LexisNexis®

The fourth annual complimentary guide to understanding DR practices around the world with an Asia-Pacific focus

阐述以亚洲为重点的全球争议解决操作的终极指南第四版(免费赠送)

LexisNexis® Dispute Resolution Law Guide 2018
争议解决法律指南 2018

Including articles from featured contributor: | 包括律所的专题文章：

大成 DENTONS

大成律师事务所
二十五周年庆

25th Anniversary of Dentons China

LexisNexis® Dispute Resolution Law Guide | 争议解决法律指南 2018

Contents | 目录

Feature Article | 专题:

Jurisdictional Q&As |司法管辖区Q&A:

Feature Article
专题

Feature Article: Brief Introduction to Arbitration in China

Firm: Dentons
Authors: Dr. Jiangtao Ma, Dr. Tao Li, Yongyi Li and Dr. Jing Liu
Co-Authors: Mandy Guo and Hongtao Niu

大成 DENTONS

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

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

a) whether the subject matter is capable of settlement by arbitration under P.R.C. law; and
b) if it is, whether there is a valid arbitration agreement or arbitration clause executed between/among the parties.

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

Confidentiality is an underlying principle for arbitration in China, which is embodied in all its proceedings. For example, arbitrators or tribunals' secretaries are not allowed to have private contact with either party or its lawyers, nor can they reveal any information in relation to the arbitration. One point worthy of mentioning is that oral hearings in arbitration cases are not open to public, which requires all the attendees to obtain authorizations from the parties in advance, even if the attendees are someone working for the parties. On the contrary, litigation is principally heard in public, while, only under exceptional circumstances, is it heard in a private session, namely under the circumstances where the dispute concerns national secrets, individual privacy or other factors as provided by the law. Owing to confidentiality, arbitral awards are not open to any third party, which may result in the possibility

of the same arbitration cases resulting in different rulings from different tribunals. Contrarily, as judgments made by the people's courts are usually open to public, such situation happens in litigation.

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

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

About the Authors:

Dr. Jiangtao Ma
Senior Partner, Dentons
E: jiangtao.ma@dentons.cn

Dr. Tao Li
Senior Partner, Dentons
E: tao.li@dentons.cn

Yongyi Li
Senior Consultant, Dentons
E: li.yongyi@dentons.cn

Dr. Jing Liu
Junior Consultant, Dentons
E: liujing.1@dentons.cn

Co-Authors:

Mandy Guo and **Hongtao Niu**

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

大成DENTONS

From Largest 从最大到领先 to Leading

Dentons Dispute Resolutions Practice

大成争议解决业务

深度诉讼 Litigation in Depth

- Deep Understandings of Litigation Theory & Skills
  深解诉讼理论与技巧
- Deep Knowledge of Judgment Logic & Obstacles
  深谙审判逻辑与关隘
- Deep Concerns for Clients' Needs & Profits
  深谋客户需求与利益

Simultaneous Development of Domestic & International 国内仲裁与国际仲裁并举 Arbitration

- Local Resources & Talents
  本土资源与智慧
- Global Presence & Coordination
  全球网络与协作

专题: 中国仲裁简介

律所: 大成律师事务所
作者: 马江涛博士
李涛博士
李永一先生
刘净博士
共同作者: 郭孟兰、牛洪涛

大成 DENTONS

随着“一带一路”倡议和中国企业“走出去”战略的推进，我们正在见证这样一个时代：中国凭借其快速发展的经济和贸易，充分参与到全球一体化进程中来。然而，只要有交易，就会有产生争议的风险。在争议解决方面，大多数中国人相对来说对中国的诉讼比较熟悉，只有少数人对仲裁、调解等其他争议解决机制有全面的了解。与此同时，外国人对中国的诉讼和仲裁实践也是知之甚少。考虑到我们在 Q&A 指南部分主要围绕中国的司法诉讼程序展开，本文篇幅有限，在这里简单介绍一下中国的仲裁。

争议属于仲裁委员会管辖，还是属于人民法院管辖，通常取决于以下两个因素：

(1) 根据中国法律的规定，争议的主体内容是否能够通过仲裁解决；以及

(2) 如果可以，争议方之间是否存在有效的仲裁协议或仲裁条款。

根据中国法律，合同争议和涉及财产权的争议可以仲裁，但与婚姻、收养、监护、抚养、继承相关的争议以及依法应当由行政机关处理的行政争议，不能通过仲裁解决。在实践中，即使该争议依据中国法律可以通过仲裁解决，在将争议递交仲裁委员会之前，仍然需要一份有效的仲裁协议 / 条款。仲裁协议在某些情况下会被视为无效。例如，中国不允许临时仲裁。所以，如果争议方同意在中国通过临时仲裁解决争议，那么该临时仲裁的最终裁决将不被人民法院认可，这也就意味着法院不会执行该裁决。按照中国法律，争议方应当协商一致，指定一个具体的、在中国合法设立的仲裁委员会。通常情况下，如果上述两个因素中的任何一项都不成立，那么该争议属于中国的人民法院管辖。

“保密性”是中国仲裁的一个基本原则，这体现在其全部的仲裁程序之中。例如，仲裁员或仲裁庭秘书不得与任何一方或其律师进行私下接触，也不能透露与仲裁有关的任何信息。值得一提的是，仲裁案件的开庭是不公开的，因此，所有参与开庭的人士需提前获得当事人的授权，即使是当事人的员工也不例外。相反，大部分诉讼的开庭都是公开的，而只有在特殊情况下（即争议涉及国家秘密、个人隐私或者法律另有规定的情况），才不对外公开。由于仲裁裁决不向任何第三方公开，这可能会造成不同仲裁庭对类似案件作出不同的裁决。反之，人民法院作出的判决通常是公开的，这种情况则鲜有发生。

“当事人意思自治”是仲裁的另一个基本原则。根据该原则，当事人通常可以自由安排自己的仲裁程序，但是在中国情况略有不同。由于中国不允许临时仲裁，中国的仲裁中心 / 委员通常按照其仲裁规则或当事人协商一致选择的仲裁规则，在仲裁程序中承担更多的管理职能。诚然，如果仲裁委员会承担仲裁程序的管理职责，通常会为仲裁员和当事人节省大量的时间。

除上述两个基本原则之外，本文还想要指出一点，即中国的仲裁庭在审理仲裁案件时，与人民法院审理诉讼案件的不同。在诉讼案件中，人民法院会主动审查案件的全部事实，即使当事人均未对此提出诉求或抗辩。在协议争议案件中，人民法院将主动审查协议的内容是否公平。如果不公平，当事人索赔的

依据便可能会被认定为无效，基于协议的相关权利和义务也将会被认定为无效。然而，在中国进行仲裁时，仲裁庭是被动的听取，并不主动审查全部案情，它也更加充分尊重“契约自由”的原则。因此，仲裁庭将坚持依照双方签署并生效的协议审理案件。即使协议根据规定尚未获得相关政府部门的批准，只要协议已生效，仍然对签署各方的协议履行具有约束力。

作者资料：

马江涛 博士
高级合伙人，大成律师事务所
电子邮箱：jiangtao.ma@dentons.cn

李涛 博士
高级合伙人，大成律师事务所
电子邮箱：tao.li@dentons.cn

李永一 先生
高级顾问，大成律师事务所
电子邮箱：li.yongyi@dentons.cn

刘净 博士
二级顾问、大成律师事务所
电子邮箱：liujing.1@dentons.cn

共同作者：郭孟兰、牛洪涛

网址：www.dentons.cn
地址：中国
北京市朝阳区东大桥路9号侨福芳草地D座7层
电话：+86 10 58137799
传真：+86 10 58137778

大成DENTONS

From Largest 从最大到领先 to Leading

Dentons Dispute Resolutions Practice

大成争议解决业务

深度诉讼 Litigation in Depth

- Deep Understandings of Litigation Theory & Skills
  深解诉讼理论与技巧
- Deep Knowledge of Judgment Logic & Obstacles
  深谙审判逻辑与关隘
- Deep Concerns for Clients' Needs & Profits
  深谋客户需求与利益

Simultaneous Development of Domestic & International 国内仲裁与国际仲裁并举 Arbitration

- Local Resources & Talents
  本土资源与智慧
- Global Presence & Coordination
  全球网络与协作

Jurisdictional Q&As
司法管辖区Q&A

Jurisdiction: Belgium
Firm: Rulkin and Partners
Authors: Guy Rulkin
and Adrien Hanoteau

rulkin AND PARTNERS
Avocats • Advocaten • Attorneys

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

The Kingdom of Belgium is a federal state divided into three regions (Brussels-Capital, Flanders and Wallonia) and three linguistic communities (French-, Dutch- and German-speaking communities, i.e. the three official languages). Although Belgian legislation comprises European, federal and legislation enacted by these regions and communities, the Belgian court system is exclusively organized at the federal level.

Belgium is a civil law country. Civil procedure is regulated by the Judicial Code. Precedents do not in principle bind the courts, but are nonetheless used as a source of authority. Legislative preparatory works and legal doctrine also provide strong authority on the interpretation and application of the law.

Its court system is composed of courts of mainly three levels. Most decisions rendered by first instance courts can be appealed before appeal courts.

At the first (district) level, there are the Court of First Instance, the Labor Court as well as the Commercial Court. The Justices of the Peace have jurisdiction for small disputes (not exceeding €1.860) and specific matters (lease agreements, neighboring nuisance, etc.).

In principle the plaintiff may initiate proceedings before either the court where the defendant has its registered office or where the legal obligations which are in dispute have arisen, have been performed or should have been performed. In contractual claims, the territorial court is that elected in a jurisdiction clause (which will most of the times be respected) or where the defendant has its registered office or the court of the place where the contract has to be performed.

The appellate level is concentrated around five Appeals Courts, before which judgments of the Court of First instance and Commercial Court can be appealed, and the Labor Appeals Courts, before which judgments of the Labor Court can be appealed. Most judgments issued by the Justices of the Peace can be appealed before the Court of First Instance.

At the highest level the Court of Cassation has sole jurisdiction for reviewing the judgments on appeal or judgments against which appeal is no longer possible, but only on points of law, without reviewing the underlying facts of the dispute.

There are also specific administrative courts, as well as a Constitutional Court.

2. What is the role of the judge in civil proceedings?

In Belgium, the role of the courts is limited to resolving disputes. Judges may not refuse to render decisions. All judgments are binding upon the parties, which means that all the parties involved must adhere to it.

Judges are impartial and independent. They are appointed by Royal decree, upon recommendation of the High Council of Justice, an independent federal entity.

The main duties of the judge are understanding and exploring the underlying facts (based on the evidence brought by the parties, testimonies and other reports), assessing and questioning the claims brought by all parties in dispute, before judging the case by means of a judgment

discussing all claims and explaining the reasoning of the court.

The judge can only rule on the matters claimed by the parties and cannot allow for more than was claimed by the parties. The judge can, upon a party's request or on his own, order an investigation, request the filing of exhibits or appoint an expert.

There are no jury trials in civil proceedings in Belgium.

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

Court hearings, records and judgments are in principle open to the public. This means that the doors of the courtroom shall remain open and that anyone can enter the hall, including journalists.

The access to hearings and to judgments can be restricted in special circumstances. The court may order that the dispute be heard behind closed doors if there is a danger to the public order or for good practice. The defendant may also request closing the doors if he/she fears that disclosure may cause damages, subject to the judge's approval. If the hearing takes place behind closed doors, only the parties involved and their lawyers will be admitted.

In civil and commercial matters, members of the public do not have access to the files pertaining to current or past proceedings. Only parties and their counsels have access to their files. Exceptions apply for contributing to the legal doctrine. In practice the court clerks refrain from giving access to judgments, based on data protection and privacy restrictions.

4. 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?

Belgian lawyers (including trainee-lawyers) may appear before any civil courts in Belgium, with the exception of the Court of Cassation, provided that they are registered with a Bar. Only the lawyers who have been registered at a Bar for at least ten years and who have passed an ad hoc examination may be appointed as lawyers at the Court of Cassation.

Anyone holding a master's degree in law issued by a Belgian university can be registered with a Belgian Bar. After having completed a three-year traineeship, which includes practical training and exams, the trainee-lawyer becomes a full member of the Bar. During this traineeship, the trainee-lawyer can for instance issue legal opinions and directly represent clients before the courts.

National lawyers of EU Member States can apply for registration on the EU lawyers list and may start practicing under their original professional title. They may carry out the same professional activities as the lawyers and the trainees. However, before the Belgian courts, they may only act and plead in cooperation with a registered Belgian lawyer provided that they have been presented to the president of the court beforehand.

Non-EU lawyers may be registered on a specific list. They may not plead in Belgium. A bilateral agreement with the non-EU state or Bar Association of origin may, by way of derogation, authorize the conduct in law under certain conditions. On the other hand, there is generally no need or permission to advise on Belgian, foreign, European or international law. Foreign lawyers can thus practice as legal consultants in Belgium and start an advisory and transactional practice without having the title of lawyer. However, they must comply with Belgian laws, including immigration matters (professional card or work permit, etc.).

At present there are 25 bars in Belgium. A Bar Association groups together the bars of the French-speaking and German-speaking communities in the country, whereas another Bar Association groups together the bars of the country's Dutch-speaking community.

rulkin AND PARTNERS
Avocats • Advocaten • Attorneys

Guy Rulkin

Partner, Rulkin and Partners

Guy holds a degree in law which he obtained magna cum laude from the Université Libre de Bruxelles (ULB) in 2000, as well as a Master's degree in Law from the University of Kent at Canterbury, England (LL.M. in International Commercial Law), in 2001.

Member of the Brussels Bar Association since September 2001, Guy Rulkin specializes in company law. He has joined in 2010 the Commission on Commercial Law at the Brussels Bar and also handles cases relating to distressed companies (University Certificate in Crisis Management, University Faculty of Mons, 2010). Finally, Guy holds a University Certificate in banking and financial law (Catholic University of Louvain, 2013).

He assists and advises Belgian and international clients in the transfer of companies or assets, restructuring of groups of companies, raising funds with investors and arranging financing with credit institutions.

Through his experience, he has built up in-depth expertise in the IT and new technologies industry.

Guy is also experienced in business negotiations and in handling complex litigations (liability of company directors, disputes between partners, termination of commercial lease agreement, debt collection against foreign states, breaches of contract, etc.).

Working in a strict and precise manner, he offers practical solutions wherever possible.

His preferred fields also include assistance to international and national not-for-profit organizations.

In Brussels there are two bars, the French-speaking Bar and the Dutch-speaking Bar. Lawyers' activities are not limited to their legal district: a Brussels lawyer may appear in Liège or in Antwerp.

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

Limitation periods are pre-defined time periods after which a claim becomes time-barred. These are set by substantive law applicable to the subject matter of the claim.

Most contractual claims become time-barred within a period of ten years. This time period is more generally the default limitation period for claims based on a personal right. Most claims relating to extra-contractual damages (i.e. tort) have a five-year time limitation, commencing on the discovery by the victim of the tort having caused the damages.

Whereas claims based on a right *in rem* are time-barred after 30 years, shorter limitation periods apply with respect to rental issues, specific invoices (e.g. utilities, medical, legal

costs), etc. Limitation periods are in principle not mandatory provisions and hence the parties may agree otherwise.

The limitation periods can be interrupted by a formal order for payment, a writ of summons or attachment proceedings. The interruption of a limitation period means that the period is reset. The interruption is limited to the parties involved in the dispute at hand. In addition, the limitation period may also be suspended, i.e. temporarily frozen, under certain circumstances.

Last but not least, any claims based on latent defect of a purchased good must be notified promptly to the seller.

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

There is no mandatory pre-action conduct imposed by the Belgian Judicial Code. However, before commencing proceedings, the (future) plaintiff should normally issue a formal notice requesting the (future) defendant to pay or to perform, within a reasonable period. In case of no performance, proceedings may then be initiated.

Furthermore, the parties may have agreed to enter into mediation prior to bringing the case to the court or to arbitration. In such a case, the failure to comply with this mandated pre-action conduct may lead to potential inadmissibility of the claim.

The judge can at any time invite (but not force) the parties to enter into mediation.

According to Article 851 of the Judicial Code, security for legal costs can be requested by the defendant when the plaintiff originates from a non-EU Member State. The plaintiff can be exempted under certain conditions from providing such a security.

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

Civil proceedings generally start with a writ of summons, to be served by a court bailiff to the defendant (in person or by letter), after the bailiff has registered the case with the docket of the competent court.

In this document, the plaintiff details the underlying facts, briefly explains the evidence supporting his views, states the relief sought from the court and provides for the date of the introductory hearing.

Service of a writ commencing Belgian proceedings over foreign entities is done via the office of a court bailiff, following, for defendants located within the EU, Council Regulation (EC) 1393/2007 of 13 November 2007 on the service in the member states of judicial and extrajudicial documents in civil or commercial matters and, for defendants located outside the EU, usually the Den Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

The Judicial Code specifies the time period that must elapse between the date of service of the writ of summons and the introductory hearing, i.e. between 8 days and up to 90 days in case the defendant is located outside the EU. This time period can be shortened by decision of the court.

Other means for commencing civil proceedings include the contradictory application as well as the voluntary intervention of both parties.

At the introductory hearing the parties generally agree upon a timeframe concerning the future procedural steps. In case the parties cannot come to an agreement this timetable is then set by the court, after having allowed the parties to provide their comments on such a timetable.

When the case is (very) straightforward and implies only short debates, the judge can handle the case at the introductory hearing itself or some weeks thereafter.

If the defendant fails to appear, the judge may also under certain circumstances render a default judgment.

In most cases the pleadings only take place after the exchange of written submissions (or briefs), usually over several rounds, whereby each party details his opinion on the merits of the case. The judgment is generally issued within 30 days after the final pleadings.

It is not uncommon for proceedings at first instance to take up to two years. On appeal, the proceedings can last up to three or more years.

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

The concept of discovery, as applied in common law jurisdictions, does not exist under Belgian law. Furthermore, there is no general legal requirement to disclose relevant documents to other parties and to the court.

However, all relevant documents that are likely to provide evidence of a fact which is relevant to the dispute, should be disclosed to the other parties and to the court. Indeed, each party bears in principle the burden of proving its allegations ("*actori incumbit probatio*") and shall file documents which the party deems appropriate to justify its opinion.

Each party has also a duty of good faith, what implies a certain degree of cooperation in the communication of evidence. Parties who have reasons to believe that the opponent has in its custody a document relevant to the case at hand can request the court to order this opponent (or any third party) to communicate such a document to the court, subject to financial penalty. Strict conditions apply.

If the party or the third party refuses to disclose such a relevant document to the other party, the later may allege an infringement of his rights of the defense and of due process.

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

The lawyer's professional secrecy, set out under the Criminal Code art 458 as well as in the Belgian Rules of Professional Conduct, is fundamental to the Belgian legal order.

Any correspondence between a lawyer and his client as well as any lawyer-to-lawyer communication is in principle privileged (subject to exceptions) and therefore cannot be disclosed to the court. However deontological rules prohibit lawyers from making statements which contradict with privileged communication. In such a case, the President of the competent Bar will decide on whether and to what extent the privileged information can be disclosed to the court.

Medical records and some other documents are also considered privileged and will not be allowed as evidence by the courts. These privileges, which are considered to be of public policy, cannot be waived.

Last but not least, the 2016/943 EU Directive on the protection of undisclosed know-how and business information (trade secrets) shall be implemented into Belgian law by 9 June 2018.

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

Each party bears the burden of proof of its allegations and must present sufficient evidence to justify its claim. The court has a rather passive role. Therefore, each party attaches to its submissions the list of all documents on which it relies. These are provided to the other party with the communication of the submissions and to the court shortly before the hearing.

Oral evidence and use of witnesses remain unusual in Belgium. For the most part, only written evidence will be admissible. Written factual affirmations, provided that these comply with

ad hoc formalities, are possible, but the courts enjoy wide discretion as to how much weight should be given to such an evidence.

The Judicial Code does not provide for the possibility to cross-examine a witness. However, the counterparty may ask the court to hear other witnesses who may contradict the initial witness statement.

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

Expert evidence may be presented by the parties. The court may also appoint an expert at its initiative or upon unilateral or joint request of the parties. Party-appointed expert evidence and findings will be given much less weight than court-appointed expert evidence and findings.

The Judicial Code organizes and regulates expert evidence by court-appointed expert. The decision must mention the scope of the assignment, the identity of the expert as well as a description of the circumstances under which the expert is appointed. There is a national register with all the official experts.

An expert inquiry ordered by the court may only aim at making actual findings or providing technical advice in the scope of his expertise. The court-appointed expert, who owes a duty to the court, may not rule on the merits of the claim.

The expert will meet with the parties, carry out investigations and write a draft report on his findings to the parties. The parties are then invited to comment, before the issuance of the final report. The role of the expert is to assist the court, but the court is not bound to follow the findings or position of the expert. The court may also decide to hear the expert, request additional investigations, ask questions to the expert or appoint other experts.

All experts must take an oath and comply with the recently enacted "Code of conduct for court-appointed experts" (Royal Decree of 25 April 2017).

12. What interim remedies are available before trial?

Interim remedies can be requested from the President of the Court of First Instance or of the Commercial Court in the framework of summary proceedings, provided that there is urgency and there is a need for the measure in order to prevent imminent and serious damage or inconvenience. Such an interim measure does not deal with the merits of the case. In the case of absolute urgency, such measures can be requested in *ex parte* proceedings, without the defendant being notified. It is up to the requesting party to demonstrate irreparable harm and urgency in the event of the requested measure not being granted.

Furthermore, once the case has been brought to the court, interim measures can also be requested at any time with respect to gathering evidence, the appointment of an expert, the communication of documents, etc. The court may also take interim measures in order to protect the interest of the parties during the course of proceedings, such as the payment of the indisputable part of an unpaid invoice.

Provisional attachments and securing assets can also be obtained. Depending on the nature of the asset provisionally attached, the party seeking such attachment shall obtain a prior authorization from the attachment judge (member of the Court of First Instance) or can proceed without such a prior authorization, but in any case, with the assistance of a court bailiff.

13. What does an applicant need to establish in order to succeed in such interim applications?

There are some strict conditions to obtain such a remedy. The party must be able to demonstrate irreparable harm and urgency (understood as a risk or serious loss or inconvenience to the applicant), a breach of a *prima facie* existing and indisputable subjective rights, as well as the temporary nature of the relief sought in these interim applications.

rulkin AND PARTNERS
Avocats • Advocaten • Attorneys

Adrien Hanoteau

Partner, Rulkin and Partners

Adrien holds a degree in law from the Université Libre de Bruxelles (ULB) and a degree in Economic law from the Vrije Universiteit van Brussel (VUB), which he obtained in 2000 and 2004 respectively.

He has been a member of the Brussels Bar Association since 2000.

Adrien specializes in company law in general, and advises clients on the incorporation of companies and other investment vehicles, mergers and acquisitions (both national and international deals), fundraising for growth companies, and restructuring operations.

He has also built up wide experience in the area of corporate financing and the raising of collateral that accompanies such transactions, acting on behalf of credit institutions as well as private companies.

He also regularly practises general commercial law, more particularly in connection with the negotiation, drafting, performance or termination of distribution agreements.

Adrien represents clients in lawsuits in court and in arbitration proceedings, such as in disputes between shareholders, cases involving directors' liability, interim injunction proceedings relating to company matters or in commercial cases.

14. What remedies are available at trial?

Belgian courts can make orders and judgments, ranging from provisional measures, preparatory, interlocutory or final judgments.

The court can order the other party to perform a specific obligation (e.g. payment or delivery) or to refrain from taking certain actions or behavior. Penalties can be awarded as a measure ancillary to the primary conviction, whereby the penalties will be due if the awarded court order is not complied with, either per day delay or per infringement after the said order.

In tort law, the parties must be replaced in the position that they would have been, had the behavior causing damages not occurred. The courts may grant damages, which may be in the form of a compensatory damages for moral distress and/or the economic losses, as well as additional damages. No punitive or exemplary damages are available under Belgian law. The court may increase the awarded damages with interest (current legal interest rate: 2% or 8%) and compensation for costs.

Furthermore, the court may authorize the plaintiff to proceed with certain measures, such as the publication of a statement in the press.

The courts do not have power to discontinue or stay proceedings, other than in cases provided for under the Judicial Code (e.g. parallel criminal proceedings, prejudicial question addressed to the European Court of Justice, etc.).

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

Once a party has obtained a judgment, a formal notice requesting the debtor to comply with the decision will be sent to the other party. Should the debtor fail to comply voluntarily with the judgment, a court bailiff will then request from the court the delivery of an official copy of the judgment, including the so-called execution form, and notify the same to the debtor, together with the service of a payment order.

Compulsory enforcement is usually used to recover money, but it can also be applied to enforce performance of, or refraining from, an act, sometimes subject to a penalty payment.

A domestic judgment can be enforced through attachment and seizures (garnishment) on assets of the other party, in accordance with the Judicial Code. The enforcement possibility of judgments rendered by any court of first instance has been recently improved. In principle, appeal proceedings or opposition proceedings (in the case of a default judgment) must be filed within one month following the service of the judgment and do not uphold the enforceability of the judgment, which is then done at the risk of the enforcing party. The judicial escrow mechanism allows the debtor to avoid the provisional enforcement of the judgment by paying the owed amount, including interest and expenses, to a court bailiff while waiting for the definitive decision by the appeals court.

A distinction is made between the type of goods attached (movable asset, immovable asset and debt) and the nature of the attachment (precautionary attachment and attachment in execution of a judgment). The Judicial Code contains various rules regarding the goods which are not eligible for attachment. When a debtor's goods are attached in execution of a judgment, they are sold and the proceeds are given to the claimant. The claimant has no right to the attached goods themselves, but only to the proceeds from their sale. The attachment does not, however, give the attachment creditor a preferential claim.

The recognition and enforcement in Belgium of foreign judgments is discussed under question 22.

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

There is no "*winner takes all*" principle in Belgian law regarding legal costs. On the other hand, legal costs for Belgian civil proceedings are often considered as being limited compared to other jurisdictions.

The losing party will be generally ordered to pay the costs of the proceedings, which include the proceedings costs (court fees, registration duties, stamp duties, bailiff costs, judicial expertise costs, translation costs, attachment costs, etc.) and a (limited by law) compensation for the legal costs incurred by the winning party, whatever their actual amount.

The amount of this compensation for the legal costs of the winning party depends upon the complexity of the dispute and the amounts in dispute. For instance, the current standard compensation for a dispute ranging between €100.000 and €250.000, amounts to €6.000. The maxim compensation amounts €36.000.

Also, when a judgment is rendered in Belgium, it has to be filed with the public administration. At this time a registration duty amounting to 3% of the amount under the judgment is payable. Whilst the administration claims this registration duty from the losing party, the winning party may be held jointly liable in a case where it has received the amount under the said judgment.

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

Appeal is allowed in most decisions of first instance courts on any grounds, both for admissibility issues or merits of the case. An appeal may be brought by the losing party within one month from the notification by a court bailiff of

the judgment in first instance. The appeal certificate must also contain a number of mandatory entries.

Since the recent entry into force of the Pot-Pourri V Act, an objection against a judgment by default (opposition) is no longer possible if the judgment is appealable. Consequently, a defendant who failed to appear before the first instance judge will only be in a position to lodge an appeal. For judgments which are not subject to appeal, objection proceedings (i.e. the reexamination of the case, with adversarial proceedings, by the court that rendered the first decision) remain available.

Both the appeal and opposition procedures are largely the same as the procedure before the first instance court, namely the appeals courts review the case in its entirety, both in matters of fact and in law.

An appeal against a judgment rendered itself on appeal before the Court of Cassation is restricted to mere questions of law and limited formal requirements, and is made subject to a prior positive legal opinion from a lawyer admitted at the Bar of the Court of Cassation on the chances of success. In case the Court of Cassation quashes the judgment, the case is then sent to another court of appeals, which will render a new judgment on the merits of the case.

18. Are contingency or conditional fee arrangements permitted between lawyers and clients?

Belgian law and rules of ethics require lawyers to charge fees with fairness and moderation. Belgian lawyers are free to determine the amount of their professional fees and their methods of calculation. In practice, the Bars require the fees to be reasonable and transparent, and proportionate to the difficulty of the case and to the interest at stake.

Contingency fee arrangements which are exclusively linked to the outcome of the case are prohibited under Article 446 of the Judicial Code. However, arrangements whereby additional and reasonable success fees are to be paid in the event of a positive outcome are permitted.

19. Is third-party funding permitted? Are funders allowed to share in the proceeds awarded?

In Belgium third-party litigation funding is not regulated by any laws or guidelines. Therefore, it is not forbidden. The third party and the claimant may agree on sharing the proceeds of the dispute, but there are a number of practical difficulties such as the confidentiality between the client and the lawyer, as well as the potential duty of disclosing the identity of the third-party funder.

At this stage third-party funding is not common in litigation, but seems to be gaining importance in national disputes as well as in international arbitration where the seat of arbitration is located in Belgium.

Agreement for the assignment of disputed claims must be drafted with caution. Indeed, Belgian law allows the debtor of disputed claims to redeem the debt by paying back to the debt assignee the price paid for the assignment, with all interest and costs. Furthermore, disputed claims cannot be transferred to lawyers, judges, bailiffs, clerks, notaries, etc.

20. May parties obtain insurance to cover their legal costs?

There are multiple legal insurance products, with their respective thresholds. In Belgium, most mandatory insurances (car or fire insurance, etc.) include some kind of insurance to cover the legal costs in case of disputes. Standalone legal protection insurances are also available and may become standard practice in the coming years.

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

There are various types of multi-party litigation.

Class action ("actions for collective redress") is an action exercised by a claimant appointed

by law ("the group representative") who, on behalf of an unknown group of individuals brings an action, which may lead to a decision that prevents subsequent litigation not only towards both the group representative and the defendants, but also towards all group members that have opted in or have not opted out of the procedure. Since the entry into force of the class action scheme in 2014, all class actions have been brought by *Test-Achats*, the main Belgian consumer protection organisation. The use of class actions has been limited to associations recognized by the government or limited organizations representing the consumers. Class actions must be brought against an enterprise and must deal with an alleged violation of specifically enumerated Belgian and European laws, which only relate to consumer protection. Apart from this recently introduced procedure, there is no legal procedure to achieve collective redress.

Some laws allow some form of representative action, where an organization or a group of people with the aim to realize an objective that goes beyond the personal interests of the individual members of the organization or the group (e.g. associations fighting racism or xenophobia, associations protecting the environment) may initiate an action of collective interest.

Last but not least, in the collective (related) action, several separate legal actions arising from the same event or contract are consolidated in the same proceedings by different claimants. These actions are often represented by the same lawyer. The court will examine these claims together, even though they remain individual actions.

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

The procedures for the recognition or enforcement of foreign judgments in Belgium depend on whether the foreign judgment is issued by an EU Member State or by a non-EU Member State.

The judgments handed down in other EU Member States are governed by Council Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast Brussels Regulation). The purpose of this Regulation is to improve and to facilitate the free circulation of judgments and to further enhance access to justice. Subject to limited exceptions, a final court decision is recognized and immediately enforceable in another EU Member State, with no prior *exequatur* being required. The debtor may ask for the refusal of the enforcement, based on pre-determined grounds of refusal, such as a clear violation of public policy in the Member State, etc.

If a foreign judgment issued by a non-EU Member State is issued in a jurisdiction with which no bilateral of multilateral treaty is in place with Belgium, the recognition and enforcement must be requested in line with the relevant provisions contained in the Belgian Code of Private International Law. The requests for enforceability and recognition of a foreign judgment is to be filed with the Court of First Instance, whereas the enforceability or recognition of a decision declaring insolvency is reserved to the Commercial Court. In very limited circumstances the recognition and enforcement of a foreign judgment (*exequatur*) will be refused in case there is a violation of public policy, of the rights of defense, or of exclusive jurisdiction rules, or in case of fraud or incompatibility with another judgment in Belgium.

23. What are the main forms of alternative dispute resolution?

Arbitration and mediation are widely used as forms of alternative dispute resolution mechanisms for commercial disputes, both for domestic and international affairs.

(a) Arbitration

Arbitration clauses are frequently inserted into commercial agreements, allowing the parties

to receive a final decision on the case within a shorter time, in the language chosen by the parties and (most of the time) on a confidential basis. Arbitration can only take place with the express consent of all parties. An ad hoc arbitration clause can be stipulated in any existing contract. Once the dispute has arisen, the parties may also enter into a specific arbitration agreement.

Arbitration is available for most areas of law, with the exceptions of family matters, labour disputes and consumer disputes. Recent case law confirms that issues relating to the termination of a distribution agreement may be submitted to arbitration.

The parties may submit their disputes to an arbitral tribunal consisting of one, three or more arbitrators. Based on the request and declarations of the parties, the arbitration award is binding upon the parties. There is no right of appeal, unless the parties have agreed otherwise. However, there is a possibility to seek judicial annulment of an arbitration award on the basis of limited grounds. Belgium is bound by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and Belgian courts will recognize and enforce foreign arbitration awards.

Parties, agreeing to resolve their disputes by arbitration, may opt for *ad hoc* arbitration (where the parties or arbitrators themselves determine and define the rules applicable to the proceedings) or for an institutional arbitration body (e.g. CEPANI, ICC, where the parties accept the regulations of this arbitration body). Belgium has enacted a specific law on arbitration, based on UNCITRAL Model Law, with recent minor amendments.

(b) Mediation

Mediation can be proposed either by the court (judicial mediation) or by the parties (voluntary mediation). In any case, mediation procedures are subject to the steady agreement of the parties. All documents drafted as well all documents exchanged during the mediation process shall remain confidential. In case the mediation results in a settlement agreement, signed by the parties and the registered mediator, such a settlement agreement may be homologated by the Court of First Instance. The order that homologates the agreement constitute an enforceable judgment.

(c) Conciliation

In a conciliation procedure, the conciliator is a neutral third party who hears both parties before he offers a solution, that they are not obliged to apply. A conciliation procedure often takes place within the context of a court action. In this case, it can be led by the judge. Conciliation is always a voluntary procedure.

(d) Ombudsman

An ad hoc ombudsman is also available in various sectors, such as the banking and finance sector, telecommunications, etc. The ombudsman's mission is to analyze individual complaints and to deliver opinions which may enable the settlement of the dispute.

24. Which are the main alternative dispute resolution organisations in your jurisdiction?

The major arbitration center in Belgium is the CEPANI (the Belgian Centre for Mediation and Arbitration), which offers several methods for the settlement of national and international disputes in commercial matters (arbitration, mediation, etc.). Brussels is frequently used as the seat of ad hoc or institutional arbitrations under the rules of the ICC.

The mediation organisations to which parties most commonly submit their disputes are bMediation (the former Belgian Centre of Arbitration and Mediation) as well as the CEPANI. Mediation is also recently promoted by the Commercial Courts, with the assistance of the Bar Associations, in order to reduce the judicial backlog.

25. Are litigants required to attempt alternative dispute resolution in the course of litigation?

At the beginning of a trial, it is not uncommon that judges informally encourage parties to explore alternative dispute resolution especially in certain types of disputes (such as shareholders disputes). During court proceedings, with a few exceptions, referral to alternative dispute resolution remains possible at the initiative of a party or the court.

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

There are regular proposals and acts for reform to the laws governing both judicial and alternative dispute resolution for civil (and criminal) cases. Indeed, by means of five successive acts (known as the "Pot-Pourri Acts"), multiple sections of the Belgian Judicial Code have been recently amended in order to improve and accelerate civil proceedings, including but not limited to the long-awaited modernization and computerization of the Belgian justice system. These initiatives, which include the electronic filing of submissions, claims declarations in insolvency proceedings, general database for securities concerning movable goods, etc. are currently being implemented.

Besides the further promotion of mediation, with the announcement of a potential new mediation law, the current Federal government also intends to facilitate so-called "collaborative negotiations" as an additional possible method for resolving disputes. This mechanism is a structured, voluntary and confidential method of negotiation where specifically trained lawyers closely accompany their clients during the negotiation process, in order to work towards a resolution for the dispute.

Recent changes have also been adopted to Belgian insolvency laws, which will enter into force on 1 May 2018. The reform of Belgian insolvency laws forms part of a broader move to rationalize key economic legislation (including the Belgian Companies Code, see below). The scope of application of the new insolvency rules has been expanded by replacing the "tradesman" criteria by the "undertaking" criteria, what allows more SMEs to benefit from the protections offered by the insolvency law regime in case of financial difficulties. Furthermore, all insolvency procedures will be fully digitalized. Out-of-court settlements between debtors and creditors are also encouraged. These agreements can be confirmed by the Commercial Court. Furthermore, the debtor will be entitled to request the appointment of a company mediator in order to support and assist the undertaking. The provisions relating to directors liability have also been clarified.

Last but not least, a draft bill introducing a completely new Belgian Companies Code has been approved by the Belgian Council of Ministers. The bill is expected to be adopted by the Parliament in 2018. This new code aims at modernising Belgian company law by making it more simple, flexible and coherent, to enable Belgium to become a more competitive and attractive place of establishment for companies. It will also have direct consequences on dispute resolution in corporate matters as well as the organisation of the Commercial Courts. For instance, the new code shall confirm the incorporation theory (instead of the seat theory) and extend the issues of potential shareholders liability in limited companies.

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

Belgium has three official languages: Dutch, French and German. Their use in court proceedings is governed by the Belgian Act of 15 June 1935, which governs the language to be used in the writ of summons, the use of languages during the proceedings, the request to change

language during the proceedings, the use of documents drafted in a language other than the language of the proceedings, etc.

The consequences of the Brexit vote will be felt throughout the legal systems, including Belgium, and open new opportunities. The Belgian federal government has recently announced its plan to create a new "Brussels International Business Court" (BIBC), which would deal exclusively with international business disputes. The novelty lies in the fact that all proceedings and the judgments of the BIBC would be in English. The BIBC would be a "one stop shop" and would deliver final judgments with no possibility of appeal. For the time being, it remains unclear as to what will be the key differences between international arbitration and proceedings before the BIBC. The draft bill is at a preliminary stage and still has to go through the whole legislative process.

State immunity from execution of enforceable judgments remains a hot topic in Belgian dispute resolution law. The Belgian Judicial Code, which has been recently amended, provides that assets located in Belgium that belong to a foreign State are immune from execution and cannot be subject to enforcement proceedings by creditors. France adopted a similar provision. Exceptions to that rule are, however, possible if (very) strict conditions are met: a party wishing to seize the assets belonging to a State needs to obtain a prior authorization from the attachment judge, who will only allow the seizure if the foreign State has "expressively" and "specifically" consented to the seizure of the assets; if the foreign State has specifically allocated those assets to the enforcement of the claim which gives rise to the seizure and if the assets are located in Belgium and are allocated to an economic or commercial activity. In a judgment dated 27 April 2017, the Belgian Constitutional Court confirmed the validity of this legal provision, thereby significantly hampering the enforcement of international judgments and arbitral awards against a foreign state.

About the Authors:

Guy Rulkin
Partner, Rulkin and Partners
E: GRulkin@rulkin.be

Adrien Hanoteau
Partner, Rulkin and Partners
E: AHanoteau@rulkin.be

W: www.rulkin.be
A: Boulevard Louis Schmidt 87/4, B-1040 Brussels
T: +32 (0)2 737 05 50
F: +32 (0)2 737 05 59

司法管辖区： 比利时
律所： Rulkin and Partners
作者： Guy Rulkin
和 Adrien Hanoteau

rulkin AND PARTNERS
Avocats • Advocaten • Attorneys

1. 在民事诉讼方面，法院系统的结构是怎样的？

比利时王国是一个联邦国家，分为三个地区（首都布鲁塞尔区、法兰德斯区及瓦隆区）和三个语言区（法语、荷兰语和德语，即三种官方语言）。虽然比利时法律包括欧盟法、联邦法以及国内各区颁布的法律，但是比利时只设有联邦法院系统。

比利时是一个大陆法系国家。其民事诉讼程序受《司法法典》的规制。判例原则上对法院的判决不具有约束力，但可以作为权威性参考。立法准备工作和法律原则也是司法解释和法律适用的有力依据。

其法院系统主要由三级法院组成。初审法院作出的大多数判决都可在上诉法院提出上诉。

第一（区）级法院包括，初审法院、劳工法院和商事法院。治安法官对小型纠纷（不超过 1,860 欧元）和特定问题（租赁协议、扰民等）具有司法管辖权。

原则上，原告可向被告注册住所地法院提起诉讼，也可向争议法律义务的履行地（已经履行或应当履行）法院提起诉讼。在合同索赔案件中，属地法院是根据管辖权条款（多数情况下应予以尊重）指定，或设在被告的注册住所地或合同履行地。

初审法院和商事法院的判决可诉至五大上诉法院（Appeals Court），劳工法院的判决可诉至劳工上诉法院。治安法官的多数判决可在初审法院提起上诉。

仅最高法院（Court of Cassation）有权审查上诉判决或不可上诉的判决，但只能对适用法律要点进行审查，而不再审查争议的基本事实。

此外，还特别设有行政法院和宪法法院。

2. 法官在民事诉讼中的角色是什么？

在比利时，法院的作用仅限于解决争端。法官不得拒绝作出决定。所有的判决都对当事人具有约束力，这意味着所有当事人都必须遵守。

法官公正独立。他们由最高司法委员会（一个独立的联邦机构）推举，由皇家任命。

法官的主要职责是理解和探究潜在事实（根据当事人所提供的证据、证词和其他报告），评估和询问争议各方提出的诉求，通过讨论各方诉求，解释法庭论断，对案件做出判决。

法官只能裁决当事人诉求的事项，不能超过当事人的诉求范围。法官可以根据当事人或自己的要求，下令调查，要求提交证物或者指定专家。

在比利时的民事诉讼中没有陪审团陪审。

3. 庭审是否向公众开放？公众是否能够查阅法庭文件？

法庭听证会、记录和判决原则上向公众公开。这意味着审判室的大门应保持开放，任何人都可以进入，包括记者在内。

在特殊情况下，可以限制听证会或审判过程的公开性。法院可下令对有害公序良俗的案件非公开审理。如果被告担心案情披露会造成损害，可在法官的同意下，要求非公开审理。如果听证会是非公开的，那么只有当事人及其律师才能参加。

在民事和商业案件中，公众无法查阅现有或过去的相关诉讼文件。只有当事人及其律师可以查阅他们的档案。利于法律原则实施的情况除外。实际上，法院书记官们会以数据保护和隐私限制为由，拒绝提供判决书。

rulkin AND PARTNERS
Avocats • Advocaten • Attorneys

Guy Rulkin

合伙人，Rulkin and Partners

盖伊于2000年在布鲁塞尔自由大学以优等成绩毕业，获得法学学位，并于2001年在英格兰坎特伯雷的肯特大学获得法学硕士学位（国际商法法学硕士）。

盖伊·鲁金（Guy Rulkin）于2001年起成为布鲁塞尔律师协会组织成员，他擅长公司法。他于2010年加入布鲁塞尔律师协会商务法律委员会，也处理与困境企业相关的案件（拥有危机管理的大学课程结业证书，University Faculty of Mons，2010年）。盖伊还拥有银行和金融法律大学课程结业证书（鲁汶大学，2013年）。

他协助比利时和国际客户转让公司或资产，建言献策，重组集团公司，向投资者融资，安排信贷机构融资。

经过经验的积累，他对IT和新技术产业的专业知识有了深入的了解。

盖伊也在商务谈判、处理复杂的诉讼案（公司董事责任、合伙人之间的纠纷、商业租赁协议终止、对境外国家的债务清收、合同违规等）方面具有经验。

他工作严谨，提出一切可能的可行的解决办法。

他偏好的领域还包括向国际和国内的非营利组织提供援助。

4. 所有律师均有权代表其委托人出庭并参加诉讼吗？如果不是，律师职业的结构是怎样的？

比利时的注册律师（包括实习律师）能够出席比利时的所有民事法庭，但最高法院除外。只有注册期满十年并且通过特设考试的律师才可能被任命为最高法院的律师。

任何持有比利时的大学颁发的法学硕士学位的人都可以在比利时的律师协会注册。在完成为期三年的培训后（包括实务培训和考试），实习律师方能成为协会正式会员。在实习期，实习律师可以出具法律意见书，可以直接代表客户出庭。

欧盟成员国的律师可以在欧盟律师名册上申请注册，并可以按照原来的职称开始执业。他们同正式律师和实习律师从事相同的职业活动。然而，如果他们要在比利时法院采取法律行动和辩护，就只能事先向法院院长提交申请，请求与比利时注册律师合作。

非欧盟国家的律师可在特定名单上注册。他们可能不得在比利时进行辩护。与非欧盟国家或者母国律师协会之间的双边协定可通过克减的方式，授权在某些条件下的法律行为。另一方面，通常律师不需要或者不允许对比利时法律、国外法、欧盟法或国际法提出建议。因此外国律师可以在比利时做法律顾问，他们没有律师的头衔，可开展咨询业务。但是，他们必须遵守比利时法律，包括移民事务（职业证书或工作许可等）。

目前比利时有 25 家律师协会。有一家律师协会组织汇集了该国法语区和德语区的律师协会；另一家律师协会组织汇集了该国荷兰语区的律师协会。

布鲁塞尔区有两家律师协会：德语律师协会和荷兰语律师协会。律师的活动不受法律管辖区的限制：布鲁塞尔的律师可能会出现在列日（Liège）或安特卫普。

5. 提起民事请求的时效期为多久？

诉讼时效是预先设定的期间，一旦超过该期间，诉讼请求将失效。诉讼时效由实体法规定，适用于申诉中的主体问题。

大多数合同之债的诉讼期限为十年。这个期限通常适用于基于个人权利的违约申诉。涉及合同外损害（即侵权）的事项大多有五年的诉讼时效，从受害人发现侵权行为造成损害时算起。

基于物权的诉讼时效是 30 年，在租赁问题、具体收据（例如公用事业、医疗、法律费用）等方面适用较短的诉讼时效。原则上，时效期间不是强制性条款，因此当事人可以另行约定。

诉讼时效会因正式的付款命令、或扣押程序而中断。诉讼时效的中断意味着将重新计时。诉讼时效中断仅限于当前争端各方。此外，在某些情况下，诉讼时效也可能暂停，即暂时冻结。

最后，要想对所购商品的潜在缺陷提出申索，必须及时通知卖方。

6. 有哪些诉前程序是当事人在开始诉讼之前必须遵守的？

《比利时司法法典》对诉前行动不做强制性要求。但是，在起诉之前，（未来的）原告通常应发出正式通知，要求（未来的）被告在合理的期限内支付或履约。如果被告没有履行，那么可以启动诉讼程序。

此外，当事人可能同意优先选择调解，而不是上诉或仲裁。这种情况下，如果不实施这一强制性诉前行动，可能导致申索不予受理。

法官可以随时邀请（但不强迫）当事人进行调解。

根据《司法法典》第 851 条，当原告来自非欧盟成员国时，被告可要求原告提供法律费用担保。在某些条件下，原告可以免除提供这种担保的责任。

7. 案件进入审理之前要经过哪些典型的民事程序？有什么样的时间表？

法警在主管法院的案卷上登记案件后，向被告发出传票（亲自送交或邮寄），民事诉讼由此开启。

在这份文件中，原告详细说明基本事实，简要解释支持其观点的证据，陈述向法院寻求的救济，并确定了介绍性听证会的日期。

法警办公室发出令状，启动比利时对外诉讼程序。如果被告是欧盟成员国，就遵循 2007 年 11 月 13 日颁布的《1393/2007 号理事会条例（欧盟）》关于成员国在民事或商事案件中提交司法和非司法文件的规定；如果被告不是欧盟成员国，通常依据 1965 年 11 月 15 日颁布的《海牙公约》关于在民事或商事案件中提供涉外性司法和非司法文件的规定。

《司法法典》规定了传票送达和介绍性听证会之间的时间间隔，如果被告非欧盟成员国，该间隔为 8 天至 90 天。这一间隔可以根据法院的决定而缩短。

启动民事诉讼的其他方式包括互斥的应用（contradictory application）和当事人的自愿干涉。

在介绍性听证会上，当事人一般会商定后续程序的时间安排。如果双方不能就时间安排达成协议，法院允许当事人发表意见，而后自行决定。

当案件（非常）直接明了，没有太多辩论余地时，法官可以在介绍性听证会时当即处理或其后的几周内处理。

如果被告没有出庭，法官也可能在某些情况下作出违约判决。

在大多数情况下，只有在当事人交换书面陈述（或概要）后，诉答才能进行，通常会有几轮。各方都将详细陈述其对该案的意见。判决一般在最后一次诉答后 30 日内下达。

rulkin AND PARTNERS
Avocats • Advocaten • Attorneys

Adrien Hanoteau
合伙人，Rulkin and Partners

阿德里安（Adrien）持有布鲁塞尔自由大学（ULB）的法律学位以及荷兰语布鲁塞尔自由大学经济法学位，其中前述学位由其分别在2000年和2004年予以获得。他于2000年起成为布鲁塞尔律师协会组织的成员。

阿德里安擅长公司法，就公司和其他投资工具的设立、兼并和收购（国内和国际案件）、增长型公司的融资和重组业务等问题向客户提供咨询意见。

他还代表信贷机构和私人公司，在公司融资和筹集担保品方面积累了丰富的经验。

他还经常与商事法律打交道，特别是在谈判、起草、履行或终止分销协议方面。

阿德里安代表客户出席法院诉讼程序和仲裁程序，例如股东之间的纠纷案、涉及董事责任的案件、与公司事务相关的临时禁令程序或者商事案件。

一审长达两年的情况并不少见。如果再有上诉，可能会拖至三年或更长。

8. 当事人是否必须向其他当事人和法院披露相关文件?

“证据开示”这一概念在普通法司法体系中被采用，而在比利时法律中并不存在。此外，也没有向对方当事人和法院披露相关文件的一般法律要求。

但是，所有与争端有关的事实证据的相关文件应向对方当事人和法院披露。事实上，各方都承担举证责任（“*actori incumbit probatio*”，拉丁语，意为“由原告承担证明被告人有罪的责任”），并递交其认为适当的辩护意见。

每一方当事人都有诚信义务，这意味着在证据交流中要有一定程度的合作。如果一方当事人有理由相信对方已保有与本案有关的文件，那么可以要求法院命令该对方（或任何第三方）将该文件呈交法院，否则会有罚款。有严格的适用条件。

如果对方或者第三人拒绝向当事人透露有关文件的，当事人可以主张其侵犯辩护权、违反正当程序。

9. 是否存在特权文件或其他规则允许当事人不披露特定文件?

根据《刑法》第 458 条以及《比利时职业行为规则》制定的律师职业保密要求，是比利时法律秩序的基础。

原则上，律师与当事人之间的任何通信，以及律师与律师之间的任何通信，都具有特权（特例除外），因此不能向法院披露。然而道义规则禁止律师发表与特许保密通信相悖的声明。在这种情况下，将由主要律师协会的会长做出决定，特许保密信息是否及在何种程度上可以向法院披露。

人们认为医疗记录和一些其他文件也具有特权，不允许被法院作为证据。这些特权被认为是公共政策，不能被打破。

最后，旨在保护未披露的专有技术和商业信息（贸易秘密）的《2016/943 号欧盟指令》将于 2018 年 6 月 9 日在比利时实施。

10. 当事人在审理之前是否交换书面证据？或是否提供口述证据？对方是否有权盘问证人？

各方当事人都承担举证责任，必须提供充分的证据支持其主张。法院的角色较为被动。因此，各方当事人将所有依据性文件的清单附在其提交的文件上。这些资料已在听证会召开前不久交予对方当事人和法院。

在比利时，口头证据和证人的使用仍然不常见。在大多数情况下，只接受书面证据。只要符合特定手续，书面的事实认定是可行的。但法院有很大的自由裁量权，决定应该给这样的证据多少权重。

《司法法典》没有规定可以对证人进行质证。但是，对方当事人可以要求法院听取其他证人的证词，这些证词可能与最初的证词相矛盾。

11. 关于指定专家证人的规则是怎样的？

当事人可以提出专家证据。法院也可以主动或根据当事人单方面或共同请求指定专家。当事人指定的专家证据和调查结果远不及法院指定的专家证据和调查结果重要。

法院指定的专家证据由《司法法典》组织和规制。该决定必须包括任务范围、专家的身份以及专家被任命的情况的描述。所有官方专家都经国家注册。

法院所指定的专家调查可仅以在其专业范围内得出实际调查结果或者提供技术性意见为目标。法院指定的专家，对法院负责，不得对案件的是非曲直下结论。

专家将会见各方当事人，开展调查，并就调查结果撰写报告草稿，递交当事人。在最终报告发表之前，请各方当事人发表意见。专家的作用是协助法院，但法院不一定参考专家的调查结果或立场。法院也可以决定听取专家的意见，要求进一步调查，向专家提出问题，或指派其他专家。

所有专家必须宣誓并遵守最近颁布的《法院指定专家之行为守则》（2017 年 4 月 25 日皇家法令）。

12. 案件审理前可获得哪些临时救济？

在简易程序的框架内，如果情况紧急，并有必要采取措施以防止即将发生的严重损害或不便，那么可向初审法院院长或商事法院院长提出临时救济。这种临时措施不涉及案情。在绝对紧急的情况下，这样的措施可以应单方的诉讼请求，而不通知被告。在请求的救济措施未获批准时，请求方应证明损害的不可弥补性和紧迫性。

此外，一旦案件已经提交法庭，在涉及证据收集、专家任命和文件交换的各个环节，仍可随时请求临时救济措施。在诉讼过程中，法院为了保护当事人的利益也可采取临时救济，如对未付款发票中无争议部分提出支付要求。

法院也可以临时扣押和保全资产。根据被临时扣押的资产性质，当事人必须事先从扣押法官（初审法院成员）处获得授权才可扣押，或者未获得此类事先授权，但是必须在法院法警的协助下才能扣押。

13. 申请人需要确立些什么才能成功申请此类临时救济？

获得这种救济措施有一些严格的条件。当事人必须能够证明损害的不可弥补性和紧迫性（理解为对申请人造成的风险，或严重的损失或不便），表面上现存的、无可争辩的主观权利受到侵犯，以及申请寻求的救济具有临时性质。

14. 案件审理时可获得哪些救济？

比利时法院可以作出的命令和判决种类，包括临时措施、初步判决、中间判决和最终判决。

法院可以命令对方当事人履行特定的义务（例如付款或交付），或者限制其采取某些行动或行为。罚款可作为执行最初判决的辅助

措施。如果法院命令未被遵守，法院可以根据延迟天数或者违反次数进行罚款。

在侵权法中，如果造成损害的行为没有发生，当事人必须以本来的情形予以替代。法院可以给予损害赔偿，这种赔偿可能是对精神损害和 / 或经济损失的补偿性赔偿，以及附加损害赔偿。比利时法律没有惩罚性或示范性赔偿。法院可能对损害赔偿金加计利息（现行法定利率：2% 或 8%）和补偿费用。

此外，法院可以授权原告采取某些措施，例如在媒体发表声明。

除了《司法法典》规定的情形（例如：同时进行的刑事诉讼、向欧盟法院递交的偏向性问题等），法院没有权力停止或中止诉讼。

15. 执行判决的主要方式有哪些?

一方当事人得到法院判决后，将递送正式通知给另一方当事人，要求债务人履行决定。如果债务人不自觉遵从判决，法院法警将向法院获取判决的正式副本，包括所谓的执行表格，并将此连同付款令一同送达债务人。

强制执行通常是用于恢复金钱损失，但它也可以用于强制履行或者限制一种行为，有时须支付罚金。

根据《司法法典》，可以通过对另一方当事人的资产进行查扣或保全（扣押）来执行国内的判决。最近，一审法院判决的执行可能性有所提升。原则上，上诉程序或异议程序（在缺席判决的情况下）必须在判决送达后一个月内提出，且其并不认可判决的可执行性，此时执行判决的风险由执行方予以承担。在等待上诉法院做出最终决定时，司法托管机制允许债务人向法院法警支付所欠款项，包括利息和费用，以避免相关判决的临时执行。

要区分所扣押财产的种类（动产、不动产和债权）和扣押的性质（预防性扣押和执行判决时的扣押）。《司法法典》对不宜扣押的财产做出了各类规定。当债务人的财产在执行判决时被扣押，它们将被出售，收益归索赔人所有。索赔人本身对被扣押财产无任何权利，只对其出售所得收益有权利。然而，扣押不授予查扣人优先求偿权。

第 22 个问题讨论了比利时承认和执行外国判决的问题。

16. 胜诉方一般是不是会获得诉讼费用补偿? 诉讼费用如何计算?

比利时有关法律成本的问题不适用“赢者通吃”原则。另一方面，比利时民事诉讼的诉讼费用与其他国家相比，较少。

败诉方一般会被要求支付诉讼过程中产生的费用，包括诉讼费用（法庭费、注册税、印花税、法警费、司法专家费、翻译费、查扣费等）和（依照法律限制）对获胜方法律费用的补偿，无论其实际金额有多少。

对胜诉方法律费用的补偿额取决于争议的复杂性和争议所涉金额。例如，对所涉金额在 100,000 欧元至 250,000 欧元之间的纠纷，现行补偿标准为 6,000 欧元。最高补偿额可达 36,000 欧元。

此外，在比利时法院作出的判决必须向公共行政部门报告。目前，应当按照判决所涉金额的 3% 缴纳注册税。行政机关向败诉方收取注册税时，若胜诉方已收受判决所涉金额，应承担连带责任。

17. 对最终判决有哪些上诉途径? 当事人能够以什么理由提起上诉?

如果当事人对证据采信或案情有任何异议，初审法院的多数判决都允许上诉。败诉方可以在收到法警递送的初审判决后一个月内提起上诉。上诉书还必须包含若干强制性条件。

从《集锦法案（五）》（Pot-Pourri V Act，）不久前实施以来，如果判决可上诉，就不能反对缺席判决。因此，没有在初审法院出庭的被告只能提出上诉。对于不得上诉的判决，异议程序（即对作出第一裁决的法院进行复审的诉讼程序）仍然可用。

上诉和异议程序在很大程度上与初审法院的程序相同，即上诉法院在事实和法律上全面审查案件。

在最高法院对上诉法庭的判决提起上诉，仅限于法律问题，并有形式要件的限制。诉讼行为是基于最高法院注册律师对上诉成功机

率的正面判断。如果最高上诉法院撤销判决，案件转至另一个上诉法院，将对案件的是非曲直作出新判决。

18. 是否允许律师和委托人之间存在胜诉酬金或按条件收费的安排?

根据比利时的法律和道德规范，律师收费要公平和适度。比利时律师可自行确定其收费数额和计算方法。在实践中，律师协会要求收费合理、透明，并与案件的难度和利害关系相称。

根据《司法法典》第 446 条，禁止与案件结果相关的按条件收费安排。但是，如获取积极结果时，可以支付额外并合理的胜诉费用。

19. 是否允许第三方资助? 资助人是否可分享胜诉收益?

在比利时，第三方诉讼融资不受任何法律或准则的监管。因此，它没有被明令禁止。第三方出资人和原告可就共享诉讼收益达成协议，但实际操作中还存在一些困难，如客户与律师之间的保密要求如何处理，以及披露第三方出资人身份是否会产生潜在责任。

在现阶段，第三方融资在诉讼中并不常见，但它似乎在国家争端解决以及国际仲裁（仲裁地为比利时）中越来越重要。

起草协议以转让有争议的债权时必须谨慎。事实上，比利时法律允许系争债权的债务人向债权受让方支付转让价款以及全部利息和成本，从而偿还债务。此外，系争债权不能转让给律师、法官、法警、书记员、公证员等。

20. 当事人是否可为其诉讼费用投保?

法律保险产品多种多样，各自的门槛不同。在比利时，大多数强制保险（汽车或火灾保险等）都覆盖了争端引发的法律费用。也有独立的法律保障保险，并可能在未来几年成为标准做法。

21. 诉讼人是否可提起集体诉讼? 如果可以，哪些规则适用于集体诉讼?

多方诉讼的类型多种多样。

集体诉讼（“集体救济诉讼”）是法律指定的原告（“团体代表”）代表某一未知群体提出的诉讼。法院可能对此作出决定，避免后续诉讼，不仅是针对团体代表和被告的，还有针对已加入或还未退出诉讼程序的全体诉讼团成员的。自从 2014 年集体诉讼方案付诸实施以来，所有的集体诉讼都由 Test-Achats（比利时主要的消费者保护组织）发起。集体诉讼只能由政府承认的组织或代表消费者的几个组织发起。集体诉讼必须针对某个企业，必须主张其违反了具体列举的比利时和欧盟法律，且仅与消费者保护有关。要实现集体救济，只能适用这一最近颁布的程序，别无他法。

某些法律允许某些形式的代表诉讼。即一个组织或一群人（例如，反对种族主义或仇外心理的组织、保护环境的组织）为了实现同一目标，超越该组织或该群体中成员的个人利益，为集体利益发起诉讼。

最后，在集体（相关）诉讼中，由不同的索赔人提起的因同一事件或合同引起的若干单独法律诉讼会合并审理。这些诉讼通常由同一律师代理。尽管这些诉讼仍然是个别诉讼，但法院将共同审理。

22. 外国判决通过哪些程序予以承认和执行?

比利时承认或执行外国判决的程序取决于外国判决是由欧盟成员国还是非欧盟成员国作出的。

其他欧盟成员国做出的判决适用于《1215/2012 号欧盟条例》关于民事和商事问题中的司法管辖以及判决的承认和执行的相关规定（《重铸布鲁塞尔规则》）。该规则旨在促进判决信息的流通，并进一步增强公正性。除了个别例外情况，法院的最终判决会在另一个欧盟成员国得到承认、立即执行，无须得到其事先许可。债务人可根据预定理由要求拒绝执行判决，如判决明显违反会员国的公共政策等。

如果一个非欧盟成员国做出国外判决，且比利时没有与判决产生的司法管辖区订立双边或多边协议，那么必须按照《比利时国际私法法典》中的有关规定来承认和执行该项判决。必须向一审法院申请执行和承认外国判决。而执行和承认宣布破产的判决需要诉诸商事法院。在极少数情况下，如果承认与执行外国判决将违反公共政策、被告权利或专属管辖规定，或者造成欺诈或与比利时的判决相悖，那么该判决将被拒绝承认和执行。

23. 另类争议解决的主要形式是什么?

仲裁和调解作为商业纠纷的另类争议解决机制，无论是在国内还是国际事务中都被广泛采用。

(1) 仲裁

仲裁条款经常出现在商业协议之中，允许当事人在较短的时间内，以当事人选择的语言，并（大部分时间）以保密的方式对案件作出最后裁决。仲裁只能在各方当事人的同意下进行。任何现有合同都可订立临时仲裁条款。一旦发生争议，当事人也可以订立具体的仲裁协议。

除了家庭事务、劳资纠纷和消费者纠纷外，大多数法律领域都有仲裁机制。最近的判例法确认，有关终止经销协议的问题也可提交仲裁。

当事人可以将争议提交仲裁庭，仲裁庭由一名、三名或多名仲裁员组成。根据当事人的请求和声明，仲裁裁决对当事人具有约束力。除非当事人另有约定，否则没有上诉权。但是，有一种可能性，那就是在有限的理由下，寻求通过司法手段撤销仲裁裁决。比利时遵守 1958 年的《关于承认和执行外国仲裁裁决的纽约公约》，比利时法院将承认并执行外国仲裁裁决。

如果双方同意通过仲裁解决他们的纠纷，可选择进行临时仲裁（当事人或仲裁员自行确定适用的诉讼规则）或机构仲裁（例如：比利时仲裁和调解中心、国际商会仲裁院，当事人须接受该仲裁机构的规定）。比利时已经根据《联合国国际贸易法委员会示范法》实施了一部关于仲裁的专门法律，最近有少许修订。

(2) 调解

调解可以由法院（司法调解）或当事人（自愿调解）提出。在任何情况下，调解程序须得到当事人的一致同意。在调解过程中起草的所有文件以及交换的所有文件都应保密。如果案件达成和解协议，并由当事人和注册调解员签署，那么该和解协议可能被一审法院予以确认。确认该协议的命令就构成了一个可执行的判决。

(3) 协调

在协调过程中，协调员是一个中立的第三方，在提出解决方案之前会听取双方当事人的意见。当事人不一定得使用该解决方案。协调程序通常在法院诉讼的范围内进行。在这种情况下，可以由法官主持。协调程序总是自愿的。

(4) 监察专员

在银行和金融、电信等多个行业也有特设监察专员。监察专员的任务是分析投诉个案，并提出解决争端的意见。

24. 在您所在的司法管辖区有哪些主要的另类争议解决机构?

比利时主要的仲裁机构是比利时调解和仲裁中心，为国内和国际商事争议的解决提供多种方案（仲裁、调解等）。依据国际商会仲裁院的规则，布鲁塞尔经常被设为专案仲裁或机构仲裁的仲裁地。

当事人通常选择的调解组织是 Mediation（比利时仲裁和调解中心的前身）以及比利时仲裁和调解中心。在律师协会组织的协助下，商事法院最近也在鼓励调解，以减少司法积压。

25. 在诉讼过程中诉讼人是否必须尝试另类争议解决办法?

审判开始时，法官经常鼓励当事人寻求解决纠纷的替代性方案，尤其是在处理某些类型的纠纷（例如股东纠纷）时。除了少数例外，

在法院审理过程中，在当事人或法院的提议下，仍有可能采用另类纠纷解决机制。

26. 当前是否有在审议中的改革争议解决法律法规的建议？

一些法律规定了民事（或刑事）纠纷的司法解决方案和另类争议解决方案，为改革该法律，会定期提议和立案。事实上，五个法案相继提出（称为“《集锦法案》”，“Pot-Pourri Acts”），对《比利时司法法典》的若干章节最近也进行了修订，以期改进和加快民事诉讼程序，包括但不限于期待已久的比利时司法系统现代化和计算机化。这些倡议（包括提交文件的电子化、破产程序中的债权声明、有关动产证券的一般数据库等）目前正在实施中。

联邦政府宣布可能出台新的调解法，以进一步促进调解，除此之外，当前政府还有意推动所谓的“合作协商”，作为解决争端的另一种可行方法。该机制是一种结构化、自愿和保密的谈判方法，在谈判过程中，经过专门培训的律师与客户密切合作，以期解决争端。

最近，比利时破产法也得到修订，并将于2018 年 5 月 1 日生效。比利时破产法的改革将推动关键经济立法（包括《比利时公司法典》，见下文）的合理化。新的破产规则用“企业”标准替代“商人”标准，应用范围大幅扩展，让更多的中小企业在财务困难情况下能够获得破产法律制度提供的保护。此外，所有破产程序都将完全数字化。也鼓励债务人和债权人之间的庭外和解。这些庭外和解协议可以由商事法院确认。此外，为了支持和协助企业，债务人有权要求任命一名公司调解人。有关董事责任的条文也已澄清。

最后，比利时部长理事会通过了全新的《比利时公司法案》草案。该提案预计于 2018 年由议会采用。这个新的法典旨在对比利时公司法进行现代化改造，使其更加简单、灵活、连贯，使比利时成为一个更具竞争力和吸引力的公司注册地。它也会对公司纠纷的解决以及商事法院的组织架构产生直接影响。例如，新法典应确认成立地理论（incorporation theory），而不是本座理论（seat theory），并延伸出有限责任公司股东的潜在责任问题。

27. 关于您所在司法管辖区或者亚洲地区的争议解决，是否有任何特殊情况需加以强调？

比利时有三种官方语言：荷兰语、法语和德语。它们在法院程序中的使用由 1935 年 6 月 15 日颁布的《比利时法案》规定。该法案规定了传票中使用的语言、诉讼过程中使用的语言、诉讼过程中改变语言的请求、不采用诉讼语言起草文件等。

英国脱欧投票的后果将波及整个法律系统，包括比利时，但同时也出现新的机遇。比利时联邦政府最近宣布拟创建一个新的“布鲁塞尔国际商事法庭”，专门处理国际商务纠纷。其新颖之处在于所有的诉讼程序和判决将采用英语。布鲁塞尔国际商事法庭将是“一站式”的，最终判决不得上诉。还有一些地方暂且不明确，如布鲁塞尔国际商事法庭的诉讼程序与国际仲裁程序的主要区别是什么？草案尚处于初拟阶段，还需经过整个立法过程。

在比利时争端解决的相关法律中，国家对执行强制判决的豁免仍然是一个热门话题。最近修订的《比利时司法法典》规定，若判决涉及比利时境内的外国的资产，可豁免执行，不受债权人的强制执行程序约束。法国采取了类似的法规。然而，这一规定的例外情况是，如果满足（非常）严格的条件：一方当事人若想扣押另一个国家的资产，需要获得扣押法官的授权，但是扣押法官只有在以下情形满足时才会出具授权：该境外国家“明确”、“具体”地同意扣押资产；该境外国家明确将这些资产归为债权实现方式；并且这些资产在比利时境内，且属于经济或商务活动纠纷。比利时宪法法院在 2017 年 4 月 27 日的判决中确认了这项法律规定的有效性，从而严重阻碍了针对境外国家的国际判决和仲裁裁决的执行。

作者资料：

Guy Rulkin
合伙人，**Rulkin and Partners**
电子邮箱：GRulkin@rulkin.be

Adrien Hanoteau
合伙人，**Rulkin and Partners**
电子邮箱：AHanoteau@rulkin.be

网址：www.rulkin.be
地址：Boulevard Louis Schmidt 87/4,
B-1040 Brussels
电话：+32 (0)2 737 05 50
传真：+32 (0)2 737 05 59

Jurisdiction: Bulgaria
Firm: Djingov, Gouginski, Kyutchukov & Velichkov
Authors: Angel Ganev, Simeon Simeonov and Tsvetelina Bayraktarova

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

Bulgaria has a three-tier court structure, which is made up of regional and district courts, courts of appeal and the Supreme Court of Cassation.

The regional courts always act as first instance courts. Their decisions are reviewed by the district courts as second instance courts. The judgments of district courts, when they act as a first instance, are subject to appeal before the courts of appeal. Courts of appeal always act as second instance courts.

The Supreme Court of Cassation adjudicates on the second-instance judgments of either district courts, or courts of appeal. Bulgarian civil law makes no provision for specialist courts.

2. What is the role of the judge in civil proceedings?

Civil proceedings in Bulgaria are conducted in accordance with the ex officio principle. It means that the courts perform ex officio all procedural steps necessary for the progress and resolution of a case. The courts supervise the admissibility and due performance of all actions of the parties.

Besides the broad case management powers, the judge has the ultimate power and authority to decide on the merits of the case, solely based on its own judgment.

In addition, judges have powers to impose sanctions in order to guarantee timely and effective proceedings. They may impose fines on the parties to the proceedings if they disobey or fail to comply with the orders of the court. The judge may impose fines on witnesses and expert witnesses, should they fail to appear, or testify, or give an expert opinion without a reasonable excuse. Any third party who does not participate in the proceedings may also be fined if it refuses to present a document or other evidence which has been established to be in the possession of the said party, for inspection by the court.

Furthermore, the presiding judge has the power to expel any person (including any of the parties), who breaches the orders during the hearings.

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

As a principle, court hearings are open to the public. Cases are examined orally in open public sessions, unless special law provides for examination in a closed session as a matter of exception (e.g. insolvency cases) or the presiding judge decides so (e.g. if the subject matter of the case concerns the private life of the parties or any other facts that relate to the right to privacy).

4. 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 Bulgarian qualified lawyers have the right to appear in court and conduct proceedings on behalf of their clients. Normally, legal representation is conducted either by in-house lawyers or attorneys, who took the bar exam and are registered with the respective bar association, the latter organized on a territorial principle.

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

Limitation periods under Bulgarian law are mostly considered as a substantive law issue (yet there is a continuing debate on that matter).

The general term of limitation under Bulgarian law is 5 years, unless it is otherwise provided by law. Some claims are precluded within a 3-year period. For monetary obligations, the prescription period starts as of the date on which the obligation became due and payable. After this date the creditor has the (substantive) right to opt for forcible execution of its rights by lodging a claim. The prescription is also subject to stopping or suspension (the latter refers to the cases where a new prescription shall start to run as from the moment of suspension), under detailed conditions set forth in the applicable law.

In addition, exercising some procedural rights within an already commenced civil lawsuit is also subject to preclusion. However, the latter is a procedural law matter as opposed to the prescription described above. The Bulgarian applicable procedural law – the Code on Civil Procedure ("**CPC**") provides for different preclusion periods, often determined not as a specified period of time, but rather as a concrete stage until which the parties are entitled to exercise certain procedural rights.

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

Bulgarian procedural law does not provide for any formalities or pre-action procedures with which the parties must comply before commencing proceedings.

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

The CPC sets the main stages in civil proceedings in Bulgaria as follows:

(a) submission of a statement of claim before the respective court;

(b) service of the statement of claim to the respondent. The latter is entitled to submit a written response to the statement of claim within 1 month as from the date of service, and the response should be served back to the plaintiff;

(c) examination by the court of the statement of claim lodged and the other documents as to their conformity with the formal requirements of the CPC and the admissibility of the action(s) brought;

(d) rendering a ruling by the court ascertaining all preliminary issues before bringing the case to trial (e.g. the subject matter of the case, the parties, the evidence, whom the burden of proof lies with, etc.).

The court hears the case with the participation of the parties (the presence of other attendees is also possible, subject to the respective provisions of the CPC). The CPC does not provide for a specific timeframe for the development of the case. It does, however, set out the principle that the court must examine cases and render its decisions within a reasonable period of time.

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

The Bulgarian procedural law does not entertain the concept of disclosure as known under the Anglo Saxon legal system.

Each party is entitled to ask the court to order the other party to present a specific document, which is of relevance for the proceedings and is allegedly in possession of such party. Should the latter fail to do so, the court may draw adverse inference from the party's failure to present the document and may assume, to the latter's detriment, that the respective facts have been proved.

In addition, each party may request the court to oblige any third party, which is not a party to

the proceedings, to present a document which is considered to be of relevance to the case. Should the third party fail to deliver the document so demanded without any sound reason, the latter could be fined by the court and would be liable for damages to the party on whose request the disclosure has been ordered.

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

The privilege and confidentiality of any attorneys' documents, equipment, or correspondence with clients, are guaranteed by Bulgarian law. This principle equally applies to all forms of dispute resolution, acknowledged in Bulgaria. In addition, all facts, or recordings related to attorney – client relations are also privileged and confidential, i.e. they could not be used as evidence in the proceedings and parties may refuse to disclose them.

10. 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 are required to exchange all written evidence they have together with the statement of claim and the statement of response, respectively, so as to substantiate their factual statements and allegations. After the first court hearing and prior to the conclusion of the trial, the parties may:

(a) allege any new facts and circumstances and cite and present any new evidence solely if the parties were unable to learn of such circumstances and to cite and present such evidence through the course of exchange of initial documents; or

(b) allege any newly established facts and circumstances, which are relevant to the case, and cite and present evidence of any such circumstances.

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

As a basic rule, an expert is appointed either upon party's motion or ex officio by the court, where special knowledge in the field of science, art, skilled crafts and other is necessary for clarification of certain questions relevant to the subject matter of the case.

The court may appoint either single or multiple expert opinion (normally by three experts), where this is necessary considering the circumstances of the case and the expert opinion needed.

Pursuant to the CPC, appointment or participation as an expert is inadmissible for any person who:

(a) is a party to the case or, together with any of the parties to the case, has entered into the contested legal relationship or into a legal relationship related thereto;

(b) is a spouse of or a lineal relative up to any degree of consanguinity, or a collateral relative up to the fourth degree of consanguinity, or an affine up to the third degree of affinity, to any of the parties or to any representative of any such party;

(c) is a de facto cohabitee with any party to the case or with any representative of any such party;

(d) has been a representative or an attorney-in-fact, as the case may be, of any party to the case;

(e) has taken part in adjudication in the case in a court of another instance or who has been a witness or an expert witness in the case;

(f) in respect of whom other circumstances exist which give rise to reasonable doubts as to the impartiality of the said person.

In other words, an expert must recuse her or himself in any proceeding in which impartiality might reasonably be questioned. Furthermore, if any of the abovementioned circumstances

exists, it is a reason for any of the parties, or the judge ex officio, to challenge the appointment of the said expert and to ask for his or her replacement.

12. What interim remedies are available before trial?

Under the CPC, interim measures of protection (e.g. freezing of bank accounts, detrain on shares and company participations, attachment of real estates of debtor etc.) may be imposed as conservatory measures for the purpose of securing the enforcement of a court judgment, which is expected to be rendered, or for preserving the status quo, i.e. the factual or legal situation so as to safeguard rights, the recognition of which is sought from the competent court.

The earliest moment at which a Bulgarian court may be requested to impose a conservatory measure is the time prior to filing the statement of claim.

In terms of procedure, the applicant submits an application to the court, which specifies the requested provisional measure, the relief to be sought under the claim on the merits and the value of the claim. The court should resolve on the application at a closed session, held on the day on which the application was submitted. If the court rejects the request, its ruling is subject to appeal before the higher court, whose decision would be final. If the request is honored and the measure is imposed, the defendant also has the right to appeal it and to ask for its revocation by the competent higher court, whose decision is final.

13. What does an applicant need to establish in order to succeed in such interim applications?

The court would grant the request for a conservatory measure only if there is sufficient written evidence, presented by the plaintiff in support of his (potential) claim. The evidence must convince the court that there is a substantial possibility that the requesting party will succeed on the merits. Moreover, the court may grant a request for the imposition of a conservatory measure against a monetary deposit made by the applicant. The court could order the applicant to make a deposit, even though the applicant may have presented sufficient written evidence.

14. What remedies are available at trial?

Regarding the type of claim filed, the court may render the following types of judgments:

(a) judgments, which officially proclaim the existence, or non-existence, of a certain legal relationship, a right, a fact, etc.;

(b) judgments directly ordering the performance of a certain civil obligation (e.g. paying an amount of money, fulfilment of contractual obligation, etc.). Based on such judgment, the plaintiff would be able to apply for issuing of a writ of execution and to commence forcible execution proceedings thereon; and

(c) judgments by which the court grants relief by intervening directly into the parties' relation, by bringing in a certain legal change demanded by the plaintiff.

Depending on the nature of the proceedings, the following court acts are possible:

(a) judgments on the merits of the case;

(b) rulings – rulings are issued to set procedural matters, accompanying the final decision of the court; and

(c) orders – with this decision the court normally determines some points, or directs some steps in the proceedings, not included in the judgment.

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

Enforcement of domestic judgments is carried out by virtue of a writ of execution. A writ of execution is issued on the basis of a final court judgment, which has entered into force upon

the request of the party that benefits from the judgment. Based on the writ of execution, which serves as an execution title, the creditor commences forcible execution proceedings, carried out either by a private or a state bailiff.

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

Commencing civil proceedings in Bulgaria involves certain costs besides legal fees. These costs normally include the state fee for initiation of the proceedings, a state fee for appealing (as the case may be), expenses for expert opinions and witnesses, etc.

As a basic principle, the state fee for initiation of the proceedings, amounting to 4% of the claimed sum, shall be prepaid by the plaintiff (evidence for such payment shall be attached to the statement of claim). Further, during the proceedings each party makes an advance deposit to the court for the costs incurred regarding the steps which the said party has moved for.

All state fees and reasonable legal fees, paid in the course of the proceedings, of the party in whose favor the court adjudges shall be finally borne by the party that has lost the case.

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

The CPC provides for an extensive list of rules concerning both the right and the grounds for appeal and the appeal procedure.

All judgments rendered by first instance courts are subject to appeal before the respective appellate courts. The appellate court is empowered to review the contested judgment both regarding substantive and procedural law issues.

The Bulgarian law system also recognizes the cassation appeal of appellate judgments. Cassation appeal can be lodged before the Supreme Court of Cassation. The grounds for cassation appeal are as follows:

(a) the judgment is null and void;

(b) the judgment is inadmissible; or

(c) the judgment is erroneous by reason of violation of the substantive law, a material breach of the rules of court procedure, or ill-founded.

Only judgments concerning claims exceeding certain monetary amount are allowed for referral to the Supreme Court of Cassation. For civil claims the threshold is no less than BGN 5,000 (approx. EUR 2,500) and for commercial claims the threshold is no less than BGN 20,000, (approx. EUR 10,000).

However, a referral to the Supreme Court of Cassation follows a stringent screening process which is provided by the CPC and which is carried by the Supreme Court of Cassation prior to the review of the cassation appeal itself. Thus, the Supreme Court of Cassation shall leave the cassation appeal, only if the appealed decision:

(a) has been adjudicated upon in controversy with the mandatory case law of the Supreme Court of Cassation, the Constitutional Court or the EU Court of Justice;

(b) is of importance for the accurate application and the development of law.

In addition, the Supreme Court shall leave the cassation appeal if the respective decision is likely to be null and void, or inadmissible, as well as in case of obvious erroneousness of the decision.

18. Are contingency or conditional fee arrangements permitted between lawyers and clients?

A contingency fee/conditional fee arrangement is permissible under Bulgarian civil procedure law, although not explicitly regulated. However, such type of fee could not be awarded with the court decision (as the regular lawyer's fee), since it would be due and payable only after the decision enters into force.

Pursuant to the Bulgarian Bar Act, contingency or conditional fee arrangements are not permitted in criminal cases or civil cases where a non-material interest is involved.

19. Is third-party funding permitted? Are funders allowed to share in the proceeds awarded?

Third-party funding is permitted under Bulgarian Civil Procedure Law. However, third party funders are not officially allowed to share in the proceeds awarded, nor they obtain any official status in the proceedings. Any proceeds and costs awarded are allocated solely to the winning party as acknowledged in the judgment, in accordance with the general rules for allocation of the legal costs.

20. May parties obtain insurance to cover their legal costs?

The option for legal costs insurance is not regulated by the Bulgarian Civil Procedure Law. However, the insurance market in Bulgaria does offer such insurance products, although it is not commonly used in practice.

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

A class action may be brought on behalf of persons who are harmed by the same infringement where, according to the nature of the infringement, the circle of the said persons cannot be defined precisely but is identifiable.

Class action could be launched in two cases:

(a) an action for non-monetary relief; and

(b) class actions for mass tort.

In the first case, the class seeks only declarative judgment on the ground whereof each member is entitled to an individual proceeding. The other option given is for a claim in damages for all members of the group in a common trial.

The class action lawsuit may be initiated by one or several persons having suffered damages from a violation or by an organization for protection of the harmed persons.

For initiation of a class action the following prerequisites shall be included in the statement of claim (in order for the class action to be certified):

(i) adequate way of notice suggested by the class representative, which may be debated and changed by the court;

(ii) all common questions of law and fact that are important for specifying the harmed class;

(iii) evidence for the capability of the representative plaintiff(s) for protection of the damaged interest and in carrying out the class action and meeting all trial expenses;

The court shall, apart from the provided evidence, examine ex officio the eligibility of the representative, including their financial stability. The adequacy of representation is a prerequisite for certification of the class action.

Following the consideration of these issues, the court renders resolution to announce a proper way of notice (which may differ from that offered by the plaintiff) and adequate deadline for all concerned persons to file claims or to withdraw from the case.

In the next stage, in a closed court session the participation of other persons willing to be parties to the case shall be debated and the opt-out list of the damaged who do not want to be engaged by the trial shall be issued.

The decision rendered in a class action is binding for the participants in the proceeding. Moreover, the decision is also binding for those persons who did not explicitly withdrew from the case in the given term before the start of the trial, which characterizes the class action as an opt-out type of procedure. When the judgment is in favor of the class, those members of the class who opted out are allowed to take advantage of the decision.

The proper payment of the compensation, as awarded by the class action judgment, could be

secured through specific measures provided for by the CPC, such as meeting and committee of the class and opportunity for the court to control the bank accounts and process of payment.

The court may rule payment of the compensation in a certain bank account in the name of one of the plaintiffs or in a bank account at the disposal of all plaintiffs or of all members of the class. After the judgment is rendered, the court may compel the plaintiffs to transfer the compensation in a bank account at the common disposal of all plaintiffs. The court may also call a meeting of the class which will assign a committee supervising the compensation distribution.

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

Different rules for the enforcement of foreign court judgments apply depending on whether the judgment was issued in an EU Member State, or outside the EU.

With respect to judgments issued in an EU Member State, enforcement is governed by the rules of *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)*. A judgment rendered in an EU country shall be recognized in Bulgaria without the need of any special procedure.

With respect to judgments issued outside the EU, enforcement is governed by the Private International Law Code as well as multilateral and a number of bilateral treaties, which Bulgaria is a party to. In general, these judgments are subject to recognition before their enforcement is declared. However, under no circumstances may a foreign judgment be reviewed as to its substance.

23. What are the main forms of alternative dispute resolution?

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

Arbitration is a well-established and widely used method of dispute resolution. Arbitration may be institutional or ad hoc, and in either case it takes place on the basis of an explicit arbitration agreement/clause, concluded between the parties. Where an arbitration agreement exists, the courts must relinquish jurisdiction. Once rendered, the arbitration award is final and has the same effect as a court judgment.

As a method of dispute resolution, mediation is a voluntary and confidential procedure for out-of-court resolution of either legal or non-legal disputes, whereby a third party – mediator, assists the parties in reaching a settlement agreement. Compared to arbitration, mediation is still rarely used in Bulgaria, despite its popularization in the course of last couple of years.

Besides those two forms for alternative adjudication of disputes, the Ombudsman in Bulgaria is empowered to examine complaints regarding violation of citizens' rights and freedoms by the state and municipal authorities. That said, it cannot be recognized as a classical instrument for resolution of civil disputes within the meaning given by civil law.

Tribunals and special (ad hoc) courts are not allowed in any form under Bulgarian law and they are not permitted by the Constitution.

24. Which are the main alternative dispute resolution organizations in your jurisdiction?

The Court of Arbitration with the Bulgarian Chamber of Commerce and Industry is usually considered the major alternative resolution institution in Bulgaria. Other important institutions are the Arbitration Court with the Bulgarian Industrial Association, the National Institute for Reconciliation and Arbitration in the case of collective labor disputes and the

Court of Arbitration with the Confederation of Employers and Industrialists in Bulgaria (KRIB).

The major mediation institutions are the Mediation Centre with the Arbitration Court at the BCCI and the Institute for Dispute Resolution with the National Association of Mediators.

25. Are litigants required to attempt alternative dispute resolution in the course of litigation?

While the litigants are not required to attempt alternative dispute resolution, pursuant to the CPC, the court has the formal obligation to invite the parties to resolve the case through a settlement agreement. The court is obliged to include the formal invitation for the voluntary settlement of the dispute in the ruling ascertaining all preliminary issues before bringing the case to trial.

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

The Bulgarian Parliament has recently adopted important amendments to the CPC concerning fundamental issues related to the procedures for service of court documents, filing of appeal before the Supreme Court of Cassation (the "**SCC**") and enforcement. These amendments were promulgated on 27th October 2017 and came into force on 30th October 2017.

(a) Service of court documents

The CPC provides for a procedure under which court documents which should be served to a defendant are considered duly served although the defendant was not in fact found at its address. The application of this procedure gave rise to conflicting case law. The newly introduced amendments to the CPC specify the exact conditions which should be met in order for this special service procedure to be applied, namely: the defendant cannot be found at its address for more than a month, although (a) the server visited the address at least three times allowing for at least one week to pass between each visit and (b) at least one of the visits was made on a non-business day.

(b) Cassation appeal

Bulgarian law provides for explicit grounds for allowing appeal of second instance decisions before the SCC. The new amendments to the CPC introduce new grounds for allowing such appeal, namely: (a) the appealed decision is inconsistent with the case law of the Bulgarian Constitutional Court or the Court of Justice of the European Union; and (b) the appealed decision is possibly invalid or inadmissible or obviously erroneous.

The amended CPC now also provides that the decisions of the SCC do not constitute mandatory case law. The motives behind this amendment are not clear, since inconsistency between second instance decisions and the case law of the SCC remains grounds for cassation appeal even though the decisions of the SCC are not 'mandatory'. Thus, the case law of the SCC will continue to influence the future practice of lower courts.

(c) Enforcement Procedure

Some of the newly introduced amendments to the CPC are aimed at reducing the overall sum of the enforcement costs which may be generated in the enforcement proceedings. The amended CPC provides for certain limits of the enforcement costs which could be borne by the debtor. In addition, the recent amendments contain the explicit requirement that any interim measures (e.g. attachments, distraints) which the bailiff may impose in the enforcement proceedings should be proportionate to the amount of the debtor's obligation.

Under the CPC, when the creditor decides to foreclose on assets of the debtor, the bailiff is competent to determine the price of the assets to be sold and the debtor is not entitled to appeal

before courts as to the amount determined by the bailiff. The amended CPC, however, provides that when the debtor is not satisfied with the price of the asset as determined by the bailiff, the debtor may request that an expert witness be appointed for the purpose of determining the asset's value.

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

Amendments in the CPC and in the Law on International Commercial Arbitration (the "**LICA**") from January 2017 introduced fundamental changes related to the scope of non-arbitrable disputes, grounds for setting aside domestic arbitral awards as well as the criteria for establishing tacit prorogation of arbitral jurisdiction. The special rules created by virtue of these amendments form some specific features of the arbitration proceedings in Bulgaria.

(a) Non-arbitrable Disputes

Under the 2017 CPC amendment, disputes in which one party is a consumer were added to the list of non-arbitrable disputes, which means that arbitration clauses in consumer contracts are null and void. The amended CPC provides that all arbitration proceedings with respect to non-arbitrable disputes pending at the time the amendment enters into force must be terminated.

(b) Grounds for Setting Aside Arbitral Awards

(i) Non-arbitrability

The 2017 LICA amendment provides that arbitral awards rendered with respect to non-arbitrable disputes are null and void. Prior to the amendment, arbitral awards rendered in disputes that were not arbitral were prima facie valid, but could be challenged by an interested party before the SCC. By virtue of the 2017 amendment of the LICA, an interested party may plead the nullity of an arbitral award rendered in a non-arbitrable dispute without challenging the award.

(ii) Public Policy

Under the 2017 amendment of the LICA, domestic arbitral awards can no longer be challenged on the grounds that they violate public policy. The legislature's reasons for this amendment are unclear. Previously, awards were often challenged for breaches of due process under the 'violation of public policy' ground. It should be noted that violations of public policy may still be relied upon to challenge international awards under the New York Convention.

(c) Tacit Prorogation

Previously an arbitration agreement was deemed concluded when the respondent participated in the arbitral proceedings without challenging the tribunal's jurisdiction. This gave rise to inconsistent case law as to what qualifies for 'participation' in the proceedings. The 2017 amendment of the LICA clarifies that filing written objections, submitting evidence, filing a counterclaim or attending the arbitration hearing without challenging the competence of the arbitral tribunal constitutes participation that establishes the arbitral tribunal's jurisdiction. Thus, the mere failure of a respondent to object to the jurisdiction of an arbitral tribunal when such respondent was duly notified about the arbitration proceedings is not sufficient to confer jurisdiction on the tribunal.

About the Authors:

Angel Ganev

Partner, Djingov, Gouginski, Kyutchukov & Velichkov

E: angel.ganev@dgkv.com

Simeon Simeonov

Senior Associate, Djingov, Gouginski, Kyutchukov & Velichkov

E: simeon.simeonov@dgkv.com

Tsvetelina Bayraktarova

Associate, Djingov, Gouginski, Kyutchukov & Velichko

E: tsvetelina.bayraktarova@dgkv.com

W: www.dgkv.com

A: 10 Tsar Osvoboditel Blvd., fl. 3, 1000 Sofia, Bulgaria

T: +359 (2) 932 1100

F: +359 (2) 980 3586

司法管辖区：保加利亚
律所：Djingov, Gouginski, Kyutchukov & Velichkov
作者：Angel Ganev, Simeon Simeonov 和 Tsvetelina Bayraktarova

1. 在民事诉讼方面，法院系统的结构是怎样的？

保加利亚的法院结构是三层的，包括地区和大区法院、上诉法院和最高上诉法院。

地区法院通常担任一审法院。它们的裁判需经作为二审法院的大区法院复核。当大区法院作为一审法院时，它的判决可被上诉至上诉法院。上诉法院通常是二审法院。

最高上诉法院可以对大区法院或上诉法院的二审判决进行裁判。保加利亚的民法没有做出关于专门法院的规定。

2. 法官在民事诉讼中的角色是什么？

保加利亚的民事诉讼要依据职权原则进行。这意味着，法院当然地应该履行对推动案件进程及裁决所必要的一切程序步骤。法院负责监督各方采取的所有行动的可采性和履行适当性。

除了广泛的案件管理权力之外，法官还有独立基于自己的判断审判案件的是非曲直的最终权力和权威。

此外，法官还有权力实施制裁以保证诉讼的及时性和有效性。如果诉讼当事人违背或未能遵守法院指令，法官可对他们处以罚款。如果证人和专家证人没有出席、作证或者出具一份缺乏合理解释的专家意见，法官可以对他们处以罚款。任何没有参与诉讼但拒绝呈递已确认其拥有的文件或其他证据供法院检验的第三方，也有可能被罚款。

另外，审判长有权力将在庭审期间违背命令的任何人（包括任何当事人）驱逐出庭。

3. 庭审是否向公众开放？公众是否能够查阅法庭文件？

原则上，庭审是对公众开放的。公开庭审的案件采取口头审理的形式，除非有特别法规定在非公开的环境下开庭审理（例如破产案件）的例外事项，或者审判长决定如此（例如，在案件标的涉及当事人的私生活或任何其他与隐私权有关的事情）。

4. 所有律师均有权代表其委托人出庭并参加诉讼吗？如果不是，律师职业的结构是怎样的？

保加利亚所有已取得资格的律师都有权利出庭，代表他们的客户进行诉讼。正常情况下，法律代理人可以由内部律师担任，也可以由已通过律师资格考试并在各律师协会注册的律师担任，律师协会原则上按地域进行组织。

5. 提起民事请求的时效期为多久？

保加利亚法律中的时效期间大都被认为是实体法问题（然而，关于该问题还在持续争论）。

除非法律另有规定，保加利亚法律中通常的时效期间是 5 年。有些诉讼将在 3 年内被排除。对于金钱债务，诉讼时效期自债务到期应还之日开始。该日之后，债权人有（实质性）权利选择通过提出索赔来有力地行使其权利。根据可适用的法律的具体规定，诉讼时效也可能被终止或中断（后者指的是新诉讼时效将从中断之时重新算起）。

此外，在已经开始的民事诉讼中，也可能会排除对某些程序权利的行使。不过，该等排除是程序法问题，而不是关于上述诉讼时效的问题。保加利亚适用的程序法——《民事诉讼法典》（“CPC”）规定了不同的排除期间，通常不会确定为具体的时间期限，而是被确

定为当事人有权利行使某些程序权利的具体阶段。

6. 有哪些诉前程序是当事人在开始诉讼之前必须遵守的?

保加利亚的程序法没有规定当事人在开始诉讼之前必须遵守的任何手续或诉前程序。

7. 案件进入审理之前要经过哪些典型的民事程序? 有什么样的时间表?

CPC 规定保加利亚民事诉讼的主要阶段如下：

(a) 向法院提交起诉状；

(b) 把起诉状送达被告。被告有权利在起诉状被送达之日起的 1 个月内提交一份书面答辩状，答辩状应被送达原告；

(c) 法院审查提交的起诉状和其他文件是否符合 CPC 的形式要求及所提起诉讼是否具有可采性；

(d) 法院在审判案件之前作出裁决，确定所有基本问题（例如案件标的、当事人、证据、谁承担举证责任等）。

法院在当事人在场的情况下审理案件（根据 CPC 的各项规定，也可能有其他参加人在场）。 CPC 没有规定案件进展的具体时间框架。不过，它规定了一个原则，要求法院必须在一个合理的时间期限内审理案件并作出判决。

8. 当事人是否必须向其他当事人和法院披露相关文件?

保加利亚程序法没有英美法系下的证据开示概念。

每一个当事人都有权利要求法院命令其他当事人呈递与诉讼有关并且据称由该当事人拥有的特定文件。若后者未能做到，法院可以从该当事人未能呈递文件的这一行为做出不利于该方的反向推断，推定事实已得到证明。

此外，每一个当事人都可以请求法院责令非诉讼当事人的任何第三方呈递被认为与诉讼有关的文件。若第三方在没有任何合理理由的情况下未能呈递文件，则可能会被法院处罚，要对请求其披露文件的当事人所遭受的损失负责。

9. 是否有关于特权文件的规则或允许当事人不披露特定文件的任何其他规则?

任何辩护律师的文件、设备或与客户之间的通讯的特权和机密性，都会得到保加利亚法律的保障。该原则同样适用于在保加利亚承认的任何形式的争议解决。另外，与律师 - 客户关系有关的所有事实或记录，也是享有特权和机密的，亦即它们不可能被作为诉讼证据，当事人可以拒绝披露它们。

10. 当事人在审理之前是否交换书面证据? 或是否提供口述证据? 对方是否有权盘问证人?

双方当事人须互换各自拥有的所有书面证据及起诉状和答辩状，以证实他们的事实陈述和指控。在一审结束尚未作出审判之前，当事人可以：

(a) 单独提出任何新事实和情况，并引用和提交任何新证据，前提是该当事人在交换最初的文件过程中未能知晓这种新情况和引用及提交该等新证据；或者

(b) 提出任何新确定的与案件有关的事实和情况，并引用和提交关于任何该等情况的证据。

11. 关于专家任命的规则是怎样的? 是否有专家行为准则?

作为一项基本原则，如果科学、艺术、熟练技艺和其他领域的专业知识是澄清与案件标的有关的特定问题所必需的，法院可根据当事人的提议或依职权任命专家。

鉴于案件情况和所需的专家意见，如有必要，法院可指定一项或多项专家意见（通常会由三名专家出具）。

根据 CPC，不得任命下列任何人员作为专家或让其以专家身份出庭：

(a) 身为案件的当事人，或者与案件当事人形成有争议的法律关系或与之有关的法律关系；

(b) 是任何当事人或其代表的配偶或任何顺位的直系亲属，或直到第四顺位血亲的旁系亲属，或者直到第三顺位的姻亲；

(c) 是案件任何当事人或其代表的事实同居者；

(d) 一直担任案件任何当事人的代表或实际代理人，视情况而定；

(e) 在进行另一审级法院中参与对案件的判决，或者是案件的证人或专家证人；

(f) 存在会导致合理怀疑一个人的公正性的其他情况。

换言之，在公正性可能会受到合理怀疑的任何诉讼中，专家必须请求撤换其本人。另外，若上述情况存在，则是任何当事人或法官依职权质疑对上述专家的任命，并要求替换他或她的理由。

12. 案件审理前可获得哪些临时救济?

根据 CPC，为了执行预期的法院判决或为了保持现状，即从管辖法庭获得认可的与担保权利有关的事实或法律地位，可实施临时保护措施（例如，冻结银行账户，暂停股权和公司的参与权，扣押债务人的房地产等）作为保全措施。

可以请求保加利亚法院实施保全措施的最早时刻是在递交起诉状之前。

关于程序方面，申请人向法院递交申请，指明所请求的临时措施，索赔寻求的救济及索赔的价值。法院应在非公开审理的情况下于申请递交之日对其进行判定。若法院驳回请求，其裁决可被上诉至更高一级的法院，后者的裁决将是终局的。若请求被允许、措施得以实施，被告也有权利上诉，请求主管的上级法院将其撤销，该上级法院的裁决是终局的。

13. 申请人需要确立些什么才能成功申请此类临时救济?

只有在原告为支持自己（潜在的）诉讼而呈递的书面证据充足时，法院才会同意采取保全措施的请求。递交的证据必须让法院确信发出请求的当事人有极大的可能性依法胜诉。此外，法院可同意申请人提出的针对一笔货币存款实施保全措施的请求。即使申请人呈递了足够的书面证据，法院也可以命令申请人存一笔款项。

14. 案件审理时可获得哪些救济?

根据诉讼类型，法院可作出下列类型的判决：

(a) 判决书，是对一种法律关系、权利、事实等存在或不存在的官方宣告；

(b) 直接命令履行某种民事义务的判决（例如，支付一定金额的货币，履行合同义务等）。根据此类判决，原告可申请出具执行命令，然后开始强制执行诉讼；以及

(c) 法院同意给予救济的判决，法院直接介入当事人的关系，按原告的请求变更法律关系。

根据诉讼性质，法院可能有下列行动：

(a) 基于案情所作的判决；

(b) 裁定 – 裁定是为了设定一些程序事宜而随法院的最终判决一并作出的；以及

(c) 命令 - 法院通常在这样的决策中确定诉讼中的一些要点，或指示一些步骤，这些是不包括在判决书中的。

15. 执行判决的主要方式有哪些?

国内判决书是通过法院的执行命令执行的。执行命令是根据法院的最终判决出具的，在受益于判决书的当事人请求执行时予以生效。根据可作为执行权利的执行命令，债权人可亲自或通过州法警开始执行强制行动。

16. 胜诉方是不是一般会被判获得诉讼费用补偿? 诉讼费用如何计算?

在保加利亚发起民事诉讼会涉及到除了诉讼费之外的一些成本。其中通常包括发起诉讼的州政府规费、上诉的州政府规费（视情况而定）、专家意见和证人的费用等。

作为一项基本原则，发起诉讼的州政府规费占索赔金额的 4%，应由原告预先支付（起诉状中须附上付款凭证）。另外，在诉讼过

程中，每一个当事人都需要给法院一笔预付款，用于支付在当事人所提议步骤发生的费用。

在诉讼过程中，由法院判决为胜诉方的当事人支付的所有州政府规费和合理的诉讼费，最终都要由败诉方当事人承担。

17. 对最终判决有哪些上诉途径？当事人能够以什么理由提起上诉？

CPC 规定了一份关于上诉权利和理由及上诉程序的广泛规则清单。

一审法院作出的所有判决都可被提交至各上诉法院提起上诉。上诉法院有权审查有争议的判决的实体法和程序法问题。

保加利亚法律体系还认可撤销对上诉判决书的上诉。可向最高上诉法院申请撤销原判的上诉。撤销原判的上诉的理由如下：

(a) 判决无效；

(b) 判决不被承认；或者

(c) 判决不当，因为违背了实体法、严重违背法院程序规则，或无确实根据。

只有索赔金额超过一定额度的判决才可以被上诉至最高上诉法院。对于民事索赔，门槛是不低于 BGN 5,000（大约 2,500 欧元）；对于商业索赔，门槛是不低于 BGN 20,000,（大约 10,000 欧元）。

不过，要想援引至最高上诉法院，需要经过由 CPC 规定的严格的筛选流程，由最高上诉法院在审核撤销原判的上诉申请之前筛选。因此只有在上诉的判决存在下列情况时，最高上诉法院才会审理撤销原判的上诉申请：

(a) 被裁定与最高上诉法院、宪法法院或欧洲法院的强行性判例法矛盾；

(b) 对法律的正确应用和发展具有重大意义。

此外，如果相关裁判很可能无效或不被承认，以及可能存在明显的错误，最高法院也应审理撤销原判的上诉申请。

18. 是否允许律师和委托人之间存在胜诉酬金或按条件收费的安排？

根据保加利亚民事诉讼法，胜诉费 / 有条件的费用安排是被许可的，尽管这一点没有明确规定。不过，这类费用不能出现在法院判决书上（像常规的律师费那样），因为它是在判决书生效之后才予以支付的。

根据保加利亚《律师法》，在涉及非物质利益的刑事案件或民事案件中，胜诉费 / 有条件的费用安排是不被允许的。

19. 是否允许第三方资助？资助人是否可分享胜诉收益？

保加利亚《民事诉讼法》，是允许第三方资助的。不过，从官方的角度，第三方资助者不被允许分享判决的收益，也不能在诉讼中获得任何正式身份。任何判决的收益和成本都只能根据诉讼费分配的一般规则分配给判决书中确定的胜诉方。

20. 当事人是否可为其诉讼费用投保？

保加利亚《民事诉讼法》没有规定诉讼费保险的选择权。但是，保加利亚的保险市场确实提供此类保险产品，尽管在实践中采用的不多。

21. 诉讼人是否可提起集体诉讼？如果可以，哪些规则适用于集体诉讼？

集体诉讼是代表受到相同侵害的人提起的，从侵害的性质来看，受害人的范围无法被精确定义，但是是可以识别的。

在两种情况下可提起集体诉讼：

(a) 对非货币性救济的诉讼；以及

(b) 对集体侵权的集体诉讼。

在第一种情况下，集体仅寻求每一位成员在单独诉讼中有权利得到宣告式判决。另一种选择是为了让所有成员在一次共同审判中获得损害赔偿。

集体诉讼案件可以由受到侵害的一个人或多个人发起，也可以由保护受害人的组织发起。

要发起集体诉讼，起诉状中须包括下列先决条件（为了让集体诉讼通过认证）：

(i) 集体代表提出的适当通知方式，法院可对此进行讨论和更改；

(ii) 对确定损害集体范围至关重要的所有共同的法律和事实问题；

(iii) 证明原告代表有能力对受损的利益提供保护、进行集体诉讼并承担所有审判费用的证据；

除了提供的证据之外，法院应该依职权查验集体代表的资格，包括他们的财务稳定性。代表的适当性是认定集体诉讼的先决条件。

在考虑过这些问题之后，法院会作出判决，向所有相关人员宣布提起诉讼或从案件退出的一种适当通知方式（可能与原告提供的不一样）和时间充裕的截止日期。

接下来，要讨论愿意成为案件当事人参与非公开庭审的其他人，并公布不想参加审判而选择退出的受害人名单。

在集体诉讼中，作出的判决对诉讼的参与者具有约束力。另外，判决对那些在审判开始之前没有明确表示退出案件的人也有约束力，这也显示出集体诉讼的特征是自愿选择退出型程序。当判决有利于集体时，集体中那些选择退出的成员也被允许利用该判决。

如果集体诉讼判决书中判决支付赔偿金，可以通过 CPC 规定的具体措施实施担保，比如集体会议和委员会以及法院控制银行账户和支付过程的机会。

法院可以裁定将赔偿款支付至其中一名原告名下的银行账户中，或者支付至由所有原告或集体的所有成员控制的一个银行账户中。在作出判决之后，法院可以强制原告把赔偿金转至由所有原告共同处置的银行账户中。法院还可以召集一次集体会议，成立一个负责监督赔偿金分配的委员会。

22. 外国判决通过哪些程序予以承认和执行?

对外国法院判决书的强制执行存在不同的规定，这主要取决于判决书是由欧盟成员国出具的，还是由欧盟之外的国家出具的。

对于欧盟成员国出具的判决书，要根据欧洲议会和欧洲委员会 2012 年 12 月 12 日颁布的《关于民事和商业问题判决书的权力、认可和执行规章（欧盟）》的第 1215/2012 号规则（重新修订版）予以执行。保加利亚认可欧盟国家作出的判决，无需任何特殊程序。

对于在欧盟之外出具的判决书，要根据《国际私法典》，以及保加利亚加入的多边和大量双边协定来执行。通常，这类判决书在被宣告执行之前先进行确认。不过，在任何情况下，都不得对外国判决书的实质性进行审核。

23. 替代争议解决的主要形式是什么?

在保加利亚，替代性纠纷解决方式主要是仲裁和调解。

仲裁由来已久，是一种被广泛使用的纠纷解决方式。仲裁可以是制度性的，也可以是临时性的，在任何一种情况下，它都是根据当事人之间签署的明确的仲裁协议 / 条款进行的。若已签署仲裁协议，法院必须放弃管辖权。仲裁裁决一旦作出就是终局的，与法院的判决具有同等效力。

作为一种纠纷解决方法，调解是一种自愿和机密的程序，在法庭之外就法律或非法律纠纷达成解决方案，其中会有一个第三方 – 调解员，协助当事人达成庭外和解协议。与仲裁相比，调解在保加利亚鲜少被使用，但是在过去几年中它变得非常普遍。

除了这两种替代性纠纷裁定形式之外，保加利亚的申诉专员有权利审核关于州和市政当局侵犯公民权利和自由的投诉。也就是说，在民法意义上，它不能被视为民事纠纷的传统解决手段。

保加利亚法律不允许任何形式的法庭和特殊（特设）法院存在，宪法也不允许它们存在。

24. 在您所在的司法管辖区有哪些主要的替代争议解决机构?

保加利亚工商联合会的仲裁法院通常被认为是保加利亚最主要的替代性纠纷解决机构。其他重要的机构还有保加利亚工业协会的仲

裁法院，针对集体劳动纠纷的国家调解和仲裁协会，以及保加利亚雇主和实业家联盟仲裁法院（KRIB）。

主要的调解机构是 BCCI 仲裁法院的调解中心，以及国家调解员协会中的争端解决协会。

25. 在诉讼过程中诉讼人是否必须尝试替代争议解决办法?

尽管诉讼当事人可能没有要求尝试进行替代性争端解决方案，但根据 CPC 的规定，法院有义务邀请当事人通过庭外和解协议解决争端。法院有义务在审理案件之前明确所有问题的裁定书中包括一份自愿解决争端的正式邀请函。

26. 当前是否有改革争议解决法律法规的建议在审议中?

保加利亚国会最近对 CPC 做了重要修订，其中涉及与法庭文件送达、向最高上诉法院（“SCC”）提起上诉及执行程序有关的基本问题。这些修订于 2017 年 10 月 27 日公布，并于 2017 年 10 月 30 日生效。

(a) 法庭文件的送达

CPC 规定，应被送达被告的法庭文件在送达被告住所时，即使实际上未在住所处发现被告，也被视为已适时送达。该程序的应用导致与判例法冲突。CPC 的新修订内容指明了该特殊送达程序适用的具体条件，即：在超过一个月的时间里都未能在被告住所找到被告，但是（a）文件送达人至少去被告住所三次，并且每次上门之间至少间隔一周，而且（b）至少有一次上门是在非工作日。

(b) 撤销原判的上诉

保加利亚法律明确规定了将二审判决上诉至最高上诉法院的理由。CPC 的新修订内容增添了允许此类上诉的新理由，也就是：(a) 上诉的判决与保加利亚宪法法院或欧洲法院的判例法相矛盾；以及（b）上诉的判决可能无效或不被许可或存在明显的错误。

修订后的 CPC 现在还规定，最高上诉法院的判决并不构成强制性的判例法。这项修订背后的动机尚不明确，因为二审判决与最高上诉法院的判例法不一致仍然是撤销原判上诉的理由，即使最高上诉法院的判决不是“强制性的”。因此，最高上诉法院的判例法将会继续影响下级法院未来的做法。

(c) 执行程序

CPC 新进行的一些修订旨在减少在强制执行诉讼过程中产生的总体执行成本。修订后的 CPC 为可能由债务人承担的强制执行成本做了一些限额规定。此外，最近的修订还明确要求，法警在强制执行诉讼过程中可以实施的任何临时措施（例如，附加物、扣押财产）都应与债务人的债务金额成比例。

根据 CPC，当债权人决定取消债务人资产的赎买权时，法警可以为待售资产定价，债务人无权就法警确定的金额上诉至法院。不过，修订后的 CPC 规定，当债务人对法定确定的资产价格不满意时，可以请求任命一位专家证人来确定资产的价值。

27. 关于您所在司法管辖区或者亚洲地区的争议解决，是否有任何特殊情况需加以强调?

CPC 和《国际商事仲裁法》（“LICA”）自 2017 年 1 月以来的修订对不可仲裁争端的范围、驳回国内仲裁裁决的理由，以及默许的仲裁管辖权延伸的确立标准做出了更改。经由这些修订创建的特殊规则构成了保加利亚仲裁程序的特有特征。

(a) 不可仲裁的争端

根据 CPC 2017 年的修订，一方当事人为消费者的争端被添加到不可仲裁的争端清单中，这意味着，消费者合约中的仲裁条款是无效的。修订后的 CPC 规定，与不可仲裁的争端有关的所有未决的仲裁程序，在修订生效之时都必须终止。

(b) 驳回仲裁裁决的理由

(i) 不可仲裁性

LICA 2017 年的修订规定，与不可仲裁的争端有关的已作出的仲裁裁决都是无效的。在修订之前已作出的与不可仲裁的争端有关的仲裁裁决，初步认定为有效，但是相关方可

能会上诉至最高上诉法院。根据 LICA 2017 年的修订，利益相关方可以在不质疑仲裁裁决的情况下请求对不可仲裁的争端所作的仲裁裁决宣告无效。

(ii) 公共政策

LICA 2017 年的修订规定，国内仲裁裁决不能再因为违背公共政策而被质疑。这条修订的立法理由尚不明确。以前，仲裁裁决经常被以“违背公共政策”为理由质疑违背正常程序。应该注意的是，根据《纽约公约》，违背公共政策仍然是质疑国际仲裁裁决的理由。

(c) 默许的延伸

以前，当被告参加了仲裁程序且未质疑仲裁庭的管辖权时，即被认为已达成仲裁协议。这与判例法判定“参加”诉讼的资格产生了矛盾。LICA 2017 年的修订阐明，提出书面反对意见、提交证据、提起反诉，或者在未质疑仲裁庭管辖权的情况下参加仲裁听证会，都构成可以确立仲裁庭管辖权的理由。因此，仅仅因为被告在被通知仲裁程序时没有及时反对仲裁庭的管辖权，不足以让仲裁庭具备仲裁管辖权。

作者资料：

Angel Ganev

合伙人，Djingov, Gouginski, Kyutchukov & Velichkov

电子邮箱：angel.ganev@dgkv.com

Simeon Simeonov

高级律师，Djingov, Gouginski, Kyutchukov & Velichkov

电子邮箱：simeon.simeonov@dgkv.com

Tsvetelina Bayraktarova

律师，Djingov, Gouginski, Kyutchukov & Velichko

电子邮箱：tsvetelina.bayraktarova@dgkv.com

网址：www.dgkv.com

地址：10 Tsar Osvoboditel Blvd., fl. 3, 1000 Sofia, Bulgaria

电话：+359 (2) 932 1100

传真：+359 (2) 980 3586

大成DENTONS

From Largest 从最大到领先 to Leading

Dentons Dispute Resolutions Practice

大成争议解决业务

深度诉讼 Litigation in Depth

- Deep Understandings of Litigation Theory & Skills
  深解诉讼理论与技巧
- Deep Knowledge of Judgment Logic & Obstacles
  深谙审判逻辑与关隘
- Deep Concerns for Clients' Needs & Profits
  深谋客户需求与利益

Simultaneous Development of 国内仲裁与国际仲裁并举 Domestic & International Arbitration

- Local Resources & Talents
  本土资源与智慧
- Global Presence & Coordination
  全球网络与协作

Jurisdiction: China
Firm: Dentons
Authors: Dr. Jiangtao Ma, Dr. Tao Li, Yongyi Li and Dr. Jing Liu
Co-Authors: Mandy Guo and Hongtao Niu

大成 DENTONS

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

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

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

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

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

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

After the trial is completed and the judgment is in force, for those parties who fail to perform their obligations under the judgment, the other parties could apply to the People's Court for enforcement.

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

2. What is the role of the judge in civil proceedings?

Overall, the role of the judge is like an adjudicator among parties. In civil procedures, judges would balance parties' ability to participate in the lawsuit, and would assist parties who lacks ability to participate in the litigation, with the

purpose to have a relatively balanced situation regarding parties' litigation ability. For example, when a party is unable to bear the costs of the proceedings, the party could apply to the People's Court for waiver of the costs, and the People's Court will consider the party's actual circumstances to fully or partially award the waiver to protect parties' litigation rights.

Judges are also the controllers and executors of civil procedures.

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

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

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

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

In China, as long as a lawyer holds his/her P.R.C. lawyer's License and Power of Attorney executed by the client, the lawyer can act on behalf of the client and deal with matters related to the case. There are no restrictive rules in China for lawyers appearing in court.

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

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

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

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

(a) the body is injured to claim compensation,

(b) the sale of substandard goods is not declared;

(c) there is deferred or protested rent; and

(d) there is lost or destroyed property.

The limitation of action for certain types of cases is longer than that of ordinary limitation of action, for example, Article 129 of P.R.C. Contract law stipulates that the limitation of action of an international contract for sale of goods and technology import and export contract is 4 years; Article 26 of the Insurance Law stipulates that the limitation of the claim for insurance payment is 5 years.

In Chinese law, there is a concept of "the longest limitation of action". According to Article 188 of the Civil Law of P.R.C., "If it has been more than 20 years since the date of the damage, the People's Court will no longer protect." It could

大成 DENTONS

Dr. Jiangtao Ma

Senior Partner, Dentons

Mr. Jiangtao Ma is a Senior Partner at Dentons Beijing Office. He has over 20 years' practicing experience and his expansive expertise includes civil and commercial litigation, international arbitration, real estate law, investment law, corporate law, administrative litigation, etc. With over decades of practicing experience, Mr. Ma has offered legal services to numerous clients, involving enterprises directly owned by the central government, large state-owned companies, leading private enterprises, well-known joint venture companies as well as multinational companies.

Mr. Ma has offered legal services and acted as a leading counsel in numerous significant litigation and arbitration. He is also the Permanent/Special Legal Advisor for several big enterprises. Mr. Ma also specializes in providing legal advice concerning commercial transactions and real estate investment activities. As a well-recognized authority in these areas, Mr. Ma are maintaining long-term relationships with a numerous number of clients.

be inferred that "the longest limitation of action" is 20 years.

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

According to Chinese laws, there is no particular pre-action procedures for parties to comply with before commencing proceedings, except for cases of labor disputes. In accordance with Article 5 of the Law on Mediation and Arbitration of Labor Disputes of the People's Republic of China, "The parties may apply to the conciliation organization for mediation when a labor dispute arises and the parties do not wish to negotiate, negotiate or reach a settlement agreement. If the parties do not wish to mediate, mediate or fail to perform a conciliation agreement, he may apply to the Labor Dispute Arbitration Commission for arbitration; unless otherwise provided in this law, a lawsuit may be brought to the people's Court." It is understood that the party's pre-action procedure for bringing a lawsuit to the labor dispute is that the dispute has been first examined by the labor arbitration and the arbitration award has been made.

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

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

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

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

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

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

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

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

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

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

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

(d) The lawsuit falls under the scope of acceptance of civil lawsuits by People's Courts and the jurisdiction of the People's Court which accepts the lawsuit" then the parties can file a lawsuit, and the court shall file a case.

大成 DENTONS

Dr. Tao Li

Senior Partner, Dentons

Ms. Li Tao is the Director of the Dispute Resolutions Department at Dentons Beijing Office. Before she joined Dentons, She has been a judge for 17 years in the People's Court of Beijing Chaoyang District, and she has full experience in judicial work, especially in civil and commercial law trial and enforcement. As a judge, she presided over many cases with significant social impact, such as the first class action as to property management in China, the first case of internet violence in China, the first declaratory lawsuit as to title of property between husband and wife, the first dispute on the vehicle depreciation loss compensation, moral damage compensation in extra-marriage and so on.

Ms. Li has been in Dentons Beijing Office for eight years, and she is the only female partner among senior partners in Dispute Resolutions department. She is good at solving disputes. She obtained remarkable results representing international commercial disputes.

Of course, when the litigants bring up the lawsuit, they cannot exceed the limitation of action prescribed by law, which refers to the answer to the 5th question.

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

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

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

China does not have the relevant legal provisions.

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

(1) In the course of the trial, the Chinese courts have more flexible forms of evidence exchange. In cases where the evidence is more complex and complicated, the court will require both sides to exchange evidence before the trial. The relevant comments on the evidence may be orally documented or issued in writing, and there is no mandatory requirement regarding its formality.

(2) In the case of the Chinese courts, there is no oral presentation of evidence. According to our grasp of the status quo of China's trial procedure, the so-called oral presentation of evidence in the subject can be considered to happen in the following two kinds of situations:

(a) The party admits himself. However, even the expression of the parties concerned will be recorded in writing by the court.

(b) Witness testimony. According to the provisions of the Chinese law, the testimony of the witness shall be the carrier of written words.

Therefore, the Chinese Courts in the trial case, even if there is oral presentation of the nature of the evidence, the evidence will be in the form of written text to be presented.

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

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

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

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

12. What interim remedies are available before trial?

We understand that the term 'interim remedies' refers to temporary measures that the Court may take in the course of proceedings. Meanwhile, there are two types of interim remedies in China, which are pre-litigation measures and post-litigation measures. If "before trial" is before the litigation, we will understand the following answers:

Generally, according to the Article 100 of the Civil Procedure Law: "Where an interested party whose legitimate rights and interests, due to an emergency, would suffer irreparable damage if the party fails to petition for property preservation promptly, may, before instituting a lawsuit or applying for arbitration, apply to the people's court at the locality of the property, the domicile of the party on which the application is made, or the people's court with jurisdiction over the case, for the property preservation measures…" The party fills a security application, request the Court to determine the preservation of its property, ordering it to make certain acts or prohibiting it from making certain acts. However, in practice, the case of property preservation before litigation is still there, but preservation is almost non-existent before the indictment ordered to act or prohibit the conduct of acts before the case of action.

In a special area, such as IP, according to Civil Procedure Law, Several Provisions of the Supreme People's Court on the Issues Concerning the Application of Law to Terminating Infringement upon Patent Prior to Litigation and Interpretation of the Supreme People's Court on the Application of Law for Stopping the Infringement upon the Right to the Exclusive Use of a Registered Trademark and Preserving Evidence before Initiating Litigation, the infringed may apply for the pre-litigation

大成 DENTONS

Yongyi Li

Senior Consultant, Dentons

Mr. Yongyi Li is a Senior Consultant at Dentons Beijing Office. Before joining Dentons, he worked as a judge at the People's Court of Chaoyang District, Beijing. During his work as a judge, Mr. Li decided on over 2,000 cases in total, including numerous complicated cases with significant social impacts. He also participated in the writing of "Questions and Answers as to Trial of People's Courts" and served as the lead of the Civil Survey Team.

Since Mr. Li began to practice at a law firm, his team has represented for a number of state-owned enterprises, multinational corporations and private-owned enterprises, and has acted on the client's behalf in a large number of complex civil and commercial litigation and arbitration cases. Mr. Li can grasp the meaning and disputing points precisely. He is good at making full use of the rules of litigation to win favorable litigation status for the client so as to accurately predict the outcome of the litigation arbitration and accordingly guide the client to take appropriate litigation strategies to safeguard the legitimate interests to the fullest.

interim measurement to protect their right, including:

(1) Pre-litigation injunction (behavior preservation), compared to the general civil and commercial cases, it usually apply for the IP matter.

(2) Pre-litigation evidence preservation; and

(3) Pre-litigation asset preservation.

13. What does an applicant need to establish in order to succeed in such interim applications?

According to the Article 101 of the Civil Procedure Law and the relevant legal provisions in the field of intellectual property, in the pre-litigation preservation, the applicant shall prove that:

(1) Their right is violated;

(2) The circumstance is emergency; and

(3) The immediate application of the security would cause irreparable damage to its legitimate rights and interests, meanwhile, the applicant shall provide security for the preservation in accordance with the Court's request.

14. What remedies are available at trial?

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

For the preservation of the lawsuit, according to Article 100 of the Civil Procedure Law, "For cases in which the action of a party to the lawsuit or any other reason causes difficulty in

enforcement of a judgment or causes other harm to the litigants, a People's Court may, pursuant to an application by a counter party litigant, rule on preservation of its property or order the counter party to undertake certain acts or prohibit the counter party to undertake certain acts; where the litigants do not make an application, a People's Court may rule that preservation measures be adopted where necessary…" The parties may, after the indictment, bring the lawsuit to the court as a remedy to guarantee the future execution.

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

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

(b) Recourse of labor remuneration; or

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

While the cases listed above are satisfied under the conditions of section 106th of the Civil Procedure Law: "The following criteria shall be satisfied for ruling of prior enforcement by a People's Court:

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

(b) The respondent has the capacity for performance." The parties may apply to the court for enforcement as a means of relief.

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

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

(1) According to Article 221 of the Civil Procedure Law, the people's Court shall have the right to inquire with the relevant units of the assets such as deposits, bonds, shares and fund shares of the executed person. The people's Court shall have the right to seize, freeze, transfer and change the property of the executed person according to different circumstances.

(2) Article 222 of the Civil Procedure Law, the court may detain and extract from the wages, bonuses, various securities and other lawful income of the executed person the part of the person to whom the obligation is performed;

(3) According to Article 244 of the Civil Procedure Law, the Court shall have the power to seize, detain, freeze, auction and sell the property of the executed person, but it shall retain the essentials for the executed person and his dependents.

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

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

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

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

(ii) lawyer's fee and transportation fee.

In terms of the litigation fee, the people's court may determine the amount of the litigation fees for the winning party: where the litigation fee shall be borne by the losing party, it shall be accounted according to the winning proportion of the case.

With respect to the lawyer's fee and the transportation fee, generally, the courts do not in

大成 DENTONS

Dr. Jing Liu

Junior Consultant, Dentons

Ms. Jing Liu is the consultant at Dentons Beijing Office, who also works as an Arbitrator at Beijing Arbitration Commission (also known as "Beijing International Arbitration Center"). She graduated from China University of Political Science and Law with a Civil and Commercial Law Postdoctoral Degree. Before Joining Dentons, She had successively served as a judge at the Supreme People's Court, High Court, Intermediate Court and Basic People's Courts for nearly 20 years.

She was previously the Legal Manager of Law Department of China Huarong Asset Management Corporation and the legal consultant of Tencent Company, and the Deputy Director of the Tencent Legal Research Center. During her work at the Supreme Court, she drafted Guiding Cases No. 1, No. 10 and No. 15, which were approved published by the Judicial Committee of Supreme People's Court. These became one of the guiding cases for all judges nationwide. She is good at handling civil and commercial litigation and arbitration (including foreign-related cases), non-performing assets disposal, corporate governance, investments, financing and security business as well as Internet legal services.

favor of the winning party to secure these fee from the losing party, but if the case is relevant to IP, there is a special agreement under the law, or the parties to the contract had a special agreement on this matter, the litigation fee shall be borne by the losing party.

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

(1) China's trial procedure adopts the second instance final trial system. Therefore, in order to obtain the final judgment, after the judgment of the first instance is made, the party concerned shall appeal to the higher level court in order to obtain the final judgement.

(2) The basis conditions for appealing are: there is a judgement from the first instance court; it is still in the imitation.

18. Are contingency or conditional fee arrangements permitted between lawyers and clients?

According to Article 11 of the Chinese Administrative Measures on Fees for Lawyer Services: "In the handling of a civil case involving property relationship, if the client still requires to implement the risk agency after being informed of the government-guided pricing, the law firm may charge fees on the basis of risk agency, unless it is under any of the following circumstances: (a) marriage and inheritance; (b) claims for social security benefits or minimum

living standard security benefits; (c) claims for alimony, allowance, maintenance expenses, pension, relief, work injury compensation; and (d) claims for payment of labor remuneration, etc." and Article 12 "Charging of contingency fees shall be prohibited for criminal litigation cases, administrative litigation cases, State compensation cases and collective litigation cases", our country agrees with the risk agency fee arrangement between the client and the lawyer in principle, except for the special case types listed in the above articles.

19. Is third-party funding permitted? Are funders allowed to share in the proceeds awarded?

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

(2) Our law does not provide for allowing such practice, nor has it ever preceded it, as to whether the grant maker (funder) should be allowed to share in the proceeds of the judgment.

20. May parties obtain insurance to cover their legal costs?

In China, there is no legal restriction on the subject matter. However, in practice, no insurance company in our country has introduced any insurance in this respect. Therefore, the described behavior has not been carried out in China.

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

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

According to Article 52 of the Chinese Civil Procedure Law: "Where a party or both parties to a lawsuit comprise(s) two or more persons, and the subject matter of litigation is common, or the subject matters of litigation are the same type, the People's Court deemed that the lawsuit may be tried as a Joint Action, the Court may try the lawsuit as a joint action upon consent by the litigants." According to Article 53: "In the case of a joint action where there are multiple persons comprising one party to the lawsuit, the litigants may elect a representative to participate in the proceedings. The litigation actions of the representative shall be binding upon the litigants he/she represents; for change of representative, waiver of the claims of the action or confirmation of the claims of the counter-party litigants, settlement, the consent by the litigants he/she represents is required." According to Article 54: "Where the subject matter of litigation is common, there are multiple persons comprising one party to the lawsuit but the number of persons is not confirmed at the time of filing of lawsuit, the People's Court may issue a public announcement, stating the facts of the case and the claims, and notify the rights holders to register with the People's Court within a stipulated period."

By the above-mentioned law, it is known that in Chinese law, for the same subject or subject is the same kind of multi-person lawsuit, called the "joint action". If the number of joint proceedings is higher, the representative may be selected to carry out the lawsuit. When the number of prosecutions is uncertain, it can be registered in the form of a notice.

The public interest litigation is the special type of litigation in the joint action. According to Article 55 of the China Civil Procedure Law provides, "For acts which harm public interest such as environmental pollution, infringement of the legitimate rights and interests of multiple consumers, etc., the authorities stipulated by the law and the relevant organizations may file a lawsuit with a People's Court. Where a People's Procuratorate discovers in the course

of performing its duties any act which compromises public interests, such as damage to the ecological environment and resource protection, infringement upon the legitimate rights and interests of multiple consumers in terms of food and drug safety, in the absence of the authorities or organizations mentioned in the preceding paragraph or where the authorities or organizations mentioned in the preceding paragraph do not file a lawsuit, the people's Procuratorate may file a lawsuit with a People's Court. If the authorities or organizations mentioned in the preceding paragraph have filed a lawsuit, the People's Procuratorate may support the lawsuit."

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

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

(a) Conditions for the recognition and enforcement of extraterritorial judgements

1. There are treaties or reciprocal relations

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

(i) Qualified jurisdiction conditions, that is, a foreign court having jurisdiction over a case.

(ii) The referee has certainty, that is, the judgments made by a foreign court have been legally effective;

(iii) The proceedings are fair.

(iv) The foreign court that rendered the judgement has no "jurisdictional conflict" with my court in the case.

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

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

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

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

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

Where there is no mutual legal assistance agreement or reciprocal between the country of the referee and our country, our court has only recognized the decision of the foreign court concerning the relationship between husband and wife in the divorce judgement.

(ii) The applicant shall only be a Chinese citizen or a former spouse as a Chinese citizen.

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

(b) Procedures for the recognition and enforcement of extraterritorial judgements

According to Article 281, and Article 282 of the Civil Procedure Law of China:

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

(ii) If the foreign judgement and ruling need to be recognized and enforced by a Chinese court, whether by direct application by a party or by a foreign court, the court shall review the principles of international treaties or reciprocity that are jointly bound.

(iii) After examination, the foreign court found that the judgment of the foreign court did not violate the basic principles of our law or did not endanger the national sovereignty, security and public interests of our country. It ruled that the foreign court should recognize its validity and issue an executive order. Otherwise, it will not be recognized and enforced.

23. What are the main forms of alternative dispute resolution?

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

24. Which are the main alternative dispute resolution organizations in your jurisdiction?

There is commercial arbitration institutions, such as CIETAC, labor arbitration institution, civil mediation center, industry mediation center, mediation center set up by an executive function department, court's pretrial mediation center, etc.

25. Are litigants required to attempt alternative dispute resolution in the course of litigation?

During the litigation proceeding, a lord will ask the parties or their representatives whether they would like to consider alternative dispute resolution or not. However, the alternative dispute resolution is applicable to the parties voluntarily as the basic principle. However, the court shall not have right to compel the parties to apply for it, except as otherwise agreed by the parties.

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

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

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

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

(a) The number of dispute resolution cases is too much, and the ratio between the number of cases and the disposition of dispute resolution agencies is not coordinated;

(b) The dispute resolution is common in the social public life;

(c) The amount of dispute resolution cases is rising;

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

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

About the Authors:

Dr. Jiangtao Ma
Senior Partner, Dentons
E: jiangtao.ma@dentons.cn

Dr. Tao Li
Senior Partner, Dentons
E: tao.li@dentons.cn

Yongyi Li
Senior Consultant, Dentons
E: li.yongyi@dentons.cn

Dr. Jing Liu
Junior Consultant, Dentons
E: liujing.1@dentons.cn

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

Co-Authors:

Mandy Guo and **Hongtao Niu**

司法管辖区：中国
律所：大成律师事务所
作者：马江涛博士
李涛博士
李永一先生
刘净博士
共同作者：郭孟兰、牛洪涛

大成 DENTONS

1. 在民事诉讼方面，法院系统的结构是怎样的？

从宏观角度来讲，在一般的民事案件中，中国法院的结构体系由四级法院构成：基层人民法院、中级人民法院、高级人民法院以及最高人民法院。中国民事审判程序采用“二审终审”制度。基层人民法院受理绝大多数民事案件的一审程序，中级人民法院、高级人民法院及最高人民法院在特殊情况下受理部分民事案件的一审程序。一审判决作出后，当事人可以向作出一审判决的法院的上一级法院上诉进入第二审程序。

在某些特殊的民事案件中，也存在某些专门法院进行审理，包括：海事法院、知识产权法院、互联网法院。

从微观角度而言，一起民事案件的审判程序为：立案、一审、二审、审判监督及执行。上述程序的不同阶段，由不同的法院部门完成相应工作。具体如下：

立案工作主要由各法院立案庭负责。实践中，立案庭在收案后，不符合立案条件的，由立案庭裁定驳回，符合立案条件的，将转入诉前调解程序。如调解不成，则案件将进入实体审判程序。

在案件审理时，根据案件性质不同，会被分配到具体的审判业务庭。审判业务庭室根据案件的性质分为几个不同的庭室，包括但不仅限于民事审判庭、商事审判庭、知识产权审判庭、劳动争议审判庭等。

审判完毕且判决生效后，对当事人不能够自觉履行生效判决的生效内容的，经过申请人申请，法院可以予以强制执行。

除上述外，法院设有专门的审判实务管理部门，主要处理与案件相关的事务性工作，例如：财产保全及证据保全工作、送达工作、卷宗交接工作，文书校对工作，签章工作等。同时，审判实务管理部门也肩负监管审判时限的职责。

2. 法官在民事诉讼中的角色是什么？

总体而言，法官的角色是居中裁判者。在参与民事诉讼活动中，法官控制着双方的参诉能力，对参诉能力缺失的一方加以辅助，使得当事人双方主体具有相对平衡的诉讼参与能力。例如，当一方当事人经济困难无法承担诉讼费时，经该方当事人申请，法院出自于对其诉权保障的角度，会视情况裁定予以减免。

从保障民事诉讼程序的角度而言，法官的角色还是民事诉讼程序的控制人及执行人。

3. 庭审是否向公众开放？公众是否能够查阅法庭文件？

根据《中华人民共和国民事诉讼法》第 134 条：“人民法院审理民事案件，除涉及国家秘密、个人隐私或者法律另有规定的以外，应当公开进行。离婚案件，涉及商业秘密的案件，当事人申请不公开审理的，可以不公开审理”的规定，中国法院的庭审过程以公开庭审为原则，不公开审理为例外。

大成 DENTONS

马江涛是大成律师事务所北京办公室的高级合伙人。他拥有20多年的执业经验，其丰富的专业知识包括民商事诉讼，国际仲裁，房地产法，投资法，公司法，行政诉讼等。拥有数十年执业经验的马先生已经为众多客户提供法律服务，涉及中央直属企业，大型国有企业，民营龙头企业，知名合资企业以及跨国公司。

马律师提供法律服务，并担任众多重大诉讼和仲裁的首席律师。他还是几家大企业的常任/特别法律顾问。马律师还擅长就商业交易和房地产投资活动提供法律意见。作为这些领域公认的权威人士，马先生与众多客户保持着长期的合作关系。

马江涛 博士
高级合伙人，大成律师事务所

目前，中国法院所作出的案件的判决书及终局性裁定都应当予以公开，并公布于“中国裁判文书网”的网络平台上。任何人，无论是否与案件相关，均可在平台上查阅裁决文书。

4. 所有律师均有权代表其委托人出庭并参加诉讼吗？如果不是，律师职业的结构是怎样的？

在中国，只要律师持有律师资格证书，并有客户关于处理该案件的授权，律师即可以在客户授权范围内出庭并处理案件相关事项。中国的法律对于律师出庭并无限制性规定。

5. 提起民事请求的时效期为多久？

关于“提起民事诉讼的期限”，中国法律中的专有名词称之为“诉讼时效”。在中国，诉讼时效分为三种：普通诉讼时效，短期诉讼时效以及长期诉讼时效。

根据中国最新颁布的《民法总则》第 188 条：“向人民法院请求保护民事权利的诉讼时效期间为三年。法律另有规定的，依照其规定。诉讼时效期间自权利人知道或者应当知道权利受到损害以及义务人之日起计算……”，中国法律所规定的普通诉讼时效为三年。

除此之外，某些特定类型的案件的诉讼时效短于普通诉讼时效，例如《民法通则》第 136 条规定：

(a) 身体受到伤害要求赔偿的；
(b) 出售质量不合格的商品未声明的；
(c) 延付或者拒付租金的；
(d) 寄存财物被丢失或损毁的案件的诉讼时效为一年。

某些特定类型的案件的诉讼时效长于普通诉讼时效，例如《合同法》129 条规定，国际货物买卖合同和技术进出口合同争议案件的诉讼时效为 4 年；《保险法》26 条规定，人寿保险给付保险金请求权的诉讼时效为 5 年等。

在中国法的诉讼时效的规定中，还有最长诉讼时效的概念，根据《民法总则》第 188 条：“……但是自权利受到损害之日起超过二十

大成 DENTONS

李涛 博士
高级合伙人，大成律师事务所

李涛律师是大成律师事务所北京办公室争议解决部主任。在加入大成之前，她在北京朝阳区人民法院担任了17年的法官，她在司法工作方面有丰富的经验，特别是在民商事法律的审判和执法方面。作为法官，她主持了很多具有重大社会影响力的案件，如中国物业管理的第一例集体诉讼，中国首例互联网暴力案件，对夫妻财产所有权的首例申诉性诉讼，第一例车辆折旧损失赔偿纠纷，婚外恋精神损害赔偿等。

李律师在大成律师事务所北京办事处工作了八年，是争议解决部门高级合伙人中唯一的女性高级合伙人。她善于解决争端，在国际商业纠纷案件中获得显著成果。

年的，人民法院不予保护。……”可知最长诉讼时效为 20 年。

6. 有哪些诉前程序是当事人在开始诉讼之前必须遵守的?

依据中国法律规定，当事人对民事争议进行起诉前不需要特定的诉前程序，但劳动争议诉讼案件领域除外。根据《中华人民共和国劳动争议调解仲裁法》第 5 条规定：“发生劳动争议，当事人不愿协商、协商不成或者达成和解协议后不履行的，可以向调解组织申请调解；不愿调解、调解不成或者达成调解协议后不履行的，可以向劳动争议仲裁委员会申请仲裁；对仲裁裁决不服的，除本法另有规定的外，可以向人民法院提起诉讼。”可知，当事人对劳动争议提起诉讼的前置程序是该争议已经先行经过劳动仲裁审理并作出仲裁裁决。

7. 案件进入审理之前要经过哪些典型的民事程序? 有什么样的时间表?

(1) 我们理解，题述中“民事诉讼程序的必要时间表”问题，指的是民事诉讼程序的审限。

对于一审案件的审限。根据中国《民事诉讼法》第 149 条规定：“人民法院适用普通程序审理的民事案件，应当在立案之日起六个月内审结。有特殊情况需要延长的，由本院院长批准，可以延长六个月；还需要延长的，报请上级人民法院批准。”以及第 161 条规定：“人民法院适用简易程序审理的民事案件，应当在立案之日起三个月内审结。”可知，一审审限通常为 6 个月，个别简易程序案件为 3 个月。

对于二审案件的审限。根据中国《民事诉讼法》第 176 条规定：“人民法院审理对判决的上诉案件，应当在第二审立案之日起三个月内审结。有特殊情况需要延长的，由本院院长批准。人民法

大成 DENTONS

李永一 先生
高级顾问，大成律师事务所

李永一律师是大成律师事务所北京办公室的高级顾问。在加入大成之前，他曾在北京朝阳区人民法院担任法官。李先生在任法官期间，共裁决案件2000余件，包括多例社会影响重大的复杂案件。他还参与撰写了《人民法院审判问答》，并担任民事调查组组长。

李律师自从在一家律师事务所执业以来，他的团队就为一批国有企业、跨国公司和私营企业担任代理人，代表客户进行了大量复杂的民商事诉讼和仲裁案件。李律师能准确把握案件意义和争议点，他善于充分利用诉讼规则，为客户赢得有利的诉讼地位，准确预测诉讼仲裁的结果，从而引导客户采取适当的诉讼策略，最大限度地维护合法利益。

院审理对裁定的上诉案件，应当在第二审立案之日起三十日内作出终审裁定。”可知，对于判决的二审上诉审限为 3 个月，对于裁定的二审上诉审限为 30 日。

对于审判监督案件的立案审限。根据中国《民事诉讼法》第 204 条规定：“人民法院应当自收到民事再审申请书之日起三个月内审查，符合本法规定的，裁定再审；不符合本法规定的，裁定驳回申请。有特殊情况需要延长的，由本院院长批准。”可知，审判监督度案件的立案审限为三个月。同时，根据中国《民事诉讼法》第 207 条规定：“人民法院按照审判监督程序再审的案件，发生法律效力的判决、裁定是由第一审法院作出的，按照第一审程序审理……发生法律效力的判决、裁定是由第二审法院作出的，按照第二审程序审理……”

对于涉外案件的审限。根据中国《民事诉讼法》第 270 条规定：“人民法院审理涉外民事案件的期间，不受本法第一百四十九条、第一百七十六条规定的限制。”可知，涉外案件的审限没有明确的限制。

(2) 对于题述中“提起诉讼的必要时间表”，我国法律中没有此类说法。通常情况下，若当事人符合《民事诉讼法》第 119 条规定的：“起诉必须符合下列条件：

(a) 原告是与本案有直接利害关系的公民、法人和其他组织；

(b) 有明确的被告；

(c) 有具体的诉讼请求和事实、理由；

(d) 属于人民法院受理民事诉讼的范围和受诉人民法院管辖。”规定的条件时，即可起诉，法院应予立案。当然，当事人提起诉讼时，不能超过法律规定的诉讼时效，关于诉讼时效问题，详见第 5 题之回答。

8. 当事人是否必须向其他当事人和法院披露相关文件?

按照中国的法律规定，中国法院并不要求当事人一方必须向另一方提交文件。但是在案

大成 DENTONS

刘净 博士
二级顾问，大成律师事务所

刘净律师是大成律师事务所北京办公室的顾问，也是北京仲裁委员会（又称“北京国际仲裁中心”）的仲裁员。她毕业于中国政法大学，拥有民商法博士后学位。在加入大成之前，她先后在最高人民法院、高级人民法院、中级人民法院和基层人民法院担任了近20年的法官。她曾任中国华融资产管理公司法律部法律经理，腾讯公司法律顾问，腾讯法律研究中心副主任。在最高法院工作期间，她起草了最高人民法院审判委员会批准公布的指导性案例1号，10号和15号，这些均成为全国所有法官的指导性案例。她还善于处理民商事诉讼和仲裁（含涉外案件）、不良资产处置、公司治理，投融资担保业务以及互联网法律服务。

件实体审理的过程中，为了便于查明事实，法庭可能会就案件事实责令当事人双方举证，届时若负有举证责任义务的一方不予举证，则其自身需要承担不举证而造成的不利后果。

9. 是否存在特权文件或其他规则允许当事人不披露特定文件?

中国无此相关法律规定。

10. 当事人在审理之前是否交换书面证据？或是否提供口述证据？对方是否有权盘问证人？

(1) 中国法院在审理案件的过程中，其证据交换的形式较为灵活多样。若案涉证据较多且复杂，在开庭前法庭会组织双方交换证据。对于证据的有关意见可以进行口头质证说明或出具书面质证意见，在形式上并无强制性规定。

(2) 中国法院在审理案件时，并不存在口头提交证据这一说法。根据我们对中国审判现状的掌握，本题中所谓的口头提交证据，可以认为有以下两种情况：

(a) 当事人自认。但即使是当事人的表达，法院亦会以书面形式进行记载。

(b) 证人证言。根据中国法的规定，证人证言应当以书面文字为载体。

因此，中国法院在审理案件中，即便是具有口头表述性质的证据，也均会以书面文字的形式加以呈现。

(3) 双方当事人有权交叉询问案涉相关证人。

11. 关于指定专家证人的规则是怎样的?

在我国诉讼领域中，并没有“专家指定”这一专门情形。但是同此类似的，是中国具有的专家证人制度。所谓专家证人，是指具有专门知识的人员就案件所涉专门性问题进行作证的证人。根据我国最高人民法院《关于民事诉讼证据的若干规定》第 61 条规定了专家证人制度：“当事人可以向人民法院

申请由一至二名具有专门知识的人员出庭就案件的专门性问题进行说明。人民法院准许其申请的，有关费用由提出申请的当事人负担。”

根据上述规定，如案件涉及到专家证人，专家除了要遵循一般证人应当遵循的要求（如证人证言应具有真实性）外，则专家应当出庭对专门性问题进行说明，其意见才能被认定。

12. 案件审理前可获得哪些临时救济?

我们理解，题述“临时救济”是指诉讼进程中法院可以采取的一些临时性措施。同时，需要明确的是，在中国，关于临时性措施的时间分界点为起诉前和起诉后，我们将本题中的“开庭审理前”理解为起诉前，进而进行如下作答：

总体而言，对于一般性民商事案件，在开庭审理前，中国法院可以依据《民事诉讼法》第 101 条：“利害关系人因情况紧急，不立即申请保全将会使其合法权益受到难以弥补的损害的，可以在提起诉讼或者申请仲裁前向被保全财产所在地、被申请人住所地或者对案件有管辖权的人民法院申请采取保全措施。…”提出保全申请，请求法院裁定对其财产进行保全、责令其作出一定行为或者禁止其作出一定行为。但是在实践中，诉前进行财产保全的案例尚有，但是在起诉前责令作出行为或者禁止作出行为的诉前行为保全案例几乎不存在。

特殊领域中，如知识产权领域，根据《民事诉讼法》、《最高人民法院关于对诉前停止侵犯专利权行为适用法律问题的若干规定》以及《最高人民法院关于诉前停止侵犯注册商标专用权行为和保全证据适用法律问题的解释》的规定，可以通过诉前临时措施保护专利被侵权人，诉前临时措施主要包括：1. 诉前禁令（诉前行为保全），相比于一般民商事案件，知识产权案件适用诉前行为保全相对常见 2. 诉前证据保全 3. 诉前财产保全三种方式。

13. 申请人需要确立些什么才能成功申请此类临时救济?

根据《民事诉讼法》第 101 条及知识产权领域相关法律规定可知，对于诉前保全，申请人应当证明：1. 权利被侵犯；2. 情况紧急；3. 不立即申请保全将会使其合法权益受到难以弥补的损害，同时，申请人应当根据法院的要求对诉前保全提供担保。

14. 案件审理时可获得哪些救济?

起诉后，可以适用的救济一般有“诉讼保全”及“先予执行”。

对于诉讼保全，根据《民事诉讼法》第 100 条：“人民法院对于可能因当事人一方的行为或者其他原因，使判决难以执行或者造成当事人损害的案件，根据对方当事人的申请，可以裁定对其财产进行保全、责令其作出一定行为或者禁止其作出一定行为，当事人没有提出申请的，人民法院在必要时也可以裁定采取保全措施……”，当事人可以在起诉后向法院提起诉讼保全作为保障未来判决可执行的救济手段。

对于先予执行，《民事诉讼法》第 106 条规定：“人民法院对下列案件，根据当事人的申请，可以裁定先予执行：

(a) 追索赡养费、扶养费、抚育费、抚恤金、医疗费用的；

(b) 追索劳动报酬的；

(c) 因情况紧急需要先予执行的。

”以上所列之案件，当满足《民事诉讼法》第 107 条：“人民法院裁定先予执行的，应当符合下列条件：

(a) 当事人之间权利义务关系明确，不先予执行将严重影响申请人的生活或者生产经营的；

(b) 被申请人有履行能力。”的情况下，当事人可以向法院申请先予执行作为救济手段。

15. 执行判决的主要方式有哪些?

在被执行人拒不执行生效判决的，法院在执行判决时可以采取如下强制措施（方法）：

(1) 根据《民事诉讼法》第 242 条规定，人民法院有权向有关单位查询被执行人的存款、债券、股票、基金份额等财产情况。人民法院有权根据不同情形扣押、冻结、划拨、变价被执行人的财产；

(2) 根据《民事诉讼法》第 243 条规定，法院可以从被执行人的工资、奖金、各种有价证券以及其他合法收入中扣留、提取被执行人应当履行义务的部分；

(3) 根据《民事诉讼法》第 244 条规定，法院有权查封、扣押、冻结、拍卖、变卖被执行人应当履行义务部分的财产，但应当保留被执行人及其所扶养家属的生活必需品。

同时，对于拒不执行生效判决的当事人，法院可以处以拘留罚款，并将其个人信息上报征信系统（黑名单），对于拒不执行情节严重的，还可追究其刑事责任。

16. 胜诉方一般是不是会获得诉讼费用补偿? 诉讼费用如何计算?

胜诉方因诉讼支付的成本费用可分为两部分：

(i) 向法院缴纳的诉讼费用；

(ii) 支付的律师费及交通费等费用。

对于向法院缴纳的诉讼费用，胜诉方的这一部分的支出可由法院判决：由败诉方承担，具体计算方式为按照胜诉比例进行计算。如某案诉讼费用为 10 万元人民币，胜诉方在本案中胜诉比例为 80%，则败诉方应当承担的诉讼费用为 8 万元。

对于律师费，交通费等费用，根据目前的司法实践现状，中国法院原则上是不支持胜诉一方所支出的以上费用由败诉方承担，但是涉及到知识产权类案件、法律上特别约定的，或者合同双方当事人对律师费等费用承担上有特别约定的，可以判决由败诉方承担的胜诉方的该部分费用。

17. 对最终判决有哪些上诉途径? 当事人能够以什么理由提起上诉?

(1) 中国审判程序采用二审终审制，因此为了获得最终判决，在一审判决作出后，当事人应当向一审法院的上一级法院进行上诉。

(2) 当事人上诉的基础为：有一审法院作出的判决及裁定；未超过法律规定的上诉期限，当事人具备上诉意愿。

18. 是否允许律师和委托人之间存在胜诉酬金或按条件收费的安排?

根据我国《律师服务收费管理办法》第 11 条："办理涉及财产关系的民事案件时，委托人被告知政府指导价后仍要求实行风险代理的，律师事务所可以实行风险代理收费，但下列情形除外：(a) 婚姻、继承案件；(b) 请求给予社会保险待遇或者最低生活保障待遇的；(c) 请求给付赡养费、抚养费、扶养费、抚恤金、救济金、工伤赔偿的；(d) 请求支付劳动报酬的等"及第 12 条："禁止刑事诉讼案件、行政诉讼案件、国家赔偿案件以及群体性诉讼案件实行风险代理收费"之规定可知，我国原则上同意客户和律师之间进行风险代理费用安排，但是以上法条所列之特殊案件类型除外。

19. 是否允许第三方资助? 资助人是否可分享胜诉收益?

(1) 对于是否允许第三方资助诉讼，此属于当事人与第三方意思自治的范围。在当事人与第三方双方均同意的情况下，第三方可以替当事人承担诉讼成本费用，对于此，法律并无明文限制；

(2) 对于是否允许资助者在判决所得的收益中分成，我国法律没有规定允许此种做法，也从未有过类似的先例。

20. 当事人是否可为其诉讼费用投保?

在中国，法律上并没有明文限制题述行为。但是实践中，我国尚没有保险公司推出关于这方面的险种，因此，题述行为在中国未曾开展。

21. 诉讼人是否可提起集体诉讼？如果可以，哪些规则适用于集体诉讼？

中国法律中并没有“集体诉讼”的概念，与之相类似的，为《民事诉讼法》规定的共同诉讼。

《民事诉讼法》第 52 条规定：“当事人一方或者双方为二人以上，其诉讼标的是共同的，或者诉讼标的是同一种类、人民法院认为可以合并审理并经当事人同意的，为共同诉讼。”第 53 条规定：“当事人一方人数众多的共同诉讼，可以由当事人推选代表人进行诉讼。代表人的诉讼行为对其所代表的当事人发生效力，但代表人变更、放弃诉讼请求或者承认对方当事人的诉讼请求，进行和解，必须经被代表的当事人同意。”第 54 条规定：“诉讼标的是同一种类、当事人一方人数众多在起诉时人数尚未确定的，人民法院可以发出公告，说明案件情况和诉讼请求，通知权利人在一定期间向人民法院登记。”

由上述法律规定可知，中国法律中，对于同一标的或标的是同一种类的多人诉讼，称为共同诉讼。共同诉讼人数较多的，可以推选代表人进行诉讼；起诉时人数无法确定的，可以采用公告登记的方式。

共同诉讼中较为特殊的诉讼类型是公益诉讼。《民事诉讼法》第 55 条规定：“对污染环境、侵害众多消费者合法权益等损害社会公共利益的行为，法律规定的机关和有关组织可以向人民法院提起诉讼。人民检察院在履行职责中发现破坏生态环境和资源保护、食品药品安全领域侵害众多消费者合法权益等损害社会公共利益的行为，在没有前款规定的机关和组织或者前款规定的机关和组织不提起诉讼的情况下，可以向人民法院提起诉讼。前款规定的机关或者组织提起诉讼的，人民检察院可以支持起诉。”

根据以上法律规定可知，法律上并没有赋予律师这一身份提起共同诉讼的权利。当然，不排除律师本人本身就是共同诉讼中的当事人之一，也不排除律师被推选成为代表人进行诉讼。

22. 外国判决通过哪些程序予以承认和执行？

(a) 承认和执行域外判决的条件

1. 存在条约或互惠关系

根据我国《民事诉讼法》第 281、282 条和最高人民法院关于适用《中华人民共和国民事诉讼法》若干问题的意见第 544、546 和 548 条，可以根据司法协助协议或互惠关系向我国申请承认和执行。根据这些规定，外国法院的判决在中国得到承认和执行一般要满足以下条件：

(i) 合格管辖权条件，即作出判决的外国法院对案件有管辖权；

(ii) 裁判具有确定性，即外国法院作出的判决已发生法律效力；

(iii) 诉讼程序具有公正性；

(iv) 作出判决的外国法院与我国法院就该案无“管辖权冲突”；

(v) 外国法院作出的判决、裁定不违反中华人民共和国法律的基本原则或者国家主权、安全、社会公共利益；

(vi) 作出裁判的法院所在国与我国存在司法协助互惠关系。

2. 不存在互惠关系时，外国法院离婚判决的承认和执行需要满足的特殊条件

当域外裁判做出国与我国不存在司法互助协议或互惠关系，该外国法院离婚判决就不能根据《民事诉讼法》及其他司法解释中的相关规定在中国申请承认和执行，而是应该根据《最高人民法院关于法院受理申请承认外国法院离婚判决案件有关问题的规定》向中国申请承认和执行：

(i) 对承认内容的限定，仅就身份关系方面的判决进行承认

当裁判做出国与我国不存在司法协助协议或互惠关系，我国法院仅就该外国法院离婚判决中的有关夫妻身份关系方面的判决进行承认。

(ii) 对申请人的限定中国公民或原配偶为中国公民的外国公民．当申请人为中国公民时，中国法院对其原配偶是否为中国公民没有要求；但若申请人为外国公民，

则其原配偶必须是中国公民，否则中国对承认的申请不予承认或执行。

(b) 承认和执行域外判决的程序

依据我国《民事诉讼法》第281条、282条可知：

(i) 我国人民法院和外国法院作出的判决、裁定，若要在对方国家得到承认和执行，既可由当事人直接向对方有管辖权的法院（在我国为有管辖权的中级人民法院）提出申请，也可由法院提出请求。但如由法院请求，依《民事诉讼法》第281条的规定，必须以有共同约束的条约或存在互惠为依据。

(ii) 对于需要得到我国法院承认和执行的外国判决、裁定，不论是由当事人直接申请还是由外国法院提出，人民法院都必须依照共同受约束的国际条约或互惠原则进行审查。

(iii) 经审查，认为该外国法院的判决、裁定不违反我国法律的基本原则，或者不危害我国国家主权、安全和社会公共利益的，裁定承认其效力，发出执行令，否则，不予承认和执行。

23. 另类争议解决的主要形式是什么？

在中国，另类争议解决方式主要有两大类，一类是社会调解，包括：人民调解，劳动调解，行政调解，当事人协商，仲裁（含劳动仲裁）；一类是司法调解，包括：诉讼调解，当事人和解。

24. 在您所在的司法管辖区有哪些主要的另类争议解决机构？

中国国际经济贸易仲裁委员会等商事仲裁委，劳动仲裁委员会，人民调解中心，行业调解中心，行政职能部门设立的调解中心，法院的诉前调解中心等等。

25. 在诉讼过程中诉讼人是否必须尝试另类争议解决办法？

在诉讼过程中，法官会征求当事人或代理人是否考虑选择另类争议解决方案。但是替代性争议解决方案的适用以当事人自愿为基本原则，若当事人不愿意使用替代性争议解决方案，法院无权强制要求当事人适用。

26. 当前是否有在审议中的改革争议解决法律法规的建议？

目前没有新的关于争议解决方面法律法规改革的提案。

27. 关于您所在司法管辖区或者亚洲地区的争议解决，是否有任何特殊情况需加以强调？

目前，中国争议解决领域的特点主要为：

(a) 争议解决案件数量过多，案件数量和争议解决机构人员配置之间比例不协调；

(b) 争议解决在社会公众生活中较为普遍；

(c) 争议解决案件的标的额不断在上升；

(d) 争议解决案件处理周期过长，解决争议的时间成本和经济成本过高；

(e) 争议解决案件中，当事人对律师的依赖程度比较高。

作者资料：

马江涛 博士

高级合伙人，大成律师事务所

电子邮箱：jiangtao.ma@dentons.cn

李涛 博士

高级合伙人，大成律师事务所

电子邮箱：tao.li@dentons.cn

李永一 先生

高级顾问，大成律师事务所

电子邮箱：li.yongyi@dentons.cn

刘净 博士

二级顾问，大成律师事务所

电子邮箱：liujing.1@dentons.cn

共同作者：郭孟兰、牛洪涛

网址：www.dentons.cn

地址：中国
北京市朝阳区东大桥路9号侨福芳草地D座7层

电话：+86 10 58137799

传真：+86 10 58137778

大成DENTONS

From Largest 从最大到领先 to Leading

Dentons Dispute Resolutions Practice

大成争议解决业务

深度诉讼 Litigation in Depth

- Deep Understandings of Litigation Theory & Skills
  深解诉讼理论与技巧
- Deep Knowledge of Judgment Logic & Obstacles
  深谙审判逻辑与关隘
- Deep Concerns for Clients' Needs & Profits
  深谋客户需求与利益

Simultaneous Development of Domestic & International 国内仲裁与国际仲裁并举 Arbitration

- Local Resources & Talents
  本土资源与智慧
- Global Presence & Coordination
  全球网络与协作

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

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

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

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

2. What is the role of the judge in civil proceedings?

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

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

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

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

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

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

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

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

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

All lawyers, after passing the final exams of the Macau Lawyers' Association and finishing the apprenticeship, can appear in court and

conduct proceedings on behalf of their client. Macau does not have a differentiation between barristers and solicitors.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As mentioned, parties exchange documents as evidence during the written phase. It may also happen that a witness testimony is collected prior to the trial (if, for example, the witness is likely to be out of Macau when the trial takes place). Nevertheless, the rule is that the witnesses are present in court to give evidence orally.

The witness will first be questioned by the party presenting him/ her and will then be cross-examined by the opposition. Finally, the party presenting the witness is entitled to yet another round of queries after the opponents finishing the cross-examination.

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

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

Parties are entitled to request that expert evidence be produced.

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

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

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

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

12. What interim remedies are available before trial?

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

1. periculum in mora, i.e., reasonable fear that a third party (the Defendant) may cause to the Plaintiff an irrevocable loss, if not stopped or impeded from pursuing a certain activity, which could not be avoided by presenting a principal action, due to court terms and usual court timetables. A founded fear of damage of the rights.
2. fumus boni iuris, i.e., the probable or likely justification and grounds by the Plaintiff, to present such a measure. The injunction must represent a subsisting and existing indication that there are plausible reasons for presenting the forthcoming civil suit. there should be a serious probability of the existence of the right.
3. summaria cognitio, i.e., the Judge must be simply and quickly convinced by the

injunction, as it is a temporary measure that precedes the principal action or the ordinary lawsuit.

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

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

13. What does an applicant need to establish in order to succeed in such interim applications?

An applicant must establish the requisites mentioned previously, including periculum in mora and fumus boni iuris.

14. What remedies are available at trial?

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

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

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

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

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

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

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

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

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

18. Are contingency or conditional fee arrangements permitted between lawyers and clients?

Contingency or conditional fee arrangements between lawyers and clients are not permitted in Macau. The code of ethics of the lawyers

practicing in Macau specifically forbids quota litis agreements whereby lawyer and client agree that a portion of the benefit obtained by the client in the relevant case will be paid to the lawyer. However, it is admissible that the professional fees of the lawyer be established taking into account the amount of the matter assigned to the lawyer.

19. Is third-party funding permitted? Are funders allowed to share in the proceeds awarded?

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

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

20. May parties obtain insurance to cover their legal costs?

Albeit not common, there is nothing to prevent the parties from obtaining insurance to cover their legal costs.

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

Under the Macau Litigation Administrative Procedure Code, any Macau resident or legal person with competence to defend the relevant goods, may bring class action by means of a contentious appeal against acts affecting fundamental goods such as public health, housing, education, cultural heritage, the environment, spatial planning, quality of life and, in general, any good in the public domain.

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

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

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

1. There must be no doubt on the authenticity and intelligibility of the decision;
2. The decision should have acquired res judicata force according to the foreign law;
3. Fraud must have not been used for the determination of the exclusive competence of the court that rendered the decision;
4. The decision has to have been rendered on matters not befalling on the exclusive competence of Macau courts[1];
5. There must be no identical suit in respect of the same matter pending before a court in Macau;
6. The Defendant must have been properly served according to the law of the court of origin;
7. The principles of equality and due process of law must have been observed;
8. The decision cannot be against public policy of Macau jurisdiction.

If the aforesaid requisites are fulfilled, according to the laws in force in Macau, validity and

[1] As per article 20 of the Macau Civil Procedure Code, the proceedings related to real estate rights located in Macau (an enforcement to recover an asset or to pay a debt that is secured by a real guarantee against, e.g. mortgage of a real asset); and Bankruptcy and insolvency proceedings of a company having its registered address in Macau.

formal effectiveness will be attributed to the foreign judgment and it, therefore, can be enforced.

23. What are the main forms of alternative dispute resolution?

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

24. Which are the main alternative dispute resolution organisations in your jurisdiction?

The main alternative dispute resolution organizations in Macau are the Arbitration Centre of the World Trade Centre of Macau, the Macau Lawyers' Association Arbitration Centre and the Consumers Dispute Resolution Arbitration Centre.

25. Are litigants required to attempt alternative dispute resolution in the course of litigation?

Litigants are not required to attempt alternative dispute resolution in the course of litigation, despite the powers of the judges to endeavor conciliation in certain proceedings.

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

In October 2017, the President of the Last Instance Court urged the professionals in the legal sector to promote possible amendments to the Civil Procedure Code, based on the real situation in Macau, with the aim of simplifying legal proceedings and improving the efficiency of the judicial process. Furthermore, the President also suggested the drafting of a bill regulating the mediation process and the setting-up of mediation entities for different matters in Macau, with the purpose of providing residents with an alternative means of conflict resolution.

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

Macau is an Uncitral Model Law jurisdiction, which is still in the early stage of use of alternative dispute resolution forms, despite the recent increase in the number of arbitration proceedings. Recently, we have had interventions from different entities, including the Government and the Macau Lawyers Association in order to enhance Arbitration as a true dispute resolution alternative. As to the court, it is a Civil Law system that has also seen an increase in the number of court cases challenging the capacity of the courts. We are of the view that our bilingual system will surely be challenged with more and more dispute cases in the future.

About the Authors:

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

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

Rato, Ling, Lei & Cortés – Advogados
W: http://lektou.com/en
A: Avenida da Amizade,
555 - Macau Landmark,
Office Tower 23rd Floor, Macau
Macau SAR
T: +853 28562322

MCL Lawyers
W: http://mclmo.com
A: Alameda Dr. Carlos D'Assumpção,
n.º 249-263 Edifício Pak Tak
(China Civil Plaza),
7.º andar P, Macau
Macau SAR
T: +853 28715588

司法管辖区： 澳门
律所： Rato, Ling, Lei & Cortés - Advogados 和 MCL Lawyers
作者： Pedro Cortés 和 Marta Mourão

1. 在民事诉讼方面，法院系统的结构是怎样的?

澳门在民事法院的层级上有三个层次，包括澳门司法基层法院（一审法院）、二审法院和终审法院。

一般说来，民事诉讼始于澳门的基层法院。然后，根据索赔金额或根据民事诉讼规则指定的金额，败诉方可以向二审法院提出上诉。在第二审法院作出裁决后，如果该案件的索赔额或指定的金额允许，并且该裁决并非仅对澳门基层法院判决的确认（即二审判决并非维持基层法院原判），那么败诉方只能向终审法院提出上诉。

2. 法官在民事诉讼中的角色是什么?

法官负责维持案件审理期间的秩序，对扰乱审理秩序之人要采取必要措施。

作为法院诉讼的裁决人，澳门法官在裁决中的角色在原告与被告都提供书面答辩的书面陈述阶段较为活跃。

此后，法官角色非常重要，需要确定哪些是他认为已经证明或者解决的事实，哪些是审理过程中仍需证明的事实。

在审理期间，法官让律师对证人进行问询，本人只有在需要作出决定时才介入，如是否接受一项文件，是否同意对证人的问题，是否同意原被告一方的任何要求。

听取证人证言后，法官将根据当事人陈述考虑事实情况，最终根据案情作出判决。

3. 庭审是否向公众开放? 公众是否能够查阅法庭文件?

除法院另有决定外（即保障人民的尊严和社会公德，保障法院的正常运转），民事案件的开庭审理应向公众公开。

除非法律另有规定，否则公众不得查阅法院文件。根据澳门法律，如果披露其内容可能侵犯人的尊严、侵犯私人生活或公共道德或有可能损害作出决定的效力，那么就会限制查阅法院文件。仅能允许有限的查阅，例如，在婚姻无效案件、离婚案件或者是确立或质疑父子关系的案件。在这种情况下，只有当事人及其律师才能查阅法院文件。

4. 所有律师均有权代表其委托人出庭并参加诉讼吗? 如果不是，律师职业的结构是怎样的?

所有律师在通过澳门律师协会的最终考试和完成实习之后，都可以出庭代表客户进行诉讼。澳门没有大律师和诉讼律师之分。

5. 提起民事请求的时效期为多久?

澳门法律规定了多种民事诉讼时效，这取决于索赔的类型。一般为 15 年；《澳门民法典》还规定了 5 年的诉讼时效，适用于租赁费、法定或约定利息、公司分红、赡养费支付或任何其他定期重复支付等有关的索赔。在非合同责任（侵权、过失等）案件中，有 3 年的时效限制。《澳门民法典》和其他立法也规定了其他民事诉讼的时效。

6. 有哪些诉前程序是当事人在开始诉讼之前必须遵守的?

在澳门，没有各方在提起诉讼前必须遵循的诉前程序，但是良好的实践结果表明，向违

约人发送请求函、司法通知或类似文件可以给予其采取补救措施的准备时间。

7. 案件进入审理之前要经过哪些典型的民事程序？有什么样的时间表？

在民事诉讼程序（或任何其他法律程序）中，很难预测时间表，因为它非常依赖法院紧凑的排期，而不是当事人的主动性。尽管如此，典型的程序还是以原告提出的书面请求开始。然后，如果没有显而易见且无法克服的问题或错误，那么将通知被告在 30 天内提出其辩护意见。被告在辩护时也可以提出反诉。

根据诉讼的类型，原告可能有权进行另一轮的书面答辩；同样，被告在某些特殊情况下也可以驳回。

双方必须提交能够证明待证事实的所有文件作为诉状的附件。

此后，法院将对当事双方提出的事实作出决定，区分哪些是被证实或商定的事实，哪些是审理期间仍需提交证据的事实。在这个初步决定中，法院可以在当时决定案件的某些方面的是非曲直。

双方获知这一决定，并随后提出索赔要求后，必须出示其证人名单和任何他们认为适当的证据，包括专家意见和报告。专家出具报告，双方再提出一轮意见后，法院将安排审判的开庭日期。

8. 当事人是否必须向其他当事人和法院披露相关文件？

除非法院根据其自由裁量权作出明确要求，或对方当事人要求，否则不会要求当事人向他人或法院披露任何文件。原则上，一方当事人只披露认为适当的文件，以证明其指称的事实或与另一方指称的事实相抵触的文件。

9. 是否存在特权文件或其他规则允许当事人不披露特定文件？

没有这样的规定。然而，尽管这是不寻常的，但是法院可以因为资料高度机密而允许一方不披露文件。

10. 当事人在审理之前是否交换书面证据？或是否提供口述证据？对方是否有权盘问证人？

如前所述，双方在书面阶段交换作为证据的文件。也可能出现在审判前收集证人证言的情况（例如，如果出现审判时证人可能离开澳门的情况）。无论如何，证人必须出庭口头作证是一项规则。

证人将首先接受申请其作证的一方当事人的问询，然后由对方进行质证。最后，申请方有权在对方完成质证后进行下一轮问询。

法官随时有权提问，或要求澄清。

11. 关于指定专家证人的规则是怎样的？是否有专家行为准则？

双方都有权提出专家证据。

法律规定，在可能的情况下，专家证据应由在相关事宜中具有相关能力的公共服务专家完成。否则，专家应由法院在相关领域具有相关技能的人员中指定。

双方均可建议某人担任专家证人。如果双方均同意指定某人，除非有理由怀疑该人的适合性或技能，否则法院应当指定该人。

一位专家出具简单专家证据，如果法院或双方要求，也可以出具专家团证据，专家团由三位专家组成。在这种情况下，如果双方对指定何人担任专家没有达成一致，那么各方指定一位，法院指定第三位。

专家有勤勉履行职责的义务，如果没有尽职尽责，法院可能会对其处以罚款或取消其专家证人资格。专家应承诺认真履行职责，除非他是一名公务员，并在执行职务时充当专家证人。除了遵守职业道德守则，没有特别的专家行为守则。

12. 案件审理前可获得哪些临时救济？

双方都有权申请普通禁令，其应当满足以下条件：

1. 如延迟签发禁令，则会造成危险（拉丁语 periculum in mora），即有合理的理由担心，如果不制止或停止某种行为，那么第三方（被告方）可能造成原告不可挽

回的损失。由于法院和审理时间的关系，这种情况无法通过提起诉讼进行避免。对此种权利受损存在有理由恐惧。

2. 具有充分的法律根据（拉丁语 fumus boni iuris），即原告提出极可能或者可能正当的理由。禁令必须表明有理由相信即将提起民事诉讼的迹象，且这一迹象持续存在。该等权利的存在应当具有高度可能性。
3. 速裁（拉丁语 summariacognitio），即法官应当简捷快速地签发禁令，因为这是在主审或普通诉讼之前的临时措施。
4. 只有在《澳门民事诉讼法典》、《澳门商法典》或《澳门民法典》中没有明确的禁令，才可以请求非指定性禁令。

最后，法院下达的非指定性禁令对被告造成的伤害不得比其可能采取的自我防范措施的更大。

13. 申请人需要确立些什么才能成功申请此类临时救济?

申请人必须满足前述条件，包括延迟的危险和可能会胜诉。

14. 案件审理时可获得哪些救济?

可以要求专家证人，并要求法院冻结资产或对资产或场所进行检查。

15. 执行判决的主要方式有哪些?

如果澳门法院作出判令支付一定数额的金钱或者履行特定行为的终局判决，一旦向澳门基层法院单独或者作为判决所处诉讼程序的附件提交经核证的判决文书，则无需重新对案情进行再次衡量，直接强制被告履行该判决。

强制执行程序有特殊规则，参见“所作裁决的有效实现”。

16. 胜诉方一般是不是会获得诉讼费用补偿? 诉讼费用如何计算?

一般来说，根据法院收费规定，胜诉一方在其费用和法院费用上会得到一些补偿。计算费用时，考虑了索赔金额和其他因素。尽管败诉方承担多数的法庭费用，事后费用的原则在澳门并不完全适用。

17. 对最终判决有哪些上诉途径? 当事人能够以什么理由提起上诉?

如上所述，澳门法院有三个层级：司法基层法院、二审法院和终审法院。虽然有些裁决是终局的（即索赔金额小于 50000 澳元），但是在原则上，澳门基层法院或行政法院的临时或最终判决也可能被上诉至二审法院。上诉方可根据法律问题或事实提出质疑。当就事实提起上诉时，上诉方应说明本该作出不同裁决的证据和观点。诉诸终审法院时，判决只能以法律问题为基础。此外，还规定了允许一方向终审法院上诉的最低索赔金额。

终审法院驳回其对同一问题的先前判决时，有特别上诉程序。

18. 是否允许律师和委托人之间存在胜诉酬金或按条件收费的安排?

在澳门，律师和客户之间不允许出现意外或有条件的费用安排。在澳门，律师的道德规范明确禁止分成协议，即律师与客户达成协议，客户因相关案件获得的利益的一部分将支付给律师。但是，允许设立律师的专业费用，并在此费用上考虑到分配给律师的金额。

19. 是否允许第三方资助? 资助人是否可分享胜诉收益?

澳门法律在第三方融资问题上没有明确态度。通常的做法是当事人承担自己的费用。如果有第三方资金为诉讼提供资金，那么这个机构无权通过法院收回成本，并且不允许分享收益。

澳门特别行政区有一个制度，可以资助那些没有足够资金起诉之人。申请人必须出示证据证明无力承担诉讼成本，包括法院和法律费用。

20. 当事人是否可为其诉讼费用投保?

虽然不常见，但双方均可通过保险支付其诉讼成本。

21. 诉讼人是否可提起集体诉讼？如果可以，哪些规则适用于集体诉讼?

根据《澳门行政诉讼程序法典》，任何有能力捍卫相关利益的澳门居民或者法人都可以发起集体诉讼，起诉影响基本利益的行为，如公共健康、住房、教育、文化传承、环境、空间规划、生活质量等公共领域的利益。

澳门居民还有权发起集体诉讼，起诉妨害公共利益的公务员的行为。

22. 外国判决通过哪些程序予以承认和执行?

为了承认和执行外国判决，必须满足《澳门民事诉讼法典》第 1200 条第 1 款规定的必要条件。这些条件包括以下内容：

1. 对判决的真实性和理解无异议；
2. 根据外国法律，判决已经生效；
3. 作出该判决的法院并非在欺诈的情况下具有的管辖权；
4. 该判决不涉及澳门法院专属管辖权之事宜；[1]
5. 之前在澳门法院无对相同事项未决之案件；
6. 根据原审法院适用的法律，判决必须妥善送达被告；
7. 必须遵守平等和正当法律程序的原则；
8. 该判决不能违背澳门的公共政策。

如果满足上述条件，那么根据澳门现行法律，将赋予外国判决以合法性与正式的效力，进而可以强制执行。

23. 另类争议解决的主要形式是什么?

另类争议解决机制的主要形式是调解和仲裁。

24. 在您所在的司法管辖区有哪些主要的另类争议解决机构?

澳门主要的另类争议解决机制组织是澳门世界贸易中心仲裁中心、澳门律师协会仲裁中心和消费者争端仲裁中心。

25. 在诉讼过程中诉讼人是否必须尝试另类争议解决办法?

尽管法官有权在某些诉讼程序中进行调解，但诉讼当事人无须在诉讼过程中尝试其他解决纠纷的办法。

26. 当前是否有在审议中的改革争议解决法律法规的建议?

2017 年 10 月，终审法院院长促请法律界的专业人士根据澳门的实际情况，推进对《民事诉讼法典》的修正，以简化法律程序，提高司法程序的效率。此外，为了向居民提供解决冲突的备选办法，院长还建议起草一项法案，调整调解程序，并为澳门的不同事项设立调解机构。

27. 关于您所在司法管辖区或者亚洲地区的争议解决，是否有任何特殊情况需加以强调?

虽然最近仲裁案件增加了很多，但澳门采用的是联合国国际贸易法委员会示范法，仍处于使用另类争议解决机制的早期阶段。最近，我们受到了来自不同实体的干预，包括政府和澳门律师协会，以推动仲裁作为真正的争端解决机制。就法院而言，民事法律制度也增加了质疑法院能力的案件数量。我们认为，我们的双语制度未来肯定会受到越来越多的争议案件的挑战。

[1] 根据《澳门民事诉讼法典》第20条，与澳门境内的房地产权相关的诉讼（索赔的资产或支付的债务由不动产提供担保，例如不动产/地产抵押），以及公司破产清盘相关诉讼，且该公司的注册地址位于澳门。

About the Authors:

Pedro Cortés

高级合伙人，**Rato, Ling, Lei & Cortés – Advogados**

电子邮箱：cortes@lektou.com

Marta Mourão

合伙人，**MCL Lawyers**

电子邮箱：marta.mourao@mclmo.com

Rato, Ling, Lei & Cortés – Advogados

网址：http://lektou.com/en

地址：Avenida da Amizade, 555 - Macau Landmark, Office Tower 23rd Floor, Macau Macau SAR

电话：+853 28562322

MCL Lawyers

网址：http://mclmo.com

地址：Alameda Dr. Carlos D'Assumpção, n.º 249-263 Edifício Pak Tak (China Civil Plaza), 7.º andar P, Macau Macau SAR

电话：+853 28715588

Jurisdiction: Mexico
Firm: Von Wobeser y Sierra, S.C.
Author: Marco Tulio Venegas Cruz

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

Mexico is a federal state and therefore its court system is divided into federal and local courts. In addition, commercial matters are distinguished from and governed separately from strictly civil matters. Commercial matters deal with all the legal relationships between corporations and/or individual businessmen, while civil matters refer just to legal relationships between individuals not involved in commercial activities. The Constitution has established that civil law matters, both substantive and procedural, are of local jurisdiction, whereas commercial matters are governed by federal law. Since commercial matters are federal, they are regulated in the Commerce Code, which is applicable to the entire country. On the other hand, since civil matters are local, each state and the federal district has its own Civil Code and Code of Civil Procedures. There is also, however, a Federal Code of Civil Procedures, which applies to the resolution of federal administrative and civil conflicts. Although commercial matters are federal, local judges may resolve commercial disputes. In fact, there are no commercial judges; the judges that resolve commercial disputes are civil judges, both local and federal.

Within the civil sphere in Mexico City, there are also judges called Justice of Peace judges, who settle claims involving very low amounts.

In addition to being a dual federal or state system, the court system in Mexico is also divided into civil, commercial, administrative, antitrust, labour, agricultural and criminal areas. Each of these areas has its own set of substantive and procedural rules.

The courts at the federal level include the Supreme Court of Justice with 11 Justices, the Collegiate Circuit Courts, having three magistrates, the Unitary Circuit Courts, having one magistrate, and the district courts, having one judge. Each state has a State High Court and specific courts divided into legal areas such as civil, commercial, family, leasing, labour and criminal matters.

The Supreme Court functions as a full court or in two chambers of five Ministers each. Among other matters, it resolves conflicts between states and between the federal government and a state, as well as conflicting decisions by the Circuit Courts. In also addresses challenges to the constitutionality of laws and is the last resort for appeal of certain cases involving constitutional matters.

The Collegiate Circuit courts were created to exercise powers originally corresponding to the Supreme Court, which is to resolve *amparo* proceedings involving questions of legality of decisions issued by the Unitary Circuit Courts. The latter courts in turn resolve appeals from the District Courts, which are the federal courts of first instance.

Both the District Courts and the Unitary and Collegiate Courts are divided territorially in the number or circuits that the Federal Judicial Board, an administrative body of the judicial power, establishes for the entire country.

2. What is the role of the judge in civil proceedings?

The role of a Judge in a Civil (or commercial) proceeding is to rule on the dispute based on the contractual provisions, on the applicable

law, its legal interpretation and absent a specific legal framework based on the general principles of law.

Pursuant to Mexican procedural law, the parties have the burden to boost the proceeding and to ask the Court to follow up the procedural steps established in the law. If the parties do not ask the Judge to continue with the proceeding for more than 6 months, then the Judge may declare that the proceeding is closed for lack of procedural interest.

Within the duties of the Judge, he/she must invite (i) the parties to conciliate the dispute; (ii) receive the evidence proposed; (iii) attend hearings; and (iv) rule on the dispute through a final judgment.

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

Pursuant to the Commerce Code, hearings must always be held in public (the Commerce Code art. 1080). Pursuant to the Federal Code of Civil Procedures, the general rule is that hearings must be held public, exceptionally of those that the court considers appropriate to be held in private. (Federal Code of Civil Procedures art. 274).

However, court documents are private and only the parties can access the court file and the final judgment. During the trial, parties are requested for their consent to publish the award without their names and all explicit references to them are erased from the copy.

In recent years the Supreme Court declared that all information previous to 2003, relative to federal procedures is public. This statement was issued due to the approval of the Federal Law of Transparency and Public Access to Governmental Information that allows any individual to request any documentation relative to federal trials. Article 8 of the Federal Law of Transparency and Public Access to Governmental Information states that all the resolutions that are non-appealable shall be made public; nevertheless, the parties may object to the publication of their personal data. Therefore, once the resolution is non-appealable, it becomes public to anyone who wishes to consult it.

4. 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?

No, only the lawyers that are authorized through a written brief by a party authorized representative have the right to appear in Court on behalf of the client. In addition, the lawyers must have in place their license and they should be registered also before the Court.

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

Usually the limitation period for civil and/or commercial actions ranges from 5 to 10 years, depending on the nature of the action. However, there are certain specific actions that have a 6-month period, a one-year and a two-year statute of limitation.

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

No, under Mexican law a lawsuit is initiated directly through the filing of a written complaint before the Courts. No administrative or formal pre-action procedure is required.

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

Under the Mexican civil system there is no distinction between the civil or commercial proceeding and the trial itself. Once the complaint files a lawsuit, the defendant will be summoned and have the right to counterclaim if he wishes to. Afterwards the Court will formally give the

parties the opportunity to produce their evidence and hold as many hearings as required to receive it. After all the hearings are held, then the parties can file their final pleadings in writing. Finally, the Judge will render its judgment in first instance.

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

If the document is identified with precision and there is evidence about its existence, a party may request the Court to order the other party to disclose it. In addition, during a lawsuit, third parties are compelled, at all times, to assist the courts when investigating the truth and shall exhibit all documents and goods in their possession whenever they are required to do so. The courts have the power and the obligation to compel third parties, through any constraining means, to comply with such obligations. However, in the event of refusal, the courts shall hear the third party's arguments and issue a final non-challengeable decision.

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

Ascendants, descendants, spouses and those obliged to keep professional privileges, are exempt from such obligation whenever the evidence requested is prejudicial of the party to which they are related (Federal Code of Civil Procedures, art 90).

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

Pretrial discovery/disclosure is not regulated or allowed by Mexican legislation. There are, however, some specific and limited procedures that entitle a party to obtain specific information or testimony for preparing a lawsuit (article 1151, Commerce Code).

During the proceeding, attorneys are entitled to cross-examine any witness, the party or its representative (if it is a company or corporation), if it is requested.

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

The experts appointed by a party must be have the title and license to act as experts in the corresponding area. Aside from these minimum requisites there are no binding codes of conduct for experts.

12. What interim remedies are available before trial?

Injunctive relief in principle is limited to attachment of assets or an order regarding the debtor to stay in its domicile.

13. What does an applicant need to establish in order to succeed in such interim applications?

Injunctive relief may be granted by a court only if the claimant proves a justified fear that the defendant may abscond, or when there is justified fear that the defendant may hide his assets or intentionally lose a specific good (in actions in rem).

14. What remedies are available at trial?

In general, the remedy for civil tort liability is the restoration of the status quo prior to the damage, when possible, or the payment of damages and lost profits. The basic contract remedies are specific performance or termination of the contract with damages and profits in both cases. If, in a contractual relationship, an interest rate is not specified, the legal interest rate is 9% (per cent) annually in civil matters and 6% (per cent) annually in commercial matters on the principal.

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

If a party refuses to comply with a judgment, the Court may order the attachment of assets or even the intervention of the administration of the debtor to get the payment. The assets then may be sold through a public auction to obtain the amount due. If the obligation consists in the performance of certain task, then if the party refuses to do it, the Court may award damages and lost profits and consequently attach assets to get them enforced. To obtain the enforcement, a specific ancillary proceeding must be brought asking the Court for the enforcement. This proceeding may take from three to six months.

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

The Mexican system for attorney's fees awarded for the prevailing party in litigation is always fixed.

In commercial disputes, the Commercial Code does not establish clear rules as to how to determine the quantum. However, there are judicial precedents that clearly establish that the local law determines the way to liquidate costs.

The local law in Mexico City establishes that the first instance costs shall be calculated according to the following basis:

(a) When the amount of the suit does not exceed the equivalent to three thousand minimum wages in the Federal District, it will be calculated at 10% (per cent).

(b) When the amount of the suit exceeds the equivalent to three thousand minimum wages in the Federal District and is up to six thousand minimum wages in the Federal District, it will be calculated at 8% (per cent); and

(c) When the amount of the suit exceeds the equivalent to six thousand minimum wages in the Federal District it will be calculated at 6% (per cent),

If the dispute were to be ruled by a second instance the percentages will be raised by a further 2% (per cent).

Most of the other state codes of procedure follow the same rules.

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

First-instance judgments can be appealed before an appellate court. The appellate court stands in a superior hierarchical level to the court that issued the judgment.

According to the Commerce Code art. 1337, the appeal can be made in the following cases:

(a) whenever the unsuccessful party adduces a violation of rights or a grievance;

(b) when the successful party, even though it has succeeded pursuant to the first instance judgment, has not been awarded with the indemnification of damages and losses, the payment of costs or the restitution of products;

(c) when the successful party wishes to adhere to an appeal previously filed; or

(d) a third party with legitimate interest, whenever the final resolution affects him.

When the first-instance judgment is final, the appeal must be filed before the court that issued it, within nine days following the date on which such first-instance judgment was notified to the parties.

18. Are contingency or conditional fee arrangements permitted between lawyers and clients?

Under Mexican law the parties are free to agree with their lawyers as to the amount of their fees. Thus, among other compensation schemes, the lawyers' fees can be calculated based on a contingency or success fee. Normally, in this scenario the fees are calculated either:

(a) as a percentage of the amount of the claim or of the amount recovered. The percentage is agreed on between the lawyer and the client, and is based on the specific circumstances of the case, and can vary according to:
   (i) the complexity of the matter;
   (ii) the client's economic situation; and
   (iii) the reputation of the lawyer.
(b) as an hourly rate for time spent; or
(c) as a fixed fee depending on the amount of the claim.

19. Is third-party funding permitted? Are funders allowed to share in the proceeds awarded?

Under Mexican law, there is no limitation on third-party funding. However, this practice has not really been adopted in the Mexican forum yet. In any event, if there is a third-party funding the third party will not be deemed as part of the proceeding, unless there is a formal assignment of litigation rights in its favor. Thus, at the end, the sharing in the amounts awarded should be made by the party that was funded in compliance with the agreement it may have executed with the third-party funder.

20. May parties obtain insurance to cover their legal costs?

Yes, there is no restriction to obtain it. However, it is not usual to have it in Mexico.

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

Article 17 of the Mexican Constitution recognises "collective actions" in Mexico, providing that federal judges would hear these proceedings and mechanisms in an exclusive manner. This type of action is registered in the Federal Code of Civil Proceedings; Federal Civil Code; Federal Law of Economic Competence; Federal Law of Consumer's Protection; Organic Law of the Federal Judicial Power; General Law of Ecological Equilibrium and Environmental Protection; and Law of Protection to the User of Financial Services.

Mexican Law limits collective actions to matters related to the consumption of goods or services, public or private, and those related with the environment, specifically those related to the following matters:

(a) consumer protection;
(b) environmental protection matters;
(c) protection and defence of the users of financial services; and
(d) antitrust matters.

A collective claim can be filed by public entities such as the Federal Protection Consumer Office, Federal Protection Environmental Office, National Commission for the Protection and Defense of the Users of Financial Services and the Antitrust Federal Commission; the legal representative of the collectivity affected, provided it is formed by at least 30 members; and non-profit civil associations legally formed at least one year prior to the filing of the collective action.

The resolution will benefit all the members of the affected group and each member must liquidate and prove the damage caused.

Finally, the Amparo Law establishes the possibility of bringing in one single procedure a constitutional action against some decisions of the authorities, which may affect several persons.

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

In accordance with international treaties (enforcement of domestic judgments abroad) and the Federal Code of Civil Procedures, article 571, Mexican courts are willing to recognise and execute a foreign judgment, provided that:

(a) the formalities and conditions regarding rogatory letters have been met;

(b) the resolution did not result from the exercise of an action in rem;

(c) the foreign court had correctly assumed jurisdiction;

(d) the claim was properly served on the defendant;

(e) the foreign judgement is non-appealable and res judicata in the country in which it was rendered;

(f) the action that gave rise to the resolution is not a pending matter between the same parties in Mexican courts; unless a letter rogatory had been processed and delivered to the Foreign Ministry or to the authorities of the state where the claim should be served; and

(g) the judgment does not conflict with a mandatory law or Mexican public policy.

23. What are the main forms of alternative dispute resolution?

The main alternative dispute resolution method in Mexico is arbitration. Arbitration has a good reputation in Mexico and is seen by large corporations as a good and effective method of resolving disputes.

In the past, mediation was considered a waste of time. However, recent legislative reforms, as well as state policies promoting ADR, have begun to gain traction. Consequently, it is more common to find companies willing to mediate to solve their disputes. Recent legal reforms have strengthened the possibility of enforcing any agreement reached in conciliation or mediation proceedings.

24. Which are the main alternative dispute resolution organisations in your jurisdiction?

At the international level and dealing with large arbitration disputes, the ICC and the ICDR are the most important organisations in Mexico. They both have active presence in Mexico.

Local arbitral institutions have gained some traction and reputation for medium-sized local disputes. The facilities are excellent and the service they provide is high quality, in general. The main arbitral bodies based within Mexico are the following: the Arbitration and Mediation Commission of the Mexico City Chamber of Commerce (CANACO), a non-profit organisation based at Paseo de la Reforma no. 42, Delegación Cuauhtémoc, CP 06040, Mexico City, Mexico City (see www.arbitrajecanaco.com.mx); and the Mexican Arbitration Center (CAM), created in 1997, with its offices in Tecnológico de Monterrey, Campus Santa Fe, Av. Carlos Lazo No. 100, Edificio Aulas 1, Nivel 5, Col. Santa Fe, México, Mexico City, CP 01389.

25. Are litigants required to attempt alternative dispute resolution in the course of litigation?

Litigants are not obliged to attempt ADR's during litigation. However, the Courts encourage them to mediate or conciliate the dispute during each phase of the proceeding.

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

Yes, currently there is a trend adopted by the Mexican government to try to modernize and expedite the lawsuits to make them more alike to the U.S. system. In this context, ADR are being promoted and several legal reforms have been adopted to implement them in a more widespread manner. In addition, there is also a trend to have more oral proceedings (since traditionally the lawsuits in the Mexican legal systems are carried out through written briefs) and facilitate quick decisions.

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

In Mexico a conscious effort has been made to give more certainty to foreign investors modernizing the legal framework, entering Bilateral Investment Treaties and promoting ADR's and transparency and quickness in the resolution of Court proceedings. Moreover, Mexico has explicitly characterized arbitration as a manifestation of the fundamental right of freedom. Thus, I would encourage any Asian company to have confidence in the Mexican legal system and in the potential enforcing of arbitral awards in our Country.

About the Author:

Marco Tulio Venegas Cruz
Leading Partner, Dispute Resolution, Von Wobeser y Sierra, S.C.
E: mtvenegas@vwys.com.mx
W: www.vonwobeserysierra.com
A: Guillermo Gonzalez Camarena No. 1100, piso 7, Colonia Santa Fe, Centro de Ciudad, México, Ciudad de México, C.P. 01210
T: +52 55 52581034
F: +52 55 52581098

司法管辖区： 墨西哥
律所： Von Wobeser y Sierra, S.C.
作者： Marco Tulio Venegas Cruz

1. 在民事诉讼方面，法院系统的结构是怎样的?

墨西哥是联邦国家，因此其法院系统分联邦法院和地方法院。此外，商事案件从民事案件中严格区分并单独管辖。商事案件调解公司和 / 或商人之间的法律关系，而民事案件调解的是不涉及商业活动的个人之间的法律关系。《宪法》规定，无论是实质性的还是程序性的民事法律案件都属于地方管辖，而商事案件则由联邦法律管辖。由于商事案件归联邦管辖，所以在适用于整个国家的《商法典》中进行了规定。另一方面，由于民事案件归地方管辖，所以各州和联邦地区都有自己的《民法典》和《民事诉讼法典》。此外，还有一部《联邦民事诉讼法典》适用于解决联邦行政和民事争议。尽管商事案件归联邦管辖，但是地方法官也可以裁决商业纠纷。事实上，不存在商事法官；解决商业纠纷的法官是地方和联邦的民事法官。

在墨西哥城的民事领域，也有法官称为治安法官，他们处理涉案金额很低的索赔案件。

除了联邦和州两种制度之外，墨西哥的法院系统也分为民事、商事、行政、反垄断、劳工、农业和刑事领域。这些领域各自都有一套实质性和程序性规则。

联邦层面的法院包括最高法院，有十一位法官；高等巡回法院，有三位法官；单一巡回法院，有一位法官；以及地区法院，有一位法官。每个州都有一个州高等法院和按法律领域划分的专门法庭，诸如民事、商事、家庭、租赁、劳工和刑事案件等。

最高法院可以作为一个合议庭审理案件，也可以由两个法庭分别审理，每个法庭有五位成员。除其他事项外，它处理各州之间、联邦政府与州之间的冲突，以及巡回法院作出的有争议的裁决。它还处理法律的合宪性问题，也是对某些涉及宪法事项案件上诉的最后裁决机构。

高等巡回法院旨在行使原属于最高法院的权力，处理涉及单一巡回法院的裁决是否合法的宪法性诉讼。单一巡回法院处理来自地区法院的上诉（地区法院是联邦初审法院）。

地区法院、单一巡回法院和高等巡回法院均按照地域划分为若干个，由联邦司法委员会（司法权力的管理机构）设定全国的法院数量或审级。

2. 法官在民事诉讼中的角色是什么?

法官在民事（或商事）诉讼中的作用是在合同条款、可适用的法律、其法律解释的基础上，以及在有一般法律原则但无具体法律体制的情形下对争端进行裁决。

根据墨西哥诉讼法，当事人有责任推动诉讼程序，并要求法院遵守法律规定的程序步骤。如果当事人超过 6 个月不要求法官继续审理，则法官可宣布因缺乏程序性利益而结束诉讼程序。

在法官的职责范围内，他 / 她应当：(i) 邀请各方调解争端；(ii) 接收提交的证据；(iii) 出席庭审；(iv) 通过最后判决对争端作出裁决。

3. 庭审是否向公众开放? 公众是否能够查阅法庭文件?

根据《商法典》，庭审必须公开进行（《商法典》第 1080 条）。根据《联邦民事诉讼法典》，除非法院认为有必要，否则庭审必须公开举行（《联邦民事诉讼法典》第 274 条）。

然而，法庭文件是保密的，只有当事人可以查阅法庭文件和最终判决。在审判过程中，要求当事人同意公开隐藏其姓名的裁决书，

并将所有明确指向当事人的内容从副本中删除。

近年来，最高法院宣布公开 2003 年以前与联邦法院诉讼有关的全部资料。这一声明经由《关于政府信息透明和向公众提供的联邦法律》批准。根据这一法律，任何个人可以请求获取有关联邦审判的任何文件。《关于政府信息透明和向公众提供的联邦法律》第 8 条规定，尽管当事人可能会反对，全部不可上诉的判决都要公开。因此，一旦裁决是不可上诉的，它就是任何人都可以查阅的公开文件。

4. 所有律师均有权代表其委托人出庭并参加诉讼吗？如果不是，律师职业的结构是怎样的？

不，只有当事方代理人书面授权的律师可以代理其客户出席法庭辩护。此外，律师应当向法庭出示其执照并登记。

5. 提起民事请求的时效期为多久？

根据诉讼性质的不同，通常民事和 / 或商事诉讼时效期间为 5-10 年。但是某些具体诉讼的时效也可能是 6 个月、1 年和 2 年。

6. 有哪些诉前程序是当事人在开始诉讼之前必须遵守的？

不，根据墨西哥法律，仅需要向法院提交书面申诉即可直接提起诉讼，不需要经过行政程序或者形式上的预先诉讼程序。

7. 案件进入审理之前要经过哪些典型的民事程序？有什么样的时间表？

在墨西哥民事制度下，就审判本身而言，是民事诉讼还是商事诉讼并无区别。原告起诉后，被告将被传唤，并有权提起反诉（如果被告意图如此）。随后，法院将正式给予当事人出示证据的机会，并按接收证据的次数举行多次听证会。全部听证会结束后，当事人可以递交最后的书状。最后，法官将作出初审判决。

8. 当事人是否必须向其他当事人和法院披露相关文件？

如果文件准确无误且有其存在的证据，一方当事人可以请求法院命令另一方对其披露。此外，在诉讼中，第三方在任何时候都必须协助法院调查真相，并应在需要时出示其拥有的所有文件和物品。法院有权和义务通过任何强制手段强迫第三方遵守这些义务。然而，法院在遭到拒绝的情况下应当听取第三方的辩解并发布不容拒绝的最终决定。

9. 是否存在特权文件或其他规则允许当事人不披露特定文件？

当被要求出示的证据不利于与之有关的一方当事人时，祖先、后代、配偶以及有义务保证职务特权之人可免除此项义务（《联邦民事诉讼法典》第 90 条）。

10. 当事人在审理之前是否交换书面证据？或是否提供口述证据？对方是否有权盘问证人？

墨西哥没有规定立法或允许审前取证 / 披露制度。然而，有一些专门的限制性程序可以使当事人有权获得特定资料或证词以准备诉讼（《商法典》第 1151 条）。

在诉讼过程中，代理人有权要求对任何证人、当事人或其代表（如果是公司）进行交叉审查。

11. 关于指定专家证人的规则是怎样的？是否有专家行为准则？

当事人指定的专家必须具有在相应领域担任专家的职务和执照。除了这些最低限度的要求外，没有约束专家的行为准则。

12. 案件审理前可获得哪些临时救济？

禁制令原则上仅限于资产扣押或要求负债者不得离开居住处的命令。

13. 申请人需要确立些什么才能成功申请此类临时救济？

如果申请人可以证明有理由担心被告可能潜逃，或者有理由担心被告可能藏匿自己的资产或故意失去一个特定的物品（在物权诉讼中），那么法庭可能会出具禁制令。

14. 案件审理时可获得哪些救济?

一般而言，对民事侵权责任的救济，是指在可能的情况下恢复到在损害发生之前的状况，或者对损害和损失利润进行赔偿。对合同的基本救济，是指造成损害或利润损失的情况下，履行合同的某个具体条款或终止合同。如果在合同关系中没有规定利率，则在民事案件中的法定利率为每年 9%，而商事案件中每年为本金的 6%。

15. 执行判决的主要方式有哪些?

当事人一方拒绝履行判决时，法院可以命令扣押财产，甚至对债务人进行行政干预以获得付款。然后，资产将通过公开拍卖予以出售，以获得欠款。如果义务是履行某一任务而当事人拒绝履行该义务时，法院可以判决损害赔偿金、损失的利润，并因此查封财产以便对其强制执行。为了实现强制执行，必须提起请求法院强制执行的特定附属程序。这一程序可能需要三至六个月。

16. 胜诉方一般是不是会获得诉讼费用补偿? 诉讼费用如何计算?

在墨西哥，胜诉方代理人的费用总是固定的。

在商业纠纷中，《商法典》并没有明确规定如何确定该数额。然而，司法判例清楚地表明地方法律决定清算费用的方式。

墨西哥城的地方法律规定，初审费用应当根据如下原则计算：

(a) 当该诉讼的金额不超过联邦地区最低工资的 3,000 倍时，将以 10% 计算；

(b) 当该诉讼的金额超过联邦地区最低工资的 3,000 倍，但不超过 6,000 倍时，将以 8% 计算；以及

(c) 当该诉讼的金额超过联邦地区最低工资的 6,000 倍时，将以 6% 计算。

如果争端需要二审，那么费率将提高 2%。

其他多数州的诉讼法律规定与此相同。

17. 对最终判决有哪些上诉途径? 当事人能够以什么理由提起上诉?

一审判决可在上诉法院进行上诉。上诉法院比一审法院的判决具有更高的效力等级。

根据《商法典》第 1337 条，以下情况可以上诉：

(a) 败诉方举证侵犯权利或申诉的；

(b) 即使按照一审判决胜诉，一方当事人也没有得到损害赔偿和损失赔偿、支付的费用或者归还的物品的；

(c) 胜诉方希望遵守先前提出的上诉时；或者

(d) 当最终判决对具有正当利益的第三方造成影响的。

一审判决终结后，必须在一审判决送达之日起九日内，向上诉法院提起上诉。

18. 是否允许律师和委托人之间存在胜诉酬金或按条件收费的安排?

根据墨西哥法律，当事人可以与律师自由协商律师费用。因此，在其他补偿方案中，律师费的计算可以采取风险代理制或者胜诉制。通常情况下，费用可以按照以下任一种方式计算：

(a) 索赔金额或者获赔金额的一定百分比。这一比例由律师和客户根据具体案件的具体情况，结合以下情形协商而定：

  (i) 案件的复杂程度；

  (ii) 客户的经济状况；以及

  (iii) 律师的声誉。

(b) 根据所花费的小时数计算；或者

(c) 根据索赔金额确定的固定费用。

19. 是否允许第三方资助? 资助人是否可分享胜诉收益?

墨西哥法律没有对第三方资助进行限制。然而，这种做法并没有真正被墨西哥法庭接受。在任何情况下，如果存在第三方资金，除非有正式的诉讼权利转让，否则第三方将不会被视为诉讼的一方。因此，受资助方最终应

当根据与资金提供方签署的协议与其分享判决金额。

20. 当事人是否可为其诉讼费用投保?

是的，获得它没有限制。然而，在墨西哥却不常见。

21. 诉讼人是否可提起集体诉讼？如果可以，哪些规则适用于集体诉讼?

《墨西哥宪法》第 17 条承认墨西哥的“集体诉讼”，联邦法官可以用排他性的方式审理这些诉讼和机制。这类诉讼可以根据《联邦民事诉讼法典》、《联邦民法典》、《联邦经济能力法》、《联邦消费者保护法》、《司法力量组织法》、《生态均衡和环境保护总法》以及《金融服务消费者保护法》进行登记。

墨西哥法律对涉及公共或私人的商品或服务消费以及与环境相关的集体诉讼（特别是涉及如下事宜的）有所限制：

(a) 消费者保护；

(b) 环境保护事宜；

(c) 金融服务消费者的保护；以及

(d) 反垄断事宜。

集体诉讼可以由公共机构（如联邦消费者保护办公室、联邦环境保护办公室、金融服务消费者保护全国委员会和联邦反垄断委员会）、受影响的集体（至少有 30 个成员）的法律代表以及合法组建的非营利性民间组织（在发起诉讼前至少成立一年）发起。

判决将对受影响的集体的全部成员有效，每个成员必须清算和证明造成的损害。

最后，《宪法》规定了可以针对权力机构的某些决定提起宪法性诉讼，并可能会影响某些人。

22. 外国判决通过哪些程序予以承认和执行?

根据国际条约（在境外执行境内判决）和《联邦民事诉讼法典》第 571 条，在满足以下条件时，墨西哥法院将承认并执行国外判决：

(a) 委托书的手续和条件都已经满足；

(b) 判决不会导致物权诉讼；

(c) 外国法院的管辖权无误；

(d) 索赔已经正确送达给被告；

(e) 外国的判决在该国为终局判决、既判案件；

(f) 判决对应的诉讼并非原被告双方在墨西哥的未决事项；除非委托书已递交到外交部或索赔地的州相应部门；以及

(g) 判决不与强制性法律或墨西哥公共政策相冲突。

23. 另类争议解决的主要形式是什么?

在墨西哥，争端解决的替代机制是仲裁。仲裁在墨西哥享有很好的声誉，被大公司视为解决争端的有效方法。

过去，调解被认为是浪费时间。然而，由于最近的法律改革以及各州出台促进替代性纠纷解决机制的政策，调解才开始具有吸引力。因此，越来越多的公司开始愿意通过调解解决纠纷。最近的法律改革加强了在调解或调解程序中达成任何协议的可能性。

24. 在您所在的司法管辖区有哪些主要的替代争议解决机构?

ICC 和 ICDR 是墨西哥处理国际层面的大型仲裁争端的最重要的组织。它们在墨西哥都很活跃。

地方仲裁组织对于中型地方纠纷有一些吸引力和声誉。总体上说，它们设施良好，服务质量高。墨西哥主要的仲裁组织有：墨西哥城商会仲裁和调节委员会（一家位于墨西哥城的非营利组织，简称 CANACO，地址是：Paseo de la Reforma No. 42, Delegación Cuauhtémoc, Mexico City，邮政编码：06040，网址：www.arbitrajecanaco.com.mx）和墨西哥仲裁中心（成立于 1997 年，简称 CAM 地址是：Tecnológico de Monterrey, Campus Santa Fe, Av. Carlos Lazo No. 100, Edificio Aulas 1, Nivel 5, Col. Santa Fe, México, Mexico City，邮政编码：01389）。

25. 在诉讼过程中诉讼人是否必须尝试替代争议解决办法?

在诉讼期间，替代性纠纷解决机制不是必选项。但是法院鼓励在各个诉讼阶段进行调解。

26. 当前是否有在审议中的改革争议解决法律法规的建议?

是的，目前墨西哥政府奉行促进诉讼现代化、加快诉讼速度的趋势，使之更像美国的体制。在此背景下，替代性纠纷解决机制正在推广，且一些法律改革已被推行，以使得替代性纠纷解决机制更广泛地实施。此外，还有一种口头诉讼并迅速裁决的趋势（因为在传统上，墨西哥法律体系中的诉讼是通过书面陈述进行的）。

27. 关于您所在司法管辖区或者亚洲地区的争议解决，是否有任何特殊情况需加以强调?

推动法律体制现代化，签订双边投资条约，促进替代性纠纷解决机制和法院程序的透明度和快速性，墨西哥作出了可被感知的努力为外国投资者提供更高的确定性。此外，墨西哥明确规定仲裁是基本自由权的体现。因此，我鼓励所有亚洲公司对墨西哥法律制度和我国仲裁裁决的潜在执行力抱有信心。

作者资料：

Marco Tulio Venegas Cruz
领头合伙人，争议解决，
Von Wobeser y Sierra, S.C.
电子邮箱： mtvenegas@vwys.com.mx

网址: www.vonwobeserysierra.com
地址: Guillermo Gonzalez Camarena
No. 1100, piso 7, Colonia Santa Fe,
Centro de Ciudad, México,
Ciudad de México, C.P. 01210
电话: +52 55 52581034
传真: +52 55 52581098

Jurisdiction: New Zealand
Firm: Hesketh Henry
Authors: Nick Gillies, Gennise Luen and Richard Belcher

1. What is the structure of the court system in respect of 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. The jurisdiction of the Court is governed by the Senior Courts Act 2016. Appeals to the Supreme Court may only be brought with leave, which can be granted where the subject matter is of general or public importance, a substantial miscarriage of justice has occurred or may occur, or the matter is of general commercial significance. Supreme Court appeals are heard by a bench of five judges.

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

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

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

In addition, there are a number of specialist courts and tribunals. For example, the Employment Relations Authority and Employment Court, Waitangi Tribunal, Maori Land Court, Tenancy Tribunal and Weathertight Homes Tribunal.

2. What is the role of the judge in civil proceedings?

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.

3. 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 in court by counsel before a judge is a trial. Many appearances are of an administrative or procedural nature and are not generally open to the public.

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 by the Ministry of Justice via websites. 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.

4. 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.

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

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

6. 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.

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

The steps in a defended civil proceeding are standard for most proceedings and are as set out in the table below. The time between or for each step will differ depending on the particular case, although some guidance may be obtained from the standard timetable directions included in Table 2: Civil procedures.

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

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

In addition to initial disclosure, in most civil proceedings, parties are or can be ordered to

Table 1: Limitation periods

Type of claim	Limitation period
Money claim, 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 declaratory relief under various contract statutes (Contractual Mistakes Act 1977, Contractual Remedies Act 1979, etc).	6 years from the date of the act or omission on which the claim is based.
Action for an account.	6 years from the date the matter arose in respect of which the account is sought.
Claim for conversion.	6 years from the date of the original or first conversion.
Action for current, future or equitable interests in land.	12 years (unless claimant is the Crown or claiming through the Crown).
Enforcement of a judgment or arbitral award.	6 years from the date on which the decision became enforceable (by action or otherwise) in the country in which it was obtained.
To have a will declared invalid.	6 years from the date of the grant of probate or administration.
Action for a beneficiary's interest in a trust.	6 years from the date on which the interest in the trust falls into possession or when the beneficiary first becomes entitled to trust income or property.
Claims for a share or interest in a personal estate.	6 years from the date on which the right to receive the share or interest accrues.
Claims relating to building work.	10 years from the date of the act or omission on which the proceedings are based (longstop limitation period).
Defamation actions.	3 years from the date of the act or omission on which the claim is based.
Claims under the Fair Trading Act 1993.	3 years from the date on which the loss or damage, or the likelihood of loss or damage, was discovered or ought reasonably to have been discovered.

Table 2: Civil procedures

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 are required to attend a first case management conference before a judge. Orders may be made for discovery, interlocutory applications.	25 working days after statement of defence filed and not fewer than 50 working days after the proceeding was filed.
Parties provide discovery. This involves the listing, exchange and inspection of discoverable documents.	Often 20–30 working days after first case management conference.
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, followed by defendant's evidence in 10–20 working days.
Final hearing/trial.	Varies depending on court.

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

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

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

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

The Evidence Act 2006 Pt 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).

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

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

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

11. 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 with leave of the court. 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. An expert witness

must not act as an advocate or give evidence on questions of law. They must state whether their evidence is subject to any limitations or qualifications.

12. 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.

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

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

Search orders, previously known as Anton Pillar orders, are invasive orders which 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.

13. What does an applicant need to establish in order to succeed in such interim applications?

The requirements for the granting of interim relief vary depending on the type of relief.

To obtain interim injunctive relief, the applicant must satisfy the court that there is a serious question to be tried, the balance of convenience falls in favour of the interim injunction, and an award of damages would adequately compensate the respondent for losses that may be suffered as a result of the injunction. The applicant must also provide an undertaking that it will meet any court order for damages sustained by the respondent through the injunction.

To obtain a freezing order, the applicant must show that it has a good arguable case, the assets are within the jurisdiction of the court, and there is a real risk the assets will be dissipated before determination of the matter. The applicant must provide an undertaking as to damages and has a duty to the court to disclose fully and frankly all material facts. If an order is granted, the applicant must prosecute the claim as quickly and as reasonably as possible.

The requirements for the grant of a search order are stringent given its invasive nature. The applicant must show that it has a strong prima facie case, the potential or actual loss or damage will be serious if the order is not made, the respondent is in possession of relevant evidentiary material, and there is a real possibility the respondent will destroy or conceal the evidentiary material so that it is not available for use at trial. The scope of a search order must be proportional and not unnecessarily wide. The applicant must give undertakings to the court as to damages, to provide copies of documents seized to the respondent party, to inform the respondent party of its rights, and not to use seized material for collateral purposes.

14. 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.

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

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

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

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

16. 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.

17. 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.

18. Are contingency or conditional fee arrangements permitted between lawyers and clients?

Prior to the Lawyers and Conveyancers Act 2006, neither contingency nor conditional fee arrangements were lawful. Since its enactment, conditional fee agreements in civil proceedings between lawyers and clients have been permitted but are subject to strict criteria.

Under a conditional fee agreement, the lawyer's remuneration is dependent on a successful outcome being obtained. Under a conditional fee agreement, the lawyer's remuneration must be the lawyer's normal fee or the lawyer's normal fee plus a premium. The premium is payable only if a lawyer obtains a successful outcome. The premium can compensate the lawyer for the risk of not being paid or not being paid on account, but it cannot be calculated as a proportion of any amount received.

19. Is third-party funding permitted? Are funders allowed to share in the proceeds awarded?

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 cost 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.

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

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

20. May parties obtain insurance to cover their legal costs?

Yes, a party may obtain insurance to cover legal costs. However, an insurer cannot indemnify a party against penalties ordered, following prosecution under certain statutes.

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

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

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

22. 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 which 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, the judgment must be final and conclusive and for a definite sum of money.

23. What are the main forms of alternative dispute resolution?

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.

24. Which are the main alternative dispute resolution organisations in your jurisdiction?

The main private alternative dispute resolution organisations in New Zealand include the Arbitrators' and Mediators' Institute of New Zealand (AMINZ), the Resolution Institute (Lawyers Engaged in Alternative Dispute Resolution (LEADR) and Institute of Arbitrators and Mediators Australia combined), and FairWay.

25. Are litigants required to attempt alternative dispute resolution in the course of litigation?

In some forums, parties may be directed by a judge to participate in alternative dispute resolution processes before the matter can proceed. Examples are employment disputes and certain proceedings before the District Court.

Even though a majority of cases in New Zealand are resolved by settlement, there is no general requirement to attempt alternative dispute resolution, although it is encouraged. A lawyer's professional duties include keeping clients advised of alternatives to litigation.

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

A draft Class Actions Bill (and associated rules) was drafted in 2009, but has not progressed further through the legislative process.

In late 2017 a new Labour-led coalition Government took office. The Labour Party campaigned on establishing a special arbitral tribunal for insurance disputes arising from the Canterbury earthquakes in 2010-2011. It is proposed that the tribunal would have inquisitorial powers, follow a fast track process, make decisions based on equity and good conscience, and award compensation for undue delay by insurers. At the time of writing, no further detail about the proposal is available, although it has been criticised by the insurance industry. If implemented, the current timeline for the tribunal to be operational is by the end of 2018.

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

New Zealand has a stable democracy and a judiciary that upholds the rule of law. According to Transparency International, it is the least corrupt country in the world[1]. As a result, parties undertaking dispute resolution in New Zealand can have a high degree of confidence that their matter will be determined on its merits, uninfluenced by corruption or other external factors.

[1] Transparency International, 'Corruption by Country/Territory' (www.transparency.org/country/NZL last accessed 6 November 2017)

About the Authors:

Nick Gillies
Partner, Hesketh Henry
E: lawyers@heskethhenry.co.nz

Gennise Luen
Senior Associate, Hesketh Henry
E: lawyers@heskethhenry.co.nz

Richard Belcher
Solicitor, Hesketh Henry
E: lawyers@heskethhenry.co.nz

W: www.heskethhenry.co.nz
A: Level 14, PwC Tower,
188 Quay Street,
Auckland,
New Zealand
T: +64 9 375 8700

司法管辖区： 新西兰
律所： Hesketh Henry
作者： Nick Gillies, Gennise Luen
和 Richard Belcher

1. 在民事诉讼方面，法院系统的结构是怎样的?

新西兰最高一级的法院是最高法院。最高法院设立于 2004 年 1 月 1 日，代替枢密院（源于英国）成为新西兰的终审上诉法院。法院的司法权受 2016 年《高级法院法案》监管。只有经过其同意，才可以上诉至最高法院，若主题事件具有普遍或公开的重要意义，已发生或可能会发生实质性的司法不公，或者事件具有广泛的商业意义，可能会被批准上诉。上诉至最高法院的诉讼由五名法官组成的法官席审理。

上诉法院是新西兰第二级别的法院，有权力审理对高等法院判决的上诉，在一些特殊情况下，也可以审理对地区法院判决的上诉。大多数上诉都是由三名法官组成的法官席审理。

高等法院既可以履行一审法院的职责，也可以作为受理上诉的法院。高等法院的一审司法权包括索赔金额超过 350,000 新元的诉讼，以及一些复杂的诉讼，如根据 1993 年《公司法案》提起的诉讼，以及有关破产、不动产（土地）的处置、信托和房地产的行政管理和海军部的诉讼。高等法院还有权力审理来自下级法院和法庭的上诉，如地区法院、家庭法院和环境法院。

地区法院可以受理索赔金额在 15,000 新元至 350,000 新元之间的诉讼。索赔金额不足 15,000 新元（或经当事人同意，金额在 20,000 新元之下）的纠纷诉讼，可以由纠纷法庭审理。

此外，新西兰还有很多专业法院和法庭。例如，就业关系管理局和就业法院、怀唐伊法庭、土地裁判所、租务审裁处和漏水房争议仲裁庭。

2. 法官在民事诉讼中的角色是什么?

法官在新西兰民事诉讼中所起的作用是裁定当事人之间的纠纷。审判过程是对抗性的，而不是询问或调查性的。各方当事人都有机会将诉状呈递给法官，法官根据相关法律审判案件事实，作出公平公正的判决。

由于新西兰采用的是英美普通法系，所以相关法律不仅包括体现为法令和规章的法律，还包括判例法原则（判决先例）。下级法院的法官需要留意和关注上级法院设立的司法判例。在上诉过程，法官可以推翻下级法院的判决。

法官有权力确保呈递到他们面前的诉讼被依法审理。高等法院的法官有法律体系赋予他们的固有权力，可以下达任何可保证法院有效运营的必要法令，如防止滥用法院流程的法令。

法官的另一个作用是根据判例法原则协助法律的演变。当出现一种新情况，没有适用的司法判例时，法官的判决可能被作为一项新的司法判例添加到判例法，进而延伸至现有的法律体系中。

3. 庭审是否向公众开放? 公众是否能够查阅法庭文件?

民事审判是对公众开放的，除非涉及机密性——例如，主题事件具有敏感性质，或者为了公共利益，或者有充分的理由要保护当事人或证人的身份。

尽管大多数审判是对公众开放的，但是，并不是律师每一次出现在法官面前都是为了审判案件。很多时候都是行政管理或程序性质的，通常不会对公众开放。

除了一些例外情况之外，判决书是可以公开给公众的。在有些判决书中，当事人的身份和机密性信息可能被禁止公布，但是法定推理和案件结果是公开给公众的。高等法院、上诉法院和最高法院的判决书由司法部例行通过网站公布。公众可获取判决书是英美普通法系的一条主要原则。

其他法庭文件一般不公开给公众，不过，公众可以申请获取文件。

4. 所有律师均有权代表其委托人出庭并参加诉讼吗？如果不是，律师职业的结构是怎样的？

是的，律师就是持有通用的 " 仅为出庭律师 " 或 " 出庭律师兼事务律师 " 从业证书的人（2006 年《律师和承办产权转让事务的律师法案》第 6 部分）。两者都可以出现在新西兰的任何法院，从事诉讼相关工作。通常，只能作为出庭律师的律师要通过事务律师的指令接收客户的指示。

5. 提起民事请求的时效期为多久？

2010 年《时效法案》规定了大多数民事诉讼的时效期限，其中诉因是 2011 年 1 月 1 日或之后发生的。提起诉讼所依据的有些法令，也有它们自己特定的时效期限。常见的诉讼类型及它们适用的时效期限见表一。

6. 有哪些诉前程序是当事人在开始诉讼之前必须遵守的？

不是。不过，常见的是要在提起诉讼之前联系对方当事人，看是否可以不通过法院达成解决方案。

7. 案件进入审理之前要经过哪些典型的民事程序？有什么样的时间表？

二所大多数民事诉讼程序的步骤都是标准的，如下表列示。每个步骤的时间或每个步骤之间的间隔时间会因为特定的案件而有所不同，不过，以下的标准时间表中，可以获取一些参考。

8. 当事人是否必须向其他当事人和法院披露相关文件？

是的，地区法院和高等法院对于诉讼的发起都会有一个初始披露的流程。在地区法院，原告必须提供其所倚赖的文件清单，被告可以请求复制这些文件（原告必须提供的文件）。在高等法院，在诉讼开始之时还要把初始披露的信息提供给其他当事人。

除了初始披露之外，在大多数民事诉讼中，当事人还会或可能会被命令 " 开示 " 文件。" 标准的证据开示 " 命令要求当事人开示支持或反对他们自己或任何其他当事人的所有文件。为保证司法公正，必要时可下达 " 量身定制的证据开示 " 令，让当事人开示有限范围内的文件，这主要取决于案件的情况。

诉讼的当事人有义务遵守证据开示命令，否则会构成蔑视法庭。另外，根据地区法院和高等法院的规则，事务律师自身对法院负有确保遵守证据开示命令的义务。事务律师必须合理注意，确保他所代理的当事人理解其在证据开示命令中的义务，并履行这些义务。

在证据开示流程中获取的文件，只能被用于诉讼之中，除非文件已在法院公开宣读，否则不能被提供给任何其他人。

9. 是否存在特权文件或其他规则允许当事人不披露特定文件？

2006 年《证据法案》第 2 部分第 8 小节为诉讼特权列出了法定框架。

特权有很多种，其中最常见的是 " 法律专业特权 "，它保护的是法律顾问与获取法律建议的客户之间的机密通讯。" 诉讼特权 " 也很常见，可以对主要用于准备提起诉讼或诉讼辩护的文件宣布特权，其中包括当事人与其法律顾问及非当事人之间的通讯。

其他类型的特权还包括当事人之间尝试解决或调解纠纷所做的机密通讯，与宗教部长之间的通讯，以及事务律师 / 律师事务所保留的信托会计记录。

如果文件中包含机密信息（例如，商业敏感性信息，如商业秘密，个人敏感性信息，如

表一 . 时效期限

诉讼类型	时效期限
货币债权，包括根据合约、侵权行为、权益和大多数提供金钱救济的法令对货币赔偿的索取。	从诉因所基于的作为或不作为发生之日起6年
根据各种合约法令寻求非货币性救济或宣告式救济的诉讼（1977年《合约错误法案》，1979年《合约救济法案》等）	从诉讼所基于的作为或不作为发生之日起6年
索求解释	从与所寻求解释有关的事件发生之日起6年
兑换索赔	从最初或第一次兑换发生之日起6年
为土地当前、未来或公平权益提起的诉讼	12 年 （除非原告是王室，或者是通过王室提起的诉讼）
判决书或仲裁裁决的强制实施	判决在寻求判决的国家变为可执行（通过行动或其他方式）之日起6年
宣告遗嘱无效	从申请遗嘱认证或行政管理之日起6年
就信托中受益人的权益而提起的诉讼	从刚刚拥有信托权益之日或受益人第一次有权利获取信托收益或财产之日起6年
就可动产业的股份或权益有关的诉讼	从收取股份或权益的权利发生之日起6年
与建筑工作有关的诉讼	从诉讼所基于的作为或不作为发生之日起10年（制止人时效期限）
诽谤诉讼	从诉讼所基于的作为或不作为发生之日起3年
1993 年《公平交易法案》下的诉讼	从损失或损害的发生，或损失或损害的可能发生被发现或按合理推定应该被发现之日起3年

病历，或者如若披露会有损公众利益的国家机密），也可以下达不披露或有限披露文件的命令。

10. 当事人在审理之前是否交换书面证据？或是否提供口述证据？对方是否有权盘问证人？

在为审判做准备时，当事人要交换未经宣誓的书面证据简介。也可以提供补充简介。然后在听证会上口头陈述书面简介并宣誓。审判中的证人必须阅读书面简介，然后它才能成为法庭笔录和主要证据的一部分。

在仅有一名法官的审判中，若当事人之间达成协议，或者法院有令，可以承认誓证。

表二 . 民事诉讼程序

诉讼的步骤	时间
原告向法院提交诉状并送达被告，发起诉讼	不一样，取决于原告 （以及任何适用的时效期限规定）
被告提交和送达答辩书	送出之后的25个工作日
当事人被要求参加有法官在场的第一次案件管理会议。可能会对证据开示和非正审申请书下达命令	在呈递答辩书之后的25 个工作日，并且不迟于诉讼被提起之后的50 个工作日
当事人显示证据。其中包括列示、交换和检验发现的文件	通常是在第一次案件管理会议之后的20 – 30个工作日
非正审申请书。当事人可以申请审判前的命令，如进一步的证据开示、起诉状中的细节、书面质询和其他初步命令。申请可能会被反对，也可能会被接受	通常在证据开示完成之后的20个工作日
当事人被要求参加有审判员在的第二次及随后的案件管理会议	
非正审申请书决议。如果反对非正审申请书，则必须召集有法官参加的听证会，以便于确定问题	不一样，取决于申请的性质、法院的时间表和法官的决定
阶段性交换书面证据声明和审讯文件	不一样，通常先是原告的证据，随后在10 – 20 个工作日出示被告的证据
终审	不一样，取决于各个法院

11. 关于指定专家证人的规则是怎样的？是否有专家行为准则?

在法院同意的情况下，当事人有权利雇佣专家证人提供专家证据。或者，法院可以指定一名专家证人，就任何事实或观点问题进行质询和报告。法院应在当事人同意的情况下指定专家。若当事人不能就专家人选达成一致，法院可以从当事人给出的提名中进行任命。

所有专家证人都需要遵守《行为规范》（高等法院规则附表 4）。其中包括出席法院或法庭而不是高等法院的专家。《行为规范》赋予专家证人一项重大责任，在其专业领域范围内协助法院对事情作出公平审判。专家证人不得为法律问题担任支持者或作证。他们必须声明他们的证据是否有任何局限性或限定性条件。

12. 案件审理前可获得哪些临时救济?

高等法院的法官有广泛的权力，他们可以下达临时法令，给予预审救济。有些临时法令可以在等待终判决定时提供临时救济，也有其他一些法令是为了维护现状或保护证据。

关于救济，临时禁令救济可以采取很多不同的形式，包括限制贸易禁令，叫停一个公司的清算，阻止抵押权人行使权力，制止公布，阻止侵害或非法侵入，或者停止一个仲裁流程。其他类型的临时救济包括要求保护财产或资金，出售易腐财产和保留收益，转移财产和支付收益的命令。

冻结令，以前被称作马瑞瓦禁令，是为了阻止被诉人把资产耗散或转移到法院管辖范围之外，意图损害申请人在资产中享有的权益。冻结令可防止当事人在待审期间交易、减少或处置资产，这样就可以执行或强制执行关于这些资产的判决书。

搜查令，以前被称为安东 • 皮勒禁令，是侵入性的命令，可以让一方当事人进入对方当事人的房产内去搜查和转移证据，并保存证据直至审判。在证据于审判前有被转移、销毁或隐藏的风险，则可能颁发搜查令。

13. 申请人需要确立些什么才能成功申请此类临时救济?

根据救济的类型，给予临时救济的要求有所不同。

为了获得临时禁令救济，申请人必须说服法院存在一个严重的问题，只有授予临时禁令，方可实现便利平衡，而且损害赔偿足以补偿被诉人因为禁令而遭受的损失。申请人还必须保证，对于被诉人因为禁令而遭受的损害，他会履行任何法院命令。

为了获得冻结令，申请人必须证明，有充足的理由断定资产在法院的管辖权范围内，而且资产真的存在事情解决前被耗散的风险。申请人必须就损害做出保证，并且有义务向法院完全坦诚地披露所有重大事实。一旦被授予冻结令，申请人必须尽快且尽可能合理地起诉。

下达搜查令的要求非常严格，因为它是侵入性质的。申请人必须证明，这是一个表明证据非常确凿的案件，若不授予搜查令，造成的潜在或实际损失或损害将非常严重，被诉人拥有相关的证据材料，而且被诉人极有可能销毁或隐藏证据材料，这样，这些材料就不会被用于审判。搜查令的范围必须有相称比例，而非没有必要的宽泛。申请人必须就损害做出保证，提供从被诉人那里查获的文件副本，告知被诉人其权利，并且不能把查获的材料作为抵押。

14. 案件审理时可获得哪些救济?

在民事诉讼中，救济的授予通常是为了补偿受委屈的一方，而不是惩罚性的。在审讯中可获得的救济包括要求偿还钱财（例如，损害赔偿）、做出特定履行、下达永久性禁令，或做出声明的命令。

只有在被告公然无视原告权利的极端情况下，才可以获得惩罚性的损害赔偿。迄今为止，授予的惩罚性损害赔偿本质上都是名义性的。

15. 执行判决的主要方式有哪些?

若胜诉方（判定债权人）获得判决，让败诉方（判定债务人）支付资金，但未得到履行，那么判定债权人有一系列强制执行选择。法院可以下达命令，让判定债权人对判定债务人拥有的财产提起控诉，从而让法院拥有并且 / 或者出售该财产给判定债权人，或要求雇主从判定债务人的薪水或工资中代扣，将其支付给判定债权人。

若判定债务人是一家公司，未履行的判决可作为申请清算公司的理由。若判定债务人是个人，未履行的判决可构成申请破产的基础。

若未履行的判决不是支付货币，法院有权力发出逮捕令，由强制执行官对未履约方实施逮捕和拘留，这样未履约方可被带至法院。

16. 胜诉方一般是不是会获得诉讼费用补偿? 诉讼费用如何计算?

是的，诉讼费通常是为了支持胜诉方在诉讼中所采取的措施而判定的。由于诉讼费在诉讼的任何一个阶段都是确定和可识别的，所以它们通常是按照每一个诉讼阶段所发生成本的比例计算的。在诉讼费的计算过程中，也会考虑诉讼的复杂程度和每一个阶段所花时间的合理性。

如果当事人在合约或协议中规定了损害赔偿费用，则有可能会被判定该费用。如果一方当事人在诉讼过程中行动不合理、没必要或不适当，则也有可能被判定支付额外增加的费用或损害赔偿费用。

17. 对最终判决有哪些上诉途径？当事人能够以什么理由提起上诉？

在大多数情况下，若司法判决有最终判决诉讼的效果，当事人会有上诉至上级法院的权利。在一些极端情况下，可以被授予二次上诉的权利，但是在提起二次上诉之前，需要获得同意。

通常，当事人可以以事实或法律错误为由对判决上诉。但是，法庭和专业法院的上诉权利是有限的。若判决涉及司法自由裁量权的使用，上诉的理由可以是下级法院按照错误的原则行事，考虑了一些不相关的事件或没有考虑一些相关的事件，或者作出了明显错误的判决。

18. 是否允许律师和委托人之间存在胜诉酬金或按条件收费的安排？

在 2006 年《律师和承办产权转让事务的律师法案》颁布之前，胜诉费和有条件的费用安排都是非法的。自上述法案生效以来，在民事诉讼中，是允许律师与客户之间做出有条件的费用安排的，但要符合严格的标准。

根据有条件的费用安排，律师的酬劳要依赖于所获得的胜诉。根据有条件的费用安排，律师的酬劳必须是律师的正常收费，或者是律师的正常收费加奖金。只有在胜诉的情况下，才支付奖金给律师。奖金可以补偿律师未收到律师费或未收到赊欠款项的风险，但是，不能按照已收取任何金额的比例进行计算。

19. 是否允许第三方资助？资助人是否可分享胜诉收益？

在新西兰，第三方资助，也被称为诉讼资助是被允许的。第三方资助即由第三方支付原告的（一般情况下）诉讼费用。其中包括诉讼费、专家费用和其他垫付款，讼费及不利讼费命令保证金。

诉讼资助安排仅指那些由与诉讼无关的一方提供资助，并且他们的酬劳与诉讼的成功，以及 / 或者他们对诉讼的控制紧密相关的协议。它不包括可能资助诉讼的亲属或关联机构、事务律师的有条件的费用安排，以及由保险资助的诉讼。

在一项最近的判决中，最高法院认为新西兰法院没有监管诉讼资助人与当事人之间的交易的通用规则。但是，法院可以介入，以防因为诉讼资助出现的对诉讼的滥用。若诉讼过程被不当使用，或是被迷惑或恶意使用的，或者签署诉讼资助协议的真正意图是赋予资助人进行合法索赔的权利，则构成对诉讼的滥用。

若已签署诉讼资助安排，那么在发起诉讼之后，必须披露诉讼所有资助人的身份和所在地，若涉及第三方费用的申请、对诉讼的滥用，或讼费保证金，则还有可能要求披露诉讼资助协议本身。

20. 当事人是否可为其诉讼费用投保？

是的，当事人可以通过投保来弥补诉讼费。但是，保险公司不赔偿根据特定法令被检举之后被处以罚款的当事人。

21. 诉讼人是否可提起集体诉讼？如果可以，哪些规则适用于集体诉讼？

新西兰没有允许集体诉讼案的特别立法规定。

当一个或多个人在诉讼主题事件中享有共同权益时，他们可以代表，或者为了所有这些人发起代表诉讼。"共同权益"可延伸至在诉讼所产生的任何法律或事实问题决议中享有的重大共同利益。这就为把商业集体法律诉讼案件呈递法院提供了一种途径，并且可以促进对司法公正的利用，消除费用的重复发生和分担。法院的立场一直是提供一种不受先例限制的自由灵活的方法，并考虑到‘现代生活的迫切情况’。

22. 外国判决通过哪些程序予以承认和执行？

根据 2010 年《泛塔斯曼诉讼法案》、1934 年《判决相互执行法案》、1908 年《司法权法案》

登记之后的外国判决书，可以在新西兰执行，或者根据英美普通法系提起诉讼。

2010 年《泛塔斯曼诉讼法案》允许可登记的澳大利亚判决书（也就是由澳大利亚法院或某些澳大利亚法庭作出的某些、最终和决定性的判决书）在新西兰法院登记，并视之如同新西兰法院发出的判决书一样执行。

1934 年《判决相互执行法案》规定，可执行英国或一些其他国家的判决书，包括澳大利亚、比利时、博茨瓦纳、喀麦隆、斐济、法国、香港、印度、基里巴斯、莱索托、马来西亚、尼日利亚、诺福克群岛、巴基斯坦、巴布亚新几内亚、沙巴、砂拉越、新加坡、斯里兰卡、斯威士兰、汤加、图瓦卢和西萨摩亚。

如果关于一笔款项的判决书来自一个联邦国家，那么根据 1908 年《司法权法案》，它是可执行的。

为了执行其他国家的判决书，可以根据英美普通法系提起诉讼。对于要根据英美普通法系在新西兰执行的判决书，外国法院对被下达判决书的个人或实体的管辖权必须得到新西兰法律的承认，判决书必须是最终的和决定性的，而且必须是针对数目确定的一笔资金。

23. 另类争议解决的主要形式是什么？

调解是新西兰最常见的另类争议解决办法。

一审法院有时候会提供在法官的协助下召集庭外和解谈判会议的机会。此类会议被称为司法和解会议。这是调解的一种替代方式。参加司法和解会议的法官不能参与后来对诉讼实质内容的判决。

对法院诉讼的一种常见替代方式是私下仲裁，后者须受 1996 年《仲裁法案》监管。当事人必须同意提交仲裁，商业合同经常指定仲裁作为适用的争端解决方式。

24. 在您所在的司法管辖区有哪些主要的另类争议解决机构？

在新西兰，主要的私人非诉讼争端解决组织包括新西兰仲裁人与调解人学会（AMINZ），争端解决学会（律师参与的非诉讼争端解决（LEADR）与澳大利亚仲裁人与调解人学会的结合体），以及 FairWay。

25. 在诉讼过程中诉讼人是否必须尝试另类争议解决？

在有些法庭上，法官可能会在争端被诉诸诉讼之前，指示当事人采取非诉讼争端解决办法。例如包括就业纠纷和呈递到地区法院的某些诉讼。

尽管新西兰的大多数案件都是通过庭外和解解决的，但是，新西兰并没有尝试非诉讼争端解决的一般性要求，只是鼓励人们这样做。律师的职业责任包括告知客户另类争议解决的非诉讼争端解决方式。

26. 当前是否有在审议中的改革争议解决法律法规的建议？

2009 年，新西兰起草了集体诉讼法案草案（及相关规则），但没有进一步通过立法程序。

2017 年下半年，一个以工党为主导的新联合政府开始执政。工党的竞选主题是为 2010-2011 年间的坎特伯雷地震引发的保险纠纷设立一个特殊仲裁庭。它提议仲裁庭有严格审问的权力，遵循快速立法流程，基于公平和良知作出裁决，并判定保险公司为不当延误作出赔偿。截至撰写本文之时，关于提案尚没有进一步的细节，不过该提案一直被保险行业批评。若提案得以通过，那么目前为仲裁庭投入运作设定的时间线是 2018 年底。

27. 关于您所在司法管辖区或者亚洲地区的争议解决，是否有任何特殊情况需加以强调？

新西兰有稳定的民主政治，有支持法律规则的司法制度。根据透明国际的调查，新西兰是世界上腐败事件发生最少的国家[1]。因此，在新西兰寻求争端解决的当事人坚信他们的问题将被按照事情的是非曲直判定，不会受腐败或其他外部因素影响。

[1] 《透明国际》(International Transparent)，各国贪污情况 www.transparency.org/country/NZL于2017年11月6日访问

作者资料：

Nick Gillies
合伙人，**Hesketh Henry**
电子邮箱：lawyers@heskethhenry.co.nz

Gennise Luen
高级律师，**Hesketh Henry**
电子邮箱：lawyers@heskethhenry.co.nz

Richard Belcher
事务律师，**Hesketh Henry**
电子邮箱：lawyers@heskethhenry.co.nz

网址：www.heskethhenry.co.nz
地址：Level 14, PwC Tower,
188 Quay Street,
Auckland,
New Zealand
电话：+64 9 375 8700

Jurisdiction: Switzerland

Firm: Prager Dreifuss

Authors: Dr Urs Feller, Marcel Frey and Nina Lim

PRAGER DREIFUSS

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

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, there are specialised first instance courts such as labour courts or courts dealing with rental matters. Four cantons (Zurich, St. Gallen, Aargau and Berne) have set up specialised commercial courts. Judgments by these commercial courts, which constitute sections of the local high courts, can be appealed only to the Federal Supreme Court.

In Switzerland, civil litigation is usually preceded by a mandatory conciliation phase that generally takes place before the local conciliation authority of the commune in which the defendant resides. In some instances defined by statute, trial parties may approach the court directly and forgo the conciliation phase (see question 6).

2. What is the role of the judge in civil proceedings?

The judge in Swiss civil proceedings primarily has a case management role. The judge directs the proceedings and issues the required procedural orders. As a rule, the onus is on the parties (and their lawyers) to present the relevant facts to the judge. 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 on the area of law and whether a party is professionally represented, in which case the court's duty to inquire is substantially lower.

However, in some areas of law, the judge has the duty to establish the facts ex officio (i.e. in family law cases with regard to child matters).

In Switzerland, the judges also apply the law ex officio. The court deals with claims by either not entering into the matter and not considering the merits or by making a decision on the merits itself and adjudicating the matter.

3. Are court hearings open to the public? Are court documents accessible to the public?

The majority of civil law proceedings and the delivery of judgments are accessible, unless public interests or the legitimate interests of the parties involved are overriding and require the proceedings to be held in camera. Conciliation hearings as well as judicial settlement hearings are not open to the public.

Copies of judgments by the courts, usually in an anonymised version, may be requested by the public. Most jurisprudence of the high courts and all of the Federal Supreme Court judgements since 2007 are published (see www.bger.ch/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht.htm). However, all submissions by the parties, including the exhibits, are not open to the public. Compared to proceedings in common law jurisdictions, a higher degree of confidentiality is maintained.

The courts' deliberations are usually confidential. The parties are not privy to the discussion of the judges.

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

Only attorneys registered with one of the cantonal attorney registers have the right to appear in Swiss courts. Once registered, they may conduct proceedings on behalf of their clients in all cantons. In order to register, the candidate attorney must pass a cantonal bar exam. European attorneys registered with an EU/EFTA attorney register also have the right to appear in a Swiss court 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 actually and regularly as an attorney in Switzerland for three years.

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

Limitation periods form part of the substantive civil law. The general statutory limitation period for contractual claims is 10 years if the law does not provide otherwise (e.g. five years for periodic payments). Tort claims and claims for unjust enrichment become time-barred after one year. However, if a tort claim is derived from an offence for which criminal law envisages a longer limitation period, such longer period also applies to the tort claim. Usually, the courts observe limitation periods only if pleaded by the parties.

6. 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. In certain instances, the Civil Procedure Code does away with the requirement of a prior conciliation hearing, i.e. in summary proceedings, some actions in connection with debt enforcement or if a single cantonal instance is competent to hear a matter, such as a commercial court. If the value of the dispute is CHF 100,000 or more, the parties can mutually agree to waive the preceding conciliation hearing. Furthermore, the claimant may waive conciliation and commence direct proceedings in court if the defendant's registered office or domicile is abroad or if the defendant's residence is unknown.

If a conciliation hearing is necessary, a party domiciled outside the canton or abroad is exempt from appearing in person and may send a representative.

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

Conciliation hearings, if required by law, should take place within two months of receipt of the claimant's application by the conciliation authority. If no agreement is reached during the conciliation hearing, the conciliation authority grants authorisation, usually to the claimant, to approach the first instance court. The claimant is then entitled to file the action and bring the matter to trial within three months. The claimant is of course free to submit the statement of claim earlier to speed up proceedings. After three months, the authorisation lapses. Nonetheless, this does not mean that the matter may not be brought to court eventually (no res iudicata effect). However, a claimant is required to recommence conciliation proceedings.

If no conciliation hearing is required by law, the matter is brought directly to trial by lodging a submission to the court of first instance, e.g. the district court or the commercial court.

PRAGER
DREIFUSS

Dr Urs Feller

Partner, Prager Dreifuss

Urs Feller is head of Prager Dreifuss' Dispute Resolution team. This team acts for international and domestic clients in a variety of disputes before courts and administrative authorities in Switzerland as well as before international arbitration tribunals.

Urs Feller has vast experience in all forms of dispute resolution, including mediation. He regularly advises clients on contractual and commercial disputes, in particular relating to banking, insurance, compliance as well as administrative and judicial assistance. Other areas of expertise include insolvency, restructuring and asset recovery.

He is a member of the executive committee of the International Bar Association's litigation section and acts as Vice-chair of the committee. Urs is a member of STEP and regularly advises clients on trusts, foundations and inheritance matters including disputes in that area.

Chambers Europe recommends his "considered, calm and efficient approach. He is a very good strategist." In the Chambers Global 2017 edition, Urs Feller is referred to as: "He is a very smart and savvy lawyer with good political and diplomatic skills. He is a gentleman but also an aggressive and capable advocate."

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

Disclosure is narrow under Swiss civil procedure law and is not comparable to similar obligations in proceedings in common law jurisdictions. In principle, trial parties and third parties have a statutory duty to co-operate with the court in the taking of evidence. The production of evidence is either ordered by the court or the parties can produce documents in their possession with their legal brief. A request to the court by a party to order the other party to disclose evidence such as documents will be granted only if the evidence sought is required to prove facts that are legally relevant, the claim has been substantially motivated by the requesting party and the evidence requested (e.g. a specific document) is sufficiently identified. As a rule, each party is well advised to rely on the evidence in their hands rather than hoping to find evidence in the hands of the counterparty.

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

A party may refuse to co-operate where the taking of evidence would expose a close associate, such as a direct relative or a spouse,

to criminal prosecution or civil liability. Furthermore, co-operation may be refused if the disclosure would constitute a breach of professional confidentiality (e.g. attorney-client privilege). Under Swiss law there is no attorney-client privilege for in-house counsels, although patent attorneys working as in-house counsels do enjoy the attorney-client privilege.

10. 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 knows the instrument of precautionary taking of evidence by the court before a matter is actually pending. This is possible if either the law grants the right to do so or the applicant shows credibly that the evidence is at risk or that it has a legitimate interest. If successfully pleaded, a party can obtain certain critical evidence that it can use to determine whether it wants to risk proceedings.

There is no comparable right to cross-examine a witness as in common law jurisdictions. Nevertheless, each party is allowed to put additional questions to a witness through the judge after the judge's initial interrogation. The court's examination of a witness is usually thorough.

11. 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. If the court believes that expert knowledge is required in a particular matter, it can mandate one or more experts, either of its own accord but normally if requested by 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 expert must submit his/her opinion within the set deadline. 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 submits his/her opinion in writing or presents 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.

12. What interim remedies are available before trial?

Interim remedies available before trial are general interim measures, attachment orders under the Debt Enforcement and Bankruptcy Act ('DEBA') and protective letters.

For non-monetary claims, the types of general interim measures available to parties are not limited by law. Rather, the parties are free to request and the court is at liberty to order whatever measure is required. This can be in 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 disposing of an object.

If the opposing party provides appropriate security, the court can refrain from ordering an interim measure. If the principal action is not yet pending when an interim measure is requested, the court sets a deadline within which the applicant must file its principal action (no conciliation hearing required), failing which the interim measure lapses automatically. The court can issue the interim measure subject to

PRAGER DREIFUSS

Marcel Frey

Counsel, Prager Dreifuss

Marcel Frey is a member of Prager Dreifuss' Dispute Resolution and Private Clients teams. He represents local and foreign clients in court and arbitration proceedings.

He is regularly involved in mutual legal assistance matters and asset recovery. Marcel is listed in the Dispute Resolution section of Chambers Europe's Leading Lawyers for Business. Clients consider him "very knowledgeable, responsive and user friendly," and appreciate that he is "thorough and has great attention to detail." (Chambers Europe 2016, 2015). According to Chambers Europe 2017 he has "a broad commercial litigation practice frequently assisting clients with asset recovery and mutual legal assistance." Clients describe him as "very proactive, understanding and very pleasant to work with."

He also advises clients with regard to corporate law and enforcement matters.

Marcel Frey is a member of the management committee of the Swiss South African Chamber of Commerce.

the payment of security by the applicant if it is anticipated that the measures could cause loss or damage to the opposing party.

In cases of special urgency, and in particular where there is a risk that the enforcement of the measure will be frustrated by the other party if it becomes aware of the application in advance, the court can order the interim measure immediately in ex parte proceedings with a first hearing only after the measure has been put in place.

Safeguarding monetary claims must take the form of an attachment order under the DEBA. A disposal or transfer of the assets of the debtor is prohibited by such an order until the creditor's claim has been determined in debt collection proceedings. The applicant may be held to post security for potential damages from an unwarranted attachment. If the creditor has not already commenced debt enforcement proceedings or filed a court action before the attachment proceedings, the creditor must do so within 10 days of service of the attachment order to maintain the safety measure. If the debtor files an objection, the creditor must either apply for the objection to be set aside or file a court action to have the creditor's claim confirmed within 10 days of service of the objection.

A defensive measure in the form of a so-called "protective letter" can be filed with a court by any person who has reason to believe that an ex parte application for an interim measure, an attachment order under the DEBA or any other measure against that person may be lodged soon. This person can set out their position in

such a letter. The party applying for the ex parte interim measure is only served with this letter if it actually initiates the relevant proceedings. Such a letter becomes ineffective six months after it has been filed. The rationale of such letters is to prevent the court from adopting an ex parte interim measure solely on the arguments of the applicant.

13. What does an applicant need to establish in order to succeed in such interim applications?

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 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

(f) if the creditor holds a definitive title (i.e. a judgement for a monetary amount) to set aside the objection in enforcement proceedings.

14. 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 questions 12 and 13).

15. 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 22). 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).

16. 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

PRAGER
DREIFUSS

Nina Lim

Associate, Prager Dreifuss

Nina Lim is a member of Prager Dreifuss' Dispute Resolution and Private Clients teams. She represents domestic and foreign clients in court proceedings and advices entrepreneurs in commercial & corporate matters.

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.

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: has no residence or registered office in Switzerland; appears to be insolvent; owes costs from prior proceedings; or 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.

17. 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). An incorrect application of the law or an incorrect establishment of the facts may constitute grounds for review. If a judgment is not eligible for appeal, an objection is admissible. The grounds for an objection are narrower and limited to an incorrect application of the law and a manifestly incorrect establishment of the facts.

Second instance judgments as well as judgments by single cantonal instances (such as commercial courts) can be brought before the Federal Supreme Court if the amount in dispute is higher than CHF 30,000 (with some exceptions such as rental disputes). The grounds for an appeal for civil matters to the Federal Supreme Court are narrow. Usually, only breaches of federal law and/or a manifestly incorrect establishment of the facts may be pleaded.

18. Are contingency or conditional fee arrangements permitted between lawyers and clients?

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.

19. Is third-party funding permitted? Are funders allowed to share in the proceeds awarded?

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. However, funders are allowed to share in the proceeds awarded.

20. May parties obtain insurance to cover their legal costs?

Insurance for litigation costs is available and is increasingly popular.

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

Typical class actions are not available in Switzerland. However, 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. In July 2013, the Federal Council issued a report on possible improvements. Whether the motion will be transposed into law remains to be seen (see also question 26).

Currently, in instances of class action-type scenarios, it is sometimes possible to launch a test case during which some core elements of fact and/or the law can be decided. Other cases with a similar fact pattern are then stayed by the court based on an application by the respective claimants for a suspension. Once the test case is decided, the identical elements in the subsequent cases do not need to be litigated from scratch.

In a recent development, in September 2017, the Swiss Consumer Protection Foundation lodged a group action against Volkswagen and the car importer AMAG by means of which it is attempting to secure damages for VW-car owners who were required to have alterations made to their vehicles owing to the insufficient diesel exhaust emissions. In a first step, the consumer group intends to litigate the question whether Volkswagen acted fraudulently and deceived its customers (declaratory judgment). In a second step, the consumer group intends to lodge a substantial damages claim. For this purpose, it has obtained assignments by affected vehicle owners who had paid too high a price for their cars when taking into account the lower quality exhaust system. Should the consumer group be successful, it plans to distribute the damages secured among the vehicle owners who ceded their claims.

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

The Civil Procedure Code governs the recognition and enforcement of foreign judgments, as long as the Swiss Federal Act on Private International Law (PILA) or an international treaty (such as the Lugano Convention) does not take precedence. The PILA is only applicable if there is no international treaty. The recognition procedure itself is summary in nature and governed by the rules of the Civil Procedure Code.

There are two different ways of enforcing a foreign judgment. Regular enforcement proceedings for judgements by a Lugano Convention signatory state are governed by the Lugano Convention itself. Other state judgements are enforced pursuant to the rules of the PILA. Monetary judgments can be enforced by means of ordinary debt collection proceedings (see question 15). 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 17).

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.

23. What are the main forms of alternative dispute resolution?

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 6, 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.

24. What are the main alternative dispute resolution organisations in your jurisdiction?

The following are the main alternative dispute resolution organisations in Switzerland:

(a) Swiss Chambers' Arbitration Institution: they have adopted the Swiss Rules of

Commercial Mediation (www.swissarbitration.org/files/50/Mediation%20Rules/English%20mediation_20-06-2016_web-version_englisch.pdf);

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

(c) Swiss Chamber of Commercial Mediation (SCCM; www.skwm.ch);

(d) Swiss Association of Mediators (SDM-FSM; www.swiss-mediators.org).

25. Are litigants required to attempt alternative dispute resolution in the course of litigation?

Litigants are not required to attempt alternative dispute resolution in the course of litigation. The court can only recommend mediation to the parties during the proceedings.

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

Some amendments are being considered to the limitation periods (see question 5).

The Lugano Convention is the equivalent to the Brussels I Regulation (Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Regulation)). As Switzerland is not a member of the European Union, only the Lugano Convention, and not the Brussels I Regulation, is applicable. The European Union has enacted the revised Brussels Ia Regulation (Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters). Despite the amendments, there are currently no initiatives to adapt the Lugano Convention to the revised Brussels Ia Regulation.

As noted in question 21, the Federal Government has been asked by the Parliament to revise the rules on collective redress. The Federal Government had previously announced that it will make proposals by the first half of 2017 but has in the meantime informed that the proposals are delayed and are now planned for beginning of 2018.

The Federal Government is currently also reviewing the Swiss Federal Act on International Private Law with regard to the framework for international arbitration with the aim of increasing the attractiveness of Switzerland as a place for international arbitration and has made a preliminary proposal on the amendments. The Federal Government proposes to include the possibility of a revision of an award to the Federal Tribunal into the Act. Further, it proposes certain relaxations to the formal requirements governing arbitration clauses. In consequence, the requirement of dual written consent to an arbitration clause will fall away. If no seat is chosen, the Swiss court first seized by a party will be considered competent to determine the seat of the arbitration tribunal. The proposals also provide that an appeal to the Federal Supreme Court against an award may be brought in English. The decision by the Federal Supreme Court will however still be issued in one of the official languages in Switzerland (i.e. German, French or Italian).

The Swiss Federal Act on International Private Law is also being reviewed with regard to the provisions on inheritance law. The reason is the European Union Regulation on Inheritance Matters (Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession). The goal is to ensure the compatibility of Swiss and foreign competences and also to allow a better coordination with foreign proceedings. Proposals are planned for February 2018.

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

Switzerland is known for its neutrality, consistent and high-quality jurisprudence and large pool of multi-lingual legal practitioners. These are some of the reasons why Switzerland is a destination of choice for arbitration. In addition, the Swiss state court system is highly efficient and effective 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 23). Recent figures show that about two-thirds of the cases pending at the Commercial Court of the Canton of Zurich are settled with the assistance of the court within a period of six months following the submission of the statement of claim.

About the Authors:

Dr Urs Feller
Partner, Prager Dreifuss
E: urs.feller@prager-dreifuss.com

Marcel Frey
Counsel, Prager Dreifuss
E: marcel.frey@prager-dreifuss.com

Nina Lim
Associate, Prager Dreifuss
E: nina.lim@prager-dreifuss.com

W: www.prager-dreifuss.com
A: Prager Dreifuss Ltd, Mühlebachstrasse 6, CH-8008 Zurich, Switzerland
T: +41 44 254 55 55
F: +41 44 254 55 99

PRAGER
DREIFUSS

Legal services tailored to your needs

Banking & Finance . Capital Markets
Competition & Regulatory Matters . Corporate & M&A
Dispute Resolution . Employment & Pensions
Insolvency & Restructuring . Insurance & Reinsurance
IP & IT . Private Clients . Real Estate & Construction
Tax . White Collar Crimes & Investigations

Prager Dreifuss Ltd · Zurich, Bern, Bruxelles · www.prager-dreifuss.com

Schweizerhof-Passage 7, CH-3001 Bern
T +41 31 327 54 54, F +41 31 327 54 99

Muehlebachstrasse 6, CH-8008 Zurich
T +41 44 254 55 55, F +41 44 254 55 99

Square Ambiorix 45, B-1000 Bruxelles
T +32 2 537 09 49, F +32 2 537 21 16

司法管辖区： 瑞士

律所： Prager Dreifuss
作者： Urs Feller 博士 , Marcel Frey 和 Nina Lim

PRAGER DREIFUSS

1. 在民事诉讼方面，法院系统的结构是怎样的?

原则上来说，瑞士的私法体系建立了三级法院制度：第一级为地区法院，第二级为上诉法院或高等法院，最高一级为联邦最高法院。此外，瑞士还设立有专门处理劳动争议或租赁纠纷的第一级法院，四个州（苏黎世、圣加伦、阿尔高和伯尔尼）还设立了专门的商事法院。这些商事法院作出的判决是地方高等法院判决的一部分，当事人如有不服，只能向联邦最高法院提出上诉。

在瑞士，在民事诉讼之前，通常需要进行强制调解程序。强制调解一般是在被告居住地所在社区的地方调解官员的见证下进行的。在法律规定的某些特殊情况下，诉讼当事人可以不经过调解阶段，直接向法院提起诉讼（详见问题 6）。

2. 法官在民事诉讼中的角色是什么?

在瑞士民事诉讼案件审理中，法官主要承担的是案件管理工作，包括控制案件审理流程和发布必要的法庭命令。一般来说，当事人（及其律师）有责任向法官陈述有关事实。在所有的案件审理中，如果当事人的陈述不清楚、自相矛盾、模棱两可或不完整，法官有义务根据自己的意愿向当事人提出询问。需要询问到何种程度取决于相关法律规定、以及该当事人是否由具有专业资格的人代表，如果是的话，那么法官询问的义务就显著减轻了。

然而，在一些法律领域中，法官有义务根据职责确定一些基本的原则（比如，在家庭事务法律案件中有关孩子的安排）。

在瑞士，法官也会依据职责确定执行法律的方式。在审理案件时，法院不调查或审问案件事实或依据（根据庭上辩论结果作出裁决），或者根据法律依据对案件自行作出判决。

3. 庭审是否向公众开放? 公众是否能够查阅法庭文件?

公众可以查询到绝大多数的民事诉讼案件及其判决结果，除非案件内容公开可能会导致公众利益或是案件当事人的合法权益遭受到损害，在这样的情况下，案件的审理过程是由录像机来记录的。调解听证会和司法处理听证会是不对公众开放的。

公众可获得法院判决书的复印件，在这样的复印件中，案件当事人的名字通常会被隐去。2007 年以来的绝大多数高等法院的判例和所有联邦最高法院的判例都已经公开（浏览网址：www.bger.ch/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht.htm）然而，所有当事人提交的资料，包括法庭上出示的物证，都不会对公众开放。与英美法系审理的案件相比，瑞士的大陆法系具有更高的保密性。

法庭的审议过程通常是保密的，当事人不会了解法官们的讨论内容。

4. 所有律师均有权代表其委托人出庭并参加诉讼吗? 如果不是，律师职业的结构是怎样的?

只有在一个州的律师注册部门注册过的律师才能够出现在瑞士的法庭上。经过注册后，律师可以代表当事人处理所有州的诉讼案件。在注册前，律师资格申请人需要通过州政府相关部门组织的律师资格考试。在欧盟（EU）/ 欧洲自由贸易联盟（EFTA）律师注册部门进行了注册的欧洲律师也可以临时出现在瑞士的法庭上。如果欧洲法律专业人士使用原来获得的欧洲执业资格，在瑞士某州

PRAGER
DREIFUSS

Dr Urs Feller
合伙人，Prager Dreifuss

Urs Feller先生是Prager Dreifuss争议解决团队的主管负责人。该团队代表境内外客户在瑞士法院和政府监管部门、以及国际仲裁解决各类纠纷。Urs Feller先生在解决各种形式的争议案件方面拥有丰富的经验，包括调停。他经常就合同和商业纠纷向客户提供咨询服务，尤其是与银行、保险、合规以及行政和司法协助有关的案件。Urs Feller先生还在破产、重组和资产追回方面拥有专业的知识和经验。

他是国际律师协会诉讼分部执行委员会的成员，并担任该委员会副主席职务。Urs先生还是STEP成员，并经常向客户提供信托、基金和继承相关事项的专业建议，并协助解决争议。

欧洲律师联合会对他的评价是“他深思熟虑、冷静，工作方式高效，是一个高瞻远瞩的战略家。”《2017年钱伯斯环球指南》对Urs Feller的评价是：“他是一个非常精明和机智的律师，拥有良好的政治和外交技巧。他是一个绅士，但同时也是一个有进取心和有能力的倡导者。”

注册后可以在瑞士长期执业。他们甚至可以在瑞士某州的律师注册部门进行注册，条件是通过州法律资格考试、或是在瑞士经常性开展律师工作的时间超过三年。

5. 提起民事请求的时效期为多久？

有关诉讼时效的规定是实体民法的组成部分。如果法律没有另行规定（比如，有关定期支付款项的诉讼时效为五年），有关合同的法律诉讼时效通常是十年。有关侵权和不当得利的诉讼时效是一年。然而，如果侵权后果是因一个犯罪行为而引发的，而犯罪行为的诉讼时效会长一些，那么这个更长的诉讼时效期也适用于侵权案件。通常，只有在当事人提出请求时，法庭才会考虑诉讼时效问题。

6. 有哪些诉前程序是当事人在开始诉讼之前必须遵守的？

如果根据法律规定需要举行调解听证会，诉讼当事人必须先出席听证会。在一些特殊情况下，民事诉讼法不会要求提前召开调解听证会，比如，适用简易审理流程的债务执行案件，或是州级的法院完全具有审理案件的能力，比如商业法院。如果诉讼争议标的的价值超过十万瑞士法郎，当事人双方可以同意不进行调解听证会。此外，如果被告人的注册办公室或住所在境外，或是被告人的住所不明，原告方可以要求不进行调解，直接在法院提起诉讼。

如果必须要举行调解听证会，居住在州外或境外的当事人可以派代表参加听证会，不用亲自出席。

7. 案件进入审理之前要经过哪些典型的民事程序？有什么样的时间表？

如果法律要求举行调解听证会，那么该听证会需要在调解机构收到原告方请求的两个月内召开。如果在调解过程中双方没有达成一致，调解机构将会批准当事人（通常是原告方）向一级法院提起诉讼。原告方则可以在三个月内向法院提起诉讼。原告方当然可以尽早提交诉讼请求以尽快使案件得到处理。三个月后，调解机构的批准将失效。然而，这并不意味着最终不能就该案件提起诉讼（即不是已决诉讼）。若要再次提起诉讼，原告方需要再次启动案件调解程序。

如果法律不要求举行调解听证会，原告方可以直接向一级法院提起诉讼，比如，地区法院或是商业法院。

8. 当事人是否必须向其他当事人和法院披露相关文件？

在瑞士民事诉讼法中，要披露的信息量十分有限，这与英美法系案件审理要求不同。原则上来说，案件当事人和第三方具有配合法庭取证的法律义务。法庭可以要求涉事方提供证据，或是案件当事人可以在提交案情说明书的同时附上证明文件。一方可以通过法庭要求另一方提供证据，比如文件，这样的要求只有在以下情况下才会被法庭准许：需要使用该证据证明一个具有法律意义的事实，该案件在极大程度上是由要求提供证据的一方发起的，以及能够在很大程度上确认该证据（比如，一个具体的文件）是存在的。通常来说，法庭会明确地告知案件当事人，他们需要凭借自己掌握的证据、而不是对方手中的证据证明自己的诉讼请求合理。

9. 是否存在特权文件或其他规则允许当事人不披露特定文件？

如果配合取证可能会使与案件当事人关系密切的人（比如直系亲属或配偶），面临刑事犯罪的威胁或是承担某些民事责任，案件当事人可以拒绝配合法庭取证。此外，如果提供证据将会违反职业保密原则（比如，“律师与客户之间保密特权”），那么该请求可能也会被拒绝。在瑞士法律体系中，企业的法律顾问是不享有“律师与客户之间保密特权”的，不过企业的专利权代理律师确实享有“律师与客户之间保密特权”。

10. 当事人在审理之前是否交换书面证据？或是否提供口述证据？对方是否有权盘问证人？

通常情况下，案件当事人在案件审理前不进行证据交换，无论是以书面形式还是口头形式。然而，瑞士法律体系认可在案件提起诉讼前采取预先保护性取证的措施。如果法律赋予了这样的权利，或是申请人能够用事实令人信服地证明证据正处于危险中，或是该证据拥有合法的权益，那么采取这样的措施是可行的。如果预先取证申请获批，案件当事人一方可以获得某些关键证据，并根据这些证据决定是否提起案件诉讼。

英美法系中有互相询问对方证人的做法，不过在瑞士的法律体系中没有这样的规定。不过，在法官的初步询问后，案件当事人可以通过法官向证人提出其他问题。通常来说，法庭对于证人的询问是非常全面和深入的。

11. 关于指定专家证人的规则是怎样的？是否有专家行为准则？

法律没有针对由案件当事人指定专业人士的相关规定。如果当事人向法庭提交了由他自己指定的专业人士提供的证据，法庭会认为这些证据是该当事人的声明，并可以对证据的价值进行全面评估。如果法庭认为某个特定事项的判定需要专业知识支持，法庭会指定一名或多名专家提供协助，是否需要指定专家可以由法官自行决定，但通常是由案件当事人提出的。由法庭指定的专业人士被认为具有更高的公信力，因为他们需要满足的严格的客观性要求和回避制度要求几乎是与法官和其他司法人员面临的要求一样。

法庭指定的专家必须尊重事实，专家证人做伪证将面临刑事后果。专家证人必须在规定的期限内提交专家意见。法庭会向专家证人说明案件情况，并提出相关问题。法庭会就向专家提问的问题征求案件当事人的意见，也可能会邀请当事人对已有问题提出修改意

PRAGER
DREIFUSS

Marcel Frey
顾问, **Prager Dreifuss**

Marcel Frey先生是Prager Dreifuss争议解决和私人客户服务团队的成员。他在法院和仲裁案件中代表境内外客户解决争议。他经常参与司法互助事务和资产追回的案件。Marcel先生是欧洲律师联合会发布的、争议解决分部顶级律师榜单上榜人物。客户对他的评价是"知识渊博、反馈迅速、态度友好"，并赞赏他"工作认真仔细，注重细节"（欧洲律师联合会 2016, 2015）。《2017年钱伯斯环球指南》对他的评价是"他拥有丰富的商业诉讼案例经验，经常帮助客户解决有关资产追回和司法互助相关争议。"客户形容他是"工作主动、理解力强，与他一起工作非常愉快。"

他还就公司法和判决执行相关事务向客户提供咨询服务。

Marcel Frey是瑞士南非商会管理委员会的成员。

见或是提出新的问题。专家证人可以以书面形式或口头形式向法庭提交专家意见。在必要时，专家证人也可能被要求出席听证会。案件当事人可以借此机会要求专家证人就专家意见进行详细说明，或是向专家证人提出其他问题。

12. 案件审理前可获得哪些临时救济?

案件审理前的临时性补救措施包括"普通的临时性措施"、根据《债务执行与破产法(DEBA)》颁发的扣押令和保护信。

针对非货币赔偿案件，法律对于当事人可以采用的"普通的临时性措施"没有限制。当事人可以自由提出要求，而法庭也可以不受限制地发布法庭令，包括暂时性的强制令或禁止令，比如要求银行冻结某些资产，或是发布禁止令。其他可以选择的措施包括在公共注册簿上记录某个条目、执行或修改某项命令或是禁止处置某项资产等。

如果被执行的当事人能够提供适当的资产担保，法庭可以不发布采取临时性措施的法庭令。如果申请人在申请临时性措施时尚未就案件提起诉讼，法庭会确定一个提起诉讼（无需举行听证会）的最后时限，如果在最后时限到来前申请人仍没有提起诉讼，临时措施将自动失效。如果预计到采取临时性措施可能会给被执行方带来损失或造成损害，法庭可要求申请方提供资产担保，并在收到担保后才会发布临时性措施。

在一些紧急情况下，尤其是在如果被执行方提前知晓采取临时性措施的法庭令将有可能阻碍法令执行的情况下，法庭可以单方面要求立即采取临时性措施，在措施落实之后再举行第一次听证会。

对于涉及货币赔偿的案件采取补救措施只能通过根据《债务执行与破产法（DEBA)》颁发扣押令的方式进行。在债权人提起的债务纠纷诉讼案件中的权益得到确认之前，扣押令禁止债务人处置和转移资产。申请人可能需要对于因未经授权的扣押而给被执行人的财产带来的潜在损失进行赔偿。如果债权人在扣押令执行前还没有启动债务强制执行程

序或是向法院提起债务诉讼，那么为了使扣押令保持有效，债权人必须在扣押令执行之后的十日内启动程序或是提起诉讼。如果债务人提出异议，债权人必须在异议提出后的十日内申请撤销异议、或是申请法庭令以确认债权人的权益。

任何人都可以向法庭申请执行“保护信”形式的预防性措施，只要申请人有理由认为即将会有人针对自己单方面向法庭提出采取临时性措施、根据《债务执行与破产法(DEBA)》颁发扣押令、或是采取其他措施。申请人可以在“保护信”中陈述自己的处境和立场。如果单方面申请临时性措施的一方确实提出了相关请求，那么他将只会看到这封信，法庭不会采取任何行动。“保护信”在立案后的六个月失效。设立“保护信”机制的目的是防止法庭仅根据申请人的意见单方面采取临时性措施。

13. 申请人需要确立些什么才能成功申请此类临时救济?

申请临时性措施的申请人必须用事实令人信服地证明，该申请人的合法权益已经或是即将遭受到侵害，而且这样的侵害将会对申请人带来难以弥补的损失。当申请人单方面提出临时性措施申请时，申请人必须进一步证明采取临时性措施的紧迫性，解释为什么必须要在还没有听取对方意见的情况下采取临时性措施。

为了在《债务执行与破产法（DEBA)》框架下顺利执行扣押令，债权人必须证明债务人存在到期不还的债务，以及扣押相关资产的请求具有法律依据。此外，债权人还需要向法庭证明相关资产确实存在，并明确资产的地理位置。DEBA 提供了以下六种可以扣押相关资产的法律依据：

(a) 如果债务人无固定住所；

(b) 如果债务人隐匿财产、潜逃或计划潜逃以逃避履行义务；

(c) 如果债务人正在瑞士旅行或正在交易会上开展商贸活动，以处置必须立即用于偿还债务的资产；

(d) 如果债务人不居住在瑞士，而且没有其他的执行扣押令的法律依据。该法律依据成立的前提是该索赔请求与瑞士的关系非常密切，或该索赔请求是基于债务已经得到承认的基础上提出的；

(e) 如果债权人持有临时证书或正式证书，证明债务人有对债权人的欠款未还；

(f) 如果债权人持有明确的证明（比如，标明债务人需偿还一定金额债务的判决书），能够否决对于执行程序的反对议案。

14. 案件审理时可获得哪些救济?

在案件审理过程中也可以申请“普通的临时性措施”和扣押令，适用规则与审理前申请补救措施一致（详见问题 12 和 13）

15. 执行判决的主要方式有哪些?

国内法庭判决书的执行方式取决于所执行的是货币赔偿判决书还是非货币赔偿判决书（有关海外法庭判决书的执行规定，详见问题 22）。执行货币赔偿判决书时，地方债务催收办公室需下发支付令。债务人可以对该支付令提出异议。在这样的情况下，债权人须以可执行的判决书（或裁决书）为依据，要求执行法庭驳回债务人的异议。

执行法庭还可以对非货币赔偿的判决书的执行问题作出决定。法庭可自行判断判决书是否可执行，被执行方可以提出自己的意见。法庭可以把判决书是否可执行作为未决诉讼的一个初步议题并作出决定（附带议题），或者是单独就此问题作出决议（执行令）。

16. 胜诉方一般是不是会获得诉讼费用补偿? 诉讼费用如何计算?

通常情况下，诉讼成本（法庭审理成本、另一方案件当事人成本和自身成本）由败诉方承担。如果没有一方的诉讼请求得到法庭的完全支持，那么诉讼成本则根据案件判决结果由案件当事人按比例分摊。一般来说，法庭会在最后判决中明确诉讼成本由谁来承担。

PRAGER
DREIFUSS

Nina Lim

律师，**Prager Dreifuss**

Nina Lim是Prager Dreifuss争议解决和私人客户服务团队的成员。她在法院审理的案件中代表境内外客户解决争议，并就商业和企业相关法律事务向企业客户提供咨询服务。

诉讼提起人需要在提起诉讼时，预先缴纳一定金额的法庭审理费用保证金。在最终判决中，法庭费用会从案件当事人预先缴纳的费用中扣除。如预缴费用不足，法庭将会向需要承担这部分费用的当事人收取相关费用。败诉方必须向另一方偿付预缴款，并支付裁决书判定的诉讼成本。最后需要指出的是，如果案件当事人一方出现无力支付款项的情况，这个风险在很大程度上是由另一方来承担。

除非有条约另行规定（比如 1954 年《海牙公约》中有关民事诉讼的规定），在以下情况下，被告也可以提出申请，要求法庭命令原告为其诉讼费用提供担保：原告在瑞士无住所或注册办公地点；有证据表明原告资不抵债；拖欠以前诉讼案件费用；或是有理由相信，法庭认定原告方需承担的诉讼成本很有可能不会被支付。

各州确定诉讼费用标准（包括法庭费用和当事人成本）。通常来说，费用标准制定的依据是争议标的的金额大小，但也会根据案件的复杂程度和审理时间进行调整。联邦最高法院自行制定审理费用标准，依据同样是争议标的的金额大小。同样，在 DEBA 案件中，相关的联邦条例的规定明确了适用的费率标准。

17. 对最终判决有哪些上诉途径？当事人能够以什么理由提起上诉？

案件当事人可以就由州地区法院作出的一级法院最终判决书提起上诉（控诉）或提出异议（申诉），并把案件提交给二级州（高等）法院进行审理。只有标的金额超过 10,000 瑞士法郎的上诉案件才有可能被受理。针对执行法院作出的决定、或是根据《债务执行与破产法（DEBA）》作出的决定（比如扣押令）提起的上诉不会被受理。提出复审要求的依据可以包括适用法律不当或案件事实确认有误等。案件当事人可针对不可以提起上诉的判决书提出异议，当事人提出异议可使用的理由会少一些，仅限于适用法律不当和能够证明案件事实确实有误。

如果争议标的金额超过 30,000 瑞士法郎（有些情况例外，如租赁纠纷），当事人若不服第二级法院和单个的州一级法院（比如商业法院）作出的判决，可以向联邦最高法院提起上诉。就民事案件向联邦最高法院提起上诉可使用的理由不多，通常情况下只有违反联邦法律和 / 或能够证明案件事实确实有误才可以提起上诉。

18. 是否允许律师和委托人之间存在胜诉酬金或按条件收费的安排?

瑞士法律体系不允许支付和收取“胜诉酬金”。然而，在一些特定情况下，可以对“有条件的收费”项目作出安排，比如，聘请律师的基本费用可以包括律师的实际支出以及给予律师的适当的酬金。

19. 是否允许第三方资助? 资助人是否可分享胜诉收益?

只要律师能够不受第三方出资人的影响独立行事，瑞士法律允许第三方资助案件的审理，这一形式已经变得越来越普遍。此外，律师不允许自己参与资助。需注意的是，出资人可以从法庭认定的赔偿中受益。

20. 当事人是否可为其诉讼费用投保?

在瑞士可以购买诉讼费用保险，这一保险产品已经越来越被大家所接受。

21. 诉讼人是否可提起集体诉讼? 如果可以，哪些规则适用于集体诉讼?

在瑞士没有集体诉讼的规定。然而，由组织章程授权、保护一些特定团体利益的国家或地区一级的协会或其他组织，可以就团体成员利益遭受到的损害，以协会或组织的名义提起团体诉讼（团体诉讼）。在一些特定的情况下，一些组织，比如环境保护组织也可以根据一些特殊法律规定以组织的名义提起诉讼。

瑞士议会已向联邦政府提交了一项动议，以修改现行的集体赔偿制度，引入集体诉讼程序。2013 年 7 月，联邦委员会就可能采取的改进措施发布了一份报告。该项动议是否能够转化成为法律规定还有待观察（详见问题 26）。

目前，在一些集体诉讼类型的案件中，有时是有可能开展审理试点的，以确定相关事实和 / 或法律的核心要素。审理其他案情类似的案件的法庭，可以根据起诉人的要求暂时中止案件的审理，当试点案件得到判决之后再开始重新审理，这样案件审理就可以参考类似判例，不用从零开始摸索了。

有关集体诉讼的最新事件发生在 2017 年 9 月，瑞士消费者保护基金会对大众公司和汽车进口商 AMAG 提出集体诉讼，以试图确保因汽车尾气排放不合规而被要求对车辆进行改装的大众汽车车主能够获得赔偿。在第一阶段，消费者保护基金会计划就大众公司是否存在欺诈和欺骗消费者的行为提起诉讼（宣告式判决）。在第二阶段，基金会将提出实质性损害赔偿要求。为实现上述目标，基金会得到了受影响车主的委托，考虑到汽车尾气排放不合格这个因素，这些车主支付了过高的购车款。如果基金会诉讼成功，它计划把获得的赔偿分配给已经停止个人索赔申请程序的车主。

22. 外国判决通过哪些程序予以承认和执行?

在《瑞士联邦国际私法》（PILA）或有关国际条约（比如卢加诺公约）不具有法律优先权的情况下，民事诉讼法规定了外国法院判决书的确认和执行相关事宜。只有在没有相关国际条约的情况下，PILA 才适用。外国法院判决书的确认流程本身很便捷，由民事诉讼法进行了规定。

外国法院判决书的执行方式有两种。卢加诺公约对于由卢加诺公约缔约国法院下发的判决书的执行流程进行了具体规定。其他国家法院下发的判决书的执行须按照 PILA 的规定进行。货币赔偿判决书的执行可以通过普通债务催收程序进行（详见问题 15）。申请人可以立即启动债务催收程序，也可以先启动普通执行程序，在收到执行判决后再启动债务催收程序。针对被确定具有可执行性的判决结果，被执行人可以提出异议（详见问题 17）。

根据瑞士法律，外国法院单方面作出的判决不可以被执行，因为法院没有听取被执行方的意见，宣告式判决的结果也不可以被执行，因为判决中没有实际可执行的具体措施。

23. 另类争议解决的主要形式是什么?

在国际商事纠纷中，除了仲裁以外的其他争议解决手段，目前在瑞士的实际意义十分有限。

这可能是因为在法庭审理过程中，瑞士的法官们通常都会积极采取措施找到一个适当的问题解决方案。在原告和被告陈述完自己的主张之后，法庭会初步评估案件情况，并在指导听证会中与案件各方进行沟通，分析当事人在案件中面临的有利因素和不利因素。法庭随后会对案件可能的审理结果进行合理的预判，鼓励当事人在指导听证会上达成和解协议。案件当事人经常会在这样的情况下同意达成司法解决方案。法庭可以在案件审理过程中的任何时候要求举行这样的指导听证会。案件当事人也可以申请暂时中止案件审理，以使双方能够就争议解决方案进行磋商。

民事诉讼法的条款中有一些关于调停的规定。在所有案件当事人的要求下，案件审理前需举行的调解程序可由调停来替代。在案件审理过程中法庭也可以向当事人推荐进行调停，或是双方当事人可以联合提出要求调停的申请。案件当事人需要自己负责组织和开展调停工作，并承担调停所需的成本。双方可以要求法庭批准经过调停达成的协议。这样经法庭批准的协议，它的法律效力等同于法庭判决书。如果当事人达成的调停方案不涉及未决诉讼案件，那么法庭则不能批准该调停协议。

如问题 1 和问题 6 所述，在案件审理前，通常需要在地方调解官员的见证下举行调解听证会。很多小案件在这个阶段就已经得到了解决。

24. 在您所在的司法管辖区有哪些主要的另类争议解决机构?

以下是在瑞士可以选择的其他争议解决机构：

(a) 瑞士商会仲裁机构：该机构遵循《瑞士商事调解规则》解决争端

(www.swissarbitration.org/files/50/Mediation%20Rules/English%20mediation_20-06-2016_webversion_englisch.pdf);

(b) 世界知识产权组织（WIPO）仲裁与调解中心 (www.wipo.int/amc/en);

(c) 瑞士商会商业调停中心 (SCCM; www.skwm.ch);

(d) 瑞士调停员协会 (SDM-FSM; www.swiss-mediators.org).

25. 在诉讼过程中，诉讼人是否必须尝试另类争议解决办法?

在诉讼过程中，法庭不会要求案件当事人尝试其他争议解决手段。法庭只能在案件审理过程中建议当事人进行调停。

26. 当前是否有在审议中的改革争议解决法律法规的建议?

一些有关诉讼时效的修改建议正在讨论中（详见问题 5）。

卢加诺公约相当于布鲁塞尔 1 号法规（法规（欧洲委员会）44 / 2001 关于管辖权、民事和商事判决结果的认可与执行（布鲁塞尔法规））。因为瑞士不是欧盟成员国，因此在瑞士只适用卢加诺公约，而不是布鲁塞尔 1 号法规。目前欧盟已经开始执行经修订的布鲁塞尔 Ia 法规（法规（欧盟）1215 / 2012 关于管辖权、民事和商事判决结果的认可与执行）。虽然布鲁塞尔法规有了一些修改，但目前还没有根据布鲁塞尔 Ia 法规对卢加诺公约进行相应修改的动议。

如问题 21 所述，议会已要求联邦政府修改有关集体赔偿的制度。此前，联邦政府已宣布将在 2017 年上半年提出修改建议，但几乎就在同时，联邦政府又通知提议时间将被延迟，计划于 2018 年上半年提交。

联邦政府目前正在考虑修订《瑞士联邦国际私法》中有关国际仲裁的内容，旨在提高瑞士作为国际仲裁地的吸引力，并已就修正案提出初步建议。联邦政府提议在私法中明确联邦审判庭的判决结果是可以修改的，此外，还提出在一定程度上放宽对于仲裁案件立案的正式要求。在这样的调整下，要求当事人双方出具书面同意书进行仲裁的条款将被取消。如果没有确定裁判所，那么由某个案件当事人选择的瑞士法庭将被视为有权确定仲裁审判庭所在地。初步建议中还提出，可以用英语文件就某个案件的裁决结果向联邦最

高法院提起上诉。然而，联邦最高法院的裁决结果仍将以瑞士官方语言中的一种来体现（比如，德语、法语或意大利语）。

《瑞士联邦国际私法》中有关继承法的内容也可能会被修订，起因是欧盟法规有关财产继承的规定（法规（欧盟）650/2012 关于财产继承事项的管辖权、适用法律、承认和执行决定、接受和执行真实文件，以及关于办理欧洲继承证明事项）。修订目标是确保瑞士和外国相关法律管理内容的兼容性，并能更好地协调瑞士与外国法庭的案件审理过程。修订建议将于 2018 年 2 月提交。

27. 关于您所在司法管辖区或者亚洲地区的争议解决，是否有任何特殊情况需加以强调?

瑞士以其中立性、前后一致和高质量的判例以及拥有众多精通多国语言的法律执业者而闻名。这些是大家选择瑞士作为仲裁地的部分原因。此外，与其他国家相比，瑞士的法院体系的运行也更加快捷和有效。由法院提出的解决方案得到确认的情况很普遍。商业法庭尤其以其审理案件的高效率和高结案率闻名，而且也对外国当事人开放（详见问题 23）。近期统计数据表明，大约三分之二苏黎世州商业法庭的案件在起诉人提交起诉书后的六个月内，在法庭的协助下得到了解决。

作者资料：

Urs Feller 博士

合伙人，**Prager Dreifuss**

电子邮箱：urs.feller
@prager-dreifuss.com

Marcel Frey

顾问，**Prager Dreifuss**

电子邮箱：marcel.frey
@prager-dreifuss.com

Nina Lim

律师，**Prager Dreifuss**

电子邮箱：nina.lim
@prager-dreifuss.com

网址：www.prager-dreifuss.com

地址：Prager Dreifuss Ltd,
Mühlebachstrasse 6, CH-8008
Zurich, Switzerland

电话：+41 44 254 55 55

传真：+41 44 254 55 99

PRAGER
DREIFUSS

Legal services tailored to your needs

Banking & Finance . Capital Markets
Competition & Regulatory Matters . Corporate & M&A
Dispute Resolution . Employment & Pensions
Insolvency & Restructuring . Insurance & Reinsurance
IP & IT . Private Clients . Real Estate & Construction
Tax . White Collar Crimes & Investigations

Prager Dreifuss Ltd · Zurich, Bern, Bruxelles · www.prager-dreifuss.com

Schweizerhof-Passage 7, CH-3001 Bern
T +41 31 327 54 54, F +41 31 327 54 99

Muehlebachstrasse 6, CH-8008 Zurich
T +41 44 254 55 55, F +41 44 254 55 99

Square Ambiorix 45, B-1000 Bruxelles
T +32 2 537 09 49, F +32 2 537 21 16

Jurisdiction: Thailand
Firm: Weerawong, Chinnavat & Partners Ltd.
Authors: Warathorn Wongsawangsiri, Jedsarit Sahussarungsi and Witchaphon Techasawatwit

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

The Thai Courts of Justice adopt a three-tier court system which comprises the Courts of First Instance, the Courts of Appeal and the Supreme Court. In civil matters, the Courts of First Instance consist of general civil courts and specialized courts. The general civil courts are divided into district courts (or "Kwaeng courts"), which have jurisdiction to hear small claims of not exceeding THB 300,000, and provincial courts, which have jurisdiction to hear all civil claims, which are not subject to the jurisdiction of other civil courts (i.e. district courts and specialized courts). In general, provisional courts will hear claims of an amount exceeding THB 300,000, non-monetary cases and non-contentious cases. Apart from general civil courts, there are several specialized courts which hear disputes concerning certain specialized subject matters, such as labour, tax and intellectual property. At the present, specialized courts include the following:

(a) Labour Courts;

(b) Juvenile and Family Courts;

(c) The Central Intellectual Property and International Trade Court;

(d) The Central Bankruptcy Court; and

(e) The Central Tax Court.

Generally, a party to a civil case may appeal a judgment rendered by a court of first instance to a court of appeal (as the second tier of the system), subject to certain conditions as prescribed by law. Similar to the Courts of First Instance, the Courts of Appeal comprise general courts of appeal (including the regional courts of appeal) and the Court of Appeal for Specialized Cases, which have jurisdiction to hear appeals from the specialized courts.

A party who wishes to appeal a judgment of a Court of Appeal may do so only by the permission of the Supreme Court. As the highest court of the land, the Supreme Court will grant a permission to appeal when it is satisfied that the issues contained in the appeal are significant and should be considered by the Supreme Court.

2. What is the role of the judge in civil proceedings?

There are four types of judges in the Thai Judiciary, namely career judges, senior judges, lay or associate judges (e.g. in the Juvenile and Family Courts, Labour Courts) and Kadi (or "Datoh Yutithum"). Each type of judge plays a different role in adjudicating and managing cases that appear before a court. In an adversarial system, such as Thailand, judges in civil proceedings are generally passive in fact-finding and witness examination, although they may be proactive in case management and procedural matters. This is different from the approach adopted by the Thai Administrative Courts and, to a certain extent, Labour Courts (i.e. inquisitorial system), where judges are heavily involved in the investigation of facts and witness examination.

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

As a general rule, court hearings in civil proceedings are open to the public. However, a court may forbid the public from attending the hearings, either in whole or in part, based on certain grounds, e.g. safeguarding public interest. Under Thai procedural law, only parties to a case, a witness and a third party who has a legitimate interest or a reasonable ground may request access to the documents or pleadings contained in the court case file, although there are some restrictions as prescribed by law.

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

Any lawyer, who has passed the technical examination and obtained a lawyer's license from the Lawyers Council of Thailand, may represent a client in court proceedings in all areas of law, and file petitions and evidence. To represent a client, a lawyer must submit a deed of attorney or appointment, duly executed by the client, to the relevant court.

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

Under Thai law, prescription or limitation periods for commencing civil claims vary from one month to 10 years, depending on the subject matter and the substance of the claims. Failure to observe the applicable prescription or limitation periods may result in loss of all rights with respect to such claims.

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

Under Thai civil procedural law, there are no general requirements for a procedural pre-action to be taken prior to the commencement of civil proceedings. However, a person, who wishes to pursue a claim against another person with respect to certain subject matters (e.g. enforcement of mortgage or rescission of contracts) must meet certain requirements as required by a contract or by law (e.g. serving a notice to the counterparty) before filing such claim to the relevant court. In practice, a notice or a demand letter is usually sent to the other party as a pre-action step for proving the commencement of the prescription period or the calculation of relevant interests.

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

In general civil proceedings, once a complaint is filed and accepted by a relevant court, the plaintiff has to request the court to summon and serve a copy of the complaint on the defendant. The time frame required for the defendant to submit an answer to the complaint will depend on the means of service, ranging from 15 to 30 days from the date of service. Extensions of the time frame may be permitted by the court, depending on the reasonable explanation provided by the defendant. Once the answer to the complaint is duly submitted to the court, generally the court will schedule a hearing for the settlement of issues and, in such hearing, schedule the trial hearings. In practice, the parties will have no control over the timetable and the dates of the trial hearings, although the court may ask the parties about their possible hearing dates and take those dates into account. Before the first trial hearing, the court may also schedule mediation hearings to provide an opportunity for the parties to settle the case. The parties are also required to submit a list of witnesses and documents at least seven days before the first trial hearing.

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

There is no legal obligation imposed on parties to disclose all the relevant documents to other parties or to the court. Thus, it is up to the parties to create a list of witnesses and documents, and select the documents that are helpful to their case. However, upon the request of a party, the court may issue an order to subpoena a document to the court. Failure to comply with the order may result in a person possessing such subpoenaed document being subject to criminal liability.

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

In civil proceedings, a party or a person may refuse to disclose to a court certain types of information (e.g. confidential information relating to the affairs of the state, confidential information entrusted or imparted to a lawyer) However, the court may summon and demand an explanation or grounds of refusal from such party or person. If the court is not satisfied with the explanation or the grounds, it is empowered to order such party or person to disclose such information.

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

If a party submits a request and the other party does not object to such request, subject to the court's discretion, the court may allow the party submitting the request to submit witness statements in lieu of examination-in-chief. Such request must be submitted with reasons before the date of the settlement of issues or the date of trial hearing (in the case where there is no settlement of issues) and the court will fix the period, within which the relevant party must submit the witness statements to the court and deliver a copy of such statements to the other party at least seven days before the trial hearing such witness. However, such witness must be present at the court for cross-examination, unless exceptions as prescribed by law apply.

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

The Thai Civil Procedure Code allows expert witnesses to be appointed either by the initiation of the court or by the request of a party to the case. The expert witness may provide his or her opinion orally or in writing. There is no particular set of rules or code of conduct under Thai laws governing expert witnesses in civil proceedings.

12. What interim remedies are available before trial?

According to Thai law, interim remedies are available for the plaintiff upon request any time before the court renders its judgment, subject to the conditions as specified by law. These interim remedies include orders for security for costs, seizure or attachment orders, temporary prohibitive orders (or injunctions), orders requiring government authorities to suspend or revoke any registration, orders for provisional arrest or detention, etc.

13. What does an applicant need to establish in order to succeed in such interim applications?

There are different criteria required for different types of interim remedies. Generally, the applicant needs to prove to the court that there are solid and reasonable grounds for its application. For example, if the applicant wishes to request a restraining order, it must be proved that the defendant has intentionally harmed the applicant, the defendant is continuously causing harm to the applicant, etc.

14. What remedies are available at trial?

In addition to the response to question 12 above, a party to the case may, in accordance with the Civil Procedure Code, request other remedies regarding the taking of evidence, including a court's order for the production or the delivery of documents, the inspection of persons or things, the appointment of expert witness, etc.

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

After the court renders a judgment, the court will issue a decree requiring a party (i.e. the judgment debtor) to make payment of money, delivery of property or performance of or forbearance from an act (as the case may be and as required by the other party – i.e. the judgment creditor) within a certain period of time. If the judgment debtor fails to comply with such decree within the specified period, the judgment creditor will be entitled to request the execution by means of seizure of property, attachment of claims against third parties or other execution measures, and request the court to issue a writ of execution appointing the executing officer. Once the writ of execution is issued and the executing officer is duly appointed, the judgment creditor must submit a statement of execution to the executing officer within 10 years from the date of the judgment, in order for the executing officer to commence the execution process. If the executing officer commences the execution process and seizes the property of the judgment debtor, such property will be sold by public auction. During the execution, if there are reasonable grounds to believe that the judgment debtor has more property than what is known to the judgment creditor, the judgment creditor may request the court to conduct an inquiry and, then, the court may summon the judgment debtor or order the judgment debtor to produce a document listing out its property to the court.

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

It is a common practice that Thai courts make awards of costs to the successful parties. However, the amount of cost awarded will be subject to the discretion of the relevant court, and the amount is usually nominal. In order to determine the amount of costs, the court will assess the complexity and difficulty of the case and the amount of work and time used in conducting the case. It is known that the court usually consults its internal guidelines, listing out the levels of fees and costs, before determining the amount of costs to be awarded.

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

The Courts of Appeal and the Supreme Court are courts which consider questions of law and, to a limited extent, questions of fact raised by a party who is dissatisfied with a judgment of a court of first instance. Generally, in civil actions involving THB 50,000 or less, no appeal can be made on a question of fact, unless a judge in the court of first instance provides a dissenting opinion, certifies that reasonable grounds exist for the court of appeal to consider such question of fact or an approval for appeal is granted by the chief justice of the court of first instance. Such question of fact or of law can be relied upon by the litigant only if such question has been expressly stated in the appeal and has arisen in the court of first instance. Moreover, such question must also be the essential matter of the case and worthy of a decision.

As for the final appeal to the Supreme Court, a litigant cannot appeal to the Supreme Court, unless permission is granted to such litigant by the Supreme Court. The Supreme Court will consider the application submitted by the litigant and see if the issues contained in the appeal are significant and worthy of the Supreme Court's consideration. Such issues include the following:

(a) issues relating to public interests or public order;

(b) the judgment of the court of appeal contains a significant legal issue which contradicts a precedent of the Supreme Court concerning the same issue;

(c) the judgment of the court of appeal concerns a significant legal issue which is not established as a Supreme Court precedent;

(d) the judgment of the court of appeal contradicts a final judgment of the other courts; and/or

(e) issues which benefit the development of the interpretation of the law.

18. Are contingency or conditional fee arrangements permitted between lawyers and clients?

Except for class action lawsuits, according to the decisions of the Supreme Court, a lawyer's fee arrangement cannot be based on the results or outcome of the case. Lawyers are generally prohibited from having any interest, both monetary and non-monetary, in the results or outcome of the case since it is considered an agreement which is contrary to public order or good morals. Therefore, such agreement is void and unenforceable in Thai courts.

19. Is third-party funding permitted? Are funders allowed to share in the proceeds awarded?

There is no such concept under Thai law. According to the interpretation of the Supreme Court, it is possible that a third-party funding arrangement will be deemed as something similar to the concept of maintenance or champerty in common law jurisdictions and contrary to public order or good morals. As a result, such arrangement is void and unenforceable in Thai courts. The only legally available option for a third person who wishes to share the proceeds granted by a court judgment is to become a party to the case and join the proceedings as a party to the case.

20. May parties obtain insurance to cover their legal costs?

Insurance policies, which provide coverage on legal costs and legal service fees for claims of liability arising from the damage of property of the insured, are available in the Thai insurance market. However, insurance policies which are issued for the specific purpose of funding a claim or a litigation are not generally available in Thailand.

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

Class action lawsuits were recently introduced in Thailand in 2015 by an amendment to the Thai Civil Procedure Code. Under the provisions of the Code, class actions may be brought by a member of a group of persons, having the same characteristics, against a common defendant with respect to the same rights which derive from common issues of fact or law. The relevant court may allow the class action to be conducted only when it is satisfied that the nature of the claims, the reliefs sought, the allegations and the interests are common among the litigants. Moreover, the application for class action must also convince the court to the extent that a class action lawsuit is more efficient than the ordinary civil proceedings in such circumstance and the ordinary civil proceedings would be onerous and inconvenient due to the number of the relevant litigants. Should the court find in favor of the application, a specific chapter in the Thai Civil Procedure Code concerning class action lawsuits will apply.

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

At the present, Thailand is not a party to any treaty or convention which requires reciprocal recognition and/or enforcement of judgments between the state parties. Moreover, Thai law also does not provide any available means to recognize or enforce foreign court judgments. The only practical option under Thai law for a judgment creditor according to a foreign judgment is to commence new proceedings in Thai courts.

23. What are the main forms of alternative dispute resolution?

The main forms of alternative dispute resolution available in Thailand are out-of-court arbitration, court-annexed arbitration, court-supervised mediation, out-of-court mediation and negotiation. The most common and popular forms of alternative dispute resolution in Thailand are out-of-court arbitration, court-supervised mediation and negotiation.

24. Which are the main alternative dispute resolution organizations in your jurisdiction?

In addition to Thai courts, the main organizations which facilitate arbitration in Thailand are the Thai Arbitration Institute, Thailand Arbitration Centre, the Office of Insurance Commission, the Office of the Securities and Exchange Commission, and the Department of Intellectual Property. Apart from mediation supervised by Thai courts, the Thailand Arbitration Centre and the Department of Intellectual Property also provide mediation services.

25. Are litigants required to attempt alternative dispute resolution in the course of litigation?

There is no requirement for litigants to attempt any alternative dispute resolution prior to or in the court of litigation. However, at any time before a judgment is rendered, Thai courts frequently conduct court-supervised mediation whenever there is a reason to believe that an amicable settlement between the parties is possible.

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

At the moment, the following draft legislation and amendment are being considered by the relevant authorities and are worth mentioning:

(a) Draft amendment to the Arbitration Act B.E. 2545 (2002) – the issues being considered include issues concerning (i) a separation between domestic and international arbitration proceedings; (ii) performance of duties of foreign arbitrators and foreign representatives to conduct international arbitral proceedings in Thailand; and (iii) the prescription of the President of the Supreme Court and the Minister as the authorities in charge; and

(b) New draft legislation on out-of-court mediation – the issues being considered include the definition of out-of-court mediation, the qualifications of the mediator, the mediation proceedings, the enforcement of settlement agreements, mediation in international commercial disputes, mediation in electronic transactions and mediation in criminal cases.

There are public hearings conducted by the relevant authorities for both draft laws. However, the drafts have not yet been considered by the Thai National Legislative Assembly (i.e. the legislative branch of Thailand), and it is unlikely that the drafts will be finalized or enter into force in the near future.

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

None.

About the Authors:

Warathorn Wongsawangsiri
Partner, Weerawong, Chinnavat & Partners Ltd
E: warathorn.w@weerawongcp.com

Jedsarit Sahussarungsi
Associate, Weerawong, Chinnavat & Partners Ltd
E: jedsarit.s@weerawongcp.com

Witchaphon Techasawatwit
Associate, Weerawong, Chinnavat & Partners Ltd
E: witchaphon.t@weerawongcp.com

W: www.weerawongcp.com
A: 22nd Floor, Mercury Tower
540 Ploenchit Road
Lumpini, Pathumwan
Bangkok 10330
Thailand
T: +66 (0)2 264-8000
F: +66 (0)2 657-2222

司法管辖区： 泰国
律所： Weerawong, Chinnavat & Partners Ltd.
作者： Warathorn Wongsawangsiri, Jedsarit Sahussarungsi 和 Witchaphon Techasawatwit

1. 在民事诉讼方面，法院系统的结构是怎样的?

泰国法院有三个层级，包括初审法院、上诉法院和最高法院。对于民事案件，初审法院分为普通民事法院和专门法院。普通民事法院又分为地方法院（或称“克瓦恩法院”（Kwaeng courts），对涉及金额不超过 300,000 泰铢的小案件具有管辖权）和省级法院（对不受其他民事法院（即地区法院和专业法院）管辖的案件具有管辖权）。一般情况下，临时法庭对超过 300,000 泰铢的非货币案件和非诉讼案件具有管辖权。除普通民事法院外，还有若干专门法院审理有关劳动、税务和知识产权等特定专业问题的争议。目前，有以下专门法院：

(a) 劳动法院；
(b) 少年和家庭法院；
(c) 中央知识产权和国际贸易法院；
(d) 中央破产法院；和
(e) 中央税务法院

一般情况下，民事案件当事人可以根据法律规定的某些条件将初审法院的判决上诉至上诉法院（法院系统的第二层级）。与初审法院类似，上诉法院包括普通上诉法院（包括地区上诉法院）和专门案件上诉法院（对专门法院判决的上诉具有管辖权）。

只有经过最高法院许可，当事人才可以将上诉法院的判决上诉至最高法院。作为该国最高层级的法院，如果最高法院认为上诉的问题至关重要，且应由最高法院予以考虑，那么最高法院才会同意上诉。

2. 法官在民事诉讼中的角色是什么?

泰国有四种类型的法官，即职业法官、高级法官、助理法官（如在少年和家庭法院、劳动法院）和下级法官（或称“Datoh Yutithum”）。各种类型的法官在审理和管理递交法院的案件时发挥不同的作用。在对抗制下，如泰国，法官在民事诉讼中通常对事实调查和证人审查采取被动态度，尽管他们在案件管理和程序事项方面可以主动。这是不同于泰国行政法院以及（一定程度上）劳动法院的做法（即纠问制），那里的法官深度参与事实调查和证人审查。

3. 庭审是否向公众开放？公众是否能够查阅法庭文件?

一般来说，民事诉讼的法院听证环节是向公众开放的。但是，法院可以依据某些（全部或部分）理由禁止公众参加听证会，例如：为了维护公共利益。根据泰国程序法，只有案件当事人、证人和具有合法的诉讼利益或合理理由的第三人才可以申请查看法院案件档案中的文件和诉状。当然，仍然会有一些法律限制。

4. 所有律师均有权代表其委托人出庭并参加诉讼吗？如果不是，律师职业的结构是怎样的?

已通过专业考试并取得泰国律师协会律师资格的律师，可以代表当事人出庭就各法律领域参与诉讼，并提出申诉和证据。为了能够代表当事人，律师必须向相关法院提交由委托人妥善签署的委托书或任命书。

5. 提起民事请求的时效期为多久?

根据泰国法律，民事案件的诉讼时效从 1 个月到 10 年不等，具体取决于系争标的物和索赔的实质内容。未能遵守适用的诉讼时效，可能会导致丧失对此类索赔的全部权利。

6. 有哪些诉前程序是当事人在开始诉讼之前必须遵守的?

根据泰国民事诉讼法，在民事诉讼开始之前一般不需要采取程序性的预先行动。但是，如果某人希望就某一事项对另一人提起诉讼（例如，强制执行抵押或解除合同），那么其在向相关法院提起诉讼前，必须先满足合同或法律的某些要求（如向对方当事人送达通知）。在实践中，通常把向对方当事人发送通知或要求函作为诉前步骤，以此作为诉讼时效开始或计算相关利益的依据。

7. 案件进入审理之前要经过哪些典型的民事程序? 有什么样的时间表?

在一般民事诉讼中，一旦原告提出诉讼并被相关法院受理，原告必须要求法院传唤被告，并向其送达诉状副本。被告答辩的时限取决于送达的方式，自送达之日起 15 天至 30 天不等。如果被告提供合理的解释，那么法院可以允许延长时限。一旦将答辩正式提交法院，一般情况下，法院将安排协商问题的听证会，并在该听证会上安排审判听证会的日期。在实践中，尽管法院可以询问当事人可能的审判听证会日期，并予以考虑，但是当事人不能控制审判时间表和审判听证会的日期。在第一次审判听证会前，法院还可以安排调解听证会，为当事人提供调解解决问题的机会。在不晚于第一次审判听证会召开前七日，当事人还要递交证人和文件清单。

8. 当事人是否必须向其他当事人和法院披露相关文件?

当事人没有法律义务向其他当事人或法院披露所有相关文件。因此，当事人自行决定证人和文件清单内容，并选择对他们案件有帮助的文件。但是，根据当事人的请求，法院可以发出命令要求向法院递交某个文件。不遵守此命令的行为可能会导致拥有此文件的人承担刑事责任。

9. 是否存在特权文件或其他规则允许当事人不披露特定文件?

在民事诉讼中，当事人或个人可以拒绝向法院披露某些类型的信息（例如：与国家事务有关的机密信息、委托给律师的秘密资料）。但是，法院可以传唤和要求当事人或个人作出解释或拒绝的理由。如果法院对解释或理由不满意，那么法院有权命令该当事人或个人披露这类信息。

10. 当事人在审理之前是否交换书面证据? 或是否提供口述证据? 对方是否有权盘问证人?

如果一方当事人提出请求，且另一方当事人并不反对这项请求，法院可以准许提交请求的一方当事人提交证人的证词，以替代对证人的询问。这样的请求必须给出理由，且在问题协商日或审判听证会（如果没有问题协商环节）之前提出。法院将修改期限，在此期间内，相关当事人必须在不晚于审判听证会开始前 7 日，向法院提交证人的证词，并向另一方当事人提交证词副本。但是，除非法律另有规定，否则这些证人必须出庭接受质证。

11. 关于指定专家证人的规则是怎样的?

《泰国民事诉讼法典》允许法院或根据案件当事人的要求指定专家证人。专家证人可以提供口头或书面意见。泰国法律里没有关于民事诉讼程序中的专家证人的特别规定或行为准则。

12. 案件审理前可获得哪些临时救济?

根据泰国法律，在法院作出判决之前，原告可以在满足法律规定的情况下随时要求临时救济。这些临时救济手段包括：诉讼费用担保命令、查封或扣押令、暂时禁止令（或警告）、要求政府部门暂停或撤销登记的命令、临时逮捕或拘留的命令等。

13. 申请人需要确立些什么才能成功申请此类临时救济?

不同类型的临时救济有不同的标准。一般来说，申请人需要向法院证明其申请有充分和合理的理由。例如，如果申请人希望提出限制令，必须证明被告故意伤害申请人，被告不断给申请人造成伤害，等等。

14. 案件审理时可获得哪些救济?

除对上述第 12 个问题的答复外，案件当事人可根据《民事诉讼法典》，请求对收集证据采取其他补救措施，包括由法院命令保护文件的制作和移交、对人或物的检查、指定专家证人等。

15. 执行判决的主要方式有哪些?

法院作出判决后，将出具一项法令，要求一方当事人（即判决债务人）（根据另一方当事人，即判决债权人的要求）在某一期限内支付款项、交付财产、或者履行或禁止某项行为。如果判决债务人在规定期限内未能遵守该法令，那么判决债权人有权要求通过留置财产、扣押对第三方债权或其他执行手段来执行判决，并请求法院颁布一项执行令，指定执行法官。执行令一经签发，执行法官被正式任命后，判决债权人必须在判决之日起 10 年内向执行法官提交执行声明，以便执行法官启动执行程序。如果执行法官启动了执行程序，并留置了判决债务人的财产，那么该财产将以公开拍卖方式出售。在执行过程中，如果有合理理由相信该判决债务人拥有比判决债权人已知更多的财产，那么判决债权人可以请求法院进行调查。此时，法院可以传唤判决债务人或命令判决债务人向法院列明其财产清单。

16. 胜诉方一般是不是会获得诉讼费用补偿? 诉讼费用如何计算?

泰国法院通常会判令对胜诉方的诉讼费用进行补偿。但是，补偿金额的多少由相关法院执行决定，并且金额通常是名义上的。为了确定诉讼费用金额，法院将评估案件的复杂性和难度，以及案件审理所耗费的工作量和时间。众所周知，通常法院在确定补偿诉讼费用数额之前要参照其内部准则，列出各项收费级别和费用金额。

17. 对最终判决有哪些上诉途径? 当事人能够以什么理由提起上诉?

上诉法院和最高法院审理法律问题，并在一定程度上审理对初审法院判决不满的上诉方提出的事实问题。一般来说，除非初审法院法官提出异议，说明存在值得上诉法院对案件事由进行重新考虑的合理理由，或者经初审法院首席法官同意，否则涉及金额小于 50,000 泰铢的民事案件不得就案情事由上诉。当事人对事实或法律的质疑在如下情况才会予以考虑：仅有将此质疑阐明于上诉状之中，且在初审法院初审时便提及。另外，这些质疑必须是案件的实质性问题，值得予以考虑。

至于向最高法院提起最终上诉，除非经最高法院准许，否则该诉讼当事人不能向最高法院提起上诉。最高法院会考虑诉讼当事人提出的申请，并审查上诉中所记载的问题是否重要，是否值得最高法院考虑。这些问题包括以下内容：

(a) 与公共利益或公共秩序有关的问题

(b) 上诉法院的判决涉及一个重大的法律问题，且与最高法院就同一问题的先例相抵触；

(c) 上诉法院的判决涉及一个重大的法律问题，且最高法院无先例可寻；

(d) 上诉法院的判决与其他法院的终审判决相抵触；和 / 或

(e) 有利于制定法律解释的问题。

18. 是否允许律师和委托人之间存在胜诉酬金或按条件收费的安排?

除集体诉讼案件外，根据最高法院的决定，律师费用安排不能以案件结果为依据。律师通常被禁止根据案件的结果获取任何利益，无论是现金还是非现金性质，因为这样的协议被视为违反公序良俗。因此，这样的协议在泰国法院是无效的，无法执行。

19. 是否允许第三方资助？资助人是否可分享胜诉收益？

泰国法律中没有这样的概念。根据最高法院的解释，第三方的资金安排可以被视为大陆法系中的助讼与帮讼分利的概念。因此，这样的安排在泰国法院是无效的，无法执行。如果第三方希望从法院判决中获得收益，那么唯一合法的途径是成为该案的当事人，并作为诉讼当事人参加诉讼程序。

20. 当事人是否可为其诉讼费用投保？

在泰国保险市场上，有可以覆盖因被保财产损失而引起赔偿责任的法律费用和法律服务费用的保险产品。然而，在泰国一般没有为索赔或诉讼提供资金的保险产品。

21. 诉讼人是否可提起集体诉讼？如果可以，哪些规则适用于集体诉讼？

2015 年最近修订的《泰国民事诉讼法典》引入了集体诉讼概念。根据该《法典》条款，具有相同特征、针对共同的被告、涉及共同事实或法律问题赋予的相同权利的群体之代表可以提出集体诉讼。满足以下条件后，有关法院才会受理集体诉讼：当事人的索赔性质、所要求的救济、指控和利益相同。此外，申请集体诉讼时还必须使法院确信：在这种情况下，集体诉讼比普通民事诉讼更有效率，而且由于有关诉讼当事人数量众多，普通民事诉讼程序将变得繁重和不便。如果法院同意该申请，那么将适用《泰国民事诉讼法典》中有关集体诉讼的具体章节。

22. 外国判决通过哪些程序予以承认和执行？

目前，泰国尚未与任何国家签署相互承认和 / 或执行判决的条约或公约。此外，泰国法律没有为承认或执行外国法院判决提供任何手段。根据泰国法律，唯一可行的方法是，外国判决的判决债权人在泰国法院重新发起诉讼。

23. 另类争议解决的主要形式是什么？

泰国的另类争议解决机制主要有庭外仲裁、法院附设仲裁、法院监督下的调解、庭外调解和谈判。在泰国，最常见和最普遍的另类争议解决机制是庭外仲裁、法院监督下的调解和谈判。

24. 在您所在的司法管辖区有哪些主要的另类争议解决机构？

除了泰国法院外，在泰国提供仲裁服务的主要机构有：泰国仲裁协会、泰国仲裁中心、保险委员会办公室、证券交易委员会办公室和知识产权部。除了泰国法院监督下的调解外，泰国仲裁中心和知识产权部也提供调解服务。

25. 在诉讼过程中诉讼人是否必须尝试另类争议解决办法？

诉讼当事人在诉讼前或诉讼中无须尝试任何另类争议解决机制。然而，在作出判决前的任何时候，泰国法院经常在有理由相信双方能够友好协商解决的情况下，进行法院监督下的调解工作。

26. 当前是否有在审议中的改革争议解决法律法规的建议？

目前，有关当局正在审议下列值得一提的立法草案和修正案：

(a) 对《仲裁方案》(2002)（Arbitration Act B.E. 2545 (2002)）的修正草案——正在考虑的问题包括：(1) 国内和国际仲裁程序的分离；(2) 外国仲裁员和外国代表履行职责，在泰国进行的国际仲裁程序；以及 (3) 最高法院院长和相关责任部门部长的意见；以及

(b) 新设立一部关于庭外调解的法律——考虑的问题包括：定义庭外调解、调解员的资质、调解程序、和解协议的执行、国际商务纠纷的调解、电子交易的调解以及刑事案件的调解。

有关当局对这两项法律草案都进行了公开听证。然而，泰国国民议会（即泰国立法机构）

尚未审议草案，草案不可能在近期定稿或生效。

27. 关于您所在司法管辖区或者亚洲地区的争议解决，是否有任何特殊情况需加以强调?

无。

作者资料：

Warathorn Wongsawangsiri

合伙人，**Weerawong, Chinnavat & Partners Ltd**

电子邮箱：warathorn.w@weerawongcp.com

Jedsarit Sahussarungsi

律师，**Weerawong, Chinnavat & Partners Ltd**

电子邮箱：jedsarit.s@weerawongcp.com

Witchaphon Techasawatwit

律师，**Weerawong, Chinnavat & Partners Ltd**

电子邮箱：witchaphon.t@weerawongcp.com

网址：www.weerawongcp.com

地址：22nd Floor, Mercury Tower
540 Ploenchit Road
Lumpini, Pathumwan
Bangkok 10330
Thailand

电话：+66 (0)2 264-8000

传真：+66 (0)2 657-2222

Jurisdiction: Turkey
Firm: Moroğlu Arseven
Authors: Orçun Çetinkaya and Burak Baydar

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

The structure of court system in respect of civil proceedings is comprised of three tiers which are first instance courts, regional courts of appeal and the Court of Cassation. Regional courts of appeal are the primary appeal courts. On certain conditions, the decisions of regional courts of appeal could be appealed to the Court of Cassation. While civil proceedings are tried before general civil courts, there are special courts for labor, intellectual and industrial property rights, consumer rights, enforcement and execution issues, cadastral issues and commercial matters.

2. What is the role of the judge in civil proceedings?

The judge decides on the procedural and substantive issues of the case by applying the relevant laws and regulations. The judge first of all reviews the pleading in respect of admissibility. If the case passes the admissibility test, then the judge manages the case and invites parties to do their submission in time and shape. The judge decides on the matter depending on the submissions and evidence submitted by the parties. Even though the judge's evaluation is not limited with the legislative references that the parties made in their submission, as a general rule the judge is tied by the evidence submitted by the parties. The party preparation principle is accepted in Turkey and full disclosure is not the rule. The civil judge has no duty to investigate the matter as a criminal judge would do. While the judge heavily relies on the expert witness, the judge has the ultimate authority in evaluating the facts and applying the law. However, in cases which the principle of ex officio examination is applicable, the judge can seek evidence that is not submitted by either party.

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

Civil hearings are open to the public unless otherwise decided by the court owing to requirements of public morality or security. Court documents are not accessible by the public.

4. 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?

There is no limitation, rule, ranking for lawyers to appear before first instance, regional or Court of Cassation. Once qualified, a lawyer can represent his/her client at any court in Turkey on any matter.

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

The general time limitation for contractual matters is 10 years. However, there are various specific time limitations set out primarily by the Code of Obligations.

For example, there are claims which must be brought within 5 years such as the ones arising from contract of mandate, agency and commission, lease payments and labor contracts.

In respect of tort, the limitation period is 2 years which starts from when the claimant becomes aware of the tortious act, the damage and the

person who has given rise to the damages. Tortious claims should be filed within 10 years in any case from the date of tortious act. Should the tortious act also be qualified as a criminal conduct, time limitations for the related crime will apply.

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

Mediation as a pre-condition of litigation for labor law matters has been introduced by Law No. 7036 Code of Labor Courts ('Law') published in the Official Gazette No. 30221 dated October 25, 2017. Mediation on certain matters will be compulsory from January 1, 2018 in Turkey.

Mediation is a pre-condition for cases dependent on individual or collective bargaining employment contracts or cases of employee or employer claims and compensation demands and for cases of employee reinstitution.

For pecuniary and non-pecuniary compensation claims or filings for their detection or recourse based on work accidents or work-related sicknesses, mediation is not obligatory.

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

Since there is no pre-litigation settlement procedure except certain labor disputes, the claimant can directly go to court with its submission. The claimant must present its case clearly, with a sufficient degree of evidence. The claimant should clearly set out facts, relevant evidence and the counterparty, the grounds on which it thinks it is right and raise its demand. The judge prepares opening minutes where he/she indicates the time table for the parties' submission of papers and evidence at the stage of exchange of petitions as well as the date of preliminary hearing where the judge decides on the admissibility issues. If the case in question is subject to the procedure of written submission, then both parties have the right to file two sets of petitions for which they will have 2 weeks from the date when they are served with the other party's petition. Until the preliminary hearing, the parties should submit their evidence as well.

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

Full and frank disclosure is not a rule in civil cases in Turkey. Party preparation principle is the rule. If one of the parties insists on the submission of set of documents that the other party did not submit, on the basis that its case is dependent on this submission, the judge will allow the submission.

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

Since full and frank disclosure is not the principle around which disclosure is operated, parties have the right to pick the evidence they will submit for their claim/ defense. Having said that, the judge can request a party to submit a certain evidence and in case of failure to do so, the judge could take the view that the party who relied on this evidence has proven its point despite the fact that the evidence in question has not been submitted. There are however certain documents that are regarded as privileged and therefore the judge cannot request their submission. Among those, the most important ones are the communication between attorney and client as well as documentation and communication regarding settlement negotiations.

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

As per Turkish Civil Procedure Law numbered 6100, parties must submit their evidence annexed to their petitions within the prescribed time periods before the stage of exchange of petitions. Witness statements on the other hand are given orally at hearings with the participation of parties and parties can ask questions to the witnesses.

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

The Law on Expert Witnesses numbered 6754 regulates the appointment and code of conduct of expert witnesses. Each court has expert witnesses' list from where the appointments are made. Expert witnesses must have certain qualifications and experience as set out in the law numbered 6754 and are subject to ethical and professional rules and principles set forth therein.

12. What interim remedies are available before trial?

Turkish legislation defines interim remedies as temporary legal protections, with interim injunctions and precautionary attachments being the most significant and efficient methods in Turkey.

Many types of remedy exist, spread over the different laws. In general though, temporary legal protection is primarily regulated under the Civil Procedural Law and the Bankruptcy and Enforcement Law.

Interim injunctions

Interim injunctions can be requested from the court either before or after filing a lawsuit. An interim injunction claim must raise a concern that:

- Acquiring a right will become more difficult, or impossible, due to a change which will occur in the circumstances, and/or
- Damages will be incurred due to any delay.

Interim injunction decisions protect the claimant's interest during trials, provided that no change occurs to the present circumstances. If a claimant files an interim injunction request before filing a lawsuit, the lawsuit on the merits must be filed within two weeks after execution of the interim injunction order. Failing that, the injunction will be automatically lifted.

The party requesting an interim injunction must deposit a security in order to prevent possible damages of the counter-party which may arise. In practice, courts tend to request at least 15% of the claimed amount as security.

It is possible to object an interim injunction decision before the court rendering the decision. The court's decision upon objection can be appealed before the authorized regional court.

Precautionary attachments

Precautionary attachment requests enable temporary seizure of a specific amount of the debtor's assets, without hearing the debtor's defence.

Such interim relief is available for receivables (payable and due) in ongoing or planned execution proceedings, where the receivables are not guaranteed with a pledge and at risk of having collection difficulties.

The party requesting a precautionary attachment must:

- Deposit collateral with the court (usually no less than 15% of the claimed amount), and
- Seek enforcement of the attachment from the authorized enforcement office within ten days of the court's precautionary attachment decision.

Failure to do so will cause the precautionary attachment to be automatically lifted.

Upon executing a precautionary attachment order, the creditor must file the claim on the

merits or start an execution proceeding regarding the merits of their case within seven days, or the relief will again be automatically lifted.

13. What does an applicant need to establish in order to succeed in such interim applications?

An applicant should prove that its case has a good degree of likelihood of success which can be perceived even at the initial stage of the case with the evidence submitted and at the same time it should prove that there would be irreparable damages at the end of the case even if the court accepts the case unless the interim request is accepted.

14. What remedies are available at trial?

There are numerous remedies available at trial which can be split into categories such as coercive, monetary, non-monetary, specific, substitutionary personal, proprietary remedies.

(a) Coercive Remedies: They contain orders such as damage, specific performance, injunctions, the award of money had and received, the award of an agreed sum or delivery up of goods etc.

(b) Non-Coercive Remedies: They are mainly pronouncements such as declarations, rescission, rectification, constructive and resulting trusts, and liens.

(c) Monetary Remedies: They are awards of money, examples include account of profits, damages, and an award of agreed sum.

(d) Non-Monetary Remedies: These are basically injunctions.

(e) Specific Remedies: They order the defendant to comply with his primary duty or to undo the breach of primary duty (such as injunctions, specific performance)

(f) Substitutionary Remedies: They order the defendant to pay a substitute sum for having failed to comply with a primary duty (eg, damages)

(g) Personal Remedies: They are not tied to particular property in the defendant's possession and hence do not give priority to the claimant on the defendant's insolvency.

(h) Proprietary Remedies: They confer proprietary rights on the claimant over property in the defendant's possession such as delivery up of the goods, recovery of land.

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

Although the final domestic courts' decisions are binding, their enforcement may become problematic owing to insolvency or unwillingness of the respondent to comply with the decision. In that case, the claimant can enforce a domestic court judgment through an application made to the competent execution office. The respondent must comply with, or object to, the enforcement order within seven days of the date of notification. Upon expiry of the seven days without any objection from the respondent, the claimant can apply for attachment over the respondent's assets. In case of any objection, such disputes relating to execution proceedings are settled before execution courts, which are subject to the procedural rules provided in the Execution and Bankruptcy Law.

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

Successfully parties are awarded only with the official and judicial costs that they had to bear until they were awarded with a decision in their favor pro rata to the acceptance rate of their claim. For instance, if the claim is filed for the collection of TRY 100,000 but the court partially accepted the claim for TRY 50,000, then the claimant will be awarded for half of the official and judicial costs. Professional fees that the successful party had to bear, however cannot put on the losing party.

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

Regional Courts make factual and legal re-evaluation whereas the Court of Cassation makes only legal re-evaluation of the cases. Regional Justice Courts can render a new decision on the merits since they carry out a factual analysis on the case. The Court of Cassation on the other hand either quashes or upholds the decision since it carries only legal re-evaluation.

18. Are contingency or conditional fee arrangements permitted between lawyers and clients?

Yes, contingency or conditional fee arrangements are permitted by the Advocacy Law numbered 1136 provided that the success fee does not exceed 25% of the proceeds of the case.

19. Is third-party funding permitted? Are funders allowed to share in the proceeds awarded?

Third-party litigation funding is currently neither prohibited nor regulated under Turkish law. In fact, this lack of regulation is a natural result of rare recourse to funding arrangements in court litigation by Turkish parties that are not sufficiently familiar with the institution. Consequently, Turkish courts have not yet had occasion to express their position on the nature, validity and enforceability of third-party litigation funding agreements. However, where there is no restriction, the freedom of contract principle applies under Turkish law. Accordingly, parties and third-party funders, can, in principle, enter into, and structure as they wish, funding agreements provided that they comply with public policy and mandatory provisions of Turkish law.

The situation is more promising in the field of arbitration, especially in international commercial arbitration and investment arbitration. The number of Turkish parties that had recourse or at least sought to obtain funds from third parties has seen a significant increase in recent years in parallel with the increasing number of high-value disputes. Thus, third-party funding serves as a tool ensuring access to justice and equality of arms for parties that are deprived of sufficient financial resources to afford arbitration costs. This need for funding has also triggered specialisation of lawyers in the field. Considering these developments in arbitration, it would be fair to say that a funding culture is beginning to be established in Turkey and this may positively affect any future regulation as to litigation funding.

20. May parties obtain insurance to cover their legal costs?

Legal protection insurance is available under Turkish law. However, commercial disputes are not covered by this insurance under the general conditions of legal protection insurance, issued by the under secretariat of the Treasury.

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

In principle, class actions or group actions as recognised in common law systems are not available under Turkish law. However, under the new Code of Civil Procedure article 113, which entered into force on 1 October 2011, a type of group action called 'collective action' was introduced. On the basis of this article, legal associations, corporations and other legal entities may, within the framework of their statute and on their behalf, file a collective action in order to determine the rights of those concerned, to remedy a breach of law or to prevent violation of future rights of those concerned, with the purpose of protecting their members' benefits. However, unlike typical class actions, these collective actions may not be for the purposes of obtaining compensation for monetary damages.

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

For enforcement of foreign judgments, an enforcement decision rendered by the competent Turkish court of first instance is required. Anyone having a legal interest in enforcement may make an application to the court with a petition accompanied by the original and approved translation of the foreign judgment or its certified copy with an approved translation; and a duly approved statement or instrument proving that judgment is final, with its approved translation.

Under article 54 of the Code on International Private and Procedural Law, the court grants an enforcement decision provided that the following applies:

(a) there is a legal or de facto reciprocity between the two countries;

(b) the judgment does not relate to a subject that is within the exclusive jurisdiction of Turkish courts, or it must not have been made by a non-competent court, provided that the non-competence had been contested by the respondent;

(c) the judgment is not manifestly contrary to Turkish public order; and

(d) the principles of due process, including proper notice, have not been violated.

23. What are the main forms of alternative dispute resolution?

All alternative dispute resolution methods are available in Turkey while arbitration is dominant among them. The parties however do not have tendency to solve their matters through ADR partly because the culture has not developed yet and court litigation is not expensive.

24. Which are the main alternative dispute resolution organisations in your jurisdiction?

The Istanbul Arbitration Centre ("**ISTAC**") was established in 2014, aiming to establish itself as an international arbitration body and increase the demand for arbitration in Turkey. Its rules apply to both domestic and international disputes, without discrimination. Parties can determine the arbitration's seat and language, as well as select the arbitrators. Unless the parties otherwise agree, the arbitration seat will be Istanbul and the arbitrator (or tribunal) will determine the arbitration's language, considering all circumstances and conditions.

The Istanbul Chamber of Commerce Arbitration Centre ("**ICCAC**") also operates in both domestic and international disputes. The ICCAC rules apply the same approach as the ISTAC regarding the arbitration's seat, language, and selection of arbitrators.

Turkey has a mediation center called the Mediation Head of Department ("**MHD**"). However, this entity does not appoint mediators for disputes. Rather, mediators are listed on a registry and parties can choose mediators at their own discretion. The Mediation Head of Department carries out mediation activities, education, and certification of mediators.

25. Are litigants required to attempt alternative dispute resolution in the course of litigation?

In general, litigants are not required to attempt alternative dispute resolution. Having said that, the attempt to mediate has been regulated as a cause of action in the newly enacted Law on Labor Courts numbered 7036. Henceforth, the labor cases which are filed with a claim of employee or employer receivable, compensation or re-employment and filed without an attempt to mediation will be rejected before reviewing in terms of substance. Furthermore, if there is any arbitration agreement or clause between the

litigants, the defendant may object to the trial until the time of the preliminary hearing. In such cases, the plaintiff shall file its claim before competent arbitrator/s.

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

The compulsory mediation procedure introduced for labor disputes will be extended over consumer claims as well as small commercial claims. The aim is to lower the work load of civil courts and make the judiciary more efficient by using mediation as a compulsory ADR method.

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

The parties should bear in mind that the claimant pay an application fee of around 2% for monetary claims in commercial matters. Provisional attachments and precautionary injunctions are difficult to obtain but are crucial for the case to be successful in real life given that a commercial trial could take around 4 years in Turkey and dissipation of assets is common. Courts request 15% collateral for injunctions requests. It is also important that losing party does not bear the professional fees that the winning party had to pay in Turkey.

About the Authors:

Orçun Çetinkaya
Partner, Moroğlu Arseven
E: ocetinkaya@morogluarseven.com

Burak Baydar
Senior Associate, Moroğlu Arseven
E: bbaydar@morogluarseven.com

W: www.morogluarseven.com
A: Abdi Ipekci Cad. 19-1
34367 Nisantasi, Istanbul
T: +90 212 377 47 00
F: +90 212 377 47 99

司法管辖区：　土耳其

律所：Moroğlu Arseven
作者：Orçun Çetinkaya
和 Burak Baydar

1. 在民事诉讼方面，法院系统的结构是怎样的？

与民事诉讼有关的法院体系由三级法院组成，即一审法院、地区上诉法院及最高法院。地区上诉法院是初级上诉法院。在某些条件下，区域上诉法院的裁决可能被诉至最高法院。民事诉讼除了在一般法院审理之外，还有劳动、知识产权与工业产权、消费者权益、生效及执行、地籍测量问题及商业事宜等特别法庭。

2. 法官在民事诉讼中的角色是什么？

法官适用相关法律法规来对案件的程序及实体问题进行裁决。法官首先会审查诉状的可接纳性。如果案件通过可采性测试，法官开始处理案件，邀请各方按照规定的时限和形式提交材料。法官根据各方提交的材料和证据裁决案情。尽管法官对案情的评估不受限于各方提交的法律借鉴，但其通常受到各方所提交的证据约束。土耳其奉行当事人准备原则，并且不要求完全披露。民事法官无义务像刑事法官一样调查案情。法官高度倚赖专家证人，法官对事实评估及法律适用有最终决定权。但是，如果可以适用依职权审查原则，法官可以寻求任何一方均未提交的证据。

3. 庭审是否向公众开放？公众是否能够查阅法庭文件？

民事诉讼向社会公开听证，除非法庭出于公共道德或安全要求决定不公开听证。公众无法查阅法庭文件。

4. 所有律师均有权代表其委托人出庭并参加诉讼吗？如果不是，律师职业的结构是怎样的？

只要符合资格，任何律师都可出席一审法院、区域法院或最高法院的庭审，可在土耳其的任一法院、就任一案件代表他／她的客户出庭。不存在限制、规则或排序的情形。

5. 提起民事请求的时效期为多久？

合同案件一般时效期间为 10 年，但还有诸多具体时效期间，主要由《义务法典》做出规定。

例如，某些请求必须在 5 年内起诉，如委托、代理和委任，租赁费支付及劳动合同相关的请求。

就侵权方面而言，时效期间为 2 年，自原告得知侵权行为、损害事实及施害人之日起算。侵权主张应当自侵权行为发生之日起 10 年内起诉。如果侵权行为同时符合刑事行为的资格要件，将适用相关刑事案件的时效期间。

6. 有哪些诉前程序是当事人在开始诉讼之前必须遵守的？

2017 年 10 月 25 日，第 30221 号官方公报公布了《劳动法院法典》（第 7036 号法律，属于法律）规定，在劳动法案件中，调解是诉讼的前提条件。自 2018 年 1 月 1 日起，在土耳其，某些案件的调解将成为强制要求。

在以个人或集体劳动合同谈判为根据的案件或者劳动者或雇主索赔案件、赔偿主张以及员工利益偿还案件中，调解是前提条件。

对于金钱赔偿及非金钱赔偿请求、检查申请或者基于工作事故或工作相关疾病的追索，调解并非强制性的。

7. 案件进入审理之前要经过哪些典型的民事程序？有什么样的时间表？

因为除了某些劳动争议之外，并不存在诉前解决程序，原告可以直接向法院起诉。原告必须清楚地陈述案情，并充分举证。原告应该清楚、详细陈述事实、相关证据及对方，说明其认为主张正确的理由并提出其请求。开头几分钟，法官会指明，诉状交换阶段各方应于何时提交文件和证据，以及何时开展预审，对可接纳性做出决定。如果在决案件遵从书面提交程序，那么双方当事人有权在 2 周时间内提交两套诉状，该期间自其收到另一方诉状之日起算。在初审之前，各方还应当提交其证据。

8. 当事人是否必须向其他当事人和法院披露相关文件？

在土耳其，民事案件不要求完全而真实的披露，而是将当事人准备原则视作一项重要规则。如果一方当事人坚持提交另一方当事人未曾提交的整套材料，而该案的依据在于提交的该等材料，法官将允许提交该文件。

9. 是否存在特权文件或其他规则允许当事人不披露特定文件？

因为不要求完全而真实的披露，各方有权在请求 / 辩护时选择性提交证据。然而，法官可以要求一方当事人提交特定证据，并且如果未提交，法官可以认为倚赖该证据的一方当事人已证明其观点，而不论在议证据未曾被提交这一事实。但是我们认为某些文件有特殊豁免权，法官不能要求提交该等证据。在这些证据中，最重要的证据是律师与客户之间的通讯以及与协商争议有关的文件与通讯。

10. 当事人在审理之前是否交换书面证据？或是否提供口述证据？对方是否有权盘问证人？

根据第 6100 号《土耳其民事诉讼法》，各方必须在诉状交换前的规定时限内提交诉状及相关证据。证人证言在各方参与的庭审中进行口头陈述，并且各方可以向证人发问。

11. 关于指定专家证人的规则是怎样的？

第 6754 号《专家证人法》规定了专家证人的指派及行为准则。各法庭拥有专家证人名单，从该名单中指派专家证人。专家证人必须拥有第 6754 号法律规定的特定资格和经验，并且遵守该法规定的道德和专业规则及原则。

12. 案件审理前可获得哪些临时救济？

土耳其法律将临时救济措施定义为临时性法律保护，临时救济措施和预防性扣押措施是土耳其最重要、有效的方式。

诸多类型的救济措施存在并散布于不同法律当中。尽管一般而言，临时性法律保护措施基本上规定于《民事诉讼法》与《破产与执行法》。

临时救济措施

在提起诉讼之前或之后都可以向法庭请求临时救济措施。临时救济措施申请必须考虑下列因素：

- 由于环境可能发生的变化，权利的获取可能会更加困难或者无法实现，和 / 或
- 任何迟延都可能引发损害。

假如现有情形未发生变化，临时救济措施决定可以在审判期间保护原告的利益。如果原告在提起诉讼前提交了临时救济措施申请，该案的诉讼必须在临时救济措施命令执行后两周内提起。如未在两周内起诉，该禁令将自动失效。

申请临时救济措施的当事人必须存入一笔保证金以防止对方可能造成的损害行为。在实践中，法庭通常要求申请人支付申请金额的 15% 以上，作为保证金。

在法庭发布决定前可以对临时救济措施提出反对。法庭对反对意见作出的决定可以上诉至有受理权限的区域法庭。

预防性扣押措施

申请预防性扣押可暂时没收债务人一定的资产，而无需对债务人的抗辩进行听审。

对于正在回收或预期回收的应收账款（应付的以及到期的），且该账款无抵押，有坏账风险，则适用该临时救济方案。

申请预防性扣押措施的当事人必须：

- 向法庭存入一笔担保（通常不低于主张金额的 15%），以及
- 在法庭作出预防性扣押措施决定起十日内，向有权的执行局请求执行该等扣押措施。

未能满足前述要求，将导致预防性扣押措施自动失效。

预防性扣押措施命令一经执行，债权人必须在七日内基于案情实质提交请求，或者启动与案件事实相关的执行程序，否则该等救济将再次自动失效。

13. 申请人需要确立些什么才能成功申请此类临时救济?

申请人应当一开始就举证证明该案有很大的胜诉可能，同时还应证明除非法院同意临时救济请求，否则即使法庭支持该案，在案件结束时仍可能发生不可弥补的损害。

14. 案件审理时可获得哪些救济?

在审判中存在大量救济措施，这些措施可以被分类为强制性、金钱性、非金钱性、特定性、替代性、债权性、专有性措施。

(a) 强制性救济措施：其包含诸如损害赔偿、特定履行、强制令、判决支付已有及已收金钱、判决支付商定金额或者交付货物等等。

(b) 非强制性救济措施：其主要是诸如宣告、撤销、修正、推定与回归信托以及扣押之类的声明。

(c) 金钱性救济措施：其为金钱的返还，例如利润、损害赔偿，以及判决支付商定金额。

(d) 非金钱性救济措施：其主要是强制令。

(e) 特定救济措施：其命令被告遵守其基本义务以停止违背基本义务（例如强制令、特定履行）。

(f) 替代性补救措施：因被告人未遵守基本义务，而命其支付一定金额作为替代物（例如损害赔偿）。

(g) 债权救济措施：其并不依附于被告人所有的特殊财产，进而未授予原告在被告人破产后的优先索赔权。

(h) 专有性救济措施：其将被告财产之上的专有权利授予原告，例如交付货物、恢复土地。

15. 执行判决的主要方式有哪些?

尽管国内法院的最终裁决具有法律约束力，其执行却可能遇到一些障碍，如被告人破产或者不愿遵守裁决。在此情形中，原告可以向具有司法管辖权的执行部门提出申请，以执行国内法院判决。被告必须在通知之日起七日内对强制执行令予以遵守或提出反对。若被告在七日内未提出任何反对意见，原告则可申请扣押其部分资产。若被告提出反对，与执行程序有关的该等争议由执行庭根据《执行与破产法》规定的程序规则进行处理。

16. 胜诉方一般是不是会获得诉讼费用补偿? 诉讼费用如何计算?

如果案情进展顺利，在裁决下达之前，各方仅需承担一些公务费用及司法费用，承担比例为对其主张的接受比例。例如，如果提交的主张是收取 100,000 新土耳其里拉，但法院仅接受其部分主张，即收取 50,000 新土耳其里拉，那么原告仅需支付公务费用及司法费用的一半。专业费用由胜诉方承担，无论如何都不得施加于败诉方。

17. 对最终判决有哪些上诉途径? 当事人能够以什么理由提起上诉?

区域法庭会重新评估事实和法律，而终审法院仅对案件的法律适用进行重新衡量。区域司法法院可以根据案情作出新裁决，因为其可以根据案件进行事实分析。终审法院另一方面既可以推翻也可以支持该等裁决，因为其仅进行法律适用的重新衡量。

18. 是否允许律师和委托人之间存在胜诉酬金或按条件收费的安排?

是的，第 1136 号《宣传法》规定，如果胜诉费未超过该案收益的 25%，允许应急性或附条件的收费安排。

19. 是否允许第三方资助? 资助人是否可分享胜诉收益?

目前，土耳其法律既未禁止也未规范第三方诉讼融资。事实上，由于土耳其法院诉讼的当事人对该制度不够熟悉，导致资助资源稀缺，自然而然造成了法律规范缺位。因此，土耳其法庭至今没有表达其对第三方诉讼融资协议的性质、有效性和可执行性的态度。但是，如果不存在限制，土耳其法律之下适用合同自愿原则。相应地，当事人和第三方资助者原则上可以达成并自愿构建融资协议，但前提是其遵守公共政策和土耳其法的强制性规定。

在仲裁领域，尤其是在国际商事仲裁和投资仲裁领域，第三方融资机制更具前景。近年来，越来越多的诉讼当事人从第三方获取资源或试图获取资金，与此同时，高标的额争端越来越多。因此，第三方融资成为一种服务工具，为缺乏资金、无法支付仲裁费用的当事人争取公正和平等的权利。这种资金需求也促进了律师领域的专业化。考虑到仲裁在这些方面的发展，可以说，投资文化真正开始在土耳其建立起来，而且这会对诉讼融资今后的立法产生积极影响。

20. 当事人是否可为其诉讼费用投保?

土耳其法下允许法律保障保险。但是，根据财政部秘书处发布的法律保障保险的一般条件，该保险并未涵盖商事争议。

21. 诉讼人是否可提起集体诉讼? 如果可以，哪些规则适用于集体诉讼?

原则上，普通法制度所承认的集体行动或集团行动不适用于土耳其法。但是，2011 年 10 月 1 日生效的新《民事诉讼法》第 113 条引入了一种被称为“集体诉讼”的团体诉讼。在该条的基础上，法律协会、公司和其他法律实体可以在其法律框架下，以其自身的名义，以确定成员权利、保护成员利益为目的，提起集体诉讼，纠正违法行为或阻止潜在的侵权行为。但是，不同于典型的集体诉讼，这些集体诉讼可能无法实现获得金钱赔偿的目的。

22. 外国判决通过哪些程序予以承认和执行?

为了执行国外法庭的判决，有管辖权的土耳其初审法院须作出强制执行裁决。任何与执法行为利益相关的人，均可以向法院提出请求，并附有外国判决书的原本及经审核的译本或者经核证副本及经审核的译本；以及证明判决为终局性的经正式批准的判决书或文书与经核准的译本。

根据《国际私法与诉讼法》第 54 条，假如存在下列情形，法庭将作出执行决定：

(a) 该两个国家之间存在法律上或事实上的互惠关系；

(b) 判决不涉及土耳其法院专属管辖权下的主体，或者判决不得由无管辖权的法庭裁决做出，前提是被告人对无管辖权提出抗辩；

(c) 判决未明显违背土耳其的公共秩序；以及

(d) 未违反正当程序原则，包括适当通知。

23. 另类争议解决的主要形式是什么?

所有可供选择的争端解决方式均适用于土耳其，但是仲裁在其中占主导地位。但是，当事人一般不会通过 ADR 解决问题，一定程度上是因为 ADR 文化尚不发达，并且法院诉讼并不昂贵。

24. 在您所在的司法管辖区有哪些主要的另类争议解决机构?

伊斯坦布尔仲裁中心（简写作“ISTAC”）成立于 2014 年，旨在将其自身建设成为一个国际仲裁机构并增加土耳其的仲裁需求。其规则不加歧视地适用于国内和国际争端。当事人可以确定仲裁的所在地和语言，还可以

选择仲裁员。除非当事人另有协议，仲裁地将是伊斯坦布尔，并且仲裁员（或仲裁庭）将根据各种情况和条件确定仲裁的语言。

另外，伊斯坦布尔商会仲裁中心（简写作“ICCAC”）对国内和国际争端进行处理。在仲裁地、语言及仲裁员的选择方面，ICCAC 规则与 ISTAC 适用相同的规定。

土耳其有一个调解中心，叫做调解部（简写作“MHD”）。但是，该实体不为争端指定调解人。相反，调解人列在登记册上，当事人可以自行选择调解员。调解部进行调解活动、教育和调解员的认证。

25. 在诉讼过程中诉讼人是否必须尝试另类争议解决办法?

一般而言，诉讼当事人不需要尝试其他的纠纷解决办法。话虽如此，尝试调解已被规定为新颁布的第 7036 号《劳动法院法》的一个诉讼理由。从今以后，对雇员或雇主应收款、赔偿或再就业的索赔提起的劳动案件，若未经调解便提起诉讼，将在实质审查之前被驳回。此外，如果当事人之间有任何仲裁协议或条款，被告可在初次庭审之前对该审判提出异议。在这种情况下，原告应向主管仲裁员（或多名）提出其主张。

26. 当前是否有在审议中的改革争议解决法律法规的建议?

为劳动纠纷而引入的强制调解程序将扩大到消费者索赔和小额商业索赔案件。其目的是通过将调解作为强制性 ADR 方式以降低民事法院的工作量，并提高司法效率。

27. 关于您所在司法管辖区或者亚洲地区的争议解决，是否有任何特殊情况需加以强调?

当事人应当谨记，在商事案件中，索赔人要支付申请费，约为现金索赔主张额的 2%。临时性扣押和预防性强制令很难申请，但考虑到在土耳其，商事审判可能耗时约 4 年的时间，而且浪费财产是常见现象，强制令的获得对现实生活中的案件胜诉与否至关重要。法院要求为强制令的申请收取 15% 的担保费。同样重要的是，在土耳其，败诉方不承担胜诉方必须支付的专业费用。

作者资料：

Orçun Çetinkaya
合伙人，Moroğlu Arseven
电子邮箱：ocetinkaya@morogluarseven.com

Burak Baydar
高级律师，Moroğlu Arseven
电子邮箱：bbaydar@morogluarseven.com

网址：www.morogluarseven.com
地址：Abdi Ipekci Cad. 19-1
34367 Nisantasi, Istanbul
电话：+90 212 377 47 00
传真：+90 212 377 47 99

PRAGER
DREIFUSS

Legal services tailored to your needs

Banking & Finance . Capital Markets
Competition & Regulatory Matters . Corporate & M&A
Dispute Resolution . Employment & Pensions
Insolvency & Restructuring . Insurance & Reinsurance
IP & IT . Private Clients . Real Estate & Construction
Tax . White Collar Crimes & Investigations

Prager Dreifuss Ltd · Zurich, Bern, Bruxelles · www.prager-dreifuss.com

Schweizerhof-Passage 7, CH-3001 Bern
T +41 31 327 54 54, F +41 31 327 54 99

Muehlebachstrasse 6, CH-8008 Zurich
T +41 44 254 55 55, F +41 44 254 55 99

Square Ambiorix 45, B-1000 Bruxelles
T +32 2 537 09 49, F +32 2 537 21 16

LexisNexis®

Dispute Resolution Law Guide
争议解决法律指南
2018

The fourth annual complimentary guide to understanding dispute resolution practices around the world with an Asia-Pacific focus
阐述以亚洲为重点的全球争议解决操作的终极指南第四版(免费赠送)

A Fully Bilingual Guide | 一本全双语指南

LexisNexis®

www.LexisNexis.com.hk