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The International Comparative Legal Guide to:

Litigation & Dispute Resolution 2013

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

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Group Publisher
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Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
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General Chapter:

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USA - New York

Charles G. Berry

Arnold & Porter LLP

Daniel Bernstein

I. LITIGATION

1 Preliminaries

1.1 What type of legal system does the state of New York have? Are there any rules that govern civil procedure in New York?

New York State follows a common law system, as do other jurisdictions in the United States. Judicial decisions create a body of case law that guides the application of statutes, regulations, and legal principles. New York also provides a right to trial by jury in certain civil actions. Courts in New York can hear almost any type of case, including cases that arise under state and federal law. However, when a case arises under federal law or when the parties are from different states (or countries) and the amount in controversy exceeds $75,000, the defendant may remove the case from state to federal court.

New York's Civil Practice Law and Rules ("CPLR") governs civil procedure in New York courts. Adopted by the state legislature, the CPLR has been in effect since 1963.

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

The main court of original general jurisdiction in New York is called the Supreme Court (not to be confused with Supreme Courts in other U.S. jurisdictions which are often the court of last resort). Each New York county has a branch of the Supreme Court. Several counties, including New York County (Manhattan) have a Commercial Division, which consists of several judges whose caseload is devoted exclusively to complex commercial cases.

The principal intermediate appellate court in New York is the Appellate Division. There are four judicial departments based on geography, and the precedent of each department is binding on the lower courts within that department. For example, decisions of the First Department bind lower courts in Manhattan in New York City. The highest court in New York State is the Court of Appeals, located in the state capitol of Albany, and its decisions are binding throughout the state.

In addition to the Supreme Court, New York also has other specialised trial-level courts, such as family court and housing court. Each county has a surrogate's court, which administers the estate of decedents and has jurisdiction over related proceedings.

1.3 What are the main stages in civil proceedings in New York? What is their underlying timeframe?

The main stages of civil proceedings are:

- Filing of summons and complaint and getting an index number.
- Service of summons and complaint (within 120 days of filing, unless an extension is granted).
- Service of an answer, which may include defences, or a motion to dismiss (typically within 20-30 days of service of a complaint).
- Pretrial discovery (which can take months or even years).
- Possible dispositive motions (for dismissal of all or part of the pleadings, or for summary judgment).
- Trial (which often lasts days or weeks).
- Judgment.
- Appeal (which usually take many months to brief and schedule for oral argument, if any, and typically take about two months after argument or submission for the appellate court to render a decision).

Civil proceedings often involve motion practice at various stages. For example, a party may file motions for provisional remedies, motions to compel, limit or exclude discovery, or motions for dismissal or summary judgment before trial. The more complicated a case and the more motions filed, the longer it typically takes to be resolved. The discovery phase is often the most time-consuming and expensive. Cases can also be slowed down because of limited judicial resources and crowded court dockets.

1.4 What is the New York judiciary's approach to exclusive jurisdiction clauses?

New York courts generally enforce exclusive jurisdiction clauses, often referred to as "forum-selection" clauses. These clauses are a matter of contract and will be interpreted and enforced as such. Accordingly, courts will look at the intent of the parties.

Parties can agree to have their case heard in New York, even if they have minimal contacts with the state. Due to New York's importance as a commercial center, New York courts must entertain a case that is based on a contract involving more than $1 million, an agreement to submit to the exclusive jurisdiction of New York, and an agreement that New York law governs the parties' dispute. See CPLR 327(b); N.Y. General Obligation Law § 5-1402.

1.5 What are the costs of civil court proceedings in New York? Who bears these costs?

The primary cost of litigation in New York is a party's attorneys' fees, which are usually a significant consideration in a party's decision to file suit, how to prosecute or defend it, and whether and when to settle it. Under the "American" system, followed in New York, and unlike the common practice in many other countries, parties generally pay their own costs and attorneys' fees. There are limited exceptions, such as when a court awards payment of a party's attorneys' fees by an opposing party that has engaged in frivolous conduct, or where provided by a specific statute. Parties may also contract to shift fees. In addition to legal fees, there are court filing fees. Commencing a civil action (purchase of an index number) costs $210; filing motions typically costs $45.

1.6 Are there any particular rules about funding litigation in New York? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

Litigation funding by non-parties or "investors" in litigation is permitted, and several courts have rejected arguments that such practices constitute champerty. This continues to provoke controversy, however, and disputes have arisen about such topics as application of the attorney-client privilege and the discoverability and admissibility of fee arrangements.

Contingency and conditional fee arrangements are permissible in civil actions (except domestic relations cases). Although attorneys generally may not make loans to clients, attorneys can advance court costs and expenses of litigation, with repayment contingent on the outcome of the case.

Security for costs is not automatically required in New York. However, a non-resident plaintiff may be required to post a $500 bond if requested by the defendant. CPLR § 8503. A party seeking a provisional remedy, a stay, or an appeal may also have to post a bond or other form of security, the amount of which is usually within the discretion of the court.

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

New York generally permits assignment of a claim or cause of action. However, there are some narrow constraints. Claims for money damages based on personal injury are not assignable. N.Y. General Obligations Law § 13–101. New York Judiciary Law Section 489 also prohibits the acquisition of a claim for the purpose of profiting from the process of litigation, as opposed to profiting from the vindication of the underlying right. See *Trust for Certificate Holders of Merrill Lynch Mtge. Invs., Inc. v. Love Funding Corp.*, 13 N.Y.3d 190 (2009). In addition, there may be limitations on where the assignee of a claim may sue. See CPLR § 503(e).

Third parties may fund litigation in New York, so long as a lawyer's duties run to the client, not to the financier. Third-party financing is most common in personal injury and civil rights cases, but may be used in other types of civil cases and has become more common in significant financial disputes, including actions against large financial institutions by investors, creditors and others.

2 Before Commencing Proceedings

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

In general, there are no formal prerequisites to initiating a civil proceeding, but as in all other U.S. jurisdictions the lawyer filing an action must have a good faith basis for the allegations in the complaint, as must the party itself, when it verifies the truth of the allegations under oath. A few specific types of claims — such as tort claims against a municipality and certain personal injury claims — require advance notice to the defendant.

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?

CPLR Article 2 sets forth various limitation periods. The limitation period for bringing a contract action is generally six years from the date of the breach (CPLR 213). The limitation period for bringing a tort or property action is generally three years from when the injury occurs. Other limitation periods may apply to specific claims, such as defamation (one year), medical malpractice (two-and-half-years), and sales contracts subject to the Uniform Commercial Code (four years). Although the statute of limitations is usually considered procedural, it can have a fatal effect on a case.

3 Commencing Proceedings

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

A civil action is commenced by filing a summons and a complaint with the County Clerk in the county where the action is being brought. Any person of at least 18 years of age and not a party to the action may serve process within the state. Outside the state, any New York resident who is at least 18, anyone authorised to serve process in the jurisdiction where service is made, and any attorney licensed in the jurisdiction where service is made may properly serve process.

Service of process on natural persons generally occurs in one of three ways: (1) by personal delivery; (2) by leaving a copy with a person of suitable age and discretion at the person's actual dwelling or place of business and mailing a copy to the person's actual place of business or last-known residence; or (3) if service cannot be made with due diligence under the first two methods, by affixing a copy to the door of the person's actual dwelling place or actual place of business and mailing a copy to the person's actual place of business or last-known residence. See CPLR § 308. A party may specifically designate an agent to receive service of process. CPLR § 318.

Corporations may be served by personal delivery to an officer, director, designated agent, or managing agent of the corporation. CPLR § 311(a). Alternatively, a domestic corporation or foreign corporation licensed to do business in New York may be served by personal delivery of two copies to the New York Secretary of State. N.Y. Business Corporation law § 306(b). Service of an unlicensed foreign corporation through the New York Secretary of State

requires that the defendant be sent a copy by certified mail, return receipt requested. *Id*. § 307.

Service of process by first-class mail is also permissible; however, this method requires the defendant's acknowledgment within 30 days of receipt and therefore is often not preferred by attorneys. Except in the cases of personal delivery or service by mail, service is deemed complete 10 days after filing a proof of service.

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

In order to seek a remedy, a plaintiff must initiate an action. However, once an action is initiated, interim relief may be available. For example, a plaintiff may request, either on notice or *ex parte*, that a court "attach" the defendant's assets to provide security for the enforcement of a money judgment where the defendant is an unlicensed foreign corporation or non-domiciliary, or where the defendant is about to conceal or remove assets from New York with the intent to defraud creditors or frustrate enforcement of a judgment. To obtain an attachment order, a plaintiff must provide an affidavit showing grounds for attachment, demonstrate a probability of success on the merits, and furnish an undertaking to indemnify the defendant for losses caused by the attachment if it is ultimately determined to have been wrongly entered. See CPLR Article 62.

A party may also move for a preliminary injunction to maintain the *status quo* while an equity action is pending. Such a motion must be made on notice and present the grounds for relief, including a threat of irreparable injury, a probability of success on the merits, and an undertaking. See CPLR Article 63. A court may grant a temporary restraining order if the plaintiff demonstrates that the threat of injury is immediate. Unlike a preliminary injunction, a temporary restraining order may be granted *ex parte* based on a showing that prior notice would result in significant prejudice, such as the immediate removal from the jurisdiction of the property sought to be attached. See *id.*

Other provisional remedies in New York include: temporary receivership, where a person is appointed by the court to manage property in defendant's possession so that the defendant cannot injure or destroy that property while the action is pending, see CPLR Article 64; an order of seizure, which authorises the New York sheriff to take custody of personal property if the plaintiff shows a probability success on the merits and provides an undertaking, see CPLR Article 71; and a notice of pendency, which is filed with the register of deeds and gives record notice that an interest in real property may be subordinate to that of the plaintiff, see CPLR Article 65.

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

CPLR Section 3013 provides that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense". The purpose of this rule is to give adequate notice to the defendants of the notice of the claims against it. However, in specific actions, such as defamation and fraud, greater particularity is required. See CPLR § 3016. In all cases, a claimant's pleading must also include a demand for relief. See CPLR § 3017.

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

CPLR Section 3025(a) permits each party to amend its pleadings once as a matter of course, within specified time periods. CPLR Section 3025(b) allows amendment of a pleading "at any time by leave of court or by stipulation of all parties". According to the CPLR, "[l]eave shall be freely given upon such terms as may be just".

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

The defendant's responsive pleading is called an answer. In an answer, the defendant must respond to the complaint with denials or admissions. A defendant may deny an allegation based on first-hand knowledge, information and belief, or lack of knowledge or information sufficient to form a belief. See CPLR § 3018(a). Silence in a responsive pleading is deemed an admission.

An answer may also raise affirmative defences, which the defendant has the burden to prove. Affirmative defences include, but are not limited to: arbitration and award; collateral estoppel; comparative negligence; discharge in bankruptcy; illegality; fraud; infancy or other disability; payment; release, *res judicata*; statute of frauds; and statute of limitations. See CPLR § 3018(a). Moreover, an answer may assert counterclaims. The same rules that apply to a plaintiff's pleading apply to a defendant's counterclaim. See CPLR 3019.

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

An answer must be served within 20 days if the defendant is served by personal delivery within New York; it is 20 days after a defendant mails an acknowledgment of service, or 30 days after service is complete under any other circumstances. See CPLR § 320.

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

In New York, "third-party practice", which is also known as "*impleader*", enables a defendant to bring a claim against a third party who is (or may be) liable for all, or part of, that which the plaintiff seeks to recover from the defendant. See CPLR § 1007. By allowing the plaintiff's claims against the defendant and the defendant's claims against the third-party to be resolved together, the CPLR saves time, money, and effort, and avoids inconsistent outcomes.

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

If the defendant fails to respond to a summons within the requisite period of time, then the plaintiff may apply for a default judgment within one year after this failure to appear. To obtain a default judgment, a plaintiff must show proof of summons service, proof of the claim (including the amount due if a money claim), and proof of the default. See CPLR § 3215.

4.5 Can the defendant dispute the court's jurisdiction?

A defendant can dispute both the court's subject matter jurisdiction and the court's personal jurisdiction. A defendant may object to subject matter jurisdiction at any time. See CPLR 3211(a)(2). Personal jurisdiction can be challenged in a defendant's initial filing with the court, either by motion pursuant to CPLR section 3211(a)(8) or as a defence in an answer. A court may not exercise personal jurisdiction over a defendant if service of process was defective or if the defendant lacks sufficient contacts with New York to form a basis for general jurisdiction in the state or specific jurisdiction under the state's so-called "longarm" statute. See CPLR 302.

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?

A third party can be joined into an ongoing proceeding. In fact, joinder is necessary in cases where complete relief for the parties requires joinder of a third party and in cases where judgment would inequitably affect a third party. See CPLR Section 1001(a). In other cases, joinder is permissible if the several claims: (1) arise out of "the same transactions or occurrences"; and (2) have in common any "question of law or fact". CPLR § 1002(a).

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?

Consolidation of two or more proceedings is permitted when the proceedings involve "a common question of law or fact". Joint trial, in which the actions maintain their separate identities, is also allowed in similar circumstances. See CPLR § 602.

5.3 Do you have split trials/bifurcation of proceedings?

CPLR Section 603 provides judges with discretion to sever claims or order separate trials where, for example, unrelated claims might confuse the jury. Bifurcation of proceedings into liability and damages phases is also permitted and, in fact, encouraged in personal injury cases. See David D. Siegel, New York Practice § 130 (5th ed. 2011).

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in New York? How are cases allocated?

Under the Uniform Rules for New York State Trial Courts, once a party makes what is called a "request for judicial intervention", the clerk of court randomly assigns the case to an individual judge. See Uniform Rules for New York State Trial Courts § 202.3(b). Special categories of cases, however, may be assigned to specially designated judges. *Id.* § 202.3(b). A party may request assignment to the Commercial Division if the case meets certain jurisdictional requirements, which include, among other things, a monetary threshold of $150,000 in New York County (Manhattan). See *id.* § 202.70.

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

Courts have broad case management powers. Judges may, among other things, hold a preliminary conference, set a discovery schedule, set a motion schedule, hear oral argument, hold pretrial conferences and otherwise monitor the status of the case. Pretrial discovery (the exchange of documents, information and testimony of witnesses who might appear at trial) is often the most protracted and expensive phase of a case, and the parties may make interim applications to try to limit, control or (in exceptional circumstances) shift the burden of paying for the expenses of this phase.

6.3 What sanctions are the courts in New York empowered to impose on a party that disobeys the court's orders or directions?

Courts have authority to impose monetary and other sanctions on parties and, if appropriate, their lawyers, for discovery abuses or other misconduct. Court also have the power to hold a party in contempt for disobedience of court orders. Contempt may be civil and/or criminal. Civil contempt results from disobedience that injures another party, and it carries as a fine $250 plus the injured party's costs and attorneys' fees, and any additional amount that will compensate the injured party. See CPLR § 5104; N.Y. Judiciary Law § 753. By contrast, criminal contempt results from an offence against public justice and is punishable by a fine of up to $1,000 and/or jail time of up to 30 days. See *id.* § 750-51.

6.4 Do the courts in New York have the power to strike out part of a statement of case? If so, in what circumstances?

CPLR § 3024 permits a motion to strike "scandalous or prejudicial matter unnecessarily inserted in a pleading". Courts may also dismiss deficient claims and defences. See CPLR § 3211. In extraordinary cases of a party's abuse of the legal process, failure to appear in court or respond to court orders, the court also has the power to dismiss the party's claim or defence.

6.5 Can the civil courts in New York enter summary judgment?

The CPLR provides for summary judgment. A motion for summary judgment "shall 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. After considering the documentary evidence presented by the parties, courts may enter summary judgment in full, or in part, with respect to issues that do not present a triable issue of fact.

6.6 Do the courts in New York have any powers to discontinue or stay the proceedings? If so, in what circumstances?

CPLR § 2201 permits courts in New York to stay their own proceedings "in a proper case, upon such terms as may be just". Stays are common pending resolution of a relevant issue by an appellate court or an action in another court between the same parties on the same claim. In the latter situation, dismissal may also be authorised. See CPLR § 3211(a)(4). Courts can discontinue an action at any time before submission of the case to the trier of fact. See Siegel § 297.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in New York? Are there any classes of documents that do not require disclosure?

CPLR 3101 provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action". Disclosure may occur through document discovery (both paper and electronic), interrogatories (written questions), depositions (pretrial oral testimony), requests for admission, physical examination, and other devices. The purpose of this liberal disclosure policy is "to advance the function of the trial to ascertain truth and to accelerate the disposition of suits". See *Rios v. Donovan*, 21 A.D.2d 409, 411 (1st Dep't 1964).

Privileged matter, attorney work product, and materials prepared for litigation may be immune from disclosure. See Siegel §§ 346-48. A variety of privileges may protect documents and information from disclosure. The most common are attorney-client communications, but there are many other recognised privileges.

7.2 What are the rules on privilege in civil proceedings in New York?

The rules of evidence govern what is and what is not privileged. "As long as properly objected to, all privileged matter is excluded." Siegel § 346 (citing CPLR § 3101). New York recognises privileges based on relationships such as attorney-client, husband-wife, priest-penitent, psychotherapist-patient, doctor-patient, social worker-client, and reporter-source. See CPLR Article 45. A privilege that is sometimes involved in commercial litigation protects certain kinds of communications to or from regulatory agencies, particularly relating to an agency's deliberative process.

7.3 What are the rules in New York with respect to disclosure by third parties?

A party may obtain disclosure from a third party by serving a notice on all parties and a subpoena on the third party stating "the circumstances or reasons such disclosure is sought or required". CPLR § 3101. However, courts are often mindful of the burden on third parties and may require a greater showing of need where the burden is heavy. In general, New York state courts recognise the "separate entity" rule, whereby a third party that is required to produce records located within the state need not produce records located outside the state in the custody of affiliated but separate corporate entities – an issue that is of frequent concern to international financial institutions that often receive third-party discovery requests.

7.4 What is the court's role in disclosure in civil proceedings in New York?

Judicial oversight of disclosure varies by case. Although the need to preserve judicial resources often limits supervision, courts may enter protective orders, set disclosure schedules, informally resolve disclosure disputes at conferences, and rule on formal motions concerning disclosure issues. Courts may also enforce disclosure orders, including through the use of sanctions. Judges in the Commercial Division commonly use law secretaries to hear, monitor and resolve discovery disputes.

7.5 Are there any restrictions on the use of documents obtained by disclosure in New York?

In general, there are no restrictions on the use of documents obtained by disclosure. However, courts may, on their own or at the parties' request, enter a protective order "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any persons or the courts". CPLR § 3103(a). In those circumstances, documents, information or testimony designated as confidential are not allowed to be used for any purpose other than the prosecution or defence of the action.

8 Evidence

8.1 What are the basic rules of evidence in New York?

Although New York does not have an evidence code similar to the Federal Rules of Evidence, the basic rules of evidence are mainly found in case law and the CPLR. Richardson on Evidence is an authoritative treatise recognised and used by most New York state courts on issues of the admissibility of evidence at trials and hearings.

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

In general, any relevant evidence is admissible. However, evidence may be excluded, for example, on grounds of hearsay, privilege, or unfair prejudice that substantially outweighs probative value.

Expert evidence may be presented if the court determines that the expert is qualified, the expert's opinion would be helpful to the fact finder, and the expert's methodology has been generally accepted by the relevant professional community. See *People v. Wernick*, 89 N.Y.2d 111, 115 (1996). Often expert evidence is of particular importance to the trier of fact, and care should be taken in the selection, preparation and presentation of such evidence.

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

Fact witnesses must have personal knowledge and take an oath to tell the truth. Hearsay evidence (an out-of-court statement offered to prove the truth of the statement) is generally inadmissible. In most cases, a fact witness' deposition (pretrial oral testimony, transcribed by a court reporter) may be used for impeachment purposes only at a trial or hearing. The word "deposition" is sometimes misused to apply to affidavits, which are written statements under oath (or affirmations, which are written statements by attorneys, who as officers of the court are permitted to submit statements without swearing before a notary or witness); the proper usage of "deposition", however, is in reference to transcribed oral pretrial testimony.

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

CPLR Section 3101(d) provides that upon request, a party must (absent good cause) identify any expert it expects to call as a witness at trial and "disclose in reasonable detail the subject matter

on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion". Under the CPLR, courts retain discretion with respect to the precise disclosure requirements for expert witnesses in a given case. Parties may be able to protect certain communications with their expert from disclosure.

Experts are retained by parties and are obligated to act in accordance with their retainer agreement with their clients. If they fulfill their purpose properly, however, they also serve an important service to the court and the judicial process in explaining technical matters that are outside the province of the court's common knowledge. They have a duty to comply with court procedures, including testifying truthfully under oath.

8.5 What is the court's role in the parties' provision of evidence in civil proceedings in New York?

The court determines the admissibility of evidence, deciding whether the fact finder (jury or judge) can consider a piece of evidence and, if so, for what purpose.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in New York empowered to issue and in what circumstances?

New York courts may enter judgments in the form of money judgments, injunctions (requiring a party to take or refrain from taking certain action), or declaratory judgments (declaring the rights of the parties). Judgments "may be either interlocutory or final". CPLR § 5011. An interlocutory judgment generally refers to a judgment that decides only part of a case.

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

Depending on the case, a court or a jury may award damages in different forms. Damages may be compensatory (for out-of-pocket losses or pain and suffering), consequential (for other reasonably foreseeable losses), or punitive (for punishment in extraordinary circumstances).

Courts have discretion to grant prejudgment interest from the time a cause of action accrued until verdict or decision. See CPLR §5001. The CPLR requires payment of prejudgment interest on all money claims from the time of verdict or decision until judgment is entered, *id.* § 5002, and payment of postjudgment interest until the time of payment, *id.* § 503. The statutory rate of interest in New York is generally 9 percent. *Id.* § 504.

Courts usually have discretion whether to require the losing party to pay the winning party's costs. See CPLR Article 81. "Costs", however, should not be confused with attorneys' fees. Costs are set by statute and are usually not more than a few hundred dollars. In most cases, as noted above, the American rule applies, that attorneys' fees (often the major expense of litigation) are borne by the party that incurs them. This is a key difference between litigation in New York (and other U.S. jurisdictions) and most foreign nations.

9.3 How can a domestic/foreign judgment be enforced?

Domestic judgments can be enforced in a variety of ways. As discussed above, injunctions can be enforced by contempt. In certain property actions, the sheriff may seize or arrange the sale of the property at issue. See CPLR Article 51. Money judgments can be enforced by a variety of devices, such as the levy and sale of property, income execution, garnishment, and receivership. See CPLR Article 52. The Court of Appeals has held that a "New York court with personal jurisdiction over a defendant may order him to turn over out-of-state property regardless of whether the defendant is a judgment debtor or garnishee". See *Koehler v. The Bank of Bermuda Ltd.*, 12 N.Y.2d 533, 541 (2009).

A party may seek to enforce a foreign judgment in New York courts. New York courts generally enforce the foreign judgment based on principles of comity, provided that the court is satisfied that the foreign court had personal jurisdiction and used fair procedures consistent with American principles of due process. See CPLR Article 53.

9.4 What are the rules of appeal from a judgment of a civil court of New York?

In general, an aggrieved party may appeal from a judgment or an order. See CPLR § 5512(a). New York state courts are much more generous than federal courts in allowing interlocutory appeals. See Siegel § 526. Indeed, the availability of appeals from interlocutory orders rather than only from final judgments is a key difference between state and federal courts that is sometimes weighed in deciding whether to bring suit in one court or the other, where the jurisdictional basis exists in either one. As discussed above, appeals from the New York Supreme Court and other trial level courts typically go to the Appellate Division. Appeals from the Appellate Division go to the Court of Appeals. The ability to appeal to the Court of Appeals is narrower than the ability to appeal to the Appellate Division. See *id.* § 527. Even when a party does not have a statutory right of appeal, it may seek appeal by permission.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

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

The most common forms of alternative dispute resolution are arbitration and mediation. In arbitration, parties agree to be bound by the award of a chosen decision-maker, whereas in mediation, a neutral party seeks to facilitate settlement through a non-binding process. Other, less common methods of alternative dispute resolution include neutral evaluation by an expert and summary jury trial (where the parties, with cooperation of the court, present a condensed case to jurors who may be asked to answer questions).

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

Alternative dispute resolution is voluntary. Arbitration is a matter of contract, and courts generally enforce arbitration clauses that are in writing, and are explicit and unequivocal. Unlike judges, arbitrators need not be bound by substantive law or rules of evidence. This flexibility often appeals to parties trying to resolve

disputes. Nonetheless, some alternative dispute resolution organisations, such as the American Arbitration Association, have their own published rules for arbitrations.

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

The public policy of New York generally favours alternative dispute resolution, which is commonly used to resolve a wide variety of disputes. See CPLR Article 75. The parties to an arbitration typically define the scope of their arbitrator's power. However, New York law does not permit arbitrators to resolve antitrust claims, resolve usury claims, liquidate an insolvent insurance company, or punish wrongdoing through criminal sanctions or punitive damages. See Siegel § 587.

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, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to New York in this context?

New York courts regularly consider certain threshold questions, including whether the parties have a valid agreement to arbitrate, whether a dispute is within the scope of the agreement to arbitrate, whether any express conditions to arbitration have been satisfied, and whether an arbitration was timely sought. See Siegel § 589. These questions often arise in connection with a defendant's motion to stay a pending civil action and compel the plaintiff to arbitrate or in connection with service of a "notice of intention to arbitrate", which requires the party resisting arbitration to ask the court within 20 days to "stay" the arbitration. See CPLR § 7503. In addition, the provisional remedies of attachment and preliminary injunction may, in rare circumstances, be available in conjunction with an arbitration. See CPLR § 7502.

With respect to mediation, a trial court in the Commercial Division may, at any point, direct the "appointment of an uncompensated mediator for the purpose of mediating a resolution of all or some of the issues presented in the litigation". Uniform Rules for New York State Trial Courts § 202.70(g). There is a high success rate for such mediations.

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 New York in this context?

Arbitration is binding, and the scope of judicial review of arbitration awards is narrow. The narrow grounds for a court to vacate an arbitration award include: corruption, fraud, or misconduct in the arbitration proceeding; bias of an arbitrator who was chosen to be neutral; or an arbitrator exceeding his or her powers (which may be limited by contract or public policy). See CPLR § 7511(b)(1). An application to vacate or modify an arbitration award may be made within 90 days of receiving the award. CPLR § 7511(a). An application to confirm an arbitration award — and convert it to a judgment — may be made within one year. CPLR § 7510.

Settlement agreements generally do not need to be approved by the court. Parties often choose, however, to reduce their agreement to a written or oral stipulation presented, approved and "so ordered" by the court, in order to ensure the finality of the agreement. In addition, in certain cases such as class actions, settlements do require leave of court. See CPLR § 908.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in New York?

As an international commercial center, New York is home to a number of institutions dedicated to alternative dispute resolution. The American Arbitration Association is headquartered in New York City. JAMS is another private institution with offices in New York providing arbitrators, as well as mediators, many of whom are former judges and other experienced practitioners. In addition, the New York Unified Court System offers parties access to free or reduced-fee mediation.

2.2 Do any of the mentioned alternative dispute resolution mechanisms provide binding and enforceable solutions?

As noted, parties can agree to resolve a dispute through binding arbitration. In light of a public policy favouring arbitration, courts in New York generally enforce arbitration awards. Mediation is non-binding, but often results in binding settlements.

3 Trends & Developments

3.1 Are there any trends in the use of the different alternative dispute resolution methods?

Arbitration remains a popular choice for alternative dispute resolution because of its many advantages over litigation, including flexibility, privacy, speed, and cost. However, there have been growing concerns that arbitration does not necessarily achieve desired time and cost savings, especially in complex commercial cases. For example, parties have complained about burdensome production and review of electronically stored information in connection with arbitration. On the other hand, arbitration has been recognised to have advantages in some circumstances over litigation in New York or other U.S. courts: for example, in transactions involving parties from a foreign country where enforcement of a U.S. or New York judgment may be problematic because that country does not have a treaty of mutual judgment recognition with the U.S., arbitration may provide a more secure remedy if the foreign country is a signatory to a treaty recognising the enforceability of international arbitration awards.

3.2 Please provide, in no more than 300 words, a summary of any current issues or proceedings affecting the use of those alternative dispute resolution methods in New York?

New York courts continue to address questions regarding the enforceability of arbitration clauses and whether arbitration awards should be vacated. Notably, New York courts — in contrast to

federal courts — have been refusing to recognise an arbitrator's manifest disregard of the law as a basis for overturning an award. See Siegel §§ 602, 607. The issue of provisional remedies in aid of foreign arbitration also recently received judicial attention. An appellate court held that New York courts may attach assets located in New York based on a showing that an award "would otherwise be rendered ineffectual", even if the parties and the transactions involved in the foreign arbitration do not have any relationship to New York. See *Sojitz Corp. v. Prithvi Information Solutions Ltd.*, 82 A.D.3d 89 (1st Dep't 2011). This decision makes it easier for parties to satisfy foreign arbitration awards in New York.

Charles G. Berry

Arnold & Porter LLP
399 Park Avenue
New York, NY 10022
USA

Tel: +1 212 715 1000
Fax: +1 212 715 1399
Email: charles.berry@arnoldporter.com
URL: www.arnoldporter.com

Charles G. Berry is a litigation partner in Arnold & Porter LLP's New York office. He has handled a broad range of commercial litigation in federal and state courts for more than 32 years. On behalf of numerous U.S. and foreign banks and businesses, he has litigated cases involving complex inter-creditor disputes, lender liability, pre-judgment attachment, injunctions, breach of fiduciary duty and securities fraud claims, recovery of stolen and misappropriated assets, parallel international insolvency proceedings, and enforcement of debt obligations. Mr. Berry has also handled contested matters involving trusts and estates on behalf of executors, trustees, beneficiaries, and other interested parties. He has represented corporations, individuals, and non-profit organisations, as both plaintiffs and defendants, and has achieved a number of trial and appellate victories and landmark rulings. In addition to cases involving financial and fiduciary issues, he has counseled and represented clients in litigation on a broad variety of contract and tort claims, including intellectual property and privacy rights, ownership of real estate and art, and professional liability. He has served by appointment of the Presiding Judge of New York's Appellate Division, First Department, as a referee in attorney disciplinary matters. He has taught legal writing, published articles on developments in international disputes, and authored a chapter in a leading treatise on New York State commercial litigation Mr. Berry earned a JD from Columbia Law School, an MA from Cambridge University (Clare College), and a BA, *summa cum laude*, from Yale University.

Daniel Bernstein

Arnold & Porter LLP
399 Park Avenue
New York, NY 10022
USA

Tel: +1 212 715 1000
Fax: +1 212 715 1399
Email: daniel.bernstein@aporter.com
URL: www.arnoldporter.com

Daniel Bernstein is an associate in the litigation group of Arnold & Porter LLP, where he focuses on complex commercial litigation, corporate internal investigations, and white collar criminal defence. Mr. Bernstein also maintains an active *pro bono* practice that ranges from voting rights litigation, to non-profit corporate governance. Before joining Arnold & Porter's New York office, Mr. Bernstein served as a law clerk for the Honorable Sidney H. Stein of the U.S. District Court for the Southern District of New York. Mr. Bernstein is a 2009 graduate of Stanford Law School, where he was an articles editor on the *Stanford Law Review*. He earned his BA, *magna cum laude*, with distinction in political science, from Yale University in 2005.

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GLG
Global Legal Group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

www.iclg.co.uk