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# Dispute Resolution

## in 48 jurisdictions worldwide

## 2010

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**Marjorie J Peerce and Mary Margulis-Ohnuma**

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## Litigation

### 1 Court system

What is the structure of the civil court system?

#### Court of Appeals

The Court of Appeals is the highest court of the state and hears both criminal and civil appeals. It is comprised of a chief judge and six associate judges, appointed by the governor for 14-year terms. Five judges are needed for a quorum, four for a decision. The Court of Appeals reviews only questions of law, with two exceptions: it reviews facts on an appeal from a criminal judgment imposing the death penalty, and on review of an appellate division decision reversing or modifying a judgment, finding new facts, and directing that a final judgment be entered on the new facts.

#### Appellate Division

The appellate division (First, Second, Third and Fourth Departments) hears appeals from the supreme court, county courts, family court, surrogate's court, court of claims and appellate terms of the supreme court. It reviews both the law and the facts. The justices are members of the supreme court whom the governor has designated to sit on the appellate division. Up to five judges sit on a panel, four are needed for a quorum, three for a decision. It also has original jurisdiction over cases in which the facts are not in dispute and only a decision on the law is required, article 78 proceedings against a supreme court justice and other special proceedings.

#### Supreme Court

The supreme court has statewide jurisdiction and a branch in each county. Its justices are elected to the court from judicial districts for 14-year terms. The supreme court is the state's sole court of 'general jurisdiction', which means it has original jurisdiction over virtually any case. However, where another court also has original jurisdiction, that other court handles the matter. Appeals from the supreme court generally go to the appellate division.

#### Commercial part of the Supreme Court

A 'commercial part' has been established within the supreme court in some counties to hear business or commercial disputes. There are monetary thresholds for bringing cases in the commercial part.

#### Appellate term of the Supreme Court

The appellate term is a lower-level appellate court created by the appellate division. Up to three supreme court justices sit on a panel, two are needed for a quorum, two for a decision. In both the First and Second Departments, the appellate term hears appeals from the New York City civil and criminal courts, and in the Second Department it also hears appeals from the district, city, town and village courts and from the county courts in civil cases and some criminal cases. Appeals from the appellate term go to the appellate division.

#### County courts

County courts exist in each county outside New York City. The judges are elected to 10-year terms. The court hears monetary disputes up to US$25,000 where at least one defendant resides in or has a business office in the county and the claim arose in the county (counterclaims are not subject to the US$25,000 limitation); disputes relating to real property within the county (no monetary limitation); actions to recover chattel (value up to US$25,000) in the county, etc. It also hears incompetency proceedings involving county residents, and proceedings involving real property within the county owned by an incompetent person wherever he or she resides. In the Third and Fourth appellate division departments, the county court hears appeals from the city, town and village courts. Appeals from the county court go to the appellate division, except in the Second Department, where appeals go to the appellate term.

#### Surrogate's court

Each county has a surrogate's court, with at least one judge. In New York City counties, the surrogate is elected to a 14-year term; in other counties, it is a 10-year term. The surrogate's court handles probating of wills and estates of the deceased. Appeals from the surrogate's court go to the appellate division.

#### Family Court

Each county has a family court, with at least one judge. In New York City, judges are appointed by the mayor; elsewhere in the state they are elected. They serve for 10-year terms. The family court has jurisdiction over matters pertaining to family life, including support, neglect, paternity, adoption, guardianship, custody and juvenile delinquency. Adoption is handled by the family court or the surrogate's court. Matrimonial actions are handled by the supreme court; however, it may refer related custody and support issues to the family court. Appeals from the family court go to the appellate division.

#### Court of Claims

This court has jurisdiction over claims against the state or by the state against the claimant. Its judges are appointed by the governor, with the advice and consent of the senate, for nine-year terms. Appeals from the court of claims go to the appellate division.

#### New York City Civil Court

This court hears monetary disputes up to US$25,000; it also has jurisdiction over interpleader and cross-claims of up to US$25,000. (Counterclaims are not subject to the US$25,000 limit.) It has jurisdiction over summary proceedings involving the dispossession of property and the recovery of rent (recovery of rent is not limited by the US$25,000 restriction). The small claims 'court' is an accelerated procedure for hearing money cases of up to US$5,000. Judges are elected to 10-year terms. Appeals from this court go to the appellate term.

**District courts**

There are two district courts: one in Nassau County and one in western Suffolk County. The district court has jurisdiction over money and replevin actions up to US$15,000, including interpleader claims. (Counterclaims and summary proceedings for rent are not subject to the US$15,000 restriction.) The small claims part hears claims up to US$5,000. (Under CPLR (Civil Practice Laws and Rules) 3405, cases for US$6,000 and under can be sent to compulsory arbitration.) Judges are elected to six-year terms. Appeals from this court go to the county court unless an appellate term has been established to hear these appeals.

**City courts**

Each of the 61 cities outside New York City has a city court. The city courts' civil jurisdiction and practice is similar to that of the district courts described above. Appeals from this court go to the county court, unless an appellate term has been established to hear these appeals.

**Town and village courts**

Each county outside New York City is divided into towns, and within these towns are villages. The town and village courts have jurisdiction over monetary and replevin actions up to US$3,000 (this restriction also applies to counterclaims). The court also has jurisdiction over summary proceedings for rent (no monetary limitation). Town and village justices need not be attorneys. Appeals from this court go to the county court, unless an appellate term has been established to hear these appeals.

## 2 Judges and juries

What is the role of the judge and the jury in civil proceedings?

Whether a jury is allowed depends on whether the type of action evolved through the common law courts (which historically had jury trials) or the courts of equity (historically non-jury). In a jury trial, the jury decides questions of fact and the judge decides questions of law; in a non-jury trial, the judge decides issues of fact and law. Trial by jury must be demanded in the note of issue filed with the court; if a party is served with a note of issue that does not contain a demand for a jury and that party wants a jury trial, that party must file a demand within 15 days of being served.

CPLR 4101 lists types of civil actions for which jury trials are permitted:

- money actions, in tort or contract;
- actions for ejectment, dower, waste, abatement of and damages for nuisance, to recover chattel or to establish certain claims to real property; and
- 'any other action in which a party is entitled by the constitution or by express provision of law to a trial by jury'.

Other statutes authorising trial by jury include the Domestic Relations Law, which allows juries in divorce and annulment cases, and the Real Property Actions and Proceedings Law, which allows juries in summary proceedings to recover real property. In certain cases, such as worker's compensation, a statutory provision has eliminated the right to a jury trial.

## 3 Limitation issues

What are the time limits for bringing civil claims?

Article 2 of the CPLR lists many commonly invoked limitations of time, including the 20-year period to enforce a money judgment, the 10-year period for real property claims, the six-year period for contract claims (except sales contracts subject to UCC section 2-725's four-year period) and fraud claims (or two years after a person exercising reasonable diligence would have discovered the fraud), the three-year period for unintentional tort claims, injury to property, replevin and malpractice claims against professionals (except medical, dental, podiatric), the 2.5-year period for medical, dental or podiatric malpractice claims, and the one-year period for intentional tort cases, among others.

Other important limitations periods include the five-year period for divorce or separation (Domestic Relations Law, section 210), and the two-year period for wrongful death claims (Estates, Powers and Trusts Law, section 5-4.1), among others. Tort actions against a municipality must be brought within one year and 90 days, and are also subject to a 90-day notice of claim period (General Municpal Law, sections 50-i and 50-e).

Parties can agree to modify the limitations period. Parties to a contract may provide for a shorter limitations period in the original contract, as long as such period is reasonable; but for certain sales contracts it may only be reduced to one year (see UCC section 2-725(1)). An agreement to lengthen the period in a contract case is valid if made after the cause of action accrues and is in writing and signed (see General Obligations Law, section 17-103(1)). There are no statutory rules for extension agreements in tort and other non-contract cases.

## 4 Pre-action behaviour

Are there any pre-action considerations the parties should take into account?

In some cases, a notice of claim must be served within a certain time after the claim arises which notifies the potential defendant that a claim may be brought against him. (For example, General Municipal Law section 50-e (tort claims against public corporations (city, county, town, village, fire district, school district, etc) and Court of Claims Act, section 10 (suits against the state)).

CPLR 3102(c) provides for pre-suit disclosure by court order 'in aid of bringing an action, to preserve information or to aid in arbitration'.

CPLR 6313 provides for emergency relief in the form of a temporary restraining order (TRO) where there is a danger of immediate and irreparable loss or damage unless the defendant is restrained. It is brought by order to show cause, a type of ex parte application. If a summons has not already been served, it must be served with the order to show cause; in such cases, the action is filed at the same time as, or just prior to, the TRO application.

## 5 Starting proceedings

How are civil proceedings commenced?

A civil action is commenced in the supreme, county, civil, district and city courts by filing a summons and complaint, summons with notice or petition with the court clerk, along with payment of any required fee. The plaintiff has 120 days after filing in which to serve the defendant; if service is effected within that time frame or within the period as extended by the court, the action is deemed commenced as of the filing date. In the town and village courts, service (rather than filing) of the summons and complaint commences the action.

## 6 Timetable

What is the typical procedure and timetable for a civil claim?

If a summons is served with complaint, the defendant must answer within 20 days if served by personal delivery to the defendant in New York or 30 days if served by any other method. Alternatively, the defendant may move to dismiss the complaint (same time limits) or to compel its amendment (within 20 days of service). If the summons is served with notice, the defendant serves a notice of appearance on the plaintiff's attorney 20 or 30 days after service, depending on the method of service, and usually makes a demand for the complaint at that time.

The answer contains the defendant's admissions or denials (or both) regarding the allegations in the complaint, and silence regarding any particular allegation is deemed an admission. The answer should include any applicable affirmative defences, and defences not raised in the answer may be deemed waived. The answer may also include counterclaims (defendant's claims against plaintiff, whether or not they are related to the plaintiff's action) and cross-claims against co-defendants (whether or not they are related to the plaintiff's claim); an answer to a cross-claim is only required if such answer is demanded in the pleading containing the cross-claim, and otherwise is deemed denied. An answer to a cross-claim should be served within 20 days after service of the pleading containing the cross-claim; where the cross-claim is served on a non-party, the answer should be served within 20 or 30 days (depending on the method of service). The plaintiff must respond to any counterclaims in the defendant's answer in a reply; failure to reply can result in a default on the counterclaim. Parties may stipulate extensions of time to plead or may move the court for an extension.

**7 Case management**

Can the parties control the procedure and the timetable?

Under Uniform Rule 202.12, any party may request a preliminary conference after service of process. If a judge has not already been assigned, the request must be accompanied by a request for judicial intervention (RJI). The conference is scheduled for a date within 45 days from filing of the RJI. The purpose of the conference is to simplify the issues, set a timetable for disclosure, add other parties if necessary, etc. At its conclusion, the judge issues a written order embodying his or her instructions, including a timetable for disclosure (generally to be completed within 12 months, or 15 months for complex cases), or may direct the plaintiff to file the transcript with the court clerk. If the parties agree on a disclosure schedule in advance of the conference and submit it by stipulation, the court will approve the stipulation and cancel the conference.

CPLR article 31 sets forth the disclosure devices. Ordinarily, disclosure is brought on by stipulation or notice, and parties are expected to confer and agree on the time and place for depositions, etc. Because the plaintiff may not notice a party's deposition before that party's time for serving a responsive pleading has expired, the defendant may serve a deposition notice with his or her responsive pleading and thereby get priority. A discovery or deposition notice must give the recipient at least 20 days to respond. Within the limits of the disclosure schedule, discovery order and protective orders to curb discovery abuses, the parties generally set the pace and order of discovery.

A civil case is placed on the court calendar by any party filing a 'note of issue' accompanied by a 'certificate of readiness', which attests that pretrial procedures have been completed. After the note of issue is filed, the case is placed on the general calendar and then transferred to other lists closer to trial, such as the pretrial conference calendar (an optional court conference for the purpose of considering simplification of the issues, obtaining admissions of fact, discussing settlement or scheduling for trial, limiting the number of expert witnesses, etc) or the ready calendar (when trial is imminent). As noted above, the jury demand is made in the note of issue or by another party within 15 days after service of the note of issue. If a preference is sought by the party filing the note of issue (eg, seeking an early trial in the interests of justice or because a party has reached 70 years of age), he or she must move for it in a notice of motion accompanying the note of issue; if another party wants a preference, he or she must move for it within 10 days after being served with the note of issue.

When the case is ready for trial, the judge, usually in consultation with the parties, sets the trial date.

**8 Evidence – documents**

Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

CPLR 3101 sets forth the standard for disclosability in New York civil practice: 'Generally … [t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action […]'. Except for privileged matter, attorney's work product, etc, parties generally must disclose relevant matter upon request.

Parties to litigation as well as others on notice of ongoing or possible future litigation have a duty to preserve documents and other evidence pending trial, and CPLR 3126 gives courts broad discretion to impose sanctions when a party deliberately fails to comply with a discovery order or destroys evidence prior to the adversary's inspection of it. Sanctions for spoliation range from the striking of a pleading, to preclusion of evidence or testimony, to lesser sanctions or no sanctions, depending on the circumstances and the resulting prejudice to the opponent's case.

**9 Evidence – privilege**

Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

'Privileged matter' (ie, privilege against self-incrimination; attorney-client, physician-patient and spousal communication privileges; grand jury secrecy; certain communications in the course of governmental activities, etc) is absolutely immune from disclosure (CPLR 3101(b)). Where there is a dispute as to whether a document contains a privileged communication, the court may examine the material in camera and, in some instances, may direct that privileged material be redacted and the remainder be produced.

Materials 'prepared in anticipation of litigation' have conditional immunity, and may be required to be disclosed where the court finds that the party seeking discovery has substantial need of the materials and is unable without undue hardship to obtain the substantial equivalent by other means (CPLR 3101(d)(2)).

Advice from an in-house lawyer could well be protected by the attorney-client privilege, for example, if the communication is of a legal nature rather than for a business purpose.

**10 Evidence – pretrial**

Do parties exchange written evidence from witnesses and experts prior to trial?

CPLR 3101 governs pretrial disclosure relating to experts. Subparagraph (i) provides: 'Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substances 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'. The statute provides no time frame for making or responding to the request, and also provides: 'where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at trial solely on grounds of noncompliance with this paragraph'. However, failure to respond until the eve of trial can result in preclusion of the expert at trial. In a medical, dental or podiatric malpractice case, a party responding to a request may omit the names of medical, dental or podiatric experts; alternatively, in such malpractice cases, parties may mutually agree to reveal their experts' names and make them available for depositions.

Upon request, parties must also reveal the names of any witnesses they know of who witnessed the event at issue or who can reflect on any fact that can help account for the event.

**11 Evidence – trial**

How is evidence presented at trial? Do witnesses and experts give oral evidence?

Evidence at trial is presented through oral examination of lay and expert witnesses and the admission into evidence of objects or documents after proper authentication. Deposition testimony may also be used at trial if a witness is unavailable or for impeachment purposes. The parties also may stipulate to almost any matter, provided it is in writing or made in open court.

**12 Interim remedies**

What interim remedies are available?

CPLR 6001 sets forth four provisional remedies: attachment, injunction, receivership and notice of pendency. An attachment is a seizure of the defendant's property. An injunction is an order requiring the defendant not to do a specified act. Receivership is where property is put in the hands of a receiver in order to prevent the defendant from selling or otherwise disposing of it. A notice of pendency is a paper that is filed in the county clerk's office by the plaintiff and which gives the public notice that the plaintiff has a claim to the property.

In addition, an order to seize a chattel is available in replevin actions. Sequestration (seizure of parent's or spouse's property) is available in matrimonial actions.

Provisional remedies are sometimes available in support of foreign proceedings – for example, attachment of property in New York in support of pending arbitration in a foreign country or to enforce a foreign judgment pursuant to the Uniform Foreign Country Money Judgments Recognition Act, discussed in question 21.

**13 Remedies**

What substantive remedies are available?

New York courts may grant any type of relief within their jurisdictions appropriate to the proof. Compensatory damages (out-of-pocket losses, mental or physical pain and suffering, loss of time and earnings or diminished earning capacity, injury to property, loss of profits, injury to reputation or financial standing, repayment for reasonable expenses taken to minimise damage caused by defendant, etc) and punitive damages (in certain cases involving wilful, wanton or malicious conduct) are available. Double or treble damages may be available if provided by statute. Liquidated damages may be awarded in cases where a liquidated damages clause is contained in the parties' contract. Nominal damages may also be awarded in cases involving vindication of a legal right, but where the plaintiff suffered no substantial loss or injury to be compensated. Courts also may provide relief in the form of a declaratory judgment specifying the legal rights of a party. Courts can also provide equitable relief in the form of an injunction, return of specific or unique real or personal property, etc.

Interest may be allowed in certain circumstances for the period between when the cause of action accrued and when the verdict or decision is issued (eg, property damage, wrongful death claims, etc). Interest is generally available from the verdict or decision until entry of the final judgment, and from the date on which the judgment is entered until it is satisfied. Prejudgment interest is not generally available for personal injury or punitive damages. Interest on funds improperly held by a government agency is available only if provided for by statute.

**14 Enforcement**

What means of enforcement are available?

Enforcement of judgments is divided generally into two categories, non-money judgments and money judgments, which are governed by articles 51 and 52 of the CPLR, respectively.

Generally, non-money judgments, including decrees for injunction and specific performance, are enforceable by contempt. However, some types of non-money judgments, including awards of ejectment or replevin, are enforced by execution, which directs the sheriff to restore possession of the real property or chattel to the plaintiff, and instructs the sheriff to levy as if on a money judgment only if the chattel cannot be located in the county. (If the chattel is unique, the replevin judgment may be converted into one enforceable by contempt.)

Money judgments typically are enforced by property execution (levy against real or personal property) or income execution (levy against 10 per cent of judgment debtor's income, or a greater percentage if sought for family support). Some types of property are exempt, including certain categories of basic household goods; the principal of a trust created for the judgment debtor (remainder interest in the trust is not exempt, and income from the trust is only 90 per cent exempt); 90 per cent of wages; welfare payments; alimony and child support; security deposits on housing rental and for gas, electric, water, telephone and other utility services for the judgment debtor and his or her family; accelerated payment or special surrender under a life insurance policy; New York state college tuition savings program trust accounts; and the first US$2,500 of a bank account when the account contains exempt funds that were deposited within the past 45 days. (However, the 90 per cent exemption for trust income and wages may not apply if the court finds that the debtor can afford more or if the judgment debtor's family is seeking the money; similarly, alimony and support payments are only presumptively exempt.) There is also an exemption for real property of up to US$50,000 in value that is owned and occupied as a principal residence; if the property exceeds US$50,000 in value, a judgment lien may attach to the surplus and a creditor may commence a special proceeding to force a sale of the property. Supplementary enforcement vehicles include the restraining notice (issued by the judgment creditor's attorney and enjoining recipient from releasing defendant's property except to sheriff or pursuant to court order); disclosure in aid of enforcement (providing power to subpoena information from anyone who may have knowledge of debtor's assets); delivery order or judgment (requiring possessor of debtor's property to turn it over to creditors); instalment payment order (requiring debtor to make regular payments to creditor in whatever sum court deems debtor able to afford); receivership (receiver appointed to manage, preserve or sell property); and arrest (warrant for debtor's arrest where debtor is hiding in or about to leave the state with unexempt property). Although contempt is not directly available to enforce most money judgments, CPLR 5251 provides contempt as a backup in various circumstances, such as wilful disobedience of a subpoena, restraining notice, order issued under article 52, etc.

**15 Public access**

Are court hearings held in public? Are court documents available to the public?

Civil proceedings in New York State courts are presumptively open to the public. However, a judge has the discretion to close certain proceedings if there is a compelling reason for such closure (certain family court proceedings, etc).

Documents filed with the court are presumptively available to the public unless the court enters an order sealing the records in a particular case on a written finding of good cause which specifies the grounds for such order. Where parties are concerned about divulging trade secrets, etc, they may enter a stipulation and order prior to the exchange of documents that provides a mechanism for designating documents as confidential and providing for notice if a confidential document will be filed with the court, thereby providing the designating party with an opportunity to move to seal.

**16 Costs**

Does the court have power to order costs?

Articles 81 and 82 of the CPLR allow for 'costs' to be recovered by the party who prevails in a civil case, unless otherwise provided by statute or if the court determines that allowing costs would not be equitable. The amount of such 'costs' is statutorily fixed. In the supreme court, the winner may be awarded US$200 for all proceedings before a note of issue is filed, plus US$200 for all proceedings after a note of issue is filed and before trial, plus US$300 for each trial, inquest or assessment of damages. Costs on a motion may be awarded at the court's discretion up to a maximum of US$100. Costs on an appeal to the appellate division are fixed by the court up to a maximum of US$250. Costs on appeal from a county court to an appellate term are awarded at the court's discretion, up to US$30 to an appellant upon reversal, up to US$25 to a respondent upon affirmance, and up to US$25 to either party on modification. (Costs on appeal from any other court to an appellate term are governed by the provisions of the applicable court act.) Costs on appeal to the court of appeals are set by the court up to a maximum of US$500.

Security for costs may be required of a nonresident plaintiff to ensure that a defendant who prevails will not be left with a costs judgment that can only be enforced in the plaintiff's home state.

Attorneys' fees generally are not part of the winner's recovery; however, they may be awarded for frivolous litigation practice and in certain types of cases, such as class actions, certain actions against the state or state agencies, in federal civil rights litigation, etc.

Disbursements, or out-of-pocket expenses, may also be recovered by the prevailing party. Generally, if a party has been awarded costs then he or she will also be awarded disbursements. However, even if a party does not recover costs, a court may still allow the party to recover disbursements; if the judgment is US$50 or more, the court must award disbursements even if costs are not awarded. Article 83 of the CPLR sets forth a list of recoverable disbursements; it also provides for additional disbursements in accordance with the local practices of a particular court. Certain additional allowances are also recoverable in real property actions. The court may also award up to US$3,000 where the prevailing party demonstrates that the case was 'difficult or extraordinary'.

**17 Funding arrangements**

Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

Contingent fee arrangements are generally permitted in New York except in criminal and matrimonial cases. Contingent fee arrangements must be reasonable, and must not have been induced by fraud or be unconscionably excessive. Contingent fee agreements in medical, dental or podiatric malpractice claims are further limited by statute to certain percentages based on the amount recovered. In personal injury and wrongful death actions not involving medical, dental or podiatric malpractice, the validity or reasonableness of a contingent fee arrangement is governed by applicable court rules. In medical, dental and podiatric malpractice and other personal injury and wrongful death actions, attorneys may make applications for additional compensation where the attorney believes, in good faith, that the applicable fee schedule will not provide adequate compensation because of extraordinary circumstances.

Third-party litigation funding is permitted in New York, but is subject to certain strictures. For example, the lawyer must not own any interest in a financing institution providing such funding to his or her client, nor can he or she receive compensation from the financial institution for referring the client or allow the financing institution to affect the exercise of his or her independent professional judgment. Moreover, the lawyer must be careful not to make disclosures to the financing institution that could compromise confidentiality. Furthermore, the Structured Settlement Protection Act requires a judicial determination that the transfer of future payments due to a party who prevails in litigation is in the best interest of the payee and that the transaction, including the discount rate used to determine the net advance amount, is fair and reasonable.

**18 Insurance**

Is insurance available to cover all or part of a party's legal costs?

An individual may obtain liability insurance to protect against future lawsuits; however, as a matter of public policy, intentional or criminal acts are not covered by insurance. If the insurance policy covers the particular loss being sued upon, depending on the precise terms of the policy the insurer may well pay attorneys' fees and costs as well as a settlement or judgment within the monetary limits of the policy.

**19 Class action**

May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Article 9 of the CPLR provides that one or more members of a class may sue or be sued as representative parties of the class where the following conditions are met:

- the class is so numerous that joinder of all of its members is impracticable;
- there are questions of law or fact common to the class that predominate over questions affecting individual members;
- the claims or defences of the representative parties are typical of the claims or defences of the class;
- the representative parties will fairly and adequately protect the interests of the class; and
- a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

The court also must consider several other factors including, inter alia, the extent and nature of any litigation already commenced concerning the same controversy, whether or not it is desirable to concentrate litigation of the claim in the particular forum, and the types of difficulties that may be encountered in managing the class action.

**20 Appeal**

On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

Appeals may only be taken on a 'judgment' or 'order', and may only be brought by an 'aggrieved' party. Articles 55, 56 and 57 of the CPLR govern appeals; however, the rules of the particular appellate court must also be consulted because some procedures differ by court rule.

CPLR 5701 lists the types of judgments and orders of the supreme court or county courts that may be appealed to the appellate division, as well as whether they are appealable as of right or require permission. (This provision has largely been adopted by statute to apply to surrogate's court appeals as well as New York City Civil Court, and district, city, town and village court appeals.) Appeals may be taken on any judgment, whether final or interlocutory, unless the judgment was a ministerial one entered on an appellate order that had already disposed of all issues in the action; appeals also may be taken as of right on many categories of non-final orders on motions made on notice including, inter alia, where the order grants, refuses or modifies a provisional remedy, involves some part of the merits, or affects a substantial right. An order not appealable as of right may be appealed by permission of the judge who issued the order, by direct application to the appellate court or by application to the appellate court after refusal by the issuing judge.

Appeals to the Court of Appeals are more limited. CPLR 5601 provides for appeals as of right for cases originating in the supreme court, county court, surrogate's court, family court, court of claims or administrative agency where an appellate division order finally determines an action and there is a dissent by at least two justices on a question of law in favour of the appellant. An appeal as of right is also available directly from a trial-level final judgment where the only question on the appeal is the constitutionality of a New York or federal statute. An appeal as of right may also be taken 'upon stipulation for judgment absolute' from an appellate division order granting a new trial, where the appellant (who prevailed in the lower court and therefore wants to avoid a new trial) agrees that if the Court of Appeals finds the appellate division was within its powers in granting a new trial then he will forfeit the favourable lower court judgment as well as the possibility of a new trial. An appeal as of right is also available where there was a previous appeal to the appellate division but that order could not be appealed because it was not final (ie, case was remanded to lower court for further proceedings), and where the lower court proceedings have since been concluded, such that the only issues on appeal are those previously decided by the appellate division. Also, in certain circumstances, a final determination in an administrative proceeding or arbitration may be appealed as of right to the Court of Appeals.

CPLR 5602 governs appeals by permission to the Court of Appeals. Generally, permission to appeal may be sought first from the appellate division and then from the Court of Appeals, or from the Court of Appeals directly, in matters originating in the supreme court, county court, surrogate's court, family court, court of claims, an administrative agency or an arbitration and with respect to an appellate division order finally determining the action and that is not appealable as of right or a final judgment of such court or agency where the appellate division has made an order on a prior appeal in the action that necessarily affects the final determination and is not appealable as of right. In matters originating in the lower courts and with respect to the same types of final judgments and appellate division orders, permission to appeal may only be sought from the appellate division. Permission to appeal an appellate division order that does not finally determine an action (with some exceptions) may also only be sought from the appellate division.

**21 Foreign judgments**

What procedures exist for recognition and enforcement of foreign judgments?

Generally, New York courts recognise judgments of foreign nations as long as the foreign adjudicating body exercised proper jurisdiction and the judgment was not obtained by fraud or in violation of New York public policy. The Uniform Foreign Country Money Judgments Recognition Act (CPLR article 53) provides that a money judgment obtained in a foreign country – other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters – is conclusive to the extent that it grants or denies recovery of a sum of money and is final, conclusive and enforceable where rendered. A foreign judgment is enforceable by an action on the judgment, a motion for summary judgment in lieu of complaint, or in a pending action by counterclaim, cross-claim or affirmative defence.

**22 Foreign proceedings**

Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

CPLR 3102(e) is an adaptation of the Uniform Foreign Depositions Act and provides that a witness in-state may be compelled to testify in a foreign action.

## Arbitration

**23 UNCITRAL Model Law**

Is the arbitration law based on the UNCITRAL Model Law?

The Federal Arbitration Act (FAA) governs arbitration proceedings in the US, including international arbitration, and pre-empts inconsistent state law. However, the FAA allows state laws to address matters not covered by the federal statute. The New York arbitration provisions (article 75 of the CPLR) address, inter alia, court appointment of arbitrators, conduct of hearings, evidence and awards (form, timing, confirming and vacating). The New York statute predates the UNCITRAL Model Law and is not based on it.

**24 Arbitration agreements**

What are the formal requirements for an enforceable arbitration agreement?

Arbitration agreements in New York must be in writing but need not be signed as long as there is sufficient proof of the parties' agreement. An oral extension of a written contract containing an arbitration clause also extends the clause and a written agreement supplemental to an agreement containing an arbitration clause extends the clause to disputes under the supplemental agreement.

**25 Choice of arbitrator**

If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

CPLR 7504 empowers the court to appoint an arbitrator if the arbitration agreement does not provide for a method of appointing an arbitrator, if the agreed-upon method is not followed or fails, or if an arbitrator fails to act and a successor has not been appointed. Where a party seeks to challenge an arbitrator, judicial intervention to disqualify an arbitrator in advance of the arbitration hearing sometimes may be secured; more commonly, the court will not intervene until after an award is rendered and the affected party applies for a vacatur. The presumption associated with a disqualifying relationship is waivable if the negatively affected party knows of it and proceeds with the arbitration without objection.

**26 Arbitral procedure**

Does the domestic law contain substantive requirements for the procedure to be followed?

Article 75 of the CPLR sets forth some rules for arbitration, but largely leaves the arbitration procedure to the arbitrators. The statute requires that each arbitrator takes an oath to hear and decide the case faithfully and fairly. Although the hearing is to be conducted by all of the arbitrators, only a majority is needed to determine any question and render an award. Each party has the right to be represented by an attorney. The parties are entitled to be heard, to present evidence and to call and cross-examine witnesses. Subpoenas may be issued by any arbitrator or attorney of record of a party.

The arbitrator must give the parties at least eight days' notice of the time and place of the hearing. The arbitrator can adjourn the hearing as needed. The court, upon application of any party, may direct the arbitrator to proceed promptly with the hearing and determination of the controversy.

**27 Court intervention**

On what grounds can the court intervene during an arbitration?

Generally, the courts restrict their involvement to matters arising before arbitration (arbitrability, timeliness, etc) and after arbitration (to confirm, vacate or modify an award).

However, there are some exceptions: CPLR 3102(c) provides that the court may direct disclosure in aid of arbitration; CPLR 7502(c) provides that a court may provide the provisional remedies of attachment and preliminary injunction where an arbitration award may be rendered ineffectual without such relief; CPLR 7512 provides that, upon the death or incompetency of a party, the court may extend the time within which an application to confirm, vacate or modify the award or to stay arbitration must be made; and CPLR 7513 provides that the court may reduce or disallow any fee or expense associated with an arbitration if it finds it excessive.

**28 Interim relief**

Do arbitrators have powers to grant interim relief?

The CPLR does not address whether arbitrators have the power to grant interim relief.

**29 Award**

When and in what form must the award be delivered?

The award must be 'final and definite', in writing and signed and affirmed by the arbitrator. It must be made within the time fixed by agreement or, in the absence of an agreement, within such time as the court orders; such time may be extended, in writing, by the parties and a failure to object in writing to the lateness of an award prior to its delivery waives the objection. The arbitrator delivers a copy of the award to each party in the manner provided in their agreement or, in the absence of such agreement, personally or by registered or certified mail.

**30 Appeal**

On what grounds can an award be appealed to the court?

Generally, arbitration awards are not reviewable by the courts. CPLR 7511(b)(1) sets forth a narrow list of grounds upon which an arbitration award may be vacated by the court: if the applicant's rights were prejudiced by:

- corruption, fraud or misconduct in procuring the award;
- partiality of an arbitrator appointed as neutral;
- an arbitrator, agency or person making an award exceeded his or her power or so imperfectly executed it that a final and definite award was not made; or
- failure to follow the procedural guidelines set forth in the CPLR, unless the applicant continued with the arbitration with notice of the defect and failed to object.

CPLR 7511(c) provides grounds for modifying an arbitration award, including if there was a miscalculation of figures or a mistake in the description of a person, thing or property referred to in the award; if the arbitrators have awarded upon a matter not submitted to them and the correction can be made without affecting the merits of the decisions made on the issues presented; or if the award is imperfect in a matter of form not affecting the merits of the dispute.

**Update and trends**

Because there are no minimum statutory requirements for mediators in private practice, organisations like the New York State Dispute Resolution Association have begun certification programmes to assure the quality of mediators and raise public confidence in mediation.

The state legislature is considering whether to adopt the Uniform Mediation Act, which is an attempt to bring uniformity to mediation across the country. Most significantly, the proposed legislation would provide for the confidentiality of mediation communications, which would increase the public's willingness to view mediation as an effective and expeditious alternative to litigation.

**31 Enforcement**

What procedures exist for enforcement of foreign and domestic awards?

After obtaining an arbitration award, the prevailing party should 'confirm' it within one year, that is, get a formal court judgment entered on it. This makes the arbitration award akin to an ordinary judgment, thus making available the enforcement devices discussed in question 14.

**32 Costs**

Can a successful party recover its costs?

Generally, unless otherwise provided in the agreement to arbitrate, expenses and fees, not including attorney's fees, are to be paid as provided in the award. Although the CPLR does not directly empower an arbitrator to award attorney's fees, an arbitrator may interpret an arbitration clause providing that the prevailing party may recover the expenses of arbitration to include attorney's fees.

## Alternative dispute resolution

**33 Types of ADR**

What types of ADR process are commonly used? Is a particular ADR process popular?

Types of ADR used in New York include mediation, compulsory arbitration, voluntary arbitration, neutral evaluation, facilitation and

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summary jury trial. Mediation is a consensual process in which a trained neutral third party helps the parties communicate and reach a mutually acceptable outcome. Compulsory arbitration is a non-binding adversarial process in which trained arbitrators hear arguments, consider evidence, and issue a non-binding judgment that can be rejected by either party. Voluntary arbitration is a binding adversarial dispute resolution process. Neutral evaluation is a non-binding confidential process in which a neutral third party hears arguments and offers an evaluation of likely outcomes. Facilitation is where an impartial facilitator assists parties by moderating their discussions. A summary jury trial is an adversarial process in which a non-binding verdict is rendered by a 'jury' after an expedited hearing; the verdict may be binding if the parties agree to it. The most commonly used ADR processes are arbitration and mediation.

**34 Requirements for ADR**

Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

Parties in certain types of disputes are required to consider or to use ADR rather than institute a court proceeding. For example, lawyers in New York State may not sue clients over fee disputes without first providing 30 days' notice of the client's right to use the Attorney-Client Fee Dispute Resolution Program. CPLR 3405 requires that, in courts designated by the chief administrator, certain money actions beyond small claims jurisdiction but below a certain amount be sent to arbitration (disputes of under US$10,000 in New York City Civil Court and US$6,000 in other courts). The Labor Law provides for mandatory arbitration of certain collective bargaining disputes. The Rules for the Commercial Division of the Supreme Court also provide that the judge may order mediation.

## Miscellaneous

**35** Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

No.

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