the amount a law firm can charge, placing an upper limit on professional fees.

Third-party funding

As a general proposition, third-party funding is permissible in Australia.

Maintenance and champerty have been abolished at common law, and also as torts by statute in New South Wales, South Australia, Victoria and the Australian Capital Territory. They have not yet been abolished in Queensland, Western Australia, Tasmania and the Northern Territory.

Third-party litigation funding agreements can still be set aside if they are inconsistent with public policy. This is a particular concern in those jurisdictions where maintenance and champerty have not been abolished by statute. In those jurisdictions, particular attention needs to be paid to the level of control the litigation funder has over the proceeding. Otherwise, particular attention needs to be paid to the terms of the funding agreement, and dealings with the plaintiff, to ensure it may not fall foul on public policy grounds.

The Australian Law Reform Commission ("**ARLC**") completed a comprehensive review of litigation funding in December 2018. Its recommendations are currently before Federal Parliament.

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

Class actions, called "representative proceedings" in Australia, are permitted.

Generally, representative proceedings require common questions of fact or law between each proposed member of the class. It is, however, not necessary that each class member have the same cause of action or that the cause of action arises from the same transaction. The "same interest"' criterion is satisfied if the class members have a "community of interest" (*Carnie v Esanda Finance Corp Ltd* (1995) 182 CLR 398, 408). Generally, there must be at least seven proposed class-members.

There are variations between the State and Federal jurisdictions. Some have more comprehensive class action schemes than others. For example, New South Wales, Victoria and the Federal courts have comprehensive class action legislation governing the conduct of such litigation. Other States, such as Western Australia, are still considering whether to adopt their own schemes.

In the Queensland Supreme Court, the representative proceedings regime is through the *Civil Proceedings Act* 2011 (Qld), *Practice Direction 2 of 2017*, and the UCPR. A proceeding which is intended to become a representative proceeding will be assigned to a particular Supreme Court judge for management. Generally, that assigned judge will hear interlocutory applications, conduct directions hearings, and have general management of the proceeding up to trial. Representative proceedings are regularly scheduled for case conferences or review hearings. There, the judge will make directions or give an order to allow the smooth running of the matter and the trial. This includes narrowing down the issues, setting dates for the filing of evidence, making particular orders for disclosure and other procedural questions. As a matter of general practice,

such proceedings will be referred to mediation at an appropriate time.

The Australian Law Reform Commission has recently completed a comprehensive review of the Australian class action scheme, and has tabled recommendations and improvements which are currently before Federal Parliament.

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

Statutory

Some judgments, from certain jurisdictions, can be enforced under the provisions of the *Foreign Judgments Act* 1991 (Cth). The order needs to be "final and conclusive" save for the possibility of an appeal. The Act allows a judgment creditor to apply to the appropriate court to register a foreign judgment. There are time limits for doing so. Once registered, the judgment is taken to have the same force and effect as one delivered in Australia and can be enforced accordingly.

Common Law

A plaintiff may bring a common law action for a liquidated sum, relying on the foreign judgment as a basis for indebtedness. Or, bring a fresh cause of action, pleading the foreign judgment as a basis to estop the defendant from raising a defence (other than fraud or denial of natural justice). Actions of this kind require the court to be satisfied the foreign court had jurisdiction. This could require evidence about whether the defendant was physically present in the foreign jurisdiction, their nationality or domicile, or of submission to the jurisdiction.

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

The most common forms of formal alternative dispute resolution are settlement by negotiation, or mediation using an independent third party to assist parties to negotiate a resolution. Arbitration is also commonly used.

Mediation can either be court ordered or by agreement. There are a number of different registers of accredited mediators in Australia. The Mediator Standards Board develops and maintains the National Mediator Accreditation System.

Australia is party to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* and has enacted the UNCITRAL Model Law on Arbitration as part of its national arbitration law. Each State and Territory also has legislation that accords with the model law. There is therefore a harmonised approach to arbitration across all of Australia.

The main alternative dispute resolution organisations include the Australian Centre for International Commercial Arbitration (ACICA), the Australian Commercial Dispute Centre (ACDC), the Charted Institute of Arbitrators (Australia Branch) (CIArb), and the Institute of Arbitrators and Mediators Australia (IAMA).

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

Currently, there are no proposals before the ALRC or the Queensland Law Reform Commission which relate to dispute resolution. The most recently completed inquiry by the ALRC was into class actions and litigation funding.

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

Australia has a strong and independent legal profession, with great expertise across all areas of the law and a commitment to the rule of law.

22. What changes in dispute resolution practices have been implemented in light of current events? Are there any "new normal" practical tips in your jurisdiction parties should be aware of when resolving legal disputes?

Global events concerning COVID-19 have seen a raft of legislative and practical changes implemented, for example in court procedures, which affect the practice of litigation in Australia and in its various States and Territories. The legislation and the practical changes differ between Australian States and Territories, between different courts and, sometimes, within the same court. Some changes are time-limited. The changes are constantly evolving to deal with changing circumstances.

The changes deal with a broad array of issues and matters including, but not limited to:

- court procedures, including the filing of documents, signing of documents, court appearances, conduct of trials and attendance at court. There has been a significant move to more electronic court appearances by video or by telephone and to, even more so, encouraging parties to act in a conciliatory way and to resolve matters in dispute (interlocutory or otherwise);
- mechanisms for service of documents;
- mechanisms for execution and/or witnessing of documents, including affidavits which may be relied upon by way of evidence, and documents which may form the basis of a dispute (for example contracts and wills), such as to allow electronic signing;
- temporary relief measures in numerous areas, including in mortgagee-mortgagor relationships; lessee-lessor relationships; insolvency and bankruptcy. This includes steps that can be taken in dealing with parties in particular types of disputes.

In Queensland, the Queensland Law Society seeks to publish, in one central location and on an ongoing basis, information on key developments in the legal profession's response to COVID-19, including changes that may affect dispute resolution. For more details, please visit the Queensland Law Society's website. Similar resources exist in other States and Territories. In the case of any dispute which may require litigation, reference should be made to the relevant court website for up to date information on procedural matters.

Given the evolving nature of events and likely continuing changes in events and circumstances, it is important to seek to determine changes to ordinary practices at the particular time relevant to each client's dispute.

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

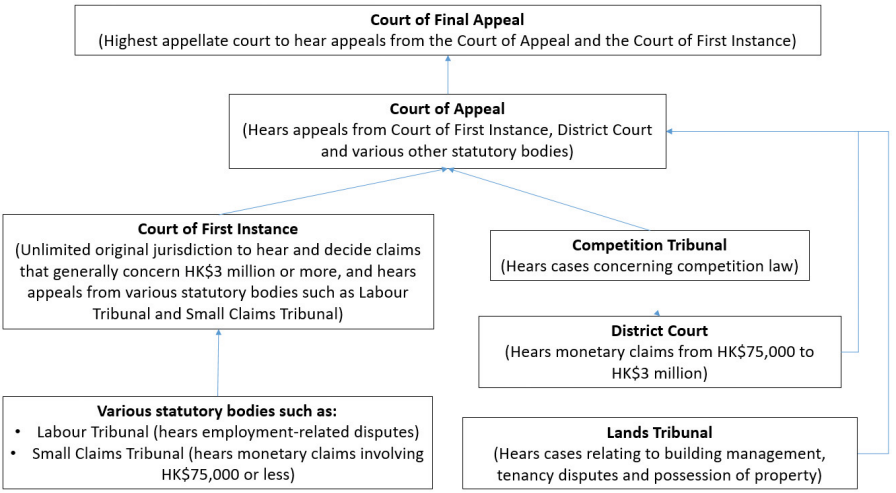
In Hong Kong, the structure of the court system in dealing with civil proceedings is as follows (please refer to *chart 1*).

Judges are one of the pillars of Hong Kong's common law adversarial system. Where the dispute is decided by a judge, the role of a judge is to assess the evidence and arguments presented by the parties on the facts and on the law in order to ultimately determine the dispute. In Court of First Instance trials where the disputes are determined by a jury, the judge's task is to regulate the conduct of the trial procedure.

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

In upholding principles of open justice, court hearings in Hong Kong are generally open to the public. However, certain hearings may be heard in closed courts ("Chambers"), where the subject matter may otherwise be destroyed, or confidentiality is required for moral, public policy or security reasons.

In general, only writs filed to commence civil proceedings and court judgments are available to the public. Other case documents such as pleadings, witness statements and court orders are not made available to the public but may be referred to in open court.



(chart 1)

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?

The two categories of lawyers in Hong Kong are barristers and solicitors. Whilst barristers have unlimited rights of audience to appear before any court in Hong Kong on behalf of their clients, solicitors usually only conduct trials in District Court and Magistrates' Courts. They also have rights of audience in Chambers applications and before Masters in open court.

The main reason for this distinction is because the nature of the roles of barristers and solicitors are different. Solicitors play a major role in client management, such as in taking instructions, communicating with opposing parties and preparing the case leading up to trial. In contrast, barristers can only act on instructions of solicitors (rather than the client directly) and specialize more with advocacy in court on behalf of the client.

Solicitors with at least five years' post-qualification experience may apply to become solicitor-advocates who have rights of higher audience, matching those of barristers.

In-person litigants may act for themselves in any proceedings but companies must normally be legally represented when appearing before the Court of First Instance, Court of Appeal or Court of Final Appeal.

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

Type of civil claim	Time limit from bringing such claim under the Limitation Ordinance (Cap. 347)
Contractual	6 years from the date of breach of contract
Tortious	6 years from the date when the damage was suffered
Personal injury	• 3 years from the date of the accident or the date of knowledge (whichever is later) for common law negligence claim
Personal injury (cont'd)	• 2 years from the date of the accident for claims under the Employees' Compensation Ordinance (Cap. 282)
Recovery of land	12 years from the date when the right accrued or 60 years if the claim is brought by the HKSAR government
Action based on a deed	12 years from the date of breach

The above time limits may be varied in the following ways:

- By agreement between the parties;
- Where the plaintiff was under a disability, time begins to run from the date the plaintiff ceases to be under a disability or dies (whichever is earlier); and
- Where the action is based upon the defendant's fraud, a relevant fact has been deliberately concealed by the defendant, or the action is for relief from consequences of mistake, time begins to run when the plaintiff has discovered the fraud, concealment or mistake or could with reasonable diligence have discovered it.

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

In general civil proceedings, there are no specific pre-action rules. However, pre-action conduct may go towards the court's determination of costs later on in the proceedings and any unreasonable conduct may lead to adverse costs consequences. Hence, in practice, the following pre-action conduct frequently takes place:

1. The plaintiff should send a pre-action demand letter to the defendant setting out the factual and legal basis of the claim and the relief sought; and

2. The parties should use reasonable endeavors to settle the dispute through 'without prejudice' settlement negotiations or mediation.

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

The typical civil procedure and timetable is as follows (please refer to *chart 2*).

Various interlocutory applications, such as requests for time extensions of certain deadlines, may be made throughout the proceedings. As such, the period of when an action reaches the trial stage differs from case to case. This generally ranges from 12-24 months, and sometimes even longer for more complex disputes.

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

Discovery is an important process in civil proceedings in Hong Kong whereby parties are required to preserve and disclose relevant documents and evidence in three main ways:

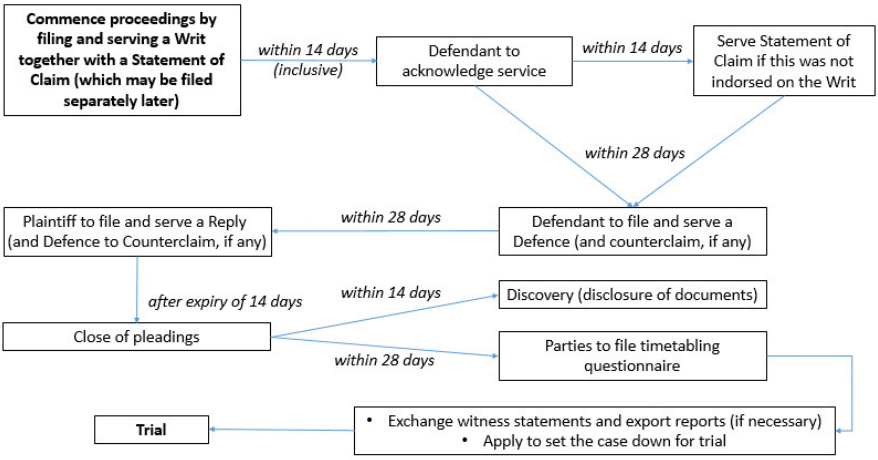
1. Automatic discovery takes place within 14 days after the close of pleadings (i.e. expiration of 14 days after service of reply/defence to counterclaim or 28 days after service of defence (if no reply/defence to counterclaim is served), whereby each party must serve a list of documents that are in his or her possession, custody or power relating to matters in question between the parties in the action;
2. The Court may also order the disclosure of particular documents or categories of documents through specific discovery; and
3. Parties may inspect any documents referred to in the aforementioned list of documents and any pleadings or affidavits by the other party.

Discovery is subject to rules protecting privileged documents from being disclosed in litigation (see answers to question 8 below).

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

There are rules protecting privileged documents from being disclosed in civil proceedings. The following types of documents are considered privileged:

1. Confidential communications made between either the client or his/her legal adviser and a third party for the dominant purpose of being used in actual, pending or contemplated



(chart 2)

legal proceedings. This is known as 'litigation privilege';

2. Confidential communications between a client and his or her legal adviser for the purpose of seeking legal advice are subject to 'legal advice privilege';
3. Without prejudice communications whereby parties engage in bona fide settlement negotiations; and
4. Documents that would be prejudicial to public interest.

A party may waive the privilege which he enjoys through a waiver that is express, implied or unintentional (through an act that carries the effect of a waiver). Although confidentiality itself is not a basis to resist production of the relevant document, the courts accept that redaction or limited disclosure may be necessary in limited circumstances.

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 the interests of saving time and costs, parties often exchange factual witness statements before trial. At trial, a witness statement will usually be directed by the court to stand as the evidence-in-chief of the witness who made the statement and the opposing party will have an opportunity to cross-examine the witness.

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

The rules governing the appointment of experts and the code of conduct that experts must adhere to are contained in Order 40 and Appendix D of the Rules of High Court (Cap. 4A) ("RHC") respectively.

Experts are normally appointed by the parties and their evidence may only be adduced at trial with the court's permission or all parties' consent. When an expert has been instructed to give or prepare evidence for the purpose of proceedings in court, he owes an overriding duty to assist the court impartially and independently on matters relevant to the expert's area of expertise, and must not act as an advocate for any party.

11. What interim remedies are available before trial?

Before trial, the court can order the following interim remedies:

- Injunction: a court order requiring a party to do specific act(s), or restraining the commission or the continuance of some wrongful act(s). The application for injunction is made by summons, with evidence tendered in the form of affidavit or affirmation. The applicant should also append a draft order and submit skeleton arguments in support of the application. An injunction can be applied for on an *ex parte* basis where there is a need for secrecy. The court also generally requires an undertaking as to costs before granting an injunction. [See Practice Direction 11.1 - Ex Parte, Interim and Interlocutory Applications for Relief (Including Injunctive Relief)].

  There are different types of interlocutory injunctions:

  - *Quia timet* ('because he fears') injunctions to prevent an anticipated infringement of the applicant's legal rights.
  - *Mareva injunction* (also known as 'freezing order'), which prevents the respondent from disposing of its assets or removing those assets from Hong Kong. The court can also issue a worldwide Mareva injunction that covers assets in and outside Hong Kong.
  - *Anton Piller order* (also known as 'search order'), which permits the applicant to enter the respondent's premises and inspect or preserve specified documents or other articles of moveable property.
    - Ancillary order to interlocutory injunction that requires the respondent to disclose its assets, to give discovery of documents and to answer interrogatories.

[See Section 21L, High Court Ordinance (Cap 4) - Injunction and receiver; Practice Direction 11.2 - Mareva Injunctions and Anton Piller Orders]

- Interim payment: where a plaintiff can show that if the case proceeds to trial, he or she will recover a substantial award of damages from the defendant, the court may order the defendant to make an interim payment into court on account of any damages, debt or other sums that he or she may be held liable to pay to the plaintiff. The application for interim payment is made by summons and requires a supporting affidavit or affirmation that verifies the debt or damages and exhibits any relevant documentary evidence [see Order 29, rule 10, RHC]
- Appointment of receivers: where it appears to the court to be just and convenient to do so, it may appoint a receiver to receive, manage or protect property pending the trial. [See Order 30, rule 1, RHC]
- Appointment of provisional liquidators: to monitor and safeguard the assets of a company prior to the hearing and determination of the winding-up petition, according to the requirements set down by the court. [See section 193, Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32)]

Sale of perishable property: on the application of any party to a cause or matter, the court may order the sale of property (other than land) that is the subject-matter of the cause which is of a perishable nature or which for any other good reason it is desirable to sell forthwith [See Order 29, rule 4, RHC].

The Court of First Instance may also grant free-standing interim relief in relation to proceedings that have been or are about to be commenced outside Hong Kong and that are capable of giving rise to a judgment that may be enforced in Hong Kong (See Section 21M, High Court Ordinance (Cap 4)).

12. What remedies are available at trial?

At trial, the court can order the following substantive remedies:

- Damages: monetary award to compensate the innocent party for loss, injury or harm as a result of the defendant's breach of duty that caused the loss. Damages may also be awarded for prospective losses, inconvenience and injured feelings or as punishment in the form of punitive and exemplary damages.
- Specific performance: an equitable remedy to compel a party to perform a specific act, such as the contractual obligations he or she undertook to discharge.
- Restitution: an order to restore the innocent party to the position they were in before the injury occurred. For example, in an unjust enrichment claim, restitution seeks to restore the relevant gains or enrichment to the claimant.
- Quantum meruit ("the amount he deserves"): a claim for reasonable remuneration for the value of work done or goods supplied to the defendant.
- Injunctions: requiring a party to do or cease to do something.
- Declarations: where the court declares the legal position of the parties.
- Account of profits: an equitable remedy requiring a party to surrender the profits attributable to a breach of a fiduciary relationship.
- Tracing of property: recovering property from a trustee or a third party, that was applied, transferred or received in breach of trust, who is not a bona fide purchaser for value without notice.
- Interest: simple interest is usually awarded on the judgment debt from the date of the judgment until its satisfaction: (1) at such rate as the Court may order; or (2) in the absence of such order, at such rate as may be determined from time to time by the Chief Justice by order. (See Section 49(1) of the High Court Ordinance (Cap. 4) or Section 50(1) of the District Court Ordinance (Cap. 336)).

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

The principal methods for the plaintiff (the judgment creditor) to enforce a judgment against the defendant (the judgment debtor) include:

- Writs of execution, whereby the court bailiffs can seize property belonging to the judgment debtor (Writs of Fi Fa).
- Garnishee proceedings, whereby debts owed may be enforced by seizure and attachment to debts owed to the judgment debtor.
- Charging orders: putting legal charges on property whereby the judgment creditor becomes a secured creditor.
- Stop notices or stop orders that prevent dealing in securities in a manner contrary to the interest of the judgment creditor.
- Prohibition orders to restrain the judgment debtor from leaving Hong Kong (often an effective tool to procure payment of a judgment debt if the individual needs to travel outside Hong Kong).
- Committal proceedings to hold the judgment debtor in contempt of court, which can result in a fine or ultimately imprisonment.
- Oral examination of the judgment debtor as to his or her available assets to satisfy the judgment.
- Appointment of a receiver.
- Bankruptcy or winding-up proceedings against the judgment debtor.

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

The court has a broad discretion to make costs orders (Order 62, rule 3, RHC). Costs cover legal fees, court fees, disbursements, expenses and remuneration payable in connection with the trial.

The general rule is that the losing party pays the successful party's costs ('costs follow the event'). The Court will generally take into account various factors when exercising its discretion, such as the parties' conduct before and during the proceedings, relative success of the parties, and existence of any settlement offers or payment into court.

The common basis for assessment of costs are:

- Party-and-party basis: the costs-paying party will reimburse the costs-receiving party for the *necessary* expenses which the cost-receiving party had incurred in enforcing or defending the action.
- Common fund basis: a more generous approach than the party-and-party basis, allowing a *reasonable* amount in respect for all costs reasonably incurred.
- Indemnity basis: all costs are to be allowed *except those unreasonably incurred or of unreasonable amount*.

If the parties disagree on the amount of the costs, the receiving party may apply to the court for taxation (a process for the court to assess the amount of costs payable by the paying party) (Order 62, rule 12, RHC).

Effective from 1 December 2018, the Court of First Instance and the District Court substantially increased the solicitors' recoverable hourly rates (by more than 40 per cent) which means a winning party can recover a much higher sum towards payments of his or her legal costs from the losing party. In practice, the winning party can usually expect to recover about 60 per cent to 70 per cent of his or her actual costs.

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

Parties may appeal against judgments or orders made by the District Court or the Court of First Instance to the Court of Appeal. For final judgments or orders made by the Court of First Instance, appeal lies 'as of right' (i.e. no leave is required) to the Court of Appeal. Leave is required to appeal against interlocutory decisions made by the Court of First Instance or decisions made by the District Court.

A party may also seek leave from the Court of Appeal or the Court of Final Appeal to appeal

to the Court of Final Appeal for interim or final judgments handed down by the Court of Appeal. Leave will be granted at the discretion of either court, if the question involved in the appeal is one that, because of its general or public importance or otherwise, ought to be submitted to the Court of Final Appeal for decision. The Court may also grant leave subject to conditions as it thinks fit.

An appellant can appeal on questions of law or fact, or against the court's exercise of its discretion. However, higher courts are generally reluctant to interfere with the lower court's exercise of discretion and findings of fact, especially where they turn on the witnesses' credibility or the weight attached to particular evidence. This is because the lower court has had the first hand advantage of hearing the live evidence and the judge is in the best position to evaluate that witness' credibility.

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 generally prohibited for litigation in Hong Kong. Furthermore, maintenance and champerty are criminal offences in Hong Kong, punishable by imprisonment and a fine (see section 101I, Criminal Procedure Ordinance (Cap 221)). Maintenance is the intermeddling with the disputes of others (without justification or excuse) by someone who has no interest in the action. Champerty is a form of maintenance where a person assists a litigant in return for a portion of the proceeds of the action.

There are exceptions to the general prohibition on litigation funding/ third-party funding:

- 'common interest' cases, involving third parties with a legitimate interest in the outcome of the litigation;
- 'access to justice considerations', such as the Supplementary Legal Aid Scheme established under the Legal Aid Ordinance;
- Accepted lawful practices such as liquidation proceedings and under the doctrine of subrogation as applied to contracts of insurance.

Third-party funding of arbitration and mediation are now legalised in Hong Kong, respectively under the Arbitration Ordinance (Cap 609) and the Mediation Ordinance (Cap 620). See also the Code of Practice for Third Party Funding of Arbitration, setting out the practices and standards in connection with third party funding of arbitration.

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

There is currently no specific procedure for class actions in Hong Kong. The only type of collective proceedings permitted under the RHC are 'representative proceedings', which enables numerous persons who have the 'same interest' and 'common ingredient' in any proceedings to begin or continue the proceedings by or against any one or more of them representing all, or as representing all except one or more of them. A judgment or order made in representative proceedings is binding on all the persons so represented but shall not be enforced against any person not a party to the proceedings except with the leave of the court.

In 2012, the Law Reform Commission of Hong Kong released its Report on Class Actions. A cross-sector working group was established by the Department of Justice that continues to research and review the wide-ranging, complex and interrelated issues covering not only technical legal issues but also policy considerations. It remains to be seen whether (and how) the class action procedure recommended in the report will be implemented in Hong Kong.

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

A foreign judgment (other than a judgment made by the Mainland Chinese Court) may be recognised and enforced in Hong Kong under

two different regimes: under the statutory regime and under common law regime:

- The Statutory regime – under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Chapter 319), judgments from certain specified countries under the Foreign Judgments (Reciprocal Enforcement) Order may be registered and enforced in Hong Kong provided that the specified statutory conditions are satisfied. Once the court grants leave for the judgment to be registered, the foreign judgment can be enforced in the same manner as a Hong Kong judgment.
- The common law regime – foreign judgments from non-specified countries may be enforced by commencing a writ action relying on the foreign judgment as a debt between the parties. The foreign judgment must be a monetary one, and must be final and conclusive on the merits of the claim. It must not be contrary to the public policy of Hong Kong or the notions of natural justice. The defendant must also have submitted to the jurisdiction of the foreign court.

The enforcement of Mainland judgments made by designated Mainland Chinese courts is subject to a separate regime under the Mainland Judgments (Reciprocal Enforcement) Ordinance (Chapter 597). The judgment creditor under a Chinese judgment that satisfies the prescribed statutory conditions can apply to the Court of First Instance to register the judgment under the Ordinance. The prescribed conditions include:

- the Chinese judgment relates to a commercial contract and was given after 1 August 2008,
- the parties to the commercial contract had a written agreement made after 1 August 2008 stipulating that the courts in China have exclusive jurisdiction over the dispute;
- the judgment is enforceable in China;
- the judgment is final and conclusive; and
- the judgment is for a definite sum of money (not being a sum payable in respect of taxes or similar charges or in respect of a fine or other penalty).

On 18 January 2019, Hong Kong and China signed a further Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the HKSAR (the 2019 Arrangement), to establish a more comprehensive mechanism for mutual recognition and enforcement of judgments in a wider range of civil and commercial matters. The 2019 Arrangement has broadened the scope of the recognition, covering both monetary and non-monetary relief and includes all types of costs orders. The 2019 Arrangement will be enacted by domestic legislations and the effective date is yet to be announced. The 2019 Arrangement, once effective, will supersede the 2016 Arrangement, unless otherwise agreed between the parties before the effective date of the 2019 Arrangement.

The exceptions under the 2019 Arrangement include:

- judicial review cases or cases brought by the Securities and Futures Commission and Competition Commission;
- cases in relation to the succession, administration or distribution of estates of deceased;
- maritime matters;
- corporate insolvency and debt restructuring and personal insolvency matters; and
- judgments on the validity of an arbitration agreement and the setting aside of an arbitral award.

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

Arbitration and mediation are the main forms of alternative dispute resolution (ADR) in Hong Kong.

Arbitration is a determinative form of ADR consented to by the parties, where the arbitral award is final, binding and may be enforced as if it were a judgment of the court. Arbitration is particularly popular in maritime-related disputes, construction-related

disputes, intellectual property related disputes and investment-related disputes. Arbitration affords the parties autonomy, procedural flexibility and confidentiality. The arbitration regime in Hong Kong is governed by the Arbitration Ordinance (Cap 609), which almost entirely adopted the UNCITRAL Model Law on International Commercial Arbitration.

Mediation is another form of ADR in Hong Kong. The Mediation Ordinance (Cap. 620) provides a framework for the conduct of mediation. Mediation is confidential and without prejudice in nature. The mediator, who is an independent third party, does not provide a decision on the merits of the dispute and there is no obligation to settle. The process is non-binding until and unless the parties reach a settlement agreement.

The Mediation Ordinance s 4 provides a statutory definition of mediation:

> "mediation is a structured process comprising one or more sessions in which one or more impartial individuals, without adjudicating a dispute or any aspect of it, assist the parties to the dispute to do any or all of the following —
>
> (a) identify the issues in dispute;
>
> (b) explore and generate options;
>
> (c) communicate with one another;
>
> (d) reach an agreement regarding the resolution of the whole, or part, of the dispute."

There are a number of world-class ADR organisations in Hong Kong, including the following:

- the Hong Kong International Arbitration Centre (HKIAC);
- International Court of Arbitration of the ICC;
- China International Economic and Trade Arbitration Commission (CIETAC);
- Hong Kong Mediation Centre;
- China Maritime Arbitration Commission (CMAC); and
- eBRAM International Online Dispute Resolution Centre Limited (eBRAM).

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

Security of payment legislation

In June 2015, the Development Bureau of Hong Kong released its consultation document on the introduction of statutory adjudication for construction disputes. The consultation period concluded on 31 August 2015. No legislation has been introduced yet.

Outcome-based fees reform

On 25 October 2019, the Law Reform Commission of Hong Kong announced that a sub-committee was formed to review outcome-based fee structures in arbitration. The findings are yet to be published.

Passage of the Court Proceedings (Electronic Technology) Bill

On 17 July 2020, the Court Proceedings (Electronic Technology) Bill was passed by the Legislative Council. The Bill enables the use of electronic technology (e-technology) in proceedings in courts (and specified tribunals) and for court-related services, as an alternative to traditional paper-based methods. Key proposals under the Bill includes:

1. Electronic filing and sending of court documents (including original and certified copy documents) to the court;
2. The Court may create, issue or send documents to court users in electronic form;
3. Electronic service of documents between parties;
4. Electronic authentication of documents that are required to be signed, sealed or certified;
5. Providing legal status for printed court documents; and
6. E-payment of fees for court-related matters.

Visa-free Entry Scheme for arbitration participants

On 29 June 2020, the Hong Kong Government launched a 2-year pilot scheme ("Scheme") to allow eligible foreign visitors to participate in arbitral proceedings in Hong Kong without

an employment visa.[1] The duration that they may stay in Hong Kong for participating in arbitral proceedings shall not exceed the current visa-free period for visits. The Scheme applies to visitors who are:

(i). Arbitrators, experts or factual witnesses, counsels, or parties to the arbitral proceedings in Hong Kong;

(ii). Eligible for visa free entry into Hong Kong; and

(iii). For ad hoc arbitrations, possess a Letter of Proof issued by the venue (i.e. the HKIAC or the Department of Justice); or for arbitration proceedings administered by an arbitral institution, a Letter of Proof shall be issued by one of those qualified arbitral and dispute resolution institutions and permanent offices in Hong Kong which satisfies the criteria set out under Article 2(1) of the "Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the HKSAR".

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

Hong Kong is a leading international dispute resolution services centre

- Hong Kong has a sound legal system and a rule of law tradition, as well as an independent judiciary.
- Hong Kong has experienced dispute resolution practitioners and rich dispute resolution culture.
- Hong Kong is renowned as an arbitration-friendly jurisdiction.
- Arbitral awards rendered in Hong Kong can be enforced in all State parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
- There is no restriction on foreign law firms engaging in and advising on arbitration in Hong Kong. Parties in arbitration may retain advisers without restrictions as to their nationalities and professional qualifications.

Proximity to China

- Hong Kong is the only common law jurisdiction within China, maintained under Article 8 of the Basic Law.
- On 18 January 2019, Hong Kong and China signed the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters between the Courts of the Mainland and of the Hong Kong SAR. This Arrangement applies to civil and commercial judgments and covers both monetary and non-monetary relief, except judgments on corporate insolvency, debt restructuring, matrimonial or family disputes, succession disputes, maritime disputes, certain patent infringement disputes, validity of arbitration agreements and the setting aside of arbitral awards. As such, judgment creditors will not need to initiate fresh proceedings in the enforcing jurisdiction.
- On 2 April 2019, the Supreme People's Court of the People's Republic of China and the Department of Justice of the Hong Kong Special Administrative Region (HKSAR) entered into the "Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the HKSAR". This Arrangement came into force on 1 October 2019. Under the Arrangement, parties to the arbitral proceedings in Hong Kong can seek interim measures from the Mainland courts to protect the enforcement of the arbitral award. Hong Kong is the first and only legal venue outside the Mainland China where parties to arbitration can seek interim reliefs from the Mainland courts in aid of arbitration under the Arrangement.
    - Hill Dickinson Hong Kong was the first law firm to successfully make an application under this new process in April 2019.

[1] https://www.info.gov.hk/gia/general/202006/29/P2020062900772.htm

22. What changes in dispute resolution practices have been implemented in light of current events? Are there any "new normal" practical tips in your jurisdiction parties should be aware of when resolving legal disputes?

Remote Hearings in courts

The recent COVID-19 pandemic and the General Adjourned Period (from 29 January 2020 to 3 May 2020) prompted the Hong Kong Courts to explore the use of technology to conduct court proceedings.

On 2 April 2020, the Chief Judge of the High Court issued a Guidance Note for Remote Hearings for Civil Business in the High Court (the Guidance Note), encouraging the use of alternative modes of hearing such as telephone and video-conferencing facilities, so as to maximise the continued and safe operation of the justice system while maintaining social distancing and reducing the risk of COVID-19 spreading in the community as far as possible.

Introduction of the COVID-19 Online Dispute Resolution (ODR) Scheme

Having received funding under the Government's Anti-epidemic Fund, the Department of Justice launched the COVID-19 Online Dispute Resolution Scheme on 29 June 2020, aiming to facilitate speedy and economical resolution of COVID- 19 related disputes, such as those involving micro, small and medium-sized enterprises (MSMEs) that may be adversely affected by the pandemic and force majeure.

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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 Civil Court system in India is adversarial in nature and has a three-tier structure with the district courts at the first level, High Courts above that and then the Supreme Court of India at New Delhi at the top of this pyramid. Most district courts have unlimited pecuniary jurisdiction, but there is a limited pecuniary jurisdiction of district courts falling under five High Courts, i.e. Delhi, Bombay (Mumbai), Calcutta (Kolkata), Madras (Chennai) and the Himachal Pradesh High Court at Shimla. All states have High Courts hearing matters arising from their appellate jurisdiction as also writ jurisdiction, with the above-mentioned five (5) High Courts having original civil jurisdiction to receive suits above a certain threshold. Judges not only regulate procedure, grant interim relief and receive evidence, but also decide all civil matters without a jury trial. Jury trials were abolished in 1959. The system does not admit inquisitional procedures. India has no currently functioning jury system for trials and the last jury trial took place in 1959 in the case of *K M Nanavati v State of Maharashtra*, AIR 1962 SC 605, when the government abolished jury trials since they were susceptible to media and public influence. Minor issues in rural areas are handled through the *Panchayati Raj* system involving village assemblies and elders and there is a robust system for mediation and conciliation through the *Lok Adalats* or People's courts that have legal sanctity and structure under the Legal Services Authorities Act, 1987 (the permanent *Lok Adalat* can actually decide a dispute up to INR 1million). The role of the judges is to interpret the law, assess the evidence presented and control how hearings and trials unfold in their courtrooms.

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

All court hearings are open to the public, but since the virtual court system began, it has been more difficult to observe open court proceedings since the links for virtual hearings are only shared with parties and with the media, but this process is evolving. All court decisions and orders are now uploaded online with few exceptions, but document filings are not public. Civil case documents can often be obtained from the court through an application for a certified copy of the record once a matter has been decided, but the practice in this regard varies from state to state depending upon the relevant High Court's promulgated rules.

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 advocates registered under the Advocates Act, 1961, with a certificate of enrolment from the State Bar Council are entitled to appear before any Court in India, including the Supreme Court of India, provided their name continues to remain on the roll of advocates of the relevant state bar council. Persons who are not advocates are not entitled to practice in any court or before any authority, but a court may permit such a person to appear or represent a party. A party in person can always represent him/herself even in the Supreme Court of India. Advocates conduct proceedings on behalf of their clients upon receiving a power-of-attorney (called a *Vakalatnama*). There are two classes of advocates, namely, senior advocates and other advocates. Senior advocates are designated by the High Courts or the Supreme Court of

India. Advocates may generally file Applications, Suits, Appeals, etc., on behalf of their clients in all civil courts, but in the Supreme Court of India filing can be done only by a party in person or through an advocate who is qualified as an "*Advocate-on-Record*" with an AoR code for all filings (e-filings can also be done using this code).

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

Civil claims must be commenced ordinarily within a period of three years, but there are some exceptions whereby limitation can be extended on specified grounds (such as legal incapacity, pendency of other proceedings, acknowledgement/part payment within the period of limitation, etc.). The periods for filing an appeal (generally 30 to 90 days) are also set-out in the Schedule to the Limitation Act, 1963, and some appeal periods are prescribed by statute. The time limit for filing an appeal can be extended upon the appellant showing sufficient cause under the Limitation Act, 1963, s 5, and also under most other statutes offering a statutory right to appeal.

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

Most civil actions can be initiated without pre-institution notice or special procedures, but a recent amendment to the Commercial Courts Act, 2015 has introduced s 12A(1) which states that:

> *"Pre-Institution Mediation and Settlement—(1) A suit, which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central Government."*

The Code also requires two months' advance notice before a civil suit is instituted against the Government or any public officer. However, such notice can be waived with the leave of the court if there is an urgent or immediate need for relief.

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

Civil procedure is governed by the Code of Civil Procedure, 1908 (the "Code" or "CPC") which was last amended in the year 2018, for ordinary civil matters. However, a more recent amendment was made to the Code in 2018 and 2019 for commercial cases. The ordinary means of filing a Suit and pursuing the same involve obtaining court fees based on the value of the claim, institution of the Suit, notice issued by the concerned civil court upon the court being satisfied that a cause of action has been disclosed, admission of the plaint and issuance of summons. The Court orders issuance of summons to all defendants who are required to file a Written Statement within a period of 30 days from the date of receipt of summons, but this can be extended for a further period of 60 days from the date of service of the summons. The Written Statement may be filed with counter-claim from one or more defendants against the plaintiff. Documents should be filed by both parties at this stage, i.e. with the plaintiff and later-on by defendants with their respective written statements. It is permissible for the court to pronounce judgement and partially or fully decree the Suit at this stage if a defendant admits the claim of the plaintiff. It is not uncommon for a plaintiff to file a replication (like a rejoinder) in response to the written statement and also to file further documents at that stage. Parties generally submit affidavits of admission and denial of documents. In commercial cases, the procedure for trial is set out in Order XV-A rule 2 (this procedure covers the first case management hearing) of the Commercial Courts Act, 2015. A case management hearing takes into account framing of issues between the parties, listing the witnesses to be examined by the parties, fixes the dates for affidavits of evidence and sets a time-table for evidence to be recorded (this involves cross-examination of witnesses), dates for written arguments to be submitted, dates for oral arguments and set time-limits for the parties and their advocates to address oral arguments. The procedure for cases that are not commercial is not as rigid at present. Under the Commercial

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Amir Singh Pasrich read law at Oxford and trained in London before returning to India at a time when the Government of India had just started liberalising the economy in 1991-92. From 1992 to 1996 he was an associate with the legendary Indian law firm of J. B. Dadachanji & Co. as an advocate in the Supreme Court of India and as a corporate lawyer. He co-founded International Law Affiliates (I.L.A.) with a Mumbai partner from the same Oxford College in 1998. The dispute resolution practice of I.L.A. was transferred to Pasrich & Company in 2004 until 2012 when both International Law Affiliates and Pasrich & Company were rolled into one firm i.e. I.L.A. Pasrich & Company, of which he is the Managing Partner. Mr. Pasrich has handled a wide variety of corporate advisory work, litigation and arbitration. His special expertise involves commercial disputes, arbitration and specialist practice areas like foreign direct investment into India, employment, competition law, aviation, public procurement, product liability and real estate. As an advocate, he has had exposure to original side practice in courts ranging from district courts in Delhi, Chandigarh, Mumbai, Haryana, Karnataka, Madhya Pradesh, Uttar Pradesh etc. up to various High Courts in 8 States of India. In 2006, Pasrich was appointed "Agent of Her Majesty the Queen in Right of Canada"; he has represented the Government of Canada as Legal Counsel since 1995 and was confirmed as such in 2017 after a formal competitive process. In March 2018, Mr. Pasrich was appointed Honorary Legal Advisor to His Excellency the British High Commissioner. He is advisor to several Governments and High Commissions/ Embassies in India. He has advised the Delegation of the European Union, the Singapore High Commission, the French Embassy and several Fortune500 companies. He has been external General Counsel in India to Air France and KLM Royal Dutch Airlines (2003-2014), Turkish Airlines (2011-17) and for Fabindia Overseas Pvt. Ltd. from 2007-2013.

Pasrich was elected as a Council Member, Legal Practice Division 2019-2022 of the International Bar Association ("IBA"), he is currently on the Policy Committee of the Bar Issues Commission of the IBA (up to December 2021). His previous appointments include Co-opted Council Member of the Legal Practice Division of the IBA (2015-16), Co-chair of the International Sales Committee (from 2011-13) of the IBA and a member of the IBA Council (2012-14). Pasrich has been Chairperson of the Law & Justice Committee of the PHD Chambers of Commerce & Industry from 2018-2020. He is presently Vice-President of the Oxford & Cambridge Society of India 2020-22. He was an independent director on the board of Jindal Steel and Power Ltd. up to 2007. From 2007 to 2009, he was Chair of the Indo-Canadian Business Chamber (North India). He has been a member of the International Council of Jurists. He has also been Co-chairman of the National Council on Legal Affairs & Regulatory Committee of the Associated Chambers of Commerce and Industry

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(ASSOCHAM), India. He has handled corporate contentious matters in the Supreme Court of India, various Indian High Courts and before specialist Tribunals/Commissions for competition law (the Competition Commission of India and Competition Appellate Tribunal), labour law, company law, product liability, Air transport law etc.

Mr. Pasrich has travelled to over five continents and has presented papers at many conferences of the International Bar Association, Union Internationale des Avocates (UIA), Inter-Pacific Bar Association or IPBA, Law Asia, The Law Society of England & Wales, The Global Arbitration Review (GAR), the PHD Chamber of Commerce & Industry, The Confederation of Indian Industry etc. both abroad and in India on commercial law subjects covering cross-border transactions, due diligence, joint ventures, e-commerce transactions, priority and title retention, international sales, competition law, arbitration, labour law and aviation etc. He has been recognized in multiple disciplines by Who's Who Legal in 2020, andhas been cited as a "Leading Individual" for his Corporate/M&A and Aviation practice in Chambers Asia as also in the 2018 Legal 500 for aviation, the 2016 Chambers Asia for Real Estate and some editions of Asialaw. A citation in Chambers Asia described Mr. Pasrich as "extremely methodical and rigorous". He has been recommended as one of a few Indian practitioners in Who's Who Legal 2018 for Franchise, Aviation (Regulatory, Finance & Contentious) and Product Liability Defence. Mr. Pasrich has authored the India chapters for international publications (Getting the Deal Through) on Product Liability, Product Recall, Real Estate and Air Transport as also for Lexis Nexis (Dispute Resolution) in 2020-21. In 2013 he was a member of the Government of India's Expert Group on reform of the regulatory mechanism for the Prasar Bharati Broadcasting Corporation of India. He is an advisory board member of Ansal University. Mr. Pasrich has been a contributor to the World Bank's Doing Business 2020 and has in the past contributed to the same since 2012 receiving certificates of appreciation annually from the World Bank.

Mr. Pasrich has several reported judgments to his credit and regularly appears as lead counsel for commercial arbitration and other disputes in Indian High Courts, before specialist tribunals like the NCDRC, COMPAT, CCI, DRAT, NCLT, NCLAT etc. and occasionally for original side law suits in the district courts. His key clients have included Indian companies that are household names like Ashok Leyland Ltd., Mahindra & Mahindra Ltd., Crompton Greaves Ltd. (now called CG Power & Industrial Solutions Ltd.) and Fabindia as also several multi-nationals and foreign governments.

Pasrich is an alumnus of The Doon School, he holds a first degree in Science from St. Stephen's College, Delhi and a law degree M.A. (Oxon.) from Worcester College, Oxford University; he speaks English, Hindi, Punjabi and some German. He has a passion for horse-riding and polo and is a non-professional polo player with a handicap of +1. He lives in New Delhi and is married with two children. He also enjoys swimming, golf and trekking.

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Courts Act, 2015 (for commercial disputes), oral evidence is meant to be recorded on a day-to-day basis, and further case management hearings are mandated with the court having the power to decide pending applications, direct filing of compilations or pleadings, issue practice directions, consolidate proceedings, etc. A separate trial can be ordered on any particular issue and the court has the power to give judgement on a claim after its decision

on a preliminary issue. Courts are also empowered to direct a deposit through payment of a sum of money into court.

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

All documents in the possession of one party are required to be disclosed to the other party and to the court. As per the current provisions of the Code, documents are meant to be filed along with the Plaint and Written Statement, but in practice additional documents are generally permitted subject to the leave of the court up to the stage of framing of issues.

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

There is provision made for privileged documents in the Code, under Order XI rules 6 and 19, but it is common for courts to exercise inherent jurisdiction in such matters under the Code, s 151, to direct the Registry to retain certain privileged or confidential documents in a sealed cover. It is not common for courts to permit receipt of documents from one party without them being disclosed to the other party, and a recent Bombay High Court judgement expressly mentions that the court was reluctant to permit documents from being filed under a sealed cover. The Indian Evidence Act, 1872, exempts discovery of privileged documents under ss 126 - 129 for privileged communications between a husband and wife and between a client and his/her attorney. The grounds on which legal protection against disclosure can be claimed are stated to be:

(1) legal professional privilege;

(2) where the production is contrary to public policy;

(3) where the documents in question may tend to incriminate the party in question or his/her spouse;

(4) where production of the documents is contrary to statute;

(5) where production of the documents violates an express or implied agreement between the parties; and

(6) where production, in certain circumstances of particular cases, would be oppressive.

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

Since 2002, the Code requires filing of evidence affidavits prior to the trial and the process of examination-in-chief has been slowly eradicated for civil cases. The opposing party is ordinarily given an opportunity to cross-examine the deposing witnesses before being required to file affidavits of evidence on behalf of the defence. The plaintiff's counsel is then also permitted to cross-examine witnesses of the defendant.

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

The Indian Evidence Act, s 45, recognises expert testimony and, generally, cross-examination follows expert testimony. Expert testimony and opinions are limited to technical points, but experts are usually produced by the concerned party seeking to rely on their testimony. Civil courts are empowered to appoint experts, but the procedure is treated as an independent process involving a commissioner that will report to the court. The Code under, Order XXVI, provides for the appointment of commissions to inquire into questions involving scientific investigation, adjustment of accounts, taking evidence, etc. Ordinarily, the report of the commission is treated as evidence, but not in circumstances where the court deems fit to order further inquiry. The Arbitration & Conciliation Act 1996, s 26, is based on the UNCITRAL model law and it empowers an arbitral tribunal to appoint one or more experts to report to it on specific issues to be determined by the tribunal or it may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for the expert's inspection. Further, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points in issue. In *Ram Narain vs. State of Uttar Pradesh* [AIR 1973 SC 220], the Supreme Court held that the opinion

of a hand-writing expert giving evidence is no less fallible than any other expert opinion. There is no specific code of conduct for expert witnesses.

11. What interim remedies are available before trial?

Interim remedies available before trial are enabled by the Civil Procedure Code which allows applications to be made to the court for interim relief through injunctions, restraining orders, deposit and other measures *inter alia* to protect the subject matter of the dispute. Courts are also mandated to appoint receivers and they sometimes appoint provisional or interim administrators or Court Commissioners with specified powers. It is not uncommon for the courts to exercise their powers to direct furnishing of security for the amount claimed provided certain conditions exist, suggesting dissipation of a defendant's assets, a risk of the decree being rendered ineffectual, conduct of the Defendant suggesting concealment or alienation of assets. The Specific Relief Act 1963 allows the court to give temporary and mandatory injunctions as provided in s 39 –

> *"When to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts."*

A recent 2018 amendment to the Specific Relief Act now prevents courts from granting an injunction in suits where the contract relates to an infrastructure project, if such an injunction would cause impediment or delay to the progress or completion of such a project. Such projects are categorized under the following sectors: transport, energy, water and sanitation, communication and social & commercial infrastructure.

12. What remedies are available at trial?

Apart from interim relief, or the prospect of a mediated settlement and/or conciliation, a partial decree can also be granted at the stage of completion of pleadings under the Code, as per the provisions contained in Order 12 rule 6, at any stage of the suit (see *S.M. Asif v. Virender Kumar Bajaj*, (2015) 9 SCC 287). Once the trial commences, the judge may decide one or more questions as preliminary issues for which either no evidence is needed, or which can be decided on the basis of admitted documents. In some cases, evidence is accepted at the initial stages only in respect of a preliminary issue so that a prolonged trial is rendered unnecessary.

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

Judgements are enforced through execution. In an Execution Petition filed under the provisions of the Code under s 52 and Order 21, the court has the power to order execution of the decree by delivery of any property specifically decreed, order attachment or sale without attachment of any property belonging to the judgement debtor, arrest and detention in prison of the judgement debtor or even appointment of a receiver to preserve, sell, rent-out or otherwise deal with the suit property. The court may also on the application of the decree holder order execution of any specified relief granted by the court.

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

Although the Civil Procedure Code (the "Code") provides for award of costs under Section 35 and Order XX-A, actual costs are rarely awarded and such costs do not come close to the full measure of expenditure incurred by the party in the pursuit of a claim or defence. Although the Code, as amended in 1956-1957, provides that where the court directs that any costs shall not follow the event, the court shall *"state its reasons in writing"*, however, this provision is still rarely honoured. In *Ashok Kumar Mittal vs. Ram kumar Gupta* (2009) 2 SCC 656, the Supreme Court observed, *"The present system of levying meagre costs in civil matters (or no costs in some matters), no doubt, is wholly unsatisfactory and does not act as a deterrent to vexatious or luxury litigation borne out of ego or greed, or resorted to as a "buying-time" tactic. More realistic*

approach relating to costs may be the need of the hour. Whether we should adopt suitably, the western models of awarding actual and more realistic costs is a matter that requires to be debated and should engage the urgent attention of the Law Commission of India." More recently, the Commercial Courts Act, 2015 amending a few provisions of the Code for commercial cases provides for courts to have the discretion to determine costs payable by one party to the other including fees and expenses of witnesses, legal fees and expenses and any other expense incurred in connection with the proceedings.

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

The Code provides for filing of an appeal from the final decree passed/judgment pronounced by any court exercising original jurisdiction to the superior court authorized to hear the appeals from the decisions of such courts. Any person aggrieved by the judgement of such subordinate courts exercising original jurisdiction may prefer an appeal to the High Court within 90 days from the date of decree and 30 days from the date of the decree in case of an appeal to any other court. The first appeal is a valuable right of an appellant and questions of fact and law as determined by the trial court can be open for re-consideration though questions of fact involving the assessment of evidence by a trial court are not easily interfered with. An appellate court is required to address itself to all the grounds of appeal and decide the case with reasons. Even when a first appellate court affirms the judgment of the trial court, it is required to comply with the requirements of Order XLI rule 31 and non-observance of this requirement can lead to a successfully pursued further appeal. Order XLI r 31 provides for the decision of an appellate court to be in writing and to state:

(a) the points for determination; (b) the decision thereon; (c) the reasons for the decision; and (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled, and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein. A person aggrieved by the order of the court of first appeal then can prefer a second appeal under the Code, s 100, subject to the condition that a substantial question of law is involved. Appeals may be preferred on the grounds of pecuniary and territorial jurisdiction, limitation, deficit court fees, non-compliance with statutory provisions, procedural defect or irregularity, etc. leading up to the pronouncement of the judgment. The High Courts of Delhi, Bombay (Mumbai), Madras (Chennai) and Calcutta (Kolkata) permit appeals from the judgement of a single judge of the same High Court to an appellate bench and these appeals are called Letters Patent Appeals or "LPAs". However, an LPA cannot be filed when the impugned judgment has been passed in exercise of the High Court's appellate jurisdiction in respect of a decree or order of a court subordinate to such High Court. LPA's also are not available against orders passed by a single judge of the High Court in exercise of its revisional or criminal jurisdictions.

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 between lawyers and clients pursuant to the Bar Council of India Rules, r 20. Apart from the Bar Council Rules in the landmark case of *Ganga Ram v Devi Das (61 P.R. (1907))*, such an agreement was held to be void as contrary to public policy and professional ethics. A similar view was taken by a five-judge bench of the Supreme Court in the matter *of Mr 'G', A Senior Advocate of Bombay High Court vs. Unknown* (1955 1 SCR 490) (decided on 27 May 1954). In that case, a senior advocate, Mr G, entered into a conditional fee agreement with his client on the terms that the client would pay him 50 per cent (50%) of whatever he wins. Later, the matter was reported to the Bar Council and, relying upon the findings in an investigation carried out by three members of the Bar Council, the Bombay High Court suspended Mr G for six months. Subsequently, Mr. G appealed to the Supreme Court against this suspension order. The Supreme Court observed

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Amit Ranjan Singh was admitted to the Bar in 2011. With 9 years of post-qualification experience, he has worked in various capacities as a young lawyer assisting senior counsel and also arguing matters before various courts. He is a member of the Bar Council of India and the Delhi High Court Bar Association.

Singh has appeared in the Supreme Court of India, Delhi High Court, various district courts, and also before several consumer fora, the Delhi State Consumer Disputes Redressal Forum, the National Consumer Disputes Redressal Commission, the Motor Accident Claims Tribunal, the Debt Recovery Tribunal (New Delhi), the Labour courts (Delhi and Mumbai), districts courts in Delhi (Patiala House, Tis Hazari, Saket, Karkardooma and Dwarka). He has handled execution proceeding, ordinary civil suits, writ matters and special leave petitions (civil and criminal) before the Hon'ble Supreme Court of India. His areas of practice include civil and commercial litigation with exposure to writ jurisdiction cases; probate & testamentary succession matters, land acquisition cases, labour and employment law disputes, negotiable instrument related litigation, property law disputes, land revenue cases, consumer law (original and appellate), competition law and arbitration cases.

Singh co-authored the Product Liability India chapter for the 2019 & 2020 editions of 'Getting the deal Through' and he contributed to the 'Employing Workers project' of the World Bank Group for the year 2019.

Amit Ranjan Singh has personally taken charge of arbitration proceedings to support lead counsel for domestic adhoc as well as international commercial matters. He has handled interim relief applications both before the Hon'ble Delhi High Court and also before arbitral tribunals.

Amit Ranjan Singh graduated with a Bachelor of Arts degree from University of Allahabad. He studied Economics and Philosophy for his degree course. He studied law at the Faculty of Law, Delhi University. His hobbies include reading and travelling.

that the conduct of Mr G amounted to professional misconduct and it upheld his suspension.

Third party funding is however not expressly barred and was briefly discussed in a 2018 Supreme Court judgment in a case titled *Bar Council of India v A. K. BalaJi & Ors.* (2018 5 SCC 379), when the Court whilst considering what constitutes the practice of law (by foreign lawyers) observed "*In India, funding of litigation by advocates is not explicitly prohibited, but a conjoint reading of Rule 18 (fomenting litigation), Rule 20 (contingency fees), Rule 21*

(share or interest in an actionable claim) and Rule 22 (participating in bids in execution, etc.) would strongly suggest that advocates in India cannot fund litigation on behalf of their clients. There appears to be no restriction on third parties (non-lawyers) funding litigation and getting repaid after the outcome of the litigation". This observation, though it was obiter, should set the question of whether India permits third party funding of litigation to rest, but third party funding remains relatively uncommon and it is also uncommon for parties to a *lis* to be able to sell their interests i.e. the expected winnings from a judicial dispute to third parties.

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

Although the Civil Procedure Code does not define the term "class", the Code allows any number of plaintiffs (under Order 1, rule 1) to file a suit against the same defendant (or defendants) if the relief claimed arises out of the same act or series of acts. Order 1 rule 8 of the Code provides that where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or defend such suit, on behalf of all the persons so interested. This is also termed as a representative suit (see *The Chairman, Tamil Nadu Housing Board, Madras v. T.N. Ganapathy* [(1990) 1 SCC 608]. Class or group actions are expressly recognized under the Consumer Protection Act, 2019. Sub-Sections 2(5)(ii) and (v) recognize 'any voluntary consumer association registered under any law for the time being in force' and "one or more consumers, where there are numerous consumers having the same interest'.

The Companies Act, 2013, s 245, provides that such number of members or depositors may, if they are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors, file an application before the Tribunal on behalf of the members or depositors.

While there is limited recognition of the concept of a Class action, and there is little public awareness of class actions thanks to the lawyers being barred from contingent arrangements, this area of the law may develop with the relatively new consumer protection law enacted in 2019 and brought into force in 2020.

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

The enforcement of Foreign Judgments is governed by the Code under ss 13, 14 and 44A. The Code, s 13, provides that a foreign judgment shall be conclusive as to matters directly adjudicated upon between the same parties or between parties from whom they or any of them claim, except where:

(1) The judgment has not been pronounced by a court of competent jurisdiction;

(2) The Judgment has not been pronounced on the merits of the case;

(3) It appears (prima facie) to be founded on an incorrect view of international law or a refusal to recognize the law of India in cases where such law is necessarily applicable;

(4) The proceedings in which the judgment was obtained are opposed to natural justice;

(5) It has been obtained by fraud; or

(6) It sustains a claim founded on a breach of any law in force in India.

The Code, s 14, provides that the court, upon the production of any document purporting to be a certified copy of a foreign judgment, shall presume that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction. A foreign judgment is thus enforceable under the Code, ss 13 and 14.

Under the Code, s 44A, foreign decrees passed in reciprocating countries may be executed in India in the same manner as if they were decrees passed by a civil court in India. Hence, such decrees may be filed before an executing court i.e. the civil or district court having territorial jurisdiction over the defendant or the relevant asset/s. Execution of such decrees may be refused only if the concerned

civil court finds that the judgment and decree fall within one of the exceptions set out in s 13. Section 13 applies for judgments or decree of reciprocating and non-reciprocating territories.

In the case of foreign judgment passed by a court in a non-reciprocating country there is no provision for automatic enforcement and such foreign judgments can only be executed by the successful party (called a "decree-holder") filing an ordinary original-side civil suit in India relying upon the judgment (as evidence of the plaintiff's rights). This suit may be admitted under the Code, ss 13 and 14, but the presumption of correctness of the judgment can be displaced by demonstrating any of the exceptions in s 13 and the presumption under s 14 (that such judgment was pronounced by a Court of competent jurisdiction) can be displaced by proving fraud.

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

Alternate dispute resolution (ADR) mechanisms are gaining popularity in India, especially owing to the present levels of case-pendency that delays adjudication. Arbitration, Mediation & Conciliation have become preferred options for most commercial & contractual disputes and parties tend to include arbitration clauses by default, sometimes even for comparatively small disputes (such as arbitration before a panel of three for an employment dispute). However, there exists a spill-over of ancillary litigation arising from arbitration cases that still go to the Courts on appeal or on account of jurisdictional challenges. The Commercial Courts Act, 2015 provides for mandatory pre-litigation mediation in cases where the relief sought is not of an urgent nature.

Section 89 of the Code was introduced with a view to attain amicable, peaceful and mutual settlement between parties. Prior to the advent of s 89, there were various provisions under different acts dealing with the power to the Courts to refer disputes to mediation. Such provisions can be found in the Hindu Marriage Act, 1955, s 23(2), in the Industrial Disputes Act, 1947 and in the Family Courts Act, 1984, s 9, and also Orders 23, 27 and 32-A of the Code. The Code, s 89, provides as follows:

> *"Settlement of disputes outside the court. - (1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for - (a) arbitration; (b) conciliation; (c) judicial settlement including settlement through Lok Adalat; or (d) mediation.*

Following the procedure contained in s 89 as mentioned above, most civil courts suggest mediation or conciliation at the initial stages of a fresh lawsuit. The mediation and conciliation process has recently been streamlined by newly established mediation centres; these are established in some of the High Courts and some are being set up outside the court system by chambers of commerce and other private organisations. In the case of *Afcons Infrastructure Ltd. and Anr. v. Cherian Varkey Construction Co. (P) Ltd.* and Ors. [(2010) 8 SCC 24], the Supreme Court held that if the parties are not agreeable for either arbitration or conciliation, both of which require consent of all parties, the court has to consider which of the other three ADR processes (*Lok Adalat*, Mediation or Judicial Settlement which do not require the consent of parties for reference) is suitable and appropriate and then the court may refer the parties to such ADR process. If mediation is not available (for want of a mediation centre or qualified mediators), then the court will necessarily have to choose between reference to the *Lok Adalat* or judicial settlement. If the suit is complex, mediation will be the recognized choice. If the suit is not complicated and the disputes are easy to resolve applying clear-cut legal principles, a *Lok Adalat* or people's court would be the preferred choice. The court's discretion in choosing an ADR process arises from the nature of the dispute, the competing interests of the parties and other aspects. The Code, Order XXIII r 3, also lays down that in the event that the parties arrive at a settlement, a court 'shall' pronounce judgment in terms of

the settlement, leaving no scope for further adjudication. It is now not uncommon in most civil proceedings for the court to compel parties to appear before a mediator (especially where there is a mediation centre available) and some judges also try to reduce long-pending disputes by meeting the parties in chambers to resolve the matter.

The people's courts or *Lok Adalats* set up under the Legal Services Authorities Act, 1987 are a conciliatory body and courts may refer disputes to the *Lok Adalats* for settlement, while the permanent *Lok Adalats* have the power to decide small claims. The heavy pendency in most of the civil courts and at every level of the system, long duration and cost of litigation procedures have led to both litigants actively exploring and judges actively encouraging ADR solutions.

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

At present there are no pending bills for reform of the laws or regulations governing dispute resolution, but several court level initiatives have been taken for reducing pendency, i.e. the present backlog of cases to be decided by the civil courts.

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

India has several hundred benches of the High Courts and over a dozen sitting benches of the Supreme Court of India dispensing hundreds of decisions every day. While we have struggled to deal with ever increasing pressures on the civil court system, there is a rich and varied emerging jurisprudence based on common laws that can be resorted to for its persuasive value in courts across Asia, Africa and beyond. Nations having an English law heritage and common law base have relied upon Indian Supreme Court decisions, but the High Courts have hitherto escaped attention mostly due to the relative lack of access to their judgments. Decisions of the High Courts and of the Supreme Court of India are now available online and should offer valuable precedents to other legal systems thanks to the comprehensive and sometimes overly academic approach of our courts. These decisions are often based on the same statutory or conceptual framework, particularly in the context of commercial laws with India increasingly enacting laws consonant with globally accepted approaches to contracts, insolvency, arbitration, competition law, air, surface & sea transport, public procurement, information technology, etc. often to align the system with UNCITRAL model laws and WTO rules. Outside the commercial system there is also a richly developed and deeply considered set of constitutional, criminal, environmental and public interest litigation derived decisions of India's courts that has evolved since January 1950 when the constitution came into force, these precedents are now freely available and should become commonly offered persuasive jurisprudence for Commonwealth nations.

22. What changes in dispute resolution practices have been implemented in light of current events? Are there any "new normal" practical tips in your jurisdiction parties should be aware of when resolving legal disputes?

Since March 2020, there have been significant improvements in the justice delivery systems through e-filing and virtual hearings that have been enabled across India for most of the Courts. Starting with the Supreme Court of India, the practice of virtual hearing has filtered downwards towards the High Courts and what began as a trickle of cases decided through virtual procedures in April and May 2020 has become the norm with several thousand cases being decided across the country every day. All the High Courts have implemented virtual hearing procedures and district courts have started the same in the past few months of 2020. Even Labour courts are no exception and new websites have been set up for enabling virtual hearings through government software to protect from hacking and other online threats. The "*new normal*" includes a recently enabled website for consumer cases which allows e-filing for cases (www.Edaakhil.nic.in) from anywhere in India or abroad. The advent of Covid-19

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Kshitij Paliwal is a legal practitioner with over five years post-qualification experience. He has handled work from the District Court level right up to the Supreme Court of India. Kshitij has appeared in the Supreme Court of India, the Delhi High Court, several District Courts in Delhi, District courts outside Delhi, National Consumer Disputes Redressal Commission, National Company Law Tribunal, National Company Law Appellate Tribunal, Competition Commission of India, National Green Tribunal, Debts Recovery Tribunal, Debt Recovery Appellate Tribunal etc.

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Kshitij has co-authored (with Mr. Amir Singh Pasrich) the 2021 Indian Chapter of 'Getting the Deal Through' (by Lexology) on Air Transport Law as well as one on Product Liability.

Kshitij was schooled at The Doon School, Dehradun. He graduated with a Bachelor of Arts degree from Delhi University. He majored in History and was awarded his LL.B. (Honours) by the Campus Law Centre, Faculty of Law, University of Delhi. Kshitij joined the Bar in the year 2015. He speaks English and Hindi proficiently. His hobbies include reading, trekking, travelling, writing poems and short stories.

has secured opportunities for parties to participate in hearings without travelling to the relevant courts. Recording of cross-examination (witness evidence) is still a challenge thanks to the age-old system of obtaining signatures on deposition sheets, but evolution of that process is only a matter of time. Practical tips for online hearings - parties must be alert, e-mail addresses must be carefully monitored since the video conference links are sent one

evening before the hearing and summons can even be sent by WhatsApp. A strong internet connection as also the availability of a back-up system has become essential in this new world order. Dropping connections or unworkable links can lead to orders being passed without participation of one or more concerned parties, particularly in a litigation with several participating parties. Whilst some precautions can be taken, there are still attendant risks caused by technology and its present state of development.

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Established in January 1998, *I.L.A. Pasrich & Company* (or "I.L.A") is a multi-practice firm that has right from its inception leaned towards cross-border matters and disputes. In the last two decades, we have represented foreign governments, the delegation of the European Union, several international airlines and many multinational companies in India and Indian clients with overseas interests. Since 2018, we have been engaged to assist the British Council and the British High Commission.

Right from the start of the Covid 19 outbreak, we have advised clients and others about important aspects of the law under lockdown- like the impact of the pandemic on commercial contracts, leases of immovable property and on employment relationships.

I.L.A. has represented clients throughout the country in over 50 District and High Courts. And have also pursued appeals before the Supreme Court of India achieving mostly favourable judgments. The Firm has emerged as a leading firm for aviation and its related fields. Our dispute resolution practice is now geared around the Commercial Courts Act, 2015 and we handle significant cross-border commercial arbitration cases.

The founder and managing partner-Amir Singh Pasrich has been recognised by The Legal 500, Who's Who Legal, Asialaw and Chambers, and was cited to have an 'excellent reputation within the aviation industry' and one which '… has a solid airline client following'.

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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 structure of Indonesia's court system in respect of civil proceedings is as follows:

(a) The District Court (the Court of First Instance)

The structure of civil proceedings at the District Court which serves as the Court of First Instance comprises 3 (three) stages of the proceeding, inter alia:

(i) Mediation/ Conciliation Process;

(ii) Hearing (Reading of Lawsuit, Response, Reply/ Counter Plea, Rejoinder, Evidentiary Process and Conclusion); and

(iii) Delivery of Judgment Process.

(b) The High Court (the Court of Appeal)

The High Court is a judicial institution that acts as the Court of Appeal for cases decided by the District Court.

(c) The Supreme Court (the Court of Cassation and Legal Review level)

The Supreme Court applies 2 (two) tiers of hearing, namely, the Cassation level to review the case decided by the High Court, and Judicial Review to review the final and binding court decision awarded in civil cases.

The role of the judge in civil proceedings

Indonesia adopts a Civil Legal System and its court system does not recognize jury system. A civil case is heard and examined solely by the Judges. In this case, the Judge will also apply the procedural law in addition to deciding a case.

As for the civil procedure system in Indonesia, there is a provision regulating that those who submit the claim, have the obligation in proving their arguments. Therefore, even though the final decision comes from the Judges, the said verdict will be based on the evidence submitted by the parties.

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

Yes, generally, all trials are open to public (vide Article 13 of Law Number 48 of 2009 on the Judge's Power) except cases where it is provided otherwise by the Law, divorce hearings and all cases concerning minors.

Regarding the court documents, in practice most documents of civil proceedings must not be disclosed to the public; however, in view of the Law Number 14 of 2008 on the Transparency of Public Information, a Court decision/verdict regarding a civil case which has been granted by the judges may become accessible to the public. Consequently, every individual may have an access to each judgement/verdict which had been delivered or announced by the Panel of Judges.

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 lawyers who has been licensed by the Advocates Bar Association and take the oath (vide Article 4 clause (1) of Law Number 18 of 2003 on the Advocates ("Law on the Advocates") in order to be entitled to appear in court and conduct proceedings on behalf of their client and a Lawyer, may only be present and represent their client during the proceedings by virtue of a Power of Attorney vested by the client.

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

According to the Indonesian Civil Code, art. 1967, all legal claims, either business as well as individual, shall expire after thirty years.

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

Before lodging a legal proceeding, by common practice, the debtor will be provided with a warning at first through a warning letter (*sommatie*). A warning letter serves as a warning or reprimand that the debtor must perform its obligation during the period of times as specified in the warning letter. Any failure to perform the obligations as specified in the warning letter will be deemed as the non-performance of the debtor, and accordingly, any consequences regarding such non-performance shall prevail. The warning letter is regulated under the Indonesian Civil Code, art. 1238.

However, there is a doctrine that a warning letter is not required prior to the submission of the lawsuit. It is also stated that the Statement of Claim could also stand as a warning letter/demand letter itself.

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

Principally, in Indonesia, those who file claims must be able to prove them, whereby the evidence will be required to be presented to the other parties and also to the panel of Judges during the trials. Before lodging a complaint to the court, the party who initiates the proceeding must prepare and submit the evidence to support the party's arguments. Once this has been done, the process will be proceed with a warning letter. If there is no response filed by the parties to dispute within the response period, then, the lawsuit can be commenced.

Dispute settlement at the court of the first instance (District Court) will persist no later than 5 (five) months and the dispute settlement at the appeal level (High Court) will be decided no later than 3 (three) months as regulated under the Circular Letter No. 2 of 2004 on the Dispute Settlement at the Court of First Instance and at Appeal Level in 4 (four) law realms.

Meanwhile, any case brought to Cassation level and judicial review at the Supreme Court must be ruled within 250 days as regulated in the Decision Letter of the Chief of Supreme Court No. 214/KMA/SK/XII/2014 on the Period of Case Handling at the Supreme Court.

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

Before a case is ready for court proceeding, either party has no obligation to disclose any relevant evidence. However, when the disputed case is ready to be heard and examined, the parties to the dispute have to provide solid evidence relevant to the actual dispute. Therefore, those who file cases must be able to prove such claim, for which relevant evidence will be required to be presented to the other parties and to the Panel of Judges during the trial as regulated under the Indonesian Civil Code art. 1865.

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

Yes, in practice, when either party fails to disclose/ present the required documentary evidence during a case hearing, it can be deemed that there is no valid evidence to support the case. On the contrary, when either party decides to disclose or present the documentary evidence, the opposing party shall have the right to examine the evidence.

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

To attest a disputed event, the Indonesian Civil Procedure has specified which evidence can be submitted by the parties for the proceeding, as stated under the Indonesian Civil Procedure Law or *Het Herziene Indonesisch Reglement* (HIR) art. 164, or the

Rechtreglement voor de Buitengewesten (RBg), art. 284, namely: Documents, Witnesses; Allegation, Parties' Acceptance, and Oath. Some evidence can be required to be presented during the evidenciary process. For witness statements, the statements are provided orally and each time a party has present their witness' testimony or other evidence, the opposing party will be provided with the same opportunity, and allowed to cross-examine the witnesses presented by the other party.

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

As regulated under the HIR art. 154, the District Court can appoint experts if necessary, as follows:

Article 154

(1) If the district court considers that the case can become clearer when examined or seen by an expert, then the district court may appoint the expert, either at the request of both parties, or because of the authority of the district court.

(2) In such a case, a trial day will be set, so that on that day the expert will give a report, either by letter or verbally, and confirm the report with an oath.

(3) People who cannot be heard as witnesses cannot be appointed as experts.

(4) The district court is in no way obliged to comply with the expert's opinion if that opinion contradicts the district court belief.

The expert witness is regulated under the Article 154 which states that if the court is of the opinion that the case can be best explained by an expert, then at the request of one of the parties or through the court's authority, the judge may appoint an expert witness. The expert witness is appointed by the judge to be asked for any opinion regarding a fact or information based on the expert's knowledge or expertise.

The parties and the judges, if desired, can present an expert witness(es). Judges, in using the testimony of an expert witness, aim to gain deeper knowledge about something that only certain expert witnesses are able to explain, for example, matters of a technical nature, customs in an event, and even regarding laws.

In providing expert testimony, an expert witness must maintain a code of ethics in court. For example, being neutral, not taking sides and fair and impartial. The expert must also be independent and not be influenced by anything. This also applies to experts who are bound by professional code of ethics, for example, such as doctors and notaries.

11. What interim remedies are available before trial?

Indonesia does not adopt interim remedies before the proceedings. Nevertheless, Indonesia adopts the Petition of Provisional Remedies. Provision is a request filed by the relevant party for the enforcement of preliminary legal action for either party, before the delivery of judgment. The Petition of Provisional Remedies is usually applied for urgent relief in the nature of an emergency. If the Petition of Provisional Remedies can be proven by the party who lodges such petition, accordingly, the Panel of Judges in the trials may grant a Provision Decision.

12. What remedies are available at trial?

Should either party breach a contract as contemplated in the of the Indonesian Civil Code, art. 1246, then, the remedies consist of 3 elements, namely costs, losses, and interest. As for the loss due to a tort lawsuit, based on the Indonesian Civil Code, the affected party can request to replace the actual loss he/ she has suffered (material loss) as well as the profit that will be obtained in the future (Immaterial).

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

Decisions in civil cases in Indonesia do not necessarily only contain compensation in the form of fees, as there are several types of judges' decisions in civil cases. Regarding the types of judges' decisions in civil cases, according to their nature can be divided into 3 (three) types, namely:

(a) Declaratory Judgment

A Declaratory Judgment is a court decision by to declare that the underlying obligation is

legally binding. In a Declaratory Judgment, it is stated that the particular legal situation requested is the recognition of a right to certain performance and generally this type of judgment falls under private law. Declaratory Judgments are usually an order by nature of law, not judicial in nature, as there is no event or matter to be disputed. Examples of Declaratory Judgment are decisions stating legal or invalid marriage ties or decisions stating legal or invalid sale and purchase agreements.

(b) Constitutive Judgment

Constitutive Judgments are decisions that ensures a legal situation, either the decisions which nullify a legal standing or raise a legal standing. An example of the Constitutive Judgment is stating that a marriage was broken down by divorce.

(c) Condemnatory Judgment

Condemnatory Judgments are decisions or judgments granted by the Court whereby the losing party has to perform specific performance or pay monetary compensation, if the plaintiff's civil rights claimed against the Defendant are recognized by the Judge before the court session. An example of the Condemnatory Judgment is a Court order punishing a party by ordering them to pay compensation to another person.

Based on the type of decisions, if the decision is a Condemnatoir Decision, the losing party, based on the Judge's decision, is punished by paying a fee to the winning party, while the amount to be paid is in accordance with the nominal sum granted by the judge in their decisions. After the decision is declared legally binding, then, such decisions can be enforced against the losing party.

However, sometimes the losing party is unwilling to fulfil the decisions voluntarily. Indeed, the prevailing Laws and Regulations do not regulate the time period within which the losing party must fulfil and perform the decisions voluntarily. Therefore, the winning party may request the Court for help to enforce the execution of such decision, which regulated under the HIR, art. 196.

If after a predetermined period, the verdict fails to be fulfilled, then the Head of District Court can order the seizure of the property of the Losing Party until it is deemed sufficient to compensate for the amount of money mentioned in the decision and all costs for carrying out the decision (HIR, art. 197).

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

Principally, the costs incurred will be borne by each party to the litigation. Like lawyer fees, these fees cannot be charged to other parties and cannot be included in the lawsuit. The fees that can be filed / requested in a lawsuit are as we have explained in number 12.

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

Either or both parties to dispute may file an appeal as one of the common legal remedies to challenge the judgment made by the District Court. Parties who are unsatisfied about the judgment, may be able to appeal against the District Court judgment in a High Court that has the same jurisdiction as the District Court where the judgment was awarded.

This provision is governed under the Law Number 4 of 2004 on the Amendment to the Law on the Judicial Power and Law Number 20 of 1947 on the Appeal Proceeding.

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

As the lawyer fees cannot be charged to the opposing party, there are no restrictions on such agreements. Thus, the agreement will bind the parties who entered into the agreement, so that the obligations established by this agreement must be carried out in good faith (*Pacta Sunt Servanda* principle).

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

Indonesia has adopted Class Action rules. Class Actions are a type of civil lawsuit brought on behalf of people who have many similar interests in the disputed case and this method is deemed to be more effective than a multiplicity of suits. Each individual who wants to settle their dispute through the class action must vest their consent to the class representative. Primarily, the aim of a class action is for efficiency in dispute settlement, the economical purpose of the litigation process, and avoidance of risky duplication of judgment which may result in inconsistency in the same disputed case.

Further regulation on the litigation procedures in class action claims can be found in the Regulation of the Supreme Court No, 1 of 2002 regarding Class Action Procedures.

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

Referring to the Regulation on Legal Proceedings or *Reglement op de Rechsvordering* (Rv), art. 436 clause (2), the only way to execute the award granted by the international court in Indonesia is by converting such award into a legal basis in order to lodge a new lawsuit in the Indonesian court. Then the Indonesian court will take such award as documentary evidence with casuistic legal force, namely:

(a) It can serve as an authentic deed that has a faithful and binding evidentiary power.

(b) It only serves as a legal fact that is openly valued in accordance with the judge's consideration.

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

In Indonesia, the main form of alternative dispute resolution is arbitration; however, other forms of alternative dispute resolution can also be carried out by means of consultation, negotiation, mediation, conciliation, or expert judgment. Meanwhile, the main arbitration institution/ organization of alternative dispute resolution in Indonesia is the Indonesian National Board of Arbitration (BANI). However, there are several other institutions / organizations in Indonesia with their special expertise which the parties to dispute can use namely the:

(a) Indonesian Institute for Alternative Banking Dispute Resolution (LAPSPI);

(b) Indonesian Guarantee Corporation Arbitration and Mediation Agency (BAMPI);

(c) Indonesian Capital Market Arbitration Board (BAPMI);

(d) Indonesian Insurance Mediation Agency (BMAI);

(e) Pension Fund Mediation Agency (BMDP); and

(f) Indonesian Financing and Pawnshop Mediation Agency (BMPPI).

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

Currently, in Indonesia, there are ongoing proposals for the Arbitration Law to be revised and updated to keep up with legal developments. However, there is a discussion on plans to renew the Civil Procedure Code, but it has not yet been completed.

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

Currently, many foreign arbitration awards have been recognized in Indonesia. However, in practice, the implementation mechanisms and procedures have to face many obstacles. One of them is that many foreign arbitration awards are being challenged in various civil proceedings in Indonesia. Seeing this, we hope the future will be better as regards dispute resolution in Indonesia.

22. What changes in dispute resolution practices have been implemented in light of current events? Are there any "new normal" practical tips in your jurisdiction parties should be aware of when resolving legal disputes?

Indonesia has adopted an e-court system (electronic court system). This E-Court

serves as one of the implementation steps of an Electronic-Based Government System ("SPBE"). SPBE is regulated under the Presidential Regulation No. 95 of 2018 on the Electronic-Based Government System ("Presidential Regulation 95/2018").

E-court serves as one of implementation steps of SPBE, as reflected in the Regulation of the Supreme Court No. 1 of 2019 on the Administration of Cases and Trials in the Electronic Court ("SC Regulation 1/2019").

SC Regulation 1/2019 initiated a court information system, by which the Supreme Court provides the entire information system which makes for better service to the justice seekers, including in areas like administration, case registration service, and electronic litigation/ trials.

SC Regulation 1/2019 also launched an electronic trial, which encompasses as set of hearings and case trials by the court and is held with the support of information and communication technology.

And considering the current situation, the E-Court may be the best choice for litigation because of its efficient nature. The E-Court also has strict controls over physical interaction, which greatly supports the Indonesian Government's stance on social distancing.

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

Structure of the Court System in Japan

The Japanese court system is basically a civil law system based on the Code of Civil Procedure (Act No. 109 of 26 June 1996, CCP) and Rules of Civil Procedure (RCP) and other various laws and treaties such as the Court Act, the Act on Costs of Civil Procedure and the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention). Under the Court Act, the Japanese Court system is structured as a three-tiered court system. Normally, the court of first instance for civil litigation is a summary court or a district court depending on the value of the subject matter of the dispute. The defeated party in the first instance may appeal to the court of second instance. In principle, high courts handle appeals against judgments rendered by district courts, whereas district courts handle appeals against judgments rendered by summary courts. The defeated party in the court of second instance may then appeal to the final appellate court. As a rule, the Supreme Court handles appeals against judgments rendered by high courts, while high courts handle appeals against judgments rendered by district courts as the court of second instance.

The Role of the Judge

As Japan has adopted an adversarial system, the judge makes decisions solely on the issues presented by the parties to the court and only on the basis of the evidence and arguments submitted by the parties. However, the judge closely controls procedural aspects and the decision-making process includes a series of oral hearings based on the judge's authority to control litigation proceedings under the CCP, Art. 148. The judge has the obligation to ensure the fairness and expeditiousness of the proceedings.

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

Oral argument is held in a courtroom open to the public. The only exception is where a court unanimously determines that publicity is likely to harm public order or public morality. Preliminary proceedings, i.e., proceedings conducted for the preparation and arrangement of issues and evidence, do not need to be open to the public.

In principal, anyone can access case records. However, where the case records contain material information of a confidential nature on the private life of a party or trade secrets, the court may limit third party access to the corresponding portion.

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?

Lawyers who have been admitted to the Japanese Federation of Bar Association are called *Bengoshi* and entitled to practice law; they are eligible to provide legal advice, draft legal documents for their clients as well as appear in court and conduct proceedings on behalf of their clients. Their power to represent their clients in court is not limited. However, registered foreign lawyers are not allowed to appear in court.

In Japan, there is another type of lawyers called *Shiho-Shoshi* (legal scriveners) who are entitled to represent their clients in relation to civil cases but only in limited circumstances where the value of the subject matter is ¥1.4 million or less.

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

The limitation periods are governed by substantive laws and a party who seeks to rely on the expiration of a limitation period must plead accordingly and prove that the claim is time-barred.

Under the amended Civil Code, which took effect on 1 April 2020, claims lapse if the right-holder does not exercise the right (i) within five years from the time when the right-holder becomes aware that it is exercisable; or (ii) within ten years from the time when the right becomes exercisable. These new rules apply to claims that have arisen on and after 1 April 2020. As such, the Civil Code provisions in force before the revision still govern most ongoing cases. Under the Civil Code before the revision, the limitation period for the extinctive prescription of claims is 10 years in principle, and the extinctive prescription starts running from the time when the right can be exercised. If an early stabilization of rights is required, shorter limitation periods apply under the Civil Code and the Commercial Code among others.

For example: (i) five years for trade receivables (the Commercial Code (Act No 48 of 1899) Art. 522) and (ii) three years for tort claims running from the time at which the claimant becomes aware of the damage and identifies the tortfeasor (Art.724, item 1 of the Civil Code). The limitation period for claims based on a payment default starts from the date on which the creditor can demand payment of the debt and not from the day the debtor defaults.

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

In principle, there are no particular pre-action procedures with which the parties must comply before initiating civil litigation proceedings in Japan. The few exceptions include litigation involving rent review disputes for which the claimant must start a mediation before filing a lawsuit. In addition, in some litigation against governmental authorities, the claimant needs to request an administrative review to the National Tax Tribunal before filing. For example, taxpayers seeking the revocation of a tax order by the National Tax Authority, must file a petition for review first.

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

Civil litigation commences with a plaintiff filling a complaint to the court that has jurisdiction over the case. First instance proceedings can last eight months on average, but complex cases can take longer.

A plaintiff submits a written statement of claim ("Complaint") to a court to commence civil proceedings. The court in charge of the case reviews the description made in the Complaint and serves a copy of the Complaint and a Writ of Summons specifying the date of the initial hearing on the defendant. The courts typically schedule the initial hearing within one to one-and-a-half months after the plaintiff has submitted the Complaint and require the defendant to submit an answer ("Answer") about a week before the Hearing (Art. 60-2 of the CPR provides that "[e]xcept when special circumstances exist, the presiding judge shall designate a date within thirty days from the date on which the action has been filed […]"). In the Answer, the defendants must make clear whether to admit or deny the facts asserted in the complaint.

On the first day for oral argument, the plaintiff makes a statement in accordance with the Complaint and submits supporting evidence while the defendant refutes the plaintiff's argument in accordance with the Answer submitted to the court in advance together with the relevant evidence. If the main facts of the case are in dispute, the court may decide to follow certain procedures to narrow down the issues and give opportunities to the parties to supplement their arguments and evidence.

Once the court is convinced that issues are well identified through arguments at Hearings and other proceedings, the court may conduct an examination of documents and witnesses. As a rule, the examination of witnesses is conducted intensively to be finished within one day or a few consecutive days.

After closing the examination of the evidence and considering both parties' allegations, the court concludes the oral argument stage and sets a date to render its judgement. Under the CPR, the judgment is to be provided within two months from the conclusion of the oral arguments.

The losing party can appeal to the court of second instance within two weeks from the day on which he or she received service of the judgement.

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

There is no disclosure obligation or extensive discovery process, in contrast with common law jurisdictions. Documents submitted as evidence by the parties are typically collected by the parties through their own efforts.

It is nonetheless possible to petition a court to issue an order to submit documents after an action has been commenced by providing valid reasons to compel the counterparty, or a third party keeping certain documents listed in the CCP, Art. 220, in his possession, to submit said documents (Art. 221). The person filing a motion must indicate (insofar as possible) the document, the identity of the person holding it, its significance, what needs to be proven with it and the reasons why it is necessary. The obligation to produce documents has been recognised in the following situations: (i) documents a party has referred to for the purpose of presentation or assertion of proof; (ii) documents that a party submitting evidence has the right to require delivery or inspection of while in the possession of another person; (iii) documents created for the benefit of a party submitting evidence or documents created with regards to a legal relationship between a party submitting evidence and the holder of the documents; or (iv) documents that are not excluded by the CCP, Art. 220-4 (e.g., documents exclusively prepared for use by their possessor; documents that contain confidential, technical or professional information (e.g., confidential information held by professionals such as lawyers and doctors)). If a party fails to comply with the court order to produce a document, the court may find the other party's allegations concerning said document to be true (Art. 224-1).

Before filing an action, if the future plaintiff has given advance notice of the filing to the future defendant, the plaintiff (and the future plaintiff answering the notice) may, within four months of the date of the notice, make inquiries to the other party on matters necessary to substantiate his allegations or collect evidence (the CCP, Art. 132-2). In addition, the parties may file a motion to preserve evidence by which they request the court to conduct examination of the evidence in advance. Such motion can be granted when it is expected to be difficult to rely on the evidence for a party unless the examination of the evidence is conducted in advance (the CCP, Art. 234).

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

There is currently no concept of attorney-client privilege under Japanese law. However, the bill to amend the Act on the Prohibition of Private Monopolization and Maintenance of Fair Trade was passed on 19 June 2019. Subsequently, on 2 April 2020, the Japan Fair Trade Commission (JFTC) published draft amendments to the Rules on Investigations by the Fair Trade Commission and draft guidelines on treatment of media recording confidential communications between an enterprise and an attorney. These drafts lay down the procedures to be followed so that JFTC investigators do not access documents containing confidential communication between an enterprise and its attorney regarding legal advice on unreasonable restraints of trade (mainly cartels and bid rigging), if certain procedural conditions are met.

Attorneys, doctors and other professionals and experts to whom confidential information has been disclosed may refuse to testify and give evidence (CCP, Art. 197-1(2)) or refuse to submit documents (CCP, Art. 220) regarding facts that have come to their knowledge in the performance of their duties. However, Art. 197-1(2) does not apply where the witness is released from his or her professional duty of secrecy under Art. 197. The attorneys' obligation to keep secret information obtained in confidence in the course of their professional duties is also stated under Art. 23 of the Lawyers' Law (Law No. 205 of 10 June 1949).

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

There is no restriction on the format of the evidence. If the evidence is in written form, a party must prior to its submission provide the other party with a copy thereof together with a description of the evidence.

Under the CCP, Art. 202 and the RCP, Art. 113 and 114, the other party is given the opportunity to cross-examine witnesses.

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

The court, at the request of a party, may designate neutral experts (*Kantei-nin*) to submit their opinion based on their expert knowledge and experience in such areas as medicine and architecture (the CCP, Art. 212). The experts' opinions are considered as evidence which supplements the judge's knowledge and experience. Because those experts must swear under oath, they will be punished by the court if they make any false testimony in the same manner as witnesses.

Apart from that, each party may request the examination of their own experts as witnesses or submit the written opinions of their own experts as documentary evidence.

11. What interim remedies are available before trial?

The following forms of interim relief are available under the Civil Provisional Remedies Law (Law No. 91 of 22 December 1989). Where a dispute involves a monetary claim, obligees/potential plaintiffs may apply for a provisional attachment order (kari sashiosae) to ensure that any future monetary judgment will be enforced under said Law (Art. 20). The effect of the attachment is to freeze the obligor's/potential defendant's assets to keep the defendant from disposing of his movables (most often money in bank accounts) or immovables and secure the future collection of their claims. It does not entitle the obligee to convert the seized property into money and have his obligation satisfied therewith.

Where a dispute involves certain categories of non-monetary claims, potential plaintiffs may apply for a provisional disposition order (kari shobun) to preserve their rights with respect to the subject matter in dispute (Art. 23). Unlike a provisional attachment which only concerns monetary claims, provisional disposition may take different forms due to the variety of subject matters in dispute. Provisional orders establishing a provisional legal relationship between the parties (e.g., labour relationship between an employer and a dismissed employee: the employee would file a motion requesting the court to issue a provisional order confirming the employee's status as an employee pending a resolution of the dispute on the merits and receive salary without having to report to work) are available to avoid substantial detriment or imminent danger caused by disputed legal relationships. To be granted an order, the claimant has to demonstrate: (i) its substantive right to be protected; and (ii) that the exercise of its rights will most likely be impossible or extremely difficult without such provisional attachment or disposition. For provisional dispositions establishing a provisional legal relationship between certain parties, the claimant must establish the prima facie existence of a legal relationship that the other party is disputing, and the need for

interim relief to avoid substantial detriment or imminent danger to the claimant.

12. What remedies are available at trial?

Remedies available at trial are: (i) a judgment ordering performance, (ii) a declaratory judgment; and (iii) a formative judgment. A judgment ordering performance is the most traditional remedy which broadly includes an order to perform or not to perform something. A declaratory judgment can be rendered only when there is a benefit to declare a specific legal relationship or a specific legal claim. A formative judgment is rendered in order to create a specific legal relationship or a specific legal claim such as a divorce or the recognition of the filiation of a child.

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

A local judgment may be enforced by submitting to the court of execution or to a bailiff an original of the judgment and a certificate of enforceability issued by a court clerk of the judgment court. Enforcement differs for a monetary and a non-monetary judgment. Pursuant to the Civil Execution Law, Art. 22, compulsory execution may be carried out based on (inter alia) the following "obligation-titles" (*saimu meigi*): a final and binding judgment; a judgment with a declaration of provisional execution; an order of damage compensation with a declaration of provisional execution; a demand for payment with a declaration of provisional execution; a notarial deed prepared by a notary with regard to a claim for payment of a certain amount of money or any other fungible chattel or a certain amount of securities, which contains a statement to the effect that the obligor will accept compulsory execution; a judgment of a foreign court for which an execution judgment has become final and binding; or an arbitral award for which an execution order has become final and binding, etc.

Compulsory execution may be commenced only when an authenticated copy or a transcript of an obligation-title or a judicial decision that is to become an obligation-title when it becomes final and binding has been served upon the obligor in advance or simultaneously. Means of compulsory execution of obligation-titles include the following:

- For the enforcement of a monetary claim, the CEL allows for compulsory execution and the debtor's general properties (real properties, ships, moveable properties, claims and other property rights) can be attached and sold in a public auction sale, and the sales proceeds are then used for the satisfaction of the monetary claim (Section 2 of Chapter 2 of the CEL).
- For the enforcement of an obligation to deliver real property, a request for the surrender or delivery of real estate property, etc. (i.e., real property in which a person resides) may be made under the CEL, Art. 168 and 169 and an indirect compulsory execution method is also available under the CEL, Art. 173 and 172.
- For the enforcement of an obligor's performance obligation, execution may be made by a third-party substitute (the Civil Code, Art. 414-2 and the CEL, Art. 171) or through an indirect compulsory execution method under the CEL, Art. 172 (monetary sanction: the execution court orders the obligor to pay the obligee a certain amount deemed reasonable to secure performance of the obligation by reference to the period of delay, or immediately if the obligor fails to perform the obligation within a reasonable period).
- For the enforcement of an obligor's obligation not to do something, a petition may be filed with the court to remove the results of the obligor's actions at the expense of the obligor or impose any other reasonable disposition for the future (the Civil Code, Art. 414-3 and the CEL, Art. 171). In addition, indirect compulsion is available under the CEL, Art. 172. No direct enforcement by specific performance is allowed if the nature of the obligation does not permit enforcement (the Civil Code, Art .414-1).

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

The general rule is that court costs are borne by the losing party (court costs consist of court filing fees, the costs associated with service of process, documentary fees (preparation and submission of documents, including petitions, briefs, copy of evidence, translation of documents), the costs incurred for the examination of evidence, accommodation and travel expenses and daily allowances paid to witnesses and interpreters and the remuneration of experts, as provided for under the Law on Costs of Civil Procedure (Law No. 40 of 1971)). Court costs do not include legal fees (attorneys' fees) which are borne by each party respectively in the absence of an attorneys' fees clause. Apart from these court costs, the general rule is that litigation costs are borne by the party incurring the expense, even if the party prevails in the dispute. In the context of tort claims, the court may nonetheless usually award a small part of the prevailing party's attorneys' fees as part of the damages when there is a reasonable causal nexus between a tort and the fees. The allocation of court costs is ordered as part of the court's decision.

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

In principle, it is possible to appeal judgments of first instance courts twice. The first appeal is called "kouso". The first appeal is for ex-post facto review of judgments of first instance courts, and whether claims made in first instance courts are right or wrong is not directly reviewed.

Appeals against "kouso" judgments rendered in high courts lies with the Supreme Court as a second appeal ("joukoku"). A further appeal is not allowed concerning issues related to facts. A further appeal is allowed only on limited grounds such as the "kouso" judgment's violation of the constitution. In addition, regardless of whether there are grounds for a final appeal, parties may file a petition for acceptance of final appeal. The Supreme Court may accept the appeal if it considers that the judgment in the prior instance involves material points concerning the interpretation of laws and regulations.

Appellate courts subsequently review the procedures of the original judgments and the process of determination and acceptance of the facts admitted in original judgments.

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

Attorneys' fees may be freely agreed upon between attorneys and clients, and lawyers are allowed to charge part of their fees on a contingency basis under Bar Association rules. Many law firms continue to determine their fees based on a combination of retainer fees and success fees based on the now repealed legal fee table of the Japanese Federation of Bar Associations.

Third-party funding is not yet common in the Japanese litigation practice. Its lawfulness is still a moot point, although it does not appear to be prohibited 'per se'. The assignment of claims or causes of action is generally permitted but the entrustment of a claim for litigation purposes is prohibited under the Trust Law (Law No. 108 of 2006). Depending on circumstances, there is still a risk that third-party funding could be considered against the Lawyers' Law which prohibits non-attorneys from engaging in legal business (including lawsuits, arbitration and conciliation) and also prohibits them from "acting as an intermediary in such matters" (i.e., referring cases to attorneys to obtain compensation for their business activities) (under the Lawyers' Law, Art.72).

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

There are currently no US-style class actions in Japan but making access to justice easier and more affordable through collective/ mass actions was the main thrust behind the

introduction of the special procedure known as the Japanese class action system. The Act on Special Provisions of Civil Procedure for Collective Recovery of Property Damage suffered by Consumers (Law No. 96 of 2013) introduced a system which provides for a two-tier opt-in procedure. During the first stage, a qualified consumer organisation files a lawsuit requesting the court to confirm the liability of a business operator for a common obligation arising under a consumer contract on behalf of potential consumer claimants. If the action is confirmed, the quantum of damages will be determined based on individual claims filed by consumers having elected to opt in. However, the scope of claims under this Act is limited and only covers claims arising from consumer contracts and to certain categories of property damage such as claims for performance based on contractual obligations, unjust enrichment, breach of contract, warranty against defects/non conformity, and claims for damages arising out of unlawful acts. Damage to property other than the subject matter of a consumer contract, lost profits, personal injury, and pain and suffering are expressly excluded by the Act. There is also the so-called "appointed party" mechanism under the CCP, Art. 30, which allows certain plaintiffs (or defendants) appointed by other claimants (or defendants) to act on their behalf in pursuing (or defending) civil actions. Appointments can be made when there are enough claimants/defendants sharing a "common interest" (i.e., the main allegations or defences are common amongst them). The appointed party can pursue the case on behalf of the appointing parties and the result will be binding upon the appointing parties, including a settlement.

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

Japan is not party to any bilateral or multilateral treaty for the recognition and enforcement of foreign judgments. To enforce a foreign judgment, the party enforcing the judgment of the foreign court must obtain an execution judgment from a competent district court in Japan declaring such enforcement (the CEL, Art. 24-4). The requirements for the recognition of a foreign judgment are set forth in the CCP, Art. 118. The petitioner must establish that the judgment is final. In addition, the judgment must satisfy the following requirements: (i) the jurisdiction of the foreign court which rendered the judgment in accordance with or under laws or regulations or conventions or treaties; (ii) the losing party has received proper service of summons or orders required to commence the proceedings (excluding service through notice by publication), or has appeared without being so served; (iii) the content of the judgment and the proceedings of the lawsuit are not contrary to public policy in Japan; and (iv) reciprocity exists (i.e., the courts of the relevant foreign country provide reciprocal recognition of Japanese judgments). If these requirements are satisfied, the foreign judgment will be effective and enforceable in Japan and the court issuing an execution judgment must not retry the whole case or review the case on its merits regardless of whether or not the foreign judicial decision was erroneous (the CEL, Art. 24-2). With respect to (iii) above, a Supreme Court judgment of 1997 denied the enforceability of punitive damages in a judgment of a state court of California as a violation of Japan's public policy.

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

Arbitration, mediation and other types of ADR are available forms of alternative dispute resolution in Japan. Although Japanese companies typically rely on Japanese courts for domestic matters, arbitration and mediation have gradually become important options, especially in an international context due to the Japanese government's promotion to expand them.

The major alternative dispute resolution institutions in Japan include, with respect to arbitration, the Japan Commercial Arbitration Association (JCAA), the Japan Intellectual Property Arbitration Centre, the Tokyo Maritime Arbitration Commission

(TOMAC) of the Japan Shipping Exchange, the Japan Sports Arbitration Agency (JSAA) for sports-related disputes and the Japan Intellectual Property Arbitration (JIPAC) for intellectual property-related disputes. For mediation, institutions include the Courts, the Financial Instruments Mediation Assistance Centre (FINMAC) and the Japan Bankers' Association. Many domestic construction disputes are also resolved through the Med-Arb process before the Construction Dispute Review Boards established pursuant to the Construction Business Act. A number of industry-associated (product-specific) trade associations have established permanent dispute-resolution organisations in the wake of the enactment of the Product Liability Law (Law No. 85 of 1 July 1994). These include the Federation of Pharmaceutical Manufacturers Associations of Japan, the Japan Chemical Industry Association, the Association for Electric Home Appliances, the Japan Automobile Manufacturers Association, Inc., the Center for Housing Renovation and Dispute Settlement Support, the Consumer Product Safety Association, the Japan General Merchandise Promotion Center, the Japan Cosmetic Industry Association, the Fire Equipment and Safety Center of Japan, the Japan Toy Association, and the Japan Construction Material & Housing Equipment Industries Federation, etc.

In 2017, the Japanese government announced its intention to establish a new dedicated dispute-resolution centre to bring various dispute-resolution bodies such as the JCAA under the same umbrella in a more internationally focused environment and raise the profile of international arbitration in Japan at a time when there is a noticeable uptick in the number of disputes involving Japanese companies. As a result, the first Japan International Dispute Resolution Center (JIDRC) was established in early 2018 in Osaka, followed by a second JIDRC facility established in Tokyo (JIDRC-Tokyo) in March 2020. The JIDRC facilities provide a venue for parties to hold hearings on cross-border disputes under procedural and substantive rules of their choosing. The JIDRC facilities can be used for institutional or ad-hoc arbitrations and other ADR procedures.

On 4 June 2019, the Singapore International Arbitration Centre (SIAC) entered into a Memorandum of Understanding with each of the Japan Association of Arbitrators (JAA) and JIDRC to promote international arbitration as a preferred method of dispute resolution for resolving international disputes. Under the MOUs, SIAC will work with JAA and JIDRC to jointly promote international arbitration through conferences, seminars, workshops and training programmes on international arbitration in Japan and Singapore.

In addition, Doshisha University and the JAA opened an international mediation centre in Kyoto in November 2018, in collaboration with the Singapore International Mediation Centre (SIMC). The new mediation centre (the Japan International Mediation Centre in Kyoto or JIMC-Kyoto) is headquartered at Doshisha University. It relies on a system similar to the Arb-Med-Arb, which is in place between the Singapore International Arbitration Center and the SIMC in Singapore, which gives parties the opportunity to resolve disputes referred to arbitration through mediation first.

The Japan International Mediation Center (JIMC) and Singapore International Mediation Centre (SIMC) signed a Memorandum of Understanding on 12 September 2020 to operate a joint protocol that provides cross-border businesses, including companies along the Singapore-Japan corridor, with an economical, expedited and effective route for resolving commercial disputes during the COVID-19 pandemic.

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

Currently, discussions over reforming CCP to enable online filing etc., are ongoing at the Legislative Council of the Ministry of Justice. The first meeting of the subcommittee regarding IT introduction in litigation was held in June 2020 to discuss a reform of the CCP to digitalize civil proceedings. See Question 22 for more detail.

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

Integrity of process underpins the general acceptance of Japanese courts as a safe and reliable forum for commercial dispute resolution. The professionalism, effectiveness, integrity, accountability and transparency of the courts are highly rated. The operation of Japanese justice relies on the existence of a highly trained, professional and independent judiciary. Japanese courts have been very successful in upholding integrity and judgments which impartially reflect the evidence, the arguments and the laws. Judges do not depart from the law and do not act from personal or political motives.

Japan is a society governed by the Rule of Law. The judicial system provides parties to a dispute with a reasonable opportunity to obtain relief when justified, and a reasonable opportunity to defend against unjustified, spurious, or malicious claims. The system attempts to implement these ideals through Constitutional provisions guaranteeing the defendant in criminal cases the right to counsel, the privilege against self-incrimination, and a right to a speedy trial before an impartial tribunal (Constitution of Japan, Art. 37 and 38). The Civil Justice system provides the parties with a reliable means of resolving disputes by being: reasonably quick; reasonably available (although cost is still an issue); providing a neutral forum; and offering a procedure for resolving disputes that gives a righteous plaintiff reasonable opportunity to be adequately compensated.

Other factors, in addition to access to justice and the relative timeliness of justice delivery, include: the quality of justice delivery; the independence, impartiality and fairness of the judiciary; public trust in the judiciary; the absence of corruption; the stability and consistency of laws and regulations and their interpretation (even in the absence of the doctrine of binding precedent, decisions of the Supreme Court are generally consistently followed by the lower courts to the extent that is equitable); as well as the relative ease of retrieving past judgments and extracting data from court records.

22. What changes in dispute resolution practices have been implemented in light of current events? Are there any "new normal" practical tips in your jurisdiction parties should be aware of when resolving legal disputes?

The Covid-19 pandemic has impacted and should accelerate the use of information technologies for proceedings which have so far been largely paper-based.

In 2004, the CCP was revised to enable online petitions, but they are only available for Demand procedures, which are simplified proceedings specially designed for a demand for payment of a claim regarding the payment of money or other fungible assets or securities. Online filing and other procedures for regular civil litigations are not available, because the necessary Supreme Court Rules have not been established yet.

In June 2018, in response to the rapid worldwide development of digitalization, the Japanese government announced that they would achieve full-scale digitalization of court proceedings of civil litigation taking the following three steps gradually: (i) the use of web conferencing in limited courts for arranging issues and evidence under current CCP (Phase 1, in operation since February 2020); (ii) online oral argument and arrangements regarding issues and evidence after the CCP revision (Phase 2, target year 2022); and (iii) online filing of lawsuits etc. (Phase 3, not yet scheduled).

Their goal is to achieve the three "E"s, i.e. e-Filing, e-Court and e-Case Management, while securing information security and access to justice by those who do not have easy access to the internet.

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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 Macau, the courts are structured in three tiers: Judicial Base Court, Second Instance Court and Last Instance Court. The Judicial Base Court will normally serve as first instance court, with higher courts acting as appellate courts, and the Last Instance Court ruling solely on matters of law.

Judges are in charge of managing civil proceedings during its entire course, and ultimately will rule on both the factual and legal sides of the dispute. In this capacity, judges oversee the initial written pleadings stage of the proceedings, culminating with the issuance of an interlocutory decision aimed as establishing the factual matrix on which the subsequent trial and judgment stages will develop.

During the trial stage, judges will preside over and conduct the hearing throughout including the production of witness evidence and the delivery of final oral arguments. A judge's ruling on the factual matrix of the dispute will follow, and finally the judgment itself, in which the judge will proceed to apply the law to the body of proven facts.

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

Hearings in civil cases are open to the public, save for cases where the judge decides otherwise based on substantiated reasons. These include, as a matter of law, hearings whereby the publicity of which may:

(a) Offend the dignity of individuals, privacy of private life, good manners cases related to divorce, annulment of marriage and hearings pertaining to the establishment or objection to affiliation; and

(b) Undermine the effectiveness of the decision to be rendered, namely those pertaining to applications for interim relief.

The same general principle applies to access to court documents, with civil proceedings being generally deemed public, with exceptions based on the same criteria as outlined above. Copies of any documents that form part of public proceedings can be requested by the parties, by any person capable of exercising a judicial mandate or by anyone who has a reasonable interest therein.

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?

Macau has a fused profession system, with no distinction between solicitors and barristers. Accordingly, all lawyers duly enrolled with the Macau Lawyers Association are permitted to act in judicial proceedings and appear in court on behalf of clients. In certain cases, generally those pending at the Judicial Base Court and not subject to appeal, trainee-lawyers in the second stage of their apprenticeship are also allowed to appear in court.

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

Under Macau law, limitation periods are a substantive, rather than procedural matter, with different periods applying to different types of claims.

The ordinary limitation period is 15 years (which will include typical contractual claims).

However, shorter periods are provided for certain claims (*e.g.* five years for rents, interests and other periodically accrued claims). For non-contractual liability, the limitation period is 3 years, unless the damaging act is simultaneously qualified as a crime, in which case the corresponding criminal statute of limitation will apply.

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

There are no statutory pre-action procedures to be undertaken by parties prior to bringing a claim to court. However, a reasonable interpretation of the principle of procedural interest set out in the Macau Civil Procedure Code ("CPC") should require that, prior to the commencement of a legal action and save for urgent cases such as applications for interim relief, proper demand notice must be given to the opposing party, providing it with an opportunity to comply voluntarily with the relevant claim.

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

Civil proceedings commence with the filing of a statement of claim by the plaintiff. Upon service of this statement, the defendant will then have 30 days to file its defence, which may be met with a counterclaim.

Another round of written pleadings for each party may follow, depending on the type of proceedings and the nature of the defense put forward by the defendant.

Upon completion of the written pleadings stage, the judge will hand down an interlocutory decision, which serves to rule on any pending formal issues and, more relevantly for the subsequent course of the proceedings, to select which points of fact asserted in the pleadings should be deemed as admitted by the parties, and which remain controverted and thus require production of evidence during the trial stage.

Parties will then be summoned to submit their applications for the introduction of such evidence into the trial in respect of the list of controverted facts. Upon production of any evidence that needs to be submitted before trial, the judge will proceed to schedule the trial hearing.

The number of variables and possible ramifications in the course of civil proceedings make it difficult to accurately estimate a timeline for the above. Indeed, while parties are bound to carry out their respective procedural acts within certain deadlines, acts to be carried out by the court and other ancillary participants are largely contingent on schedule and caseload.

In any case, the recent practice of Macau courts indicates that, unless any particular difficulties or complexities arise during the stages of written pleadings and pre-trial production of evidence, in typical civil proceedings a trial hearing will be held about 18 months after filing of the plaintiff's statement of claim.

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

Macau law does not provide for discovery *per se*, in the sense of imposing a duty on parties to disclose all documents pertaining to a certain matter being disputed.

However, parties may be instructed by the Court to disclose certain documents deemed of relevance to prove specific controverted facts, either at the request of the opposing party or under the under the court's own initiative. Under certain circumstances, failure to comply with such a disclosure order will entail inversion of the burden of proof of the subject facts.

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

According to the general principle of collaboration, parties and other participants requested to cooperate with the court must disclose documents deemed necessary for the discovery of truth.

However, said duty shall not apply in situations where disclosure of such documents will entail:

(a) Offense to individual's physical and moral integrity;

(b) Intrusion on individual's private life, domicile, correspondence or other means of communication; or

(c) Breach of professional privilege (such as lawyers, doctors, banking employees, religious members, etc.) or official secrets of the Macau Government.

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

Documentary evidence should be submitted during the written pleadings stage, accompanying the assertion of fact that the relevant document intends to prove. It may also be submitted with the party's evidence application, following the above-mentioned interlocutory decision, or until the trial hearing is closed, if the party could not obtain the document earlier or the document became necessary as evidence as a result of a supervening fact. In any case, documents can be submitted until the closing of the trial hearing under payment of a procedural fine.

As to witness evidence, the general rule is that witnesses must appear in court to give evidence in person. Exceptions are admitted for witnesses based outside of Macau, who can be heard by way of letters rogatory before a court in their home jurisdiction, and witnesses that are severely impaired from appearing in person before the court, who, subject to the judge's consent, may be allowed to give evidence in writing.

During the trial hearing, witnesses are first subject to direct examination by the party that appointed them, which must indicate the specific controverted points of fact on which the witness is to he heard. Subsequently, cross-examination by the opposing party takes place, followed by redirect examination.

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

Under the CPC, experts are appointed by the court among individuals of recognized suitability and qualifications in the field in question, following the parties indication or suggestion. Both single and collegiate expert evidence are admissible, subject to the parties' request and the judge's decision.

While there is no code of conduct *per se* for experts, they are bound to carry out their duties in a diligent and conscientious manner and can be removed and fined if they fail to do so. In carrying out their duties, experts that are subject to professional conduct codes shall continue to be bound by the respective rules.

11. What interim remedies are available before trial?

Before the trial, the plaintiff may seek preliminary injunctive relief, in order to prevent any serious damage to its rights, that may occur during trial. In general terms, in order to obtain this type of relief the plaintiff will have to demonstrate the likely merits of the case to be asserted in the main action, as well as the need for relief in order to avert serious and irreparable damage to the plaintiff's right. The standard of proof to obtain injunctive relief is that of *summaria cognitio*, i.e., summary proof of the facts asserted by the plaintiff which is sufficient to support a favorable decision.

Specific types of injunctive relief include freezing of assets, provisional restitution of possession, attribution of alimony and suspension of corporate resolutions, among others. Where none of the specific reliefs set out in the law is adequate to avert the risk invoked by the plaintiff, the latter is allowed to apply for a common injunction in such terms as may be required.

12. What remedies are available at trial?

The CPC provides for different types of legal actions depending on the nature of the claim being asserted. Under each type of

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Francisco joined MdME in 2012 and has been a partner since 2016.

Francisco heads the Litigation & Dispute Resolution practice at MdME, having joined the firm following several years practicing law with a strong focus on dispute resolution and civil and criminal litigation.

He has developed an extensive knowledge of the technical aspects of civil, criminal and transgressional procedure law, and gathered significant experience in handling the strategic challenges of complex judicial disputes in a broad variety of fields, such as property, commercial, succession and labour disputes, civil liability, debt collection or bankruptcy. He has also gained extensive trial experience, having tried hundreds of cases before first instance and appeal courts in Macau and Portugal.

Francisco is one of the most active litigation lawyers in the Macau jurisdiction, having assisted and represented several local and international companies and individuals in their Macau-based disputes, including corporate and property litigation, high-profile commercial and construction disputes, bankruptcy proceedings and mass labour litigation, as well as in infraction proceedings before the Macau regulators in a number of different areas.

Francisco's experience in recent years includes acting for clients such as a public transportation concessionaire in voluntary bankruptcy proceedings, a leading financial services provider in civil claims related to securities investment, several international engineering and construction companies in contractual disputes and arbitration proceedings against local gaming and hospitality operators, a multinational security company in mass labour litigation encompassing in excess of 600 employee claims, and several overseas gaming operators in their Macau-based debt recovery proceedings in Macau.

He has also acted in many of the highest-profile cases in the Macau Courts in recent years, in such diverse roles as criminal defense attorney against charges of corruption of public officials, racketeering or drug trafficking, or counsel for international real estate developers in administrative appeals and civil claims against the Macau Government in connection with nullified or reclaimed land concessions.

Francisco is also frequently requested to take part as Macau counsel in multi-jurisdiction teams handling complex cross-border litigation. In that capacity, he has partnered with other leading litigation practitioners from all over the world to assist clients in international arbitrations, judicial disputes based in offshore jurisdictions, discovery proceedings and confirmation of foreign judgments.

He is a contributor to several international guides on practical aspects of litigation, having authored the respective Macau chapters.

Francisco is an elected member of the Macau Lawyers Association's Supervisory Board.

action, the courts will rule on specific remedies, as may be requested by the plaintiff and which are admissible pursuant to substantive law.

In general, under the above-mentioned types of actions, the court will be called upon to:

(a) Assess and declare whether a certain right or fact exists;

(b) Sentence the defendant to perform a certain obligation or carry out a certain fact, as a result of or predicting the breach of a right of the plaintiff;

(c) Establish, modify or terminate certain legal relationships.

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

Judgments are enforced by way of autonomous enforcement proceedings, albeit typically filed as an attachment to the main case where the judgment was handed down. Enforcement proceedings will be aimed at obtaining payment of a certain sum of money, the delivery of a certain thing or the performance of a certain act, as the case may be depending on the contents of the award being enforced.

Enforcement of judgments is essentially a procedural framework for the court to exercise its authority by way of seizure, attachment, garnishment and sale – the merits of the original judgment are not reassessed and grounds for opposition by the defendant are very restricted.

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

Under the CPC and the Macau Court Fees Regulations, the losing party will bear (on a *pro rata* basis if applicable) the court fees of the litigation. These will include court tax, expenses related to production of evidence (*e.g.* compensation to witness and experts, subject to legal tariffs) and a compensation to the winning party, corresponding to one quarter to one half of the court fees, to be determined by the judge. The latter compensation is intended to cover part of the winning party's legal fees, which are not treated as reimbursable costs as a matter of law.

Court costs are calculated in accordance with the procedural value of each proceedings, which, in general terms, corresponds to the economic value of the matter under dispute.

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

Under the CPC, appeals can be filed by the losing party and whoever is deemed as being harmed by the judgment. In general, appeals to the Second Instance Court will be admissible from a judgment handed down in cases with a procedural value exceeding MOP100,000, this amount increasing to MOP 1,000,000 for appeals from the Second Instance to the Last Instance Court.

The Second Instance Court has jurisdiction on issues of both fact and law, whereas appeals to the Last Instance Court can only be based on legal matters.

Regardless of procedural value, appeals are always admissible if the appealed decision itself relates to procedural value, and also in situations such as breach of rules of jurisdiction, offense to *res judicata* and contradiction between the appealed decision and other pre-established jurisprudence, among other exceptions.

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 by the Code of Ethics of the Macau Lawyers' Association. Lawyers are prevented from entering into *quota litis* arrangements, whereby the client undertakes to pay the lawyer a portion of the material result to be obtained, whether it consists of a sum of money or any other goods or value.

However, lawyers and clients can agree that the result obtained be a factor in the

determination of lawyers' fees, provided that such agreement complies with the above-mentioned restriction.

Macau law does not regulate third party litigation funding, which therefore should be deemed admissible, provided that it does entail litigation in bad faith as provided in the Macau Civil Procedure Code. However, any such agreements will be effective strictly between the parties thereto, the litigation funder having no direct stake or protection in the dispute, namely as regards right to enforcement of judgment or recovery of costs.

Individuals lacking economic means to resort to the courts for the protection of their rights and interests may apply for legal aid, by presenting sufficient evidence of that fact. If legal aid is granted, the Macau Government will bear the individual's legal costs, including both court and legal fees.

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

Macau civil procedure law does not harbor the concept of class actions, and therefore only parties who take part in a civil action will be bound by the respective judgment. There is no limit to the number of parties who may join a particular action.

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

Applications for the recognition of foreign judgments must first be filed with the Macau Second Instance Court, which will recognize the judgment as long as it:

(a) Does not raise any doubt in relation to its authenticity and contents;

(b) Has become definitive pursuant to the applicable law;

(c) Was not issued in breach of the applicable rules of jurisdiction;

(d) Does not pertain to matters of the exclusive jurisdiction of the Macau Courts;

(e) Does not pertain to matters that are currently being or have previously been adjudicated by the Macau Courts;

(f) Was issued following proper service on the defendant;

(g) Was issued following due process under the applicable law; and

(h) Does not contain a decision that is against Macau public policy.

If the defendant is a Macau resident, it may further challenge the application on the grounds that the judgment would have been more favorable to the respondent had Macau substantive law been applied to the case, according to Macau conflict-of-laws rules.

Once a foreign judgment has been recognized by the Second Instance Court, it can then be enforced before the Judicial Base Court, by way of enforcement proceedings as described above.

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 in Macau are arbitration and mediation.

The arbitration legal framework is set out in the recently enacted Macau Arbitration Law, which adopts the United Nations Commission on International Trade Law (UNCITRAL) model.

There are several arbitration centers in Macau, the most noteworthy being the World Trade Center Macau Arbitration Center, the Macau Lawyers' Association Arbitration Center and the Consumers Dispute Resolution Arbitration Center.

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

The CPC is undergoing extensive update and revision in the Legislative Assembly. This exercise is expected to enact significant changes to civil procedure, aimed at making swifter and more efficient, by eliminating unnecessary steps and formalities without sacrificing the discovery of truth and the fair resolution of disputes. The time for the conclusion of such revision is not yet known.

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

The key distinctive feature of dispute resolution in Macau is bilinguism, which dictates that written procedural acts can be carried out in either the Chinese or Portuguese language, while hearings and other oral acts have simultaneous translation. This puts a stress on the system as regards speed and efficiency in the administration of justice, and the Macau Government now has the challenge of revamping the infrastructure of bilinguism with enhanced new technology, so as to ensure that the principle continues to be applied while coping with an increase in caseload.

It is also relevant to note that in recent years, both the Macau Government and entities such as the Macau Lawyers' Association have been making efforts and taking steps towards establishing Macau as a hub for alternative dispute resolution in the context of the Chinese investment in Portuguese-speaking countries. In this context, Macau seeks to act as neutral ground for disputes, by offering familiar elements to both sides of the disputes, such as the Chinese and Portuguese languages and a Civil law system directly inspired by and still substantially similar to Portuguese law, including its extensive body of jurisprudence and doctrine.

22. What changes in dispute resolution practices have been implemented in light of current events? Are there any "new normal" practical tips in your jurisdiction parties should be aware of when resolving legal disputes?

Strict travel restrictions and quarantine measures have been imposed in Macau in the context of the Covid-19 pandemic, which have severely impaired the ability of non-Macau based witnesses and other intervening parties to attend judicial acts scheduled to be held since the outbreak of the pandemic. This has been particularly felt with regard to Hong Kong based individuals, who, considering the deep social and economic ties between the two regions, are very frequently involved in Macau disputes, as parties, representatives of parties or witnesses.

The Macau Courts have been quite understanding of these exceptional circumstances and have postponed hearings even in cases where strict application of procedural law would not allow it.

As the CPC does not provide for video depositions, the practical remedy to adopt when appointing non-Macau based witnesses at this point would be to request that they be heard at their home jurisdiction by way of letters rogatory, without prejudice of having them appear in person if travel restrictions have been lifted by the time of the hearing.

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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, or if 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 consisting 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 up to NZ$350,000. Disputed claims up to NZ$30,000 may be determined by the Disputes Tribunal.

There are a number of specialist courts and tribunals. For example, the Family Court, Youth Court, Employment Relations Authority and Employment Court, Environment Court, Waitangi Tribunal, Māori Land Court, Coronial Services, Tenancy Tribunal, Weathertight Homes Tribunal, Immigration and Protection Tribunal and Canterbury Earthquakes Insurance 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 of 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 prescribes 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 (please refer to *chart 1*).

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, Part 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)

(chart 1)

TYPE OF CLAIM	LIMITATION PERIOD
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

(chart 1 cont'd)

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. (please refer to *chart 2 in the next page*).

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 when the proceeding is served. A defendant must also provide a bundle of initial disclosure when serving their statement of defence.

In addition to initial disclosure, in most civil proceedings, parties are or can be ordered to give 'discovery' of documents. An order for

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 15 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
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

(chart 2)

'standard discovery' requires parties to make available 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 in contempt of court. Furthermore, under the District Court Rules 2014 and the High Court Rules 2016 (**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 but signed, 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.

After a witness has given evidence in chief, the witness may be cross-examined by the other parties (other than the party calling the witness). The ability to cross-examine may be limited in certain circumstances (for example, the court may limit the ability of the party intending to cross-examine a witness if that party has (substantially) the same interest in the proceeding as the witness). Additionally, a court may grant the party calling the witness permission to cross-examine a hostile witness.

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

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). 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 proceeding. 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 to put 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 agreement itself 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 under the High Court Rules. 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".

In September 2019 the Court of Appeal permitted a class of plaintiffs' action to progress against a government-owned insurance company on an "opt-out" basis. In an "opt-out" class action everyone with the 'same interest' in the subject matter of the proceeding as the plaintiff will automatically be a member of the class, unless they actively "opt-out" of the class. Dispensing with the requirement to "opt-in" is likely to result in larger classes and increased liability for defendants. This decision has been appealed and the Supreme Court's judgment is expected in late-2020.

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, Nigeria, Norfolk Island, Pakistan, Papua New Guinea, Sabah, Sarawak, Singapore, Sri Lanka, Swaziland, Tonga, Tuvalu, and Western Samoa.

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

To enforce judgments from other countries, an action may be brought at common law. For a judgment to be enforceable in New Zealand under the common law, a foreign court's jurisdiction over a person or an entity against whom the judgment is awarded must be recognised by New Zealand law, and 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 New Zealand Dispute Resolution Centre (NZDRC), the New Zealand International Arbitration Centre (NZIAC), the Resolution Institute (Lawyers Engaged in Alternative Dispute Resolution (LEADR) and Institute of Arbitrators and Mediators Australia combined), the Building Disputes Tribunal (BDT) and FairWay Resolution Limited.

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

The New Zealand Law Commission is currently reviewing the legislation regulating class action claims and litigation funding in New Zealand. The Law Commission expects to publish a

detailed consultation document in late-2020 for public feedback. Following public consultation, the Law Commission will make recommendations as to what, if any, reform of the current class action and litigation funding system is required.

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 second 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.

22. What changes in dispute resolution practices have been implemented in light of current events? Are there any "new normal" practical tips in your jurisdiction parties should be aware of when resolving legal disputes?

The first important change is the move to electronic filing. The High Court (COVID-19 Preparedness) Amendment Rules 2020 (**Rules**) came into effect on 9 April 2020 to assist with the continuation of civil proceedings in the High Court in light of COVID-19 restrictions. Under the Rules, parties can now file documents electronically by sending documents to an electronic address provided by the court. Payment of filing fees can also be made electronically at a registrar's discretion.

The Government also made important changes to the Oaths and Declarations Act 1957 which sets out the process for making and witnessing oaths, affidavits, and statutory declarations. A person taking the oath or affirmation is no longer required to be physically present with the person making it. Instead, the making of an oath or affirmation can be done via telephone or video. This change is also reflected under the amendment to the Rules, which now permit unsworn affidavits to be used in court proceedings if the swearing of the affidavit would cause undue or unnecessary delay.

Another important change is the use of virtual mediations and arbitration hearings. Where COVID-19 restrictions and associated health and safety requirements have precluded in-person gatherings, in some instances mediation and/or arbitration processes have taken place remotely via online platforms. Similarly, other aspects of the mediation and arbitration process (such as the distribution of submissions, briefs and bundles of materials) are also now often carried out remotely.

In the insolvency context, the Farm Debt Mediation Scheme (**Scheme**) has been introduced through the Farm Debt Mediation Act 2019 to assist with the resolution of disputes between farmers (and anyone involved in the primary production sector) and creditors. The Scheme makes mediation mandatory before a creditor can take debt enforcement action against farmers and farm property (for example, by appointing a receiver of the farm property or assuming control over the property). Given the importance of agriculture to the New Zealand economy, the Scheme is an important step towards promoting the long term viability and resilience of farming businesses in New Zealand.

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[1] Transparency International, 'Corruption by Country/Territory' (www.transparency.org/country/NZL last accessed 22 September 2020)

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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 attorneys) to present (and prove if disputed) the relevant facts to the court, whilst the judges apply the law ex officio. 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 as well (i.e. in certain areas of family law). Secondly, the extent of the court's own intervention is defined by whether a party is represented by counsel, in which case the court's duty to inquire is substantially lower.

Once before it, the court deals with claims by either not entering into the matter for procedural reasons and not considering the merits, or by making a decision on the merits itself based on substantive law and adjudication of 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 the public interest or the legitimate interests of the parties involved are considered overriding and require the proceedings to be held in camera (see however, under section 22, the current limitations due to the Covid-19 pandemic). 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 decisions of the Federal Supreme Court since 2007 are available online (see https://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 of Switzerland. 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). Under the revised legislation which came into effect at the beginning of 2020, tort claims become time-barred after three years calculated from the day on which the injured party has knowledge of the damage and the injuring party. However, the latest point in time at which tort claims can be asserted is ten years from the date of injury. Only in the case of wrongful death or bodily injuries will the latest time for assertion of tort claims be twenty years after the injury.

Where 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.

Pursuant to the recently revised law, the claims for restitution for unjust enrichment become time-barred three years after the date on which the injured party becomes aware of its claim based on the revised provisions, but in any event, ten years after the claim first arose.

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, for example in summary proceedings, some actions in connection with debt enforcement or if a single cantonal court 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 forgo 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?

The conciliation authority is bound to hold a hearing within two months of receipt of the claimant's application where such a procedure is required by law. 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. The validity of the authorisation lapses if it is not submitted to

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the court within three months. This has however no material effect on the claim (no res iudicata). Rather, a claimant who wishes to continue his pursuit is required to recommence conciliation proceedings to obtain a new authorisation.

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?

Under Swiss civil procedure law, disclosure is dealt with more narrowly 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 documents is either ordered by the court or the parties can produce supporting 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 disputed facts that are legally relevant and such evidence is suited to resolve the issue, 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 rather than hoping to find evidence in the hands of the counterparty. The Data Protection Act may also be used to obtain at the least, personal documentation e.g. from banks ahead of litigation.

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

A party may refuse to surrender documents where the taking of such 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). Documents from dealings with an attorney are thus excluded from the obligation. This exception currently does not include communication with in-house lawyers although moves are afoot to change this in the pending revision of the Civil Procedure Code. If the revision is passed, in-house counsel would have the right to refuse cooperation, provided that the activity in question can be regarded as specific to the attorney's profession and that the head of the legal department is admitted to the Bar.

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. Such requests are allowed where the law either grants the applicant the right to do so or where the applicant can show credibly that the evidence is at risk or that he or she has a legitimate interest. If successfully pleaded, a party can obtain certain critical evidence that it then 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 on a contested matter, it can mandate one or more experts, either of its own accord or 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 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 the so-called protective brief.

For non-monetary claims, the types of 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 ordered, 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 might be frustrated by the other party if it became aware of the application in advance, the court can order the interim measure immediately in ex-parte proceedings with a first hearing or written statement 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 certificate 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.

A defensive measure in the form of a protective brief 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 with a court soon. This person can set out their position in such a brief to the court. The party applying for the ex-parte interim measure is only served with this brief if it actually initiates the relevant proceedings. Such a brief becomes ineffective after six months. The rationale of such submissions is to prevent the court from adopting an ex-parte interim measure solely based 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;

(e) if the creditor holds a provisional or definitive certificate of shortfall against the debtor; or

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(f) if the creditor holds a definitive title (i.e. a Swiss or foreign 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 in 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 a 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 were highly disputed during consultations, which resulted in the Federal Council removing this proposal from its motion. The Government intends to treat it in another separate motion.

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 can make reference to the new case law.

Recent case law involving VW and its diesel exhaust emission manipulation demonstrate the shortcomings of the Swiss statutory provisions: on September 2017, the Swiss Consumer Protection Foundation had lodged a group action against Volkswagen and the car importer AMAG 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. As 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 had earlier 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 would have been to distribute any damages received among the vehicle owners who had 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. This judgment by the Commercial Court of the Canton of Zurich was recently upheld by the Federal Supreme Court in February 2019. In December 2019, the claims action was also rejected by the Commercial Court of the Canton of Zurich with the argument that the consumer protection group lacked capacity to bring an action for damages for the consumers. The consumer protection group has lodged an appeal against the decision to the Federal Supreme Court, the decision of which is pending.

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

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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/Swiss%20Rules%20of%20Mediation_2019_publishedwebversion_englisch.pdf);

(b) WIPO Arbitration and Mediation Center (www.wipo.int/amc/en);

(c) Swiss Chamber of Commercial Mediation (SCCM; https://skwm.ch/);

(d) Swiss Association of Mediators (SDM-FSM; www.mediation-ch.org/cms3/de/).

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

The Federal Council has proposed a revision of the Civil Procedure Code which has been in effect for nearly ten 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 question 14, the changes of the Civil Procedure Code pertain i.a. to the collection of court fees from the unsuccessful party directly which relieves the claimant from the risk of insolvency of a counterparty.

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 the 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 hitherto had to be advanced by the claiming party. The conciliation hearings which have proven themselves useful and effective to reduce the case load of the courts 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 electively implemented into the Civil Procedure Code for clarification and specification purposes. The Federal Council has drafted a revision of the legislation which is to be approved by Swiss Parliament.

Changes to the PILA with regard to the framework for international arbitration with the aim of increasing the attractiveness of Switzerland as a place for international arbitration have also been submitted. 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). Parliament has approved these proposals and it is expected that the new framework will enter into force in January 2021.

Finally, the Federal Council has also made proposals on how to reform the PILA provisions on inheritance law. The reason for this 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 ensure a better coordination with foreign proceedings. The Federal Council has drafted a revision of the legislation which is to be approved by Swiss Parliament.

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 international arbitration. In addition, the Swiss state court system is highly efficient and effective when compared to other countries. Court-initiated settlements are widespread. The commercial courts are especially known for conducting proceedings efficiently and with a high settlement rate and are open to foreign litigants (see also question 19). Illustrating this, 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.

22. What changes in dispute resolution practices have been implemented in light of current events? Are there any "new normal" practical tips in your jurisdiction parties should be aware of when resolving legal disputes?

On the basis of its constitutional authority to legislate by issuing direct orders to maintain public order, the Federal Council on April 16, 2020, enacted a COVID-19 regulation affecting prevailing judiciary and procedural rules. The regulation sets out the possibilities and requirements for Swiss civil courts to make use of audio and video conferencing instead of the ordinary conduct of proceedings in person which are sometimes also held in public as ordinarily described by the Civil Procedure Code. Under the special regulation, court hearings may currently be conducted by video conference if the parties agree or if there are important reasons for doing so, especially in instances of urgency. Similarly, the interrogation of witnesses and the rendering of expert opinions by specialists can be carried out by means of video conferencing. The competent court has to ensure the right to be heard and take into account the technical capabilities of the parties. Under the emergency dispensation, the public may be excluded from court hearings conducted by means of video conferences with the exception of accredited media professionals. The consent of the parties is not required to do so. When implementing the new measures, the courts must ensure that all parties have access to the sound and/or images of the involved persons contemporaneously. In addition, the courts must ensure data protection and data security. This means in particular that the transmission must be "end to-end" encrypted and the servers used must be located in Switzerland or the European Union. In addition, safeguards against unintended data transfer to third parties and illicit access, participation or recording must be implemented. The regulation came into effect on April 20, 2020 and was meant to stay in force until September 30, 2020. However, the application of the regulation has been extended until December 31, 2021.

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

(a) Different Jurisdictions between Public Law and Private Law Litigations:

As a country following the European Civil Law tradition, litigations against the Government made in a legal relationship based on Public Law comes under the jurisdiction of Administrative Courts, while litigations between ordinary people or litigations made by private parties against the Government based on a Private Law relationship are within the jurisdiction of Ordinary Courts in Taiwan.

The following analysis is for reference to cases handled in Ordinary Courts only.

(b) Civil Proceedings in the Ordinary Courts

(1) Summary Litigations:

Litigations in the first instance in Taiwan is principally handled under the jurisdiction of District Courts of the Ordinary Court System. Litigation with a claim of value under NT$500,000 (around US$15,000), or litigation arising from disputes over cheques or rental issues, etc., shall be under the jurisdiction of a Summary Panel in District Court in the first instance. The judge shall handle the case according to the summary procedure specified in the Taiwan Code of Civil Procedure, 2018 The Second Instance of the summary case is handled under the jurisdiction of an Ordinary Panel in District Court and its petitioner is not entitled to appeal to the Taiwan High Court and the Supreme Court of Taiwan.

(2) Ordinary Litigations:

Litigations with a claim of a value exceeding NT$500,000 are principally handled by an Ordinary Panel of a District Court. They can appeal to the Taiwan High Court for the Second Instance. However, if the value of the claim of the litigation does not exceed NT$1,500,000 (around US$50,000), litigators cannot appeal to the Supreme Court of Taiwan for the third instance. Litigation with a claim of value exceeding NT$1.500,000 is appealable to the Supreme Court of Taiwan in the third instance. Nevertheless, an appeal to the third instance must be submitted by lawyers appointed by the petitioner and the scope of review of the Supreme Court is limited to whether or not the ruling of the Court of Second Instance had made any mistake in its application of law. The Supreme Court has no authority to review the facts of the case in dispute.

Disputes over intellectual property rights shall be subject to the jurisdiction of Intellectual Property Court.

(c) The Role of Judges in Taiwan's Civil Proceedings

The judge has the authority to preside over the process of litigation proceedings. Litigations shall be initiated by petitioners, and both parties have the duty to clarify facts and provide evidence. In comparison with common law jurisdictions, Taiwan's judges have a greater role in managing the proceeding and deciding the value of evidence given. There is no jury system or civilian judges available in the existing legal system in Taiwan. Judges may take into account testimonies or appraisals provided by other accredited bodies or experts as important references when making their

judgments. Expert witnesses' opinions are especially important in cases which require special knowledge or expertise (e.g. medical disputes, environmental disputes, patent disputes, etc.).

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

(a) Court hearings are open to the public in most cases.

All hearings on civil disputes are principally open to the public, except the following cases, which include (but are not limited to):

(1) Matrimonial Lawsuits;
(2) Domestic Violence cases regarding the issuance of protection orders;
(3) Hearings involving minors;
(4) Sexual assault cases;
(5) Hearings involving commercial confidences;
(6) Cases involving a breach of or hindering national security, or public order and good morals.

(b) Judgements and verdicts are in principle accessible to the public.

Judgements and verdicts are accessible at the website of the Judicial Yuan (Taiwan's Highest Judicial Administration Organization). Members of the public can make searches on the website using the Chinese Language to look for the corresponding materials. However, other documents and information regarding cases involving legal briefs or evidence on civil litigations are not accessible to the public. These materials can only be accessed by the parties involved in the litigation.

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) All lawyers have the right to appear in court and conduct proceedings on behalf of their client.

All parties of litigations have the right to appoint lawyers as representatives to present in court. However, litigants may attend hearings by themselves, as an appointment of lawyers is not compulsory during the processes of First Instance and Second Instance. Nevertheless, lawyers must be appointed by the litigants in the Third Instance when appeals are made to the Supreme Court.

Unlike the United Kingdom, there is no differentiation between a barrister and solicitor in the legal profession system in Taiwan.

(b) Examination and Training to Become a Lawyer in Taiwan

In order to become a lawyer in Taiwan, all graduates who obtained adequate credits from legal courses are required to take part in the Bar examinations. After they pass the Bar examination, they must participate in an internship programme under the instruction of an experienced lawyer for half a year. During the internship, they need to attend a one-month long training course offered by the Taiwan Bar Association (TBA). Upon completion, those graduates can join the Bar Association in their district, register at the court, and begin practice as a lawyer.

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

According to the Taiwan Code of Civil Procedure, 2018, the statute of limitations for the right of claim will run, in general, for 15 years from when the term of the payment or other obligation is due, but this may not apply to some situations. For example, the statute of limitations for a rental claim is 5 years, and a claim of payments to lawyers is 2 years.

A statute of limitations is part of the right of defence for the debtor. The statute of limitations in Taiwan means the debtor has the right to refuse the obligations. However, the validity of obligations remains unchanged. So, if the debtor repays the debt, the creditor still has the right to keep the payment. It does not constitute unjust enrichment.

If the debtor does not raise the issue of the statute of limitations, the judge cannot raise the issue, ex officio.

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

According to the Taiwan Code of Civil Procedure, 2018, under art 403, the following types of disputes must enter the process of mediation before commencing further proceedings:

(1) Disputes arising from a relationship of adjacency between real property owners or superficiaries, or other persons using the real property;

(2) Disputes arising from the determination of boundaries or demarcation of real property;

(3) Disputes among co-owners of real property arising from the management, disposition, or partition of a real property held in undivided condition;

(4) Disputes arising from the management of a building or of a common part thereof among the owners of the shared title or persons using the building;

(5) Disputes arising from an increment or reduction/exemption of the rental of real property;

(6) Disputes arising from the determination of the term, scope and rental of a superficies;

(7) Disputes arising from a traffic accident or medical treatment;

(8) Disputes arising from an employment contract between an employer and an employee;

(9) Disputes arising from a partnership between the partners, or between the undisclosed partners and the nominal business operator;

(10) Disputes arising from proprietary rights among spouses, lineal relatives by blood, collateral relatives by blood within the fourth degree of relationship, collateral relatives by marriage within the third degree of relationship, or head of the house or members of the house;

(11) Other disputes arising from proprietary rights where the price or value of the object in dispute is less than NT$ 500,000."

Other civil litigations, unless a commitment for arbitration or mediation is made between the parties, are principally entitled to file a lawsuit directly to the court.

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

Usually, after the plaintiff begins the litigation, the court proceeding has two stages. The first is the Preparatory Stage. The second is the Debating Stage. During the Preparatory Stage, the parties shall clarify the facts and provide evidence they want the court to ask or investigate. They also need to tell the court what kind of assertions or defenses they want to raise in the litigation. During the Debating Stage, the parties shall debate over the assertions or defenses that were raised during the Preparatory Stage. After the Debating Stage ends, generally the court will deliver its judgment within one month.

In most cases, it takes a half year to finalize a summary case in each instance. In an ordinary case, it takes one year to finalize a case in the first instance, and it takes two years to finalize a case in the second instance.

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

Yes, however, there is no mechanism in the Taiwan Civil Procedure system called "discovery procedure," such as is mainly used by countries (e.g. the U.K. and the U.S.) with common law jurisdictions.

We have a similar system to the discovery procedure. There are two stages in most civil proceedings. During the first, "Preparatory Stage," all parties must provide their evidence, claims, and defense that will be used in this litigation for the review of the court and the opposing party. If a party fails to provide evidence, claims, and defense at this stage, the judge may refuse to accept that evidence, claims, or defense offered after the preparatory stage.

Both parties have the pressure to disclose all relevant documents to the other party and the court because there are rules of burden of proof. If the party having the burden of proof fails to provide sufficient evidence of a specific assertion or defense, the judge has to make a judgement disfavoring that claim or defense.

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

According to the Taiwan Code Civil Procedure, 2018, art 344:

"A party has the duty to produce the following documents:

(1) Documents to which such party has made reference in the course of the litigation proceeding;

(2) Documents which the opposing party may require the delivery or an inspection thereof pursuant to the applicable laws;

(3) Documents which are created in the interests of the opposing party;

(4) Commercial accounting books;

(5) Documents which are created regarding matters relating to the action.

Where the content of a document provided in the fifth subparagraph of the preceding paragraph involves the privacy or business secret of a party or a third person and the resulting disclosure may result in material harm to such party or third person, the party may refuse to produce such document. Notwithstanding, in order to determine whether the party has a justifiable reason to refuse the production of the document, the court, if necessary, may order the party to produce the document and examine it in private."

Therefore, parties are allowed to refuse to provide the documents requested by the court if the documents involve a party's privacy or business secrets, and the resulting disclosure may result in material harm to that party or a third person.

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

Both parties shall disclose their evidence at trial during the Preparatory Stage. There is no restriction on the format in the course of preparing evidence, but the person(s) involved may exchange the concerning evidence in either verbal or written form.

There are no stipulations in the Taiwan Code of Civil Procedure, 2018, which require cross examination among the person(s) involved. However, the Taiwan Code of Civil Procedure, 2018, art 320 provides that "a party may move the presiding judge to conduct a necessary examination of a witness or, after informing the presiding judge, conduct such examination himself/herself. The examination provided in the preceding paragraph may be directed to matters concerning the witness's credibility."

The Judicial Yuan has issued guidelines for questioning witnesses and ways of questioning specific to civil litigations. These require person(s) questioning witnesses follow the order and steps similar to the cross examination in criminal procedures.

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

According to the Taiwan Code of Civil Procedure, 2018, art 326, it specifies that:

"An expert witness shall be appointed by the court in which the action is pending and the number of expert witnesses shall also be determined by the court.

Before appointing an expert witness, the court may accord the parties an opportunity to be heard; where the parties have agreed on the designation of an expert witness, the court shall appoint such expert witness as agreed-upon by the parties, except where the court considers that such expert witness is manifestly inappropriate. The court may replace an appointed expert witness."

Experts must take oaths before giving testimony in courts.

Experts giving false testimony are subject to punishments for perjury.

The parties involved may request to disqualify the expert whenever there is a circumstance that constitutes a real conflict of interest pursuant to either the Taiwan Code of Civil Procedure,2018, arts 32 or 33. However, there is no clearly written code of conduct for the behaviour of the experts under the existing system of laws.

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11. What interim remedies are available before trial?

Generally, the Taiwan Code of Civil Procedure, 2018, provides the following major methods for interim remedies, including:

(1) Provisional Attachment

Provisional Attachment prevents debtors transferring their property or taking out money from their bank account, which may hinder creditors from satisfying their claims. The creditor may request the court to issue a decree to freeze the debtor's assets prior to the process of litigation.

(2) Provisional Injunction

Provisional Injunction is a court order requested by creditors with non-monetary claims to restrict debtors from changing conditions of a property when litigation is pending or in progress. For instance, a buyer of a house may request a court order to restrict a seller from damaging, destroying or transferring the ownership of the said house in the course of a litigation between the two parties.

(3) Preliminary Injunctive Relief

Preliminary Injunctive Relief is a temporary court order to prevent any serious detriment from happening during a litigation by requesting the court to issue an interim order before the final adjudication is made. For example, a mother or a minor may request an interim order that requires the father to pay a certain amount of alimony as a safety net for the livelihood and maintenance of the children during a divorce proceeding.

12. What remedies are available at trial?

Remedies available at trial include (but are not limited to):

- Specific Performance:
- Monetary Judgment;
- Declaration:
- Injunction:

Specific Performance is the primary method In Taiwan Code of Civil Procedure, 2018, and Taiwan Compulsory Enforcement Act, 2019.

For example, Person A sells a house to Person B, but then Person A refuses to transfer the ownership of the house after Person B has already made payment. Person B is then entitled to request the court to issue an order to compel transfer of ownership from Person A to Person B. However, this does not apply to a situation where the house is sold again by Person A to Person C. Then, Person B is prevented from receiving title to the house. Person B, at this point, may claim compensation for a breach of contract from Person A.

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

Creditors may request from the court a compulsory enforcement subsequent to the judgment becoming final and binding.

(a) Monetary Claim

If the claim of the creditor is monetary, then the creditor may ask the court to seize the debtor's property. There are many methods; however, these are the three most used:

(1) If there is real estate property, the court may have it auctioned off and collect the amount owed by the debtor and deliver it to the creditor.

(2) If the property is deposits (cash) in a bank account, the court may order the bank to allow the creditor to withdraw the money the debtor owed.

(3) The court can order the workplace of the debtor to collect a certain amount of the wages to repay the creditor until the debt is fully satisfied.

There is no specific order to these three methods of enforcement. Also, the court must be cautious on the proportionality issues and cannot use a small claim to seize a property of a much higher value.

(b) Non-Monetary Claim

For a non-monetary claim, Specific Enforcement is the major method. For example, if the seller of a house agrees to the sale, then later on refuses to transfer the title and deliver the house to the buyer, the buyer may ask the court to evict the seller and request the land registry to register the house and issue a new deed to the buyer without the seller's cooperation.

However, certain claims are not suitable for Specific Enforcement. For instance, if a violinist agrees to play violin for someone every night, and then refuses to fulfil this promise, the one who pays for the service may not ask the court to force the violinist to play. The court may only impose default surcharges until the obligation is fulfilled.

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

All costs, including court costs, fees for an expert witness, and inspection fees charged by the courts, shall be assumed by the losing party, but the two parties shall bear their own attorney fees.

When the successful party is awarded a monetary payment, 5% interest shall be charged, starting from the day the obligation becomes effective, to the day of the fulfillment of obligations.

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

The losing party may submit an appeal through a Rehearing Proceeding. A rehearing can only be made under the following circumstances, specified in the Taiwan Code of Civil Procedure, 2018, art 496: "

(1) Where the application of law is manifestly erroneous;

(2) Where the reason for the judgment manifestly contradicts the main text;

(3) Where the court which entered the judgment is not legally constituted;

(4) Where a judge who should have disqualified himself/herself from the case by operation of law or by decision has participated in deciding the case;

(5) Where the parties are not legally represented in the action;

(6) Where a party has misrepresented that he/she did not know the opposing party's domicile/residence when initiating the action,

except where such opposing party has ratified the relevant litigation proceeding;

(7) Where a judge participating in deciding the case committed a criminal offense or received disciplinary sanction as a result of breaching his/her duties concerning the action which may affect the result of the original judgment;

(8) Where a party's agent, or the opposing party, or the opposing party's agent engaged in criminally punishable acts of any kind concerning the case which may affect the result of the original judgment;

(9) Where the tangible evidence based on which the judgment was entered was fabricated or altered;

(10) Where the witness, expert witness, interpreter, or statutory agent, after signing a written oath, gave false representation with regard to his/her testimony, expert testimony, interpretation, or statement, based on which the judgment was entered;

(11) Where the referenced civil, criminal, administrative judgment, or any other decision or administrative disposition, based on which the judgment was entered, was amended by a subsequent final decision or administrative disposition with binding effect;

(12) Where a party discovers that the same claim has been disposed of by a prior final and binding judgment or a settlement or mediation, or that the applicability of such judgment or settlement or mediation is available;

(13) Where a party discovers tangible evidence which has not been considered or which becomes available, on condition that taking into consideration such tangible evidence will result in a more favorable decision to such party."

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

According to the Taiwan Attorney Regulation Act, 2010, art 34 "An attorney shall not take by assignment rights at issue, to which his client is a party." The Ministry of Justice explains that a proportional (percentage) fee violates this regulation. Therefore, it is illegal if a attorney fee is calculated as a percentage of the amount awarded by the court.

In addition, the Taiwan Code of Ethics for Lawyers, 2009, art 35 provides that attorneys should report to their clients clearly the amount of attorneys' fees they will charge as payments, and the method of calculation for such payments which will be used in the course of handling of legal affairs. Attorneys are prohibited to make any negotiations on additional fees from legal litigations with clients who face domestic disputes, criminal charges, or juvenile delinquency charges based upon the results of the litigation. This means attorneys in these types of cases may only charge a fixed fee or fixed per-hour fee and cannot ask for an additional fee on winning the case. However, in other cases, attorneys may charge additional fees.

It is completely lawful for a payment of court and attorneys' fees to be made by a third party in Taiwan.

According to the Taiwan Legal Aid Act, 2015, persons meeting the following requirements are eligible to apply for legal aid provided by the government for dealing with attorneys' fees in the following situations:

(1) Those who are qualified as low-income residents, or middle-to-low-income residents under the Social Relief Act, 2015;

(2) Those whose families are qualified as Families in Hardship as described in the Act of Assistance for Families in Hardship, 2014, art 4, para 1;

(3) Those whose disposable assets and monthly disposable income are below a specific standard as declared by a competent authority.

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

Members of the public in Taiwan may file class actions in accordance with the Taiwan Code of Civil Procedure, 2018, the Taiwan Consumer Protection Act, 2015, or the Securities Investor and Futures Trader

Protection Act, 2015. The requirements for representative actions are as follows:

(1) Taiwan Code of Civil Procedure, 2018 art 44-1 para 1: "Multiple parties with common interests who are members of the same incorporated charitable association may, to the extent permitted by said association's purpose as prescribed in its bylaws, appoint such association as an appointed party to sue on behalf of them."

Taiwan Code of Civil Procedure, 2018, art 44-2 para 1: "When multiple parties, whose common interests have arisen from the same public nuisance, traffic accident, product defect, or the same transaction or occurrence of any kind, appoint one or more persons from themselves in accordance with the provision of Article 41 to sue for the same category of legal claims, the court may, with the consent of the appointed party, or upon the original appointed party's motion which the court considers appropriate, publish a notice to the effect that other persons with the same common interests may join the action by filing a pleading within a designated period of time specifying: the transaction or occurrence giving rise to such claim; the evidence; and the demand for judgment for the relief sought. Those persons so joining shall be deemed to have made the same appointment in accordance with the provisions of Article 41."

Taiwan Code of Civil Procedure, 2018, art 44-3 para 1: "An incorporated charitable association or a foundation may initiate, with the permission of its competent governmental business authority and to the extent permitted by the purposes as prescribed in its bylaws, an action for injunctive relief prohibiting specific acts of a person who has violated the interests of the majority concerned."

(2) Taiwan Consumer Protection Act, 2015, article 50 para 1: "Where numerous consumers are injured as a result of the same incident, a consumer advocacy group may take assignment of claims from 20 or more consumers and bring litigation in its own name. Consumers may terminate such assignment before the close of oral arguments, in which they shall notify the court."

(3) Taiwan Securities Investor and Futures Trader Protection Act, 2015, art 28 para 1: "For protection of the public interest, within the scope of this Act and its articles of incorporation, the protection institution may submit a matter to arbitration or institute an action in its own name with respect to a securities or futures matter arising from a single cause that is injurious to multiple securities investors or futures traders, after having been so empowered by not less than 20 securities investors or futures traders. The securities investors or futures traders may withdraw the empowerment to submit a matter to arbitration or institute an action prior to the conclusion of oral arguments or examination of witnesses and shall provide notice to the arbitral tribunal or court."

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

Most final adjudications that are made by foreign jurisdictions will be enforced after obtaining approval of recognition from Taiwan's courts in accordance with the Taiwan Code of Civil Procedure, 2018, art 402, unless the following circumstances apply:

(1) Where the foreign court lacks jurisdiction pursuant to Taiwan's laws;

(2) Where a default judgment is rendered against the losing defendant, except in the case where the notice or summons of the initiation of action had been legally served in a reasonable time in the foreign country or had been served through judicial assistance provided under Taiwan's laws;

(3) Where the performance ordered by such judgment or its litigation procedure is contrary to Taiwan's public policy or morals;

(4) Where there exists no mutual recognition between the foreign country and Taiwan.

Therefore, final adjudications made by foreign jurisdictions are enforceable unless one of the four circumstances listed above applies.

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

In Taiwan's alternative dispute resolution procedures, the most important are mediation and arbitration. The guiding law for arbitration is the Arbitration Act, 2015. The government recognizes several organizations that have the authority to arbitrate. These include:

(1) The Chinese Arbitration Association;
(2) The Taiwan Arbitration Association;
(3) The Chinese Construction Industry Arbitration Association;
(4) The Chinese Estate Arbitration Association and others.

Even though Taiwan is not a member of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, it still follows the rules specified in the New York Convention and recognizes foreign arbitral awards in the Taiwan Arbitral Act, 2015, chapter 7.

Regarding mediation, the most relevant law is the Taiwan Township and County-Administered City Mediation Act, 2009. According to this law, each township and district government should establish a mediation committee to handle everyday disputes. In addition to the above-mentioned committees, there are other mediation boards and committees within the government. For instance, each city or county government shall set up a consumer dispute mediation committee and according to the Taiwan Government Procurement Act, 2019, the Public Construction Commission shall also set up a mediation committee to resolve disputes regarding governmental procurement.

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

The legal system of Taiwan has been facing the problem of long waiting times for processing of litigations due to the accumulation of a tremendous number of cases. For this reason, The Judicial Yuan has been working hard to promote alternatives for dispute resolutions for better tackling of such disputes.

Mediation and arbitration are the major alternatives for dispute resolutions. Currently, there is a proposal for reforming the dispute resolutions regarding medical malpractice. If such a bill is passed, the authority will establish a Commission of Mediation for Medical Disputes in each county or city and will form a panel of experts to set up special investigation teams for resolution of medical disputes.

Such a team may also have the responsibility to suggest reforms of medical procedures to the involved hospitals, clinics or medical service providers, and to ascertain any actions which should be taken to prevent the reoccurrence of similar incidents.

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

Chinese cultural emphasis on "harmony" has sometimes outweighed the value of rights protection. It has to some extent caused obstacles to the formation of rule of law.

When observing Taiwan's dispute resolution procedures, one will discover that mediation procedures are especially highlighted and promoted by the authority even until the stage of litigation. The judges still try to persuade the litigants to unwillingly accept reconciliation, when the litigants really don't want it. I personally think that this culture, upholding mediation and reconciliation as the best way of solving disputes and keeping harmony, leads to a mentality where people will not respect others' rights and will also not value their own rights. What is even worse is that people have the idea that, even though an agreement is clearly written in a contract, they do not strictly need to abide by it. This causes tremendous problems, especially in business, because both parties lack clear guidance regarding their behaviour. People may change the agreement at will and this prevents Taiwan from becoming a society with a rule-of-law culture. This is where, if a foreigner wants to do business in Taiwan, they must take special notice, and this is where Taiwan must improve its legal system and culture.

22. What changes in dispute resolution practices have been implemented in light of current events? Are there any "new normal" practical tips in your jurisdiction parties should be aware of when resolving legal disputes?

Litigation Procedure in Taiwan is notorious for being too slow and ponderous; Taiwanese judges lack practical experience in doing business or the commercial field. Therefore, resolving disputes through litigation can become an endless nightmare for both litigating parties. For example, there is a famous dispute in Taiwan over the ownership of Pacific Sogo Department Store. The dispute started its long litigation journey in 2002, and court procedures continue to this day. Beyond being too slow, the cumbersome procedures and judges' lack of relevant knowledge relating to the dispute have been heavily criticized.

The Taiwanese government has been working on judicial reform intermittently for many years. Part of the judicial reform is to streamline dispute resolution processing. Two recent laws have been enacted for this purpose. The first is the Labor Incident Act and the second is the Commercial Case Adjudication Act. A quick introduction is as follows:

In 2018, Taiwan enacted the Labor Incident Act, which requires each court level to establish special labor court divisions to handle labor disputes. According to this law, both parties shall go through a mediation proceeding presided over by the labor court division. If the parties fail to reach a settlement, they move on to the litigation proceeding. There are some special procedural mechanisms to alleviate the litigation difficulties for laborers. For example:

(a) The court shall actively explain procedural rights to the laborer. For instance, according to the Labor Incident Act, art. 48, the court shall actively tell the laborers that they can apply for a temporary injunction to ask their employer to continue paying their salaries if the court finds that the laborers have difficulty in sustaining their living while litigating over salary payments;

(b) Article 37 is an example of when the courts shall alleviate a laborer's burden of proof. The Article specifies that if there is a dispute, certain payments shall be considered as part of the base salary. The court will presume the payments are included as base salary unless the employer can prove otherwise. Taiwan's government also issued a regulation in 2019 regarding providing legal fee assistance and living expenses to laborers during the labor dispute procedure. The laborer can apply for monetary assistance, according to this regulation.

In 2020, Taiwan enacted the Commercial Case Adjudication Law. It is supposed to be implemented on July 1, 2021. The purpose of this law is to increase the professionalism of the courts and facilitate commercial dispute resolutions. According to this law, distinct commercial courts shall be established. Commercial litigation proceedings will differ somewhat from other civil litigations in the following manner:

(a) Prior to commercial litigation, mediation is compulsory;

(b) Commercial litigations can only be initiated with the help of lawyers; and

(c) Where normal civil litigations has three instances, District Court, High Court, and Supreme Court, finalization of commercial disputes has just two instances, Commercial and Supreme Court. The first instance requires Commercial Courts to investigate relevant factual evidence concerning the dispute. During the second instance, the Supreme Court can only review whether there are mistakes in the application and interpretation of legal rules by the Commercial Courts

The Taiwanese government has endeavored to reform its judicial systems, trying to elevate the efficiency and professionalism of litigation procedures. However, most judges have achieved their positions through judicial examinations after graduating from law school, and possibly, several years of additional study in cram schools. Most of them do not have

practical working experience before becoming judges. Therefore, their lack of practical experiences is a fundamental problem. They have real difficulty grasping and resolving the issues within the disputes. Beyond the above-mentioned issues, the rapidly growing number of cases has overwhelmed the judicial system, creating an immense burden on the judges, who are then forced to make hasty decisions. Also, civil servant pension reforms leave judges with less retirement funds and this has caused many experienced judges to leave their positions to work as litigation attorneys, which lessens the number of the judiciary. These factors prevent Taiwan's judicial system from satisfactorily resolving disputes. The arbitration system may be a better way to resolve disputes in Taiwan, as both parties can select arbitrators with practical experience regarding the disputes, and the adjudication proceedings are faster than litigation proceedings.

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Jurisdiction: **UNITED STATES**

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

Dual Court Systems

There are two court systems in the United States, federal and state. Each system has its own trial, intermediate, and appellate courts of last resort. In the federal system, Article III of the U.S. Constitution mandates that there be one Supreme Court; grants life tenure to the Justices; and defines the outer boundaries of the Court's jurisdiction. The Constitution authorized Congress to establish a system of lower courts. Currently, there are 94 federal district trial courts and 13 federal courts of appeals that sit below the Supreme Court. Federal judges also have life tenure.

Constitutional limitations on federal jurisdiction make federal courts "courts of limited jurisdiction." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). Federal courts hear cases under either diversity of citizenship jurisdiction, or federal question jurisdiction. The diversity statute, 28 U.S.C. § 1332, provides that district courts have jurisdiction over all civil actions where the matter in controversy exceeds $75,000 and the parties are diverse. The statutory diversity requirement demands "complete diversity" which is present only when no party on one side of a dispute shares citizenship with any party on the other side. In diversity cases, federal courts apply the law of the state in which the federal court sits. When a federal court's subject matter jurisdiction is based on a question of federal law, under 28 U.S.C. § 1331, the courts apply the applicable federal statute (if there is one) or federal common law.

State courts are courts of general jurisdiction and will entertain most civil actions seeking equitable or damages remedies. Some state court systems have specialized courts. For instance, New York's Supreme Court (which is the trial court) has a Commercial Division that handles business disputes.

The Role of Judges

Civil proceedings are initially brought, and litigated to judgment or settlement, in the trial courts. Federal district court judges and state trial court judges manage the trial proceedings while applying rules of civil procedure and evidence. The single trial judge is in charge of the courtroom.

Appeals, which are generally taken as of right, either from a final judgment or, where permitted, from certain interlocutory rulings, are heard (whether in state or federal court) by a panel of judges who render a decision after briefing and oral argument. Where the issues are important, and particularly when there is a dissent from the majority holding, appellate courts will entertain petitions for full court review.

The U.S. Supreme Court's docket is almost entirely discretionary. Petitions for writs of certiorari and oppositions to the granting of those writs, together with amicus briefs in support or in opposition to granting certiorari, are filed with the Clerk of the Court and distributed to the Justices for consideration and conference. When certiorari is granted, which is relatively rare, the case is scheduled for briefing and oral argument before the full Court.

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

The Covid-19 pandemic has altered the legal landscape through remote hearings and

arguments. Ordinarily, however, hearings in federal and state courts are open to the public on a first come first serve basis. Certain proceedings, nonetheless, are closed to the public and to the media. For example, only a witness, attorneys for the government, and a court reporter may be present when a grand jury sits; jury deliberations and attorney-client meetings also occur in private. Proceedings that deal with classified information, trade secrets, and ongoing investigations often are closed. Judges also may meet privately with the attorneys in chambers.

Courts of appeals may provide audio or video recordings of appellate arguments. The U.S. Court of Appeals for the Ninth Circuit, for example, has for many years streamed live video of oral arguments and three district courts within the Ninth Circuit provide court-recorded video of some civil trials.

U.S. Supreme Court arguments are open to the public on a first come first serve basis. The Court makes transcripts of the arguments available on the day of argument. Audio recordings are available at the end of each argument week. Despite repeated requests from the media, the Court has declined to allow live video broadcast of oral arguments or public proceedings.

The Public Access to Court Electronic Records System ("PACER") provides access to the updated dockets and records of all federal courts. Many states have similar electronic systems permitting public access to court dockets and records.

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 have the right to appear in court on behalf of their clients so long as they are properly credentialed, meet the ethics requirements of the relevant professional conduct rules, and comply with the local rules of the court. Lawyers licensed in a state other than the one where the action is pending, or who are not admitted to a particular state or federal court, may seek admission "pro hac vice" to serve as counsel in the pending matter. Foreign-barred lawyers ordinarily may not appear in court proceedings.

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

Statutes of limitation vary with the cause of action alleged and the jurisdiction.

For example, in the District of Columbia, the statute of limitations for breach of an express or implied contract is three years, and it generally begins to run at the time of the breach. (D.C. Code § 12–301(7); *Wright v. Howard Univ.*, 60 A.3d 749, 751 (D.C. 2013)). In New York, on the other hand, the statute of limitations for breach of contract claims is six years beginning to run when the alleged breach occurs. (N.Y. Civil Practice Law and Rules (CPLR) 213(2); *Hahn Auto. Warehouse, Inc. v. Am. Zurich Ins. Co.*, 944 N.Y.S.2d 742, 745 (2012)). Further, in D.C., the statute is tolled when the plaintiff does not know, and could not reasonably have known, that an injury was suffered as a result of the defendant's wrongdoing. *Hensel Phelps Constr. Co. v. Cooper Carry, Inc.* 861 F.3d 267 (D.C. Cir. 2017). New York, however, does not apply the discovery rule to statutes of limitations in breach of contract actions. This means that in New York, the statute of limitations begins to run when the breach occurs, even if the plaintiff is not aware of the breach at the time (*ACE Sec. Corp. v. DB Structured Prods.*, 25 N.Y. 3d 581 (N.Y. 2015)) and has yet to sustain damages (*Ely-Cruskshank Co. v. Bank of Montreal*, 81 N.Y. 2d 399, 403 (N.Y. 1993)).

With respect to federal law, 28 U.S.C. § 1658(a) provides that, except as otherwise provided by law, "a civil action arising under an Act of Congress enacted after [December 1, 1990] may not be commenced later than 4 years after the cause of action accrues." Nonetheless, many federal statutes contain their own statutes of limitation and repose. Under § 10(b) of the Securities Exchange Act, for example, an action must be brought no later than the earlier of "2 years after the discovery of the facts constituting the violation," or 5 years after the violation. 28 U.S.C. § 1658(b). In *Merck & Co, Inc. v. Reynolds*, 559 U.S. 633, 653 (2010), the Supreme Court addressed the two-year portion of the statute and held that the clock starts to run either when a plaintiff actually discovers, or when a "reasonably diligent plaintiff" would have discovered the

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In 2017, Ana was named as the D.C. Women's Bar Association's Woman Lawyer of the Year in recognition of her international litigation practice and for her efforts in representing the rights of those seeking asylum in the United States.

Ana has devoted a substantial portion of her practice to pro bono work, representing refugee organizations and refugees seeking asylum in the United States. The United Nations High Commissioner for Refugees has retained Ana for representation in numerous appellate matters and commissioned her to draft a comprehensive report on asylum law in the United States. Ana was appointed to the Honorary Board for the Center for Gender & Refugee Studies, which has written, "Ana represents the very best of the legal profession: an accomplished and skilled litigator who provides the same high quality zealous advocacy whether she is representing an international corporation, a foreign government, or a refugee child."

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facts "constituting the violation," including facts giving rise to a strong inference of scienter.

Otherwise, equitable tolling is available when the litigant shows that she "has been pursuing her rights diligently and . . . that some extraordinary circumstance stood in her way and prevented timely filing." *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 755 (2016) (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)).

As to arbitrations: the Federal Arbitration Act ("FAA") does not contain a statute of limitations, and most states do not have a specific statute addressing limitation periods in the context of arbitration. The parties are free to incorporate time limits into their arbitration agreements.

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

Parties who reasonably anticipate litigation must, under Rule 37(e) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P."), as well as general spoliation law, issue preservation orders, meaning they must take steps to identify and preserve documents and electronically stored information that are relevant to or may lead to the discovery of information relevant to the potential claims or defences. Failure to do so may result in severe penalties such as adverse inference instructions, evidence preclusion, or in extreme situations, dismissal of the action.

Under Rule 5.1 Fed. R. Civ. P., a party that files a pleading, motion or other paper drawing into question the constitutionality of a federal or state statute must, *inter alia*, notify the Attorney General of the United States, if a federal statute is at issue, or the state Attorney General, if a state statute is in dispute.

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

Civil actions have no predictable timetable. The majority of civil actions brought in U.S. courts are resolved prior to trial.

Under the federal rules of civil procedure (and similar state procedural rules) once the summons and complaint have been properly served the defendant may file an answer, or delay the filing of an answer in favor of a motion to dismiss, pursuant to Rule 12(b), Fed. R. Civ. P. The motion to dismiss takes the allegations of the complaint as true and argues that even assuming the facts the case must be dismissed for one of seven reasons, including lack of jurisdiction and failure to state a claim. Time limits are associated with certain of these motions. If the motion to dismiss is denied in part or in full, the case proceeds to the discovery phase, which can be quite complex and lengthy, depending on the nature of the litigation.

The parties thereafter may file motions for summary judgment pursuant to Rule 56, Fed. R. Civ. P. A movant must show that there is no genuine issue of material fact. A fact is material if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If summary judgment is not granted, the case is on track for trial.

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

Rule 26 of the federal rules provides the framework for civil disclosure and discovery. Rule 26(a), for example, addresses parties' mandatory disclosures, including initial disclosures, expert disclosures, and other pretrial disclosures. These include:

(a) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(b) a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

(c) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(d) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

The rules of evidence contemplate the admission of relevant evidence, but the exclusion of irrelevant and potentially prejudicial evidence. *See* Federal Rules of Evidence 401, 402, 403.

Parties must reveal the identity of expert witnesses as part of their mandatory disclosures, and most experts are required to submit reports which must include "the facts or data considered by" the expert in forming his or her opinions. Fed. R. Civ. P. 26(a)(2)(A)-(B). Rule 26(b) then sets out the scope of discovery.

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

A party can withhold documents protected by a recognized common law privilege, such as the attorney-client privilege, which extends to oral and written communications between an attorney and the client made in confidence and for the purpose of obtaining legal advice. The work product doctrine (codified by Rule 26(b), Fed. R. Civ. P.) affords a qualified privilege to any materials prepared by an attorney or at the direction of an attorney, in anticipation of litigation or trial. A party, however, may purposefully, or inadvertently, waive privilege or work product protections by voluntarily disclosing the information to a third party or by placing a document "at issue" by relying on it in support of a claim or defense.

Under Rule 26(b)(5), Fed. R. Civ. P., the party claiming privilege must provide a "privilege log" containing a general description of each document withheld and identifying the applicable privilege. Invocation of a privilege may be challenged, through a motion to compel, by the party seeking the information. *See, e.g., In re Domestic Airline Travel Antitrust Litig.*, No. 15-MC-1404, 2020 WL 3496748, at *4 (D.D.C. Feb. 25, 2020).

In the United States, applicable attorney-client and work product privileges apply to both outside and in-house counsel.

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

Prior to trial, the parties engage in discovery, which includes document disclosure, depositions, and written submissions. A deposition is out-of-court testimony given under oath by any person involved in the case. Depositions may be used at trial or in preparation for trial and may be in the form of a written transcript or a videotape. Both sides have the right to be present during depositions. *See* Fed. R. Civ. P. 32.

Cross-examination of a witness is permitted, and is the general rule, but cross-examination generally should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. However, where a so-called "hostile" witness is giving testimony, meaning a witness who is identified with an adverse party, Rule 611(c) of the Federal Rules of Evidence allows leading questions.

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

The parties to an action generally retain their own experts; the identity of the experts must be disclosed prior to trial, and at the time of disclosure the expert must provide a written report. Pursuant to Rule 26(a)(2), Fed. R. Civ. P., the report must include: the opinions the expert intends to offer at trial; the facts or data considered by the expert in forming the opinion; summary exhibits supporting the expert's opinion; the qualifications of the expert including a list of all publications offered in the preceding ten years; a list of all cases in which the expert has testified in the preceding four years; and a statement addressing the compensation the expert is receiving in exchange for his or her testimony.

Pursuant to Rule 26(b)(4), Fed. R. Civ. P., experts are generally subject to cross-examination during deposition and trial. During a deposition, the focus is upon the opinions in the expert's written report. If the written report is not admissible at trial, an expert may be permitted to give live testimony.

A *Daubert* motion is a specific type of motion *in limine* raised before or during trial to exclude the testimony of an expert witness on the grounds that the testimony is arguably not reliable or relevant under Rule 702 of the Federal Rules of Evidence. *See Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993) (setting the standards for expert testimony).

If a *Daubert* motion is filed, the party seeking to admit the testimony must prove by a preponderance of the evidence that the expert possesses the requisite level of expertise and the testimony is based on reliable methodologies. Should the judge find that an expert does not have the level of expertise required under *Daubert*, or the methodology is faulty, the testimony will be excluded from trial.

11. What interim remedies are available before trial?

Rule 64, Fed. R. Civ. P., states: "At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment. But a federal statute governs to the extent it applies." The remedies available under the rule include: arrest; attachment; garnishment; replevin; sequestration; and "other corresponding or equivalent remedies." Interim measures can be granted at an early stage in the proceedings to preserve the status quo or prevent the dissipation of assets or evidence that could render an award ineffectual.

For example, interim attachment orders are issued to prevent a party from dissipating, transferring, or otherwise disposing of a debt or property to ensure satisfaction of any final judgment entered in the case. Other such orders include garnishment, receivership, replevin and liens.

Injunctive relief, in the form of temporary restraining orders and preliminary injunctions, is also available if a showing is made that absent such relief irreparable harm will occur; that there is a likelihood of success on the merits; and the public interest favors such relief. Equitable interim orders are generally available only when money damages would be insufficient.

12. What remedies are available at trial?

Depending on the nature of the case, numerous legal and equitable remedies are available. These remedies include declaratory relief, and damages both compensatory and punitive (and liquidated damages where appropriate). In a contract case, for example, available remedies would include damages, restitution, contract reformation, disgorgement of funds wrongfully obtained, rescission and specific performance. However, equitable remedies such as injunctive relief and specific performance are available only when money damages are inadequate.

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

State and federal courts have established rules for enforcing final monetary judgments. Rule 69, Fed. R. Civ. P., provides that a money judgment is enforced by a writ of execution unless the court directs otherwise. Further, "[t]he procedure on execution — and in proceedings supplementary to and in aid of judgment or execution—must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies."

The principal methods of enforcing a final monetary judgment include: garnishing the debtor's wages; garnishing the debtor's bank account; and seizing the debtor's personal property or real estate. *See generally* 28 U.S.C. § 3202.

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

In terms of fees of attorneys, each side typically bears its own fees. There are limited exceptions to this general rule. A contract between the parties can contain a fee-shifting provision. And certain statutes permit fee awards.

For example, fee-shifting statutes such as the Fair Labor Standards Act, and statutes governing civil rights, antitrust and consumer protection, may allow a prevailing plaintiff to recover litigation costs (and attorneys' fees).

When litigation is with the federal government, the Equal Access to Justice Act, 28 U.S.C. § 2412(d), requires a court to award attorney's fees and costs to a party prevailing against the United States in a civil action, "unless the court finds that the position of the United

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He is an experienced litigator outside of the international arbitration context, including in trial and appellate courts throughout the United States, in both bench and jury trials, and in civil, commercial, and criminal matters.

Jon also has extensive experience representing law firms in legal malpractice matters, financial services institutions and multinational corporations in commercial litigation and government investigations, and labor unions in government investigations and civil litigation.

Jon graduated from Dartmouth College, *magna cum laude*, in 1995, and in 1998 from the Yale Law School, where he was senior editor of the *Yale Law Journal*. Before joining the firm in 1999, Jon was a law clerk to Judge Louis F. Oberdorfer of the U.S. District Court for the District of Columbia.

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States was substantially justified or that special circumstances make an award unjust." The "substantially justified" standard requires the government to prove that its litigating position was reasonable in both fact and law. Another statute, codified at 5 U.S.C. § 504, authorizes awards of attorney's fees in proceedings before an administrative agency, on the same terms as section 2412(d).

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

In the federal court system, appeals are taken as of right from entry of a final judgment. *See* 28 § U.S.C. 1291. A final judgment is a decision by the district court that ends the litigation on the merits and leaves nothing for the court to do but execute the

judgment. *Catlin v. United States*, 324 U.S. 229, 233 (1945). "An appeal from a final judgment sufficiently preserves all prior orders intertwined with the final judgment, even when those prior orders are not specifically delineated in the notice of appeal." *Edwards v. 4JLJ, LLC*, 976 F.3d 463, 466 (5th Cir. 2020) (en banc) (quoting *Armour v. Knowles*).

A party can appeal any issue of law, for *de novo* review, so long as the issue was properly raised in the trial court; has the requisite finality; and a notice of appeal from the trial court ruling was timely filed pursuant to Federal Rules of Appellate 3(a)(1), which is a jurisdictional predicate. Factual issues may be appealed, but are reviewed under the narrow "clearly erroneous" standard. An agency ruling must often be appealed directly to the court of appeals, where it is usually reviewed under an "arbitrary and capricious or substantial evidence" standard.

(Non-final rulings may also be appealed, on an interlocutory basis, where permitted by statute, court precedent or the rules of appellate procedure. For example, 28 U.S.C. § 1292(a)(1) permits appeals of non-final orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions").

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

Contingency and conditional fee arrangements are permitted, so long as the arrangement complies with the particular jurisdiction's rules of professional conduct. Third-party funding is permitted and has become relatively common in U.S. litigation and arbitration. Financing for a party's legal representation is often provided by a hedge fund or insurance company or bank, which may, in turn, acquire a percentage of the proceeds recovered or, if the funded party is a defendant, an agreed-upon periodic payment.

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

Class actions in federal court are governed by Rule 23(a), Fed. R. Civ. P. One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

If the class seeks money damages, federal courts also require that common questions of law or fact predominate over any concerning individual members, and that the class action is superior to other available methods for fairly and efficiently adjudicating the matter. *See* Rule 23(b)(3).

Most states have adopted rules governing class action lawsuits consistent with the federal rules.

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

The United States does not have a uniform federal law governing the recognition and enforcement of foreign judgments, nor is it a party to any treaty that deals with this subject. The recognition and subsequent enforcement of foreign judgments is primarily a matter of state statutory and common law.

To have a judgment recognized, the judgment holder must file a court action against the debtor. In New York, for example, the holder of the judgment has several options: (1) a plenary action (which is often an attachment action pursuant to New York Civil Procedure Law & Rules ("CPLR") § 6201(5)); (2) an expedited summary judgment action pursuant to CPLR § 3213, which is in lieu of a complaint; or (3) filing a counterclaim or cross-claim or asserting an affirmative defense in a current proceeding. *See generally* CPLR § 5303. The summary procedure is favored; CPLR § 3213 provides that "[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint". *See Sea Trade*

Mar. Corp. v. Coutsodontis, 978 N.Y.S.2d 115, 117–18 (App. Div. 2013) (setting forth additional requirements such as having the foreign judgment authenticated in accordance with an act of Congress or the statutes of New York, and filed within 90 days of the date of authentication).

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

Arbitration and mediation are the two main forms of alternative dispute resolution. Arbitration is a trial-like proceeding; the parties present evidence and testimony to one or more arbitrators, who ultimately issue an award. Mediation is a voluntary process by which a neutral third party, often a former judge, oversees discussions between parties to a dispute. The mediator does not issue a binding decision, but encourages the parties to reach an agreement.

The main alternative dispute resolution organizations in the U.S. are: the American Arbitration Association (AAA); the Institute for Conflict Prevention and Resolution (CPR); Judicial Arbitration and Mediation Services (JAMS); and the Financial Industry Regulatory Authority (FINRA).

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

Arbitral associations have taken steps to expedite the arbitration process. For example, the CPR Rules for Non-Administered Arbitration of Domestic and International Disputes (effective as of Mar. 1, 2018) requires, in Rule 15.7, that the parties and the arbitrator(s) use best efforts to ensure that the dispute will be submitted to the tribunal for decision within six months after the initial pre-hearing conference, and that the final award will be rendered within one month after the close of proceedings. Rule 9.2 authorizes the arbitrator(s) to establish time limits for each phase of the proceeding. Rule 14 allows for emergency measures by an emergency arbitrator prior to tribunal selection.

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

In light of the Covid-19 pandemic, court rules governing civil procedure and trials, and state executive orders regarding state statute of limitations, have to be consulted by the parties. Some state executives have issued orders extending limitation periods in civil cases for limited periods of time. Courts orders governing various aspects of civil procedure may change rapidly.

22. What changes in dispute resolution practices have been implemented in light of current events? Are there any "new normal" practical tips in your jurisdiction parties should be aware of when resolving legal disputes?

The Covid-19 pandemic and consequent social distancing guidelines from health officials have caused a reassessment of the need for and advisability of in-person hearings. U.S. courts and arbitral institutions have responded by issuing guidance on the use of remote platforms for virtual hearings. In the context of arbitration, the AAA/ICDR's Model Order and Procedures for a Virtual Hearing Via Video-conference state, and the CPR Model Rules suggest, that the arbitrator can require a remote proceeding over the objection of one of the parties. These initiatives may trigger a re-evaluation of the traditional practice of holding in-person hearings as the savings of time and cost offered by remote hearings become more evident and arbitrators, parties and counsel become more comfortable with the technology.

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