

# USA – New York



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## I. LITIGATION

### 1 Preliminaries

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

New York is a common law jurisdiction and case law is developed and based on prior precedent. Courts can grant both money damages and equitable relief (*i.e.*, injunctions). The New York Civil Practice Law and Rules (“CPLR”) govern proceedings in civil cases, along with the Rules of the Court of Appeals, 22 N.Y.C.R.R. § 500 *et seq.*; the Rules of the Appellate Division, 22 N.Y.C.R.R. § 600 *et seq.* (1st Dep’t), 22 N.Y.C.R.R. § 670 *et seq.* (2d Dep’t), 22 N.Y.C.R.R. § 800 *et seq.* (3d Dep’t), and 22 N.Y.C.R.R. § 1000 *et seq.* (4th Dep’t); and the Uniform Civil Rules for the Supreme Court and the County Court, 22 N.Y.C.R.R. § 202 *et seq.* (including the Rules of the Commercial Division of the Supreme Court, codified at 22 N.Y.C.R.R. § 202.70 *et seq.*).

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

New York has a unified court system that is divided into four judicial departments consisting of 13 judicial districts. There are over 60 counties of original jurisdiction within the 13 judicial districts.

New York has a three-level appellate system. The Court of Appeals is New York’s highest court. The intermediate appellate courts are the Appellate Divisions, which consist of four departments and two appellate terms. New York’s trial courts consist of Supreme Courts, which generally hear cases involving damages in excess of \$25,000, and lower courts, which handle smaller civil cases that generally involve damages up to \$25,000.

New York also has specialised courts that hear matters related to: (i) real estate (part of the Civil Courts); (ii) children and families (the Family Courts); and (iii) estate administration and probate (Surrogate’s Court). New York’s Court of Claims has exclusive jurisdiction over actions seeking money damages against the State of New York and several state-related entities.

#### 1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe?

- Pleadings: Parties’ claims and defences are set forth in pleadings

(*e.g.*, a complaint, which sets forth the plaintiff’s statement of claims, and an answer, which is a defendant’s response to the plaintiff’s statement of claims and its statement of defence).

- Disclosure (*e.g.*, discovery): Disclosure is an exchange of factual information related to the suit and is governed by CPLR Article 31. Available methods of disclosure include depositions, written interrogatories, and requests for the production of documents. In addition, New York permits limited expert discovery. The discovery phase can last from a few months in smaller cases to several years in complex cases.
- Motion Practice: During both the pleading and disclosure phases, parties may file motions related to issues raised by the pleadings or discovery.
- Trial: Disputed issues of fact are decided by trial. A jury may be demanded in initial pleadings or in a Note of Issue, which is filed at the close of disclosure along with a Certificate of Readiness for Trial.
- Judgment: A judgment is a decision of the court or the jury that determines the parties’ rights and obligations.
- Appeal: In general, most decisions of the trial court are appealable as of right to the intermediate appellate court. CPLR Articles 55-57 and the Rules of the Appellate Courts govern appeals.
- Enforcement: Judgments from both inside and outside the State of New York can be enforced in New York pursuant to CPLR Articles 51-54.

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

In New York, “parties to a contract may freely select a forum which will resolve any disputes over the interpretation or performance of the contract”. *Brooke Grp. v. JCH Syndicate 488*, 87 N.Y.2d 530, 534 (1996). A contract’s forum selection clause “is *prima facie* valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court”. *KMK Safety Consulting, LLC v. Jeffrey M. Brown Assocs., Inc.*, 72 A.D.3d 650, 650 (2d Dep’t 2010).

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

Costs in civil proceedings vary according to the court and the nature of the action. In general, litigants should expect to pay several

hundred dollars to initiate an action or file a record on appeal, and should expect to pay varying amounts under \$100 to file various other documents. Unless otherwise provided by statute, costs, as defined in CPLR Articles 81 and 82, are awarded as of right, but are generally *de minimis*.

Additionally, the CPLR provides for the payment of certain fees (e.g., witness fees for attendance at deposition) in enumerated circumstances during the course of a proceeding. See CPLR Article 80.

New York courts follow the American Rule under which each party bears its own costs of litigation, including attorneys' fees, unless a statute or contract between the parties provides otherwise. There are no rules that require budgeting of costs or attorneys' fees.

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

Litigation funding by non-parties is currently available to help finance a plaintiff's claims. However, lawyers may not advance or guarantee financial assistance to a client, except that a lawyer may: (1) advance court costs and expenses in contingent fee matters; (2) pay court costs and expenses when representing an indigent or *pro bono* client; and (3) pay court costs and expenses where the lawyer's fee is payable as a percentage of the recovery in the action. 22 N.Y.C.R.R. § 1200.0 (Rule 1.8(e)).

Under the New York Rules of Professional Conduct, codified at 22 N.Y.C.R.R. § 1200.0, "a lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense". 22 N.Y.C.R.R. § 1200.0 (Rule 1.5(a)). When determining whether a fee is excessive, a number of factors are considered as set forth in the rule. *Id.* Contingency fees are allowed except in certain circumstances.

Security for costs (ranging between \$250–\$500) is applicable for non-domestic plaintiffs on motion by defendants. See CPLR Article 85.

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

New York prohibits assignment of claims where the claims are acquired solely for the purpose of making money by litigating the claim. See N.Y. Judiciary Law §§ 488-489 (codifying the ancient doctrine of champerty); *Trust for the Certificate Holders of the Merrill Lynch Mortg. Investors, Inc. Mortg. Pass-Through Certificates, Series 1999-C1 v. Love Funding Corp.*, 13 N.Y.3d 190, 199 (2009) ("The champerty statutes are directed at preventing the strife, discord and harassment that would be likely to ensue from permitting attorneys and corporations to purchase claims for the purpose of bringing actions thereon." (Internal quotations omitted)). See response to question 1.6 regarding litigation funding.

**2 Before Commencing Proceedings**

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

Notice is generally not required to initiate a lawsuit. However, notice is required to commence an action for personal injury, wrongful death, or damage to real or personal property against the state of New York, local governments (county, city, town, or village), and many government agencies. N.Y. Gen. Mun. § 50-e. Such notice must be

given within a fixed deadline after the event giving rise to the lawsuit. *Id.* Pre-suit notice may also be required in other circumstances, including, for example, pursuant to a contract between the parties. In medical malpractice cases, attorneys for the plaintiff are required to attach a certificate of merit to the complaint declaring that he or she has consulted with a physician and that there is a reasonable basis for the commencement of the action. CPLR 3012-a.

**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?**

Limitation periods are set forth in Article 2 of the CPLR and generally range between four months and 20 years depending on the type of action.

Generally, contract actions are subject to a six-year statute of limitations. CPLR 213(2). However, contracts for the sale of goods, which are governed by New York's Uniform Commercial Code, are subject to a four-year statute of limitations. U.C.C. Law § 2-725. Fraud claims must be commenced within the greater of six years from the date the cause of action accrued or two years from the time the fraud was discovered, or could with reasonable diligence have been discovered. CPLR 213(8). Generally, claims relating to injury to property are subject to a three-year statute of limitations. CPLR 214(3). Professional malpractice claims (except for medical, dental and podiatric malpractice claims) are also subject to a three-year limitations period. CPLR 213(6). Actions on a money judgment are subject to a 20-year statute of limitations. CPLR 211(b).

CPLR 203(a) states that "[t]he time within which an action must be commenced, except as otherwise expressly prescribed, shall be computed from the time the cause of action accrued to the time the claim is interposed". When a particular cause of action accrues is specific to the type of action and practitioners should be aware that "discovery rules" as well as possible tolling of limitations periods may apply.

Time limitations are generally considered procedural rather than substantive in New York. See *Tanges v. Heidelberg N. Am., Inc.*, 93 N.Y.2d 48, 54-55 (1999).

**3 Commencing Proceedings**

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

A civil action is initiated by filing either a: (1) summons and complaint; or (2) summons with notice, with the clerk of the appropriate court, and paying all associated fees. CPLR 304. In limited circumstances, an action can be initiated by filing a summons and motion for summary judgment *in lieu* of complaint or commencing a special proceeding by petition. CPLR 3213, 402. Initiating papers generally must be served within 120 days after filing.

New York generally requires personal service upon individuals. CPLR 308(1). In addition, an individual defendant may be served by *delivering* the summons to a person of suitable age and discretion at the individual's actual place of business, dwelling place, or usual place of abode **and mailing** the summons to the individual's last known residence or actual place of business within 20 days of one another ("Deliver and Mail"). CPLR 308(2). Service is not

completed until ten days from the filing of the Affidavit of Service, which must be filed within 20 days of the delivering or mailing date, whichever comes later. If repeated attempts to serve personally or by Deliver and Mail have failed, alternative means of service under the CPLR may be employed.

New York also generally requires personal service on corporations. See CPLR 311. Service is made by delivering the summons on any domestic or foreign corporation to an officer, director, managing or general agent, or cashier or assistant cashier, or to any other agent authorised by appointment or law to receive service. Under sections 306 and 307 of the Business Corporation Law, both authorised and unauthorised corporations may be served by personal service on the New York Secretary of State.

Service on an out-of-state person may be effectuated in the same manner as service made in New York if done by: (i) a person that is a New York resident authorised to make service; (ii) a person authorised to make service by the laws where service is to be made; or (iii) a qualified attorney, solicitor, barrister, or the equivalent in such jurisdiction where service is to be made. CPLR 313.

Service of process of foreign proceedings may be effectuated by the means set forth in the Hague Convention on the Service of Process Abroad of Judicial and Extrajudicial Documents as accepted by the United States.

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

In New York, there are four official provisional remedies. Specifically, the official provisional remedies are: (i) attachment (CPLR Article 62); (ii) injunction (CPLR Article 63); (iii) receivership (CPLR Article 64); and (iv) notice of pendency (*i.e.*, *lis pendens*) (CPLR Article 65).

To obtain an order of attachment – *i.e.*, seizing a defendant’s property during the pendency of an action – the plaintiff must seek monetary damages and satisfy one of five specific elements in CPLR 6201. A defendant can discharge the order of attachment through the posting of a bond.

A court may issue a preliminary injunction to require that a defendant maintain a specified *status quo* during the pendency of an action or issue a temporary restraining order to maintain the *status quo* pending determination on a preliminary injunction motion. To obtain an injunction, the party seeking relief must convincingly demonstrate likelihood of success on the merits and irreparable harm with no adequate remedy at law.

On motion by a party (or a non-party with interest in the property involved), a court may order that a temporary receiver take possession of and preserve designated property during the pendency of the action. See CPLR 6401. Such a remedy is appropriate on a showing that “there is a danger that the property will be removed from the state, or lost, materially injured or destroyed”. *Id.*

In connection with a real property action, a notice of pendency may be filed with the county clerk without court involvement, which puts third parties on notice of the claim and its possible impact on defendant’s property. CPLR 6501, 6511.

**3.3 What are the main elements of the claimant’s pleadings?**

All pleadings must contain plain and concise statements in consecutively numbered paragraphs, and each paragraph should contain (if practicable) a single allegation. CPLR 3014. Each cause

of action (or defence) should be stated separately; alternative (and inconsistent) causes of action (or defences) may be pleaded. CPLR 3014. The CPLR provides that a document attached to the pleading is part of the pleading for all purposes. CPLR 3014. A complaint, counterclaim, cross-claim, interpleader complaint, and third-party complaint must contain a demand for relief, which may be pleaded in the alternative. CPLR 3017.

While New York courts allow most causes of action to be pleaded generally, certain causes of action (*e.g.*, fraud and libel) and some defences (*e.g.*, a denial of performance or occurrence of a condition precedent under a contract) require additional specificity. CPLR 3015, 3016. When a party to an action is a corporation, the complaint must specify the corporation’s place of incorporation. CPLR 3015.

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

New York allows a party to amend its pleading once without leave of court: (i) within 20 days of service; (ii) any time before the period for responding to the pleading expires; or (iii) within 20 days after service of a responsive pleading. CPLR 3025(a). A party may amend or supplement its pleadings at any time by leave of court (which “shall be freely given upon such terms as may be just”) or by stipulation of the parties, and the court may permit pleadings to be amended before or after judgment to conform them to the evidence. CPLR 3025(b)-(c). After a party serves an amended or supplemented pleading, the responding party typically has 20 days to respond. CPLR 3025(d).

**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?**

A defendant may move to dismiss one or more causes of actions on the grounds set forth in CPLR 3211, including that the court lacks subject-matter jurisdiction, the plaintiff lacks legal capacity to sue, that documentary evidence establishes a defence to the cause of action, that the pleading fails to state a cause of action, that the court lacks personal jurisdiction over defendant, or for improper service. CPLR 3211.

If a defendant does not move to dismiss the complaint, or the motion to dismiss is denied, the defendant must file a responsive pleading responding to each paragraph of a plaintiff’s complaint and containing any affirmative defences the defendant may have. CPLR 3018. Defendants may bring counterclaims, which are permissive (not mandatory), or cross-claims. CPLR 3019.

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

CPLR 320 sets forth the time period for a defendant to answer a complaint or move to dismiss. Depending on how a summons is served, defendants have either 20 or 30 days to answer the complaint or move to dismiss. CPLR 320. The time to respond can be extended by stipulation between the parties.

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

CPLR 1007 provides that after serving an answer, a defendant may file a third-party complaint against a third party who may be liable

in whole or in part for the plaintiff’s damages. See the response to question 4.1 regarding counterclaims and cross-claims.

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

A defendant is in default if it fails to “appear, plead or proceed to trial”. CPLR 3215. Within one year of the default, the plaintiff may apply to the clerk (if the plaintiff’s claim is for a sum certain or can be computed with certainty) or the court (if it is not a case where the clerk can enter judgment) for a default judgment. CPLR 3215.

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

A defendant can dispute the court’s subject-matter or personal jurisdiction by filing a motion to dismiss pursuant to CPLR 3211. A challenge to the court’s subject-matter jurisdiction cannot be waived and can be raised at any time. An objection to the court’s personal jurisdiction will be waived if not included in a motion to dismiss or, if no motion to dismiss is filed, in an answer. CPLR 3211.

**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?**

Pursuant to CPLR 1001, New York courts may join any non-party to an action where that non-party is necessary for complete relief to be accorded between the existing parties or where the non-party might be inequitably affected by a judgment in the action. Failure to join a necessary party may be raised at any time and may be grounds for dismissal.

Parties are also permitted to join additional parties where common question of law or fact arise out of joint or several claims or defences or out of the same transaction(s) or occurrence(s). CPLR 1002.

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

A court may, upon motion, consolidate actions or order a joint trial of pending actions that involve common questions of fact or law, or issue other orders to avoid unnecessary costs or delay. CPLR 602. Where cases are pending in different Supreme Courts, a court may, upon motion, remove to itself an action pending in another Supreme Court and consolidate it or have it tried together. CPLR 602.

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

A court may sever claims or order separate trials of claims or issues to further convenience or avoid prejudice and may order that certain claims or issues be tried prior to others. CPLR 603.

**6 Duties & Powers of the Courts**

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

Under New York’s Individual Assignment System, each case is generally assigned to a particular judge for its life, including for trial purposes. Upon the filing of a Request for Judicial Intervention, cases are identified by action type and then assigned at random to a judge designated to handle cases of that type. Types of actions include, among others: (i) Tax *Certiorari* and Condemnation; (ii) Mass Tort (Center for Complex Litigation); (iii) General Assignment; and (iv) Commercial Division.

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

Once a Request for Judicial Intervention is filed, the court clerk assigns each case to a different “track” under the Differentiated Case Management system: expedited, standard, or complex. 22 N.Y.C.R.R. § 202.19. The time within which discovery must be completed depends on the track to which a case is assigned. *Id.* The main discovery deadlines are: (i) Expedited: eight months; (ii) Standard: 12 months; and (iii) Complex: 15 months. *Id.*

A preliminary conference must be held within 45 days after the Request for Judicial Intervention is filed. 22 N.Y.C.R.R. § 202.19(b). Routine compliance and status conferences are also scheduled by the court to monitor the parties’ progress. Motions to compel, to stay, and for a protective order are permitted, and courts are empowered to shift costs for dilatory conduct.

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

New York courts are permitted, either on a motion by a party or their own initiative, to impose sanctions for frivolous conduct (as defined in 22 N.Y.C.R.R. § 130-1.1) in the form of costs and reasonable attorney fees. 22 N.Y.C.R.R. §§ 130-1.1, 130-1.2. Courts may also impose sanctions if a party fails to comply with an order compelling discovery. CPLR 3126. The court also has the power to hold parties in civil contempt pursuant to New York Judiciary Law § 753.

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

Upon motion, courts in New York have the power to dismiss all or part of a case under certain circumstances. See CPLR 3211. Cases may also be dismissed for want of prosecution, either on motion or at the court’s own initiative. CPLR 3216.

Courts are permitted to strike “scandalous or prejudicial matter unnecessarily inserted in a pleading” upon motion by a party. CPLR 3024.

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

Courts in New York may enter summary judgment if, “upon all the papers and proof submitted, the cause of action or defence shall be established sufficiently” for the court to enter judgment as a matter of law in favour of any party. CPLR 3212. A court may also enter summary judgment in favour of the non-moving party without the need for a cross-motion. CPLR 3212(b).

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

New York courts can stay proceedings for any just cause unless otherwise prescribed by law. CPLR 2201. In general, discovery is stayed after a party files a motion to dismiss, a motion for summary judgment, or a motion for summary judgment *in lieu* of complaint unless the court orders otherwise. CPLR 3214. However, in cases before the Commercial Division, “[t]he court will determine, upon application of counsel, whether discovery will be stayed, pursuant to CPLR 3214(b), pending the determination of any dispositive motion”. 22 N.Y.C.R.R. § 202.70 (Rule 11(d)).

**7 Disclosure**

**7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents?**

New York permits broad discovery of “all matter material and necessary in the prosecution or defence of an action, regardless of the burden of proof”. CPLR 3101. Methods of discovery include written interrogatories, discovery and inspection of documents or property, physical and mental examination of persons, requests for admission, depositions, demands for addresses, and subpoenas to non-parties. CPLR 3102, 2301.

Disclosure prior to the commencement of an action is permitted by court order to aid in bringing an action, to preserve information, or to aid in arbitration. CPLR 3102(c).

Documents that are privileged or subject to the attorney work-product doctrine are not discoverable. CPLR 3101 (b)-(c). Both the Uniform Civil Rules for the Supreme Court and the County Court and the Rules of the Commercial Division of the Supreme Court have provisions related to e-discovery. The Uniform Civil Rules for the Supreme Court and the County Court require that attorneys attending a preliminary conference “be sufficiently versed in matters relating to their clients’ technological systems to discuss competently all issues relating to electronic discovery”. 22 N.Y.C.R.R. § 202.12(b). The Rules of the Commercial Division of the Supreme Court require that counsel for the parties confer regarding anticipated electronic discovery issues prior to the preliminary conference, and address electronic discovery issues with the court at the preliminary conference. 22 N.Y.C.R.R. § 202.70 (Rule 8). The Rules of the Commercial Division of the Supreme Court also provide guidance on obtaining electronic discovery from non-parties. 22 N.Y.C.R.R. § 202 Appendix A.

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

Privileged material is not discoverable; nor is attorney work product. CPLR 3101 (b)-(c). New York recognises a number of privileges, including attorney-client privilege, spousal privilege, and clergy-penitent privilege. CPLR 4502, 4503, 4505. Communications between a client or patient and their physician, dentist, podiatrist, chiropractor, nurse, psychologist, or social worker are also privileged and generally inadmissible. CPLR 4504, 4507, 4508.

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

Third parties can be subpoenaed to: (i) produce documents; (ii) attend a deposition, trial, or other evidentiary proceeding; or (iii) both. CPLR Article 23. Subpoenas must be served in the same manner as a summons, and the party issuing the subpoena must provide the subpoenaed third party, in advance, with authorised travelling expenses and one day’s witness fee. CPLR 2303. Subpoenas for the production of documents or things must be served on each party to the action promptly after being served on the third party. CPLR 2303. Deposition subpoenas must be served on each party to the action 20 days before the deposition is taken, unless the court orders otherwise. CPLR 3107.

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

New York courts have broad powers to supervise discovery, either upon motion by a party or on its own initiative without notice. CPLR 3104. A judge may also select a referee to supervise discovery, or the parties can stipulate that an attorney act as a referee. CPLR 3104. A judge or referee can decide motions to compel discovery and other motions allowable under CPLR Article 31.

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

Parties often enter into stipulated confidentiality orders limiting the reach of discovery and the use of confidential business information and trade secrets. Such stipulated confidentiality orders are routinely granted by the courts. In addition, certain confidential personal information, such as social security numbers, financial account numbers, and taxpayer and employer identification numbers, must be omitted or redacted in most court filings.

**8 Evidence**

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

In New York, the law of evidence comprises a combination of case law and statutory rules. The statutory rules are primarily set forth in CPLR Article 45.

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

“In New York, the general rule is that all relevant evidence is admissible unless its admission violates some exclusionary rule.

Evidence is relevant if it has any tendency in reason to prove the existence of any material fact.” *People v. Scarola*, 71 N.Y. 2d 769, 777 (1998) (internal citations omitted). In addition, relevant evidence may be excluded at the court’s discretion if its probative value would be outweighed “by the danger that it [would] unfairly prejudice the other side or mislead the jury”. *Id.*

Examples of types of evidence that are generally not admissible include: privileged information; hearsay (with numerous exceptions set forth in the CPLR and case law); evidence of liability insurance; and offers to compromise.

Expert testimony is generally admissible. New York courts use the *Frye* test to evaluate expert testimony. The *Frye* test requires that the expert’s testimony be based on techniques that are “generally accepted” within the scientific community. *See Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 446 (2006).

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

Fact witnesses must be competent to testify and may only testify to matters within their personal knowledge. Fact witnesses generally cannot offer lay opinions. Fact witness affidavits must be based on personal knowledge and sworn to under oath.

Deposition testimony may be used at trial to impeach a witness and may be used *in lieu* of calling a witness in certain circumstances, including where a witness is unavailable. *See CPLR 3117.*

**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?**

In cases outside of the Commercial Division, parties must generally identify any expert witness they intend to call 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”. CPLR 3101(d)(1). Absent a court order, in general, expert reports are not required to be exchanged by the parties, nor are experts subject to deposition. *Id.*

In Commercial Division cases, the parties must “confer on a schedule for expert disclosure -- including the identification of experts, exchange of reports, and depositions of testifying experts”. 22 N.Y.C.R.R. § 202.70 (Rule 13(c)). Generally, expert reports must be exchanged and must contain specific information as set forth in the rule. *Id.*

Expert testimony must be based on facts and not speculation. Courts in New York disagree about whether an expert may opine on the ultimate issue in the case.

Although rarely used outside of the matrimonial context, New York courts have inherent power to appoint experts, and parties can stipulate to such appointments. Expert witnesses are most commonly retained by the parties and do not owe duties to the court except to testify truthfully.

**9 Judgments & Orders**

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

Judges in New York are permitted to enter final and non-final orders and judgments. Courts may also enter partial judgments disposing of one or more of a party’s claims or against one or more parties. CPLR 5012.

Courts may enter various orders during the course of a matter, including orders related to the pleadings, discovery, and other requests for relief. Pursuant to CPLR 3001, courts may also enter declaratory judgments as to the rights and legal relations between parties to a justiciable controversy. Courts may also grant equitable relief, including temporary or permanent injunctions.

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

As set forth in the response to question 1.5, courts are entitled to grant costs, which are generally *de minimis*, and New York courts follow the American Rule under which each party bears its own costs of litigation, including attorneys’ fees, unless a statute or contract between the parties provides otherwise.

Courts, and in some cases, juries, may make rulings on damages. Outside of the trial context, the court can hold an inquest to determine the amount of damages if damages are not in a set amount.

Interest is calculated at a rate of 9% *per annum* unless otherwise provided by statute. CPLR 5004. A court may award pre-judgment interest depending on the cause of action. CPLR 5001. Interest is also awarded from the date of verdict or decision through the entry of final judgment. CPLR 5002. All money judgments bear interest from the date of entry of final judgment. CPLR 5003.

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

CPLR Articles 51 and 52 govern the enforcement of New York judgments. To enforce a New York judgment, a party may engage in a number of devices, including the appointment of a receiver, replevin, property and income executions, levies, restraining notices, and the issuance of information subpoenas to discover assets.

CPLR Article 53 applies to any foreign judgment that is final, conclusive, and enforceable where rendered, and provides that such judgments will be recognised and enforced except in limited, specified circumstances. CPLR 5302-5304. Foreign arbitration awards are recognised and enforced in New York pursuant to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which provides for the enforcement of arbitration awards of more than 145 countries, except in limited circumstances as set forth in the Convention.

Judgments validly entered by the courts of another U.S. state that are filed with any New York county clerk are entitled to full faith and credit in New York and will be treated and enforced in the same manner as a New York judgment. CPLR 5402.

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

Generally, every final judgment, and even most orders, are appealable as of right to the appellate division. An appeal is generally initiated by filing a notice of appeal within specified time frames pursuant to CPLR 5513. In some circumstances, appeals may be made directly to the Court of Appeals. See CPLR 5602.

**10 Settlement**

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

As discussed below, New York courts encourage settlement and the use of alternative dispute resolution (“ADR”). The Commercial Division in New York County Supreme Court operates an ADR programme. Cases are assigned to the ADR programme by: (i) a referral from a Commercial Division Justice; or (ii) inclusion in the Commercial Division’s pilot Mandatory ADR programme, which assigns every fifth case to mandatory mediation. In addition, certain courts require mandatory arbitration in cases involving claims for money damages only where each cause of action is for less than \$6,000, exclusive of costs and interest. 22 N.Y.C.R.R. § 28.2.

**II. ALTERNATIVE DISPUTE RESOLUTION**

**1 Preliminaries**

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

Arbitration and mediation are the most common methods of alternative dispute resolution used in New York. In general, parties engage in arbitration (which is typically binding) or mediation (which is typically non-binding) by agreement.

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

In general, mediation and arbitration are conducted according to rules and procedures agreed upon by the parties. CPLR Article 75 sets forth procedures to be followed if the parties’ agreement is silent with respect to certain aspects of the arbitration. As set forth above, the Commercial Division in New York County Supreme Court operates an alternative dispute resolution programme with its own set of rules and procedures.

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

New York courts strongly encourage alternative dispute resolution measures, such as arbitration and mediation, under appropriate circumstances. It would be unusual for a court to have a blanket prohibition on alternative dispute resolution.

**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 your jurisdiction in this context?**

CPLR 7502 provides that courts in the county in which an arbitration is pending may grant provisional remedies, such as an order of attachment or a preliminary injunction. A party can compel arbitration pursuant to CPLR 7503, and the grant of such a motion stays any pending or subsequent action, or so much of the action as is referred to arbitration. CPLR 7503.

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

Mediation is generally non-binding, and, in most circumstances, voluntary. Settlements reached after mediation do not need to be sanctioned by a court unless court approval is otherwise required.

Arbitration is generally binding and is subject to limited judicial review absent agreement by the parties. CPLR 7511 provides that a court may vacate or modify an award in specific and limited circumstances on application of a party made within 90 days of the arbitration award.

**2 Alternative Dispute Resolution Institutions**

**2.1 What are the major alternative dispute resolution institutions in your jurisdiction?**

Most major national and international alternative dispute resolution organisations provide services in New York, including the American Arbitration Association, JAMS, the International Institute for Conflict Prevention & Resolution (CPR), and the International Chamber of Commerce. In addition, entities such as FINRA operate alternative dispute resolution programs.

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# Drinker Biddle

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