



# ICLG

The International Comparative Legal Guide to:

## Litigation & Dispute Resolution 2019

**12th Edition**

A practical cross-border insight into litigation and dispute resolution work

Published by Global Legal Group, in association with CDR, with contributions from:

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URL: www.glgroup.co.uk

**GLG Cover Design**  
F&F Studio Design

**GLG Cover Image Source**  
iStockphoto

**Printed by**  
Stephens & George  
February 2019

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ISBN 978-1-912509-56-0  
ISSN 1757-2789

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EDITORIAL

Welcome to the twelfth edition of *The International Comparative Legal Guide to: Litigation & Dispute Resolution*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of litigation and dispute resolution.

It is divided into two main sections:

Two general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting litigation and dispute resolution work.

Country question and answer chapters. These provide a broad overview of common issues in litigation and dispute resolution in 44 jurisdictions, with the USA being sub-divided into seven separate state-specific chapters.

All chapters are written by leading litigation and dispute resolution lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Greg Lascelles and Julia Steinhardt of Covington & Burling LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at [www.iclg.com](http://www.iclg.com).

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# USA – New York

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## I. LITIGATION

### 1 Preliminaries

#### 1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

New York's legal system is common law. The Civil Practice Law & Rules governs civil procedure in state courts. Courts and judges have individual rules that must also be consulted.

#### 1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

New York has trial courts, called Supreme Courts, for each county that have state-wide jurisdiction in law and equity, and generally hear cases involving damages over \$25,000. There are lower courts that hear civil cases involving damages less than \$25,000. The Appellate Division hears appeals from the lower trial courts and a lower appeals court called the Appellate Term. The Court of Appeals is New York's highest court and final court of appeal.

There are special courts for: (i) family matters; (ii) landlord-tenant/housing matters; (iii) estate administration; and (iv) actions against the State of New York. In several counties, the Supreme Court has a specialised Commercial Division.

#### 1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

**Pleadings:** Statements of the parties' claims and defences "sufficiently particular to give notice of the transactions [or] occurrences . . . intended to be proved and the material elements of each cause of action or defence". CPLR 3013.

**Discovery:** Exchange of information by the parties (and third parties) under court supervision, including written questions, witness examinations, and document requests. Discovery may vary in timeframe from months to years depending on the size and complexity of the case.

**Motion practice:** The parties can apply to the court for rulings regarding pleadings, including dispositive motions; or regarding discovery-related disputes.

**Trial:** The parties have a waivable right to trial by jury in most cases.

**Appeals:** The parties can generally appeal trial court judgments as of right to the Appellate Division. Appeals to the Court of Appeals are only on request, except where the Appellate Division is divided or there is an issue concerning the New York or U.S. constitution.

**Enforcement of judgments:** Judgments are enforceable state-wide and are governed by CPLR Articles 51–54.

New York courts do not impose uniform timeframes on litigation; timeframes vary based on complexity and the court's scheduling determinations.

New York's Commercial Division has an Accelerated Adjudication Procedure that requires all pre-trial procedures to be completed within nine months after a Request for Judicial Intervention, with limits on discovery; certain defences are deemed waived. 22 N.Y.C.R.R. § 202.70(g) (Rule 9).

#### 1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

New York courts will enforce an exclusive jurisdiction clause calling for New York jurisdiction under General Obligations Law § 5-1402 if the contract also has a New York choice of law clause and concerns a transaction worth at least \$1 million. New York courts will generally enforce exclusive jurisdiction clauses in contracts freely negotiated by the parties, unless the clause is "unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court". *KMK Safety Consulting, LLC v. Jeffrey M. Brown Assocs., Inc.*, 72 A.D.3d 650, 651 (2d Dep't 2010).

#### 1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

Costs are generally *de minimis* and are awarded to the prevailing party. A prevailing party may not recover its attorney's fees except if contractually agreed or in certain limited circumstances provided by statute or court rule. *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, 3 N.Y.3d 592, 597 (2004). There are no rules on budgeting of costs in New York.



### 1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

New York’s Rules of Professional Conduct prohibit a lawyer from providing financial assistance to a client, with certain limited exceptions. A lawyer may: (1) advance court costs and expenses in contingency fee matters; (2) pay court costs and expenses when representing an indigent or *pro bono* client; and (3) pay court costs and expenses in contingency fee matters. 22 N.Y.C.R.R. § 1200.0 (Rule 1.8(e)). New York’s champerty statute, Judiciary Law §489, prohibits certain types of claim assignments unless consideration of at least \$500,000 is paid. *Justinian Capital SPC v. WestLB AG*, 28 N.Y.3d 160 (2016). There are no rules aimed specifically at litigation funding.

Contingent fees are generally permissible, but New York’s Rules of Professional Conduct prohibit attorneys from collecting “an excessive or illegal fee or expense”. 22 N.Y.C.R.R. § 1200.0 (Rule 1.5(a)). The rules set forth a number of factors to be considered in determining whether a fee is excessive. *Id.*

### 1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

Claims and causes of action are generally assignable, and non-party litigation funding is permitted. New York’s champerty statute prohibits certain assignments where the only purpose is litigation if the assignment has less than a \$500,000 purchase price. N.Y. Judiciary Law § 489 (2015); *see generally Justinian Capital*, 28 N.Y.3d 160.

### 1.8 Can a party obtain security for/a guarantee over its legal costs?

No, it cannot.

## 2 Before Commencing Proceedings

### 2.1 Is there any particular formality with which you must comply before you initiate proceedings?

In most cases, no particular formalities are required prior to initiating proceedings. However, there are several exceptions. In tort actions against state and local governments, the plaintiff must serve the government with a notice of claim within 90 days of the date that the claim arises; in wrongful death cases, the notice must be served within 90 days of the appointment of a representative of the decedent’s estate. N.Y. Gen. Mun. L. § 50-e. In medical malpractice cases, a plaintiff’s attorney must attach a certificate of merit to the complaint declaring that he or she has consulted with a physician and that the attorney has concluded there is a reasonable basis for the action. CPLR 3012-A. A pre-suit notice of claim may be required by contract.

### 2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Generally, limitations periods are provided by Article 2 of the CPLR and vary between four months and 20 years. Contract and fraud

claims have a six-year limitations period (subject to a discovery toll for fraud claims), in each case measured from the date the action accrued – that is, when the final act giving rise to the cause of action occurred; except that claims on contracts for the sale of goods have a four-year limitations period. CPLR 213(2), 213(4); U.C.C. § 2-725. Product liability, negligence resulting in personal injury, and legal malpractice claims are subject to a three-year limitation. CPLR 214(3), 214(5), 214(6). Medical malpractice claims must be brought within two years and six months of accrual. CPLR 214-A. Wrongful death claims must be brought within two years of the decedent’s death. Estates, Powers and Trusts Law § 5-4.1.

While statutes of limitations generally run from the date of accrual of the claim, they may be tolled by certain conditions. The discovery rule permits a plaintiff to sue within two years of the date the claim is discovered or should reasonably have been discovered, or within the statutory period for that claim, whichever is longer. CPLR 203(g). Other conditions that may permit tolling include incapacity to sue and ongoing violations by the defendant.

New York courts consider time limitations to be procedural, not substantive. *Davis v. Scottish Re Grp. Ltd.*, 30 N.Y.3d 247, 255 (2017).

## 3 Commencing Proceedings

### 3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

Civil proceedings are commenced by filing a summons and complaint or a summons with notice with the court. CPLR 304. The defendant must generally be served within 120 days thereafter, but the court can extend this time. CPLR 306-B. In suits on instruments for payment of money only (e.g., promissory notes), a summary judgment motion may be filed *in lieu* of a complaint. CPLR 3213.

Service may be accomplished by personal service upon an individual. CPLR 308. Alternatively, a plaintiff may serve an individual plaintiff by delivering the summons to an individual of “suitable age and discretion” at the individual’s place of business or dwelling, and also mailing the summons to the individual’s last known residence or place of business. In such case, service is considered complete 10 days from the filing of an affidavit of service. CPLR 308(2). Where neither of these methods is practicable, service may be accomplished by affixing the summons to the door of the place of business or dwelling as well as mailing it. CPLR 308(4). If none of these means are practicable, the court may direct an alternative means of service. CPLR 308(5).

Similar requirements apply to personal service upon an assistant attorney general of the state; a partner in a partnership; an officer, director, agent or cashier of a corporation; or certain officials within a government entity. CPLR 307, 309-312. In addition, under the Business Corporation Law (BCL), corporations may be served by personal service on the New York Secretary of State. BCL §§ 306, 307.

Service may also be completed by mail alone, but is only effective if the defendant or its agent mails or delivers an acknowledgment of receipt within 30 days. CPLR 312-A.

Personal service outside the state may be accomplished by the same means, so long as it is accomplished by a person authorised to make

service within the state who is a resident of the state; by any person authorised to make service by the laws of the state or country in which service is made; or by a qualified attorney there. CPLR 313. Service of foreign proceedings may be effectuated by the means set forth in The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Convention).

### 3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

There are four pre-action provisional remedies:

**Attachment (CPLR 6201):** Seizure of the defendant's property during the action, generally where there is a danger that the defendant will dispose of its property to defeat judgment enforcement.

**Preliminary injunction (CPLR 6301):** An order that maintains the *status quo* during the action, generally where the defendant is engaging in activity that could render judgment ineffectual. A court can issue a temporary restraining order that provides for injunctive relief until the injunction application can be decided. To obtain an injunction, a party must demonstrate irreparable harm absent the injunction, likelihood of success on the merits, and a balancing of the equities in its favour.

**Receivership (CPLR 6401(b)):** An order that appoints a temporary receiver of property which is the subject of an action, "where there is danger that the property will be removed from the state, or lost, materially injured or destroyed". CPLR 6401(a). The receiver may take possession of the property and sue for, collect and sell debts or claims. CPLR 6401(b).

**Notice of pendency (CPLR 6501):** A notice filed with the county clerk in a real property action that alerts affected parties that the judgment demanded would affect the title to, or the possession, use or enjoyment of the property.

### 3.3 What are the main elements of the claimant's pleadings?

The main pleadings are the complaint and the answer, which must have plain and concise statements in consecutively numbered paragraphs and should state each cause of action or defence. CPLR 3014. Complaints and other claims (e.g., counterclaims in an answer) must include a demand for relief. CPLR 3017(a). Claims and defences may be stated alternatively or hypothetically. CPLR 3014. Pleadings may attach documents, which become part of the pleadings. *Id.*

In general, statements in a pleading must be "sufficiently particular to give the court and parties notice of the transactions [or] occurrences . . . intended to be proved and the material elements of each cause of action or defense". CPLR 3013. Certain claims and defences require pleading with additional particularity, including claims for libel or slander, fraud, separation or divorce, or personal injury; actions on a judgment, involving the sale and delivery of goods or performing of labour or services, or based on foreign law; or certain actions for gross negligence or intentional infliction of harm. CPLR 3016.

### 3.4 Can the pleadings be amended? If so, are there any restrictions?

A pleading can be amended once without leave of court: (i) within 20 days after service; (ii) at any time before the period for

responding to it expires; or (iii) within 20 days after service of a pleading responding to it. CPLR 3025(a). A pleading can be amended by leave of court or agreement with the adversary, with leave to be "freely given upon such terms as may be just". CPLR 3025(b). The court may permit pleadings to be amended before or after judgment to conform them to the evidence. CPLR 3025(c).

### 3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

A party may withdraw a claim without court permission: (i) by serving a notice of discontinuance on all parties, if done before a responsive pleading is served or within 20 days after service of the pleading; (ii) by stipulation; or (iii) by filing a notice of discontinuance concerning certain real property. CPLR 3217(a). A claim may be discontinued by order of the court, but once the case has been submitted to the court or jury, stipulation of all parties is required. CPLR 3217(b). Discontinuance is generally without prejudice, but if the claim has previously been discontinued in any prior action the discontinuance may be deemed an adjudication on the merits. CPLR 3217(c).

## 4 Defending a Claim

### 4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

The answer must deny statements in the complaint the defendant knows or believes to be untrue and specify those statements as to which defendant lacks knowledge or information sufficient to form a belief regarding their truth. CPLR 3018(a). All other statements in the complaint are deemed to be admitted unless no responsive pleading is permitted. *Id.* A defendant may assert any affirmative defences. Certain affirmative defences are waived if not raised in the answer. A defendant may assert counterclaims against the plaintiff and cross-claims against other defendants. A defendant may raise the defence of set-off. CPLR 3018(b), 3019.

Prior to serving an answer, a defendant may move to dismiss any cause of action in the complaint on a variety of available grounds, including for failure to state a claim, lack of subject matter jurisdiction, or lack of personal jurisdiction; or because documentary evidence establishes a defence. CPLR 3211(a).

### 4.2 What is the time limit within which the statement of defence has to be served?

If the summons is served on the defendant by personal service within New York, the defendant must make an appearance by answering the complaint or moving to dismiss it within 20 days. CPLR 320(a). For all other means of service, the time to respond is 30 days. *Id.* The parties may agree to extend these time limits.

### 4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

A defendant may file a third-party complaint against a party who may be liable in whole or in part for the plaintiff's damages. CPLR 1007. A defendant may also counterclaim against the plaintiff and cross-claim against another defendant. CPLR 3019.

#### 4.4 What happens if the defendant does not defend the claim?

Where a defendant fails to “appear, plead or proceed to trial”, the plaintiff may seek a default judgment within one year. CPLR 3215(a). If the plaintiff fails to apply for a default judgment within one year, the court will dismiss the complaint as abandoned unless cause is shown why the complaint should not be dismissed. CPLR 3215(c).

#### 4.5 Can the defendant dispute the court’s jurisdiction?

A defendant may dispute the court’s personal or subject matter jurisdiction. CPLR 3211(a). An objection to the court’s subject matter jurisdiction is never waived and can be raised at any time; a challenge to personal jurisdiction is waived if not raised in an answer or pre-answer motion to dismiss. CPLR 3211(e).

## 5 Joinder & Consolidation

#### 5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

Parties may join additional parties where a party asserts any right to relief jointly, severally, or arising out of the same transaction or occurrence, if common questions of law are present. CPLR 1002. The court may join individuals or entities who ought to be parties in order for complete relief to be granted, or who might be inequitably affected by a judgment in the action. CPLR 1001(a). When a person who should join as a plaintiff refuses to do so, he may be made a defendant. *Id.* If jurisdiction can be obtained only by consent or appearance, the court may allow the action to proceed when justice requires. CPLR 1001(b).

#### 5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

A court may consolidate pending actions when they involve common questions of law or fact. CPLR 602(a). If the related action is pending in the Supreme Court for another county, the court may remove the action to itself and consolidate it or have it tried together with the action pending before it. CPLR 602(b).

#### 5.3 Do you have split trials/bifurcation of proceedings?

A court may order the severance of claims or a separate trial of any claim, or of any separate issue, in furtherance of convenience or to avoid prejudice. CPLR 603. A court may also order the trial of any claim or issue prior to the trial of the others. *Id.*

## 6 Duties & Powers of the Courts

#### 6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

Upon the filing of a Request for Judicial Intervention, cases are generally randomly assigned. The assigned judge supervises all

proceedings related to that action. 22 N.Y.C.R.R. § 202.3. A party may seek to have its case assigned to the Commercial Division by filing a commercial division addendum or by letter application. 22 N.Y.C.R.R. § 202.70(d)-(e).

#### 6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

A preliminary conference is held within 45 days after the Request for Judicial Intervention is filed. Parties are generally not required to meet and confer prior to a preliminary conference; however, counsel before the Commercial Division must attempt before the conference to reach agreement on certain discovery and dispute resolution issues. 22 N.Y.C.R.R. § 202.70(g).

At the preliminary conference, the court can simplify and limit the factual and legal issues, establish a timetable and method for discovery, add necessary parties, settle the action, remove the action per CPLR 325, and take any other action the court deems relevant. 22 N.Y.C.R.R. § 202.12. The court also assigns the case to one of three tracks: expedited; standard; or complex. 22 N.Y.C.R.R. § 202.19. Discovery must be completed within eight months for expedited cases; 12 months for standard cases; and 15 months for complex cases. *Id.*

#### 6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court’s orders or directions?

A court can hold a party in contempt, which can result in fines or imprisonment. N.Y. Judiciary Law § 753. A court can sanction a party that refuses to comply with a discovery order by resolving issues in favour of the other party, prohibiting the disobedient party from supporting or opposing certain claims or defences, striking parts of pleadings, staying the proceedings until compliance, or dismissing the action. CPLR 3126. Frivolous conduct can result in an order to pay the other party’s expenses and attorney’s fees. 22 N.Y.C.R.R. § 130-1.1.

#### 6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

New York courts may dismiss or strike a pleading upon a party’s motion or on the court’s initiative. CPLR 3211; *see* CPLR 3126. Cases may be dismissed for want of prosecution. CPLR 3216. Courts may also strike “scandalous or prejudicial matter unnecessarily inserted in a pleading” upon motion by a party. CPLR 3024.

#### 6.5 Can the civil courts in your jurisdiction enter summary judgment?

A motion for summary judgment may be granted if “upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party”. CPLR 3212(b). The motion should be denied if there is a material issue of fact. Summary judgment “searches the record”: if the court finds a party other than a moving party is entitled to summary judgment, it may enter summary judgment in that party’s favour. *Id.*



## 6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

The CPLR authorises the courts to stay proceedings in certain circumstances, including: in conjunction with the removal of a case (CPLR 326); *in lieu* of dismissing an action based on the pendency of another action between the same parties (CPLR 3211(a)(4)); or to enforce a judgment or order pending appeal (CPLR 5519). CPLR 2201 also gives courts discretion to stay a proceeding in “a proper case”.

Discovery is generally stayed once a party files a motion to dismiss or a motion for summary judgment, but the court may order otherwise. CPLR 3214. In Commercial Division cases, discovery is only stayed at the court’s discretion upon a party’s application. 22 N.Y.C.R.R. § 202.70(g), Rule 11(d).

## 7 Disclosure

### 7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

There is “full disclosure of all matter material and necessary in the prosecution or defence of an action, regardless of the burden of proof”. CPLR 3101(a). Information may be obtained through depositions, interrogatories, discovery and inspection of documents or property, physical and mental examinations, requests for admission, and subpoenas to third parties. CPLR 3102(a), 2301. Privileged materials may not be obtainable. CPLR 3010(b)-(c). The court may issue a protective order limiting the scope of disclosure. CPLR 3103(a).

Parties to cases involving electronic discovery must confer on anticipated electronic discovery issues during the preliminary conference. 22 N.Y.C.R.R. § 202.12(b). If electronic discovery is reasonably likely to happen, the court considers the factors listed in 22 N.Y.C.R.R. § 202.12(c)(3) in determining the method and scope of the discovery.

In the Commercial Division, parties must confer on anticipated electronic discovery issues prior to the preliminary conference. 22 N.Y.C.R.R. § 202.70, Rule 8. Parties acquiring electronically stored information from non-parties must adhere to the Commercial Division’s Guidelines for Discovery of Electronically Stored Information. 22 N.Y.C.R.R. § 202.70, App’x A.

### 7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

Parties must state the legal ground for withholding each document unless the case is in the Commercial Division. CPLR 3122(b). Parties before the Commercial Division may establish categorical designations for withholding documents. 22 N.Y.C.R.R. § 202.70(g), Rule 11-b(b).

Privileges include those for spouses (CPLR 4502), attorneys and clients and attorney work product (CPLR 4503, 3101(c)), medical practitioners (CPLR 4504), clergy (CPLR 4505), psychologists (CPLR 4507), social workers (CPLR 4508), and rape crisis counsellors (CPLR 4510).

### 7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

Third parties can be required to testify and produce documents through a subpoena. CPLR 2301. Subpoenas are served in the same manner as a summons, and witnesses must be paid a fee and travel expenses. CPLR 2303(a). A subpoena for the production of documents must be served on all parties simultaneously, and the party receiving the subpoenaed records must deliver a copy of the records to all opposing counsel. CPLR 2305(d).

If electronically stored information is sought from a non-party in the Commercial Division, the party seeking disclosure must follow the Commercial Division’s Guidelines for Discovery of Electronically Stored Information. 22 N.Y.C.R.R. § 202.70, Appendix A.

A witness who refuses to comply can be held in contempt of court. CPLR 2308(a). The court may issue a warrant directing a sheriff to bring the witness to court or committing the witness to jail until there is compliance. *Id.*

### 7.4 What is the court’s role in disclosure in civil proceedings in your jurisdiction?

The courts supervise disclosure. CPLR 3104. A judge may assign a referee to supervise discovery or allow the parties to stipulate to an attorney referee. *Id.* If a person fails to comply with a discovery request, the court may compel disclosure or find a witness in contempt. CPLR 3124, 2308(a). The court rules on motions regarding disclosure under CPLR Article 31.

### 7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

The courts can issue protective orders limiting the use of information disclosed. CPLR 3103(a). Parties may also agree to limit discovery or the use of discovered information by stipulation. CPLR 2104.

## 8 Evidence

### 8.1 What are the basic rules of evidence in your jurisdiction?

Evidence must be relevant and admissible. Evidence is relevant if it tends to prove the existence or nonexistence of a fact directly at issue in the case. *People v. Davis*, 43 N.Y.2d 17, 27 (1977). Relevant evidence is generally admissible unless its admission violates an exclusionary rule. *People v. Scarola*, 71 N.Y.2d 769, 777 (1998). A court may exclude relevant evidence if its probative value is outweighed by the prospect of delay, undue prejudice, confusing the issues, or misleading the jury. *See Davis*, 43 N.Y.2d at 27.

### 8.2 What types of evidence are admissible, and which ones are not? What about expert evidence in particular?

Relevant evidence is admissible if the probative value and need for the evidence outweigh the potential for delay, surprise, or prejudice. *People v. Alvino*, 71 N.Y.2d 233 (1987). Evidence subject to special relevance rules includes subsequent remedial measures to prove negligence, offers of compromise or offers to pay medical expenses



to prove liability, pleas and plea discussions as statements of guilt, and liability insurance to prove negligent or wrongful actions. Character evidence and prior crimes are also subject to various restrictions. Hearsay is generally not allowed unless it falls under an exception.

New York follows the *Frye* standard in determining whether to admit expert testimony. *Giordano v. Market Am., Inc.*, 15 N.Y.3d 590, 601 (2010). To be admissible, an expert's testimony must be grounded on methods that are generally accepted within the scientific community. The proponent bears the burden of proof. *People v. Middleton*, 54 N.Y.2d 42, 49 (1981); *Parker v. Mobil Corp.*, 739 N.Y.S.2d 432, 437 (2d Dep't 2005).

### 8.3 Are there any particular rules regarding the calling of witnesses of fact, and the making of witness statements or depositions?

Adults are presumed competent to testify as fact witnesses. *Matter of Brown v. Ristich*, 36 N.Y.2d 183, 188 (1975). Fact witnesses may not be paid more than the statutory fee for testimony, but may be compensated for loss of time if the testimony was procured through a subpoena. *Caldwell v. Cablevision Systems Corp.*, 925 N.Y.S.2d 103, 107 (2d Dep't 2011).

Witness statements and depositions must be signed by the witness before an officer authorised to administer an oath. CPLR 3116(a). Depositions may be used to impeach a witness or *in lieu* of calling a witness if the witness is unavailable. CPLR 3117.

### 8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Are there any particular rules regarding concurrent expert evidence? Does the expert owe his/her duties to the client or to the court?

Parties must describe in reasonable detail the subject matter and the substance of the facts and opinions on which an expert is expected to testify, the qualifications of the expert, and a summary of the grounds of the expert's opinion. CPLR 3101(d)(1).

In the Commercial Division, parties intending to introduce expert testimony must confer on a schedule for expert disclosure at least 30 days before the end of fact discovery. 22 N.Y.C.R.R. § 202.70(g), Rule 13(c). Disclosure includes identifying the experts, exchanging reports, and deposing the testifying experts. *Id.*

Unlike fact witnesses, who have a public duty to testify, experts have no public duty and cannot be compelled to testify. *Caldwell v. Cablevision Systems Corp.*, 925 N.Y.S.2d 103 (2d Dep't 2011).

Concurrent expert evidence is not permitted in New York.

## 9 Judgments & Orders

### 9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

The courts may enter interlocutory or final judgments. CPLR 5011. They may direct a judgment at one or more of a party's causes of action or towards one or more parties. CPLR 5012. These may be issued during the course of the proceedings, and can deal with

pleadings, discovery, and other relief. Courts may also issue declaratory judgments, delineating the rights and other legal relations of the parties. CPLR 3001.

A court may also grant equitable relief in the form of temporary, preliminary, or permanent injunctions, as discussed *supra* in response to question 3.2.

### 9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Courts may award damages and increase an award if permitted by statute. CPLR 4018. They may also grant additional allowances in certain instances. CPLR 8303. In frivolous cases, the court may award the successful party costs and reasonable attorney's fees. *See* CPLR 8303-A(a).

All monetary awards bear interest from the date of the final judgment. CPLR 5003. A court can award pre-judgment interest depending on the cause of action. CPLR 5001. The interest rate is 9% per annum, unless otherwise provided by statute or agreement. CPLR 5004.

### 9.3 How can a domestic/foreign judgment be recognised and enforced?

Valid judgments issued by another U.S. state are entitled to full faith and credit and can be enforced in the same manner as a New York judgment. CPLR 5402. Foreign country judgments that are final, conclusive, and enforceable where rendered will also be recognised and enforced, with certain exceptions. CPLR 5302-5304.

A party may apply to a court to confirm an arbitration award. CPLR 7510. Confirmation is a special proceeding that moves directly from pleadings to decision. CPLR 409(b). Foreign arbitration awards are enforceable in New York pursuant to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

### 9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

Most judgments and orders are appealable as of right. Appeal is initiated by notice of appeal. Appeals are generally made to the Appellate Division, but may be made directly to the Court of Appeals in some circumstances. *See* CPLR 5602.

## 10 Settlement

### 10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

As described in the next section, New York has a strong policy favouring alternative dispute resolution. Most New York courts offer free or reduced-fee mediation services, and the Commercial Division operates an alternative dispute resolution programme. Some courts require arbitration if the claims amount to less than \$6,000. 22 N.Y.C.R.R. § 28.2.

## II. ALTERNATIVE DISPUTE RESOLUTION

**1 General****1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)**

Arbitration and mediation are the most common methods of alternative dispute resolution.

Arbitration is an informal, private trial-like proceeding in which the parties agree to accept an arbitrator's decision as final.

Mediation is a structured settlement discussion in which a neutral mediator assists the parties in attempting to settle a dispute. New York's Unified Court System offers parties access to free or reduced-fee mediation in family law, general civil and commercial law disputes.

**1.2 What are the laws or rules governing the different methods of alternative dispute resolution?**

Parties generally agree to arbitration and mediation rules. CPLR Article 75 fills gaps where arbitration agreements are silent. For example, a court can appoint an arbitrator if a selection procedure is not provided for (CPLR 7504). Article 75 also gives the courts power to compel arbitration and enter judgment on arbitral awards.

**1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?**

Certain claims that allege a violation of a statute, decisional law, or public policy may not be arbitrable. See *Enlarged City School Dist. Of Middletown New York v. Civil Service Employees Ass'n, Inc.*, 148 A.D.3d 1146, 1148 (2d Dep't 2017).

**1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, force parties to arbitrate when they have so agreed, or order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?**

The courts may grant provisional remedies (e.g., attachment or preliminary injunction) in aid of arbitration. CPLR 7502. However, if the arbitration is not commenced within 30 days of granting the provisional relief, the order will expire. *Id.* Parties may also ask a court to compel arbitration or stay an arbitration per CPLR 7503(a)-(b).

**1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?**

Mediation is usually non-binding and voluntary. Arbitration is typically binding. An arbitration award may be vacated or modified in very limited circumstances under CPLR 7511.

**2 Alternative Dispute Resolution Institutions****2.1 What are the major alternative dispute resolution institutions in your jurisdiction?**

The major alternative dispute resolution organisations in New York are the American Arbitration Association, JAMS, CPR, and the ICC.

**Acknowledgment**

The authors would like to thank Joanne Liu for her assistance in the preparation of this chapter. Ms. Liu is an associate in Hughes Hubbard & Reed's litigation department and received her J.D. from Columbia Law School.

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