

# Global Litigation Survey

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A survey of 161 jurisdictions, produced by the Allen & Overy Global Law Intelligence Unit and carried out by Allen & Overy's Litigation Department, together with global relationship firms

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2015

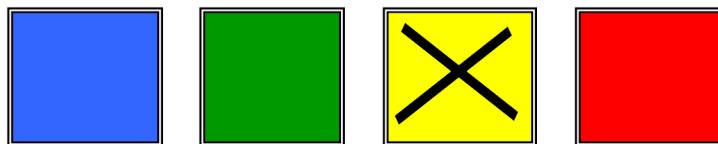


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Legal ratings of 161 jurisdictions with commentary

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Litigation Department together with global relationship firms

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# Preface

There is no question that the rise in legal risks occasioned by litigation has been quite startling and a cause for dismay. Adverse litigation can lead to unexpected and large losses, penalties for senior managers and sometimes disqualifications, as well as high costs.

We surmise that these risks have increased because of the unmanageable volume of law internationally, the intensification of regulatory regimes, the increase in amounts involved reflecting GDP, the fact that almost all of the world's jurisdictions are part of the world economy, that the law is volatile and that there is great diversity around the world, not only as to what the law is but as to how it is applied.

The law is supposed to reduce risk, not to increase it. It is supposed to be our ally, not our enemy.

We have developed a methodology for colour-coded ratings of key indicators in legal areas which are intended to present risks in a dramatic and visible way at a glance. The objective is to enable those affected to reach a quick strategic view without legalistic baggage and obfuscation – something which is clean and straightforward. We hope that this methodology of presenting the law will be useful to the international business community and others.

This is probably the largest and most pioneering litigation survey which has ever been done and I would congratulate all the law firms around the world who have contributed.

## **Philip R Wood CBE, QC (Hon)**

Head, Allen & Overy Global Law Intelligence Unit  
Visiting Professor in International Financial Law, University of Oxford  
Yorke Distinguished Visiting Fellow, University of Cambridge  
Visiting Professor, Queen Mary College, University of London



# Introduction

The globalisation of business has meant that commercial counterparties come from increasingly diverse jurisdictions. Disputes also increasingly involve multiple jurisdictions. Parties correspondingly need a broader, more international, awareness of different legal systems and risks, including the approach of a counterparty's local courts to fundamental legal questions. Will a counterparty's courts apply the law chosen by the parties to govern a contract, even where there is no connection between that choice and the contract (or the parties)? Will the courts of a particular country assume jurisdiction if the parties have agreed that they should? Conversely, will those courts respect a foreign jurisdiction clause? How reliable are the chosen courts in resolving disputes under the contract? Can a judgment of the courts be enforced in another jurisdiction where the counterparty has its assets? This new edition of the Allen & Overy Global Litigation Survey, which has been conducted in conjunction with law firms from across the world, includes responses from 161 jurisdictions and addresses these essential questions to be considered when choosing to litigate – or facing litigation – in a particular forum.

The survey also provides a useful overview of the approach of the courts in 161 legal systems. The survey considers, for example, whether local courts will generally give effect to a written sovereign immunity waiver clause. How easily can a freezing order be obtained to prevent a defendant from dissipating its assets before judgment (if at all)? How wide is compulsory disclosure in proceedings? Are class actions permitted? And, once a party has obtained a judgment in its favour, what proportion of its costs can it recover? The responses to these questions are enlightening and sometimes surprising, and, we hope, will offer valuable information to commercial organisations worldwide.

In order to help readers quickly and easily assess risks and opportunities associated with litigating in a given jurisdiction, the results of the survey are presented using simple colour-coded charts and maps. Ten key indicators of the litigation process have been selected and are evaluated in each jurisdiction by the assignment of a colour rating (ranging from blue through green and yellow to red), which best captures the position in that jurisdiction. Each of the colour ratings is accompanied by brief notes and additional data explaining the selection country by country, but the broad position in all the jurisdictions can always be seen and compared at a glance. This innovative technique of rating legal issues – allowing complex legal data to be synthesized and distilled – has been devised by Philip Wood CBE, QC (Hon) of our Global Law Intelligence Unit and is intended to enable surveys of this kind to be conducted swiftly and at a fraction of the cost generally involved.

Last, but not least, the survey is also intended to act as a helpful resource for local counsel contacts in each of the jurisdictions surveyed. We have included contact details of all participating lawyers at the end of their individual entry.

We would like to express our thanks to all the law firms that have contributed. We are extremely grateful to them for providing their expertise, and it is only as a result of their assistance that we have been able to produce such a comprehensive and informative publication.

### Note on the second edition

This new edition represents not only an extensive updating of the entire survey but also an expansion of its geographical scope to encompass a total of 161 jurisdictions. The 25 new entries include jurisdictions as diverse as **Bahrain, Bangladesh, Cayman Islands, Cuba, Jamaica, Lebanon, Macau, Malawi, Paraguay, Rwanda and Senegal**. As well as giving the survey broader scope (with new entries coming from all corners of the globe and a range of different legal traditions), the new entries also provide greater depth in certain areas – for example, a significant increase in African jurisdictions covered. In addition, new entries come both from jurisdictions with established international business links and those that have recently seen an increase in international trade.

Many respondents took the revision process as an opportunity to elaborate on earlier views and to add detail to their entries, causing previously unseen trends to emerge. For instance, we can now see a proliferation of commercial courts in Sub-Saharan Africa.

Of the many legislative changes reported by our respondents the recasting of the Brussels Regulation has been the most significant, the 28 EU Member States representing almost one fifth of the surveyed jurisdictions. A full analysis is to be found at Annex B.

This second edition offers an evaluation of the essentials of litigation in 161 jurisdictions, a truly global survey which, as far as we know, remains the only one of its kind.



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# Overview

## Using the survey

This survey contains a wealth of information about commercial litigation worldwide. To allow the reader to find information quickly and to use the survey in different ways depending on areas of particular interest, the survey is divided into the following sections:

- **Key indicators** identifies the ten legal indicators against which the litigation process in each jurisdiction is measured in the survey (*see page 12*).
- The **chart of results** shows the colour rating assigned by each contributing jurisdiction for all of the key indicators, giving the reader an instant picture of the results globally (*from page 13*).
- **Maps and analysis** looks at the results for each key indicator in more depth and includes detailed guidelines on the meaning of the colour ratings, as well as colour-coded world maps and analysis (*from page 25*).
- **Results and commentary by jurisdiction** presents the colour ratings and commentary provided by each survey respondent alphabetically by jurisdiction (*from page 67*).
- **Annex A – Rome I** acts as a reference point for further detail on Regulation (EC) No 593/2008 of 17 June 2008, the European Union (EU) Regulation on the determination of the governing law of contracts (*on page 347*).
- **Annex B – the Brussels regime** summarises the effect of Council Regulation (EC) No 44/2001 of 22 December 2000, now updated and "recast" by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 (the **Brussels Regulation**), the Brussels Convention 1968 and the Lugano Convention 2007 on jurisdiction and the enforcement of judgments in civil and commercial matters in EU Member States, European Economic Area (EEA) countries and related overseas territories (*on page 348*).
- **Key contacts at Allen & Overy** gives details of key Allen & Overy points of contact around the world (*from page 352*).

## Levels of law

We distinguish between four levels of law, namely:

- **Black-letter law** or what the law actually says, sometimes known as law on the books.
- **Application of the law** where courts and tribunals have a discretion (for example, whether there is an emphasis on the literal and predictable interpretation of a contract, whether the judicial authorities tend to support retail individuals as opposed to businesses or banks, or tend to support domestic residents as opposed to foreigners).
- The **legal infrastructure**, such as the independence and competence of the judiciary and the time taken to get a matter heard.
- Whether the jurisdiction upholds the basic **rule of law**.

In many jurisdictions, it is necessary to take all of these levels into account, and an adverse assessment of one or more of the levels should be taken into consideration in the approach to the key indicators and their rating. In addition, it should be remembered that colour-coding involves a weighting of possibly several complex factors and there may therefore be a degree of subjectivity.

## Focus

This survey is concerned with commercial civil litigation and does not cover criminal, family or administrative/public law litigation.

It should be noted that the contents of this survey are not legal advice for strict reliance purposes. It is always necessary to obtain specific advice in relation to a particular dispute or transaction from relevant jurisdictions. If you have a query in relation to any of the jurisdictions featured you are invited to contact the contributor from that jurisdiction.

# Key indicators

We have selected the following ten legal indicators relevant to commercial parties that are deciding whether to litigate or are facing litigation in a particular forum.

- 1. Governing law:** Our courts will generally apply a foreign law as the governing law of a contract if it is expressly chosen by the parties to decide the rights and obligations under the contract, subject only to local public policy and mandatory rules and even if there is no connection between the choice of law and the contract or the parties.
- 2. Jurisdiction – parties choose your courts:** Our courts will generally assume jurisdiction over a contract and dispute if the contract states that the parties have agreed that our courts should have jurisdiction (a choice of court or jurisdiction agreement), but neither the parties nor the dispute have any connection with our jurisdiction.
- 3. Jurisdiction – parties choose a foreign court:** If a clause in a contract states that a foreign court is to have exclusive jurisdiction over a contract, our courts will almost always decline jurisdiction even though they would have had jurisdiction in the absence of the clause.
- 4. State (or sovereign) immunity:** Our courts will normally give effect to a written waiver in a contract of state immunity from jurisdiction and enforcement over the local assets of a foreign state, including pre-judgment freezes on assets.
- 5. Pre-judgment arrests or freezing orders:** Our courts will normally grant an order prior to judgment to prevent a defendant from dissipating its assets.
- 6. Disclosure or discovery of documents in litigation:** In a contractual dispute, compulsory disclosure/discovery is very limited.
- 7. Class actions:** Class actions or collective actions, whereby all members of the class are bound by a judgment, are not usually possible in our jurisdiction.
- 8. Enforcement of foreign judgments:** Our courts will enforce a foreign judgment for a fixed sum of money.
- 9. Costs:** The losing party typically has to pay most of the litigation costs of the winning party in the case of a dispute on a commercial contract.
- 10. Standards of the courts – high value disputes:** Our courts are generally efficient and reliable in the case of high value commercial disputes involving cross-border parties and issues (including, for example, large bank loans to corporations (secured or unsecured), bond issues, derivative contracts, sale and purchase of companies, takeovers, joint ventures, high value supply contracts and large insolvencies and restructurings).

# Chart of results

The colour-coded chart on the following pages shows the colour rating assigned by the contributing law firm in each jurisdiction for each key indicator. Where cells are split into two colours, the answer falls between the two colour categories.

The detailed guidelines followed by contributors when choosing a colour rating for each key indicator are set out in full in **Maps and analysis** (*from page 25*). However, the overall system of colour scaling can be summarised as follows:

BLUE	GREEN	YELLOW	RED	WHITE
Indicates that the legal position is unrestricted, not bound by rules, relaxed and therefore favourable from the point of view of a commercial party with a high value contractual claim.	Intermediate.	Intermediate.	Indicates that there are prohibitions, strict legal restrictions or statutory bars, so that the position is unfavourable from the point of view of a commercial party with a high value contractual claim.	Can't say/not applicable.

Hence the scale ranges from freedom to strict control, from liberalism to legal prevention, and is represented by colours in the spectrum: blue, green, yellow and red. This scale does not measure whether a particular approach is or is not justifiable or reasonable. The scale is neutral in terms of legal values and only seeks to measure the degree of freedom as against legal restriction.

The advantage of this method of scaling is that it is consistent and it is not necessary to engage in policy evaluations. In addition, one can see at a glance whether a jurisdiction is overall free or rule-bound.

True	False	Can't say/not applicable

	1. Governing law	2. Jurisdiction: home court	3. Jurisdiction: foreign court	4. State (or sovereign) immunity	5. Pre-judgment
	Choice of foreign law effective?	Choice of home court effective?	Choice of foreign court respected?	State immunity waiver effective?	Pre-judgment arrests or freezing orders normally granted?
Albania	Blue	Blue	Blue	Blue	Blue
Algeria	Yellow	Blue	Blue	White	Green
Angola	Green	Yellow	Green	Yellow	Green
Anguilla	Blue	Green	Red	White	Blue
Argentina	Blue	Blue	Blue	Green	Green
Armenia	Blue	Green	Green	Blue	Blue
Australia	Blue	Blue	Blue	Blue	Blue
Austria	Blue	Blue	Blue	White	Green
Azerbaijan	Green	Yellow	Green	White	Green
Bahrain	Blue	Blue	Blue	Blue	Blue
Bangladesh	Blue	Blue	Blue	White	Green
Barbados	Blue	Blue	Blue	White	Green
Belarus	Green	Blue	Green	Yellow	Green
Belgium	Blue	Blue	Blue	Blue	Blue
Belize	Blue	Green	Blue	Blue	Blue
Benin	Green	Blue	Blue	White	Blue
Bermuda	Blue	Blue	Blue	Green	Green
Bolivia	Red	Green	Yellow	Blue	Green
Bosnia and Herzegovina	Blue	Blue	Blue	White	Green
Botswana	Blue	Blue	Blue	White	Green
Brazil	Yellow	Blue	Yellow	Green	Blue
British Virgin Islands (BVI)	Blue	Blue	Blue	Blue	Blue
Brunei	Yellow	Green	Blue	Green	Green
Bulgaria	Green	Blue	Green	Blue	Blue
Burkina Faso	Green	Blue	Blue	Blue	Blue
Burundi	Blue	Blue	Blue	Blue	Green
Cameroun	Green	Blue	Blue	Blue	Green
Canada	Blue	Blue	Blue	Blue	Green
Cape Verde	Blue	Blue	Blue	Blue	Blue
Cayman Islands	Blue	Blue	Blue	Blue	Blue
Chad	Blue	Blue	Blue	Blue	Blue

6. Disclosure Disclosure/ discovery very limited?	7. Class actions Class actions not usually allowed?	8. Enforcement of foreign judgments Foreign judgments enforced?	9. Costs Losing party typically pays most of the costs?	10. Standards of the courts Courts usually reliable for high value commercial disputes?	
					Albania
					Algeria
					Angola
					Anguilla
					Argentina
					Armenia
					Australia
					Austria
					Azerbaijan
					Bahrain
					Bangladesh
					Barbados
					Belarus
					Belgium
					Belize
					Benin
					Bermuda
					Bolivia
					Bosnia and Herzegovina
					Botswana
					Brazil
					British Virgin Islands (BVI)
					Brunei
					Bulgaria
					Burkina Faso
					Burundi
					Cameroun
					Canada
					Cape Verde
					Cayman Islands
					Chad

	<b>1. Governing law</b>	<b>2. Jurisdiction: home court</b>	<b>3. Jurisdiction: foreign court</b>	<b>4. State (or sovereign) immunity</b>	<b>5. Pre-judgment</b>
	Choice of foreign law effective?	Choice of home court effective?	Choice of foreign court respected?	State immunity waiver effective?	Pre-judgment arrests or freezing orders normally granted?
Chile					
China (PRC)					
Colombia					
Democratic Republic of Congo					
Costa Rica					
Croatia					
Cuba					
Cyprus					
Czech Republic					
Denmark					
Djibouti					
Dubai International Financial Centre (DIFC)					
Ecuador					
Egypt					
El Salvador					
England and Wales					
Eritrea					
Estonia					
Finland					
France					
Georgia					
Germany					
Ghana					
Gibraltar					
Greece					
Grenada					
Guatemala					
Guernsey					
Guinea					
Hong Kong					
Hungary					
Iceland					
India					
Indonesia					

<b>6. Disclosure</b>	<b>7. Class actions</b>	<b>8. Enforcement of foreign judgments</b>	<b>9. Costs</b>	<b>10. Standards of the courts</b>	
Disclosure/ discovery very limited?	Class actions not usually allowed?	Foreign judgments enforced?	Losing party typically pays most of the costs?	Courts usually reliable for high value commercial disputes?	
					Chile
					China (PRC)
					Colombia
					Democratic Republic of Congo
					Costa Rica
					Croatia
					Cuba
					Cyprus
					Czech Republic
					Denmark
					Djibouti
					Dubai International Financial Centre (DIFC)
					Ecuador
					Egypt
					El Salvador
					England and Wales
					Eritrea
					Estonia
					Finland
					France
					Georgia
					Germany
					Ghana
					Gibraltar
					Greece
					Grenada
					Guatemala
					Guernsey
					Guinea
					Hong Kong
					Hungary
					Iceland
					India
					Indonesia

	<b>1. Governing law</b>	<b>2. Jurisdiction: home court</b>	<b>3. Jurisdiction: foreign court</b>	<b>4. State (or sovereign) immunity</b>	<b>5. Pre-judgment</b>
	Choice of foreign law effective?	Choice of home court effective?	Choice of foreign court respected?	State immunity waiver effective?	Pre-judgment arrests or freezing orders normally granted?
Iran	Green	Red	Red		Green
Iraq	Yellow	Red	Red	Blue	Blue
Ireland	Blue	Blue	Blue	Blue	Green
Isle of Man	Blue	Blue	Green	Yellow	Blue
Israel	Blue	Blue	Blue		Blue
Italy	Green	Green	Green	Yellow	Blue
Jamaica	Blue	Blue	Blue		Blue
Japan	Blue	Blue	Blue	Blue	Blue
Jersey	Blue	Blue	Blue		Blue
Jordan	Blue	Blue	Blue	Blue	Blue
Kazakhstan	Blue	Yellow	Blue	Blue	Blue
Kenya	Blue	Blue	Green	Blue	Blue
South Korea	Blue	Yellow	Green	Blue	Green
Kuwait	Blue	Red	Red	Red	Green
Kyrgyzstan	Green	Red		Blue	Blue
Laos	Yellow	Red	Yellow	Green	Green
Latvia	Blue	Blue	Blue		Blue
Lebanon	Blue	Blue	Blue	Blue	Green
Liberia	Blue	Blue	Blue	Blue	Blue
Liechtenstein	Blue	Blue	Blue	Blue	Blue
Lithuania	Blue	Blue	Blue	Blue	Blue
Luxembourg	Blue	Blue	Blue	Green	Blue
Macau	Green	Yellow	Green	Red	Green
Macedonia	Yellow	Red	Blue	Blue	Green
Madagascar	Blue	Blue	Blue		Blue
Malawi	Blue	Blue	Blue	Blue	Blue
Malaysia	Blue	Green	Green		Blue
Malta	Blue	Blue	Blue		Blue
Mauritania	Blue	Blue	Blue	Blue	Yellow
Mauritius	Blue	Green	Green	Blue	Blue
Mexico	Green	Red	Yellow	Yellow	Green
Moldova	Blue	Red	Blue	Blue	Green
Monaco	Blue		Green		Blue
Mongolia	Yellow	Blue	Blue	Blue	Blue

<b>6. Disclosure</b>	<b>7. Class actions</b>	<b>8. Enforcement of foreign judgments</b>	<b>9. Costs</b>	<b>10. Standards of the courts</b>	
Disclosure/ discovery very limited?	Class actions not usually allowed?	Foreign judgments enforced?	Losing party typically pays most of the costs?	Courts usually reliable for high value commercial disputes?	
					Iran
					Iraq
					Ireland
					Isle of Man
					Israel
					Italy
					Jamaica
					Japan
					Jersey
					Jordan
					Kazakhstan
					Kenya
					South Korea
					Kuwait
					Kyrgyzstan
					Laos
					Latvia
					Lebanon
					Liberia
					Liechtenstein
					Lithuania
					Luxembourg
					Macau
					Macedonia
					Madagascar
					Malawi
					Malaysia
					Malta
					Mauritania
					Mauritius
					Mexico
					Moldova
					Monaco
					Mongolia

	<b>1. Governing law</b>	<b>2. Jurisdiction: home court</b>	<b>3. Jurisdiction: foreign court</b>	<b>4. State (or sovereign) immunity</b>	<b>5. Pre-judgment</b>
	Choice of foreign law effective?	Choice of home court effective?	Choice of foreign court respected?	State immunity waiver effective?	Pre-judgment arrests or freezing orders normally granted?
Montenegro	Yellow	Blue	Blue	Blue	Blue
Morocco	Green	Blue	Green	Blue	Blue
Mozambique	Blue	Blue	Blue	Blue	Blue
Myanmar	Blue	Blue	Blue	Red	Red
Namibia	Blue	Green	Green	White	Yellow
Nepal	Red	Red	Green	Blue	Blue
The Netherlands	Blue	Blue	Blue	Blue	Blue
New Zealand	Blue	Green	Green	Blue	Green
Nicaragua	Green	Blue	Blue	Blue	Blue
Nigeria	Blue	Blue	Blue	Blue	Blue
Norway	Blue	Green	Blue	Green	Blue
Oman	Yellow	Blue	Yellow	Yellow	Blue
Pakistan	Green	Green	Green	Red	Blue
Panama	Blue	Blue	Red	Blue	Blue
Paraguay	Red	Yellow	Blue	White	Green
Peru	Green	Blue	Blue	White	Green
Philippines	Green	Green	Green	Blue	Blue
Poland	Blue	Blue	Blue	Blue	Blue
Portugal	Blue	Blue	Blue	Blue	Green
Puerto Rico	Green	Green	Blue	White	Yellow
State of Qatar	Blue	Blue	Blue	Green	Yellow
Qatar Financial Centre (QFC)	Blue	Green	Green	White	Blue
Romania	Blue	Blue	Blue	Blue	Green
Russian Federation	Green	Blue	Green	Blue	Yellow
Rwanda	Blue	Red	Blue	Blue	Blue
Saudi Arabia	Red	White	Red	White	Green
Scotland	Blue	Blue	Blue	Blue	Blue
Senegal	Green	Green	Green	Yellow	Blue
Serbia	Yellow	Yellow	Blue	Blue	Green
Seychelles	Blue	Blue	Blue	White	Green
Singapore	Blue	Blue	Blue	Blue	Blue
Slovakia	Blue	Blue	Blue	White	Blue
Slovenia	Blue	Blue	Green	Blue	Blue
Somalia	Yellow	Yellow	Green	Yellow	Green

<b>6. Disclosure</b>	<b>7. Class actions</b>	<b>8. Enforcement of foreign judgments</b>	<b>9. Costs</b>	<b>10. Standards of the courts</b>	
Disclosure/ discovery very limited?	Class actions not usually allowed?	Foreign judgments enforced?	Losing party typically pays most of the costs?	Courts usually reliable for high value commercial disputes?	
					Montenegro
					Morocco
					Mozambique
					Myanmar
					Namibia
					Nepal
					The Netherlands
					New Zealand
					Nicaragua
					Nigeria
					Norway
					Oman
					Pakistan
					Panama
					Paraguay
					Peru
					Philippines
					Poland
					Portugal
					Puerto Rico
					State of Qatar
					Qatar Financial Centre (QFC)
					Romania
					Russian Federation
					Rwanda
					Saudi Arabia
					Scotland
					Senegal
					Serbia
					Seychelles
					Singapore
					Slovakia
					Slovenia
					Somalia

	1. Governing law	2. Jurisdiction: home court	3. Jurisdiction: foreign court	4. State (or sovereign) immunity	5. Pre-judgment
	Choice of foreign law effective?	Choice of home court effective?	Choice of foreign court respected?	State immunity waiver effective?	Pre-judgment arrests or freezing orders normally granted?
Somaliland	Yellow	Green	Yellow		Blue
South Africa	Blue	Red	Green	Blue	Green
Spain	Blue	Green	Blue		Blue
Sri Lanka		Blue		Yellow	Green
Sudan	Blue	Blue	Blue	Blue	Blue
Swaziland	Blue	Green	Green	Blue	Blue
Sweden		Green	Blue		Blue
Switzerland		Green	Blue		Green
Taiwan	Blue	Blue	Blue	Blue	Green
Tajikistan		Blue			Blue
Tanzania	Green	Blue	Green	Blue	Blue
Thailand	Blue	Red	Red	Red	Green
Togo	Blue	Blue		Red	Blue
Trinidad and Tobago				Blue	Blue
Tunisia	Blue				Blue
Turkey	Blue				Green
Turkmenistan	Yellow	Green	Green	Blue	Blue
Turks and Caicos	Blue				Blue
Uganda	Blue			Green	Green
Ukraine	Green	Blue	Red	Yellow	Green
United Arab Emirates (UAE)	Red	White	Red		Green
United States – New York	Blue	Blue	Blue	Blue	Blue
Uruguay	Red	Yellow	Red	Blue	Green
Uzbekistan	Green	Red	Blue	Blue	Blue
Venezuela	Blue	Blue	Blue		Blue
Vietnam	Red	Red	Yellow		Green
Zambia	Green	Green	Green		Green
Zimbabwe	Red	Blue	Blue	Green	Green

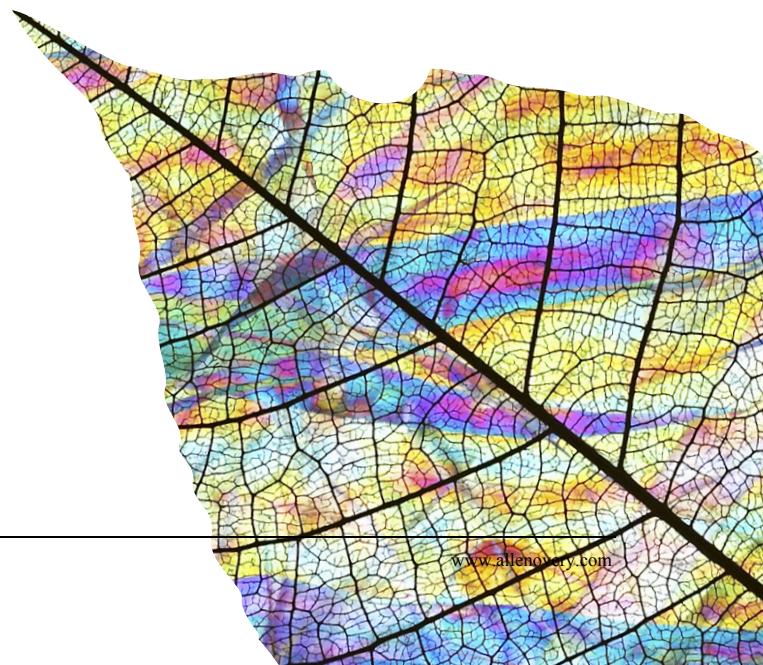
<b>6. Disclosure</b>	<b>7. Class actions</b>	<b>8. Enforcement of foreign judgments</b>	<b>9. Costs</b>	<b>10. Standards of the courts</b>	
Disclosure/ discovery very limited?	Class actions not usually allowed?	Foreign judgments enforced?	Losing party typically pays most of the costs?	Courts usually reliable for high value commercial disputes?	
					Somaliland
					South Africa
					Spain
					Sri Lanka
					Sudan
					Swaziland
					Sweden
					Switzerland
					Taiwan
					Tajikistan
					Tanzania
					Thailand
					Togo
					Trinidad and Tobago
					Tunisia
					Turkey
					Turkmenistan
					Turks and Caicos
					Uganda
					Ukraine
					United Arab Emirates (UAE)
					United States – New York
					Uruguay
					Uzbekistan
					Venezuela
					Vietnam
					Zambia
					Zimbabwe



# Maps and analysis

This section considers the results question by question and contains, in relation to each key indicator:

- Detailed **guidelines** on the meaning of the colour ratings.
- A **colour-coded world map**, showing the results at a glance.
- **Analysis** and discussion of the results.



## Question 1 *Governing law*

**Key indicator:** Our courts will generally apply a foreign law as the governing law of a contract if it is expressly chosen by the parties to decide the rights and obligations under the contract, subject only to local public policy and mandatory rules and even if there is no connection between the choice of law and the contract or the parties.

### *Guidelines*

#### BLUE

The governing law usually governs most aspects of the contract such as validity, interpretation, performance and breach, although it may not govern the status, powers and authorities of the parties (which are normally determined by the place of incorporation) or determine the law relating to security interests, property, trusts, insolvency, court procedure or evidence. Mandatory rules are generally normal economic or regulatory rules, and public policy is restricted to basic morality. The result is a wide respect for the chosen foreign law and upholding party autonomy. There may be special rules (for example, in relation to contracts of carriage, consumer contracts, insurance contracts and employment contracts).

#### GREEN

Our courts will often not apply a chosen foreign governing law unless there is a connection between the foreign law and the parties or the contract. Alternatively, there may be restrictions on our courts applying a chosen foreign law; for example, the mandatory and public policy overriding rules are quite broad in their application.

#### YELLOW

Our courts are slow to apply a chosen foreign governing law. There must be very significant connections between the foreign law and the parties or the contract. In addition, the foreign governing law is overridden by local views about public policy and also by local mandatory rules. The public policy and mandatory rules are very wide in scope and substantially restrict the foreign law. The result is that local law often prevails over the chosen foreign law.

#### RED

Our courts will not generally apply a chosen foreign governing law.

#### CAN'T SAY/NOT APPLICABLE

## **I. Governing law**



## Governing law – analysis

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Where commercial parties have chosen a particular law as the governing law of their contract, the question whether that choice will be upheld by the courts in any relevant jurisdiction is a critical one. At the most fundamental level, if the law chosen is not upheld by a particular court, the parties may find that their contractual rights and obligations are significantly different in nature and scope to the rights and obligations that they thought they had assumed when the contract was entered into. But it is not just at this level that governing law can have an impact on commercial parties. There are a host of other reasons why parties may have chosen a particular law to govern their contract, many of which will also have been relevant to their assessment of the risk of doing the deal, including the following:

- Identifying a law that is commercial, stable and predictable.
- Insulating the contract from legal changes in a counterparty's country (for example, local legislation imposing a moratorium on foreign obligations, reduction of the interest rate by legislation or exchange controls).
- Avoiding the need for a detailed investigation into an unfamiliar system of law.
- Coinciding the governing law with the choice of enforcing jurisdiction (ie the courts chosen to hear any dispute under the contract) or, where there is no choice of jurisdiction for disputes, establishing the jurisdiction of particular courts (in some jurisdictions a choice of local law to govern a contract may be sufficient to confer jurisdiction on the local courts).
- Being able to use lawyers who have special experience in the type of contract concerned.
- Language or other non-legal preferences, such as market acceptability, familiarity and convenience, and/or relative cost.

If a choice of law is not upheld by the relevant courts, therefore, this may fundamentally change the risks faced by parties in circumstances where those parties will generally not be in a position to renegotiate commercial terms.

It is therefore reassuring (although perhaps unsurprising) that the responses to our survey indicate that in **two thirds of the jurisdictions surveyed, the local courts will generally uphold a choice of foreign law** to govern a contract, subject only to limited exceptions. Indeed, it appears that there are only **11 jurisdictions (Bolivia, Colombia, Cuba, Eritrea, Nepal, Paraguay, Saudi Arabia, UAE, Uruguay, Vietnam and Zimbabwe)** in which reports suggest the local courts will not generally uphold a choice of foreign law at all. In key emerging markets, however, a foreign governing law may not be respected by local courts. In **Indonesia**, respondents note that local courts may apply Indonesian law, notwithstanding a foreign choice of law in the relevant contract. Respondents report that **Brazilian** courts are extremely reluctant to apply foreign law. Also, respondents from **Macedonia** describe a general reluctance of their courts to apply foreign law. It is reported that the application of foreign law is rare in **Somalia** and the respondents from **Grenada** are not aware of cases in which their courts have applied foreign law.

It seems that, among the jurisdictions in which a choice of law is generally upheld, there is a high degree of consensus as to the limited grounds on which the local courts might in fact refuse to apply the chosen law. So, for example, in many of these jurisdictions the local courts may apply **mandatory rules of local law** despite a choice of foreign law to govern the contract, or may refuse to apply aspects of the chosen law on **public policy** grounds. However, when one looks at the survey responses in more detail it is clear that these grounds are construed more broadly in some jurisdictions than in others. For example, in **Jordan** the notion of public policy appears to be wide enough to encompass all mandatory rules in applicable Jordanian laws or legislation. As such, any provision of a contract which contradicts a mandatory Jordanian law will be contrary to public policy and null and void. In **Kuwait**, mandatory rules and public policy rules are also reported to be construed widely (so, for example, public policy rules would include matters prescribed by Islam). In **Bulgaria** the courts are described as generally very cautious when applying foreign laws and sometimes tend to exaggerate

the application of public policy rules. On the other hand, in **England and Wales** and the **Netherlands**, for example, the public policy exception is applied narrowly and rarely. There appears to be a divergence between certain EU Member State courts on this question (notwithstanding the fact that choice of law rules have been broadly harmonised across the EU, as to which see further below).

Further, whilst the survey responses do present a broadly positive picture for commercial parties on governing law, the fact that exceptions apply in every jurisdiction means that if parties have chosen a foreign law in order to insulate themselves from the application of a particular law, this **insulation may not always be complete**. One particular point to note in this context is that, in many jurisdictions, the local courts may have regard to the overriding mandatory rules of the law of the place of performance of a contract in certain circumstances (so it is not just the law of the jurisdiction in which the courts are located that can potentially undermine the choice of a foreign governing law).

The various grounds on which a choice of law may not be upheld by the courts (in particular by EU Member State courts) have been the subject of particular focus in the light of events in the **eurozone**. Parties have sought to determine whether their contracts may be affected by any changes to local law in a vulnerable Member State, even though those contracts are expressed to be governed by a different law. Parties involved in major infrastructure and energy projects in emerging markets jurisdictions often focus on these grounds. This is because the risk that the law of the place of performance may be applied notwithstanding a choice of a foreign law to govern the contract can be significant given that the law in those jurisdictions may differ greatly from the law commonly chosen by parties to govern commercial contracts, and also given that there is often less scope to move the place of performance.

Some more general themes also emerge from the survey. For example:

- Geographically (and notwithstanding the points mentioned above), the most consistent picture appears to be among the EU Member States, with responses from 26 Member States confirming that local courts will generally uphold a choice of foreign

law to govern a contract (though note the divergence on some points of detail). This is unsurprising since, as mentioned above, all EU Member States other than **Denmark** apply the same regime for determining contractual governing law (Regulation (EC) No 593/2008 of 17 June 2008, known as **Rome I**). For a summary of the provisions of Rome I, see Annex A on page 302 below.

- Across the African continent, a number of responses suggest that local courts may be slow to apply the chosen law.
- Among the jurisdictions whose courts will not often uphold a choice of law, the absence of a sufficient connection between the foreign law and the parties or the contract is a key reason given for the refusal to apply the parties' choice.
- In **Russia** and **China**, the question whether a foreign law can be chosen to govern a contract depends on whether there is a foreign "element" to the contract; for example, whether a party is foreign or there is a foreign element in the subject matter of the contract.
- In some jurisdictions the local courts have little experience of applying foreign law (for example, as reported in **Kyrgyzstan, Mongolia, Montenegro, Turkmenistan and Uzbekistan**) and/or may apply local law in circumstances where they are unfamiliar with provisions of the chosen law (for example, in **Laos**).
- In a large number of jurisdictions, there are special rules that apply to particular types of contract or particular issues, such as employment, consumer or insurance contracts, questions of capacity and authority, exchange contracts and insolvency.

There is nothing that commercial parties can do in the governing law clauses of their contracts to make their choice of law absolutely watertight. However, including an express *jurisdiction* clause (a clause in which the parties agree on the courts in which any dispute under the agreement will be heard) and identifying the courts of a jurisdiction where the grounds on which a governing law clause will not be upheld are narrow and clearly delineated may go some way to reducing the risks. A discussion of the enforceability of jurisdiction clauses follows in the next section.

## Question 2 Jurisdiction: parties choose your courts

**Key indicator:** Our courts will generally assume jurisdiction over a contract and dispute if the contract states that the parties have agreed that our courts should have jurisdiction (a choice of court or jurisdiction agreement), but neither the parties nor the dispute have any connection with our jurisdiction.

### Guidelines

#### BLUE

Our courts will accept jurisdiction over a contract dispute in most cases, even though the parties and the contract in question have no connection with the jurisdiction. They generally respect the choice of the parties.

However, our courts may not accept jurisdiction in special cases, for example:

- if earlier concurrent proceedings, including related proceedings, have been commenced elsewhere;
- if another court has exclusive jurisdiction, such as in a dispute relating to rights *in rem* in land, corporate constitutional issues, the validity of entries in public registers, and the validity of registered intellectual property rights; or
- in relation to certain insurance, consumer and employment contracts (where the domicile of the insured, consumer or employee tends to be relevant).

#### GREEN

Our courts will accept jurisdiction only if our courts are a suitable place to hear the action by reason of connecting links, presence of witnesses and other factors. Jurisdiction is not automatic but is discretionary and so not always predictable.

#### YELLOW

Our courts are very slow to accept jurisdiction unless there is a substantial connection between the contract or the parties and the jurisdiction.

#### RED

Our courts will generally not accept jurisdiction if there is no connection between the contract or the parties and the jurisdiction.

#### CAN'T SAY/NOT APPLICABLE

## 2. Jurisdiction: parties choose your courts



## *Jurisdiction: parties choose your courts – analysis*

Commercial parties generally strive for certainty in their contractual dealings and this includes a desire for certainty in their choice of dispute resolution mechanism. If a deal goes wrong, they want to know where they can sue their counterparty and where they can be sued. Thus, in an effort to achieve certainty in this area, they include a jurisdiction clause.

The court or forum in which parties choose to resolve their commercial disputes is of critical importance. This choice can have an impact on the length of time it takes to resolve any dispute and the costs incurred. In some cases, it can even affect the outcome. The sophistication of the courts involved may also be important; for example, some courts are more familiar with dealing with complex commercial contracts and disputes than others. Some courts will also be more familiar with particular market documentation, such as shipping contracts or ISDA Master Agreements. The more experienced commercial courts are likely to provide more predictable decisions based on established precedents, and to do so more speedily (but not always). There may also be procedural differences in different *fora*; for instance, some courts will permit or require disclosure by the parties of all relevant documents, including unhelpful ones. Some courts will require witnesses to give evidence in court (and be cross-examined). These evidential factors and other procedural issues may influence a party's choice of court.

The enforceability of any resulting judgment is an important and interconnected factor. Parties might choose a particular forum because that court's judgments are recognised and relatively easily enforceable in a jurisdiction in which a counterparty has assets. For example, and as discussed further in Question 8 below, EU Member State judgments are relatively easily enforceable in other EU Member States.

For all these reasons, if a court declines jurisdiction where it has been specified as the chosen court to determine disputes in a contract, this gives rise to unhelpful uncertainty in commercial transactions.

Commercial parties will be interested to read that **almost half of respondents indicate that their courts will accept jurisdiction over a contract dispute in most**

**cases** if they are **the chosen courts**, even though the parties and the contract in question have no connection with the jurisdiction (this is the case in 78 of the 161 jurisdictions surveyed).

As one would expect, the majority of EU Member States provide a similar response to this question because the courts in each Member State are bound to apply the rules set out in Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (the **Brussels Regulation**).

A similar approach to that taken in the Brussels Regulation is seen between **Iceland**, **Norway**, and **Switzerland** (European Free Trade Association (**EFTA**) States, minus **Liechtenstein**) and EU Member States under the Lugano Convention of 2007 (the **Lugano Convention**). There is more information on the Brussels Regulation and the Lugano Convention in Annex B.

Article 25(1) of the Brussels Regulation requires a court in a Member State to accept jurisdiction if it is named as the chosen court in a contract, regardless of the parties' domicile (Article 23 of the Lugano Convention sets out a similar rule provided at least one party is domiciled in a contracting state). However, it seems there are some variations in approach between Member States. For example, respondents observe that in **Denmark** courts could be reluctant to take jurisdiction if the contract in dispute is governed by a foreign law and there is no connection with Denmark.

In some jurisdictions, jurisdiction clauses must comply with certain **formalities**. For example, under the Brussels Regulation, a choice of court/jurisdiction clause must be in writing or evidenced in writing, or in a form which accords with practices which the parties have established between themselves or trade practice. "In writing" can include any communication by electronic means that provides a durable record. It is also necessary to show clearly that the agreement was the subject of actual consensus between the parties; thus unilateral clauses may sometimes be problematic. Respondents from **Japan** also note that agreements on jurisdiction need to be in writing or electronic form.

In some jurisdictions there are **limits to party autonomy** and a choice of court clause in favour of the courts of such jurisdictions may not be effective. Responses to the survey suggest that the courts of **Colombia, Democratic Republic of Congo, Georgia, Iran, Iraq, Kuwait, Kyrgyzstan, Laos, Macedonia, Mexico, Rwanda, Moldova, Thailand, South Africa, Saudi Arabia, Uzbekistan and Vietnam** will generally not accept jurisdiction if there is no connection between the contract or the parties and the jurisdiction. Further, in **Azerbaijan** it is reported that the courts are likely to be slow to accept jurisdiction (even if they are specified as the chosen court) in the absence of substantial connections between the contract or the parties and the jurisdiction. In **Moldova**, respondents observe that there is no express right in the procedural code for parties to choose the competent court in national disputes. Respondents from **Macedonia** note that parties may choose Macedonian courts only if one party has Macedonian citizenship or a registered office in Macedonia. A similar rule applies in **Serbia**.

Interestingly, the survey results also suggest that the courts of certain major trading nations will not generally accept jurisdiction if there is no connection between the contract or the parties and the jurisdiction: this appears to be the case in **Indonesia, Mexico and South Africa**.

Some respondents warn that there is **uncertainty about the efficacy of jurisdiction clauses** in their jurisdiction.

In **Saudi Arabia**, for instance, if a court considers that it does not have jurisdiction over a dispute it will not hear the case, regardless of what is provided in the contract, unless all parties submit to the court's jurisdiction during the first hearing.

Many common law jurisdictions including **Isle of Man, Barbados, Cayman Islands and Australia** recognise the concept of *forum conveniens*, which is in essence a discretionary, flexible concept, allowing a court to decline jurisdiction if it considers that in all the circumstances it is not the appropriate and convenient court to determine the dispute (although this concept is not generally relevant where there is a valid jurisdiction clause in a contractual dispute). Interestingly, there are also some civil law jurisdictions which recognise this traditionally common law concept, such as Belgium (for matters outside the Brussels Regulation). Following a law introduced in 2004, Belgian courts will not accept jurisdiction even if they are the named court if there is no meaningful link with the jurisdiction.

Finally, more widespread ratification of the Hague Convention on Choice of Court Agreements of 30 June 2005 (the **Hague Convention**) will create greater certainty in this area: Article 5 provides that a contracting state designated in an exclusive jurisdiction clause shall not decline to exercise jurisdiction on the ground that the dispute should be decided by another state.

## Question 3 Jurisdiction: parties choose a foreign court

**Key indicator:** If a clause in a contract states that a foreign court is to have exclusive jurisdiction over a contract, our courts will almost always decline jurisdiction even though they would have had jurisdiction in the absence of the clause.

### Guidelines

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#### BLUE

Our courts will almost always decline jurisdiction so that the freedom of contract of the parties is respected. However, our courts will assume jurisdiction in special cases where they have exclusive jurisdiction, for example, *in rem* actions relating to local land (in these cases a foreign jurisdiction clause may be ignored).

#### GREEN

Our courts will sometimes take jurisdiction (for example, where a dispute is centred in our jurisdiction).

#### YELLOW

Our courts do not consider the foreign exclusive jurisdiction clause to override the discretion of our courts and our courts will accept jurisdiction despite the foreign exclusive jurisdiction clause if they think that it is more convenient for the dispute to be tried locally. The courts are very ready to find that it would be more convenient. The effect is that it is quite easy for a litigant to make a pre-emptive strike locally to escape the foreign exclusive jurisdiction.

#### RED

Our courts will normally ignore a foreign exclusive jurisdiction clause and assume jurisdiction if the courts would otherwise have jurisdiction under our normal jurisdictional rules.

#### CAN'T SAY/NOT APPLICABLE

3. Jurisdiction: parties choose a foreign court



## *Jurisdiction: parties choose a foreign court – analysis*

The assumption of jurisdiction by a court that is not specified by parties in their jurisdiction clause can give rise to considerable risk for commercial parties, including the possibility that the foreign court may be partial, hostile or apply rules of law contrary to the original bargain. It may also be inconvenient and add expense. Some of these factors have been considered in Question 2 above, but they are also relevant to this question. Here, respondents were asked about the approach of their courts to a foreign exclusive jurisdiction clause. Would local courts respect party autonomy in this area and almost always decline jurisdiction where there was such a clause?

Some clear trends can be seen in the responses to this question.

A striking feature is that a **majority of respondents** indicate that their courts would **generally respect** commercial parties' **agreement that a foreign court would have exclusive jurisdiction over a contract**, and would almost always decline jurisdiction in these circumstances (as reported by 87 of the 161 jurisdictions surveyed). This will be seen as a positive result by commercial parties who, for the reasons discussed in Question 2, value legal certainty and seek to avoid as far as possible the risk that a foreign court may take jurisdiction in circumstances under which the parties have not agreed that it could do so.

There remains uncertainty on this issue in certain economically significant jurisdictions, including **Russia, Brazil, Indonesia and Mexico**.

The jurisdictions in which foreign jurisdiction clauses seem vulnerable include **Saudi Arabia**, which does not recognise choice of forum provisions. Accordingly, if the Saudi Arabian courts consider they have jurisdiction over a particular dispute under Saudi Arabian procedural laws, they will hear the case regardless of any contractual language to the contrary. The responses to the survey suggest that a foreign choice of court agreement may not be respected in other jurisdictions including: **Anguilla, Colombia, Democratic Republic of Congo, Cuba, Egypt, Iran, Iraq, Kuwait, Oman, Panama, Ukraine, UAE and Uruguay**. In **Iran** the courts have general jurisdiction to examine all cases brought before them in

circumstances where they have general jurisdiction under the Iranian Civil Procedure Code. In certain jurisdictions it remains to be seen what approach will be taken to foreign exclusive jurisdiction clauses, the issue having not yet arisen before their respective courts.

There also seems to be an almost universal response that, notwithstanding a foreign jurisdiction agreement, if a dispute has a **special subject matter** (for example, it involves certain *in rem* rights such as property which is within the jurisdiction), then the jurisdiction clause will effectively be ignored or "trumped". This is true of EU Member States, where this approach is enshrined in statute at Article 24 of the Brussels Regulation, but also appears to be the case in a wide range of other jurisdictions; for example, **Albania, Ecuador, Moldova, Chile, Mauritania and Venezuela**.

Furthermore, survey results suggest that in many jurisdictions special jurisdictional rules apply to certain **protected categories of counterparties** and, in particular, apply in relation to employment and consumer disputes, when a foreign jurisdiction clause may not be effective. This is certainly the case in the EU, where there are limitations on the ability of commercial parties to agree particular choice of court agreements with employees or consumers (as set out in Articles 17 to 23 of the Brussels Regulation). Respondents from non-EU jurisdictions also describe similar rules, including those from **Japan** and **Jordan**.

Another common theme is that an **international or cross-border element** is required for a foreign jurisdiction clause to be recognised by local courts. Respondents report that this cross-border element is necessary in jurisdictions such as **Argentina, Azerbaijan and Georgia**.

Commercial parties should be aware that various jurisdictions set **formal requirements** for the foreign jurisdiction clause – **Djibouti**, for instance, requires that jurisdiction agreements be signed by the defendant.

Of potential concern to commercial parties, a number of respondents comment that, whilst a foreign jurisdiction clause would generally be recognised by their courts, there might be circumstances in which, if there were **substantial connections** with their jurisdiction, the

clause might be ignored (for example, **Bolivia**). Whilst those "substantial connections" may, in fact, be matters such as the property being located within their jurisdiction (see the observations regarding *in rem* rights above), this concept is conceivably more flexible and expansive.

For more detail on the position of Member State courts applying the Brussels Regulation in relation to foreign (Member State and non-Member State) jurisdiction clauses see Annex B – the Brussels regime. As noted, the Brussels Regulation requires Member State courts to give effect to jurisdiction clauses in favour of the courts of

other Member States. As to jurisdiction clauses in favour of the courts of non-Member States, there has been some uncertainty. However, recent English authority suggests that an English court (at least) will respect such clauses, giving "reflexive effect" to Article 25 (ie extending the principle to non-Member State jurisdiction clauses).<sup>01</sup>

It is thought that the EU's ratification of the **Hague Convention**<sup>02</sup> will also provide greater certainty in this area: signatory states agree to respect exclusive jurisdiction agreements in favour of the courts of other signatory states.

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01. *Plaza BV v Law Debenture Trust Corp Plc* [2015] EWHC 43 (Ch).

02. Hague Convention on Choice of Court Agreements of 30 June 2005.

## Question 4 *State (or sovereign) immunity*

**Key indicator:** Our courts will normally give effect to a written waiver in a contract of state immunity from jurisdiction and enforcement over the local assets of a foreign state, including pre-judgment freezes on assets.

### *Guidelines*

BLUE	GREEN
Our courts will normally give effect to a waiver of state immunity from jurisdiction, enforcement and pre-judgment freezing orders, subject to some minor exceptions such as diplomatic immunity, defence assets or heritage property.	Our courts limit the scope of the waiver – for instance, enforcement is possible only in respect of commercial property.
YELLOW	RED
The limitations of the waiver of immunity are significant. For example, the waiver from jurisdiction is effective but the waiver from enforcement is ineffective, or the waiver from pre-judgment freezing orders is ineffective.	A waiver of state immunity is ineffective and the foreign state is entitled to immunity from jurisdiction, enforcement and pre-judgment freezing orders, notwithstanding an express written waiver.
CAN'T SAY/NOT APPLICABLE	

#### 4. State (or sovereign) immunity



## *State (or sovereign) immunity – analysis*

Over the last few decades states and quasi-state entities have been increasingly involved in cross-border commercial activity, whether in order to obtain inbound investment (such as through international transactions to fund and execute major infrastructure or energy projects) or to invest overseas (for example, through sovereign wealth funds). The issue of sovereign immunity has also become relevant in the context of the nationalisation of certain banks during the financial crisis.<sup>01</sup>

For those contracting with state entities, the question whether the state will be immune from the jurisdiction of the courts of any relevant jurisdiction is of course fundamental to any assessment of transaction risk. The responses to our survey show a **spectrum of different approaches to immunity**, ranging from jurisdictions where the rights of states to claim immunity are highly restricted (for example **Mozambique**) to those where immunity is effectively absolute (such as **Kuwait, Hong Kong, Eritrea, Myanmar, Macau, Nigeria, Pakistan, Thailand and Togo**). Respondents from **Saudi Arabia** note that their courts do not recognise the concept of sovereign immunity, whilst respondents from **Iran** report that Iranian law does not have provisions relating to foreign state immunity. Half of those surveyed responded that a waiver of state immunity would normally be given effect.

The starting point in many countries is that foreign states will generally have immunity – so the courts will refuse to hear substantive proceedings brought against a state/quasi-state entity, and will refuse to recognise a judgment or to enforce that judgment against the state's assets – but that this immunity is subject to a series of restrictions. A key restriction in many jurisdictions is **waiver**. The local courts in many countries will give effect to a waiver of immunity from suit and from enforcement, subject to minor exceptions. However, a common theme among those jurisdictions that recognise waiver is the importance of distinguishing between waivers of immunity from suit (ie from the jurisdiction of the local courts to hear disputes brought against states) and waivers of immunity from jurisdiction to recognise or enforce judgments. **In many jurisdictions, an explicit waiver of immunity from both suit and recognition/enforcement is necessary** for the local

courts to be able to both hear disputes and recognise or enforce judgments. Other exceptions may apply in certain cases (even absent a waiver) – for example where the state is engaged in **commercial acts** or **enforcement** is sought against **property** in use for **commercial purposes**.

In a number of jurisdictions, however, the position is much less positive for non-state parties. For example, in **Hong Kong** (perhaps surprisingly given its commercial significance), foreign states cannot waive immunity by way of waiver in advance of proceedings in the Hong Kong courts. Instead, state immunity can only be waived after the jurisdiction of the Hong Kong courts has been invoked.<sup>02</sup> Further, respondents from **Kuwait, Myanmar, and Pakistan** report that sovereign immunity cannot be waived, whilst the survey response from **Bolivia** explains that, although Bolivian law provides generally that contractual waivers should be respected, in practice the position may vary in Bolivian courts. This uncertainty can be very problematic for commercial counterparties to states or quasi-state entities who may wish to litigate (or enforce their judgments) in these jurisdictions. If the state can successfully assert immunity from suit and/or from recognition or enforcement if things go wrong, the counterparty may be left without any effective remedy.

Many jurisdictions have enshrined the concept of immunity into **statute**. A well-known example is the U.S. Foreign Sovereign Immunities Act 1976 (the **FSIA**). Such statutes may also recognise contractual waivers and other exceptions to immunity, such as the "commercial transactions" exception under the UK State Immunity Act 1978. The Australian Foreign States Immunities Act 1985 also contains an exception in respect of commercial parties or where there has been a submission to the Australian courts.

**Multilateral treaties** have also been concluded, but are of limited effect. The European Convention on State Immunity, signed at Basel on 16 May 1972, has been ratified by eight states.<sup>03</sup>

The UN Convention on Jurisdictional Immunities of States and Their Property was signed in New York on 2 December 2004 but is yet to come into force.

Thirty ratifications/acceptances are required: to date, there are twenty-eight signatories to the UN Convention but only fifteen states have ratified it.<sup>93</sup>

As illustrated by the survey responses, in a number of jurisdictions **the laws and authorities on state immunity are fairly sparse**. Indeed, there are some jurisdictions in which the law or authority appears to be so limited that it is simply unclear whether the local courts would give effect to a waiver of immunity or not (for example in **Algeria, Armenia and China**). The response from **Djibouti** explains that there is no court precedent on waiver of immunity. Elsewhere, respondents note that the approach in the **Dubai International Financial Centre (DIFC)** is as yet untested and respondents from **Nicaragua** have not seen new courts consider the issue of waiver in practice. There is also relatively little authority in other countries, including some of the most commercially significant jurisdictions.

There have recently been a number of interesting and high-profile decisions which have served to clarify the law in this area and also to further focus parties' attention on immunity issues when transacting with state counterparts. These cases have demonstrated that disputes about state immunity can be time-consuming and costly, potentially involving a series of appeals. This is a function, no doubt, of the fundamental importance of the issue to the disputing parties.

To cite one example that has been the subject of much attention, the Belgian, English, French, Ghanaian and New York courts have witnessed a series of skirmishes over immunity in the long-running battle between the fund NML Capital Ltd and the Republic of Argentina. In 2011, more than ten years after the Argentinian financial collapse and five years after NML obtained a USD 284 million judgment on the disputed bonds from the New York courts, NML was still arguing before the English Supreme Court as to whether Argentina was entitled to claim immunity in relation to the cognition of the New York judgment in England. The litigation is ongoing in the New York courts. The New York Second Circuit Court of Appeals has ruled that Argentina cannot invoke sovereign immunity, and Argentina's appeal to the Supreme Court was unsuccessful. Argentina defaulted on its debt, and was held in contempt of court in New York.

Another noteworthy example is the decision of the New York courts in *Fir Tree Capital Opportunity Master Fund v Anglo Irish Bank Corp Ltd*, a case with its genesis in

much more recent times.<sup>94</sup> In this decision Judge Gardepe held that consent to jurisdiction entered into by Anglo Irish Bank prior to its nationalisation by the Republic of Ireland in 2009 did not amount to an effective waiver under the FSIA, because the consent was provided by the Bank when it was a private sector entity, ie before the Republic of Ireland had ownership. The facts of the case are relatively unusual, but the fact that pre-nationalisation contractual waivers of immunity were found not to apply post-nationalisation could present issues for other nationalised banks and their creditors.

The differing approaches taken in different jurisdictions in relation to waiver (and, indeed, the other exceptions to immunity) highlight the importance of considering immunity at all stages of the litigation process when seeking to ascertain whether a party may have immunity and when drafting any waiver clause. Further, it is important to bear in mind that this issue must be considered from the perspective of all jurisdictions in which the parties might end up litigating or seeking to enforce any judgment, as **in most (although not all) jurisdictions the extent to which a state is immune is determined by reference to the law of the forum rather than the law of the relevant contract**. Given the increased commercial activity of international organisations and sovereign wealth funds, we are likely to see the number of cases considering complex immunity questions continue to increase for some years to come.

01. Lord Millett sitting in the UK House of Lords in *Holland v Lampen-Wolff* [2000] 1 WLR 1573 summarised sovereign immunity in 2000 as follows: "It is an established rule of customary international law that one state cannot be sued in the courts of another for acts performed *jure imperii* [sovereign acts]. The immunity does not derive from the authority or dignity of sovereign states or the need to protect the integrity of their governmental functions. It derives from the sovereign nature of the exercise of the state's adjudicative powers and the basic principle of international law that all states are equal: see *I Congreso de Partido* [1983] 1 AC 244 at 263, per Lord Wilberforce".

02. *Democratic Republic of the Congo v FG Hemisphere Associates LLC* [2011] 4 HKC 151.

03. The European Convention on State Immunity has been ratified by Austria, Belgium, Cyprus, Germany, Luxembourg, the Netherlands, Switzerland and the United Kingdom. Portugal has signed but not ratified the Convention.

04. The UN Convention on Jurisdictional Immunities of States and Their Property has been ratified by Austria, France, Iran, Italy, Japan, Kazakhstan, Latvia, Lebanon, Norway, Portugal, Romania, Saudi Arabia, Spain, Sweden and Switzerland.

05. No 11 Civ 0955 (PGG), 2011 WL 6187077 (SDNY, 28 November 2011).

## Question 5 *Pre-judgment arrests or freezing orders*

**Key indicator:** Our courts will normally grant an order prior to judgment to prevent a defendant from dissipating its assets.

### *Guidelines*

#### BLUE

Our courts will normally grant a freezing order if there is a real risk that the defendant will dissipate its assets so that any judgment may not be satisfied. The claimant must show that it has a good arguable case. The courts need not have jurisdiction in the main action.

#### GREEN

Our courts will sometimes grant a freezing order but are quite reluctant to do so unless there is a very obvious risk that assets will be dissipated and unless the claimant has a very strong ultimate case. The courts must have jurisdiction in the main action.

#### YELLOW

There are major obstacles to obtaining pre-judgment freezing orders. For example, bank deposits cannot be attached. It is not enough to show that there is a serious risk that the defendants will dissipate assets. The courts must have jurisdiction in the main action. An order cannot be given in respect of foreign assets of the defendant.

#### RED

Our courts will not grant such an order in most cases. An order cannot be given in respect of foreign assets of the defendant.

#### CAN'T SAY/NOT APPLICABLE

## 5. Pre-judgment arrests or freezing orders

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## *Pre-judgment arrests or freezing orders – analysis*

Freezing orders, or "Mareva orders" as they are often known, were fully recognised by the English courts in 1975 in *Mareva Compania Naviera SA v International Bulkcarriers SA*.<sup>01</sup> Although a design of the common law, the responses to our survey demonstrate that remedies such as pre-judgment arrests are available in some form or another in many jurisdictions across the world, albeit to varying degrees.

Freezing orders are a powerful judicial tool, described as one of the "nuclear weapons" of the civil law armoury.<sup>02</sup> Freezing orders prohibit a party from disposing of, or dealing with, certain assets pending a judgment or satisfaction of a judgment. Since claimants would not generally litigate if they did not wish to obtain a particular remedy, freezing orders are a useful strategic tool to help claimants secure their intended outcome, particularly where the claim involves some dishonesty or fraud and there is a real risk that the defendant may dispose of its assets in the interim. Such a remedy can also act as useful leverage for claimants by encouraging defendants to provide (voluntarily) security directly to the claimant or make a payment into the court rather than become subject to a restrictive freezing order. In **England and Wales** freezing orders are often accompanied by an order requiring a defendant to disclose details of its assets.

Whilst the availability of freezing orders is generally seen as positive by prospective claimants, these remedies do have limitations. Freezing orders are not a form of security, nor do they give the claimant any proprietary right to the frozen assets. Therefore the claimant with the benefit of a freezing order does not necessarily stand a better chance of ultimately recovering a judgment debt than any other unsecured creditor. Indeed, in many jurisdictions, freezing orders do not prevent the defendant from creating new obligations and therefore new creditors. Moreover, in jurisdictions such as **England and Wales**, if the defendant does not comply with the freezing order, usually the only sanction available is committal for contempt of court.

The heavy burden that freezing orders place on defendants should also be appreciated, and may account for some of the reluctance to grant them in various jurisdictions. Freezing orders can have serious

consequences for the defendant against which they are granted; for instance, by affecting the defendant's creditworthiness and restricting its ability to conduct business. Because of their draconian nature, courts have developed a number of protections for the defendant, for example, requiring "full and frank" disclosure by claimants and often a cross-undertaking in damages.

On the whole, the responses to our survey demonstrate **wide use of interim remedies such as freezing orders**. In over half of jurisdictions (95 of the 161 surveyed), courts will normally grant a freezing order where there is a real risk that the defendant will dissipate its assets in order to frustrate a judgment. In a further 59 jurisdictions, the courts would at least sometimes be prepared to grant a freezing order where there is an obvious risk of dissipation and the claimant has a strong underlying case. Indeed, it appears from the responses that there is only one jurisdiction (**Myanmar**) in which the courts will rarely grant such an order. In a further six jurisdictions (**Colombia, Mauritania, Namibia, Puerto Rico, State of Qatar and Russia**), there are said to be major obstacles to obtaining a pre-judgment freezing order.

Despite the homogeneity suggested by the overall survey results set out above, where a pre-judgment arrest or freezing order is available the **specific requirements of the national courts vary considerably**, even between those jurisdictions which frequently grant such orders. Nonetheless, in most jurisdictions the claimant will have to establish:

- Some degree of likelihood of success on the merits of the underlying claim, ranging from the relatively low threshold of making out a good arguable case on the merits in **Ireland, Nigeria** and in **England and Wales** to the requirement in jurisdictions such as **Luxembourg** and **Jordan** that the claim be certain, due and payable (such as from a previous court order or a foreign judgment).
- Some degree of risk that the defendant will dissipate assets, ranging from a low degree of probability through to the requirement (for instance in **Kenya**) to establish that there is a real threat that the assets are being disposed of to defeat a judgment.

- Some degree of likelihood that this will mean that any judgment will not be satisfied (for example, the "very clear risk" required in **Taiwan**).
- In certain common law jurisdictions only, that it would be just and convenient to grant such an order (for example in **England and Wales, Hong Kong, India and Ireland**).

In 2014 EU Member States approved Regulation 655/2014, which introduces a **pan-European freezing order** called a European Account Preservation Order (**EAPO**). The **UK** has not opted into the Regulation and **Denmark** has not signed up to it. The Regulation will be applied by Member States (other than the UK and Denmark) from **18 January 2017**. The EAPO procedure marks a significant development in European law. For the first time, a claimant will be able to make an application to the courts of one Member State to obtain an order which will "freeze" monies held by a defendant in bank accounts in all participating Member States, without further applications being required. By way of illustration, under this new legislation a claimant in proceedings in Milan will be able to seek an EAPO from the Italian court and that Italian order will then be effective to freeze monies held in a defendant's Spanish, German and French bank accounts. A claimant will no longer have to make three separate applications to the courts of those Member States for such relief. There remain a number of concerns about the Regulation, in particular a concern about the relatively low threshold for obtaining an EAPO.

Some more general observations may also be made about the results of the survey. For example, although the question guidelines for the blue colour category (set out on page 42) envisage that the courts need not have jurisdiction in the main action, this cannot always be taken for granted. Furthermore, in a number of jurisdictions where respondents consider that freezing orders are normally granted with relative ease, whilst the court need not have jurisdiction in the main action, there often has to be some kind of nexus with that jurisdiction (for example, in **Bulgaria** and **Sweden**, that the courts would have jurisdiction for the purpose of enforcing the foreign judgment; or in the **Netherlands**, that the assets or judgment debtor must be located or resident in the jurisdiction).

Practice as to the **timing** for making such an order also varies. **Urgency** is highlighted in many responses, for example those from the **Democratic Republic of**

**Congo** and **El Salvador**. It is generally noted in responses that the main action need not have been commenced when the freezing order is sought. However, a number of jurisdictions (including **Botswana, Jordan** and **Oman**) set down a time limit within which proceedings must be brought following the making of the freezing order application. For example, in **Jordan** the claimant must file his claim within eight days from the granting of the freezing order. Also in relation to timing, in **Pakistan** it is reported to be common to make a freezing order application at the same time as filing the claim, in order to restrain the defendant from dissipating assets until the conclusion of the suit which could take many years.

In most jurisdictions, the claimant must provide **security** when making an application for a freezing order (including, for example, in **Bolivia, Peru** and **Nicaragua**).

The willingness of national courts to grant wide-ranging orders over all the assets of a defendant also varies. For instance, although the **Ghanaian** response describes the property that the court may order the detention, custody and preservation of as "any property which is the subject matter of the action or of which any question may arise in the proceedings", it appears to be more common in other responses for the order to be granted over **any of the tangible personal property or intangible assets** of the debtor. Common law jurisdictions such as **England and Wales, Singapore** and **Ireland** appear to be more prepared to issue **worldwide freezing orders**, whilst other courts limit the order to assets within the jurisdiction (for example, the courts of **Kuwait** and **Venezuela**).

Responses to the survey suggest that judicial practice in relation to freezing orders is sometimes unclear, and the responses from **Kuwait** and **Moldova**, for example, point to some judicial unpredictability. However, even in those jurisdictions where there are considered to be major obstacles to obtaining a freezing order or where they are almost never granted, there does appear to be at least some form of redress for claimants.

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01. [1975] 2 Lloyd's Rep 509.

02. Sir John Donaldson MR in *Bank Mellat v Nikpour* [1985] FSR 87 PP 91-22 (the other weapon identified was a search order).

## Question 6 *Disclosure or discovery of documents in litigation*

**Key indicator:** In a contractual dispute, compulsory disclosure/discovery is very limited.

### *Guidelines*

#### BLUE

The parties are not required to disclose all relevant documents except, for example, those on which a party directly relies in the action. Privileged documents can be withheld from inspection.

#### GREEN

Compulsory disclosure is moderate and is not burdensome in most cases. Privileged documents can be withheld from inspection.

#### YELLOW

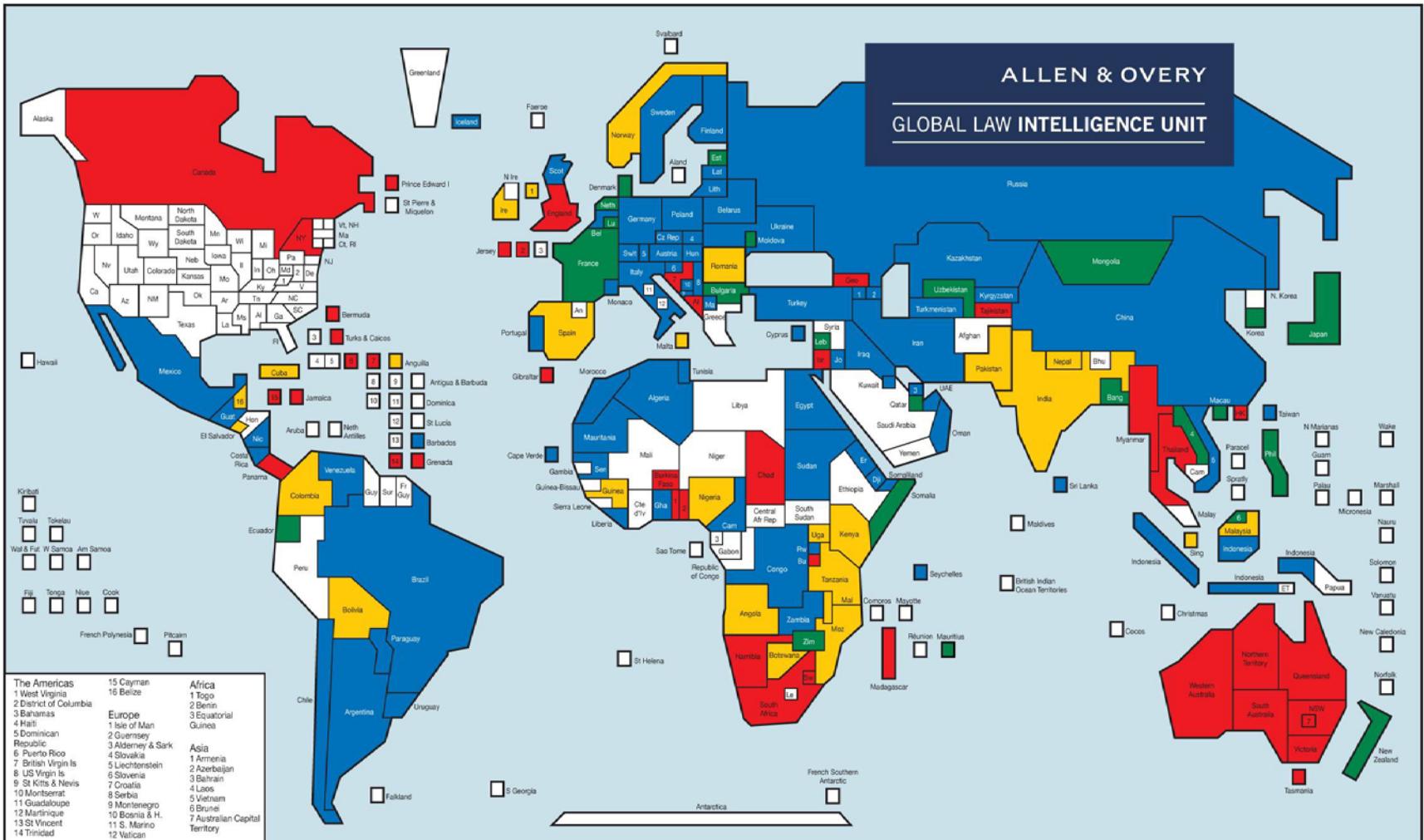
Compulsory disclosure is quite wide. Certain documents are privileged, for example, communications between lawyer and client, but the scope of privileged documents is quite narrowly construed.

#### RED

The parties have to disclose all documents which might be relevant (whether or not they are prejudicial). Disclosure is a heavy burden and can be very costly and time-consuming. It includes electronic media, for example, emails, voicemails and text messages. However, certain documents are protected from disclosure, such as communications between lawyer and client on the grounds of privilege or an equivalent concept (such as attorney-client confidentiality).

#### CAN'T SAY/NOT APPLICABLE

## 6. Disclosure or discovery of documents in litigation



## *Disclosure or discovery of documents in litigation – analysis*

The potential requirement for disclosure or "discovery" of documents in litigation is an important issue for both lawyers and non-lawyers within commercial organisations. If a damaging document is disclosed to the other side in proceedings (or, indeed, a regulator), the harm done may be immense. Cases can still be won or lost on the discovery of a helpful document in the other side's documents. Disclosure can also provoke an early settlement, perhaps because disclosure reveals a candid admission by a witness in an email or an instruction letter to a bank revealing hidden accounts. More widely, there may be reputational repercussions for commercial parties if damaging documents are revealed in court.

For this reason commercial parties should be aware of the scope of any disclosure obligation in jurisdictions in which they might bring proceedings or might find themselves being sued. Also important are the grounds upon which a party is entitled to refuse to produce such documentation; for example, on the basis of privilege.

The picture from respondents in response to this question is **very mixed**. Disclosure is reported to be limited in 72 of the 161 jurisdictions, but the rest of the responses are quite evenly split between those reporting moderate, quite wide and broad disclosure. There are also significant variations in procedure, and even in jurisdictions in which parties are required to disclose all relevant documents to other parties – whether those documents are helpful or harmful – the rules under which they do so differ. **Most jurisdictions, however, appear to provide some special protection to communications between lawyers and their clients**, whether that protection arises from the concept of privilege or is otherwise framed (for example as a professional duty of confidentiality).

**Broadly, responses can be split into common and civil law approaches.** Civil law jurisdictions, such as **Austria, France, Germany, Scotland and the Netherlands**, generally have much more restricted and less onerous disclosure obligations than common law jurisdictions. The protections in civil law jurisdictions against disclosure (ie the grounds upon which disclosure might be resisted, such as privilege) are correspondingly less well developed. In common law jurisdictions, disclosure obligations on commercial parties to litigation

are generally wide-ranging and onerous but the grounds for refusing disclosure are fairly well established.

**Broad disclosure obligations** are reported by respondents in common law (or common law influenced) jurisdictions such as **Australia, Belize, Bermuda, BVI, England and Wales, Jersey, Guernsey, Grenada, Gibraltar, Hong Kong, Jamaica, Mozambique, Namibia, New York, South Africa, Sri Lanka, Turks and Caicos, Trinidad and Tobago and Togo**. This can be onerous and time-consuming. In **Canada**, there are wide-ranging disclosure obligations except in the Province of Quebec, where the obligation is much less burdensome. However, respondents from a range of other legal traditions also report that in their jurisdictions parties must disclose all relevant documents and/or that disclosure is a heavy burden, including respondents from **Benin, Burkina Faso, Chad, Croatia, Burundi, Georgia, Israel, Myanmar, Madagascar, Panama, Puerto Rico, South Africa, Tajikistan and Thailand** (although in **Puerto Rico** it is noted that discovery in federal courts is often broader than in local courts).

In certain jurisdictions in which extensive disclosure is required, respondents report that there have recently been moves to **limit the disclosure** parties must provide in the course of proceedings. The reforms introduced in **England and Wales** following proposals by Lord Justice Jackson in 2013 are in part aimed at limiting disclosure costs in English litigation. Respondents from **New Zealand** and **Australia** also report a trend towards narrower disclosure in an effort to reduce the financial burden of litigation.

The responses from civil law jurisdictions often state there is **no or a limited obligation** on parties to disclose relevant documents (including harmful documents) and parties only have to produce those documents upon which they wish to rely. For example, in **Germany** there is no concept of compulsory disclosure. A party to proceedings must disclose only those documents it wishes to rely on in evidence, and documents for the surrender or production of which the opposing party has a claim under substantive law. The German court may order a party to produce certain documents, but will not entertain "fishing expeditions", and will require convincing submissions to exercise its discretion to make

such an order. Judges are also concerned to avoid fishing expeditions in **the Netherlands**, where compulsory disclosure is possible but, in practice, generally limited in contractual disputes. A judge may order disclosure provided a requesting party specifies clearly which documents pertaining to a legal relationship to which it is a party it wants to see and why they are relevant to the proceedings. In **France**, parties only disclose documents that they consider necessary to support their case. In limited circumstances, once proceedings on the merits have been commenced, a party may ask the court for an order that the other party produce documents.

Respondents comment, however, that in recent years French courts have interpreted the relevant rules more broadly. In **Russia**, the disclosure rules are described as quite relaxed and parties are not obliged to disclose all documents relating to the dispute within their possession. The survey response from **Iraq** explains that the courts there do not require disclosure, except for disclosure of evidence that the parties wish to present. In **Japan**, respondents note that there is no general disclosure obligation; however, the court may order a party to submit relevant documents. Indeed, there is also no concept of attorney/client privilege in Japan.

In a number of jurisdictions, whilst there is no compulsory disclosure, a party faces the **burden of proof** when making its claim and this factor may result in the disclosure of material to the other side and the court. This is the position, for example, in **Argentina** where respondents observe that a party must produce proper evidence to support its claim. In the **Czech Republic**, respondents state that, under the Czech Code, the rule is that "whoever asserts something, he or she also has an obligation to prove it". In **Indonesia**, in civil and commercial disputes, the courts are reported to take a passive position and it is up to the parties to present sufficient evidence to prove any of their claims against the other party.

Certain jurisdictions describe the concept of disclosure as **undeveloped** and state that in practice documents can be withheld from the other side. Respondents from **Ukraine** note that the concept of disclosure is undeveloped and that often parties may withhold documents requested by the court with no significant consequences, other than a fine. The response from **Uruguay** describes how, whilst an order requiring disclosure may be granted, there are no specific sanctions for failing to comply with such an order. In **Kuwait**, respondents comment that, although a party may request disclosure of a specific document which it believes the other party holds, in practice, there is often little effective remedy if the other party fails to produce it. Respondents from **Saudi Arabia** observe that mandatory disclosure of documents is entirely a matter for the court acting in its absolute discretion. Often the court will order the disclosure of a document on the request of a party, but the court is not obliged to honour such requests and the court may order disclosure of its own initiative, without a request from one of the parties. There is also no concept of privilege under Saudi Arabian law and so the protection of confidential information rests entirely with the court. In **Somalia**, there are reservations reported about the lack of documentary evidence (and lack of established rules of evidence to verify that documentary evidence) in court proceedings generally.

The wide variation in the approach of courts in the jurisdictions surveyed means that tactically, and for risk management reasons, commercial parties may need to adapt their approach (and expectations) according to the disclosure rules in relevant jurisdictions. This is important not only when litigation arises, but also when creating internal corporate policies on document creation and management.

## Question 7 *Class actions*

**Key indicator:** Class actions or collective actions, whereby all members of the class are bound by a judgment, are not usually possible in our jurisdiction.

### Guidelines

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#### BLUE

Class actions are not usually allowed. The courts are hostile to mass tort actions. Normally, parties have to join in the action to be bound. Since losing parties have to pay the costs of the other side, there are challenges getting parties to agree to pay costs.

#### GREEN

Class actions are possible if there are common issues and a large number of claimants, but are discouraged by the courts. There can be challenges to obtaining the agreement of the class to costs and obtaining mandates from all the parties for a representative action binding all members of the class.

#### YELLOW

Class actions are quite commonly permitted by the courts but claimants have to opt in, or class actions are permitted in the case of certain types of dispute, notably consumer, product liability, regulatory, or tort claims.

#### RED

Class actions are very common. Potential claimants must opt out. Otherwise, the judgment binds all persons with the same claims even if they were not aware of the proceedings. The question of costs is not usually a major issue. The representative claimants do not have to get a mandate from each member of the class.

#### CAN'T SAY/NOT APPLICABLE

## 7. Class actions



## *Class actions – analysis*

Class actions are a mechanism of collective redress, allowing individuals or companies with similar legal claims to be grouped together into a single action. They can either be on an "opt-in" basis, where those affected will only be bound by the decision (and receive any benefit) if they have positively chosen to join the mass claim, or on an "opt-out" basis, where all those affected are bound by the decision unless they choose specifically not to be. There has been an intensifying debate in Europe and elsewhere about collective redress, with a growing view in many jurisdictions that adequate provision for at least low value mass claims is needed in certain areas of the law (if not universally).

Many commercial entities remain concerned about the growth of class actions, in light of what many consider to be the "excesses" of the U.S. model (including the powerful Plaintiff Bar, the opt-out system, availability of punitive damages, contingency fees for lawyers, extensive discovery and limited costs sanctions). The complaint is that this has led to a highly litigious environment, with many unmeritorious mass claims being initiated.

Although historically seen as a U.S. phenomenon, the survey results show a **growth of collective redress mechanisms** in many other jurisdictions. Of particular note is **the Netherlands**. The Dutch Civil Code provides for class actions on an opt-in model, although damages must be claimed individually. There is, however, also an Act on Collective Settlement of Damages, which enables class settlements to be declared generally binding on an opt-out basis. In **Belgium**, consumer-specific class action legislation has recently been introduced which prescribes either an opt-in or opt-out requirement depending on the nature of the case. Responses also show that in **Bolivia, Botswana, Brazil, Canada, Georgia and India** it is not uncommon for class actions to be brought. In Bolivia, class actions are admitted by the courts for a wide variety of disputes, and in Botswana class actions are permitted in all types of litigation. Furthermore, in **Canada** all but the smallest provinces have class action legislation.

Our responses reveal this is an area of law that is in a **state of flux** in some jurisdictions, and undergoing reform in others. For example, in **Argentina**, where class actions are not expressly allowed by law except in consumer cases, a recent case (*Halabi, Ernesto*) has paved the way for class actions if certain requirements are satisfied. Although Europe-wide wholesale proposals have previously stalled (see further below), there is sector-specific legislation and there have been developments at individual EU Member State level. In **France** reform on class actions may be introduced in the near future. It is anticipated that there will be new legislation in 2015 permitting opt-in and opt-out collective proceedings in certain circumstances relating to antitrust private damages actions. **Thailand** also recently passed a class action law (subject to Royal Assent).

**Class actions are still not permitted (or are unheard of) in numerous jurisdictions.** For example, the concept of class actions is reported to be unknown in jurisdictions such as **Azerbaijan, Slovakia or Ukraine**. Class actions are not permitted in jurisdictions such as **Slovenia** (save for one exception) and **Iran**, where each claimant must file a separate lawsuit against the defendant. In **Switzerland**, the introduction of class actions was consciously renounced by the legislature due to a general mistrust of this method of redress.

In many other jurisdictions such as **Belize, France, Guernsey, Hong Kong, Jersey and Singapore** class actions as such are not recognised but **"representative" actions** are instead permitted. This is an alternative mechanism of collective redress where a claim is brought by a representative association on behalf of its members.

The responses show that the use of (and success of) such a procedure varies. In many of these jurisdictions there appears to be an acknowledgement by respondents that the system is not performing well. For instance, in **Hong Kong** the rules for such actions mean that it is difficult to show that a particular case is appropriate for representative action. This has led to the publication by the Law Reform Commission of Hong Kong of a report in May 2012

in which it recommended the introduction of a "comprehensive regime for multi-party litigation". Although reform is not expected imminently, it does suggest that a new collective redress mechanism is being contemplated. In **France**, this representative procedure is recognised but rarely used, with the conditions that need to be met in order to do so being quite restrictive. On the other hand, the **Irish** courts do not recognise a class action but have developed a test case based mechanism to deal with group litigation in an efficient way.

The fact that certain jurisdictions that currently have only a representative action procedure are considering other forms of collective redress suggests there may be further developments in this area in such jurisdictions. Furthermore, the answers to the survey suggest it is not only jurisdictions with representative mechanisms that are interested in **reform**, with many more jurisdictions introducing recent changes or considering reform of their systems in the future.

**Germany** is an example. At present, general class actions do not exist in Germany but certain capital markets disputes proceedings similar to these are possible under the Capital Markets Model Case Proceedings Act. The law has had to be reformed recently since it was not working in practice.

In **Finland**, class actions are only permitted in the consumer field. In **Mexico**, recent amendments to the Constitution have allowed class actions in matters relating to the consumption of products and services, and in relation to environmental matters.

The results of the survey also demonstrate variations as to whether an opt-in or opt-out regime is preferred.

Indeed, **Canada** has a hybrid system in some provinces whereby residents must opt out of the action but non-residents are required to opt in if they wish to be a part of the claim. There is no general consensus as to which is preferable. The European Commission recommendation on collective redress announced on 11 June 2013 proposed an opt-in procedure except for exceptional cases. Although Commission recommendations are non-binding principles, they are designed to ensure a coherent horizontal approach within the EU, and Member States have two years to adapt their national systems to achieve the objectives set out in the recommendation.

Whilst the process of introducing a European system of collective redress commenced almost a decade ago, there remains an absence of agreement. However, stemming from the Commission's recommendation, in the competition law context there has been a significant development as the Directive on rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the EU (Directive 2014/104) entered into force on 25 December 2014 and the Member States have two years to comply with the Directive.

Given the relatively recent nature of the reforms in certain jurisdictions there is a great deal of uncertainty in this area of the law. As shown by the survey there are differing approaches to collective redress throughout the jurisdictions surveyed; however, a general trend towards such redress being available is detectable in the results.

## Question 8 *Enforcement of foreign judgments*

**Key indicator:** Our courts will enforce a foreign judgment for a fixed sum of money, assuming that:

- the parties agree to the jurisdiction of the foreign court;
- there was due process; for example, there was no fraud and the basic rules of natural justice were observed;
- the judgment is final and conclusive;
- the judgment is not for taxes or a penalty;
- the judgment does not conflict with a local judgment; and
- there is no treaty between the foreign state and the relevant jurisdiction.

### *Guidelines*

#### BLUE

Our courts will normally enforce the foreign judgment in the above circumstances. The courts do not require reciprocity and do not usually re-examine the merits of the claim. They will not enforce a judgment if it conflicts with our public policy but these public policy matters generally relate to some very basic moral principles.

#### GREEN

Our courts will normally enforce a foreign judgment in the above circumstances but there are restrictions. For example, there must be reciprocity. The courts will not re-examine the merits of the claim unless, for example, it was clearly wrong or unless the wrong conflicts of law rule was applied.

#### YELLOW

Our courts are reluctant to enforce foreign judgments, even in the above circumstances. They require reciprocity and the courts will normally re-examine the merits of the claim so that in effect there is a new trial. The procedure can be slow.

#### RED

Our courts will not normally enforce foreign judgments in the absence of a treaty. The foreign judgment may be used in evidence but that is all.

#### CAN'T SAY/NOT APPLICABLE

## 8. Enforcement of foreign judgments

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## *Enforcement of foreign judgments – analysis*

The enforceability of foreign judgments in the jurisdiction where the defendant's assets are located can be a crucial factor in deciding where to litigate a dispute. A judgment obtained in one jurisdiction may prove virtually worthless if that judgment is not recognised in another jurisdiction where enforcement is sought.

The **Brussels Regulation** facilitates enforcement of judgments obtained in the courts of one EU Member State in the courts of another EU Member State. Reciprocal enforcement arrangements are also found in respect of EFTA states minus **Liechtenstein (Iceland, Norway, Switzerland)** and EU Member States under the **Lugano Convention 2007** (see Annex B – the Brussels regime).

Outside Europe, however, the picture is more complex. Many Commonwealth and former Commonwealth countries have reciprocal arrangements in place under certain bilateral treaties (such as the UK Administration of Justice Act 1920 or the Foreign Judgments (Reciprocal Enforcement) Act 1933). In the absence of an applicable bilateral treaty or statute, the enforceability of a foreign judgment will depend on whether the law of the relevant state permits recognition and enforcement or otherwise allows claimants to sue on the judgment debt.

It is encouraging that the **majority of respondents** (just under 80%) indicate that the courts in their jurisdictions **will normally enforce foreign judgments, and will not usually re-examine the merits of the claim**. Respondents from some jurisdictions identify uncertainties in this area. For example, respondents from **Vietnam** note that a foreign judgment may be enforceable only after consultation with certain Ministries. Respondents from **Indonesia** and **Thailand** comment that their courts will not enforce foreign court judgments (but may give that judgment evidential weight in any new action).

The most common restriction on enforcement raised in the replies is **reciprocity**. States applying this restriction will generally only enforce a foreign judgment if a similar judgment of their own courts would be enforceable in the state that handed down that judgment.

The Scandinavian countries, for example, indicate that the courts in their jurisdictions will be reluctant to enforce foreign judgments or will not normally enforce foreign judgments in the absence of an **applicable bilateral treaty**. In **Finland** it is reported that the evidentiary value of the judgment will be stronger if the foreign court deciding the case has applied its own law. It is interesting to note that some respondents indicated that reciprocity would be assumed in their jurisdiction unless proved otherwise. Responses suggest that this is the case in **Serbia** and sometimes in **Russia**, although the Russian courts have discretion to require evidence of reciprocity.

Another common restriction on enforcement mentioned by respondents is failure to comply with the **public policy** of the enforcing state. Again, there appears to be some variation in how widely different states will interpret the public policy exception. Article 45(1)(a) of the Brussels Regulation provides that a Member State judgment shall not be recognised if it is manifestly contrary to public policy in the Member State in which recognition is sought. Respondents from **Kuwait** note that a foreign judgment will not be enforced if it conflicts with "local public morals and public order".

As regards the **need for due process**, many responses mention a requirement for the original proceedings to have been properly served on the defendant and for the defendant to have been given a chance to respond. The Brussels Regulation contains such a requirement (Article 45(1)(b)). **Guatemala** takes this requirement a stage further: it will not enforce a default judgment issued in the absence of the defendant.

There is the potential for smoother enforcement procedures for court judgments in future if the Hague Convention<sup>01</sup> is ratified by a large number of states. This Convention would create a worldwide framework of rules on the recognition and enforcement of judgments in civil and commercial matters delivered in the courts of contracting states pursuant to choice of court/jurisdiction agreements. The aim is to create the same level of enforceability of court judgments handed down pursuant to choice of court agreements as is the

case with arbitral awards in New York Convention<sup>02</sup> states. The Hague Convention has to date been acceded to by **Mexico**, ratified by the EU and signed by the **U.S.**

and **Singapore**. The ratification of the EU seems likely to prove an incentive to other jurisdictions to sign and ratify the Convention.

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01. Hague Convention on Choice of Court Agreements of 30 June 2005.

02. Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (known as the New York Convention) signatory states are required to recognise and enforce arbitration awards rendered in accordance with the Convention, subject only to the limited grounds for refusal of enforcement contained in the Convention and any reservations made by the enforcing state on accession (such as reciprocity).

## Question 9 *Costs*

**Key indicator:** The losing party typically has to pay most of the litigation costs of the winning party in the case of a dispute on a commercial contract.

### *Background*

#### BLUE

The losing party typically has to pay 60%-70% of the litigation costs of the winning party (including lawyers' fees).

#### GREEN

The losing party usually has to pay only a proportion of the litigation costs of the winning party – this may include part of the lawyers' fees (subject to a maximum).

#### YELLOW

The losing party usually has to pay only a small proportion of the litigation costs of the winning party – usually according to a tariff by reference to the claim.

#### RED

The losing party either does not have to pay any of the litigation costs of the winning party or only the court fees and witness costs.

#### CAN'T SAY/NOT APPLICABLE

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## Costs – analysis

In many jurisdictions, the losing party typically has to pay a share of the litigation costs (including lawyers' fees) of the winning party in the case of a dispute on a commercial contract. This "**loser pays**" principle is applied in a number of jurisdictions, including **England and Wales** and certain Commonwealth countries.

The "loser pays" principle is sometimes said to deter unmeritorious or spurious claims from being commenced in the first place. On the other hand, this approach to costs arguably discourages litigants with *bona fide* claims who might not pursue claims because they are fearful of a significant adverse costs award against them if their claim fails. This is a particular concern for litigants that are individuals or small businesses.

The approach adopted in a jurisdiction towards the award of costs may have wider consequences. The fact that there is **no adverse costs sanction** is cited in the survey response from **Kuwait** as contributing to delays in the final determination of proceedings because there is no incentive to settle or to limit the issues raised.

The amount of recovery of costs varies. In **Uganda** respondents report that the losing party typically pays 100% of the winning party's litigation costs, including lawyers' fees. In English proceedings, however, the losing party typically has to pay 60%-70% of the litigation costs of the winning party, including the lawyers' fees, although the position can be different where offers to settle have been made (and rejected) during the course of proceedings. Further court reforms, including the introduction of costs budgeting for certain cases under the Jackson reforms, mean this percentage may vary. Costs are, however, at the **discretion of the court** and so in certain circumstances different costs orders can be made. In the **BVI** the loser has to pay the winning party's costs, which are assessed, with a payment of between 60%-70% of all costs, including lawyers' costs, also being common. The position is similar in **Canada**, except in the Province of Quebec, where the losing party usually has to pay only a small proportion of the litigation costs of the winning party. In **Hong Kong**, the "loser pays" principle exists but the typical rate of recovery of the costs in commercial litigation involving international firms is estimated to be closer to 40%-60% of the

lawyers' costs incurred, which is a similar proportion to the litigation costs recovered in **Australia**. In **Bosnia and Herzegovina**, it is reported that a party that loses a case is obliged to refund all legal costs to the winning party, but that the amount in respect of lawyers' fees is capped by reference to the average salary in Bosnia and Herzegovina and therefore in higher value cases a successful party is unlikely to be compensated fully for lawyers' fees. In **South Korea** respondents comment that the costs of a lawsuit (this can include lawyers' fees) are borne by the losing party. Respondents from **Columbia** note that a losing party has to pay 100% of the costs evidenced in the docket, but, as regards lawyers' fees, the losing party will have to pay the amount ordered by the court.

In some jurisdictions the courts do not generally make any award in respect of the winning party's lawyers' fees. For example, in **China**, the courts in general do not order compensation in respect of lawyers' fees, but will award the court fees to the winning party. In **Egypt**, a litigant only has to pay the court fees, even if it loses the case. In **Puerto Rico**, court costs and witness fees are usually allowed, but lawyers' fees are not (unless there is a specific statutory provision or some form of misconduct). In **Saudi Arabia**, lawyers' fees can only be sought through a separate action and that action can only be initiated once the underlying case is finally resolved. In **Ukraine**, there is a rule that only fees of "advocates" can be compensated and not all Ukrainian lawyers are advocates.

In other jurisdictions, **costs may be recovered as part of the damages award**. In **Japan**, it is reported that although the losing party has to pay the court fees and witness costs in normal cases, each party bears its own lawyers' fees (except for tort cases where a proportion of the lawyers' fees can be recovered as "damage"). In **Monaco**, respondents note that the winning party may be awarded damages which may include all or part of the litigation costs but that such damages are not automatically awarded by the court.

Recovery of costs may be based on **tariffs**. For example, in **Iran** it is reported that the losing party recovers the entire court costs based on relevant tariffs. In **Switzerland** the costs the losing party has to pay are

calculated according to a (cantonal) tariff, often much lower than actual costs incurred in international cases. In **the Netherlands**, the losing party generally only has to pay a small proportion of the actual costs of the winning party, usually according to a tariff by reference to the amount of the claim. In **Malaysia**, the losing party only pays the other party's costs according to a scale which is very low. The survey response from **Namibia** indicates that, subject to the discretion of the court, the successful party should generally be awarded costs but that, unless ordered otherwise, these costs are calculated according to statutory tariffs which tend to limit the costs awarded. In **Iraq**, respondents explain that costs are fixed by law and the court usually orders the losing party to pay minimal legal fees to the winning party.

In various jurisdictions, costs are **not generally recoverable, or awards are low**. In **New York**, generally each party to litigation must bear its own costs, including attorneys' fees, although there are certain statute-based exceptions to this rule, including in relation to federal antitrust and securities laws. In **Uruguay**, costs orders are very unusual, although there is a provision under Section 56 of the General Code of Procedure whereby the losing party can be ordered to pay litigation costs and fees on the grounds of unreasonable behaviour.

In **Oman**, the court generally awards only a nominal amount, if at all. In **Kuwait**, historically a nominal award of approximately GBP 200 or so is made, although it is reported that recently there have been slightly higher awards made.

For many jurisdictions, the award of any costs is a matter of **discretion**, including in **Zimbabwe**, where the court may make an award of costs in the cause if the matter is important to the development of jurisprudence in Zimbabwe. In **Peru**, the winning party is entitled to request all expenses arising out of the proceedings; however the court may reject the request or fix an amount at its discretion. In **Thailand** respondents note that the court has discretion to determine the costs that should be borne by the losing party. The survey entry from **Burundi** states that the losing party may be liable for payment of a proportion (or the whole) of the litigation costs (including expert costs).

Finally, actual recovery of any costs award can, in itself, prove difficult. For example, in **Pakistan** it is noted that whilst a nominal amount (such as the court fee and other expenses) is occasionally awarded to the successful party, in practice, recovery of even that small amount is often extremely difficult given the length of proceedings.

## Question 10 *Standards of the courts: high value disputes*

**Key indicator:** Our courts are generally efficient and reliable in the case of high value commercial disputes involving cross-border parties and issues (including, for example, large bank loans to corporations (secured or unsecured), bond issues, derivative contracts, sale and purchase of companies, takeovers, joint ventures, high value supply contracts and large insolvencies and restructurings).

### *Guidelines*

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#### BLUE

The courts are generally efficient and reliable in high value commercial disputes.

#### GREEN

The courts are quite efficient and reliable in high value commercial disputes.

#### YELLOW

The courts are quite inefficient and unreliable in high value commercial disputes.

#### RED

The courts are very inefficient and unreliable in high value commercial disputes.

#### CAN'T SAY/NOT APPLICABLE

## 10. Standards of the courts: high value disputes



## *Standards of the courts: high value disputes – analysis*

This is perhaps the most controversial and subjective question in our survey. It concerns the extent to which respondents consider their local courts to be efficient and reliable when determining high value commercial disputes involving cross-border parties and issues.

One of the most striking features of the responses to this question is that *the* overwhelming concern expressed by respondents about local court systems is **excessive delay**. Concerns about the speed at which disputes are resolved apparently outweigh all other worries (such as inexperience, bias, disproportionate costs or unpredictability).

Respondents express particular reservations about the ability of defendants to "drag out" proceedings. In **Pakistan** respondents note that the backlog in cases in the High Court and the ability of parties to delay proceedings mean that "it can take eight to ten years to obtain a final judgment". The losing party may also appeal that decision. In **India**, it is reported that there are approximately 64,000 cases pending in the Indian Supreme Court, and 4.2 million cases pending before the Indian High Courts. In total, approximately 28 million cases are pending before all Indian courts (including lower courts) and 99% of cases are reported to have been pending for more than ten years. Respondents from **Uruguay** estimate that the resolution of complex litigation can take six to eight years. Other significant economies are reported to have slow-moving court systems. In **Indonesia**, respondents note that their courts are not very efficient and are quite unreliable in high value or complex commercial disputes. Respondents from **China** observe that the efficiency and reliability of PRC courts may vary. The response from **Mexico** explains that, although the courts have become more experienced in hearing high value claims, there can still be delay. Scope for delay is also reported in other jurisdictions including **Burkina Faso, Djibouti, Trinidad and Tobago, Costa Rica, Guatemala, Grenada, El Salvador, Madagascar, Macau, Mexico, Montenegro, Lebanon, Nicaragua, the Philippines, Saudi Arabia, Serbia, Thailand, UAE and Vietnam**. Appeals are obviously also a contributing factor to a delay in final resolution. However, it is not just the

volume of appeals that can cause delays. The *structure* of the appeal system itself is identified in the survey as a factor. For example, the response from **Belize** states that the Court of Appeal is constituted only every three months, which has resulted in a backlog of cases developing.

A number of EU Member States, including **Romania, Slovakia, Bulgaria, Czech Republic, Cyprus, Italy, Portugal, Spain** and **Greece**, also report considerable delay in their court systems. In the case of **Greece**, it is reported that the ability of a defendant to launch numerous appeals can delay progress of an action and that there may also be enforcement delays due to strikes by the judiciary, lawyers, clerks and court officers. The difference in the time frames in which disputes are resolved in EU Member States is striking: respondents note that in **Italy** it takes on average four years to secure a first instance judgment, the majority of which are appealed all the way to the Supreme Court, whereas in **Ireland** it is reported that the average duration of a case in the Commercial Court is only **21 weeks**.

Many respondents state that inefficiencies in their local court system have led to a trend in parties increasingly referring complex commercial matters to **arbitration**. This trend is particularly notable in the responses from certain South American jurisdictions, such as **Colombia, Ecuador, Uruguay and Venezuela**. This trend is also noted in responses from other regions including **Bangladesh, Nepal, Oman and South Africa**. Some respondents suggest that the inability of their local courts to deal reliably with high value commercial disputes has encouraged this trend (see further below).

Certain courts are reported to deal with commercial disputes very efficiently; for example, **Anguilla, Australia, Austria, Germany, Guernsey, Ireland, Jersey, Singapore, Switzerland and Taiwan**.

**Botswana** reports that an increasingly "hands-on" approach by the judiciary to case management has improved the efficiency of the court system in handling commercial disputes. Respondents in the **BVI** state that their commercial courts are very efficient and often resolve disputes in one year.

Many jurisdictions have developed **specialist commercial divisions** of their respective higher courts. Unsurprisingly, there appears to be a correlation between those jurisdictions with specialist commercial chambers/divisions and the efficiency of the resolution process. The commercial division of the High Court of **England and Wales** regularly hears complex commercial disputes where at least one of the parties is from outside the UK and where the dispute is governed by a foreign (ie non-English) law. The courts "manage" cases and they generally progress quite efficiently.

A notable trend is the proliferation of such courts in African jurisdictions. In **Malawi**, there is a commercial division which is reported to operate more quickly than other divisions, while in **Liberia**, in commercial cases involving more than USD 1 million, three judges sit together to try the case. **Tanzania** is also reported to have an efficient commercial court.

In other African jurisdictions, **reforms** have been made to increase the efficiency of the courts. In **Botswana**, there is a "docket system" whereby a single judge is responsible for dealing with a matter from start to finish. In **Kenya**, respondents suggest that various recent structural reforms may improve the future conduct of commercial cases. In **Zambia** there is a specialist commercial court which deals with proceedings more swiftly.

Reforms are also noted in the **Croatian** response. New court structures have been established in the Middle East such as the **Bahrain** Chamber for Dispute Resolution and the courts of the new **Qatar Financial Centre**. These developments are likely to allow disputes in the region to be resolved more quickly.

Certain respondents express concerns **about how predictably the law is applied** in their local courts (for example, in **Bolivia**, **Latvia**, **Moldova**, **Macau**, **Mongolia**, **Morocco**, **Myanmar**, **Togo** and

**Uzbekistan**). It is reported that in **Somalia** the court system is "extremely underdeveloped" and commercial disputes are "incredibly difficult to litigate in Somali courts".

In some jurisdictions, there are concerns that the local courts **lack experience** in dealing with high value cross-border commercial disputes. In **Iraq**, it is reported that the courts are not yet experienced in dealing with complex commercial transactions, meaning it is not easy to predict how those courts would apply the relevant laws (although respondents note increasing numbers of complex transactions being litigated). A lack of case law relating to commercial disputes is identified in **Mauritania** as an issue. In **South Africa** it is observed that some judges are inexperienced in high value commercial disputes. In **Costa Rica** there are concerns about the lack of sophistication of certain courts trying cross-border commercial disputes; likewise, in **Azerbaijan** respondents note there is a concern about inexperience in trying commercial disputes in that court system.

Some **regional variations** within jurisdictions can also be identified. For instance, the response from **China** notes that the courts in major cities, such as **Beijing**, **Shanghai** and **Guangzhou**, are reported to be more predictable than courts in other areas. In **Pakistan**, it is reported that certain courts can be quite efficient, especially the High Court of Sindh, but that in other courts there is a significant backlog of cases and parties are able to drag out proceedings. In **Puerto Rico**, it is reported that efficiency varies, and federal courts tend to be more predictable than local courts even though there are no juries in local civil cases.

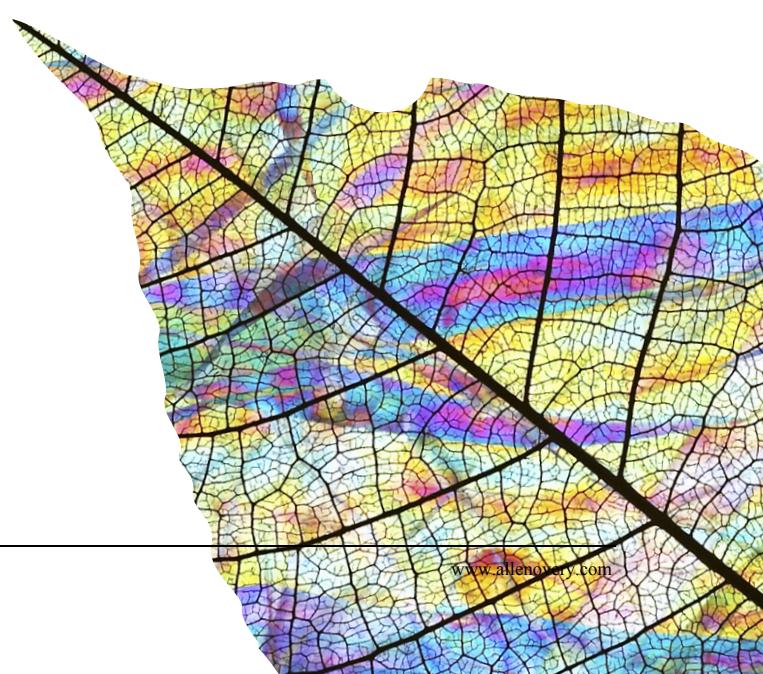
Finally, other trends emerge such as in **Poland**, where respondents note an informal system of precedent is emerging for appellant decisions.



# Results and commentary by jurisdiction

This section presents the results alphabetically by jurisdiction and contains the **colour ratings** and any **additional commentary** contributed by each respondent.

Each entry also includes **contact details** of the contributing law firm.



# Albania



## 1. Governing law

Pursuant to Albanian Law No 10428, dated 2 June 2011, on International Private Law, if the parties to a contract have expressly chosen a foreign law as the governing law of the contract, then Albanian courts must as a rule apply that foreign law except in certain circumstances (ie in relation to security interests, property, trusts, insolvency, for which there must be a connection between the foreign law and the contract or the parties). Law No 10428 also provides for special rules, for example, in relation to contracts of carriage, consumer contracts, insurance contracts and employment contracts.

## 2. Jurisdiction: parties choose your courts

As a rule, referring to Article 73 of Law No 10428, our courts have jurisdiction over a contract and dispute if the parties have so agreed by means of a jurisdiction agreement, on condition that such agreement should be made in writing and comply with the principles of international trade.

## 3. Jurisdiction: parties choose a foreign court

Jurisdiction of Albanian courts cannot be transferred to a foreign court by agreement, except for disputes between foreigners or between a foreigner and an Albanian citizen/entity (Article 37 of the Albanian Code of Civil Procedure).

Our courts may ignore the foreign jurisdiction clause in special cases where they have exclusive jurisdiction, for example in actions relating to real estate located in Albania, in actions relating to the decisions of the governing body of a commercial company if the place of incorporation is Albania (Article 72 of Law No 10428).

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

Our courts will normally grant a freezing order if there is a real risk that the defendant will dissipate its assets, provided that the assets to be seized are located in Albania.

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

The Albanian Code of Civil Procedure does not provide for class actions. There are joint actions where one or more claimants sue one or more defendants subject to the condition of proving the joint rights or obligations in the case. The judgment of the court is strictly binding on the litigant parties only.

## 8. Enforcement of foreign judgments

Pursuant to Articles 393 to 397 of the Albanian Code of Civil Procedure, our courts will enforce any foreign judgment in the circumstances set out in the question.

## 9. Costs

Pursuant to Article 106 of the Albanian Code of Civil Procedure, the litigation costs are charged to the losing party to the extent of the part of the lawsuit which has been accepted.

## 10. Standards of the courts: high value disputes

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# Algeria



## 1. Governing law

## 2. Jurisdiction: parties choose your courts

Provided that the parties are corporate bodies, the courts will accept jurisdiction over a contract dispute in most cases, even though the parties and the contract in question have no connection with the jurisdiction.

## 3. Jurisdiction: parties choose a foreign court

A foreign jurisdiction clause would not apply to local parties but rather only between a foreign party and a local party to a contract.

## 4. State (or sovereign) immunity

To date we are not aware whether such waiver would be effective as there is no written precedent. However, certain assets, for example assets of Sonatrach (national oil company) or defence assets, are immune by law from any action.

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

Note that certain documents are privileged, for example, communications between lawyer and client, and cannot be disclosed.

## 7. Class actions

## 8. Enforcement of foreign judgments

## 9. Costs

## 10. Standards of the courts: high value disputes

Note that this may depend on the publicity given to the case, the kind of parties and the context of the litigation (for example, whether it concerns a strategic project). It also depends on the court (for example, the qualifications of the judges).

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# Angola



## 1. Governing law

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## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

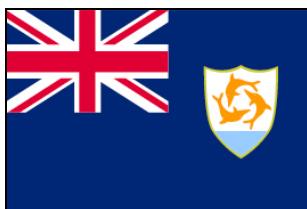
## 7. Class actions

## 8. Enforcement of foreign judgments

## 9. Costs

## 10. Standards of the courts: high value disputes

# Anguilla



## 1. Governing law

The court would be governed by most aspects of the contract including the governing law.

## 2. Jurisdiction: parties choose your courts

If there is an issue involving property outside the jurisdiction, the court may decide not to hear the matter, so as not to act in vain.

## 3. Jurisdiction: parties choose a foreign court

The court would be very reluctant to be guided by ouster clauses in contracts.

## 4. State (or sovereign) immunity

Anguilla is an Overseas Territory of the United Kingdom, so Anguilla is subject to the international treaties of the United Kingdom.

## 5. Pre-judgment arrests or freezing orders

The court may grant a freezing order before the completion of a matter. However, the claimant is to execute a bond in the event the claim fails and the defendant suffers any damages as a result of the freezing order.

## 6. Disclosure or discovery of documents in litigation

The court tries at all times to act justly and would request that all relevant documents be disclosed.

## 7. Class actions

Class actions are rare in our jurisdiction. The court prefers the mediation process.

## 8. Enforcement of foreign judgments

There is reciprocal enforcement of judgments between Member States of the Eastern Caribbean Supreme Court. However, our laws also allow for foreign judgments to be registered.

## 9. Costs

The winning party's recovery of costs is normally based on the court regulated fees or any agreement by the parties on costs.

## 10. Standards of the courts: high value dispute

Our jurisdiction has a special Commercial Court with a good reputation for getting matters heard promptly. This court is based in the British Virgin Islands (BVI).

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# Argentina



## 1. Governing law

Our courts will apply the law chosen by the parties with the restrictions mentioned, unless any of them alleges that there is no relevant/reasonable connection between such law and the facts of the case. Our courts tend to follow the traditional rule according to which the foreign law has to be proved by the party (section 13 of the Civil Code), notwithstanding that Argentina is a party to the Inter-American Convention on General Rules of IPL (section 2).

## 2. Jurisdiction: parties choose your courts

With the restrictions mentioned, our courts tend to accept cases if so chosen by the parties.

## 3. Jurisdiction: parties choose a foreign court

According to the National Code of Civil and Commercial Procedure (section 1) choice of jurisdiction in favour of foreign courts or arbitration panels is valid only where international and patrimonial issues are involved. Section 1 of the National Code of Civil and Commercial Procedure sets out two exceptions regarding the right to submit a case to a foreign court or arbitration panel in international and patrimonial cases: (i) if the Argentine courts have exclusive jurisdiction; and (ii) if the choice of court is forbidden by law.

## 4. State (or sovereign) immunity

According to Law 24,488 waiver from jurisdiction is valid with certain restrictions. However, enforcement is not possible without a new waiver. Section 22 of the Convention of Vienna of 1961 applies.

## 5. Pre-judgment arrests or freezing orders

General pre-conditions to this are that the claimant must submit strong evidence that: (i) he has a right; (ii) the foregoing right is currently threatened; and (iii) the injunction order is needed in order to preserve the chance of enforcing the final judgment successfully.

## 6. Disclosure or discovery of documents in litigation

Compulsory discovery is not admitted. Of course, the party bearing the burden of proof has to face the consequences of any failure to produce proper evidence (according to section 377 of the National Code of Civil and Commercial Procedure).

## 7. Class actions

Class actions are not expressly allowed by law, except in consumer law cases (sections 52 to 54 of Law 24,240 as amended by Law 26,361). However, a recent judgment of the Supreme Court (*Halabi, Ernesto*) paved the way for class actions, if certain requirements are satisfied.

## 8. Enforcement of foreign judgments

Assumptions made by the question coincide in general terms with the requirements set out in section 577 of the National Code of Civil and Commercial Procedure. However, an *in rem* judgment cannot be enforced, unless it relates to moveable assets transferred to Argentina during or after the judicial proceedings held abroad.

## 9. Costs

The losing party has to pay all the costs of the winning party, including the fees of the attorneys and experts appointed by the court in the amount set by the same court. However, the losing party may be totally or partially exempted from paying judicial expenses, should the court find grounds to grant such exemption. Notwithstanding the foregoing, independent experts are entitled to enforce up to 50% of their fees against the losing party (section 77 of the National Code of Civil and Commercial Procedure).

## 10. Standards of the courts: high value disputes

Note, however, that certain courts lack the expertise to understand all the issues at stake.

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# Armenia



## 1. Governing law

According to article 1284 of the Civil Code of the Republic of Armenia (the **Civil Code**), a contract shall be regulated by the law of the state chosen by agreement of the parties. The parties to a contract may choose the law to be applied both for the contract as a whole and for individual parts of it. A choice of the law to be applied may be made by the parties to the contract at any time, both at the conclusion of the contract and later. The parties may also at any time agree on changing the law applicable to the contract.

The exception to the above-mentioned rule is provided by articles 1258 and 1259 of the Civil Code, according to which a norm of foreign law shall not be applied if the consequences of its application would clearly contradict the basic legal order (public order) of the Republic of Armenia. The chosen law shall not affect the effectiveness of imperative norms of the law of the Republic of Armenia.

## 2. Jurisdiction: parties choose your courts

According to article 244 of the Civil Procedure Code of the Republic of Armenia (the **Civil Procedure Code**), the courts of the Republic of Armenia are also entitled to try civil cases involving foreign citizens if: (i) there is an agreement to that effect between the citizen or legal entity of the Republic of Armenia and the foreign person; (ii) the defendant has property in the territory of the Republic of Armenia; (iii) in cases concerning divorce, one of the spouses is a citizen of the Republic of Armenia; (iv) the case concerns damage to one's health or the death of a breadwinner inflicted in the territory of the Republic of Armenia; (v) the circumstances or other actions which served as the basis for the demand for compensation for damage inflicted to property took place in the Republic of Armenia; (vi) the affiliate or representative of the foreign person is

located in the Republic of Armenia; (vii) the action follows from an agreement which was executed or must be executed in the territory of the Republic of Armenia; (viii) the action follows from an unjust enrichment which took place in the territory of the Republic of Armenia.

## 3. Jurisdiction: parties choose a foreign court

The question is not regulated under Armenian law, but there is some precedent of the court taking jurisdiction in this situation.

## 4. State (or sovereign) immunity

The statement is true, though there has never been such a precedent.

## 5. Pre-judgment arrests or freezing orders

According to article 97 of the Civil Code, the court, by motion of a person participating in the case, takes measures to secure the action if failure to take such measures could make execution of the court's act impossible or difficult. The securing of the action is allowed at any stage of the proceedings.

## 6. Disclosure or discovery of documents in litigation

According to article 48 of the Civil Procedure Code, the parties have the right to refer to the evidence they have disclosed to the other party.

## 7. Class actions

Class actions are not regulated under Armenian law.

## 8. Enforcement of foreign judgments

According to article 2476 of the Civil Procedure Code, our courts will normally enforce the foreign judgment in the circumstances referred to in the question.

## 9. Costs

According to article 73 of the Civil Procedure Code, distribution of court costs amongst persons participating in the case is in proportion to the satisfied claims.

## 10. Standards of the courts: high value disputes

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# Australia



## 1. Governing law

Australian courts will usually give effect to an express choice of law identified in a contract, even where there is no connection between the choice of law and the contract or parties. The High Court of Australia, however, has held that a choice of law may be overruled on public policy grounds in circumstances where the choice of law is made to allow a party to avoid a legal requirement in the forum that they would otherwise be obliged to observe (see *Akai Pty Ltd v The People's Insurance Co Ltd* (1996) 188 CLR 418). Similarly, parties' choice of a foreign law will be subject to overriding "mandatory" Australian laws – statutes which contain "self-limiting provisions". These laws cannot be avoided by a contractual stipulation that the law of a foreign country applies. Examples of such statutes are the *Bills of Exchange Act 1909* (Cth), the *Insurance Contracts Act 1984* (Cth), and the *Carriage of Goods by Sea Act 1991* (Cth). Australian competition and consumer law legislation has been held to be a mandatory law in this regard. Courts may also set aside contractual terms considered to be unjust in the circumstances, which may include a particular choice of law clause.

## 2. Jurisdiction: parties choose your courts

Australian courts adopt the "clearly inappropriate forum" test in matters where their jurisdiction is disputed (see *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538). A court will be deemed a "clearly inappropriate forum" where "continuation of the proceedings in that court would be oppressive, in the sense of 'seriously and unfairly burdensome, prejudicial or damaging', or, vexatious, in the sense of 'productive of serious and unjustified trouble and harassment'" (see *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491). It is therefore rare for Australian courts to

decline jurisdiction even where the parties in dispute have a remote or evanescent connection to Australia.

## 3. Jurisdiction: parties choose a foreign court

Australian courts will, absent strong reasons to the contrary, generally give effect to a choice of foreign jurisdiction in a contract that is express or, if not express, implied (in the sense that the choice of law can be inferred from the contract; see further *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418).

## 4. State (or sovereign) immunity

Foreign states are immune from suit in Australia under s 9 of the *Foreign States Immunities Act 1985* (Cth), with the exception of states who are also commercial parties (see s 11 of the Act), or where the state has submitted to an Australian jurisdiction, for example by instituting proceedings or through a waiver of immunity, written or otherwise (see s 10 of the Act).

## 5. Pre-judgment arrests or freezing orders

Both the Federal Court and the various state and territory jurisdictions in Australia allow for the granting of "Mareva" or freezing orders (see, for example, Pt 7 Div 7.4 of the *Federal Court Rules 2011*, Pt 25 Div 2 of the *Uniform Civil Procedure Rules 2005* (NSW) or Order 52A of the *Rules of the Supreme Court (WA)*). The plaintiff would need to demonstrate that they have a good and arguable case, and that there exists a real risk that any judgment will not be satisfied if the order is not granted (see further *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319). Where there is a real risk of dissipation of assets if an order is not made, the court will normally make the order.

## 6. Disclosure or discovery of documents in litigation

All Australian jurisdictions make use of compulsory discovery, although the scope of discovery may be limited by the court. Historically, all documents relevant to a fact in dispute in proceedings were the subject of compulsory disclosure. However, in an effort to curb the financial burden of litigation, courts are increasingly reluctant to make orders for parties to disclose all potentially relevant documents in commercial disputes. Despite these measures, disclosure obligations remain broad, but there is a trend towards narrower disclosure.

## 7. Class actions

In Australia, all jurisdictions recognise the possibility of class actions or "representative proceedings", although requirements vary. These are most commonly brought in the Federal Court of Australia, although there are mechanisms for them to be brought in other Australian jurisdictions.

As a general proposition, most Australian courts adopt an "opt-out" regime. This is the case in the Federal Court of Australia. However, as contingency fees for lawyers are not permitted in Australia, class actions are often funded by third party litigation funders. Because of the nature of third party litigation funding arrangements, a number of class actions are effectively run on an "opt-in" basis.<sup>01</sup> Despite that, there are a number of prominent plaintiff firms who regularly market, and bring, substantial class actions in Australia and those firms are supported by a substantial number of litigation funders operating in Australia.

## 8. Enforcement of foreign judgments

Under the *Foreign Judgments Act 1991* (Cth), foreign money judgments may be registered in Australia if the court in which the judgment was handed down is one of a number of superior courts recognised explicitly in the Schedule to the *Foreign Judgments Regulations 1992* (Cth) as affording Australia reciprocity of treatment. This includes superior courts from jurisdictions such as the UK, Hong Kong and Switzerland.

For those jurisdictions not recognised under the Act, it is possible to have money judgments enforced at common law, subject to a number of straightforward conditions (for example, the foreign court must have

had jurisdiction over the person in question at the time of judgment).

## 9. Costs

The unsuccessful party ordinarily has to pay the litigation costs of the winning party. Typically, the successful party will recover 50%-70% of their costs incurred in the conduct of the claim. However, the precise rate of recovery can vary, and a successful party's recovery rate can be as low as 40% in some cases.

## 10. Standards of the courts: high value disputes

Australian courts have a long history of determining disputes relating to complex, high value commercial transactions. By way of example, the Supreme Courts of New South Wales and Western Australia have lists dedicated to active management of commercial cases, presided over by commercial list judges. Similar lists operate in the Supreme Courts of a number of other Australian States.

Generally speaking, Australian courts are reliable and competent in resolving high value commercial disputes.

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<sup>01</sup> We also note that a particular state-based regime is an opt-in regime (see rule 80 of the *Supreme Court Civil Rules* (South Australia)).

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# Austria



## 1. Governing law

Generally, parties can agree on the application of any foreign law. However, this mostly applies to the law of obligations, as the choice of law in other fields of law such as property law, labour law, consumer protection law, law of succession and family law is severely restricted. The choice of law does not need to be in writing, although it is advisable that it is. A connection between the choice of law and the subject of the contract or the parties is not required. In relation to the law of obligations, the Austrian courts will apply the rules set out in Rome I to determine whether and when a choice of law may be displaced (see Annex A below for further details on Rome I).

## 2. Jurisdiction: parties choose your courts

Austrian courts will generally accept jurisdiction agreements, even if there is no connection between the contract or the parties and the jurisdiction. The legitimacy of jurisdiction agreements is governed by the Brussels Regulation and the Austrian Code of Civil Procedure (see Annex B below for further information on the Brussels Regulation). However, there are several restrictions, for example, for disputes relating to rights *in rem* concerning real estate as well as relating to more sensitive matters such as family law, social security law or consumer protection law. In disputes relating to employment contracts, jurisdiction agreements departing from Section 5 of the Brussels Regulation may only be concluded once the dispute has arisen or if the jurisdiction agreement allows (only) the employee to bring proceedings in courts other than those indicated in that section.

## 3. Jurisdiction: parties choose a foreign court

Generally, the jurisdiction agreement must explicitly state that the foreign court shall have exclusive

jurisdiction. In the absence of such explicit agreement, jurisdiction agreements only provide for additional elective jurisdictions and actions may still be brought before the competent Austrian courts. However, within the scope of application of the Brussels Regulation and the Lugano Convention, the opposite is the case: if the parties do not explicitly state otherwise, the jurisdiction agreement will result in exclusive jurisdiction of the chosen courts.

## 4. State (or sovereign) immunity

According to Austrian case law, foreign states can claim immunity from jurisdiction if the acts giving rise to the dispute are to be qualified as *acta iure gestionis* (as opposed to *acta iure imperii*). This is not to be determined by the purpose but rather by the nature of the conduct of the foreign state. Therefore, a written waiver regarding the immunity from jurisdiction over civil law contracts is advisable, but not essential. However, enforcement against local assets of the debtor state which are intended for sovereign purposes is only possible if the contract contains a separate, explicit waiver of immunity from enforcement proceedings.

## 5. Pre-judgment arrests or freezing orders

Austrian courts will grant interim relief including an order for seizure for security under certain conditions. The court must have jurisdiction in the main action or in the respective enforcement proceedings. In most cases, the claimant has to show that without such seizure or security, the enforcement of the judgment would evidently be frustrated or significantly impeded, or that the judgment will have to be enforced in a country that is not a Member State of the EU or a signatory of the Lugano Convention. The mere suspicion that a defendant might dissipate its assets is, however, not sufficient.

## 6. Disclosure or discovery of documents in litigation

Under Austrian law, a party is generally not obligated to cooperate and disclose to the other party documents in its possession. A party will only be obliged to produce a document: (i) if that party itself relied on that document in the instant trial; (ii) if that party is obligated to disclose a certain document by contract (explicitly or impliedly) or by law (in only a few cases); or (iii) if the document is a joint document of the parties. Austrian courts cannot compel a party to produce a document but may only draw (adverse) inferences from a party's refusal to disclose a document whose production was requested by the court.

## 7. Class actions

Austrian laws do not provide for a special proceeding for class actions. In the past, courts have been reluctant to accept such actions. However, courts are now generally accepting class actions, particularly regarding claims brought by shareholders against companies which allegedly acted fraudulently or in breach of for example, a prospectus. In the absence of statutory provisions, Austrian practice has created a technique referred to as "Austrian style class action": the factual and legal basis of the individual claims must be essentially identical in order to file such a claim.

## 8. Enforcement of foreign judgments

Our courts will not normally enforce foreign judgments in the absence of a multilateral or bilateral treaty. Additionally, there are some government regulations envisaging enforcement even where there is no such treaty; such regulations require reciprocity however. Also note that enforcement of Member State judgments under the Brussels Regulation is relatively straightforward (further information on the Brussels Regulation can be found in Annex B below).

## 9. Costs

Litigation costs are allocated by the court based on the proportion of the parties' success. In case a party succeeds 100%, the opposing party has to bear 100% of the court fee. However, attorneys' fees are only awarded according to the Austrian lawyers' tariff index, under which the amount of compensation is determined by the amount in dispute. There is no clear answer to the question whether this is sufficient to cover the actual costs. If the amount in dispute is quite high, this might well be the case.

## 10. Standards of the courts: high value disputes

The duration of Austrian court proceedings is comparatively short.

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# Azerbaijan



## 1. Governing law

According to the Law of the Republic of Azerbaijan on International Private Law, a local court will apply local law if it is difficult to establish the content of a chosen foreign law.

## 2. Jurisdiction: parties choose your courts

Although Article 450.1 of the Civil Procedure Code of the Republic of Azerbaijan states that an Azerbaijani court will assume jurisdiction if there is a written contract on choice of an Azerbaijani court as exclusive jurisdiction (despite the fact that an Azerbaijani court would not otherwise have jurisdiction over a case), we believe that our courts will be slow to accept jurisdiction unless there is a substantial connection between the contract or the parties and the jurisdiction.

## 3. Jurisdiction: parties choose a foreign court

Under Article 450.2 of the Civil Procedure Code of the Republic of Azerbaijan, contractually agreed exclusive jurisdiction of a foreign court will be recognised only if one of the parties resides, or is based, in a foreign country.

## 4. State (or sovereign) immunity

It is difficult to provide any grounded advice as Azerbaijani law is silent about this matter. Also, we do not have such precedents in court practice.

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

Please note that Azerbaijani law does not recognise disclosure or discovery concepts. Nonetheless, Article 78 of the Civil Procedure Code of the Republic of Azerbaijan allows a litigant to request a court to order submission of evidence (for example, documents) from the opposite party or third parties that could be relevant to the subject matter of the case, provided that the requesting party shows that such party is not able to obtain such evidence independently.

## 7. Class actions

Although class action and collective action concepts are not known in Azerbaijan, persons may choose to sue a defendant(s) together, and such a case will be heard as a single case. However, in such a case, a court will review the merits of the claims of each and every plaintiff individually. Therefore, it is possible that while the court dismisses a claim in relation to one claimant, it may grant a claim in relation to another claimant from the same group.

## 8. Enforcement of foreign judgments

Azerbaijani courts will not recognise foreign judgments if the subject matter of the case relates to the exclusive jurisdiction of an Azerbaijani court (for example, *in rem* jurisdiction in relation to immoveable property located in Azerbaijan). In addition, an Azerbaijani court will reject enforcement of a foreign judgment if it finds that such judgment contradicts the laws of the Republic of Azerbaijan and legal order. It is not clear what "legal order" means, but we read this concept as something close to a public policy notion.

## 9. Costs

The losing party has to pay documented costs of the winning party, including court fees and attorneys' fees. Please note that attorneys' fees will be granted if such fees are reasonable and documented. In the meantime, Article 119 of the Civil Procedure Code of the Republic of Azerbaijan recognises pre-litigation contractual agreements of the parties on distribution of such costs.

## 10. Standards of the courts: high value disputes

In Azerbaijan, the major concern is that judges are not very knowledgeable, sophisticated or experienced in high value disputes.

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# Bahrain



## 1. Governing law

The party relying on the foreign law must prove the foreign law and provide the relevant provisions of law. Since the language of the court in the Kingdom of Bahrain is Arabic, these documents should be translated into Arabic.

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

The party relying on the clause in the contract whereby the parties agreed to resolve their dispute in a jurisdiction other than Bahrain must object to the assumption of the jurisdiction by the Bahraini court at the earliest opportunity and before making submissions on merits of the case.

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

There is no concept of "class action" in Bahrain. However, interested people may, by agreement, join and file a case in the court such as in labour matters or bankruptcy matters.

## 8. Enforcement of foreign judgments

Article 252 of the Civil and Commercial Procedures Act states: "Court judgments and orders passed in any foreign country may be ordered to be enforced on the same conditions as are laid down in the law of that country for enforcing court judgements and orders issued in Bahrain."

## 9. Costs

The court fees are not covered in this answer.

## 10. Standards of the courts: high value disputes

A law was enacted some time ago by which the Bahrain Chamber for Dispute Resolution (**BCDR**) came into existence to resolve high value disputes (claims exceeding Bahraini Dinars 500,000) among financial institutions licensed by the Central Bank of Bahrain (the financial regulator) and other institutions, companies and individuals. BCDR also has jurisdiction to resolve high value international commercial disputes (if one of the disputant parties or the place where a substantial part of the obligations of the commercial relationship is to be performed, or the location most closely connected with the dispute, is outside Bahrain). The judicial process in BCDR is speedy. The judgment rendered by the Dispute Resolution Tribunal can only be challenged by way of set-aside application before the Cassation Court based on limited grounds.

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# Bangladesh



## 1. Governing law

Bangladesh courts uphold choice of foreign law and party autonomy as agreed among the parties while entering into the contract. It was decided in PLD 1964 Dacca 637 that when the intention of the parties to a contract as to the law governing the contract is expressed in words, this expressed intention determines the proper law of the contract and in general overrides every presumption.

## 2. Jurisdiction: parties choose your courts

Bangladesh courts accept jurisdiction over a contract dispute in most cases if such courts have been nominated to have jurisdiction over the disputes arising out of such contract, even though the parties and the contract in question have no connection with the jurisdiction. However, execution of judgments against foreign residents and/or assets requires reciprocal arrangements with such jurisdiction within which the foreign resident or asset is domiciled.

## 3. Jurisdiction: parties choose a foreign court

Bangladesh courts shall not exercise jurisdiction over a contractual dispute where the contract states a foreign court to have exclusive/non-exclusive jurisdiction over it unless all of the parties to the dispute agree to submit before the jurisdiction of Bangladesh courts to resolve the dispute. However, Bangladesh courts will assume jurisdiction in special cases where they have exclusive jurisdiction, eg labour disputes, *in rem* actions relating to local land etc. Bangladesh courts may also allow specific relief in favour of a plaintiff in form of injunction, attachment etc where there is a risk that the defendant may get rid of assets to frustrate any future judgment against the plaintiff pending the final adjudication in the court of foreign jurisdiction.

## 4. State (or sovereign) immunity

Such a waiver to sovereign immunity is upheld in Bangladesh courts with respect to a contract which is not against any local policy, and which is valid and binding otherwise. In addition, for disputes arising out of contracts of a commercial nature, Bangladesh courts accept the common law doctrine of restrictive immunity adopted by the English courts in 1981.

## 5. Pre-judgment arrests or freezing orders

Sections 5 and 6 of the Code of Civil Procedure allow attachment before judgment and Order 39 Rules 1 and 2 of the Civil Procedure Code allow a party to seek an injunction during the pendency of the suit. To extract such an order from the court, the principal requirements are: (i) the courts must have jurisdiction over the subject matter; (ii) the defendant must have properties within the territorial jurisdiction of Bangladesh; and (iii) the plaintiff is to establish that there is a possibility that the defendant may intend to obstruct or delay the execution of any decree that may be passed against him by way of disposing or removing any part of his properties within the territorial jurisdiction of Bangladesh.

## 6. Disclosure or discovery of documents in litigation

Bangladesh courts have been empowered to make an order for the production of documents at any time during the pendency of any suit. Such an order can be made only if two preconditions are satisfied; namely, that the documents must be in the possession or power of the party against whom the order is made, and secondly, the documents must relate to the matter in question. Privileged communications and documents are not subject to scrutiny and inspection.

## 7. Class actions

In general all affected parties may be joined as claimants with their consent where any right to relief is in respect of the same transaction and claims, and if such persons brought separate suits. In cases of writ and public interest litigation any person acting *bona fide* can approach the court to challenge the violation of fundamental rights (under the constitution) of an individual or class of persons, but not for personal gain.

## 8. Enforcement of foreign judgments

For a foreign judgment to be enforceable in Bangladesh, such judgment must be passed by a competent court of a reciprocating territory and filed with the district court for enforcement under Section 44 of the Code of Civil Procedure. The prerequisites for such enforcement of judgment, as laid down in Section 13 of the Code of Civil Procedure, are: (i) the judgment must be conclusive and given on the merits of the case; (ii) the judgement must be pronounced by a court of competent jurisdiction; (iii) the judgment must be capable of enforcement in the original court; (iv) the judgment debtor must have been duly served with the process of the original court; (v) the judgment must not have been obtained by fraud; (vi) the judgment must not be contrary to Bangladesh public policy; and (vii) there is no pending or possible intended appeal against the judgment of the original court. A suit may be filed on the basis of foreign judgment from a non-reciprocating territory where the cause of action is the foreign judgment.

## 9. Costs

As per law the winning party is entitled to recover all costs associated with the lawsuit. However, in practice a nominal amount, such as the *ad-valorem* court fee, expenses for summons/services, and other direct expenses are occasionally awarded in favour of the winning party. Recovery of any such amount is extremely difficult owing to the unpredictability of enforcement by the tribunal and the lengthy procedure involved in effecting such recovery and, as such, such endeavours are seldom taken up.

## 10. Standards of the courts: high value disputes

The judicial system of Bangladesh mostly follows the adversarial model and the courts of Bangladesh adjudicating on high value disputes, especially the High Court Division and Appellate Division of the Supreme Court of Bangladesh, are quite competent and able to apply the law properly and predictably without any sharp bias. However, the judiciary infrastructure is inadequate and, as such, overburdened and consequently the process of getting the dispute heard and the orders enforced is very slow. Furthermore, the constitutional writ provisions, the right to appeal and application for revision under the Supreme Court of Bangladesh provide the losing party with three layer recourse thus making the procedure to get final adjudication quite time-consuming and lengthy. This is leading parties to high value contracts in Bangladesh to adopt arbitration as the dispute resolution mechanism.

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# Barbados



## 1. Governing law

Foreign law will be applied so long as it can be pleaded and proved to the satisfaction of the local courts (see *Lazard Brothers & Co. v Midland Bank Ltd* [1933] A.C. 289).

## 2. Jurisdiction: parties choose your courts

So long as there is credible basis under the common law for establishing Barbados as the *forum conveniens*, the courts will accept jurisdiction over the matter.

## 3. Jurisdiction: parties choose a foreign court

So long as the contract term governing choice of jurisdiction is found to be valid and enforceable, the law governing contracts and in particular, the freedom to choose a forum will generally be respected by the Barbados courts.

## 4. State (or sovereign) immunity

There is no local authority on the point. Notwithstanding, we anticipate that the courts would follow the English position subject to any exceptions outlined in the Diplomatic Immunities and Privileges Act, Cap 18 and the Immunities and Privileges (International Organisations & Overseas Countries) Act, Cap 131.

## 5. Pre-judgment arrests or freezing orders

The Barbados courts have explicit jurisdiction to grant injunctive relief, including pre-judgment freezing orders pursuant to s.44 of the Supreme Court of Judicature Act, Cap 117A. This jurisdiction is given further effect by Part 17 of the Supreme Court (Civil Procedure) Rules, 2008. In order to grant a freezing order, the court must satisfy itself that (i) the claim is one over which the court has jurisdiction; (ii) the plaintiff has a good arguable case; (iii) the defendant appears to have assets within the jurisdiction; (iv) there is a real risk that those assets will be removed if injunctive relief is not granted; (v) there is a real risk that if the injunction is not granted the defendant will be unwilling or unable to satisfy the plaintiff's claim; and (vi) there is a balance of convenience in favour of granting the injunction.

## 6. Disclosure or discovery of documents in litigation

Parties to an action in Barbados courts are required by the common law to disclose all documents deemed relevant which are or were in the control of that party. There is an exception where privilege is claimed. Unlike under the prior Rules of Supreme Court (RSC) regime, disclosure is no longer an automatic process under the new Supreme Court (Civil Procedure) Rules, 2008 at Part 28. Whether the disclosure being sought is standard or specific, an order must first be sought from the courts.

## 7. Class actions

Class action suits are not usually available. The more likely route is to join various suits with the same underlying cause of action against the same party.

## 8. Enforcement of foreign judgments

Enforcement of foreign judgments is available under the common law. In this way, it is possible to enforce a foreign judgment in Barbados even where there is no treaty or other statutory agreement in place between the foreign and local *fora*. The critical consideration is whether the court providing the judgment is competent. The enforcement of foreign judgments is directly contemplated by the Supreme Court (Civil Procedure) Rules, 2008 at Part 72.

## 9. Costs

Under Part 64.6 of the Supreme Court (Civil Procedure) Rules, 2008, the winning party is generally entitled to their costs. However this rule is subject to the discretion of the court which may take into consideration factors such as the behaviour of the parties to the claim.

## 10. Standards of the courts: high value disputes

There are a few issues with the overall efficiency of the system. Outside of these, the courts are very reliable in high value commercial disputes.

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# Belarus



## 1. Governing law

See Article 26 of the Economic Procedure Code. There is no clearly defined concept of public policy and scope of imperative local norms that may override applicable foreign law chosen by the parties.

## 2. Jurisdiction: parties choose your courts

See Article 237 of the Economic Procedure Code. Belarusian courts adjudicate on a dispute between the foreign parties if the parties agreed on that and a dispute does not fall within the exclusive competence of a foreign court.

## 3. Jurisdiction: parties choose a foreign court

Article 236 of the Economic Procedure Code provides for exclusive jurisdiction of Belarusian economic courts over certain disputes. Belarusian economic courts have exclusive jurisdiction, for example, over disputes related to state property, real estate located in Belarus and insolvency of legal entities and individual entrepreneurs registered in Belarus.

## 4. State (or sovereign) immunity

See Article 239 of the Economic Procedure Code. A clearly expressed consent of a foreign state is required to waive immunity.

## 5. Pre-judgment arrests or freezing orders

See Article 115 of the Economic Procedure Code. Belarusian courts are often reluctant to apply interim measures.

## 6. Disclosure or discovery of documents in litigation

See Article 101 of the Economic Procedure Code. Though it is theoretically possible there is no effective mechanism to enforce disclosure, even if granted.

## 7. Class actions

The courts are reluctant to join claims.

## 8. Enforcement of foreign judgments

Foreign judgements are enforced in Belarus in accordance with international treaties or on the basis of reciprocity.

## 9. Costs

The amount of legal assistance costs to be paid by a defendant is usually decreased by the courts to minimum amounts.

## 10. Standards of the courts: high value disputes

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# Belgium



## 1. Governing law

If the matter falls within the scope of Rome I, a Belgian court will respect the choice of foreign law subject to and in accordance with Rome I (see Annex A below for further details on Rome I). If the matter falls outside the scope of Rome I and in the absence of specific PIL rules/international conventions, the Belgian Code of Private International Law (the **PIL Code**) states that the Belgian courts must apply the provisions contained in Rome I.

## 2. Jurisdiction: parties choose your courts

There is no exception of *forum non conveniens* if the dispute falls within the scope of the Brussels or Lugano regimes (see Annex B below for further information on the Brussels Regulation and the Lugano Convention). However, if the dispute falls outside these regimes, Article 6(2) of the Belgian PIL Code provides for an exception of *forum non conveniens*: the court may decline jurisdiction if from the circumstances as a whole it appears that the dispute has no meaningful link with Belgium. This provision was introduced into Belgian law in 2004, but we are not aware of any case law applying it.

## 3. Jurisdiction: parties choose a foreign court

Both under the Brussels and Lugano regimes as well as under Article 7 of the Belgian PIL Code, the parties to a dispute may validly choose a foreign court, and Belgian courts will then, generally speaking, decline jurisdiction. However, under the PIL Code, a Belgian court may refuse to dismiss or stay the proceedings on the substance of a dispute that has been commenced before it if: (i) it is foreseeable that the foreign decision cannot be recognised or enforced in Belgium; or (ii) the dispute has close connections with Belgium and the commencement of proceedings abroad appears to be

impossible (denial of justice) or would be unreasonable (Article 7 of the PIL Code).

## 4. State (or sovereign) immunity

Note however that a waiver of jurisdictional immunity does not *ipso facto* imply a waiver of enforcement immunity. A separate act of waiver of immunity from enforcement will be required.

## 5. Pre-judgment arrests or freezing orders

See Article 1413 and following of the Belgian Judicial Code.

## 6. Disclosure or discovery of documents in litigation

There is no obligation to disclose all documents relevant to the issues in the case. However, a party may ask the court to order the production of specific documents (Article 877 of the Belgian Judicial Code).

## 7. Class actions

In 2014, a law was enacted providing for the introduction of class actions into the Belgian judicial system ("loi sur l'action en réparation collective"/"wet over rechtsvordering tot collectief herstel"). The relevant provisions were inserted as Title 2 in Book XVII of the Belgian Economic Code, and entered into force on 1 September 2014. Collective redress is made possible provided that: (i) the claimed cause is a potential violation of a company of a contractual obligation, a European regulation or one of the laws specifically enumerated in Article XVII.37 of the Belgian Economic Code (related to, for example, consumer health protection relating to food and other products, liability for defective products, certain

insurance contracts, privacy protection and other matters); (ii) the action is brought by an applicant which satisfies the requirements referred to in Article XVII. 39 of the Belgian Economic Code and which is considered as adequate by the judge (essentially, claims can only be brought by consumers meeting certain requirements); and (iii) the recourse to a collective redress action seems more efficient than an action under general law. Class members must opt in or opt out to the class action depending: (i) on the type of damages (for physical or moral damages, consumers must opt in to the class action, for other types of damages, the court will decide whether the proceeding will be opt-in or opt-out); and (ii) the place of residency of the consumer (any consumers not resident in Belgium automatically fall under an opt-in system).

## 8. Enforcement of foreign judgments

This is the case under the Brussels and Lugano regimes, as well as under the Belgian PIL Code (subject to grounds for refusal listed in Article 25 of the PIL Code).

## 9. Costs

The court usually orders the unsuccessful party to pay to the successful party the costs of the summons and a specified amount to cover its counsel's fees. However, the level of this specified amount is limited, which means that, in many cases, the successful party will be unable to fully recover its counsel's fees. This specified amount will depend on: (i) the value of the case (the amount actually claimed in the proceedings); and (ii) other criteria, such as the complexity of the case. For claims between EUR 500,000.01 and EUR 1 million, the specified amount awarded might, at most, be EUR 22,000. If more than one successful party is involved, then different rules apply.

## 10. Standards of the courts: high value disputes

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# Belize



## 1. Governing law

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

The court regularly grants freezing orders prior to the trial and judgment in order to prevent the dissipation of assets. There must be clear evidence establishing that a respondent intends to or is dissipating assets. The court will also grant freezing orders in aid of substantive foreign proceedings.

## 6. Disclosure or discovery of documents in litigation

The duty to disclose documents in civil proceedings is quite wide and includes a duty to disclose all documents directly relevant which means: (i) the party with control of the document intends to rely on it; (ii) the document tends to adversely affect that party's case; and (iii) the document tends to support another party's case. The rule of law known as "the rule in *Peruvian Guano*" does not apply to the obligation to disclose. A party's duty of disclosure is limited to documents which are or have been in the control of the disclosing party. The court may make an order either for standard disclosure of all documents directly relevant to the proceedings or

specific disclosure. The duty of disclosure also continues during the proceedings. A party is however permitted to claim a right to withhold disclosure of documents in limited circumstances once it provides the grounds for doing so.

## 7. Class actions

The courts do not generally discourage class actions or, as is referred to in this jurisdiction, "representative actions" particularly where the representative action would otherwise further the overriding objective of the Civil Procedure Rules by saving expense and court resources.

## 8. Enforcement of foreign judgments

## 9. Costs

The losing party typically only has to pay the attorneys' fees and costs normally in accordance with the terms outlined in the Civil Procedure Rules on the basis of either fixed, budgeted or prescribed costs. Litigation expenses separate and apart from lawyers' fees and expenses are not typically recoverable.

## 10. Standards of the courts: high value disputes

The hierarchy of the courts in Belize in ascending order for these types of high value disputes is: (i) Supreme Court; (ii) Court of Appeal; and (iii) the Caribbean Court of Justice. Ordinarily, the Supreme Court and the Caribbean Court of Justice are efficient and reliable and the pace of litigation has increased in the Supreme Court with a new complement of judges. While the same may be said for the Court of Appeal in terms of reliability generally, the Court of Appeal is experiencing some issues with a backlog of cases. The Court of

Appeal is constituted every three months to hear appeals and this may be a reason for the current backlog being experienced by the court.

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# Benin



## 1. Governing law

In general, our court accepts that a foreign law may govern a contract, at the discretion and choice of the parties. However, in practice, the foreign law chosen by the parties must have a connection with the identity of the parties.

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

Article 750 of the Code of Civil Procedure (Law No 2008-07 dated 28 February 2011) provides that, if required and necessary, a judge may take any conservatory measures so as to solve a dispute including granting a freezing order.

## 6. Disclosure or discovery of documents in litigation

A judge may require that documents, which are important for the denouement of the litigation, be deposited at the registry of the court. This includes documents held by a third party. The non-disclosure of these documents can lead to the payment of a fine (Article 353 of the Code of Civil Procedure).

## 7. Class actions

## 8. Enforcement of foreign judgments

Articles 1150 and 1151 of the Code of Civil Procedure provide that a foreign judgment is enforceable only by virtue of an *exequatur*. The *exequatur* is granted by the decision of the president of the First Court acting in lieu in the place where the foreign decision should be executed provided that the foreign decision is not contrary to the Beninese public order.

## 9. Costs

In general, according to Article 710 of the Code of Civil Procedure the losing party has to pay the costs of the proceedings, and of the acts and the procedures of execution, unless the judge decides that another party is liable for the payment of the totality or a part of the costs.

## 10. Standards of the courts: high value disputes

Article 49 of Law No 2001-37 relating to the judicial system of Benin states that the First Instance Court is competent to deal with any commercial dispute regardless of the amount involved in that litigation. In order to clarify this point, further to Articles 49 and 51 of Law No 2001-037 dated 10 June 2002 relating to the judicial system in Benin (the **2002 Law**), the Court of First Instance (the **CFI**) is competent as the final court for any commercial claim up to CFA 20,000 (approximately USD 41). For any claim exceeding CFA 20,000, the CFI is relevant at first level instance and susceptible to appeal before the competent Court of Appeal.

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# Bermuda



## 1. Governing law

Bermuda law follows English common law on this question.

## 2. Jurisdiction: parties choose your courts

Again, Bermuda courts follow English common law on this question. Questions of *forum non conveniens* apply.

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

Bermuda does not have legislation equivalent to the UK State Immunity Act 1978, and applies English common law as it existed prior to the passing of this legislation on questions of state immunity. The extent to which pre-judgment freezing injunctions are available against states is unclear.

## 5. Pre-judgment arrests or freezing orders

The Bermuda courts will generally grant a *Mareva* injunction or freezing order if there is a real risk that the defendant will dissipate its assets, but the courts must have jurisdiction in the main action – in accordance with the decision in *The Siskina*.

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

## 9. Costs

## 10. Standards of the courts: high value disputes

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# Bolivia



## 1. Governing law

In general, Bolivian courts will not apply foreign law. Courts will, however, generally respect contractual clauses providing for foreign law and a foreign forum. In particular, Bolivian courts may apply Bolivian law to contractual disputes if petitioned to do so by a contractual party on the basis that the majority of the contract performance takes place in Bolivia.

## 2. Jurisdiction: parties choose your courts

Bolivian courts will generally accept jurisdiction if there is a link between the parties and/or their dispute to Bolivia (ie the contractual obligations were performed or the contract was executed in Bolivia).

## 3. Jurisdiction: parties choose a foreign court

Bolivian courts will generally accept jurisdiction in spite of a contractual clause designating another jurisdiction if petitioned to do so when there is a substantial connection between the contract and Bolivia (ie the majority of contractual performance takes place in Bolivia).

## 4. State (or sovereign) immunity

In general, Bolivian courts will respect contractual waivers of sovereign immunity. Courts may be influenced, however, by political considerations relevant to the state party at issue.

## 5. Pre-judgment arrests or freezing orders

Bolivian courts will grant pre-judgment freezing orders if the applicant demonstrates a risk that the assets will be dissipated or hidden. A court may also require that the party requesting the injunction or freezing order

post a guarantee that could, if necessary, be used to compensate the opposing party for damages.

## 6. Disclosure or discovery of documents in litigation

Parties are not required to disclose confidential information unless ordered to do so by the court. However, Bolivian courts frequently order the production of confidential information if it is directly relevant to the dispute.

## 7. Class actions

Class actions are common in Bolivia and will be admitted by courts for a wide variety of disputes. The claimants must opt in and unify their representation.

## 8. Enforcement of foreign judgments

The following conditions must be met before a Bolivian court will enforce a foreign judgment: (i) a treaty must be in effect between the jurisdictions; (ii) if there is no treaty in effect, reciprocity between the jurisdictions must exist for the type of action at issue; and (iii) if neither (i) nor (ii) applies, the judgment must have a substantial connection to Bolivia (ie the judgment affects property in Bolivia, the defendant resides in Bolivia, etc).

## 9. Costs

The losing party will normally have to pay procedural costs if the following requirements are met: (i) the winning party requested procedure costs in its claim; and (ii) the losing party's claims were rejected in their totality or the winning party's claims were granted in their totality.

## 10. Standards of the courts: high value disputes

Bolivian courts can be inefficient, particularly with regard to the time it takes for an action to be adjudicated. Courts are also prone to apply the law in unpredictable ways.

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# Bosnia and Herzegovina



## 1. Governing law

Federation of Bosnia and Herzegovina can award to a party to a legal action in respect of all lawyers' fees is limited to the amount of the average salary in the Federation of Bosnia and Herzegovina. Therefore, the client will not be fully compensated for lawyers' fees in higher value cases as the fees predicted in the Lawyer's Tariff are higher than the average salary, whereas in smaller value cases the winning party is often compensated in full. This or a similar restriction does not exist in the Republic of Srpska.

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

## 9. Costs

The party which loses the case is obliged to refund all legal costs to the winning party, including lawyers' fees. However, the maximum amount that a court in the

## 10. Standards of the courts: high value disputes

The courts are generally inefficient, in both low and high value commercial cases.

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# Botswana



## 1. Governing law

The common law position is that our courts will usually respect contracting parties' decisions to apply a foreign governing law in contracts they enter into. It is possible for the Botswana courts to deal with a matter in which a foreign law is to apply and to apply that law in resolving the dispute. However, Botswana courts will not give effect to such choice of law if such choice of law is against the public policy in Botswana. On occasion Botswana courts may be called upon to resolve a dispute and in doing so apply the law of another jurisdiction.

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

The wishes of contracting parties are usually respected in Botswana and this extends to the choice of a jurisdiction in which disputes will be resolved.

## 4. State (or sovereign) immunity

State immunity matters are usually regulated in a treaty negotiated between the two countries. The country seeking to invoke immunity is usually required to express its wish to do so.

## 5. Pre-judgment arrests or freezing orders

The freezing/attachment of assets is a common law remedy utilised by litigants to ensure that once they institute action for recovery of a debt, for example, such as a judgment, it is enforceable against assets in the jurisdiction. A time frame will be set within which action for recovery of the debt is carried forward, so as

to ensure that the next stage of the litigation is implemented and finalised as soon as possible.

## 6. Disclosure or discovery of documents in litigation

Order 39 of the High Court Rules [CAP 4:02] provides for a wide array of discovery, inspection and production processes. Another party in the litigation may apply to the court for an order that the other side be compelled to discover. In instances where the discovery is insufficient, the dissatisfied party may apply to the court for an order demanding further and better particulars. These rules are stringent and a party's action or defence may be struck out should such an order not be complied with. Order 54 of the High Court Rules goes further to enable a judgment creditor to examine a judgment debtor.

## 7. Class actions

Class actions are permitted in all types of litigation. Order 16 of the High Court Rules [CAP 04:02] allows all persons to be joined in one action as litigants in whom any right of relief is alleged to exist, whether jointly, severally or in the alternative where if such persons brought separate actions any common question of law or fact would arise.

## 8. Enforcement of foreign judgments

The legislature has promulgated legislation wherein Botswana courts may generally accept and enforce a judgment of a foreign court through a registration process under the Judgments (International Enforcement) Act [CAP 11:04] (the *Act*). The *Act* extends to countries which are prescribed by the President by way of a statutory instrument. Section 4(1) of the *Act* provides that the *Act* extends to every

country to which the UK Judgments Act applied immediately before the commencement of the Act (25 September 1981). In terms of the Act the President also has to issue a statutory instrument prescribing those countries to which the UK Judgments Act applies.

The Act provides that a person, being a judgment creditor under a judgment, may apply to the High Court at any time within six years after the date of the judgment (or, where there have been proceedings by way of appeal against the judgment given in those proceedings, after the date of the last judgment given in those proceedings) to have the judgment registered in the High Court, and on the application the court may, subject to proof of the prescribed matters and to the Act, order the judgment to be registered.

Registration by the court is subject to the following conditions: (i) the foreign court that issued the judgment must have been the superior court of the relevant country; (ii) the judgment must be final and be for a sum of money; (iii) substantial reciprocity must exist between the country in which the judgment was pronounced and Botswana (meaning that a judgment given by the High Court of Botswana would be enforced in that country); (iv) the judgment must not have been obtained through fraudulent means; and (v) the judgment must not be contrary to Botswana public policy.

## 9. Costs

The common law position in Botswana is that costs follow the cause (ie "loser pays"). Legal costs are usually awarded on a party and party/ordinary scale which are approximately 60%-70% of the actual costs incurred. Another scale of costs may be awarded which are punitive in their nature (attorney and client costs, attorney and own client costs and costs awarded against the attorney, in his personal capacity).

A final point is that where a judgment is granted by the High Court on a contract to which interest has not been stipulated, the High Court rules [CAP 4:02] allow the judgment creditor to charge a default interest of 10% per annum from the date of *mora*.

In a case involving a class action, costs are usually awarded against such a class jointly or severally liable, the one paying, the others to be absolved.

## 10. Standards of the courts: high value disputes

The Botswana judiciary has introduced a case management system which allows all judges handling matters to dictate the pace of litigation, from inception of the matter. Moreover, a single judge is responsible for dealing with a matter from start to finish. Parties are required to comply with stringent case management timelines for the filing of pleadings and the drafting of a case management conference for consideration by the judge. This is provided for under order 42 of the High Court Rules.

The effect of this case management system is that it enables the judge to guide the litigation and have a more "hands-on" approach to matters before the court. There is a clear appeal process which is available for litigants who are dissatisfied with judgments from the High Court and the Industrial Court.

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# Brazil



## 1. Governing law

Brazilian courts are extremely reluctant to apply foreign law to any case in which they have jurisdiction to decide despite provisions allowing that.

## 2. Jurisdiction: parties choose your courts

Brazilian courts tend to accept jurisdiction over a dispute if the parties do not disagree about this and the case is filed before one of them.

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

The court will generally have to determine the validity of state immunity based on the laws of the foreign state that waived immunity. To the extent that the act is valid, the court should accept it and act accordingly.

## 5. Pre-judgment arrests or freezing orders

Provided the legal requirements are present.

## 6. Disclosure or discovery of documents in litigation

Disclosure is limited to what is specifically requested by the court.

## 7. Class actions

Class actions are common and allowed. Class members benefit from favourable decisions but are not prevented from suing individually in case the class action is not successful.

## 8. Enforcement of foreign judgments

## 9. Costs

The losing party pays the court costs and the amount of fees awarded by the court in favour of the prevailing party. That does not necessarily cover the cost of litigation.

## 10. Standards of the courts: high value disputes

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# British Virgin Islands (BVI)



## 1. Governing law

The BVI court can be expected to apply established principles of English common law and respects the contractual bargain made between the parties as to choice of governing law.

## 2. Jurisdiction: parties choose your courts

The BVI court can be expected to apply established principles of English common law and respects the contractual bargain made between the parties as to forum.

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

Where the BVI court has jurisdiction in respect of the main proceedings, then the **BLUE** description applies without qualification.

Where, however, the injunction is sought in aid of foreign proceedings, the position is a little more complex. The BVI does not have an equivalent to section 25 of the Civil Jurisdiction and Judgments Act, and therefore there is no statutory right to a freestanding assistance injunction. However, the BVI common law has moved to fill that gap: *Black Swan Investment ISA v Harvest View Ltd* (BVI HCV (Com) 2009/399). Nevertheless, there are subtle nuances in respect of the jurisdiction.

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

The BVI civil procedure rules contain provisions dealing with representative actions, but an order obtained cannot be enforced without joining a party. Representative actions are very uncommon in the BVI.

## 8. Enforcement of foreign judgments

As to enforcement of foreign judgments, the BVI position depends upon the country from which the judgment is derived. If the judgment is from, for example, England, then the matter is straightforward. If it derives from a country that is not the subject of a reciprocal agreement, then it will be necessary to commence a new action. However, by pleading the fact of the earlier judgment, it can be expected that the enforcement proceedings would proceed by way of summary judgment.

## 9. Costs

Costs will be assessed and a 60%-70% estimate is reasonable. There is power, which is used frequently, to adopt an issue-based approach to the assessment of costs, so that one party does not necessarily recover costs on all issues.

## 10. Standards of the courts: high value disputes

The dedicated BVI Commercial Court is very efficient. One can expect a fully contested trial to be listed within a year, for example. It also offers the opportunity to take evidence by video-link – a potentially cost-saving mechanism.

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# Brunei



## 1. Governing law

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

## 9. Costs

Lawyers' fees are normally not paid by the losing party unless they are awarded on an indemnity basis.

## 10. Standards of the courts: high value disputes

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# Bulgaria



## 1. Governing law

The Private International Law Code provides that contracts with an international element shall be governed by the law chosen by the parties. The provisions of the foreign applicable law shall not apply only if the consequences of such application are obviously incompatible with Bulgarian public policy. Also, the foreign law chosen by the parties may not affect the application of the mandatory rules of Bulgarian law which, considering their subject matter and purpose, must be applied notwithstanding the referral to a foreign law. There are special rules in relation to consumer contracts and employment contracts. Our courts are generally very cautious and concerned when applying foreign laws and sometimes tend to exaggerate the application of the public policy rules.

## 2. Jurisdiction: parties choose your courts

Where the Brussels Regulation applies, under Article 25, the Bulgarian court is bound to accept jurisdiction if it is named as the chosen court in the contract unless the jurisdiction agreement is null and void as to its substantive validity under Bulgarian law (see Annex B below for further information on the Brussels Regulation). Where the Brussels Regulation does not apply, Bulgarian courts must accept jurisdiction, even though the parties and the dispute have no connection with Bulgaria, provided that all of the following conditions are satisfied: (i) the action is brought to assert a proprietary right; (ii) the parties have agreed in writing about the jurisdiction of Bulgarian courts; and (iii) the dispute does not fall within the exclusive jurisdiction of foreign courts.

## 3. Jurisdiction: parties choose a foreign court

In cases of a foreign exclusive jurisdiction clause, Bulgarian courts will decline jurisdiction only if the defendant makes such an explicit objection in the pending litigation proceedings within a time limit prescribed by the law. However, our courts will ignore the foreign jurisdiction clause and will assume jurisdiction in certain cases where they have exclusive jurisdiction pursuant to the Private International Law Code and/or the Brussels Regulation, for example, *in rem* actions relating to local real estate or actions regarding intellectual property rights registered in Bulgaria.

## 4. State (or sovereign) immunity

Bulgarian courts will without exception give effect to a waiver of state immunity from jurisdiction, pursuant to Article 18, paragraph 1, page 1 of the Civil Procedure Code.

## 5. Pre-judgment arrests or freezing orders

Bulgarian courts will normally grant a freezing order if there is a real risk that the defendant will dissipate its assets and if: (i) the claim is supported by convincing written evidence; or (ii) a bond is furnished in an amount determined by the court. In practice, and particularly in cases of high value commercial disputes, the courts usually require the claimant to provide security (typically at around 10% of the value of the secured claim) in order to receive a freezing court order. The courts need not have jurisdiction in the main action but it is necessary that the judgment of the foreign court is entitled to recognition and enforcement in the Republic of Bulgaria. An order can be given only in respect of assets situated in Bulgaria (Article 25 of the Private International Law Code).

## 6. Disclosure or discovery of documents in litigation

Each party in a dispute may approach the court with a motion to obligate the other party to present a document in its possession, explaining the relevance of the said document to the dispute. If the other party fails to present the documents, the court may hold as proved the facts in respect of which the document was not disclosed. Certain documents are protected from disclosure, such as communications between lawyer and client, documents concerning circumstances of the personal or family life of the party, or documents the disclosure of which would lead to defamation or to criminal prosecution of the party.

## 7. Class actions

Class action procedure in Bulgaria was first introduced with the new Civil Procedure Code, effective as of 1 March 2008. It is a typical "opt-in" procedure. Class actions are still not very popular and are not commonly brought. There are challenges for admission of such cases by the court due to the fact that the current class action rules are insufficient and not very clear as a lot of questions of significant importance for the development of the proceedings are not regulated at all.

## 8. Enforcement of foreign judgments

Our courts will normally enforce foreign judgments in the above circumstances after checking whether certain conditions prescribed by the law have been satisfied: the proper jurisdiction of the foreign court; the observance of the fundamental principles of Bulgarian law relating to the defence of the parties; and the non-existence of conflict with a local judgment, for example. The court will not enforce a judgment if it conflicts with Bulgarian public policy. The court does not re-examine the merits of the claim.

## 9. Costs

The losing party has to pay all litigation costs of the winning party (including lawyers' fees) proportionate to the portion of the action granted. The court, acting on a motion by the losing party, may reduce the awarded lawyers' fees of the winning party if they are excessive considering the actual legal and factual complexity of the case. However, the reduced awarded lawyers' fees

cannot be less than the minimum amount set in a special tariff.

## 10. Standards of the courts: high value disputes

Undertaking high value commercial disputes litigation in Bulgaria may be considered expensive since the court fees amount to 4% of the value of the claim for the first court instance, 2% of the value for the second court instance and 2% of the value for cassation appeal. Litigation proceedings are generally slow. The decision of the first instance court may be appealed to the appellate court both on issues of law and fact. The decision of the appellate court may be challenged before the Supreme Court of Cassation if grounds for cassation appeal can be found. The Supreme Court of Cassation has discretion to decide whether to accept the appeal and will decide only on questions of law. As a result, it usually takes an excessive amount of time to get a final judgment, sometimes more than five years. Quite often the courts do not apply the law properly and predictably and thus there is inconsistent case law on many issues. As a whole, the courts are inefficient and unreliable in cases of high value commercial disputes involving cross-border parties and issues.

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# Burkina Faso



## 1. Governing law

Our courts require a foreign element in the contract binding the parties and the compatibility of the contract provisions with fundamental principles of public order. The judge complies with the will of the parties.

of inquiry permitted by the Civil Procedure Code are documentary evidence (authentic and private deed), testimonial evidence, presumptions, the statements of the parties and their oaths.

## 2. Jurisdiction: parties choose your courts

The judge complies with the will of the parties.

## 7. Class actions

## 3. Jurisdiction: parties choose a foreign court

The judge complies with the will of the parties.

## 8. Enforcement of foreign judgments

## 4. State (or sovereign) immunity

The judge complies with the will of the parties.

Article 415 of Law No 022/99/AN of 18 May 1999 relating to the Civil Procedure Code and Article 993 of the Family and Person Code of 1999 provide that foreign judgments are enforceable in Burkina Faso only by way of *exequatur* pronounced by the first instance court. The court will only verify if the foreign judgment is authentic, fully enforceable in the state where the decision was made and was pronounced by the competent foreign court. The court will also check the decision is not contrary to public order in Burkina Faso.

## 5. Pre-judgment arrests or freezing orders

Articles 464 and 93 of Law No 022/99/AN of 18 May 1999 relating to the Civil Procedure Code provide that the court may order precautionary measures such as seizure in order to prevent imminent damage or to stop illicit behaviour or activity harmful to the rights of one of the parties. Generally, a person whose claim is founded can request the competent court to grant such measures.

## 9. Costs

According to Article 394 of Law No 022/99/AN of 18 May 1999 relating to the Civil Procedure Code, "the unsuccessful party should pay the costs, unless the judge charges another party by special and reasoned decision, to pay all or a portion of the litigation costs".

## 6. Disclosure or discovery of documents in litigation

According to Article 25 of Law No 022/99/AN of 18 May 1999 relating to the Civil Procedure Code: "it is for each party to prove, in accordance with the law, the facts needed for the success of his claim". The measures

## 10. Standards of the courts: high value disputes

Delay in concluding exchanges of documents between the parties will also cause delays in the trial.

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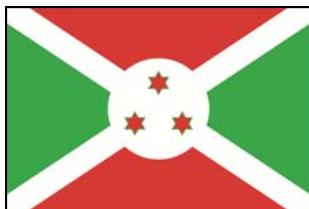
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# Burundi



## 1. Governing law

The parties to a contract are free to decide the law governing their contract, whether local law or foreign law. However, the foreign law shall be subject to the local policy.

## 2. Jurisdiction: parties choose your courts

The judge complies with the will of the parties.

## 3. Jurisdiction: parties choose a foreign court

The judge complies with the will of the parties.

## 4. State (or sovereign) immunity

The judge complies with the will of the parties.

## 5. Pre-judgment arrests or freezing orders

Articles 145 and 162, 243 of law No. 1/10 dated 13 May 2004 Civil Procedure Code provides that the judge may pronounce provisional measures in case of emergency or in order to repair or prevent damage.

## 6. Disclosure or discovery of documents in litigation

According to article 31 of law No. 1/10 dated 13 May 2004 Civil Procedure Code, the parties shall prove the facts required for the success of the claim.

## 7. Class actions

## 8. Enforcement of foreign judgments

The decisions rendered by courts in foreign private matters and under authentic legal instruments which are enforceable by a foreign authority in Burundi are rendered enforceable by the courts of first instance subject to certain conditions. Foreign judgments are enforceable in Burundi only by way of *exequatur* pronounced by the first instance court. The court will only verify the authenticity of the judgment. The court will also check the decision is not contrary to public order in Burundi.

## 9. Costs

According to article 401 of law No. 1/10 dated 13 May 2004 Civil Procedure Code, the losing party may be liable for payment of a proportion of, or the whole of, the litigation costs. This includes the costs of the proceedings, the tax witnesses, the compensation of experts and other costs incurred by the trial. "Tax witnesses" include all travelling expenses and subsistence expenses of witnesses. These expenses are fixed by the judge. The compensation for the experts is determined by the judge according to the case when the fees are not precise.

## 10. Standards of the courts: high value disputes

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# Cameroun



## 1. Governing law

The law is silent regarding the applicable governing law in contracts but the solution is given by jurisprudence. In general, the applicable governing law in contracts is the law chosen by the parties. This governing law will be used when there is litigation between the parties. Foreign law is applicable if it does not breach the public order and morality and if there is a connection between the parties and the contract.

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

Article 317 of the Code of Civil Procedure states that in some decisions that need to be dealt with, the judge may grant a freezing order. The judge must require from the claimant security or sufficient solvency before making such an order.

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

Law No/2007/001 dated 19 April 2007 established the Judicial Disputes Executive and also established the conditions for the execution of judicial decisions in Cameroun and foreign public documents and foreign arbitral awards. In Articles 5 and 6, it states that: "The *exequatur* is granted by decision of the President of the First Court acting in lieu in the place where the foreign decision should be executed".

## 9. Costs

Article 50 of the Code of Civil Procedure stipulates that any losing party will have to pay the litigation costs.

## 10. Standards of the courts: high value disputes

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# Canada



## 1. Governing law

In terms of the common law provinces, the choice of law must be *bona fide*. While the absence of a connection between the choice of law and the contract or the parties will not defeat this requirement, it may be relevant to the analysis. Foreign law must be pleaded and proven by evidence.

## 2. Jurisdiction: parties choose your courts

In the common law provinces, the courts will take jurisdiction where: (i) the defendant was served in the jurisdiction; (ii) the defendant consented to the jurisdiction; or (iii) the claim has a "real and substantial" connection to the jurisdiction.

## 3. Jurisdiction: parties choose a foreign court

Canadian common law courts have discretion not to apply a choice of forum clause but this discretion will only be exercised in exceptional cases.

## 4. State (or sovereign) immunity

Under the federal State Immunity Act RSC 1985 c. S-18 (the **Act**), a foreign state is not immune from the jurisdiction of the Canadian courts if the state has waived the immunity conferred under the Act. One of the ways that a state will have waived immunity under the Act is if it explicitly submits to the jurisdiction of the court by written agreement or otherwise either before or after the proceeding commences. The Act also provides that a foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of that foreign state.

## 5. Pre-judgment arrests or freezing orders

The moving party seeking a *Mareva* injunction must establish: (i) a strong *prima facie* case; (ii) that the defendant has assets in the jurisdiction; and (iii) that there is a serious risk that the defendant will remove the property or dissipate assets before judgment. In addition, in some (but not all) Canadian jurisdictions, pre-judgment attachment orders are available where there are reasonable grounds to believe that the debtor is dealing with its exigible property in a manner that is likely to seriously hinder the plaintiff's enforcement of a judgment.

## 6. Disclosure or discovery of documents in litigation

With the exception of the Province of Quebec, where the obligation to produce documents is more moderate and less burdensome than the rest of the country, the obligation to produce documents in the common law provinces is based on a relevance standard. Accordingly, the obligation to produce documents in the common law provinces can be onerous and time-consuming.

## 7. Class actions

All but the smallest province in Canada have class action legislation. Most provinces have an "opt-out" regime although certain provinces have a hybrid opt-out and opt-in regime whereby residents of the province must opt out of the class but non-residents are required to opt in if they wish to be part of the class.

## 8. Enforcement of foreign judgments

## 9. Costs

In the common law provinces, the losing party will usually be ordered to pay a portion of the litigation costs of the winning party (which will include part of the winning side's lawyers' fees). In the Province of Quebec, however, the unsuccessful party typically will only be required to pay a small portion of the litigation costs of the winning party.

## 10. Standards of the courts: high value disputes

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# Cape Verde



## 1. Governing law

The Cape Verdean conflict of law rule applicable to contracts (Article 41 of the Civil Code) provides that the parties may choose the law governing their contractual relationships provided such choice of law: (i) corresponds to a serious interest of the parties; or (ii) has a relevant connection with an element of the contract.

Such relevant connection may be: (i) the domicile of the parties (or one of them); (ii) the place of performance of the contractual obligations (place of shipment of the goods or acceptance of orders, place of payment, etc); or (iii) the place where the contract is executed.

The above-mentioned choice of law principle is limited by the conflict of laws principles included in Cape Verdean law. In accordance with such principles, the law of a foreign jurisdiction shall not be applicable if deemed contrary to: (i) the public policy principles of Cape Verdean law (which will always apply, even if the governing law chosen by the parties is not Cape Verdean law); and (ii) the mandatory provisions of Cape Verdean law.

## 2. Jurisdiction: parties choose your courts

According to Article 95 of the Civil Procedure Code, a jurisdiction agreement is valid provided the following cumulative requirements are met: (i) the jurisdiction agreement is accepted by the law of the chosen court; (ii) the choice of the jurisdiction must correspond to a serious interest of the parties (or one of them); (iii) the jurisdiction agreement does not relate to inalienable rights or to any cause of action subject to the exclusive jurisdiction of the Cape Verdean courts; and (iv) the jurisdiction agreement is in the same form required by the main agreement, and: (a) is in written form; (b) contains an indication of the issues that it covered; and (c) expressly indicates the chosen court.

## 3. Jurisdiction: parties choose a foreign court

Please see our previous comments.

Pursuant to Article 67 of the Civil Procedure Code, Cape Verdean courts have exclusive jurisdiction in respect of: (i) actions relating to rights *in rem* in real estate located in Cape Verde; (ii) bankruptcy proceedings in relation to companies with registered offices in Cape Verde; (iii) actions related to the validity of the incorporation act or the winding-up of companies with registered offices in Cape Verde, as well as actions relating to the validity of the resolutions of the corporate bodies of such entities; (iv) actions relating to the validity of the registration in a public registry of any right subject to registration in Cape Verde; and (v) enforcement proceedings involving real estate located in Cape Verde.

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

Whenever someone has a well-founded fear that others may cause severe damage and/or damage that is difficult to repair to their right, a maintenance or pre-emptive pre-trial proceeding (**injunction**) may be required to ensure the effectiveness of the threatened right. Said proceedings may be based either on a pre-existing right or a right emerging from a court decision of an ongoing action or of an action yet to be initiated. Based on the evidence made available, the court shall grant the injunction whenever the evidence shows that there is a high probability that the right exists and that the fear of damage is well founded. Further to this general interim measure, the Civil Procedure Code foresees for specific interim measures, such as attachment orders ("arresto"), which may be requested whenever a given creditor has a

well-founded fear that the patrimonial guarantee of its credit may be lost. In such cases, and linked to the action in which the credit is claimed, the creditor may request the attachment of the debtors' assets.

## 6. Disclosure or discovery of documents in litigation

Under Articles 485, 486 and 487 of the Civil Procedure Code, disclosure of documents is not mandatory. There are no civil or criminal penalties for a party that refuses or fails to submit relevant documents following a request by the other party. Nevertheless, the burden of proof will lie with the party that unjustifiably refuses to disclose the relevant documents.

## 7. Class actions

## 8. Enforcement of foreign judgments

A foreign judgment may only be enforced in Cape Verde after it has been duly recognized by the competent court. The foreign judgment recognition procedure is set forth in Article 914 *et seq.* of the Civil Procedure Code. The recognition procedure does not involve revision on the merits, but a simple re-examination of the relevant decision for the purpose of confirming certain requirements. The interested party must file an application to that effect with the relevant Cape Verdean court.

In order for the foreign judgment to be recognised, the following requirements must all be met: (i) the foreign judgment must be authentic; (ii) the foreign judgment must be final, non-appealable and conclusive in accordance with relevant applicable laws; (iii) the subject matter of the judgment must not be subject to the exclusive jurisdiction of Cape Verdean courts, or the jurisdiction of the foreign court must not have been established in a fraudulent manner; (iv) there is no case pending in relation to the same dispute before a Cape Verdean court (*lis pendens*), or there is no final and binding ruling by a Cape Verdean court (*res judicata*) on the same dispute, except if it was the foreign court which prevented jurisdiction of the Cape Verdean courts; (v) the defendant must have been served proper notice of the claim in accordance with the law of the country in which the judgment was rendered, and the

principles of due process (equality of the parties and right to be heard) were respected; and (vi) the foreign judgment must not lead to a result that is manifestly incompatible with principles of international public policy.

## 9. Costs

According to Article 1 of the Court Fees Code, enacted by Decree-Law 4/2011, of 17 January 2011, legal proceedings require payment of court fees, stamp duty and other charges.

Court fees vary between CVE 20,000 and CVE 200,000 depending on the nature and complexity of the proceedings. The losing party must bear the court fees of the prevailing party, but this usually does not include the total amount paid by way of attorney fees.

## 10. Standards of the courts: high value disputes

Cape Verde does not have specialized courts dealing with commercial disputes. Cape Verde, as a developing country striving to achieve its potential in a world economy, currently has a very limited number of high value cases heard by the courts. The value of the commercial dispute does not influence the reliability of the courts. The courts generally apply the law properly and predictably. Nevertheless, the lack of experience to deal with such transactions could lead to court delays.

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# Cayman Islands



## 1. Governing law

Cayman follows English common law on this question.

## 2. Jurisdiction: parties choose your courts

Again, Cayman follows English common law on this question. Questions of *forum non conveniens* apply.

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

The UK State Immunity Act has been extended to Cayman by the State Immunity (Overseas Territories) Order 1979.

## 5. Pre-judgment arrests or freezing orders

The Cayman courts will grant a *Mareva* or freezing injunction if there is a real risk that the defendant will dissipate its assets. Recent legislation provides for the granting of freezing injunctions and the appointment of receivers in aid of foreign proceedings.

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

## 9. Costs

## 10. Standards of the courts: high value dispute

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# Chad



## 1. Governing law

Most often courts refer, first, to the provisions of the contract agreed by the parties to verify whether there are specific clauses governing the contract. It is only when the contract is silent that the judges apply local law.

## 2. Jurisdiction: parties choose your courts

In contractual matters, the parties determine at the time of entering into the said contract which court has jurisdiction over the disputes that could arise from their relationship.

## 3. Jurisdiction: parties choose a foreign court

The jurisdiction clause is a principle of contract law that is always complied with.

## 4. State (or sovereign) immunity

Our courts generally give effect to a state waiver of immunity from jurisdiction and execution. This rule is subject to certain exceptions including diplomatic immunity and national defence assets.

## 5. Pre-judgment arrests or freezing orders

This is a very important preventive measure in business law, the purpose of which is to prevent cases of insolvency created by dishonest defendants.

## 6. Disclosure or discovery of documents in litigation

With the exception of confidential documents, parties are bound to produce the important documents in support of their allegation. Article 1315 of the Civil Code is clear in this regard. The party making an allegation has the obligation to prove it.

## 7. Class actions

It is important to distinguish between criminal and civil proceedings. It also depends on whether one is an accused or a complainant. In the case of an accused, criminal liability is personal. On the other hand, in the case of a complainant, group action is allowed. Several victims with a common interest could form a group to initiate proceedings against the wrongdoer. This could also apply to civil matters.

## 8. Enforcement of foreign judgments

There is no issue when reciprocity exists between both states.

## 9. Costs

The losing party does not pay the costs of litigation but will pay the court fees.

## 10. Standards of the courts: high value disputes

Courts are very cautious especially when it comes to the rights and obligations of others. For example, in insolvency proceedings, the rights of the creditors are highly protected.

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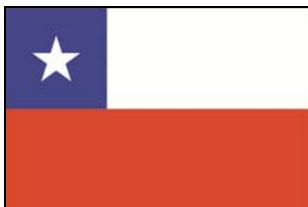
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# Chile



## 1. Governing law

Law No 19.971 (29 September 2004) on international arbitration allows the parties to choose the law that will govern the main aspects of the contract. Domestic arbitrators can also apply a foreign law, but it is unusual to choose domestic arbitration in relation to a conflict that is governed by a foreign law.

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

The assessment is true with the exception of public order issues, such as criminal, labour, inheritance and bankruptcy cases, in which the Chilean courts will not waive their jurisdiction regardless of any clause that provides otherwise.

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

Our courts could grant an injunction or freezing order, even if those courts do not have jurisdiction to hear the main action, provided that the main action has not been filed and there is a serious risk that the future defendants will try to dissipate their assets.

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

To enforce a foreign judgment for a fixed sum of money, the plaintiff must obtain the approval of the Chilean Supreme Court, in a special procedure called *exequatur* that applies international treaties and the Bustamante Code on reciprocity, and will generally accept the foreign judgment unless it affects public order issues.

## 9. Costs

The losing party has to pay the litigation costs only if the judgment expressly orders the losing party to do so. Please be aware that the Chilean courts are usually very conservative in the amount of damages that they award.

## 10. Standards of the courts: high value disputes

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# People's Republic of China (PRC)



## 1. Governing law

The **BLUE** colour category is applicable to contracts involving a foreign element, which often means contracts with at least one foreign party. For purely domestic contracts, the prevailing view is that the parties' choice of foreign law will not be respected.

## 2. Jurisdiction: parties choose your courts

Under Article 34 of the PRC Civil Procedural Code (2013), a party to the contract dispute may choose by written agreement to be subject to a people's court jurisdiction in the defendant's domicile, the *situs* of the contract being signed, the plaintiff's domicile, the *situs* of the subject item and other locations which have actual connections with the dispute, provided that the provisions of hierarchical jurisdiction and exclusive jurisdiction are not violated.

## 3. Jurisdiction: parties choose a foreign court

The PRC Civil Procedural Code (2013) is silent on this issue. Generally, however, choosing foreign courts for dispute resolution is not prohibited by Chinese law. In practice, this should be avoided unless parties have assets outside China. In this regard, overseas arbitration is recommended if a foreign venue is preferred.

## 4. State (or sovereign) immunity

PRC law has no specific provisions on sovereign immunity. However, the Ministry of Foreign Affairs of PRC (**MFA**) has stated that "absolute immunity" applies to sovereign states, whilst state-owned enterprises as independent corporate entities are not entitled to assert state immunity.

In addition, China has provided state immunity to foreign central banks' assets on the conditions that such a foreign bank does not consent to waive its immunity and the same foreign state has given state immunity to the PRC central bank on a reciprocal basis.

Given that China accords state immunity to sovereign states, a waiver of state immunity will not be recognised in China. However, we have not seen any such cases in practice.

## 5. Pre-judgment arrests or freezing orders

Article 100 of the PRC Civil Procedural Code (2013) provides broad preservation measures including pre-judgment freezing orders.

## 6. Disclosure or discovery of documents in litigation

PRC courts place the burden of proof on the party who advocates the case. There is no discovery procedure.

## 7. Class actions

In a strict sense, there is no legal concept of "class actions" under PRC law. There is a litigation process involving massive litigants but that process is part of consolidation proceeding.

## 8. Enforcement of foreign judgments

Unless there is a binding treaty in place or reciprocity can be established, foreign judgments are not legally enforceable. PRC courts can but need not recognise foreign judgments.

## 9. Costs

PRC courts in general would not support a request for compensation of lawyers' fees but will award the court fees to the winning party.

## 10. Standards of the courts: high value disputes

The efficiency and reliability of PRC courts may vary depending on the type of dispute and the familiarity of the courts with such disputes. It is generally believed that the courts in big cities such as Beijing, Shanghai and Guangzhou are more reliable than courts from other areas.

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# Colombia



## 1. Governing law

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

## 9. Costs

The losing party will have to pay 100% of the litigation costs that are evidenced in the docket. With regard to lawyers' fees, the losing party will have to pay 100% of the amount determined by the court.

## 10. Standards of the courts: high value disputes

Complex commercial disputes should be resolved by specialists through international arbitration and not through the Colombian court system.

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# Democratic Republic of Congo



## 1. Governing law

Under Congolese law, the free will of parties is allowed in international contracts but certain contracts are subject to specific law (for example, insurance policy, tenancy and employment contracts). The deed of gift *inter vivos* shall be governed by the law of the place where they are made. However, private deed could be made also in the forms permitted by the national laws of all parties.

## 2. Jurisdiction: parties choose your courts

There must be a connection between the contract or the parties and the jurisdiction. The parties may designate a foreign jurisdiction except with regard to restriction of the law.

## 3. Jurisdiction: parties choose a foreign court

The parties could choose a foreign court in their contract but the Congolese courts would otherwise have jurisdiction under normal Congolese jurisdictional rules.

## 4. State (or sovereign) immunity

The foreign state is entitled to immunity from jurisdiction, subject to reciprocity.

## 5. Pre-judgment arrests or freezing orders

The court will receive this demand and will proceed, if it is necessary, in order to protect the interest of the applicant or complainant on the basis of urgent application.

## 6. Disclosure or discovery of documents in litigation

The principle is one of loyalty to the litigation; there is total disclosure with some exceptions. A party who has an interest can request an undisclosed document from the other party. Failure to disclose may be a lawyer's fault and lead to disciplinary procedures. However, there are some restrictions on disclosure; for example, it is forbidden to disclose a lawyer's correspondence with his client without authorisation from the president of the Bar.

## 7. Class actions

In the context of civil law differing from common law, our court does not apply the principle of public impact or interest litigation.

## 8. Enforcement of foreign judgments

According to Congolese law, the procedure of *exequatur* is applied if the foreign judgment does not offend public order.

## 9. Costs

The party who loses the case bears the cost of the case, but not the lawyers' fees of the other party. Sometimes the cost of the case can be shared between the parties. This is at the judge's discretion.

## 10. Standards of the courts: high value disputes

There are few cases which involve cross-border companies, but some case law does exist, especially in the context of foreign investment in mining companies.

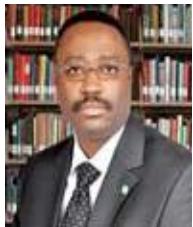
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# Costa Rica



## 1. Governing law

The party invoking foreign law has the burden of proof to demonstrate the existence and scope of the foreign provision under Article 30 of the Civil Code. Evidence should be in the form of two legal opinions from counsel in the relevant jurisdiction, as per Article 409 of the Bustamante Code.

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

The plaintiff or claimant needs to provide security to the court in the form of cash bonds or securities in order to secure the lien, in most cases. Should the plaintiff's case be withdrawn, the security is handed over to the defendant as indemnity for the improper lien.

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

## 9. Costs

Fees and costs are assessed based on a statutory fee schedule approved by the Bar Association.

## 10. Standards of the courts: high value disputes

A lack of sophistication in such matters could lead to severe court delays.

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# Croatia



## 1. Governing law

Following Croatia's accession to the EU in July 2013, Rome I is now applied by Croatian courts to many questions of applicable law (see Annex A for more details on Rome I). Where Rome I applies the provisions in the Croatian Conflict of Laws Act (the **Act**) are superseded. Where Rome I does not apply the position broadly is that the law governing contracts is the law which the contracting parties have chosen unless otherwise provided by the Act, for example, the governing law regarding real property matters is the law of the territory/state in which the real property is situated.

## 2. Jurisdiction: parties choose your courts

Following Croatia's accession to the EU in July 2013, the Brussels Regulation applies to matters of jurisdiction broadly concerning parties incorporated or domiciled in the EU, and parties (regardless of domicile) who have selected the exclusive jurisdiction of Croatian courts (see Annex B below for further information on the Brussels Regulation).

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

Enforcement or security measures cannot be conducted against the property of a foreign state without previous consent from the Croatian Ministry of Justice, except when the foreign state has consented to such enforcement. Also, Croatia is not a party to the European Convention on State Immunity of 1972 (European Treaty Series No. 074) with its Additional Protocol (ETS No. 074A). Croatia is also not a party or

signatory to any other international legal instrument in this respective field.

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

Croatia has introduced a new Civil Procedure Act providing that all relevant documents/proposals to present evidence must be provided to the competent court already in the lawsuit or in the response to the lawsuit. Subsequent filing of relevant documentation/proposals for presenting evidence are not allowed unless the parties were unable to provide/propose them to the competent court due to reasons for which they cannot be held accountable.

## 7. Class actions

Croatian legislation is unfamiliar with the term "class action" but recognises collective lawsuits and/or lawsuits for the protection of collective interests. Such collective lawsuits can only be brought before the courts by authorised companies or associations dealing in the protection of collective rights/interests. The purpose of collective lawsuits is primarily to establish that collective rights were breached and not to award damages. In order to receive compensation for any damages incurred by breaches of collective rights/interests, individuals must file individual damage claims based on the decision reached in the collective dispute.

## 8. Enforcement of foreign judgments

## 9. Costs

According to the Croatian Civil Procedure Act the losing party has to pay to the winning party all litigation costs which have been incurred during the procedure. If the party has lost the litigation procedure only in part, it has to pay a proportionate amount of costs. When deciding on the amount of costs that the losing party has to pay, the courts adjudicate only those costs which were necessary in the course of the procedure. The decision on "necessary costs" is at the discretion of the court, but the court has to take into account all relevant circumstances and consider them with care.

## 10. Standards of the courts: high value disputes

The newly enacted Croatian Civil Procedure Act aims to further simplify and expedite civil litigation procedures. Institutions which have proven to slow down the procedure have been removed or amended, whereas new provisions regarding several important aspects of the procedure have been introduced, such as those regarding legal remedies.

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# Cuba



## 1. Governing law

## 2. Jurisdiction: parties choose your courts

Cuban law is very specific in this sense. At least one of the parties must be Cuban or assets must be located in Cuban territory.

## 3. Jurisdiction: parties choose a foreign court

The Cuban court's jurisdiction cannot be declined when one of the parties in dispute is Cuban or the dispute relates to assets located in Cuba. There is an exception for disputes that, pursuant to international agreements to which Cuba is signatory or agreements between the parties, are to be resolved by the arbitration court.

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

## 9. Costs

Litigation costs are very often assumed by each party.

## 10. Standards of the courts: high value disputes

As a general note to the responses above, disputes involving joint ventures with foreign companies, branches of foreign companies and high value commercial disputes are generally under the jurisdiction of the arbitration court. The arbitration court is more relaxed and has its own procedure. For many years in Cuba, there have been two different commercial relationships: one between Cuban companies (most of which are owned by the government) and also between Cuban and foreign companies. Over the years the Cuban court has mostly heard domestic disputes between Cuban companies but currently also sees litigation between Cuban and foreign companies.

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# Cyprus



## 1. Governing law

Generally, as between EU Member States, our courts will uphold an express choice of law as a valid choice under and in accordance with the Rome Convention (before 17 December 2009) or Rome I (on or after 17 December 2009) (see Annex A below for further details on Rome I). Where none of the Rome Convention, Rome I or any other treaty applies, our courts will apply the common law rules.

## 2. Jurisdiction: parties choose your courts

Under the Brussels Regulation, the Brussels Convention of 1968, the Lugano Convention of 2007, any similar treaty or convention on jurisdiction and/or the enforcement of judgments or under common law (see Annex B below for further information on the Brussels regime).

## 3. Jurisdiction: parties choose a foreign court

Generally speaking, where a contract provides for a foreign court to have exclusive jurisdiction, our courts will decline jurisdiction or stay proceedings brought in Cyprus in breach of such a clause unless the plaintiff can prove that there is strong cause for not doing so.

## 4. State (or sovereign) immunity

Cyprus is a signatory to the European Convention on State Immunity.

## 5. Pre-judgment arrests or freezing orders

The principles which govern the issue of freezing orders in Cyprus are based on Article 32 of Courts Law No 14/60, which have been applied in a number of Supreme Court cases. The three-prong test is: (i) there is a serious matter to be tried; (ii) there is a possibility that the plaintiff is entitled to a remedy; and (iii) it is difficult

or impossible for justice to be done at a later stage unless the order is granted. However, our courts will not issue an order in lieu of proceedings pending in a state outside the EU which has not entered into a treaty with either Cyprus or the EU that provides for such power.

## 6. Disclosure or discovery of documents in litigation

The procedure is governed by Order 28 (Rules 1 to 15) of the Civil Procedure Rules. Any party may apply to the court for an order for disclosure or discovery on oath as well as for inspection of documents which are or have been in the other party's possession or power relating to any matter in question in the action. A party may not subsequently put into evidence to support its claim any document that it has failed to disclose on discovery.

## 7. Class actions

Under the Civil Procedure Rules, where a large number of persons have the same interest in one cause or matter, one or more of these persons may be authorised by the court to sue or defend in such cause or matter, on behalf or for the benefit of all interested persons.

## 8. Enforcement of foreign judgments

Where no treaty exists between Cyprus and the relevant foreign state from which the judgment is obtained, a judgment creditor can enforce the foreign judgment in Cyprus at common law by bringing a fresh action and applying by summons for summary judgment under Order 18 of the Civil Procedure Rules on the ground that the defendant has no defence to the claim. (As Cyprus is a party to the Brussels Regulation, Member State judgments are relatively easy to enforce, save for timing issues (see below).)

## 9. Costs

Any award of costs is in the sole discretion of our courts. Generally, the costs of the litigation are awarded to the successful party. Our courts, in their costs order, can direct whether the costs will be assessed or taxed by the registrar of the court in which the proceedings have taken place.

## 10. Standards of the courts: high value disputes

Local litigation in our courts is sometimes unattractive because of the following factors: (i) delay in the completion of judicial processes; and (ii) ability of defendants to delay enforcement.

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# Czech Republic



## 1. Governing law

In common with other Member States, the Czech Republic applies Rome I (see Annex A below for further details on Rome I).

## 2. Jurisdiction: parties choose your courts

In common with other Member States the Czech Republic applies the Brussels Regulation (see Annex B below for further information on the Brussels Regulation). Outside the scope of the Brussels Regulation, section 85 of Czech Act No 91/2012 Coll., on International Private and Procedural Law, as amended (the **PILA**) applies, which states that the jurisdiction of Czech courts may be based on the parties' jurisdiction agreement.

## 3. Jurisdiction: parties choose a foreign court

If the parties choose a court in an EU Member State, the Brussels Regulation applies; otherwise section 86 of the PILA applies. Czech courts may assume jurisdiction in limited circumstances under the PILA, including where the foreign court's decision would not be enforced in the Czech Republic.

## 4. State (or sovereign) immunity

Waivers of immunity would normally be given effect even though not explicitly addressed in Section 7 of the PILA, which is the applicable rule.

## 5. Pre-judgment arrests or freezing orders

This is based on Article 35 of the Brussels Regulation, as well as Czech Act No 91/1963 Coll., the Civil Procedure Code, as amended (**CPC**) and the PILA.

## 6. Disclosure or discovery of documents in litigation

Under the Czech CPC, the rule is that "whoever asserts something, he/she also has an obligation to prove it".

## 7. Class actions

The Czech Republic rules on class actions do not seem to fit into any of the colour boxes. Class actions are allowed, but their scope is limited by: (i) the types of disputes permitted (consumer protection, unfair competition, certain types of claims arising in connection with company transformations); and (ii) the types of remedies that may be sought (generally, and with the exception of company transformations, only claims to refrain from certain types of behaviour are possible). Another point to note is that a court decision in the above types of disputes binds all persons with the same claims even if they were not aware of the proceedings.

## 8. Enforcement of foreign judgments

The Czech Republic is a party to the Brussels Regulation, therefore, other Member State judgments are relatively easy to enforce. In relation to other, non-EU courts' judgments, Czech courts normally require reciprocity in order to enforce a foreign judgment if there is no treaty.

## 9. Costs

Lawyers' fees are usually awarded according to a tariff – this may be more or less than actual costs according to circumstances.

## 10. Standards of the courts: high value disputes

The Czech Republic answer is in between **GREEN** and **YELLOW**. Generally, there are complaints about excessive time delays and the unpredictability of decisions, but this depends on a particular court or judge.

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# Denmark



## 1. Governing law

Danish courts very much stick to the principle of upholding party autonomy. Rome I is not applicable in Denmark (see Annex A below for further details on Rome I).

## 2. Jurisdiction: parties choose your courts

It depends on the choice of law clause as to which law the court is supposed to apply. The starting point for a Danish court is that, even if the parties have agreed to Danish jurisdiction, and the choice of law is, for example, U.S. law, and that law declares the jurisdiction clause valid, then Danish courts would be very reluctant to declare competence if there is no connection between the contract, the parties and the jurisdiction (Denmark). Danish courts will follow Article 25 in the Brussels Regulation (see Annex B below for further information on the Brussels Regulation). If the Brussels Regulation is not applicable, and the parties have agreed Danish jurisdiction and they do not object to the Danish jurisdiction, the courts will also follow the express wish of the parties. If, however, the jurisdiction is disputed by one of the parties, the agreement must be very clear, if otherwise there is no relation whatsoever to Danish jurisdiction. There is no legal practice, but in a decision from 1973 where the parties expressly confirmed that they accepted the jurisdiction, also during the proceedings, the case was heard.

## 3. Jurisdiction: parties choose a foreign court

This would always be the case.

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

Danish courts are generally reluctant to grant such orders and the burden of proof on the part of the claimant can sometimes be very difficult to satisfy.

## 6. Disclosure or discovery of documents in litigation

The principle of disclosure is not known and it is only possible to request documents etc from the other side if: (i) they are identified; and (ii) the court finds the identified documents to be of importance to the issue at hand. Even so, it is still possible for a party to the proceedings to withhold the documents even if it has been required to produce them, subject only to the principle of adverse inference.

## 7. Class actions

In principle opt-out is possible but has never been tried before the courts.

## 8. Enforcement of foreign judgments

There is a fine line between **YELLOW** and **RED**. There is no established case law but if there is reciprocity and the court knows the legal system, it is possible that the merits of the case will not be re-examined, at least not in full. As Denmark is a party to the Brussels Regulation, Member State judgments are relatively easy to enforce.

## 9. Costs

This is a weakness in the Danish system. To a great extent, the courts do not look at factors such as complexity and the amount of written pleadings etc exchanged.

## 10. Standards of the courts: high value disputes

Danish courts (including Danish-based arbitrations) are known to be effective and impartial, applying the law in a predictable and proper way.

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# Djibouti



## 1. Governing law

A party requesting application of foreign law has to give proof of the foreign law content.

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

A jurisdiction clause for a foreign court must be signed by the defendant.

## 4. State (or sovereign) immunity

We have no court precedent in Djibouti on waiver of state immunity, but when there is no waiver, enforcement is possible only in respect of commercial property.

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

A foreign defendant can be asked for a *cautio judicatum solvi* fixed by the judge at the beginning of enforcement proceedings to cover damages and legal expenses (but not lawyers' expenses).

## 9. Costs

The losing party has to pay only bailiffs' fees, registration of judgment fee (2%) and experts' costs but not lawyers' fees (although limited damages for unlawful action can be obtained).

## 10. Standards of the courts: high value disputes

In some cases, litigants can face excessive delays in the progress of their case due to lack of diligence of experts appointed by the court or numerous opportunities given to defendants, or improper application of the law by lower judges.

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# Dubai International Financial Centre (DIFC)



## 1. Governing law

### 2. Jurisdiction: parties choose your courts

There is a residual uncertainty where the parties have submitted to the jurisdiction of the DIFC courts but where the UAE Civil Procedure Law allocates jurisdiction to a particular UAE state court. This has not yet been tested.

### 3. Jurisdiction: parties choose a foreign court

The approach would be similar to the English courts.

### 4. State (or sovereign) immunity

The approach would be similar to the English courts, but this has not yet been tested.

### 5. Pre-judgment arrests or freezing orders

The approach would be similar to the English courts. The colour rating is likely to be green, although there is no case law making explicit the requirement that the courts must have jurisdiction in the main action.

### 6. Disclosure or discovery of documents in litigation

The approach would be similar to the English courts.

### 7. Class actions

The DIFC Court Rules do make provision for Group Litigation Orders to be made. As far as we are aware, however, this has not yet been tested in practice.

### 8. Enforcement of foreign judgments

The colour rating is likely to be green or blue but it is not clear if reciprocity is required in the DIFC as it is in the English courts. This has not yet been tested.

### 9. Costs

### 10. Standards of the courts: high value disputes

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# Ecuador



## 1. Governing law

The legal framework in effect allows submission to foreign law. The prior favourable opinion from the Attorney General of the State is required for submission to foreign law by public sector entities.

## 2. Jurisdiction: parties choose your courts

Our courts will respect the choice of the parties regarding jurisdiction. The connection to our jurisdiction would be precisely the agreement between the parties. However, there is a possibility that a court would choose to apply the provisions of the International Private Law Code which states that at least one of the parties must be a citizen of the state where the court belongs. There are no other restrictions on submission to foreign jurisdiction by individuals and private sector entities.

## 3. Jurisdiction: parties choose a foreign court

Our courts may also claim jurisdiction if: (i) it is the court of the location where the obligations of the parties must be met; (ii) the court is located in the place of execution of the agreement between the parties; (iii) it is the court of the place where real estate which is the subject of the litigation is located; and (iv) it is the court of the location where the defendant has his domicile. Public sector entities require the favourable opinion from the Attorney General of Ecuador, for submission to foreign jurisdiction.

## 4. State (or sovereign) immunity

In our opinion, our courts would limit the scope of the waiver based on international treaties and conventions on privileges and immunities. The waiver must be

subject to the provisions of the applicable international treaties to which the foreign country is a party.

## 5. Pre-judgment arrests or freezing orders

The claimants must present documents evidencing the existence of an unsatisfied obligation.

## 6. Disclosure or discovery of documents in litigation

Compulsory disclosure is moderate and is not burdensome in most cases. Privileged documents can be withheld from inspection.

## 7. Class actions

In Ecuadorian law there is no definition of class actions. More than one person is permitted to file a demand in the same petition in the following cases: certain damages derived from a lease of real property; joint and several obligations; environmental matters; and human rights. In addition, certain procedural requirements must be met.

## 8. Enforcement of foreign judgments

Ecuadorian courts will enforce foreign judgments provided that: (i) such judgment does not contravene Ecuadorian public law or any national law; (ii) such judgment was rendered in accordance with international treaties in effect at the time it was rendered; (iii) such judgment is final and non-appealable under the laws of the country where it was rendered; (iv) such judgment was rendered as a consequence of a personal action; (v) the parties were personally served or served through their legal representatives; (vi) if the decision relating to such judgment was rendered in a foreign language, such decision is translated into Spanish; and (vii) the formal

request for enforcement of such judgment sets forth evidence of enforceability of such judgment in the jurisdiction in which it was rendered.

## 9. Costs

Attorneys' fees are set by the courts.

Ecuadorian law states that the party who has litigated with bad faith or with malice must pay the costs of litigation.

## 10. Standards of the courts: high value disputes

Alternative mechanisms for resolution of disputes such as national and international arbitration and mediation have significant importance as a consequence of inefficiencies of the courts.

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# Egypt



## 1. Governing law

If the contract is about real estate, the governing law will be the law of the location of the real estate.

## 2. Jurisdiction: parties choose your courts

The civil procedural law states that Egyptian courts would have jurisdiction over a matter, even if it is not related to its jurisdiction, if the parties accepted explicitly or implicitly the jurisdiction of the Egyptian courts.

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

The law has stated a defined list of the cases where a party may ask the court to obligate the other party to disclose a document in his possession. Such cases are as follows: (i) if the law authorises the party to demand the disclosure of the document; (ii) if the document is common between the two parties (proves their mutual rights and obligations); and (iii) if the other party based its allegations on such document at any stage of the case. In practice, if a party does not comply with the court order, there is no legal consequence.

## 7. Class actions

## 8. Enforcement of foreign judgments

## 9. Costs

A litigant only has to pay the court fees, even if he loses the case.

## 10. Standards of the courts: high value disputes

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# El Salvador



## 1. Governing law

According to Article 315 of the Salvadoran Civil and Commercial Procedures Code, any party supporting its claim on the basis of a contract governed by a foreign law shall evidence its content and current validity.

## 2. Jurisdiction: parties choose your courts

We are not aware of any cases that have no connection with Salvadoran jurisdiction, nor of any cases in which Salvadoran law was applicable to the dispute because the parties submitted their dispute to the jurisdiction of the Salvadoran courts of law, having no connection with Salvadoran jurisdiction. However, we are of the opinion that it is very likely that the local courts of law would accept the parties' jurisdiction agreement and hear the case.

## 3. Jurisdiction: parties choose a foreign court

According to Article 21 of the Salvadoran Civil and Commercial Procedures Code, and unless otherwise established by international treaties, the Salvadoran courts of law will have exclusive jurisdiction over the following matters: (i) *in rem* actions and lease agreements related to real estate located in El Salvador; (ii) matters related to the incorporation, validity, nullity or dissolution of legal entities domiciled in El Salvador, or with the decisions taken by their governing bodies; and (iii) claims relating to the validity or annulment of records made at a local public registry.

## 4. State (or sovereign) immunity

We are not aware of any judicial precedent relating to the waiver of state immunity. However, it is important to mention that the jurisprudence of the local courts of law has been categorical in the sense that the rights that have not yet been created or raised cannot be ruled out, this is to say that the expectation of a right cannot be waived.

## 5. Pre-judgment arrests or freezing orders

The granting of precautionary measures to prevent a defendant from dissipating its assets is regulated by the Civil and Commercial Procedures Code. For this purpose, the applicant must justify the legal standing of the claim, that the measures requested are indispensable for the protection of its right, and that there is danger of harm or frustration of the claim because of the delay in the process; in the sense that, without the immediate adoption of the measures requested, the execution of the ruling of the claim would be impossible or very difficult.

## 6. Disclosure or discovery of documents in litigation

The Salvadoran Civil and Commercial Procedures Code recognises privileged documents or communications, such as the ones between, amongst others, a lawyer (or accountant or auditor) and its client, and physicians and their patients, subject to certain restrictions.

## 7. Class actions

The Salvadoran legal system permits class actions in certain matters, in general, involving collective or diffuse interests (such as those of consumers or those for the protection of the environment) but these are not commonly used and, consequently, the judicial system lacks considerable experience in this kind of matter.

## 8. Enforcement of foreign judgments

The procedure for enforcement of a foreign judgment in El Salvador begins with a request addressed by the interested party (or plaintiff) to the Salvadoran Supreme Court of Justice for authorisation to enforce the judgment. The Supreme Court of Justice, prior to granting its authorisation, shall hear the defendant, who may argue non-fulfilment of the requirements prescribed by the Salvadoran Civil and Commercial Procedures Code in which case a period for producing evidence will be ordered. After the conclusion of the evidence period, the Supreme Court of Justice will issue a final resolution, authorising or denying the local enforcement of the foreign judgment. If the authorisation is granted by the Supreme Court of Justice, the interested party will be entitled to enforce the foreign judgment before the corresponding local court of law.

## 9. Costs

Litigation costs are expressly regulated by a legal tariff (*Arancel Judicial*), so the amount of such costs – unless otherwise agreed between the parties – cannot exceed the maximum amounts expressed therein, which are percentages based on the claimed amounts.

## 10. Standards of the courts: high value disputes

In El Salvador the administration of justice is free, so there are no court fees to be paid by the parties involved in a judicial procedure. However, taking into account the factors listed in the question, it is important to note that the court's timing is not usually as expected, because the procedures to be followed take a significant amount of time to reach final judgment (including appeals) and there is also the possibility, on the side of the defendant, of delaying the procedure and the eventual enforcement of the judgment.

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# England and Wales



## 1. Governing law

The English courts will generally apply a foreign law as the governing law of a contract if it is expressly chosen by the parties, even if there is no connection between the choice of law and the contract or the parties, subject to the following: (i) where all elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of law will not prejudice the application of non-derogable laws of that other country; (ii) where all elements relevant to the situation at the time of the choice are located in one or more EU Member States, the choice of a non-EU Member State law will not prejudice the application of non-derogable provisions of EU community law; (iii) the chosen law will not restrict the application of overriding mandatory provisions of English law; (iv) effect may be given to overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, insofar as those overriding mandatory provisions render the performance of the contract unlawful; (v) the English courts may refuse to apply a provision of the chosen law if such application is manifestly incompatible with English public policy; (vi) in relation to the manner of performance and the steps to be taken in the event of defective performance, the English courts will have regard to the law of the country in which performance takes place; and (vii) the chosen law may not be applied to determine certain questions in relation to the existence and validity of a contract.

The effect of these rules is that, as well as potentially applying local public policy and mandatory rules (in the narrow circumstances outlined above), the English courts may also apply the non-derogable or mandatory rules of another country (although again, only in the narrow circumstances outlined above). There are also special rules in relation to, for example, contracts of

carriage, consumer contracts, insurance contracts and employment contracts. Further, the chosen law may not govern certain aspects of the contract, for example the status, powers and authority of the parties, certain matters relating to trusts, agency, insolvency, court procedure or evidence. This reflects the rules set out in Rome I and, as such, should be in line with the position in other EU Member States. Given that the circumstances in which the English courts will refuse to apply the chosen law are narrow, the basic position (particularly regarding commercial contracts) is therefore that the English court will generally respect the chosen foreign law and uphold party autonomy. See Annex A for further details on Rome I.

## 2. Jurisdiction: parties choose your courts

Our courts will accept jurisdiction conferred on them by parties in respect of a contractual dispute in most cases, even though the parties and the contract in question have no connection with the jurisdiction. Whether applying the Brussels Regulation, the Lugano Convention or the common law, they generally respect the choice of the parties (see Annex B below for further information on the Brussels Regulation and the Lugano Convention). However, our courts may not accept jurisdiction in special cases, for example: (i) if earlier or concurrent proceedings, including related proceedings, have been commenced elsewhere; (ii) if another court has exclusive jurisdiction, such as in a dispute relating to rights *in rem* in land, corporate constitutional issues, the validity of entries in public registers, or the validity of certain intellectual property rights; (iii) in relation to certain insurance, consumer and employment contracts (where the domicile of the insured, consumer or employee tends to be relevant); and (iv) under common law, in certain narrow circumstances, if the court considers that it is not the appropriate forum (*forum conveniens*) to hear the dispute. (This principle is applied

rarely by the English courts where jurisdiction is expressly conferred on the English courts in a jurisdiction clause, particularly where the jurisdiction conferred is exclusive.)

### **3. Jurisdiction: parties choose a foreign court**

Our courts will almost always decline jurisdiction if the parties have agreed that a foreign court is to have exclusive jurisdiction over a contract dispute. However, our courts may assume jurisdiction in special cases, for example: (i) if they have exclusive jurisdiction, such as in a dispute relating to rights *in rem* in land, corporate constitutional issues, the validity of entries in public registers, or the validity of certain intellectual property rights; (ii) in relation to certain insurance, consumer and employment contracts (where the domicile of the insured, consumer or employee tends to be relevant); (iii) if the defendant has taken steps in the proceedings in the English courts; and (iv) in certain narrow circumstances, if the court considers that it is the appropriate forum to hear the dispute. (This principle is applied very rarely where exclusive jurisdiction has been conferred on a foreign court. It is not applied at all where the chosen foreign court is that of an EU Member State.) There is, however, a debate about the scope of the English courts' discretion to stay proceedings brought before them where there is a foreign jurisdiction clause in favour of a non-EU state.

### **4. State (or sovereign) immunity**

Our courts will normally give effect to a waiver of state immunity from jurisdiction, enforcement and pre-judgment freezing orders, subject to some minor exceptions.

### **5. Pre-judgment arrests or freezing orders**

Our courts will normally grant a freezing order if it is just and convenient to do so. The test is high however: in particular, there must be a real risk that the defendant will dissipate its assets so that any judgment may not be satisfied. The claimant must show that it has a good arguable case on the merits of the claim. The court need not have jurisdiction in the main action (although in such circumstances there must nevertheless be a sufficient connection with England).

### **6. Disclosure or discovery of documents in litigation**

A party to English litigation will generally have to disclose documents which are under that party's control and: (i) on which they rely; (ii) which adversely affect their case or support another party's case; and (iii) which adversely affect another party's case. The word "document" in this context covers anything in which information of any description is recorded, so it would include information in paper documents, photographs, tape recordings, computer disks, databases and emails, as well as copies of such documents and back-up copies of word-processing and email documents. It also includes documents stored on servers, documents which have been "deleted" and any metadata associated with documents. The disclosure obligation is therefore wide and the disclosure process can be costly and time-consuming. However, certain documents are protected from disclosure on the grounds that they are privileged. This would include communications between a lawyer and client for the purposes of legal advice and communications between a lawyer or client and a third party for the dominant purpose of obtaining advice or evidence in respect of litigation which is reasonably in prospect or existing.

### **7. Class actions**

U.S.-style class action litigation is not currently possible. It is possible to seek a Group Litigation Order for multiple claims with similar issues. Representative actions for one claim on behalf of a group of people with an identical interest are also possible but rare in practice. Parties to both group litigation and representative actions must opt in to this process. It is anticipated that new legislation permitting opt-out and opt-in collective proceedings in certain circumstances in relation to private damages actions in the anti-trust sphere will come into force during the course of 2015.

### **8. Enforcement of foreign judgments**

A judgment of this nature would be treated as constituting a cause of action against the judgment debtor and could be sued upon summarily in the English courts. The English courts should enter judgment in such proceedings, without re-examination of the merits of the original judgment, provided that, in addition to the factors described above: (i) the original judgment is not for multiple damages; (ii) its

enforcement is not contrary to English public policy; and (iii) enforcement proceedings are instituted within six years after the date of the judgment.

Different considerations may apply if the judgment debtor is a state entity.

## 9. Costs

The losing party typically has to pay a proportion (in appropriate cases a significant proportion) of the litigation costs of the winning party (including lawyers' fees), although the position can be different where offers to settle have been made (and rejected) during the course of the proceedings. However, costs are at the discretion of the court, so in certain circumstances different costs orders may be made.

## 10. Standards of the courts: high value disputes

The English courts are often the jurisdiction of choice for parties to high value commercial disputes involving cross-border parties and issues. This is in part due to the fact that many commercial documents are governed by English law and in the English language but it is also due to the fact that the English courts are very experienced at dealing with complex commercial disputes, outcomes in the English courts are generally predictable, there is no bias in favour of particular types of party, and appeals may only be brought within strict time limits and with the court's permission. There is a specialist commercial court devoted to dealing with complex cross-border commercial disputes. Decisions are published on [www.bailii.org](http://www.bailii.org). Judges exercise active management of cases. The English courts also hear many disputes under foreign (non-English) law. Following a report by Lord Justice Jackson, reforms have sought to reduce the costs of disclosure and other aspects of the litigation process.

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# Eritrea



## 1. Governing law

The civil procedure code makes reference to reciprocity. There are no clear rules defining reciprocity and we are not aware of any case where foreign law was used as the basis of adjudication.

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

Provided the assets are in the country.

## 6. Disclosure or discovery of documents in litigation

Documents that involve the state are an exception.

The court may be forced to order that the evidence be produced.

## 7. Class actions

## 8. Enforcement of foreign judgments

## 9. Costs

## 10. Standards of the courts: high value disputes

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# Estonia



## 1. Governing law

The Estonian Private International Law Act section 2 sets an obligation to apply foreign law and section 7 provides an exemption. Foreign law shall not apply if the result of such an application would be in obvious conflict with the essential principles of Estonian law (public order). In such an event Estonian law applies. Also, Rome I applies in EU disputes.

## 2. Jurisdiction: parties choose your courts

Relevant Articles are to be found in section 70 and section 104 of the Estonian Code of Civil Procedure. Estonian courts will accept jurisdiction if the dispute relates to the economic or professional activities of both parties, or the dispute relates to the economic or professional activities of one party and the other party is the state, a local government or another legal person in public law, or if both the parties are legal persons in public law. It is not required that a party or both parties reside in Estonia.

## 3. Jurisdiction: parties choose a foreign court

Estonian courts accept jurisdiction in cases where the defendant responds to the action without contesting jurisdiction, and also in cases where the defendant does not respond to the action but participates in a court session without contesting jurisdiction (section 105 of the Estonian Code of Civil Procedure). As an EU Member State, Estonia is bound by the Brussels Regulation – see Annex B.

## 4. State (or sovereign) immunity

We are not aware of any such requests for waiver of sovereign immunity being made, but assume the courts would give effect to them due to the contractual freedom of the parties.

## 5. Pre-judgment arrests or freezing orders

Estonian courts may secure an action at the request of the plaintiff if there is reason to believe that failure to secure the action may render enforcement of a court judgment difficult or impossible. If enforcement of a court judgment will evidently take place outside of the European Union and the enforcement of court judgments is not guaranteed on the basis of an international agreement, it is presumed that failure to secure the action may render enforcement of the court judgment difficult or impossible (section 377 (1) of the Estonian Code of Civil Procedure).

## 6. Disclosure or discovery of documents in litigation

Estonia does not recognize disclosure and discovery as they are understood in common law countries. In Estonia evidence is submitted by the participants in the proceedings. The court may propose to the participants in the proceeding that they submit additional evidence (section 230(2) of the Estonian Code of Civil Procedure).

## 7. Class actions

Estonian Code of Civil Procedure section 207 refers to joint actions and not class actions. However, in limited areas (such as consumer complaints), it is possible to bring a class action, even though they are rare in practice.

## 8. Enforcement of foreign judgments

A court decision of a foreign state is subject to enforcement in Estonia after the decision has been declared to be subject to enforcement by the Estonian court, based on a petition for declaring a foreign court decision enforceable (sections 621 and 622 of the Estonian Code of Civil Procedure).

## 9. Costs

The costs of an action are generally covered by the party against whom the court decides (section 162 (1) of the Estonian Code of Civil Procedure) and only reasonable lawyers' fees are recoverable.

## 10. Standards of the courts: high value disputes

Estonian courts lack practice with high value disputes. Therefore, it might take more time for the court to hear the action. However, generally courts are quite efficient and reliable.

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# Finland



## 1. Governing law

Finland is bound by Rome I, which, subject to certain defined exceptions, expressly accepts the parties' choice of substantive law without requirements of connection between the choice of law and the contract or the parties (see Annex A below for further details on Rome I). Also, such principle applies in Finland as a general principle of (international) contract law (ie the principle applies also in respect of non-treaty or non-EU states). However, according to the Finnish Code of Judicial Procedure, if in a given case a foreign law should apply but no information is available on its contents, Finnish law applies instead.

## 2. Jurisdiction: parties choose your courts

Finnish courts follow the international procedural principle according to which a court designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of the state in question. The Brussels Regulation applies (see Annex B below for further information on the Brussels Regulation). According to the Code of Judicial Procedure, Finnish courts will not assume jurisdiction over a contract if another court has exclusive jurisdiction over it.

## 3. Jurisdiction: parties choose a foreign court

According to the Code of Judicial Procedure, Finnish courts will not assume jurisdiction over a contract if another court has exclusive jurisdiction over it. However, Finnish courts will acquire secondary jurisdiction over the dispute only provided that otherwise no court would have jurisdiction in the case. Exclusive jurisdiction does not however prevent proceedings to enforce the foreign ruling (which essentially are new proceedings in Finland).

## 4. State (or sovereign) immunity

There are no national laws or case law regarding waivers of state immunity in Finland and thus the legal state of the issue is somewhat unclear. According to doctrinal works, commercial activities are considered excluded from state immunity even without a waiver. Further, it seems that Finland adopts the principles set forth in the European Convention on State Immunity, to which Finland is not a party, and the United Nations Convention on Jurisdictional Immunities of States and Their Property that has not entered into force yet, but which Finland accepted in April 2014 (acceptance has the same legal effect as ratification). The principles set forth in the above-mentioned conventions seem to be treated as binding principles of international law (Supreme Court case No 2007:49). According to the UN Convention Article 19, no post-judgment measures of constraint, such as attachment, arrest or execution, against property of a state may be taken in connection with a proceeding before a court of another state unless and except to the extent that the state has, for example, expressly consented to the taking of such measures as indicated by international agreement, by an arbitration agreement or in a written contract or by a declaration before the court or by a written communication after a dispute between the parties has arisen.

## 5. Pre-judgment arrests or freezing orders

Under the Code of Judicial Procedure, interim measures are available when a party can demonstrate that it is probable that it has a claim against the other party which can be enforced against it. The Brussels Regulation sets out the framework for EU Member States.

## 6. Disclosure or discovery of documents in litigation

Finnish courts may order a person to produce a specific document when it can be assumed that the document is of significance as evidence in a case, the person is in possession of the document and the document is not privileged (however, privilege in Finland does not equal privilege, for example, in the UK). Also a witness may refuse to give a statement which would reveal a business or professional secret unless very important reasons require that the witness be heard thereon.

## 7. Class actions

In Finland, class actions are possible only in disputes between consumers and businesses. The Finnish Act on Class Actions applies within the limits of the competence of the Consumer Ombudsman, to the hearing of a civil case between a consumer and a business as a class action.

## 8. Enforcement of foreign judgments

If there is no treaty between Finland and the foreign state, "enforcement" may be reached through new proceedings where the foreign judgment may be used as evidence. The evidentiary value may be stronger if the foreign court deciding the case has applied its own law.

## 9. Costs

The principal rule in Finland is that the losing party is liable for all reasonable legal costs incurred by the necessary measures taken by the opposing party. However, for example, frivolous proceedings or dilatory tactics on the part of the winning party may be sanctioned by the cost ruling. The amount of costs awarded may be adjusted by the court. Also, if before the trial, the losing party did not know nor should have known the facts on which the decision in the case turned, the court may order that the parties are to be liable for their own legal costs.

## 10. Standards of the courts: high value disputes

Most high value commercial disputes are resolved by way of arbitration. In general, the Finnish courts are deemed efficient and reliable but in the case of more complex commercial disputes the cases are likely to take several years, with the risk of an appeal, which contributes to the increase in party costs. There are no specialized departments or courts for complex commercial disputes, which in turn increases the need for evidence of a very broad scope.

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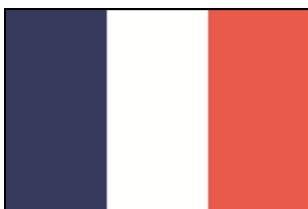
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# France



## 1. Governing law

This is governed by Rome I, which allows parties to choose the applicable law to an international contract, although there are special rules in respect of specific contracts, such as consumer contracts, insurance contracts or employment contracts. Overriding mandatory rules of law of the forum apply and overriding mandatory rules of another country may also be applied by the court (see Annex A below for further details on Rome I).

## 2. Jurisdiction: parties choose your courts

Under both the Brussels Regulation and otherwise applicable rules, the French courts will accept jurisdiction over an international contract dispute even where the parties and the contract in question have no connection with the jurisdiction (see Annex B below for further information on the Brussels Regulation). There are however specific rules for some contracts, such as employment and consumer contracts.

## 3. Jurisdiction: parties choose a foreign court

This is true both under the Brussels Regulation and otherwise applicable rules of French law. The French courts will enforce the parties' choice of court except where the French courts have exclusive jurisdiction. In addition, restrictions on the choice of court may apply to certain types of contract such as consumer or employment contracts.

## 4. State (or sovereign) immunity

French courts give effect to written waivers but also to implicit waivers of state immunity from both jurisdiction and enforcement. Under French law, such implicit waivers can result from the choice of an International Chamber of Commerce (ICC) arbitration

clause (on the basis that the ICC rules provide that the parties undertake to carry out any award). There are some minor exceptions: for example, a waiver of state immunity from jurisdiction and enforcement does not amount to a waiver of diplomatic immunity, which must be waived separately.

## 5. Pre-judgment arrests or freezing orders

Such a judgment can indeed be obtained if the claimant can show that it has a monetary claim, which is apparently good and arguable and that there is a substantive risk of dissipation of the assets (either because the debtor is organising his or her insolvency or because he or she has few available assets).

## 6. Disclosure or discovery of documents in litigation

Parties only disclose documents that they consider necessary to support their respective cases, and the parties are required to exchange written witness statements, expert reports, and any other documentary evidence they rely on in their submissions. This being said, disclosure remains possible in limited circumstances. Under Article 142 of the French Code of Civil Procedure, once proceedings on the merits have been commenced, a party can ask the court to order another party to produce documents. Additionally, before the beginning of proceedings on the merits, pursuant to Article 145 of the French Code of Civil Procedure, it is possible to file an application and obtain a provisional decision without notice to the other party, for example, to preserve evidence. Traditionally, judges only granted such requests where the documents were specifically identified and the request was not designed to enable the requesting party to obtain facts or documents that are not within its knowledge. In recent years, however, courts have interpreted these provisions

more broadly, permitting parties to obtain evidence with a lower threshold of specificity in requests.

## 7. Class actions

Class actions as understood in the U.S. or in other jurisdictions do not exist in France. There are few, very limited procedures in France that permit parties to pursue claims for mass wrongs or injuries. First, there are procedures for joining actions in order to aggregate many parties into a single proceeding. Second, in some instances, claims can be brought by representative associations on behalf of their members. This being said, these procedures have proved to be little use in practice, as the conditions that need to be met remain quite restrictive. A reform on class actions may be introduced in the near future.

## 8. Enforcement of foreign judgments

Where there is no applicable treaty and where the Brussels Regulation does not apply, foreign judgments are recognised in France via *exequatur* proceedings, provided the following conditions are met: (i) the foreign court must have had jurisdiction over the claim, that is, there must be a "characterised link" between the case and the state where the judgment was rendered; (ii) the judgment rendered must be consistent with principles of (French) international public policy; and (iii) there must have been no fraud, that is, no attempt to select a forum in order to evade the application of the law that would have been applied by a French court.

## 9. Costs

Unavoidable legal costs, which typically include costs such as court costs, are borne by the losing party, although the judge can apportion the costs differently provided that he justifies his decision. With respect to attorneys' fees and costs, French courts usually award a lump sum based on fairness and the economic situation

of the parties. The court has broad discretion in these matters. In practice, the sum awarded is usually rather limited and is entirely unrelated to the actual costs incurred by the party. Courts typically award costs up to EUR 10,000 in value, although rare cases have seen cost awards approaching EUR 100,000 in value.

## 10. Standards of the courts: high value disputes

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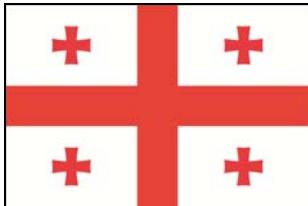
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# Georgia



## 1. Governing law

According to the Georgian Private International Law 1998, the choice of law shall not conflict with the mandatory rules of the country to which the contract is closely connected.

## 2. Jurisdiction: parties choose your courts

In general, Georgian courts have international competency provided there is a certain connection (specified in the law) between the contract or the parties and the jurisdiction. However, under the Georgian legislation, parties are allowed to agree on international competency of Georgian laws and courts notwithstanding the absence of the above-mentioned conditions. Georgian courts have international competency when the defendant does not object to the competence of Georgian courts.

If a defendant, in breach of a Georgian jurisdiction agreement, objects to the jurisdiction of the Georgian court, the court (the judge) decides the issue of international competency of the Georgian court on the basis of the factual circumstances of each case.

## 3. Jurisdiction: parties choose a foreign court

Parties are entitled to agree on the international competency of a foreign court provided the domicile, residence or ordinary residence of one of the parties is in a foreign country. However, when Georgian courts have exclusive international competency and in certain cases provided under the law, the parties are not entitled to agree on the international competency of a foreign court.

## 4. State (or sovereign) immunity

Representatives/staff of foreign countries with an official mission in Georgia, also those persons who are exempt from the jurisdiction of Georgian courts according to the general rules of international law or other norms of law, are not subject to the jurisdiction of Georgian courts according to the general rules of international law or other norms of law that are not amenable to the jurisdiction of Georgian courts.

## 5. Pre-judgment arrests or freezing orders

Our courts will normally grant a freezing order if there is a real risk that the defendant will dissipate its assets so that any judgment may not be satisfied. The claimant must show that it has a good arguable case. The courts need not have jurisdiction in the main action.

## 6. Disclosure or discovery of documents in litigation

According to the Georgian Code of Civil Procedures when the party is not able to obtain written evidence from the relevant person/agency, he/she is entitled to petition the court to obtain those documents.

## 7. Class actions

**GREEN** / **WHITE** Class actions are common in Georgian courts. According to the Georgian Code of Civil Procedures, if the court has to deal with a number of common and legally interconnected cases in which the same or different parties are involved, the court is entitled on its own initiative or on the motion of a party/parties to consolidate these cases provided such a merger will lead to dealing with the cases more quickly and correctly.

## 8. Enforcement of foreign judgments

According to the Georgian legislation, foreign court decisions shall be enforced in Georgia provided they are subject to the enforcement.

According to the Georgian Private International Law, enforcement of foreign court decisions on civil and labour law cases is carried out provided that enforcement of them is feasible. The Supreme Court of Georgia makes a decision on the petition of the interested party to the enforcement. However, prior to enforcement the foreign court decision shall be acknowledged by the Supreme Court of Georgia.

Furthermore, the decision shall not be acknowledged in the following circumstances: (i) the case is subject to the special competence of Georgia; (ii) procedural violations have taken place according to the legislation of the country making a decision on the case; (iii) in regard to the same legal dispute between the same parties there is a Georgian court decision in force or a third country's court decision in force, which has already been acknowledged in Georgia; (iv) the foreign court, that made a decision, is not considered as a competent court according to Georgian legislation; (v) a foreign country does not acknowledge Georgian court decisions (however, acknowledgement of a foreign court decision is possible, unless the decision is related to property rights and the dispute is subject to the local (Georgian) court jurisdiction); (vi) court proceedings are being held in Georgia regarding the same dispute between the same parties on the same basis (however, acknowledgement of the foreign court decision is possible upon the completion of court proceedings regarding the case in Georgia); or (vii) a decision contradicts the main legal principles of Georgia.

## 9. Costs

The lawyers' fees will be paid by the losing party within reasonable limits but must not be more than 4% of the cost of the object of the pleading.

## 10. Standards of the courts: high value disputes

The courts are quite efficient and reliable in high value commercial disputes.

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# Germany



## 1. Governing law

Rome I applies. Note that under Article 3(3) of Rome I, in a purely domestic situation, German law rules which cannot be derogated from by agreement apply despite a choice of foreign law. Such rules are, for example, the rules on unfair standard business terms, which also apply to a large extent in business-to-business relationships. See Annex A below for further details on Rome I.

## 2. Jurisdiction: parties choose your courts

The Brussels Regulation and the Lugano Convention apply in many cases (see Annex B below for further information on the Brussels Regulation and the Lugano Convention). Where a jurisdiction clause is outside the scope of the Brussels/Lugano regime, it will be subject to the German Civil Procedure Code (*Zivilprozeßordnung, ZPO*). The ZPO requires either both parties to be merchants under the Commercial Code, section 38(1) ZPO or, if at least one party is seated outside of Germany, the jurisdiction agreement to be in written form, ie on paper with an original signature, section 38(2) ZPO. German courts would assume jurisdiction without looking for a connection between the dispute and Germany. The jurisdiction agreement would, however, be inadmissible if another court has exclusive jurisdiction, section 40(2) ZPO. The ZPO provides for exclusive jurisdiction, for example, in disputes concerning rights in real estate and certain matters concerning enforcement. Courts apply these rules in the situation described above if they point to the exclusive jurisdiction of courts of another state.

## 3. Jurisdiction: parties choose a foreign court

The Brussels Regulation and the Lugano Convention apply in many cases. If not, the jurisdiction clause is subject to the ZPO. In the situation described above, a German court would apply the ZPO if: (i) the chosen court is outside the EEA, regardless of where the parties are seated, or (ii) the chosen court is in Iceland, Norway or Switzerland and both parties are seated outside the EEA. It is still unclear, however, how German courts would decide if, without the jurisdiction clause in favour of the courts of a third state, a court within the EEA would have jurisdiction under the Brussels/Lugano Regime (eg the defendant's seat, or the place of performance, is in the EEA, or a tort was committed in the EEA). Some authors suggest that in such cases the court should examine the jurisdiction clause under the Brussels Regulation or Lugano Convention requirements instead of the ZPO. It is yet to be seen if and how this debate will change under the recast Brussels Regulation.

In addition, it is unclear whether a German court, which is seised despite a jurisdiction clause in favour of the courts of a third state and which would have jurisdiction under the Brussels/Lugano regime, will consider the jurisdiction clause at all or accept jurisdiction under the Brussels Regulation.

The ZPO requires that the parties are merchants under the Commercial Code; see Q2 above. If at least one party is seated outside Germany and the parties are not merchants, the jurisdiction agreement must be in written form; see Q2 above. In all cases, the jurisdiction agreement would be inadmissible if another court has exclusive jurisdiction; see Q2 above.

## 4. State (or sovereign) immunity

German courts give effect to a waiver of state immunity. State immunity exists for sovereign acts and state property used for sovereign purposes, but not for commercial acts of states and state property used for commercial purposes. As to the latter acts and property, a waiver only has declaratory effect. The German Constitutional Court decided in 2006 that a general waiver of state immunity does not lift the protection of diplomatic property; the waiver must specify if diplomatic immunity is to be waived as well. Germany has not yet signed the UN Convention on Jurisdictional Immunities of States and Their Property.

## 5. Pre-judgment arrests or freezing orders

This is done via an arrest order/judgment and an attachment order. The arrest requires a claim, which must be convincingly set out and accompanied by evidence. Affidavits are permitted as evidence. In addition, there must be a danger that without the arrest the enforcement of a judgment would be frustrated or substantially impaired, section 917 ZPO. Examples of such a situation are: hiding assets, sham transactions, suspicion of sale of major assets or of the only tangible asset (if the proceeds cannot be used for enforcement), or disguising pecuniary circumstances. The arrest order or judgment is immediately enforceable, allowing attachment of claims of the debtor against any third parties, including banks. The court does not need to have jurisdiction in the main proceedings: the local court (*Amtsgericht*) at the place where the assets are located also has jurisdiction (section 919 ZPO).

## 6. Disclosure or discovery of documents in litigation

In Germany, there is no general compulsory disclosure. A party to proceedings must disclose documents it wishes to rely on in evidence or which it referred to, and documents for the surrender or production of which the opposing party has a claim under substantive law, for example, for rendering of accounts, assignment of claims, mandate/agency, or documents made for another person.

In addition, the court may order documents to be disclosed, section 142 ZPO. The court has discretion to make such an order. Disclosure under this rule may not be used for fishing expeditions but requires convincing submissions related to specific facts. The concept of

privilege does not exist. A court, when exercising its discretion, must consider the disclosing party's interests, such as business secrets.

## 7. Class actions

Class actions as in the U.S. do not exist in Germany. In certain capital markets disputes proceedings similar to class actions are possible under the Capital Markets Model Case Proceedings Act. This allows only certain issues arising in many proceedings to be dealt with in one model case. The model case proceedings are not fully fledged proceedings. In practice, these proceedings are rather cumbersome and take a long time; the law has recently been reformed to make proceedings faster and to facilitate settlement.

## 8. Enforcement of foreign judgments

If the Brussels Regulation does not apply, the recognition of a foreign judgment by a German court is subject to the following requirements, section 328 ZPO:

- (i) the foreign court had jurisdiction on the basis of the German jurisdiction rules as if applicable in the foreign country – the jurisdiction under the jurisdiction clause is respected except where German law provides for exclusive jurisdiction (see Q2 above);
- (ii) if the judgment was given in default of appearance, the defendant was served with the document instituting the proceedings duly and in sufficient time to enable him to arrange for his defence – due service is examined under the applicable law (including international treaties) on service for the foreign proceedings;
- (iii) the foreign judgment is not irreconcilable with:

  - (a) a judgment given in a dispute between the same parties in Germany;
  - (b) an earlier judgment given in any other country which is recognisable in Germany; or
  - (c) proceedings pending in Germany which were commenced before the proceedings which resulted in the foreign judgment;

- (iv) the recognition of the foreign judgment is not contrary to public policy (*ordre public*) in Germany, for example, judgments allowing for punitive damages exceeding compensation of actual damage and judgments in class actions concerning a defendant who is not aware of the action are unlikely to be recognised in Germany; and
- (v) a judgment given in Germany would be recognised on generally equivalent conditions to those which would apply for the purposes of enforcement in the jurisdiction in which the judgment enforcement of which is sought in Germany was given (reciprocity).

German courts will not re-examine the merits of the claim.

## 9. Costs

If one party wins completely, the other party has to bear all costs, ie court fees, witnesses' and experts' expenses and the other side's costs. However, the losing party must only pay the other party's lawyers' fees calculated according to the Lawyers' Fees Act, no matter what that party has to pay to its lawyer under the retainer. Fees under the Lawyers Fees Act are calculated according to a schedule based on the value of the matter. Fees based on hourly rates are usually higher, so the winning party will often not be able to recover all of its lawyers' fees. If no party wins completely, the costs are divided between the parties according to the win/lose ratio.

## 10. Standards of the courts: high value disputes

German courts are generally very efficient and reliable. Court fees are reasonable and foreseeable, as are the lawyers' fees to be reimbursed to the winning party. Court proceedings normally do not take excessively long. Enforcement procedures are efficient. The grounds for appeals were narrowed in a law reform in 2002, limiting the review of facts on appeal. Judges are very thorough in applying the law properly, for example, in banking cases, the Frankfurt courts are very experienced. In the Federal Supreme Court and some appeal courts, people sometimes perceive a slight bias in favour of consumers and other unsophisticated investors and against banks, but this does not apply to all cases.

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# Ghana



## 1. Governing law

According to Ghanaian law, a court, when determining the law applicable to an issue arising out of any transaction or situation, is guided by a number of rules, one of which is that an issue arising out of a transaction shall be determined according to the system of law intended by the parties to the transaction to govern the issue or the system of law which the parties may, from the nature or form of the transaction, be taken to have intended to govern the issue.

## 2. Jurisdiction: parties choose your courts

The Ghanaian courts will assume jurisdiction only in such circumstances where it is the intention of the parties that Ghanaian law should govern the contract.

## 3. Jurisdiction: parties choose a foreign court

Where a contract provides, for instance, that all disputes between the parties shall be referred to the exclusive jurisdiction of a foreign tribunal, in such a case, the foreign court is deemed to have jurisdiction over the parties.

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

A party may make an application for the court to make an order for the detention, custody or preservation of any property which is the subject matter of the cause or matter in respect of which any question may arise in the action. In some instances the court would grant this order, subject to the payment of security into court.

## 6. Disclosure or discovery of documents in litigation

According to the rules of court, after the close of pleadings in an action, there shall be discovery of documents but the parties to the action are not prevented from agreeing to dispense with or limit the discovery of documents which they would otherwise be required to make to each other.

In the course of trial, documents which have not been subject to discovery may be tendered in evidence, subject to costs being paid to the other party.

## 7. Class actions

In Ghana, where numerous persons have the same interest in any proceedings, it may be commenced, continued by or against any one or more of them as representing all or some of them. Where judgment or an order is given in such proceedings, it shall bind all persons acting as representatives of the parties, but shall not be enforced against a person who is not a party to the proceedings except with leave of the court.

## 8. Enforcement of foreign judgments

According to Ghanaian law, in order to enforce a foreign judgment, the judgment must first be registered and there must be reciprocity with respect to the country where the judgment is obtained. An application to have the judgment registered must be made to the court. The application shall be accompanied by evidence with respect to the enforceability of the judgment by execution in the country of the original court and of the law of that country under which any interest has become due under the judgment as may be registered.

## 9. Costs

According to the rules of court, the costs of and incidental to proceedings in court are at the discretion of the court, and the court has full power to determine how much costs are to be paid. An award of costs is usually designed to compensate for expenses reasonably incurred and also for court fees paid by the party in whose favour judgment was given. Costs also provide reasonable remuneration for the lawyer of that party in respect of work done by the lawyer.

It must be noted that costs are also awarded whilst the case is pending; for example, costs may be awarded if a lawyer fails to appear in court for the matter to proceed.

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## 10. Standards of the courts: high value disputes

# Gibraltar



## 1. Governing law

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

## 9. Costs

## 10. Standards of the courts: high value disputes

There are three full time Supreme Court judges who are experienced in dealing with high value and complex commercial disputes. The Gibraltar Court of Appeal sits twice a year and is made up of retired English Court of Appeal judges from the UK. The current President of the Court of Gibraltar is Sir Paul Kennedy. A final appeal lies to the Judicial Committee of the Privy Council which sits in London.

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# Greece



## 1. Governing law

Please note that in almost all civil cases, the court only proceeds to order documents to be disclosed after a relevant request by one of the parties.

## 2. Jurisdiction: parties choose your courts

## 7. Class actions

## 3. Jurisdiction: parties choose a foreign court

## 8. Enforcement of foreign judgments

## 4. State (or sovereign) immunity

## 9. Costs

## 5. Pre-judgment arrests or freezing orders

## 10. Standards of the courts: high value disputes

## 6. Disclosure or discovery of documents in litigation

None of the above indicators is quite accurate. According to Article 450 of the Greek Civil Procedure Code, each party is obliged to disclose all documents that have been used or invoked by that party to prove its claims and allegations. Each party is obliged to present the documents that it holds and which could be used as evidence, unless there is an important reason that justifies these documents remaining undisclosed, for example, communications between lawyer and client, or doctor and patient, etc. The court, might, however, order these documents to be disclosed depending on whether they are crucial for the outcome of the case.

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# Grenada



## 1. Governing Law

The High Court of Grenada is vested with such jurisdiction as is exercised by the High Court of England, and so it will not construe or interpret foreign law, but such law will be presented to the court through expert evidence. As a result of the manner in which judges in Grenada conduct their cases, and as we are not aware of there ever being an instance where a Grenada court has been requested to apply the law of a foreign jurisdiction, we cannot say definitively whether the courts will apply foreign law in a Grenada court.

## 2. Jurisdiction: parties choose your courts

The court has an inherent jurisdiction to stay or dismiss proceedings on the grounds of *forum non conveniens*, and a defendant may apply to the court to dispute the jurisdiction of the court in accordance with Rule 9.7 of the Civil Procedure Rules 2000 (as amended). Service on a defendant outside of the jurisdiction must be done in compliance with Part 7 of the Civil Procedure Rules 2000.

## 3. Jurisdiction: parties choose a foreign court

The court is not likely to assume jurisdiction if it can be satisfied that there is some other available appropriate and competent forum, which is clearly more appropriate than its own, for the trial of the action – *IPOC International Growth Fund Ltd v LV Finance Group et al BVI Civil Appeal Nos 20 of 2003 and 1 of 2004 (Unreported)*.

## 4. State (or sovereign) immunity

There is no legislation in Grenada which governs the issue of foreign sovereign immunity; accordingly the common law conflict of laws principles on this issue will apply.

## 5. Pre-judgment arrests or freezing orders

The Court will grant pre-judgment freezing orders pursuant to Rule 17.1(1)(j) of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 and *Yukos CIS Investments Limited and Others v Yukos Hydrocarbons Investments Limited and Others BVIAP 2010/028*.

## 6. Disclosure or discovery of documents in litigation

Disclosure and discovery are governed by Part 28 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000. The scope of information which may be subject to disclosure can be quite extensive.

## 7. Class actions

Part 21 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 governs actions brought or defended by "representative parties", where the court may appoint a body having sufficient interest in the proceedings, or one or more of those persons to represent all or some of the persons with some or similar interests, subject to certain requirements. This type of action is not commonplace in Grenada.

## 8. Enforcement of foreign judgments

Foreign Judgments (Reciprocal Enforcement) Act Cap. 113 permits the judgments of Commonwealth countries to be registered in Grenada's Supreme Court Registry, and provides that the Governor General may direct that a foreign judgment be registered in the Supreme Court Registry of Grenada if he or she is satisfied that substantial reciprocity of treatment will be assured to judgments given by the Court of Grenada in that foreign country. Any other foreign judgment must be sued upon as an ordinary debt.

## 9. Costs

The principle that costs follow the event applies in the absence of an order of the court or an agreement between the litigants on costs.

## 10. Standards of the courts: high value disputes

Grenada does not have a fast-track or Commercial Court. Accordingly, as a result of the tremendous backlog of cases to be heard and the frequent relocation of judges, it takes an inordinate length of time for a matter to be heard at trial; approximately three to five years. The process is likely to be delayed even further where there are cross-border parties and legal issues which the court does not often address.

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# Guatemala



## 1. Governing law

According to Guatemalan law, the governing law chosen by the contracting parties governs most aspects of the contract, unless the submission to governing law is contrary to prohibitive rules or public order.

## 2. Jurisdiction: parties choose your courts

The Guatemalan courts have jurisdiction when the contracting parties agree to submit any dispute to the jurisdiction of the Guatemalan courts.

## 3. Jurisdiction: parties choose a foreign court

The most likely scenario is that a local court would receive any claim filed before it and would only reject jurisdiction upon the interested party asserting the exclusive jurisdiction clause as a procedural defence.

## 4. State (or sovereign) immunity

Guatemala is not a signatory to the United Nations Convention on Jurisdictional Immunities of States and Their Property.

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

There are no particular discovery rules, but a party may ask the judge to order the other party to disclose a document which may be relevant to the case. If so ordered, then a party must produce such document.

## 7. Class actions

Class actions do not usually occur in Guatemala.

## 8. Enforcement of foreign judgments

In order for a foreign judgment to be enforceable in Guatemala, additional requirements must be met; for example: (i) it must have been issued as a consequence of exercising a personal, civil or mercantile right of action; (ii) it must not have been a default judgment or issued in the absence of the defendant; (iii) the obligation whose fulfilment is being pursued is lawful in Guatemala; and (iv) the judgment complies with all the necessary legal requirements in the country of origin.

## 9. Costs

For the losing party to be obligated to pay the costs of the winning party, the winning party must have requested it in his initial brief.

## 10. Standards of the courts: high value disputes

We have taken into account the following main factors for the rating we have chosen: the excessive time taken to get the action heard; slow and unpredictable enforcement; and the ability of defendants to delay enforcement.

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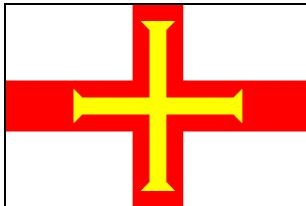
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# Guernsey



## 1. Governing law

The Guernsey courts will uphold choice of law clauses and disputes determined under foreign law are regularly heard in Guernsey with expert evidence on foreign law being adduced where necessary or appropriate (expert evidence on English law is not usually necessary).

## 2. Jurisdiction: parties choose your courts

The Royal Court will generally exercise jurisdiction over contracts which state that the Guernsey courts have jurisdiction.

## 3. Jurisdiction: parties choose a foreign court

Following the Court of Appeal decision in *Carlisle Capital Corporation Ltd (in liquidation) & ors v Conway Jnr & ors* (2012), where various claims are being litigated in one proceeding, the Guernsey court will ask what is the *forum conveniens* for the resolution of the trial of the dispute rather than of the individual issues within it. In a limited number of cases, this question may be answered by overriding an exclusive jurisdiction clause – for example, where mandatory statutory provisions require the parties to litigate certain claims only in Guernsey and where there is a risk of claim-splitting and inconsistent decisions from different courts. In such cases, the courts may assume jurisdiction over the dispute if the mandatory statutory provisions require the parties to litigate in Guernsey notwithstanding contractual provisions to the contrary.

## 4. State (or sovereign) immunity

There are no decided cases on this issue and there is no equivalent of the English State Immunity Act 1978 in Guernsey.

## 5. Pre-judgment arrests or freezing orders

The Guernsey courts will determine this under Guernsey statute, applying *American Cyanamid* principles, although the Guernsey courts can only grant an injunction where there will be no substantive proceedings in Guernsey in "exceptional circumstances" – which include the making of orders in aid of foreign substantive proceedings.

## 6. Disclosure or discovery of documents in litigation

The Guernsey rules of disclosure and privilege in litigation closely mirror those in the English Civil Procedure Rules. There is no general right (other than in death and personal injury matters) to pre-action disclosure.

## 7. Class actions

The Guernsey court has no experience of class actions but representative proceedings are permitted by rules 33 to 35 of the Royal Court Civil Rules, 2007. The rules provide (amongst other things) that unless the court otherwise directs, any judgment or order given in a claim where a party is acting as a representative under rule 33 is binding on all persons represented in the claim but may only be enforced by or against a non-party to the claim with the permission of the court. There is further provision for the representation of persons whose interests cannot be ascertained and for representation of beneficiaries by trustees.

## 8. Enforcement of foreign judgments

Foreign money judgments from the UK courts and the courts of some other countries must be enforced by way of registration under statute where bilateral agreements have been reached for recognition of foreign monetary

judgments. Judgments from most countries in the world will need to be enforced under the common law which, in effect, means suing on the judgment in Guernsey as a debt and obtaining summary judgment in the Royal Court which can then be enforced against Guernsey-*situs* assets.

## 9. Costs

The golden rule generally applies: costs follow the event. Recoverable fees are taxed if not agreed on a standard basis and usually only include the costs of Guernsey advocates and their non-Guernsey qualified staff rather than any foreign lawyers or counsel assisting them. There is a stipulated index-linked maximum recoverable rate for Guernsey advocates and the court has an absolute discretion on issues of costs and can in appropriate circumstances award an uplift over the maximum recoverable rate and/or indemnity costs (and the costs of foreign solicitors and counsel in some exceptional circumstances).

## 10. Standards of the courts: high value disputes

The Royal Court of Guernsey is very used to dealing with high value commercial disputes and has sufficient expertise in its judiciary to handle these types of cases. Availability of non-Guernsey resident judges can sometimes be an issue.

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# Guinea



## 1. Governing law

When a contract is concluded or is carried out in Guinea, according to Guinean law, the terms of the contract are determined by the choice of the parties with the exception of certain mandatory laws (such as those related to employment and insurance).

## 2. Jurisdiction: parties choose your courts

By virtue of the autonomy of the choice of the parties and contractual clause conferring jurisdiction on the courts, the courts will be competent but a difficulty may arise at the execution of the decision: Guinea must have an agreement with the country where the parties are that would allow the execution on both sides of the court decisions.

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

## 9. Costs

## 10. Standards of the courts: high value disputes

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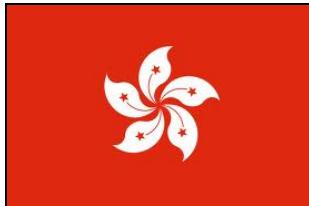
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# Hong Kong



## 1. Governing law

Generally, the Hong Kong courts will respect the parties' choice of governing law with respect to their rights and obligations under the contract, subject to the application of mandatory rules of Hong Kong law and Hong Kong public policy. There is usually no need to demonstrate that the chosen system of law has any connection with the parties or their transaction.

## 2. Jurisdiction: parties choose your courts

The Hong Kong courts will generally accept jurisdiction over a dispute if the relevant contract provides for the jurisdiction of the Hong Kong courts. However, proceedings may be stayed or set aside in certain circumstances, including: (i) where the Hong Kong courts believe that another forum is more appropriate; (ii) parallel proceedings have been commenced elsewhere by the same party commencing proceedings in Hong Kong; (iii) the Hong Kong courts believe that they are precluded from resolving disputes regarding the subject matter; or (iv) there is found to be no effective jurisdiction or choice of court agreement between the parties.

## 3. Jurisdiction: parties choose a foreign court

The Hong Kong courts will generally respect a jurisdiction clause in favour of a foreign court. However, the Hong Kong courts may refuse to stay or set aside proceedings in Hong Kong in certain circumstances, including: (i) where the Hong Kong courts believe that they are the more appropriate forum for the dispute than the foreign court; (ii) the defendant has submitted to the jurisdiction of the Hong Kong courts; or (iii) there is found to be no effective jurisdiction or choice of court agreement between the parties.

## 4. State (or sovereign) immunity

In *Democratic Republic of the Congo v FG Hemisphere Associates LLC* [2011] HKCFA 41, the Court of Final Appeal held that a foreign state cannot waive its immunity by way of an agreement with a private party in advance of proceedings in the Hong Kong courts. State immunity can only be waived after the jurisdiction of the Hong Kong courts has been invoked. Similarly, the People's Republic of China is entitled to claim Crown immunity before the Hong Kong courts.

## 5. Pre-judgment arrests or freezing orders

O.29, r.1 Rules of the High Court (**RHC**) allows a party to apply for a *Mareva* (freezing) injunction. The applicant has to show that he has a good arguable case, that the respondent has assets in Hong Kong (or overseas) and that there is a real risk of dissipation in the absence of an order being made. In addition, the applicant has to show that the balance of convenience is in favour of the order being made.

## 6. Disclosure or discovery of documents in litigation

O. 24, r.1(1) RHC provides that after the close of pleadings in an action begun by writ there will be discovery by the parties to the action of documents which are or have been in their possession, custody or power relating to matters in question in the action.

## 7. Class actions

Currently, parties in Hong Kong can engage in a limited form of class action. "Representative proceedings" under O.15, r. 12 RHC provides that proceedings may be begun, and may be continued (unless the court otherwise orders), by or against one or more persons as representatives of numerous other persons with the

same interest. While it is not the case that the courts are hostile to representative actions, the rules regarding representative actions mean that it is often difficult to show that a particular case is an appropriate one for a representative action. The Law Reform Commission of Hong Kong published a report in May 2012 in which it recommended the introduction of a "comprehensive regime for multi-party litigation". There is, however, no short-term prospect of legislation being enacted in this regard.

## 8. Enforcement of foreign judgments

If a foreign judgment for a sum of money is obtained in a country designated under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319), an application can be made to the Hong Kong Court to register that foreign judgment provided that certain conditions are satisfied (section 4). Once leave is given to register, the judgment can be enforced in the same way as a Hong Kong judgment. Where a foreign judgment cannot be registered under the ordinance, it may be enforceable at common law by an action in debt arising out of the foreign judgment provided certain conditions are satisfied.

## 9. Costs

The general rule in Hong Kong is that costs follow the event and are paid on a party and party basis. However, the Hong Kong courts retain discretion as to costs, including determining the extent to which a party may be liable for another party's costs and the basis on which costs will be paid. The typical rate of costs recovery in commercial litigation involving international firms is likely to be closer to 40%-60%.

## 10. Standards of the courts: high value disputes

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# Hungary



## 1. Governing law

Hungary is a Member State of the EU, and hence is bound by the provisions of Rome I (see Annex A below for further details on Rome I).

## 2. Jurisdiction: parties choose your courts

Hungary is a Member State of the EU, and hence is bound by the provisions of the Brussels Regulation (see Annex B below for further information about the Brussels Regulation).

## 3. Jurisdiction: parties choose a foreign court

Hungary is a Member State of the EU, and hence is bound by the provisions of the Brussels Regulation.

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

Under section 205 of the Hungarian Enforcement Act, the Hungarian courts must enforce foreign judgments, provided that: (i) a Hungarian act (for example, Brussels

Regulation); (ii) a treaty; or (iii) reciprocity so provides. Therefore, reciprocity, established by the Ministry of Foreign Affairs and Trade and the Ministry of Justice, is the minimum condition (or rather a fallback option) without which Hungarian courts will not enforce foreign judgments. Once any of the above conditions is met, Hungarian courts are not allowed to examine the foreign judgment on the merits (there is no *exequatur* procedure) and will affix an execution clause on the foreign judgment.

## 9. Costs

The losing party normally has to pay 100% of the litigation costs of the winning party; however there are some statutory exceptions (for example, the losing party does not have to pay those costs which were generated wrongfully by the winning party). Please also note that, although the litigation costs include the lawyer's fees, recent case law shows that courts are reluctant to adjudicate unreasonably high legal fees.

## 10. Standards of the courts: high value disputes

In order to enhance efficiency in high value disputes, the Hungarian Procedural Code has been amended to offer a special, fast track procedure with limited options to delay the proceedings for commercial matters with an amount in dispute of above HUF 400 million (approximately EUR 1.3 million).

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# Iceland



1. Governing law

7. Class actions

2. Jurisdiction: parties choose your courts

8. Enforcement of foreign judgments

3. Jurisdiction: parties choose a foreign court

9. Costs

4. State (or sovereign) immunity

10. Standards of the courts: high value disputes

5. Pre-judgment arrests or freezing orders

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# India



## 1. Governing law

Indian courts recognise party autonomy regarding choice of law subject to certain exceptions. Foreign law is to be treated as a question of fact and proven by evidence. For example, if Indian courts are hearing a dispute relating to an English law contract, they may hear expert testimony on English law from English law experts.

## 2. Jurisdiction: parties choose your courts

Parties cannot confer jurisdiction on an Indian court by agreement alone. If there are two or more courts that may exercise jurisdiction on a particular matter, the parties have the right to choose the forum.

## 3. Jurisdiction: parties choose a foreign court

The parties cannot confer jurisdiction, where none exists, on a court to which Indian law applies, but this principle does not apply when the parties agree to submit to the exclusive or non-exclusive jurisdiction of a foreign court. The parties to a contract may agree to have their disputes resolved by a foreign court creating exclusive or non-exclusive jurisdiction on it.

## 4. State (or sovereign) immunity

The contract must be a valid contract, not in violation of any statute or constitutional provision.

## 5. Pre-judgment arrests or freezing orders

In order to succeed in a claim for an interim injunction, the applicant must satisfy the following three grounds: (i) there is a *prima facie* case; (ii) irreparable injury will be caused to the party if the injunction is not granted; and (iii) the balance of convenience must lie in favour of the party seeking the injunction. A *prima facie* case cannot be made unless the jurisdiction of the court is established first.

## 6. Disclosure or discovery of documents in litigation

Privileged communications and documents are not subject to scrutiny and inspection. Although the court undoubtedly has the power to make an order for the production of documents at any time during the pendency of any suit, such an order can be made only if two pre-conditions are satisfied; namely, that the documents must be in the possession or power of the party against whom the order is made, and secondly, the documents must relate to the matter in question.

## 7. Class actions

In ordinary civil suits, those persons may only be joined as claimants where any right to relief in respect of the same transaction is alleged to exist in such persons, and if such persons brought separate suits, any common question of law or fact would arise. However, the rule of *locus standi* has been relaxed in cases of public interest litigation where any person acting *bona fide* can approach the court to challenge violation of fundamental rights (under the constitution) of an individual or class of persons, but not for personal gain.

## 8. Enforcement of foreign judgments

However, our answer is **GREEN** if there is a treaty between the foreign state and India, and the foreign state has been notified as a reciprocating territory.

## 9. Costs

## 10. Standards of the courts: high value disputes

Although the courts adjudicating on high value disputes are quite competent, the Indian judiciary is overburdened and consequently the process of getting the dispute heard and the orders enforced is very slow. There is a significant backlog in the court system. There are roughly 64,000 cases pending before the Supreme Court, 4.2 million cases pending before the High Courts and 28 million cases in total pending before all courts (including subordinate courts) and 99% of cases have been pending for more than ten years.

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# Indonesia



## 1. Governing law

In general, the Indonesian courts would uphold the choice of foreign law. However, in practice the courts have from time to time applied the laws of the Republic of Indonesia, notwithstanding the choice of law provisions in the relevant documents.

## 2. Jurisdiction: parties choose your courts

In general, Indonesian courts would accept jurisdiction over any dispute if it is chosen by the parties. However, if neither the parties nor the disputes have any connection with the jurisdiction of the Indonesian courts and one of the parties challenges the jurisdiction of the Indonesian courts (including on the basis of the *forum non conveniens* doctrine), it is likely that the Indonesian court will refuse to entertain the dispute.

## 3. Jurisdiction: parties choose a foreign court

The appointment of a foreign court as an exclusive forum for dispute resolution does not override the jurisdiction of Indonesian courts to try the dispute and in practice we are aware that Indonesian courts have taken jurisdiction based on the argument that by law a court has the authority to decide the case if either party is domiciled in Indonesia or the disputed asset is located in Indonesia.

## 4. State (or sovereign) immunity

Indonesian law acknowledges the principle of state immunity based on international conventions. However, if there is any commercial dispute on a matter in which the foreign state acts in its private capacity that is not related to such immunity (for example, real estate), the Indonesian courts may take jurisdiction and allow certain aspects of enforcement on a case-by-case basis.

## 5. Pre-judgment arrests or freezing orders

In general, the Indonesian civil procedural code does allow an interim order to prevent the dissipation of assets prior to the granting of a final judgment of a dispute under its jurisdiction.

## 6. Disclosure or discovery of documents in litigation

Unlike when they adjudicate a criminal dispute, in a civil/commercial dispute Indonesian courts take a passive position. It is up to the parties to present sufficient evidence to prove any of their claims/arguments against the other parties.

## 7. Class actions

Class action claims are not uncommon in Indonesia and have been acknowledged, among other types of claim under consumer protection law and environmental law, although for other areas of law they are still rare or not well established. Any potential claimants to the dispute have to opt out (rather than opt in).

## 8. Enforcement of foreign judgments

Indonesian courts will not enforce a foreign court judgment. Such foreign court judgments can only be used as evidence if the competent Indonesian court considers this appropriate based on its own discretion.

## 9. Costs

The losing party will only be obliged to pay court fees as part of the litigation costs. Although by law litigation costs could be requested as part of the compensation (which could consist of costs, interest and damages) payable by the losing party to the winning party, it is a well-established precedent that Indonesian courts will not grant any request from the winning party to obtain compensation for any litigation costs (including attorneys' fees), other than the court fees.

## 10. Standards of the courts: high value disputes

It is generally acknowledged that Indonesian courts are not very efficient and are quite unreliable in high value or complex commercial disputes involving a complicated structure and multi-jurisdictional laws/entities. We are aware that several courts in big cities like Jakarta have several career and *ad hoc* judges who are well trained and experienced in handling complex commercial disputes, but these judges are a minority in the pool of Indonesian judges. In addition, judges in courts which are located in rural areas (where some of the disputed assets may be located so that the case falls within the jurisdiction of such courts), might have no exposure/experience at all to even medium-sized commercial disputes and therefore the risk factor in respect of inefficiency and of unreliability is even higher.

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# Iran



## 1. Governing law

Under Article 968 of the Civil Code of Iran, contracts are governed by the laws of the place of execution of the agreement unless all parties are foreign, in which case the parties are free to choose the applicable law.

## 2. Jurisdiction: parties choose your courts

The courts have a general jurisdiction in specific circumstances. These circumstances generally require some form of connection to Iran. If no connection exists, our courts will not have jurisdiction irrespective of the choice of the parties.

## 3. Jurisdiction: parties choose a foreign court

Under the Code of Civil Procedure, the Iranian courts have general jurisdiction to examine all cases brought before them in circumstances where they have general jurisdiction under the Code.

## 4. State (or sovereign) immunity

Iranian law does not have any provision relating to foreign state immunity.

## 5. Pre-judgment arrests or freezing orders

Security for probable losses will need to be provided.

## 6. Disclosure or discovery of documents in litigation

Although the parties are not obliged to disclose all relevant documents, they must disclose once a court

order for the disclosure of a particular document is issued.

## 7. Class actions

Each claimant must file a separate lawsuit against the defendant. However, the court may examine all cases in one proceeding.

## 8. Enforcement of foreign judgments

In addition, the court shall not enforce a foreign judgment deemed to be against public policy and good morals or in breach of mandatory laws.

## 9. Costs

The losing party shall recover its entire court costs based on relevant tariffs.

## 10. Standards of the courts: high value disputes

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# Iraq



## 1. Governing law

Generally, Iraqi law, such as the Civil Code, the Labour Code and the Government Contracts Law, restricts the use of foreign governing laws in several subjects, such as most government contracts, real estate transactions, employment-related contracts and other specific statutory transactions. However, in practice the Government allows foreign governing laws for strategic transactions, including government financing, investments and large purchases with international companies. Nevertheless, Iraqi courts would most likely not apply a foreign governing law if they were chosen as the venue under the dispute resolution clause in the contract. If the conflict involved the form of the contract, the court would look to the law of the jurisdiction where the contract was concluded.

## 2. Jurisdiction: parties choose your courts

Iraqi law requires that there be a connection between the contract or the parties or venue of performance; a governing law clause in the contract citing Iraqi law and even appointing a local agent of services without having any other connection to Iraq would not be sufficient for Iraqi courts to accept jurisdiction.

## 3. Jurisdiction: parties choose a foreign court

Iraqi courts would assume jurisdiction if they would otherwise have jurisdiction under Iraqi legislation.

## 4. State (or sovereign) immunity

Iraqi courts generally tend to follow the terms of the contract unless statute and/or social policy dictate otherwise.

## 5. Pre-judgment arrests or freezing orders

Iraqi civil procedure allows pre-judgment court injunctions and freezing orders upon the presentation of enough evidence to argue in favour of such measures.

## 6. Disclosure or discovery of documents in litigation

Generally, Iraqi courts do not require disclosure, except for what the parties want to present as evidence. However, the judge may request specific pieces of evidence which the parties have not brought forward.

## 7. Class actions

Iraqi law allows for class actions, and the judge usually directs the potential claimants who have filed parallel claims to join their claims into a class action suit. The claimants have to opt in, otherwise the judgment will not bind the claimants who did not opt in, and they would have to file a subsequent new claim.

## 8. Enforcement of foreign judgments

Iraq is a member of the Riyadh Convention and may enforce foreign judgments from treaty member countries so long as it complies with specific additional requirements. Iraq also enforces other foreign judgments under special conditions according to the Foreign Judgment Enforcement Law.

## 9. Costs

Iraqi courts usually impose minimal fixed statutory legal and court fees on the losing party as payment to the victor.

## 10. Standards of the courts: high value disputes

Iraqi courts are increasingly dealing with cases involving large complex transactions as the level of business grows in the country. However, the judges have very little experience or training to deal with such transactions; they would be unpredictable as to how they would apply the law, whether they would give preferential treatment to local over foreign parties and how they would enforce laws and judgments.

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# Ireland



## 1. Governing law

Rome I is part of Irish law and applies to contractual obligations in any situation involving a choice between the laws of different countries (ie not just Member States of the EU) subject only to the exclusions expressly outlined in Rome I itself (see Annex A below for further details on Rome I).

In considering any choice of law issue, if the Irish courts recognise the foreign law as the governing law of the contract, the courts will call for foreign law advice to confirm the validity and enforceability of the contract as a matter of that governing law.

jurisdiction of the Irish courts, the Irish courts will generally accept jurisdiction. However Ireland will decline jurisdiction for the reasons set out in the guidance note for **BLUE** above, namely: (i) if earlier concurrent proceedings, including related proceedings, have been commenced elsewhere; (ii) if another court has exclusive jurisdiction, such as in a dispute relating to rights *in rem* in land, corporate constitutional issues, the validity of entries in public registers, and the validity of registered intellectual property rights; or (iii) in relation to certain insurance, consumer and employment contracts (where the domicile of the insured, consumer or employee tends to be relevant).

## 2. Jurisdiction: parties choose your courts

Where a contract contains a clause which provides that Ireland shall have exclusive jurisdiction, then the Irish courts will generally accept jurisdiction.

In general the Brussels Regulation sets out the rules for deciding which EU court has jurisdiction in relation to a commercial contract over a dispute (see Annex B below for further information about the Brussels Regulation). Article 25 of the Brussels Regulation provides that if the parties, regardless of their domicile, have agreed that the courts of a Member State will have jurisdiction to settle any disputes which arise, those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. The jurisdiction is expressed to be exclusive unless the parties have agreed otherwise. Certain formal requirements must however be satisfied, including that the agreement must be in writing, or in a form which accords with practice between the parties themselves, or a practice which accords with the usage generally accepted in a particular area of international trade or commerce.

In circumstances where the Brussels Regulation does not apply, and parties have agreed to submit to the

## 3. Jurisdiction: parties choose a foreign court

An agreement by the parties to trial in a foreign country is a strong indication that the appropriate forum is the one chosen by the parties – Irish courts would be most reluctant to overturn this choice, even under the doctrine of *forum non conveniens*. Irish courts will generally be persuaded by a choice of court clause, regardless of whether the parties are EU or non-EU. Again, however, Ireland will assume exclusive jurisdiction over a matter where the proceedings have as their object rights *in rem* over immoveable property or tenancies of immoveable property and the property is situated in Ireland. Consequently, if a party wishes to enforce security over an immovable asset (for example, book debts, shares, buildings or land), an exclusive jurisdiction clause in the agreement will not take effect, to the extent that the party wishes to obtain orders to take possession of the asset or to enforce its sale. Instead, pursuant to the Brussels Regulation, the courts of the Member States will decline jurisdiction in favour of the country where: (i) the asset is situated; (ii) the proceedings have as their object the validity of the constitution of companies or other legal persons, or the validity of decisions of any such persons or their organs, and the body has its seat

in Ireland. This means that parties cannot arrange for the courts of another jurisdiction to hear proceedings concerning the dissolution of Irish companies, the validity of their constitution or the validity of the decisions of their board of directors; (iii) the proceedings have as their object the validity of entries in public registers, and the register is kept in Ireland; (iv) the proceedings concern the registration and validity of patents, trademarks, designs or other similar rights, and registration has been applied for, has taken place, or is deemed to have taken place in Ireland; and (v) the proceedings are concerned with the enforcement of judgments, and the judgment has been or is to be enforced in Ireland. This is a rather self-evident exception providing that, if a judgment is obtained in, for example, the English courts, only the Irish courts can hear enforcement proceedings with regard to that judgment where the parties concerned are trying to enforce the judgment in Ireland.

#### **4. State (or sovereign) immunity**

While there is no statutory codification in Ireland of the principles in relation to state immunity, Article 29.3 of the Constitution of Ireland states that "Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other states". Although the classic definition of foreign sovereign immunity was one of absolute immunity, this doctrine has now been qualified both in international law and in Irish law to take account of the increased role of states in commercial activity. The Irish courts have held that in cases where the activities of the sovereign government are or could equally be performed by trading or commercial corporations or private individuals, such activities no longer enjoy immunity from the jurisdiction of the Irish courts and tribunals.

The ability of a state to waive its immunity has been implicitly recognised by the Supreme Court in Ireland. However, given that the principle of state immunity is so well established in Irish law, Irish courts and tribunals have required that waivers of state immunity be express, and may not be implied. Therefore, it would appear that an explicit contractual provision waiving state immunity would be accepted by an Irish court. In Ireland an explicit waiver of immunity from both suit and recognition/enforcement is likely to be accepted by an Irish court allowing it to hear disputes and recognise or enforce judgments.

#### **5. Pre-judgment arrests or freezing orders**

Irish courts are willing to grant freezing orders or *Mareva* injunctions as they are still commonly known in Ireland if the following basic requirements are satisfied: (i) the applicant must have a substantive cause of action which is capable of being enforced against the other party; (ii) the applicant must have a "good arguable case"; (iii) there must be a real risk that the other party will remove the assets or otherwise dispose of them in some way in order to frustrate the anticipated court order. It is insufficient to establish that the assets are likely to be dissipated in the ordinary course of business or in the payment of lawful debts; (iv) the assets must be capable of being frozen whether or not they are within or outside the jurisdiction of the court; and (v) the balance of convenience must favour granting the injunction.

The need to demonstrate a likelihood of improper dissipation is generally applied more stringently in Ireland than in other common law jurisdictions.

A *Mareva* injunction will restrain a defendant from disposing of assets pending the completion of Irish proceedings or "in aid" of foreign proceedings. The court may also freeze assets pending the enforcement of a judgment that has already been obtained in another Member State of the EU.

#### **6. Disclosure or discovery of documents in litigation**

Documentary discovery in the High Court is limited to specified categories of relevant and necessary documents. The party seeking such discovery must show the discovery is relevant and necessary for the proceedings or for saving costs. Legally privileged documents are not disclosed to the other side. All non-privileged documents which are in the power, procurement, custody or possession of a party and which are relevant and necessary to the issues in the case must be disclosed if they fall within the required discovery categories.

Parties have an obligation to disclose not only documents which assist their case, but also any relevant documents which may not necessarily do so. Discovery should not allow a party to carry out an exploratory or "fishing" exercise. The request for discovery must specify the precise documents or identify each category of document sought, and give reasons why the

documents are relevant to the proceedings. The party seeking discovery must also establish that such discovery is necessary to dispose fairly of the matter or to save costs. The test for discovery is that the documents are both relevant and necessary.

The term "documents" includes all electronically stored information (**ESI**). ESI itself is not defined. The term "documents" extends to information recorded in any form such as computer records, emails, microfilm, video and audio tapes, photographs, drawings etc. It also includes letters, agreements, minutes, notes (both handwritten and/or typed) memos, diary notes and handwritten notes on documents.

## **7. Class actions**

Irish procedure does not recognise a "class action" procedure as it exists in the United States (nor is there a UK-style "opt-in" procedure). Irish courts have developed mechanisms to deal with group litigation, and to deal with common issues on a test case basis, but each claim would need to be individually proved by each claimant, making recovery more challenging than in the U.S. or even the UK.

## **8. Enforcement of foreign judgments**

The key statutory text in considering the enforcement of judgments is again the Brussels Regulation. The provisions of the Brussels Regulation apply to any judgment given by a court or tribunal of a Member State of the EU. Where such judgment is given, the Irish courts are obliged to recognise such judgment without any special procedure. The courts can refuse to recognise the judgment if it is manifestly contrary to public policy, if the defendant was not served with notice of the proceedings to allow him to prepare a defence, or if it is irreconcilable with an earlier judgment given in connection with the dispute.

The Brussels Regulation simplifies the formalities for recognition and swift enforcement of any judgment delivered by generally recognising automatically the judgments given in the Member States of the EU without any special procedure and by describing a specific procedure to be followed where a party against whom judgment has been given contests recognition. In any proceedings taken in Ireland for the enforcement of a foreign judgment which is not subject to the Brussels Regulation (generally judgments obtained in the

courts of a non-EU state), the foreign judgment should be recognised and enforced by the Irish courts save that to enforce such a foreign judgment in Ireland it will be necessary to obtain an order of the Irish courts. Such order will be granted without any retrial or examination of the merits of the case subject to the qualifications set out above in the **BLUE** guidelines.

## **9. Costs**

The Irish court has discretion as to costs, but the Rules of Court (O.99, R.1 RSC) provide that the winning party is to obtain an order for costs to be paid by the other party, unless the court, for special reasons, directs otherwise.

Accordingly, the unsuccessful party is generally ordered to meet the costs of the other parties. The amount actually paid can be assessed by a court official in default of agreement. Generally, the amount recovered is about 65% of the actual costs incurred by the successful party.

## **10. Standards of the courts: high value disputes**

All commercial litigation of any substance is conducted before the High Court in Dublin which has an unlimited monetary jurisdiction. It is the principal court of first instance. The Commercial List addresses the growing need for specialist judges and a case management regime to accommodate large-scale commercial litigation. Commercial Court litigants need to be ready to meet the more exacting timetables and pleading requirements but the reward is that the dispute should be resolved far more quickly than elsewhere in the High Court. Cases progress in the Commercial Court very quickly. Active case management enables quick resolutions and the judges are committed to progressing cases without delay. The average completion time currently stands at 21 weeks from start to finish of a case.

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# Isle of Man



## 1. Governing law

In cases in which a contract is governed by foreign law, the Manx court will apply Manx procedural law, and require expert evidence to be addressed as to the relevant foreign law. In the absence of satisfactory evidence as to the foreign law, it will be assumed to be the same as Manx law, and the Manx court will apply it as such. (See *Asiatrust Ltd & Friedman v Butterfield Investments Ltd* [2005-07] Manx Law Reports N21.)

## 2. Jurisdiction: parties choose your courts

Whilst the Manx court will normally accept jurisdiction over a contract dispute, if a challenge to jurisdiction is made by one of the parties to the contract, the Manx court has discretion to override a contractual clause giving exclusive jurisdiction to it, and will take guidance from English case law relating to *forum conveniens*.

## 3. Jurisdiction: parties choose a foreign court

The Manx court has discretion to override a contractual clause giving exclusive jurisdiction to a foreign court, and will usually do so when that court is not clearly and distinctly the *forum conveniens*. In deciding whether it is the correct forum for a case to be heard, the Manx court will take guidance from English case law relating to *forum conveniens*. In the Manx case of *Claims Incorporated plc v IOM Assurance Ltd* [2005-07] Manx Law Reports N28, the Manx court cited with approval the decision in the English case of *The Spiliada* [1986] 3 All ER 843.

## 4. State (or sovereign) immunity

The State Immunity Act 1978 (of England and Wales) has been extended to the Isle of Man by Order in Council (The State Immunity (Isle of Man) Order 1981 (SI 1981/1112).

## 5. Pre-judgment arrests or freezing orders

Section 56B of the High Court Act 1991 grants to the Manx court the discretionary power to grant "freestanding" freezing orders over assets in the Isle of Man in support of proceedings in other jurisdictions. The Manx court will normally apply English case law relating to freezing orders, which is deemed to be of persuasive authority in the Manx court.

## 6. Disclosure or discovery of documents in litigation

Under Rule 7.35 of the Rules of the High Court of the Isle of Man 2009, a party is required to disclose:

- (i) documents on which it relies;
- (ii) documents which adversely affect its own case or another party's case; and
- (iii) documents which support another party's case.

## 7. Class actions

Class actions are possible in the Manx courts, and are governed by the rules relating to group litigation at Rules 3.33 to 3.37 in the Rules of the High Court of the Isle of Man 2009. Group litigation is fairly rare, although not unknown. Accordingly, it could not be described as "quite commonly permitted by the courts", (YELLOW), but equally it would not be fair to say that group litigation is "discouraged by the courts" (GREEN), although a group litigation order can only be made by or with the consent of the First Deemster (who is the Isle of Man's most senior judge).

## 8. Enforcement of foreign judgments

The Isle of Man is not a party to the Brussels and Lugano Conventions upon Reciprocal Enforcement, and has no equivalent to the Civil Jurisdiction and Judgments Act 1982 of England and Wales. Summary judgment can normally be applied for under Rule 10.46(a)(ii) of the Rules of the High Court of the Isle of Man 2009.

## 9. Costs

The Manx court has discretion to award costs on the standard or indemnity basis. On the standard basis the losing party typically has to pay 60%-70% of the litigation costs of the winning party, whereas on the indemnity basis this will be higher. Under Rule 11.3(2) of the Rules of the High Court 2009 the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but this rule is for guidance only and the Court has an absolute discretion in this regard.

## 10. Standards of the courts: high value disputes

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# Israel



## 1. Governing law

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

## 9. Costs

The answer is somewhere between **BLUE** and **GREEN**. Although the losing party will have to pay the litigation costs of the winning party, the amount is usually less than 60%-70%. However, the costs are usually subject to the discretion of the courts and the amount of costs will vary from matter to matter, and will not be subject to a maximum.

## 10. Standards of the courts: high value disputes

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# Italy



## 1. Governing law

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

## 9. Costs

## 10. Standards of the courts: high value disputes

The main concern is the excessive length of proceedings in Italy: it takes nearly four years to get a first instance judgment issued by an Italian civil court.

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# Jamaica



## 1. Governing law

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

Whilst it has a discretion, if the terms of the contract specifies trial in a foreign court, the Jamaican court will generally force the parties to comply with those terms. If the defendant is served in Jamaica he will normally be entitled to a stay of the Jamaican proceedings.

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

The court may appoint one or more persons (or a body having a sufficient interest in the proceedings), having the same or similar interests in the proceedings, to represent all or some of the persons with the same or similar interests.

## 8. Enforcement of foreign judgments

The foreign court must be a court of competent jurisdiction.

## 9. Costs

The foreign court must be a court of competent jurisdiction.

## 10. Standards of the courts: high value disputes

This response is in respect of the Commercial Division of the Supreme Court of Judicature of Jamaica.

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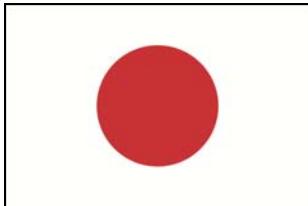
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# Japan



## 1. Governing law

## 2. Jurisdiction: parties choose your courts

Agreements on jurisdiction need to be in writing or in electromagnetic form. Our court may decline its jurisdiction if the agreement on jurisdiction is not an exclusive one and there is a special reason why the acceptance of its jurisdiction over the dispute may harm the fair treatment of the parties and appropriate as well as prompt court procedures.

## 3. Jurisdiction: parties choose a foreign court

The parties may agree to foreign jurisdiction. However, our courts will accept jurisdiction if a party cannot commence a legal action in the exclusive jurisdiction which the parties have agreed (for example, if the court in the agreed jurisdiction declines its jurisdiction) or if the agreement on exclusive jurisdiction is against public policy. There are special rules on jurisdiction agreements relating to consumer and employment contracts.

## 4. State (or sovereign) immunity

Waiver of sovereign immunity from jurisdiction does not include waiver of immunity from enforcement and pre-judgment freezing orders, and therefore waiver of immunity from enforcement and pre-judgment is separately required.

## 5. Pre-judgment arrests or freezing orders

Although the court does not need to have jurisdiction in the main action, the relevant assets of the freezing order need to be in the jurisdiction of the court. The court will also require a bond to be posted.

## 6. Disclosure or discovery of documents in litigation

There is no general disclosure obligation rule in Japan, provided however that the court may order a party to submit relevant documents. There is no concept of attorney-client privilege.

## 7. Class actions

Although the position of the court is neutral, a class action is not common in Japan as all parties must join the action to be bound.

## 8. Enforcement of foreign judgments

Japanese courts should recognise as a valid judgment any final and conclusive civil judgment for monetary claims which are limited to those of a purely civil nature and do not include monetary claims in the nature of criminal or administrative sanction, such as punitive damages, even though they take the form of civil claims, obtained in the courts of a foreign court, provided that:

- (i) the jurisdiction of such court is recognised under Japanese laws or treaties;
- (ii) the defendant has received service of process otherwise than by public notice or any method comparable thereto, or has appeared before such court;
- (iii) such judgment and court proceeding are not repugnant to public policy as applied in Japan;
- (iv) there exists reciprocity as to recognition by such court of a final judgment obtained in a Japanese court; and
- (v) there is no conflicting Japanese judgment on the subject matter.

## 9. Costs

Although the losing party has to pay court fees and witness costs in normal cases, lawyers' fees should be borne by each party, except for tort cases where a proportion of the lawyers' fees can be recognised as "damage".

## 10. Standards of the courts: high value disputes

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# Jersey



## 1. Governing law

The Royal Court will generally uphold choice of law clauses. Foreign law is proved as a matter of fact, with expert evidence on foreign law being adduced where necessary.

## 2. Jurisdiction: parties choose your courts

The Royal Court will generally exercise jurisdiction over contracts which state that it has jurisdiction. The Royal Court does retain a discretion. However, policy considerations result in a very heavy burden on a party to a contract who seeks to resile from an exclusive jurisdiction clause to show a strong case for jurisdiction to be refused, and for the agreement not to be honoured.

## 3. Jurisdiction: parties choose a foreign court

The Royal Court will usually decline jurisdiction in order to respect the freedom of contract of the parties. As with Q2, the court retains a discretion, but there is a very heavy burden to be discharged before a court will override what the parties have agreed. The general rule is that, where parties have bound themselves by an exclusive jurisdiction clause, effect should normally be given to that obligation absent strong reasons to depart from it (which will depend on the facts and circumstances of each case). The burden is less in relation to trust deeds which refer disputes to the exclusive jurisdiction of a particular court.

In view of the position recently taken by the Guernsey court, it is conceivable that the Royal Court could override an exclusive jurisdiction clause where it conflicts with a mandatory statutory provision (and where both are relevant to the litigation) in order to avoid claim-splitting.

## 4. State (or sovereign) immunity

This issue has not yet come before the Royal Court. While the Royal Court generally respects parties' freedom of contract, it also recognises state immunity. It is difficult to determine the balance that the Royal Court would strike between these concepts.

## 5. Pre-judgment arrests or freezing orders

The Royal Court will normally grant a freezing order if there is a real risk that the defendant will dissipate its assets to defeat a judgment (and will apply *American Cyanamid* principles). Furthermore, the Royal Court can grant a freezing order to preserve the current position (in relation to assets in the jurisdiction) where the parties are overseas and there is no substantive right in issue in Jersey. This is in aid of foreign proceedings in *Solvabub Ltd v Match Investments Ltd* 1996 JLR 361 (CA).

## 6. Disclosure or discovery of documents in litigation

The Jersey rules of disclosure and privilege are very similar to those in England. Potential plaintiffs are generally not entitled to pre-action disclosure to establish a cause of action. Jersey recognises concepts similar to *Norwich Pharmacal/Bankers Trust* orders regarding disclosure from third parties to a dispute.

## 7. Class actions

The Royal Court does not recognise class actions as such. However, representative proceedings are permitted by rule 4/3 of the Royal Court Rules 2004. When numerous persons have the same interest in proceedings, proceedings may be commenced and continued by or against one or more of them. Judgment will be binding on all those represented, but enforcement against a non-party can only occur with the

leave of the Court. Rule 4/4 of the Royal Court Rules 2004 makes specific provision for representative proceedings concerning the estate of a deceased person's property to be subject to a trust and the construction of written instruments.

## 8. Enforcement of foreign judgments

In the absence of any treaty, law or agreement between the foreign state (and we note that the Judgments (Reciprocal Enforcement) (Jersey) Law 1960 applies to enforce judgments from England and Wales, Scotland, Northern Ireland, Isle of Man and Guernsey), the Royal Court will enforce foreign monetary judgments in accordance with the usual common law rules. The Royal Court may also assist a post-judgment creditor with enforcing a foreign judgment debt by ordering worldwide disclosure of a non-resident judgment debtor's assets in appropriate cases where the court otherwise has jurisdiction over the debtor (*Dalemont Ltd v Senatorov* 2012 (JLR 108)).

## 9. Costs

Costs generally follow the event. Recoverable fees are taxed if not agreed. There are caps on the recoverable rates of Jersey lawyers (which are indexed by levels of experience) and the amount recoverable for certain attendances. Where work has been done by a foreign lawyer, those costs are allowable, but are capped at the rate of a Jersey lawyer with equivalent experience unless the work could not have been done by a Jersey lawyer. In such circumstances the allowable costs are capped at what is reasonable in the circumstances.

## 10. Standards of the courts: high value disputes

The Royal Court is very efficient and reliable in the case of high value commercial disputes involving cross-border parties and issues. The standard of the judiciary is very high both in terms of local judges and those UK-based senior lawyers who sit on the Jersey Court of Appeal (who may themselves go on to become English High Court judges). The judiciary within Jersey is, in general terms, highly commercial and well experienced in dealing with complex commercial disputes.

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# Jordan



## 1. Governing law

The notion of public policy includes all mandatory rules in applicable Jordanian laws and legislations. As such, any provision in a contract which contradicts any mandatory rule under local laws is deemed to be a violation of public order and will be considered null and void and such provision will be excluded. Alternatively, and in the event where the applicable foreign law does not contradict mandatory rules outlined in domestic laws, then the foreign law will be applicable.

## 2. Jurisdiction: parties choose your courts

A contractual agreement granting local courts competency over disputes does not contravene public policy, and hence is enforceable before the local courts.

## 3. Jurisdiction: parties choose a foreign court

Examples of exclusive jurisdiction of Jordanian courts include disputes relating to agency agreements that fall under the scope of the Agents and Intermediaries Law save in the case of arbitration, as well as employment disputes.

## 4. State (or sovereign) immunity

The Jordanian courts may enforce a waiver of immunity in a contract, provided that it is expressly stated that such waiver includes both the waiver of state immunity from jurisdiction and also from enforcement over the local assets of a foreign state, including pre-judgment freezes on assets.

## 5. Pre-judgment arrests or freezing orders

Requesting a freezing order against the defendant's assets pursuant to Jordanian law is considered as an interim measure.

In order for a judge to grant a freezing order, the following conditions must be satisfied: (i) the exact amount of debt is known; (ii) the claimed amounts are due and payable; and (iii) the payment obligation is unconditional.

A freezing order may be granted if the above-mentioned conditions are fulfilled provided that the claimant submits a guarantee. In the event that a freezing order is granted, the claimant must file its claim within eight days from granting the freezing order, otherwise the court will release the frozen assets upon the request of the defendant.

## 6. Disclosure or discovery of documents in litigation

A request by a party for the production of a document in the possession of the adversary or in the possession of a third party must meet the following conditions: (i) the law must allow the party to request the production of such a document from an adversary or a third party; and (ii) the requesting party must rely upon the requested document in the action.

Privileged documents such as attorney-client communications may be withheld.

## 7. Class actions

Nothing in Jordanian law prohibits class actions. Article (70) of the Civil Procedures Law provides that class actions are possible in claims provided that the rights being claimed by the group of claimants relate to one or a number of similar acts, or one or a number of similar documents, or the claim revolves around the same legal/factual issue. Also, a case might be initiated against a group of defendants provided that the rights being claimed relate to one or a number of similar acts, or one or a number of similar documents, or the claim revolves around the same legal/factual issue. It is pertinent to note that the above-mentioned article also outlines that it is entirely at the discretion of the court to decide whether to join or separate class actions.

## 8. Enforcement of foreign judgments

The Jordanian courts may enforce foreign judgments if the following conditions are met: (i) the foreign judgment relates to a civil matter; (ii) the foreign judgment is issued by a competent court/arbitrator or arbitral panel; (iii) the foreign judgment is final, and may not be further appealed in the country in which the judgment was originally issued; (iv) the defendant has been served with the statement of claim in the original claim; (v) the foreign judgment was not obtained by fraudulent means; (vi) the foreign judgment does not contravene public policy/morality; and (vii) the principle of reciprocity – the foreign judgment is issued by a country which enforces Jordanian court rulings.

## 9. Costs

The Jordanian Civil Procedures Law and the Jordan Bar Law clearly provides that the losing party shall bear all litigation costs and expenses, provided that attorneys' fees may in no event exceed 5 % of the awarded amount in the Court of First Instance and such percentage shall not exceed 1000 Jordanian Dinars (approximately USD 1430) and half of the Court of First Instance fees before the Appeal Court. Hence, any attorney fees paid by the winning party in excess of USD 2150 shall not be borne by the losing party to the claim.

## 10. Standards of the courts: high value disputes

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# Kazakhstan



1. Governing law

7. Class actions

2. Jurisdiction: parties choose your courts

8. Enforcement of foreign judgments

3. Jurisdiction: parties choose a foreign court

9. Costs

4. State (or sovereign) immunity

10. Standards of the courts: high value disputes

5. Pre-judgment arrests or freezing orders

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# Kenya



## 1. Governing law

The principle of freedom of parties to determine the choice of law that will govern their contract is generally upheld. There are specific contracts that may necessitate that Kenyan law be applied, such as contracts conveying interests in land and those relating to employment. Kenyan courts would grant protective orders if the subject matter in dispute is within its jurisdiction despite a foreign governing law clause, if a party applied for such relief and the court found that there was merit in such an application.

## 2. Jurisdiction: parties choose your courts

If it is demonstrated to the court by either party to the dispute that there are circumstances that warrant dispute resolution in the country with substantial connection with the subject matter, then the Kenyan courts would direct accordingly.

## 3. Jurisdiction: parties choose a foreign court

It is not possible to oust the jurisdiction of the Kenyan courts completely. Kenyan courts will retain residual jurisdiction.

## 4. State (or sovereign) immunity

The courts would give effect to a written waiver of state immunity in a contract.

## 5. Pre-judgment arrests or freezing orders

The court will grant freezing orders to preserve assets pending the determination of a matter if the party making the application establishes that the assets are being disposed of with a view to defeating justice.

## 6. Disclosure or discovery of documents in litigation

Litigation is front-loaded and documents that a party intends to rely on at the hearing are disclosed at the outset when filing pleadings.

## 7. Class actions

Class actions can be presented where the right to relief arises from the same act or transaction, or series of acts or transactions, where if a party presented a separate suit a common question of law or fact would arise.

## 8. Enforcement of foreign judgments

The Foreign Judgments (Reciprocal Enforcement) Act details the countries with which Kenya has reciprocal arrangements. Those listed in the schedule of the Act are: Australia, Malawi, the Seychelles, Tanzania, Uganda, Zambia, the UK and the Republic of Rwanda. In enforcing judgments from these countries the applicant is required to make an application for registration of the foreign judgment at the High Court. If one desires to enforce a judgment from a non-reciprocating country, this is done by filing suit on the judgment, which will be determined on merit.

## 9. Costs

The principle in Kenya is generally that costs usually follow the event other than in exceptional situations where reasons have to be given. However, after the courts make an order as to payment of costs, there is usually a need to have the costs of the litigation assessed by the Deputy Registrar of the High Court. The taxation/assessment of costs is usually based on fees prescribed in the Advocates' Remuneration Order which sets the minimum sums that advocates can bill for work.

## 10. Standards of the courts: high value disputes

On 25 July 2014, Practice Directions Relating to Case Management in the Commercial and Admiralty Division of the High Court came into effect. As a result, judges now have the power to sanction parties who fail to comply with directions issued to advance the conclusion of disputes. The Directions are being implemented and this will invariably improve the time taken to conclude disputes.

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# South Korea



## 1. Governing law

A contract shall be governed by the law which the parties choose explicitly or implicitly, provided that the implicit choice shall be limited to cases in which the implicit choice can be reasonably recognised by the content of the contract and all other circumstances (Article 25, Paragraph 1 of the Private International Act). In cases where, notwithstanding that all the elements are solely related to one country, the parties choose the law of any other country, the application of the mandatory provisions of the relevant country shall not be excluded (Article 25, Paragraph 4 of the Private International Act). Consumer contracts (Article 27 of the Private International Act) and employment contracts (Article 28 of the Private International Act) are governed by special rules.

## 2. Jurisdiction: parties choose your courts

In a case where the party or the case in dispute is substantively linked to the Republic of Korea, a court shall have international jurisdiction to hear the case. The court shall obey reasonable principles, compatible with the ideology of the allocation of international jurisdiction, in judging whether a substantive link exists or not (Article 2, paragraph 1 of the Private International Act).

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

In effecting a seizure of a monetary claim, the court shall prohibit the garnishee from making any payment to the debtor, and the debtor from disposing of the claims and from receiving the payment (Article 277 of the Civil Execution Act).

## 6. Disclosure or discovery of documents in litigation

In cases falling under any of the following, the holder of a document shall not refuse to submit it: (i) when a party holds a document referred to in a lawsuit; (ii) when the applicant holds a judicial right to ask the holder of the document to transfer or show it to him; and (iii) when the document has been prepared for the benefit of the applicant, or prepared by virtue of a legal relationship between the applicant and the holder of the document (Article 344, Paragraph 1 of the Civil Procedure Act).

## 7. Class actions

Many persons having a common interest may appoint from among themselves one or more persons to act as a party or parties on behalf of all such persons, or alter such appointment (Article 53 of the Civil Procedure Act). The true meaning of a class action lawsuit is only recognised in securities-related matters (Act on Securities-Related Class Actions).

## 8. Enforcement of foreign judgments

A final and conclusive judgment by a foreign court shall be acknowledged to be valid, only upon the entire fulfilment of the following requirements: (i) such foreign court has an international jurisdiction which is recognised by the principles of international jurisdiction pursuant to the acts and subordinate statutes of the

Republic of Korea, or pursuant to the treaties; (ii) a defeated defendant received, by a lawful method, service of a summons or a document equivalent thereto, and a notice of date or an order, with sufficient time to defend the claim (excluding cases pursuant to a service by public notice or similar service), or that he responded to the lawsuit even without being served; (iii) such judgment does not violate good morals and other social order requirements of the Republic of Korea; and (iv) the Republic of Korea has reciprocity with the country where the judgment is rendered (article 217 of the Civil Procedure Act).

## 9. Costs

Costs of a lawsuit shall be borne by the losing party (Article 98 of the Civil Procedure Act). This includes lawyers' fees, subject to a separate regulation. Attorneys' fees may be partially included in the costs to the extent that the relevant rules indicate.

## 10. Standards of the courts: high value disputes

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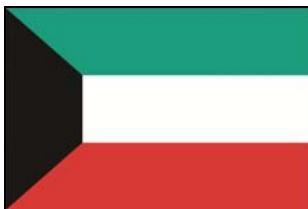
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# Kuwait



## 1. Governing law

"Mandatory rules" here may go further than described above and "public policy" would go further than just "basic morality" due to the inclusion within such term of matters prescribed by Islam, the state religion here. Issues may arise in proving to the local courts exactly what the "foreign law" on a particular matter may be. Kuwait is a civil law jurisdiction and so the local judges will request production of the relevant "Code" (this would need to be attested by the relevant Kuwaiti Embassy and translated officially into Arabic) which can be problematical in common law jurisdictions where the "relevant law" may be constituted by a court decision.

## 2. Jurisdiction: parties choose your courts

Under our Code of Civil and Commercial Procedure the local courts will accept jurisdiction in the following circumstances: (i) actions that are initiated against a Kuwaiti national and suits that are brought against a foreigner who has a domicile or place of residence in Kuwait; the foregoing does not apply to actions that are related to real estate outside of Kuwait; (ii) actions that are brought against a foreigner who does not have a domicile or place of residence in Kuwait in the following cases: (a) he has an elected domicile in Kuwait; and (b) if the action is related to realty or moveable property existing in Kuwait, an obligation which arose, was performed or is enforceable in Kuwait; or a bankruptcy that was adjudicated upon in Kuwait; and (iii) if the other party has accepted expressly or impliedly the local courts' jurisdiction, even when he does not fall within their jurisdiction according to the provisions of the above.

## 3. Jurisdiction: parties choose a foreign court

Please see our reply to Q2 above.

## 4. State (or sovereign) immunity

Under local law, where sovereign immunity exists it cannot be waived.

## 5. Pre-judgment arrests or freezing orders

At present, the local courts seem to be more reluctant to grant freezing orders (known locally as "precautionary attachments") than in the past; however, as the judges assigned to such applications do not have to specify the reasons for their decisions, it is not possible to express a view on why this might be so. Even where an order is granted it cannot be given in respect of the foreign assets of the defendant. Prior to an application for a freezing order being made the claimant must file its main action and submit proof of this in the form of a copy of the receipt for the court fees.

## 6. Disclosure or discovery of documents in litigation

Any type of document can be withheld from the other side. Through the judge, a party may request a specific document which it believes is in the possession of the other party but, in practice, there is little that can be done to ensure its disclosure if the other party denies that it is in his possession.

## 7. Class actions

There is provision under the Kuwait Labour Code for this type of action but this has not been used for a considerable time (more than a decade).

## 8. Enforcement of foreign judgments

Our courts should enforce a foreign judgment in the circumstances listed in the question if the claimant can demonstrate that the various conditions for enforcement contained in our Code of Civil and Commercial Procedure have been met; these conditions are fairly common ones such as the existence of reciprocity, and that the judgment is final, was issued by a court of competent jurisdiction, is not contrary to any order or judgment previously issued from the local courts, and does not conflict with local public morals and public order.

The courts should not re-examine the merits of the claim for any reason.

## 9. Costs

Essentially, in this jurisdiction each party bears its own lawyers' costs and expenses. Historically, a nominal award, for example, GBP 200 or so, was made in respect of these but recently we have seen awards of several thousands of pounds being made. However, the situation is still very far away from that which prevails, say, in England.

## 10. Standards of the courts: high value disputes

The claimant would have to pay court fees of 2.5% of the first KWD 10,000 (about GBP 22,000) of the amount in dispute plus 1% of the balance with no upper limit. This fact alone could be enough to persuade a potential litigant to seek another jurisdiction.

Actions here can take many years to resolve; this is due in part to the fact that the losing party does not have to pay the legal costs of the winning side (please refer to our answer to Q9 above on this point).

Local courts are likely to be unfamiliar with certain types of contracts, for example derivatives contracts, but we cannot say what if any effect this might have. At the end of the day, a "contract" is a "contract" no matter how novel or complicated and the judges here have many years' experience of reviewing and construing contracts.

We have not noticed any general trend to favour the local side in any dispute.

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# Kyrgyzstan



## 1. Governing law

As far as we are aware, there are few precedents where the Kyrgyz courts have applied foreign law as a governing law. Moreover, mandatory rules which prevail over the rules of governing law and the concept of public policy can be interpreted broadly. In Kyrgyz law, there is no exhaustive list of such mandatory rules.

## 2. Jurisdiction: parties choose your courts

There is an exhaustive list of grounds provided in Kyrgyz law as to when the court has jurisdiction to consider a case which involves the participation of foreign residents.

## 3. Jurisdiction: parties choose a foreign court

There are no provisions on prorogation agreements in Kyrgyz law. Therefore, it is difficult to respond to this question. Under Kyrgyz law, the jurisdiction over cases involving the participation of foreign individuals can be modified by mutual agreement of the parties. But it is not clear whether the parties can change the territorial jurisdiction between Kyrgyz courts or between courts of different states.

## 4. State (or sovereign) immunity

As far as we are aware, there are no court precedents on this point. It is difficult to check since there is no comprehensive database of court decisions. Besides, we have no official interpretation as to the form which any written waiver of state immunity must comply with. In our opinion, written waiver of state immunity in a contract can be one of the permitted forms of such written waiver.

## 5. Pre-judgment arrests or freezing orders

Usually, the courts grant a freezing order if the non-issuance of a freezing order could lead to the risk that a judgment may not be satisfied.

## 6. Disclosure or discovery of documents in litigation

There is no separate procedure similar to disclosure of documents. However, if a party has no access to the documents/information which are in the possession of state agencies or another party, that party can file a petition to the court in order to request those documents from the state agencies or other party. The requesting party has to reasonably justify how these documents or information could assist in the consideration of the dispute.

## 7. Class actions

There is no special legal regulation of class actions in the Kyrgyz Republic. A dispute with the same subject matter involving the same respondent can be subject to court proceedings if the claimant has not participated in previous proceedings against the respondent. The claimant who has not participated in previous proceedings against the respondent is not bound by the previously declared judgment.

## 8. Enforcement of foreign judgments

There is an exhaustive list of grounds provided in Kyrgyz law when the Kyrgyz courts will not enforce foreign judgments.

## 9. Costs

The losing party can be obliged to pay wholly or partially the costs of the litigation. It depends on whether the court establishes wholly or partially the claims of the plaintiff.

## 10. Standards of the courts: high value disputes

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# Laos



## 1. Governing law

Certain types of contracts must be governed by local law: concession agreements, land lease agreements, security documents and company articles of association. Other types of contracts may be governed by foreign law but the courts are not familiar with foreign law concepts and may apply their knowledge of local law instead.

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

There is no express basis on which a Laos court may decline jurisdiction. The concept of *lis pendens* is not recognised. Indeed even a valid submission to arbitration (domestic or foreign) does not expressly exclude the jurisdiction of Laos courts.

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

There is a general provision (Article 105 of the Civil Procedure Law 2012) which requires evidence to be used by a litigant to be notified to the other side. Precise timing as to when this needs to be done is not stipulated. The concept of legal privilege is not recognised but there is a general obligation to keep confidential information or commercial information confidential.

## 7. Class actions

Article 76 of the Civil Procedure Law 2012 provides for the rights of third parties to participate in a claim without joining the action. The court may order that third parties be joined in the action either on its own initiative or at the request of a litigant. It is difficult to assess whether Laos courts are hostile to class action suits as they are extremely rare.

## 8. Enforcement of foreign judgments

Foreign court judgments are unlikely to be enforced without a complete retrial on the merits, barring a bilateral or multilateral treaty to the contrary.

## 9. Costs

## 10. Standards of the courts: high value disputes

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# Latvia



## 1. Governing law

Section 19 of the Civil Law of the Republic of Latvia permits the parties to choose the applicable law. Latvian courts will apply the rules of Rome I (see Annex A below for further details on Rome I) which prevail over national conflict of law provisions.

## 2. Jurisdiction: parties choose your courts

Section 30 of the Civil Procedure Law of the Republic of Latvia provides that parties are free to agree on the first instance court that should be competent to resolve any disputes between the parties. The Latvian courts would also apply the Brussels Regulation (see Annex B below for further information on the Brussels Regulation).

## 3. Jurisdiction: parties choose a foreign court

In addition, Latvian law provides for exceptional cases where Latvian courts alone have exclusive jurisdiction.

## 4. State (or sovereign) immunity

Latvia is a signatory to the UN Convention on Jurisdictional Immunities of States and their Property (2004). It is likely that Latvian courts would follow the generally recognised principle that States are only granted jurisdictional immunity in respect of their governmental acts, but not in respect of their commercial acts. Foreign State entities (eg embassies) may be parties to litigation in private commercial actions (see, for example, Judgment No. SKC-237 of 12 December 2007 of the Supreme Court of Latvia).

## 5. Pre-judgment arrests or freezing orders

In order to obtain a favourable pre-judgment freezing order, the claimant needs to show that he has a good arguable case and that there is a real risk that the defendant is likely to or at least might dissipate his assets.

## 6. Disclosure or discovery of documents in litigation

However, if a party is able to clearly identify a particular document that is in another party's possession, it is entitled to ask the court to issue an order obligating the other party to disclose this particular document (ie to deliver it to the court; Section 93(2) of the Civil Procedure Law of the Republic of Latvia). If a party refuses to submit the documentary evidence required to the court, without denying that the party possesses such evidence, the court may find as proved facts which the opposite party sought to prove by referring to such documentary evidence.

## 7. Class actions

An action may be brought by several plaintiffs against one defendant, one plaintiff against several defendants, or several plaintiffs against several defendants. The judgment may bind only parties to the proceedings.

## 8. Enforcement of foreign judgments

An application to enforce a foreign court judgment has to be filed with a Latvian court which has jurisdiction over either the place where the residence of the defendant is or the place where the assets of the defendant are located. In the latter case this means that the claimant needs to have evidence that the defendant's assets are located in the jurisdiction of a particular Latvian court. If the claimant does not have this evidence, then the court will refuse even to accept the

application for enforcement of a foreign judgment. Given that often the claimant does not have this evidence, it becomes a serious practical obstacle to the enforcement of a foreign court judgment in Latvia.

## 9. Costs

The largest proportion of litigation costs consists of attorney fees. According to the Civil Procedure Law of the Republic of Latvia, the compensation in respect of attorneys' fees that is awarded to the winning party is limited depending on the amount of the claim. If the amount or value of the claim does not exceed EUR 8,500, the cap is 30% from the awarded amount or fully rejected amount (if the compensation should be awarded to the defendant). If the amount or value of the claim is EUR 8,501 to EUR 57,000, the cap is EUR 2,850. If the amount or value of the claim exceeds EUR 57,001, the cap is 5% from the awarded or fully rejected amount. In cases where the claim is not of monetary value, the cap is EUR 2,850. In cases where the claim is not of monetary value, and the court has recognised it as a complex case, the cap is EUR 4,275.

In practice these caps limit the coverage of the party's actual expenses for attorneys' fees. In large cases, the larger the claim, the greater the possibility that the compensation awarded to the winning party will cover the winning party's expenses for attorneys' fees.

## 10. Standards of the courts: high value disputes

Latvian court practice concerning a number of specific legal issues (for example, derivative contracts) is underdeveloped or even non-existent and also, there are few disputes that are referred to the courts for adjudication so they lack experience in resolving disputes in some sectors. As a result, Latvian courts may misunderstand what is required when, in a particular dispute, they have to address any of the above-mentioned complicated legal issues, and misinterpret the law.

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# Lebanon



## 1. Governing law

Lebanese law recognises the principle of freedom of contract, which theoretically also extends to the choice of law provisions. Lebanese courts will uphold the choice of a foreign law as the governing law of an agreement except if the provisions of such law contradict public policy or mandatory laws in Lebanon (eg labour law, consumer protection law).

## 2. Jurisdiction: parties choose your courts

Lebanese courts will generally accept jurisdiction over a contract dispute, even though the parties and the contract in question have no connection with the jurisdiction except when the dispute falls within the exclusive jurisdiction of a foreign court.

## 3. Jurisdiction: parties choose a foreign court

Lebanese law does not prevent the parties to a contract from agreeing to have their disputes resolved before a foreign court or through arbitration (Lebanon has ratified the New York Convention) and Lebanese courts should decline jurisdiction, except when Lebanese courts have exclusive jurisdiction.

## 4. State (or sovereign) immunity

Lebanese courts should give effect to a written waiver of jurisdictional immunity by a foreign state taking into consideration that a specific act of waiver of enforcement immunity is generally required.

## 5. Pre-judgment arrests or freezing orders

Such orders could be obtained in order to guarantee the recovery of an outstanding debt pursuant to Articles 866 of the Lebanese Civil Code of Procedure (**LCCP**) and 111 of the Lebanese Code of Obligations taking into consideration that, due to the banking secrecy in Lebanon, bank deposits cannot be attached.

## 6. Disclosure or discovery of documents in litigation

Parties only disclose the documents they deem necessary for their action, however a party can ask the court to require the disclosure by the other party of documents that are relevant to the case if the conditions of Article 203 of the LCCP are fulfilled.

## 7. Class actions

Class actions do not exist yet under Lebanese law.

## 8. Enforcement of foreign judgments

Foreign judgments are enforceable in Lebanon via *exequatur* proceedings provided that the following conditions of Article 1014 of the LCCP are fulfilled: (i) the judgment was rendered by a court having jurisdiction over the dispute according to the law of the country in which the judgment was rendered and the Lebanese courts did not have an exclusive jurisdiction over the dispute; (ii) the judgment is final and enforceable in the country where it was issued; (iii) the parties in relation to which the judgment was issued had been given due notice of the proceedings and had

been duly represented in the proceedings and other rights of the defendant have been respected; (iv) such foreign court enforces judgments and orders rendered by Lebanese courts (condition of reciprocity); and (v) the judgment contains nothing that would be in breach of the public policy of Lebanon.

## 9. Costs

Lebanese courts order generally the losing party to pay all or a proportion of the litigation cost without including in their decisions the lawyer's fees.

## 10. Standards of the courts: high value disputes

Lebanese courts are expensive and generally slow and the defendants can delay enforcement by numerous appeals.

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# Liberia



## 1. Governing law

A choice of law stated in any agreement is enforceable in Liberia. In fact, choice of law is a common feature of commercial agreements in Liberia.

## 2. Jurisdiction: parties choose your courts

Liberian courts generally give deference to the choice of law and forum made by parties to a contract either to confer exclusive jurisdiction on Liberian courts or the courts of another jurisdiction.

## 3. Jurisdiction: parties choose a foreign court

Consistent with the recognised right of parties in respect of choice of law and forum, Liberian courts will generally decline jurisdiction in every case where the parties have chosen arbitration or the court(s) of another country as the one having exclusive jurisdiction in deciding their dispute(s).

## 4. State (or sovereign) immunity

As a general point, Liberian law recognizes the freely negotiated provisions of any contract between private parties, public bodies or involving a sovereign state and other sovereign state(s) of private parties. Waiver of sovereign immunity is recognized under Liberian law and, in this regard, the Liberian Government usually provides in its concession agreements with private mining, oil and agriculture and other companies waiver of the sovereign immunity it is otherwise entitled to. A waiver of sovereign immunity by a foreign government is therefore enforceable under Liberian law.

## 5. Pre-judgment arrests or freezing orders

The law of Liberia provides that a party seeking money judgment against one or more defendants may apply for and obtain a writ of attachment/garnishment in respect of the personal property of the defendant(s) in the possession of the defendant(s) or third parties to ensure that these personal assets are not disposed of prior to final determination of the case.

## 6. Disclosure or discovery of documents in litigation

Liberian laws require that a party pleads all the documents it relies on for relief and that the pleading of the documents is necessary to give the other party notice. We are not aware of any requirement for disclosure of all other documents or correspondence between the parties.

## 7. Class actions

Our laws are categorical that when there is a question of law or fact common to persons of a large class action whose joinder is impracticable due to their number, their absence from the jurisdiction, or otherwise, one or more of them whose defences are representative of the claims or defences of all, and who will fairly and adequately protect the interests of all, may sue or be sued on behalf of all.

## 8. Enforcement of foreign judgments

A money judgment obtained from any foreign court is enforceable in Liberia.

## 9. Costs

It is an established rule in our jurisdiction that the party in whose favour a judgment is entered is entitled to costs in the action. Also, the party in whose favour an appeal is decided in whole or in part is entitled to costs in the action.

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## 10. Standards of the courts: high value disputes

We are unable to refer to any experience or rule of law bearing on the point of special care taken to deal with high value disputes. Our courts seem to treat all commercial disputes in the same manner. The only exception is that the rules of our commercial court provide that all three members of the judge court simultaneously sit and hear all commercial disputes in the amount of USD 1 million or more.

# Liechtenstein



## 1. Governing law

The Act on Private International Law is applicable ([www.gesetze.li](http://www.gesetze.li); LR 290).

## 2. Jurisdiction: parties choose your courts

The Law on Jurisdiction is applicable ([www.gesetze.li](http://www.gesetze.li); LR 272.0).

## 3. Jurisdiction: parties choose a foreign court

Section 53a paragraphs 1 and 2 of the Law on Jurisdiction (according to which agreements on jurisdiction required public notification) were repealed by the European Free Trade Association Court in April 2012. The Law on Jurisdiction has been amended accordingly.

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

In Liechtenstein, foreign judgments will only be enforced provided that they have been rendered in a country which has concluded a treaty on the enforcement of foreign judgments with Liechtenstein. Liechtenstein is not a member state of the Lugano Convention on jurisdiction and the enforcement of judgments. Further, the Brussels Regulation is *not* applicable in Liechtenstein.

## 9. Costs

The rules about litigation costs are determined by the principle of liability. The losing party has to pay the litigation costs of the winning party to the extent the winning party has been awarded such costs.

## 10. Standards of the courts: high value disputes

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# Lithuania



## 1. Governing law

With regards to international private law procedure, Article 780 of the Civil Code of the Republic of Lithuania provides that international private law agreements (to which Lithuania is a party) shall prevail if there is a contradiction with national laws. Rome I and Rome II Regulations are applicable when it comes to private international disputes and governing law. Article 808 allows the parties to choose the applicable law and the national courts apply it *ex officio*. However, the parties must provide the sources, explanation and interpretation of the law governing the dispute, otherwise the court will apply Lithuanian law.

## 2. Jurisdiction: parties choose your courts

The Brussels Regulation is applicable regarding jurisdiction and it provides the possibility for the parties to agree on any jurisdiction. The Regulation would be also applicable by Lithuanian courts. However, there is no relevant case law so it is not clear how courts would act when parties from different jurisdictions choose a Lithuanian forum.

## 3. Jurisdiction: parties choose a foreign court

Article 781 the Code of Civil Procedure states the principle of national jurisdiction, but the parties can choose another forum if the disputed issue does not belong to the exclusive jurisdiction of the Lithuanian court (family matters and *in rem* actions related to local land come under the exclusive jurisdiction of the Lithuanian courts).

## 4. State (or sovereign) immunity

The restrictive principle of sovereign immunity is recognised according to the practice and application of the law by Lithuanian courts. When a state acts as a

private person in commercial matters, no derogation from the jurisdiction can be made; therefore, if a judgment is issued in a civil case against the state as a private entity, this judgment shall be executed without implications of state immunity.

## 5. Pre-judgment arrests or freezing orders

In order to obtain a favourable pre-judgment arrest or freezing order, there must be a risk that the defendant is likely to dissipate his assets. Moreover, it is a requirement to show that without applying interim measures it will be difficult or impossible to execute likely favourable judgment.

## 6. Disclosure or discovery of documents in litigation

The parties to the dispute are not required to disclose all relevant documents, only those which can prove and support the claim. The Code of Civil Procedure provides the possibility to extract documents from another party if the document required is relevant for the case, but there must be evidence that the party cannot obtain it individually. Confidential documents of commercial sensitivity are protected from disclosure.

## 7. Class actions

The issue of class actions is very recent in Lithuanian civil procedure and there is no practice regarding it. However, the Code of Civil Procedure presents the possibility to submit a collective claim if it is based on the same or similar factual circumstances and the individuals or legal persons are somehow related. Moreover, the court should acknowledge that the collective claim is more effective than individual claims.

## 8. Enforcement of foreign judgments

Even though the Brussels Regulation promotes the elimination of any national restrictions on the enforcement of foreign judgments, Article 41 of the Regulation provides that the procedure for the enforcement of judgments given in another Member State shall be governed by the law of the Member State addressed. Article 811 of the Code of Civil Procedure states that before execution, the foreign judgment shall be recognised and this is done through the Court of Appeal of Lithuania. Therefore, without the authorisation of the Court of Appeal, the foreign judgment will not be executed. Despite this, the Court is not hesitant to recognise foreign judgments.

## 9. Costs

According to Article 93 of the Code of Civil Procedure, the costs of the winning party are awarded to the party which won. If the claim is satisfied partially the costs are awarded proportionately. The greater part of litigation costs consists of attorney fees. There are approved Recommendations according to which the costs of legal services of attorneys and their assistance shall be taken into account when apportioning fees. In practice, the attorneys' fees are usually greater than those recommended. The degree of compensation of the attorneys' expenses depends on the size of the claim and the sum awarded to the winning party.

## 10. Standards of the courts: high value disputes

The courts are content to recognise and enforce foreign judgments without difficulties. It takes approximately six months from when the foreign judgment is brought for recognition to the Lithuanian court to when the

bailiff commences execution action. There are no observations of bias against foreign parties by Lithuanian judges. The courts are quite efficient and reliable in high value commercial disputes, regardless of the origin of the parties.

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# Luxembourg



## 1. Governing law

This is governed by Rome I, which allows parties to choose the applicable law to an international contract, although there are special rules in respect of specific contracts, such as consumer contracts, insurance contracts or employment contracts (see Annex A below for further details on Rome I).

## 2. Jurisdiction: parties choose your courts

As a rule, jurisdiction clauses are generally valid under Luxembourg law. Under both the Brussels Regulation (see Annex B below) and otherwise applicable rules (mostly case law), the Luxembourg courts will accept jurisdiction over an international contract dispute even where the parties and the contract in question have no connection with the jurisdiction. There are, however, specific rules for some contracts, such as employment and consumer contracts.

## 3. Jurisdiction: parties choose a foreign court

This is true both under the Brussels Regulation and otherwise applicable rules of Luxembourg law. The Luxembourg courts will normally enforce the parties' choice of court except maybe where the courts of another state have exclusive jurisdiction. In addition, restrictions on the choice of court may apply to certain types of contract such as consumer or employment contracts.

## 4. State (or sovereign) immunity

Judicial immunity prevents a state or state entity from being prosecuted in Luxembourg. However, judicial immunity is relative in that it applies only to an activity carried out by a state or a state entity which is not of a private or commercial nature (that is, an act performed on a *jure imperii* basis or an act of sovereignty). Acts

which are *jure imperii* involve the exercise of public authority and concern assets that are sovereign in nature as opposed to acts which are of a private or commercial nature (that is, acts performed on a *jure gestionis* basis) and which are acts that would typically be performed by a private person.

Immunity from execution of judgment is broader than, and independent from, the immunity from jurisdiction in that it covers, in principle, assets by reference to the use thereof rather than their origin. It shields the property of a foreign state or a state entity from being seized or subjected to conservatory measures in Luxembourg.

According to Luxembourg case law, the immunity from enforcement available to states (and their emanations) protects the assets of the state (or its emanations) that are allocated to the performance of missions of public authority or of public service (even where the state has acted *jure gestionis*). These assets are presumed to be of a public nature and therefore sovereign.

However, assets of a state entity, distinct from the foreign state, which belong to an estate that the state has allocated to a principal activity of a private or commercial nature, may be attached by creditors of that state entity unless the state entity proves that the assets are sovereign in nature or, in other words, that the assets have been allocated to, or have been managed in the context of, a public authority mission or a public service mission.

## 5. Pre-judgment arrests or freezing orders

A freezing order is a two-stage proceeding which implies: (i) requesting a judicial authorisation to freeze the assets; and (ii) obtaining the validation of the freezing order.

The authorisation shall only be granted if the claimant's claim *vis-à-vis* the debtor is certain, due and payable. Such claim may result either from a previous court order handed down by a local or foreign jurisdiction or from a private right or instrument acknowledging the claim.

The court will decide on the validity and enforcement of the freezing order. The court will therefore check that the judgment justifying the freezing order: (i) contains an order to pay an amount which is certain, due and payable to the claimant; (ii) is enforceable; and (iii) has been notified to the debtor. In the case of a claim resulting from a private right or instrument, the court will decide on the merits of such a claim prior to enforcing the freezing order.

## **6. Disclosure or discovery of documents in litigation**

There is no pre-trial deposition in Luxembourg or formal prior disclosure procedure. However each document, technical report, witness statement and generally all evidence must be exchanged by the parties during the proceedings. The court may reject evidence submitted if it considers that it has not been communicated (to the other party) in due time.

## **7. Class actions**

A class action procedure is not admissible under Luxembourg law.

## **8. Enforcement of foreign judgments**

The Brussels Regulation is applicable in a civil or commercial matter.

A foreign judgment will, in principle, be recognised and enforced by the Luxembourg courts without re-examination of the merits of the case.

The recognition and the enforcement of a foreign judgment will however be refused if: (i) such recognition and enforcement are manifestly contrary to Luxembourg public policy; (ii) "where the judgment was given in default of appearance, the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so"; (iii) the judgment is irreconcilable with a judgment given in the dispute between the same parties in Luxembourg; (iv) "the judgment is irreconcilable with an earlier judgment given in another member state or in a third state involving the same cause of action and between the same parties provided that the earlier judgment fulfils the conditions necessary for its recognition in the member state addressed" (Article 45 of the Brussels Regulation); and (v) the judgment conflicts with the exclusive jurisdiction rules of Article 24 or other specific jurisdiction rules (Article 45.1(e)(i) of the Brussels Regulation).

## **9. Costs**

Judicial expenses, including bailiffs' fees and experts' costs, are awarded against the losing party. Furthermore, the court may order the losing party to pay an indemnity, in order to compensate the successful party for expenses incurred (such as lawyers' fees). The amount of this indemnity is determined by the court at its discretion.

## **10. Standards of the courts: high value disputes**

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# Macau



## 1. Governing law

The chosen foreign governing law will generally be applied by Macau courts, provided that said law is in connection with the contract or the parties or its application corresponds to a serious interest of the parties (article 40 of the Macau Civil Code).

## 2. Jurisdiction: parties choose your courts

Acceptance of jurisdiction by the Macau courts on contractual matters is subject to a set of typified rules relating to the specific contract's relationship with Macau (article 16 of the Macau Civil Procedure Code (**CPC**)). When such a relationship does not exist, other general rules may render the Macau courts as competent, such as the parties residing or having a registered office in Macau (article 17 of the CPC). Macau courts will not accept jurisdiction in cases where the contract in question has no relationship with Macau.

## 3. Jurisdiction: parties choose a foreign court

Macau courts will generally accept parties' choice of a foreign court. However, pursuant to article 29 of the CPC, said choice shall only be considered valid by Macau courts provided that it: (i) relates to disputes concerning waivable rights; (ii) is accepted by the law of the chosen foreign court; (iii) corresponds to an underlying serious interest of one or all the parties and does not pose a serious inconvenience to the other; (iv) does not relate to disputes on matters of exclusive jurisdiction of the Macau courts; and (v) is set out in writing, with express mention of the chosen jurisdiction (requirements are cumulative).

## 4. State (or sovereign) immunity

Aside from diplomatic and consulate immunity, there are no provisions in force in Macau with respect to state immunity. According to articles 13 and 19 of the Macau Basic Law, the Central People's Government of the People's Republic of China shall be responsible for foreign affairs relating to the Macau SAR, and the Macau courts do not have jurisdiction on acts of state, such as defence or foreign affairs. We are not aware of any decision of the Macau courts on the issue of state immunity, and therefore cannot provide definitive advice on the matter. Notwithstanding, we note that, when adjudicating on such matter, the Macau Last Instance Court shall be required to seek an interpretation from the Standing Committee of the National People's Congress and to abide by said interpretation (article 143 of the Macau Basic Law).

## 5. Pre-judgment arrests or freezing orders

Macau courts will normally grant freezing orders if there is a serious probability of: (i) the existence of the claimant's credit; and (ii) a concrete risk that the defendant will dissipate its assets, causing the claimant to justifiably fear that its credit will not be satisfied (articles 326, 332 and 351 of the CPC). The court must have jurisdiction for the main action (article 328 of the CPC).

## 6. Disclosure or discovery of documents in litigation

Under the request of an opposing party, parties may be required to disclose certain documents, subject to the judge's view on said documents' relevance to prove the facts under discussion (articles 455 *et seq.* of the CPC). Disclosure is not usually burdensome and privileged documents can be withheld.

## 7. Class actions

Macau procedural law does not harbour the concept of class actions. Only parties who take part in the action will be bound by the respective decision (article 576 of the CPC). There is no limit to the number of parties who may join a particular action (article 64 of the CPC).

## 8. Enforcement of foreign judgments

Foreign judgments must undergo a review and confirmation procedure to become enforceable in Macau (article 1199 of the CPC). Said procedure will not re-examine the merits of the claim, but will focus on issues such as breach of exclusive jurisdiction of the Macau courts, observance of due process under the law of the foreign court or the content of the decision being contrary to public order in Macau (article 1200 of the CPC).

## 9. Costs

The losing party will pay the court fees, expenses related to production of evidence (including compensation to witnesses and experts, subject to legal tariffs) and compensation to the winning party, corresponding to one quarter to one half of the court fees (articles 376 of the CPC and 1, 12, 21 and 26 of Decree-Law 63/99/M).

## 10. Standards of the courts: high value disputes

The main factors leading to inefficiency are the excessive time taken to obtain a first instance judgment (normally around two years from filing) and the frequently poor quality of decisions with respect to legal and contractual interpretation, leading to unpredictable rulings.

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# Macedonia



## 1. Governing law

Aside from the compulsory applicability of the mandatory rules, and always bearing in mind public order, according to local regulation the parties are free to choose the applicability of a foreign law to their contractual relations and the courts should apply it accordingly. However, there is a general reluctance of Macedonian courts to apply foreign laws, which is due to their inexperience with such practice, as well as the lengthy procedure to obtain the content of the foreign laws.

## 2. Jurisdiction: parties choose your courts

Parties may choose Macedonian court jurisdiction only when one of the parties has Macedonian citizenship/a registered office in Macedonia.

## 3. Jurisdiction: parties choose a foreign court

Macedonian courts would assume jurisdiction in cases where they have exclusive jurisdiction regardless whether the parties have chosen the jurisdiction of a foreign court on such matters.

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

Macedonian courts may grant pre-judgment arrests or freezing orders in the form of interim measures. The condition for granting the interim measure is that the plaintiff proves: (i) the existence of its receivables; and (ii) the existence of obvious risk that the assets would be dissipated.

## 6. Disclosure or discovery of documents in litigation

Upon the request of a party, the court may request the disclosure of certain documents from the other party. If the party refuses to disclose, the court will take this into consideration when deciding upon the subject matter.

## 7. Class actions

We expect to have more collective actions in the future with respect to consumer protection legislation.

## 8. Enforcement of foreign judgments

If the conditions provided in the Law on Private International Law are met (eg confirming that the defendant could practise its defence rights during the procedure before the foreign court), Macedonian courts would enforce foreign judgments without restrictions (eg reciprocity). Macedonian courts will never re-examine the merits of the claim when enforcing a foreign judgment. The party requiring enforcement of a foreign judgment should provide proof of enforceability from the foreign court.

## 9. Costs

In general, the losing party bears the complete litigation costs of the winning party (or proportionally to the success ratio in the case).

## 10. Standards of the courts: high value disputes

Due to being overloaded with a large number of disputes, Macedonian courts could be quite inefficient while resolving high value disputes. Although comparatively litigation costs are not high, the procedures are significantly long and time-consuming. The ability to delay enforcement is also present through the possibility of appealing. There is a possibility of unpredictable law enforcement due to unharmonized court practice.

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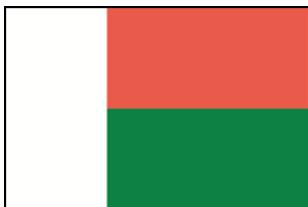
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# Madagascar



## 1. Governing law

The parties to a contract are free to decide the law governing their contract. However, please note that in practice, the Malagasy government or any other public entities party to an agreement often require that Malagasy law govern the contract. The foreign law is applicable only if Malagasy law is silent in respect of the subject of the contract. If Malagasy law does not make specific provisions regarding the case in the contract, the foreign law is applicable.

## 2. Jurisdiction: parties choose your courts

The parties to a contract may waive the local jurisdiction and decide to litigate abroad and vice versa. Indeed, according to Article 11 of Ordinance 62-041 of 19 September 1962 relating to local and international private law, the Malagasy court cannot refuse, in any case which is brought before that court, to address the dispute. In that case, the court will apply the law which the parties have chosen.

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

Article 721 of the Code of Civil Procedure provides that, at the request of the claimant, the Malagasy courts can grant a freezing order against the assets and moveable property of the defendant, subject to the claimant proving that it has a good arguable case.

## 6. Disclosure or discovery of documents in litigation

Even if disclosure is a heavy burden and can be time-consuming, at the request of the parties, the court may require the disclosure of any documents which may be relevant for the resolution of the litigation. The non-disclosure of these documents can lead to the payment of a fine or penalty determined by the court (Article 11 of the Code of Civil Procedure).

## 7. Class actions

Class actions are possible in Madagascar subject to the condition that the claim has the same object and concerns the same case.

## 8. Enforcement of foreign judgments

Foreign judgments are enforceable by virtue of an "*exequatur*". The *exequatur* is granted by ordinance of the president of the appeal court and this ordinance is not subject to any legal remedy. However, if the court refuses to grant the *exequatur*, the court must give the grounds of such refusal.

## 9. Costs

According to Article 197 of the Code of the Civil Procedure of Madagascar, the losing party may be liable to pay a proportion of the litigation costs. However, the losing party is not required to pay the lawyers' fees of the winning party.

## 10. Standards of the courts: high value disputes

Even if sometimes the Malagasy courts are slow in acting to get the action heard, the courts are quite efficient and reliable in high value commercial disputes.

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# Malawi



## 1. Governing law

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

## 9. Costs

The costs which the losing party pays to a winning party and party costs, are determined (taxed) by reference to guidance rates suggested by the Registrar of the High Court from time to time. Principally, these costs are aimed at partially indemnifying the plaintiff against the total costs incurred in the action.

## 10. Standards of the courts: high value disputes

In Malawi we have the High Court (Commercial Division) which deals with commercial disputes provided they qualify to be dealt with at the High Court level. It does not really matter whether the dispute involves cross border parties, bank loans etc. All commercial disputes are treated the same by the court. Generally, the Commercial Division operates with a little more efficiency than the General Division, which handles all other matters.

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# Malaysia



## 1. Governing law

Foreign law will, however, be subject to proof by expert evidence.

## 2. Jurisdiction: parties choose your courts

Choice of jurisdiction clauses are usually but not always upheld.

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

The foreign court judgment must be from a court recognised under our legislation as subject to reciprocal enforcement. Absent such legislative recognition, a foreign judgment can be relied on as a cause of action under common law.

## 9. Costs

The losing party normally pays party costs on a scale that is generally conservative and low.

## 10. Standards of the courts: high value disputes

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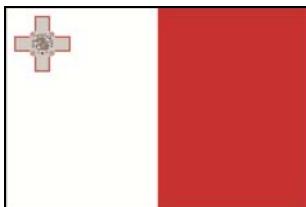
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# Malta



## 1. Governing law

Choice of law clauses are recognised and enforceable if EU Regulations/Conventions such as Rome I apply (see Annex A below for further details on Rome I), unless the chosen law results in an act or omission which is contrary to Maltese public policy, in which case the courts would conform to Maltese public policy. The courts may also disregard a choice of law if there exists an overriding mandatory provision or mandatory rule. If the matter is outside the remit of the EU Regulations but expressly provided for in the law, then the courts will apply the choice of law in accordance with the relevant law. If there is no such special legal provision and the matter falls outside the scope of the said EU Regulations, the courts will still generally apply choice of law clauses although there have been very rare instances in the past where choice of law clauses were ignored if there was absolutely no significant connection.

## 2. Jurisdiction: parties choose your courts

If the matter falls to be regulated by EU Regulations/Conventions such as the Brussels Regulation, the jurisdiction clause must be in line with the applicable Regulation to be recognised and enforced. See Annex B below for further information on the Brussels Regulation.

## 3. Jurisdiction: parties choose a foreign court

As pointed out above, if the Brussels Regulation or Lugano Convention applies, jurisdiction agreements have a special status and are generally recognised and enforced if they respect the provisions of the applicable Regulation/Convention.

In matters outside the remit of the Brussels/Lugano regimes, courts will generally still look favourably towards jurisdiction clauses; however, there have been

instances in the past where exclusive jurisdiction clauses in favour of foreign courts were ignored. Subject to certain exceptional circumstances, the plea of jurisdiction may not be raised by the court of its own motion. Thus, if either party fails to raise it in the very preliminary stages of the dispute (*in limine litis*), it is deemed that that party has waived his right to raise the plea.

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

In order to issue such provisional orders and measures, the essential prerequisites provided in our Procedural Code must be met. In practice, upon an application by a creditor, the provisional order is granted by the courts on a temporary basis until a hearing is held to determine whether to issue the provisional order definitively.

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

Traditionally, class actions were not admissible under Maltese law; multiple claimants had to have almost nearly identical claims to be able to pursue the matter "collectively". In 2012 collective redress legislation was introduced in our legal system by the Collective Proceedings Act. This Act works on an "opt-in" basis. The new legislation limits class actions to matters relating to breaches of consumer law and competition law.

## 8. Enforcement of foreign judgments

The courts have, on some occasions, upheld a narrow interpretation of the public policy exception when it comes to the enforcement of judgments, even those delivered by courts in countries outside the EU.

## 9. Costs

## 10. Standards of the courts: high value disputes

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# Mauritania



## 1. Governing law

A provision from the Mauritian Arbitration Code expressly states that parties are entirely free to determine the governing law of their contract as well as the court which will assume jurisdiction if a dispute arises.

## 2. Jurisdiction: parties choose your courts

Our courts will accept jurisdiction in those cases except where jurisdiction is a matter of public policy.

## 3. Jurisdiction: parties choose a foreign court

Our courts decline jurisdiction except in cases relating to public policy where subject matter jurisdiction is concerned. For instance, as regards immovable property, the court of the place where the immovable property is located has jurisdiction over the dispute.

## 4. State (or sovereign) immunity

The most relevant answer is the **BLUE** one.

## 5. Pre-judgment arrests or freezing orders

The most relevant answer is the **YELLOW** one especially because for some time this type of order has become more and more unusual. However, it cannot be said that they no longer exist.

## 6. Disclosure or discovery of documents in litigation

The disclosure of documents depends on those enounced in the submissions of each party.

## 7. Class actions

Such actions are not really appreciated by the courts except in the case where common interests are of such pertinence that they can only be accepted.

## 8. Enforcement of foreign judgments

The red answer is the most precise and the most complete.

## 9. Costs

The losing party pays all the costs and the court fees. For this reason only the answer "can't say" fits this case.

## 10. Standards of the courts: high value disputes

Our courts suffer from insufficient education, from an absence of case law and especially from an incapacity to handle high value commercial disputes.

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# Mauritius



## 1. Governing law

Recent case law has interpreted the public policy exception as pertaining to international public policy as opposed to domestic public policy.

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

Our courts may assume jurisdiction under Articles 19 and 20 of the Civil Code if one of the parties is Mauritian.

## 4. State (or sovereign) immunity

At present, there is no legislation or reported cases which deal specifically with this matter.

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

## 9. Costs

Note that, since 2013, proceedings before "Designated Judges" in matters arising under the International Arbitration Act 2008 and the Convention for the Recognition and Enforcement of Foreign Arbitral Awards Act 2001 are subject to rules which contain CPR-type provisions on costs.

## 10. Standards of the courts: high value disputes

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# Mexico



## 1. Governing law

The Mexican Federal Civil Code includes rules that establish the restrictions when applying a chosen foreign law.

## 2. Jurisdiction: parties choose your courts

Mexican procedural law states that if the parties enter into an agreement that includes a choice of court clause, it must satisfy several requirements for it to be effective, specifically related to the connection between the contract or the parties and the jurisdiction. The requirements are: (i) that there is a connection between the forum and the domicile of either party to the contract; (ii) that there is a connection between the forum and the location of the assets; or (iii) that there is a connection between the forum and the place where the obligation under the contract must be performed.

## 3. Jurisdiction: parties choose a foreign court

Mexican procedural law states that if the parties enter into an agreement that includes a choice of court clause, it must satisfy several requirements for it to be effective.

## 4. State (or sovereign) immunity

A waiver of state immunity may be effective if the choice of court clause satisfies the legal requirements for it to be effective.

## 5. Pre-judgment arrests or freezing orders

Mexican procedural law includes rules that establish the restrictions which apply when obtaining pre-judgment freezing orders. However, there are certain negotiable instruments, for example, promissory notes, which by statute require the courts to issue pre-judgment attachment orders.

## 6. Disclosure or discovery of documents in litigation

The party seeking disclosure must be able to identify a document in some detail such as the date, addressor and addressee, and must convince a court of the relevance of the document in the action before it will be permitted to obtain it.

## 7. Class actions

The constitution was recently amended in order to allow class actions in the country. The final version of Mexico's class action law increases aggrieved group access to justice. Mexican class action law limits collective actions to matters relating to the consumption of products or services, and those relating to environmental issues. At this early stage, it is not possible to determine whether courts will discourage class actions.

## 8. Enforcement of foreign judgments

Mexico's laws on the recognition and enforcement of foreign judgments preclude the Mexican judge from reviewing the foreign judgment on its merits. The judge may only examine the substance of the foreign judgment to ascertain whether it may be enforced in accordance with Mexican rules of homologation. Our courts will, by statute, not enforce a judgment if it stems from an *in rem* action.

## 9. Costs

Mexico regulates this topic under the procedural law provisions which are based on the general rule that the parties must pay for their own litigation costs. The Mexican procedural law sets out the specific cases in which the losing party should be liable for the attorneys' fees of the winning party. However, even in cases where a losing party has to pay the litigation costs, it may only be liable for a small fraction of the total costs and it is not bound by agreements between the prevailing party and its counsel.

## 10. Standards of the courts: high value disputes

Although the courts are now more often hearing high value cases and have become more sophisticated in resolving these, we chose the **YELLOW** box because at least three of the factors outlined as a preamble to the question are present in Mexico. We would not go as far as to say that Mexican courts are "inefficient" in hearing high value cases but the rules and formalistic approach of our courts do tend to delay these.

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# Moldova



## 1. Governing law

Mandatory rules and rules of public order are applied regardless of the law chosen by the parties. In some cases the courts could allege that a rule is mandatory and apply the law of the forum.

## 2. Jurisdiction: parties choose your courts

The Code of Civil Procedure (the CCP) does not expressly provide for the right of the parties to choose the competent court in national disputes (see Articles 460, 462 of the CCP).

## 3. Jurisdiction: parties choose a foreign court

The CCP allows parties to choose the court competent to determine their dispute. The CCP also stipulates the situations when the competence of national courts is mandatory, regardless of the parties' agreement (see Articles 461, 462 of the CCP).

## 4. State (or sovereign) immunity

**5. Pre-judgment arrests or freezing orders**

The judicial practice on granting an order prior to judgment to prevent a defendant from dissipating its assets can differ in its application. Sometimes the court will give such an order in cases when it is not necessary, and sometimes, in contrast, it will refuse to issue such an order when the reasons to grant it exist. According to Article 174 of the CCP, an order for interim measures could be granted in the situation where a failure to order interim measures could lead to enforcement of a judgment being rendered impossible.

## 6. Disclosure or discovery of documents in litigation

Each party is responsible for the evidence it provides to the court. In some situations the court or another party could demand certain evidence from the participants if such evidence is held by one of them. In such cases the law stipulates certain consequences if the evidence is not provided by the participant.

## 7. Class actions

A judgment can bind only the parties that participated in the court proceedings. However, Moldovan legislation on unfair terms entitles the court, when granting the claim on challenging the unfair terms submitted by a consumer, to challenge similar provisions from all other contracts with other consumers and prohibit the use of such terms in future.

## 8. Enforcement of foreign judgments

The courts will enforce a foreign judgment on the bases of reciprocity or existence of a treaty between the states (see Article 470 of the CCP).

## 9. Costs

Costs awarded must be reasonable and capable of being proved.

## 10. Standards of the courts: high value disputes

Moldovan courts can be incompetent, and outcomes uncertain. They do not compare favourably with any western courts.

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# Monaco



## 1. Governing law

## 2. Jurisdiction: parties choose your courts

Although Monegasque courts usually accept jurisdiction where there is an agreement to such end, this is subject to Monegasque public order. There is no published case law on the subject. However, it is possible that forum shopping would be considered contrary to public order in a case where the dispute and the parties have no connection at all with our jurisdiction.

## 3. Jurisdiction: parties choose a foreign court

Case law shows that Monegasque courts will accept jurisdiction, notwithstanding a jurisdiction clause granting jurisdiction to a foreign court, if the defendant is located in Monaco and the clause was provided for the exclusive benefit of the claimant who thereby waives the enforcement of the said clause.

## 4. State (or sovereign) immunity

There are no legal provisions, and no published case law on this subject.

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

## 9. Costs

The winning party may be awarded damages which may cover in part or fully the litigation costs, but such damages are not automatically awarded by the court.

## 10. Standards of the courts: high value disputes

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# Mongolia



## 1. Governing law

Mongolian courts lack experience in applying foreign law and may apply local law instead, even if foreign law governs a contract. Further, foreign law may not be applied by the courts if it contradicts Mongolian law.

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

## 9. Costs

## 10. Standards of the courts: high value disputes

Key concerns relate to slow and unpredictable enforcement, proper and predictable application of law and possible bias in favour of one of the parties.

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# Montenegro



## 1. Governing law

The main problem is the reluctance of the Montenegrin courts to apply foreign law and the lengthy procedure to obtain the content of the foreign law. In addition, court practice in applying foreign law as the governing law is not very well developed.

## 2. Jurisdiction: parties choose your courts

Montenegrin courts may also deny jurisdiction if there are earlier concurrent proceedings, including an international *lis pendens*.

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

Montenegrin courts do not assess the matter of immunity of their own volition; rather they consider the specific motion of the party.

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

Upon the request of a party, the court may request the disclosure of certain documents from the other party. If the party that has issued the request refuses to disclose, the court will take this into consideration when deciding upon the subject matter.

## 7. Class actions

We expect to have more class actions due to expected changes in consumer protection legislation.

## 8. Enforcement of foreign judgments

Please note that reciprocity is assumed, unless proved otherwise; however, the Montenegrin courts will never re-examine a case when enforcing a foreign judgment.

## 9. Costs

In principle, the losing party has to bear all of the costs of the winning party.

## 10. Standards of the courts: high value disputes

The courts in Montenegro are often overloaded with a large number of disputes, because the same courts deal with both high level disputes and regular disputes. As a corollary, the judges in these courts are quite often unable to dedicate a reasonable amount of time to the disputes that they preside over.

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# Morocco



## 1. Governing law

As a matter of principle, Moroccan courts should respect parties' autonomy and apply the governing law chosen by them to decide the rights and obligations of the parties under the contract, subject nonetheless to Moroccan public policy and mandatory rules. However, as a matter of practice, Moroccan courts are uncomfortable applying a foreign law that they are not familiar with. In fact, they will only apply it if the party requesting its application proves its content.

## 2. Jurisdiction: parties choose your courts

Parties' autonomy applies.

## 3. Jurisdiction: parties choose a foreign court

As a general principle, Moroccan courts will decline jurisdiction over a contract if the parties expressly provide in their contract for a foreign jurisdictional clause.

## 4. State (or sovereign) immunity

State and state entities may properly waive their immunity of jurisdiction and for enforcement, however it may be difficult to demonstrate before Moroccan courts as matter of practice that the person who signed such a waiver, in his/her capacity, duly represented the state.

State entities and local authorities are allowed to provide for arbitration clauses in their contract subject, however, to the applicable laws and regulations relating to their control in relation to such contracts.

## 5. Pre-judgment arrests or freezing orders

Conservatory measures such as conservatory attachments (*saisie conservatoire*) may be ordered by the courts in the event the claimant can demonstrate the existence of a mere monetary claim. However, if the claimant seeks a garnishment (*saisie arrêt*), he shall demonstrate that his debt is certain.

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

## 9. Costs

True except in respect of lawyers' fees.

## 10. Standards of the courts: high value disputes

One of the main issues that the Moroccan court system encounters is the inability to foresee and predict what the courts' ruling will be. One aspect of this is the disparate publication of courts' decisions and the resulting lack of transparency.

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# Mozambique



## 1. Governing law

Please note that in the event that no connection exists between the choice of law and the contract or the parties, a significant serious interest of the parties in the chosen law is required.

## 2. Jurisdiction: parties choose your courts

Please note that when neither the parties nor the dispute have any connection with our jurisdiction, and the Mozambican Code of Civil Procedure is applicable, parties will be required to demonstrate a significant interest in the designated jurisdiction. Furthermore, a party's autonomy is only recognised in relation to disposable rights.

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

As a general rule, in Mozambique, the state is not entitled to immunity from jurisdiction at all and therefore an express waiver of immunity should not be necessary. For this reason and *a contrario*, there are no reasons for a court to object to a waiver of immunity clause. This being said, it should however be noted that some Mozambique state property (public utility assets) cannot be the subject of judicial enforcement, unless such enforcement refers to a credit guaranteed by a guarantee *in rem* (a mortgage or a pledge, for example).

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

## 9. Costs

## 10. Standards of the courts: high value disputes

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# Myanmar



## 1. Governing law

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

5. Pre-judgment arrests or freezing orders

A court cannot issue a freezing order but it may grant an interim injunction and an order to deter at the R/D office and prevent a defendant from dissipating its assets.

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

Parties have to join in the action to be bound.

## 8. Enforcement of foreign judgments

## 9. Costs

## 10. Standards of the courts: high value disputes

Whilst official policy laid down by the authorities is that the courts must be efficient and reliable, in practice the courts are not capable of complying with this objective as yet.

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# Namibia



## 1. Governing law

Subject to certain exceptions, in principle, and in the interests of legal certainty, it is submitted that the proper law as expressly chosen by contracting parties should govern as many aspects of a contract as possible. It is not clear beyond doubt whether it is possible for parties to avoid by their choice of law a *ius cogens* norm (those imperative provisions which the parties cannot by agreement set to one side) of an otherwise applicable legal system, but there are indications that this will be possible.

## 2. Jurisdiction: parties choose your courts

Submission to jurisdiction would not suffice. Jurisdictional connecting factors recognised by the common law must be present, which include residence, domicile, the situation of the subject matter of the action within the jurisdiction (*ratio rei sitae*), and cause of action (*ratio rei gestae*), and which include the conclusion or performance of a contract (*ratio contractus*).

Apart from the jurisdictional connecting factors by virtue of which a court *ipso jure* has jurisdiction in a given situation, jurisdiction in some cases is conferred upon the court by virtue of an attachment of the goods or arrest of the person *ad fundandam jurisdictionem*. These grounds are based on the doctrine of effectiveness.

## 3. Jurisdiction: parties choose a foreign court

Our courts will normally ignore a foreign exclusive jurisdiction clause and assume jurisdiction if the courts would otherwise have jurisdiction under our normal jurisdictional rules.

## 4. State (or sovereign) immunity

Whether or not a Namibian court would enforce a waiver of state immunity and allow an attachment of assets that belong to a foreign government depends on the laws of such country.

The Crown Liabilities Act 1 of 1910, provides that the prerogative of the State whereby it cannot be sued in the courts is abolished: the liability of the State has, within the limits of the Act, become co-extensive with that of the citizen, so that any claim which can find an action against an individual may similarly be brought against the State.

In terms of section 4 of the above-mentioned Act, no execution or attachment or process in the nature thereof shall be issued against the State or against any property of the State, however but the nominal defendant or respondent (i.e. Ministers of Government Ministries) may cause to be paid out of the Consolidated Revenue Fund (State Revenue Fund) such sum of money as may by a judgment or order of court be awarded to the plaintiff (Section 4 of that Act).

## 5. Pre-judgment arrests or freezing orders

A litigant would be able to bring an application for an anti-dissipation interdict *pendente lite* in common law.

An applicant for such relief must show: (i) that the respondent has assets within the jurisdiction of the court; (ii) that the respondent, *prima facie*, has no *bona fide* defence against the applicant's alleged contingent rights; (iii) that the respondent has the intention to defeat the applicant's claim or to render it hollow by dissipating or secreting assets.

However, even if these jurisdictional requirements are present, then an applicant must still show a well-grounded apprehension of irreparable loss, should the interdict *pendente lite* not be granted. It is perhaps apposite

here to point out that, because of the draconian nature, invasiveness and conceivably inequitable consequences of such anti-dissipation relief, the courts have been reluctant to grant it, except in the clearest of cases.

## **6. Disclosure or discovery of documents in litigation**

### **7. Class actions**

### **8. Enforcement of foreign judgments**

### **9. Costs**

An award of costs is a matter wholly within the discretion of the court. A court's approach to costs proceeds from two basic principles: the first being that

the award of costs is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, be entitled to costs. A court may grant cost orders on different scales and the costs would be calculated according to statutory tariffs which limit the costs unless a cost order is given that allows an award to exceed such tariffs.

## **10. Standards of the courts: high value disputes**

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# Nepal



## 1. Governing law

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

Nepalese contract law recognizes the autonomy of the contracting parties, ie the parties are free to choose the nature and subject matter of the contract, decide the nature and quantity of the consideration, conditions of contracts, the nature of remedy in case of breach of contract and the procedure to settle the dispute.

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

The court's order is crucial in this respect which may vary from case to case depending on the facts.

## 7. Class actions

## 8. Enforcement of foreign judgments

## 9. Costs

## 10. Standards of the courts: high value disputes

It is advisable to choose arbitration rather than court proceedings in high value commercial disputes.

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# The Netherlands



## 1. Governing law

Dutch courts will generally apply an expressly chosen foreign law as the governing law of a contract. Rome I is applied in this respect (see Annex A below for further details on Rome I). However, a judge may be restricted in the application of foreign law if it would conflict with mandatory provisions or the public order (the latter being very exceptional).

## 2. Jurisdiction: parties choose your courts

Dutch courts will assume jurisdiction over a contract and dispute if the parties have agreed that the Dutch courts should have jurisdiction, unless there is no "reasonable interest" for making such a choice (Article 8(1) of Dutch Code of Civil Procedure (**DCCP**)). This exception is hardly ever applied in practice. Factors that have been considered to constitute a reasonable interest include, *inter alia*, neutrality of the Dutch courts, expert knowledge on the *lex fori* or the subject of the dispute, preventing forum shopping and legal certainty for the parties.

## 3. Jurisdiction: parties choose a foreign court

As an EU Member State, the Netherlands is bound by the Brussels Regulation – see Annex B for a summary. Outside the Brussels Regime, Dutch courts will generally decline jurisdiction if a contract states that a foreign court shall have exclusive jurisdiction over a contract. However, this rule does not apply to employment contracts or certain contracts with consumers (Article 8(3) of the DCCP).

## 4. State (or sovereign) immunity

Contractual waivers of state immunity are generally upheld. The Netherlands has signed the European Convention on State Immunity, Article 2 of which

states that a state can waive immunity by international agreement or by an express term in a contract in writing. Outside the context of relevant treaties, the Dutch courts generally do not give full immunity to other states; only public acts (ie acts that are not private acts of a state) will usually fall within state immunity before the Dutch courts. For pre- and post-judgment freezing orders separate rules apply: goods that are meant for public use cannot be subject to a freezing order (Articles 436 and 703 of the DCCP). The Netherlands has not yet signed the United Nations Convention on Jurisdictional Immunities of States and Their Property.

## 5. Pre-judgment arrests or freezing orders

Freezing orders (or "attachments") are relatively easily granted compared to other jurisdictions, although courts are becoming a bit more critical in their assessment. The Dutch courts do not need to have jurisdiction in the main action, but the assets concerned must be within the jurisdiction of the court or the debtor must have residence within the jurisdiction of the court (Article 700 of the DCCP).

## 6. Disclosure or discovery of documents in litigation

Disclosure of specified documents is possible but in practice generally limited in contractual disputes. It can be ordered provided that the requesting party requests disclosure of documents pertaining to a legal relationship to which it is a party, specifies clearly which documents it wants to see and why it is relevant to the proceedings that such documents are disclosed. If these requirements are fulfilled (judges are generally critical and "fishing expeditions" are not allowed) the judge will order disclosure unless there are good reasons why the documents should remain confidential (one of which is legal privilege).

## 7. Class actions

Article 3:305a of the Dutch Civil Code provides for a class action based on the opt-in model, where the proceedings can be conducted by a foundation on behalf of a group of claimants (who do not have to participate individually). Although Dutch law currently does not accept the concept that members of a group are entitled to claim damages on behalf of an entire class of injured parties, other relief can be awarded – most importantly, declarations of law that a tort or a breach of contract has been committed. There are plans to introduce a collective action for damages in the Netherlands, but no bill has yet been submitted to parliament and the form of such a bill is currently still subject to debate. Furthermore, Dutch law provides for court certification of damages in class settlements. The *Wet collectieve afwikkeling massaschade* (Act on collective settlement of mass damage) allows such "class settlement" agreements to be declared generally binding on the basis of an opt-out system.

## 8. Enforcement of foreign judgments

The principal rule is that, if there is no ground for recognition of a foreign judgment either in a treaty or in law (which is the case, for example, for arbitration awards), a foreign judgment cannot be executed in the Netherlands and a new trial would have to be held to obtain an enforceable title (Article 431 of the DCCP). However, this does not always amount to a "new trial" as it has been determined in case law that the Dutch courts will have to decide whether, within the limits set by public order, authority must be attributed to the foreign judgment. In making that assessment, the more the foreign judgment meets the requirements set by private international law, the less the judge will be inclined to fully revisit the case. For foreign court judgments, in addition to the requirements of due process having been met, the Dutch courts will look primarily at the basis for jurisdiction of the foreign court. If the foreign court had exclusive jurisdiction on the basis of an agreement in contract that is not disputed by the parties, then that is generally sufficient to recognise the "substance" of that award.

## 9. Costs

The losing party usually has to pay only a small proportion of the actual costs of the winning party, according to a tariff by reference to the (amount of the) claim. (NB this does not apply in arbitration, or in intellectual property cases.)

## 10. Standards of the courts: high value disputes

Costs and court fees in the Netherlands are relatively low. The time taken to get the action heard is not (usually) dependent on the complexity of the dispute and high value disputes are heard on similar terms to lower value disputes. The courts generally apply the law properly and predictably, and the number of instances for appeal is limited to two: the Court of Appeal and the Supreme Court (although Supreme Court appeals are relatively rare). There is no bias in favour of debtors as opposed to creditors or against foreign parties, although it should be noted that consumers enjoy a certain level of protection against businesses and professional parties (both foreign and domestic) as a matter of law.

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# New Zealand



## 1. Governing law

Our courts will generally apply a foreign law as the governing law of a contract if it is expressly chosen by the parties to decide the rights and obligations under the contract (subject only to local public policy and mandatory rules and even if there is no connection between the choice of law and the contract or the parties).

## 2. Jurisdiction: parties choose your courts

A submission to the exclusive jurisdiction of NZ courts will usually be enforced, but subject to *forum non conveniens* arguments (taking into account, though, the fact that the parties were prepared to submit to the exclusive jurisdiction of NZ).

## 3. Jurisdiction: parties choose a foreign court

An exclusive jurisdiction clause is not a guarantee that all disputes will be litigated in the foreign court; but it will significantly increase the likelihood that litigation will occur in that foreign court. Our courts will assume jurisdiction where they have exclusive jurisdiction eg *in rem* actions relating to local land.

## 4. State (or sovereign) immunity

**BLUE/GREEN** Proceedings may not be brought against a foreign state, its government or department, unless the proceedings relate to an act of a private law character (which would include commercial contracts). A judgment creditor cannot execute judgment against property in the possession of a person or entity with state immunity.

## 5. Pre-judgment freezing arrests or freezing orders

Our courts will normally grant an order prior to judgment to prevent a defendant from dissipating its assets. The courts need not have jurisdiction in the main action. However, there must be a real prospect of success in the main action, and that the court in the main action has jurisdiction in accordance with our courts' jurisdictional rules (for instance, where the main action is in a foreign jurisdiction).

## 6. Disclosure or discovery of documents in litigation

Discovery is increasingly controlled, but in large cases is still onerous and will remain so.

## 7. Class actions

Class actions are rare, but increasing in frequency. Opt-in is required, and they are logically difficult to run. NZ does not have personal injury litigation, so mass tort claims are less common than in other common law jurisdictions.

## 8. Enforcement of foreign judgments

Our courts will normally enforce a foreign judgment for a fixed sum of money.

## 9. Costs

Costs are awarded based on a sophisticated scale established by the High Court Rules. In most cases the amount is a contribution only to the total actual cost. In rare cases, the successful party can recover full indemnity costs.

## 10. Standards of the courts: high value disputes

Our courts are generally efficient and reliable in the case of high value commercial disputes.

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# Nicaragua



## 1. Governing law

Nicaraguan law allows the parties to agree the terms, conditions and clauses of a contract, as long as they are not contrary to law, morals or public order. The Civil Procedure Code (**CPC**) establishes that anyone who bases their rights on a foreign law must provide authentic proof of the existence of such foreign law.

## 2. Jurisdiction: parties choose your courts

The CPC states that a judge or court has jurisdiction over a conflict if the parties have expressly or implied selected such jurisdiction (Article No. 260). If Nicaraguan courts are selected contractually, and there is no exception involved, the courts will assume jurisdiction to hear the matter.

## 3. Jurisdiction: parties choose a foreign court

The CPC states that a judge or court has jurisdiction over a conflict if the parties have expressly or implied selected such jurisdiction (Article No. 260). If the jurisdiction is expressly selected, the freedom of contract of the parties shall be respected.

## 4. State (or sovereign) immunity

We have never seen this case in our practice however we have verified this answer with civil district judges and their response was the same.

## 5. Pre-judgment arrests or freezing orders

The CPC (Article No. 888) states that a judge can decree a pre-judgement freezing order with the only requirement that the petitioner must file a bond of equal or superior value than the requested order.

## 6. Disclosure or discovery of documents in litigation

There is no legal obligation for the parties to disclose any documents. The court could order inspection of relevant documents requested by the parties. Labour litigation is the exception, in which case if the employer fails to disclose relevant documents, the court would give greater weight to the employee's arguments related to the documents in favour of the employee.

## 7. Class actions

Nicaraguan law allows collective claimants and defendants to participate together on a lawsuit (Article No. 82 CPC); nevertheless, it does not regulate such things as class actions for economic issues in civil law.

## 8. Enforcement of foreign judgments

Foreign final judgments are enforceable in Nicaragua on a reciprocity basis (Articles No. 542 and 543 CPC). The requirements of Nicaraguan law in order to enforce foreign judgments are established in Article No. 544 CPC.

## 9. Costs

The losing party has to pay according to the maximum amount established in the Judicial Fees Law.

## 10. Standards of the courts: high value disputes

Courts are not specialized in cross-border deals, complex contracts or any non-usual high value disputes; this and the ability of defendants to delay enforcement makes the procedure very slow and inefficient.

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# Nigeria



## 1. Governing law

The parties to a contract are allowed within the law to regulate their rights and liabilities themselves. The duty of the court is to give effect to the intention of the parties as it is expressed in and by their contract. It is also conceded that when the intention of parties to a contract is expressed in words, this certainly expressed intention as a general rule determines the proper law of the contract. However, for the choice of the law to be effective, it must be *bona fide*, legal and reasonable. See *Sonnar (Nig) LTD & Anor v Partenreedrim. S. Nordwind Owners of The Ship M.V. Nordwind & Anor* (1987) LPELR 3494 (SC).

## 2. Jurisdiction: parties choose your courts

See *African Reinsurance Corporation v J.D.P Construction Nigeria Ltd.* [2007] 11 NWLR (Pt 1045) 224.

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

See *African Reinsurance Corporation v Abate Fantaye* [1986] 3 NWLR (pt 32) 811.

## 5. Pre-judgment arrests or freezing orders

This is referred to in our jurisdiction as a *Mareva* injunction. There are several cases supporting the application so far as the applicant shows that it has a good arguable case. See *Sotuminu v Ocean Steamship* (1992) 5 NWLR (Pt 239) 1.

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

A foreign judgment must meet certain conditions before it is registered and enforced in Nigeria. These conditions are set out in Section 34(2) of the Reciprocal Enforcement of Judgments Ordinance.

## 9. Costs

Costs usually follow the event and a winning party is entitled to costs.

## 10. Standards of the courts: high value disputes

For example, the High Court of Lagos has a Commercial Division for large scale commercial disputes. There is foreign participation in all commercial sectors in Nigeria, and when disputes arise, the courts only seek justice.

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# Norway



## 1. Governing law

The choice of the parties with respect to the governing law of a contract will normally prevail.

## 2. Jurisdiction: parties choose your courts

Pursuant to Norwegian civil dispute legislation, the principal rule on the acceptance of jurisdiction in international cases makes such acceptance contingent on the case being sufficiently connected to Norway.

## 3. Jurisdiction: parties choose a foreign court

The choice of the parties with respect to jurisdiction for disputes arising out of a contract will normally prevail. As a principal rule, Norwegian civil dispute legislation requires agreements restricting the international jurisdiction of Norwegian courts to be in writing. Although not an EU Member State, Norway is bound by the Brussels regime through the Lugano Convention – see Annex B for a summary.

## 4. State (or sovereign) immunity

Our courts will normally give effect to a waiver of state immunity from jurisdiction. A waiver from enforcement will, however, as a general rule be ineffective unless the foreign state has acted as a commercial party in the matter at hand.

## 5. Pre-judgment arrests or freezing orders

Pursuant to Norwegian civil dispute legislation, the court may impose an obligation on the petitioner to provide security for any potential compensation to the defendant following the arrest or freezing order, for which the petitioner may be found liable. The defendant may petition for the arrest to be discharged upon providing security for the claim.

## 6. Disclosure or discovery of documents in litigation

The parties are obligated by Norwegian civil dispute legislation to contribute to the complete disclosure of the factual basis of the case. As such, the parties are legally bound to disclose any object that may constitute evidence subject however to the limitations following from statutory rules stipulating that certain pieces of evidence shall be prohibited or exempt from disclosure. A party may ask the court to render a decision imposing the other party to disclose evidence, in which case the petitioner must – as a general rule – specify the objects or documents to be disclosed.

## 7. Class actions

Any potential class action requires the court's approval to be brought before the court. As stipulated by Norwegian civil dispute legislation, the general terms for filing class actions include, *inter alia*, the cases of the individual claimants being substantially similar in factual and legal bases, as well as the same composition of the court and the same procedural rules being applicable to all claims. Norwegian rules on class actions were adopted relatively recently, and the effect of the rules therefore needs to be further assessed.

## 8. Enforcement of foreign judgments

Pursuant to Norwegian civil dispute legislation, enforcement of foreign judgments is subject to the authority of law or treaty. However, a judgment of the parties' agreed forum will normally be enforced provided that the jurisdiction agreement meets certain formal requirements as stipulated by Norwegian dispute legislation.

## 9. Costs

The principal rule following from Norwegian civil dispute legislation entitles the winning party to be fully compensated by the opposing party with regard to litigation costs. The opposing party's obligation may be reduced if weighty reasons call for such reduction.

## 10. Standards of the courts: high value disputes

Although generally efficient and reliable, there are examples of court proceedings in commercial disputes being time-consuming. A general concern relating to the efficiency of commercial disputes is the appointment of judges for individual cases following an ordinary random distribution system rather than being based on the judges' expertise in different areas of the law.

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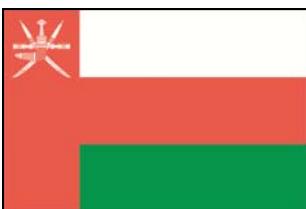
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# Oman



## 1. Governing law

The Omani courts have historically been reluctant to apply foreign law as the *lex causae* of disputes before them. However, with the passage of the recent Civil Transactions Law (2013), Omani choice of law rules for contractual and non-contractual claims have now been placed on a statutory footing, and it is therefore anticipated that the application of foreign law in litigation will become more commonplace in future.

## 2. Jurisdiction: parties choose your courts

The Omani courts generally espouse a fairly broad-based and liberal view of their jurisdiction in civil and commercial litigation, and so long as the dispute has some demonstrable connection to the Sultanate, the Omani courts will typically accept jurisdiction. Arbitration clauses are, however, strictly enforced (whether local or foreign) and jurisdiction will ordinarily be declined, save with respect to interlocutory matters.

## 3. Jurisdiction: parties choose a foreign court

An exclusive foreign jurisdiction clause in a contract is not generally seen as fettering the discretion of the Omani courts, although it would be considered a material factor in the court's determination of its jurisdiction. The provisions of the Civil & Commercial Procedure Law (2002) which govern the international jurisdiction of the Omani courts are broad and permissive, and the presumption is in favour of the courts accepting jurisdiction.

## 4. State (or sovereign) immunity

Although a waiver of sovereign immunity by contract is effective in terms of preventing challenges to the jurisdiction of the Omani courts by a foreign state entity on that basis, the scope for enforcement of a judgment

or arbitral award may be limited by a Supreme Court ruling which holds that foreign governments are entitled to the same degree of immunity from execution as the Government of Oman.

## 5. Pre-judgment arrests or freezing orders

Freezing orders and pre-judgment attachment orders are normally granted by the Omani courts in appropriate cases without security for costs. Substantive proceedings must, however, be issued within 15 days, failing which any such order is liable to be cancelled.

## 6. Disclosure or discovery of documents in litigation

There is no formal concept of discovery in civil proceedings before the Omani courts; parties must, however, disclose and produce all documentary evidence on which they intend to rely. The court may also order specific production of documentary evidence in suitable cases.

## 7. Class actions

Although class action litigation is still fairly rare in Oman, the law and practice in this area is slowly developing, particularly in relation to airline passenger and accident claims. There are currently no specific procedural rules or guidelines governing this type of litigation.

## 8. Enforcement of foreign judgments

In general, the enforcement of foreign judgments remains a challenging undertaking in Oman; however, the enforcement of final judgments from other Gulf Cooperation Council (GCC) member states may be more readily permitted.

## 9. Costs

Costs are assessed on a summary basis, and cost awards to successful parties are generally nominal, even in high value commercial disputes.

## 10. Standards of the courts: high value disputes

The merits of litigation in Oman are mixed. Although the cost of litigation itself is quite low and trial courts typically fix cases for hearing swiftly, in cases involving issues perceived as being of a "technical" or specialist nature (eg construction or banking and finance disputes), the Omani courts will invariably appoint an expert to assess such matters. The quality of court-appointed experts varies considerably, and it is not unknown for trial courts to simply rubber-stamp experts' findings. Declaratory and injunctive relief are generally not available, and first-round appeals have a tendency to become retrials of the action.

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# Pakistan



## 1. Governing law

It was established in the case ref: PLD 1964 Dacca 637, that when the intention of the parties to a contract, as to the law governing the contract, is expressed in words, this expressed intention determines the proper law of the contract and in general overrides every presumption. However, a connection between the parties and the law chosen is generally required.

## 2. Jurisdiction: parties choose your courts

Parties to contracts are free to choose the jurisdiction of the courts that they want and the courts generally respect their choice.

## 3. Jurisdiction: parties choose a foreign court

In a case where the cause of action has arisen in the local jurisdiction and an urgent action needs to be taken, the courts may take jurisdiction and pass an appropriate order.

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

Order 39 Rules 1 and 2 of the Civil Procedure Code allow a party to seek an injunction during the pendency of the suit. The usual practice is that the plaintiff files an application for a temporary injunction along with the suit, in order to restrain the defendant from dissipating the assets until the final disposal of the suit.

## 6. Disclosure or discovery of documents in litigation

The usual practice is for the party raising a claim to produce evidence (including documents) in support of such claims or those documents on which the party directly relies in the action. However, the court may direct a party to produce all relevant documents either of its own motion or on the application of the other party.

## 7. Class actions

## 8. Enforcement of foreign judgments

Sections 13 and 44A of the Civil Procedure Code provide for the execution of foreign decrees in our jurisdiction as long as they have been passed by competent courts of a reciprocating territory. If a judgment/decree is obtained from the courts of a non-reciprocating country, a suit may be filed on the basis of such foreign judgment (in such a suit, the cause of action is the foreign judgment).

## 9. Costs

A nominal amount, such as the court fee and other expense is occasionally awarded in favour of the successful party. In any event, the recovery of any such amount is extremely difficult owing to the lengthy procedure involved in effecting such recovery.

## 10. Standards of the courts: high value disputes

The courts in Pakistan, especially the High Court of Sindh, are quite efficient when it comes to disposing of matters involving huge amounts. However, the backlog of cases in the High Courts in our jurisdiction and the ability of parties to stall legal proceedings results in slow proceedings. It can take eight to ten years to obtain a final judgment. However, temporary and injunctive relief can be obtained quickly by an aggrieved party. Further, the losing party has the option to appeal up to the Supreme Court and once the Supreme Court renders a judgment there is the potential remedy of filing a revision application against such judgment. Therefore, the litigation process in our jurisdiction is slow and inefficient.

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# Panama



## 1. Governing law

## 2. Jurisdiction: parties choose your courts

Given the fact that Panama is a centre of incorporation of many corporations, the courts are willing to accept jurisdiction when a Panamanian corporation is involved in the litigation.

## 3. Jurisdiction: parties choose a foreign court

The Panamanian courts accept jurisdiction when a party to the litigation has a domicile in Panamanian territory or is a Panamanian corporation, even though the parties have chosen a different jurisdiction.

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

In order to freeze assets in pre-judgment proceedings, it is always necessary that the courts have jurisdiction in the main action. However, the freezing order does not involve *exequatur* proceedings.

## 6. Disclosure or discovery of documents in litigation

As a general rule, the parties have to disclose all documents that the counterparty requests of them.

## 7. Class actions

Class action proceedings are only allowed in consumer protection matters.

## 8. Enforcement of foreign judgments

The rules of procedure of *exequatur* require reciprocity.

## 9. Costs

The amount of legal fees is discretionary for the courts.

## 10. Standards of the courts: high value disputes

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# Paraguay



## 1. Governing law

## 8. Enforcement of foreign judgments

## 2. Jurisdiction: parties choose your courts

## 9. Costs

## 3. Jurisdiction: parties choose a foreign court

## 10. Standards of the courts: high value disputes

## 4. State (or sovereign) immunity

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## 7. Class actions

# Peru



## 1. Governing law

Although there is no express provision in the law, based on principles applicable to conflicts of laws provisions contained in our Civil Code, there must be a connecting element with the jurisdiction of the law chosen in order to validate the foreign choice of law.

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

The effect that the court will give to the waiver of immunity will be subject to the rights and obligations stipulated in the governing law. According to Peruvian law, the waiver will not be acknowledged when local public policy and mandatory rules are involved.

## 5. Pre-judgment arrests or freezing orders

In order to take jurisdiction prior to judgment and grant an injunction, Peruvian courts will review whether they would have jurisdiction over the case if it were brought before them. The exception to this rule relates to arbitration procedures.

Depending on the evidence in support of the motion (for an injunction), the court will usually require that adequate counter-guarantees are provided in order to grant the injunction.

## 6. Disclosure or discovery of documents in litigation

According to Peruvian law, there is no discovery. Within a procedure, relevant documents may be required from the parties and third parties. This is in very specific cases, and a high specificity and detailed description of the requested documents is required together with a justification of their relevance to the procedure. If the requested party does not comply, there are limited sanctions; basically, the judge may record the non-compliance against the party that failed to provide the requested evidence.

## 7. Class actions

Class actions are not regulated in Peruvian law. Our laws of civil procedure only contemplate different ways of accumulating claims but this is based on the existence of individual claims. We have an action called a "diffuse interest claim", but this is not an action which pursues individual compensations for the plaintiff.

## 8. Enforcement of foreign judgments

Local courts will not re-examine the merits of the case.

## 9. Costs

The winning party is entitled to request all the expenses derived from the procedures. However, the court may reject the request or fix the amount at its discretion.

## 10. Standards of the courts: high value disputes

Although specialised commercial courts were created a few years ago to deal with commercial disputes, these still lack the sophistication that high value commercial disputes usually require.

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# Philippines



## 1. Governing law

In *Cadalin et al v POEA Administrator* [G.R. Nos. 104776, et al., 5 December 1994], the Philippine Supreme Court recognised that "[t]he parties to a contract may select the law by which it is to be governed. In such a case, the foreign law is adopted as a "system" to regulate the relations of the parties, including questions of their capacity to enter into the contract, the formalities to be observed by them, matters of performance, and so forth". The court further stated "[a] basic policy of contract is to protect the expectation of the parties. Such party expectation is protected by giving effect to the parties' own choice of the applicable law". The court, however, also held that "[t]he choice of law must, however, bear some relationship to the parties or their transaction".

## 2. Jurisdiction: parties choose your courts

In *Raytheon International Inc v Rouzie Jr.* [G.R. No 162894, 26 February 2008], the Philippine Supreme Court reiterated its observance of the doctrine of *forum non conveniens*, whereby "a court, in conflicts-of-laws cases, may refuse impositions on its jurisdiction where it is not the most "convenient" or available forum and the parties are not precluded from seeking remedies elsewhere". The court held that "it is within the discretion of the trial court to abstain from assuming jurisdiction on the ground of *forum non conveniens*".

## 3. Jurisdiction: parties choose a foreign court

In *Unimasters Conglomeration Inc v CA et al* [G.R. No 119657, 7 February 1997], the Supreme Court opined that "[e]xclusive jurisdiction of foreign courts over causes of action arising in the Philippines may be the subject of a treaty, international convention, or a statute permitting and implementing the same. Definitely, however, such jurisdiction and venue designation

cannot and should not be conferred on a foreign court through a contractual stipulation even if restrictive in nature". In *Santos III v Northwest Orient Airlines et al* [G.R. No 101538, 23 June 1992], the Supreme Court held that "[r]ules as to jurisdiction can never be left to the consent or agreement of the parties, whether or not a prohibition exists against their alteration". Note, however, that under Philippine law, venue and jurisdiction are entirely distinct matters. With respect to venue, section 4, rule 4 of the Rules of Court recognises that parties can validly agree in writing before the filing of an action on the exclusive venue thereof. Thus, while a court may have jurisdiction, such court may refuse to exercise its jurisdiction on the ground of improper venue.

## 4. State (or sovereign) immunity

In *Republic of Indonesia et al v. Vinzon* [G.R. No 154705, 26 June 2003], the Philippine Supreme Court recognised that a foreign state may waive its sovereign immunity from suit in the Philippines. It held, however, that "[s]ubmission by a foreign state to local jurisdiction must be clear and unequivocal. It must be given explicitly or by necessary implication". With respect to immunity from enforcement, the Philippine Supreme Court in *Republic of the Philippines v NLRC, et al* [G.R. No. 120385, 17 October 1996] has recognised that "usability does not necessarily mean liability". The court upheld "the universal rule that where the State gives its consent to be sued by private parties... it may limit [the] claimant's action only up to the completion of proceedings anterior to the stage of execution and that the power of the Courts ends when the judgment is rendered, since government funds and properties may not be seized under writs of execution or garnishment to satisfy such judgments... Disbursements of public funds must be covered by the correspondent appropriation as required by law".

Although the above case pertains to a suit against the Philippine government, the same rule may be applied to suits involving a foreign state. This is pursuant to the Customary International Law principle on the immunity of State property (as embodied in the UN Convention on Jurisdictional Immunities of States and Their Property) and the Philippine Constitution's adoption of generally accepted principles of International Law as part of the law of the land.

## 5. Pre-judgment arrests or freezing orders

A claimant may obtain a preliminary injunction, ie a court order, requiring any person to refrain from a particular act where the defendant "is doing, threatening, or is attempting to do, or is procuring or suffering to be done, some act or acts probably in violation of the rights of the [claimant] respecting the subject of the action or proceeding, and tending to render the judgment ineffectual" (sections 1 and 3(c), rule 58, Rules of Court). A claimant may also secure a writ of preliminary attachment and have the property of a party attached as security for the satisfaction of any judgment that may be recovered "in an action against a party who has removed or disposed of his property, or is about to do so, with intent to defraud his creditors" (section 1(e), rule 57, Rules of Court).

## 6. Disclosure or discovery of documents in litigation

A party may request the court, upon showing good cause, to order any party "to produce and permit the inspection and copying of any designated documents [and] papers, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody or control" (section 1, rule 27, Rules of Court).

## 7. Class actions

When the subject matter of the controversy is one of common or general interest to many persons so numerous that it is impracticable to join all as parties, a number of them which the court finds to be sufficiently numerous and representative as to fully protect the interests of all concerned may sue or defend for the benefit of all (section 12, rule 3, Rules of Court). Note, however, that the Philippine Supreme Court has repeatedly held that "courts must exercise utmost caution before allowing a class suit" (see for example,

*Banda, et al v Ermita, et al* [G.R. No 166620, 20 April 2010]).

## 8. Enforcement of foreign judgments

In *St. Aviation Services Co Pte Ltd v Grand International Airways Inc* [G.R. No 140288, 23 October 2006], the Philippine Supreme Court recognised that "under the rules of comity, utility and convenience, nations have established a usage among civilised states by which final judgments of foreign courts of competent jurisdiction are reciprocally respected and rendered efficacious". The court held that "[c]ertainly, the Philippine legal system has long ago accepted into its jurisprudence and procedural rules the viability of an action for enforcement of foreign judgment". Pursuant to section 48, rule 39 of the Rules of Court, the court held "a foreign judgment or order against a person (for example, for a fixed sum of money) is merely presumptive evidence of a right as between the parties. It may be repelled, among others, by want of jurisdiction of the issuing authority or by want of notice to the party against whom it is enforced. The party attacking a foreign judgment has the burden of overcoming the presumption of its validity".

## 9. Costs

Litigation costs, which must be reasonable, may be recovered only when contractually stipulated or in those cases listed in section 2208 of the Civil Code (for example, in the case of a clearly unfounded civil action or proceeding). Courts, in the exercise of discretion to determine the reasonableness of an amount claimed as litigation costs, have in many cases reduced the winning party's claim for litigation costs.

## 10. Standards of the courts: high value disputes

Generally, the following factors contribute to the slow pace of court cases in the Philippines (whether high value or not): clogged court dockets, cultural propensity of defence lawyers to employ dilatory tactics, and availability of multiple fronts for appeal. However, there are certain courts that manage their cases more efficiently so that those factors which contribute to the slow pace of court cases are mitigated.

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# Poland



## 1. Governing law

The choice of law is governed by Rome I. It allows the parties to choose the law to apply to an international contract. However, special rules apply to some contracts, such as consumer, insurance and employment contracts. The overriding mandatory rules of law of the forum apply and the overriding mandatory rules of another country may also be applied by a court (see Annex A below for further details on Rome I).

## 2. Jurisdiction: parties choose your courts

Under both the Brussels Regulation and other applicable provisions of the Polish Civil Procedure Code, Polish courts will accept jurisdiction over an international contract dispute even if the parties and the contract in question have no connection to the jurisdiction. However, there are specific rules for some contracts, such as employment and consumer contracts. See Annex B below for further information on the Brussels Regulation.

## 3. Jurisdiction: parties choose a foreign court

This is true both under the Brussels Regulation and other applicable rules of the Polish Code of Civil Procedure. The Polish courts will enforce the parties' choice of jurisdiction except if the Polish courts have exclusive jurisdiction, and where a Polish law-governed jurisdiction clause grants the right to opt out of the jurisdiction of the Polish courts to one party only. There are specific rules for some contracts, such as employment and consumer contracts. The defendant must file an objection to jurisdiction before engaging in discussions on substantive matters (usually as the first item in the statement of defence). If such objection is not filed or dismissed, the court will proceed with the case unless it does not have jurisdiction on other grounds.

## 4. State (or sovereign) immunity

Polish courts give effect to express written waivers of sovereign immunity. A waiver of state immunity from jurisdiction does not amount to a waiver of immunity from enforcement, which must be waived separately.

## 5. Pre-judgment arrests or freezing orders

This order can be obtained if the claimant is able to establish that a judgment in its favour is at least probable (both on a legal and factual basis), and show that the judgment would be impossible or difficult to perform or enforce, unless the order is granted, or that it would be impossible or difficult to achieve the purpose of the action. The courts do not need to have jurisdiction in the main action if the order can be performed in Poland or if it can have an effect in Poland (typically when the other party has assets in Poland).

## 6. Disclosure or discovery of documents in litigation

The parties should disclose all documents that they consider necessary to support their respective cases on the earliest occasion. If they choose not to do so, they may be precluded from doing so at a later stage. A party can ask the court to order another party or a third person to produce a particular piece of evidence. A party seeking such order should provide a very specific description of the piece of evidence to be produced.

## 7. Class actions

In Poland there is a specific procedure for class actions. The legislation is new, but beginning to gain momentum. Any class action, before proceeding to the merits, must go through a preliminary admission procedure. The limitations on the admissibility of class actions are quite

extensive. Class actions require at least ten claimants and are permitted in consumer, product liability, tort and similar disputes. If an action is for monetary relief, the claimed amounts must be equalised in groups of at least two claimants. Otherwise, the claimants may only seek declaratory relief. Poland adopted an opt-in model. As a result, once a class action is certified, the court will make a public announcement about the formation of the "class". Only then can other claimants join the class action.

## 8. Enforcement of foreign judgments

The Brussels Regulation applies to judgments obtained in EU Member States. The court will enforce a certified judgment without undue delay. The enforcement may be appealed only if specific circumstances listed in the Regulation arise. The court may not examine the case on its merits. If the Regulation does not apply, the court will enforce the judgment unless specific circumstances listed in the Polish Civil Procedure Code arise. These circumstances are slightly broader those in the Regulation and include reasons of Polish public policy. The fee for enforcing a foreign judgment is approximately EUR 75. The fee for obtaining an enforcement clause on an EU judgment certified in the country of its origin as a European enforcement order is approximately EUR 1.50 per page.

## 9. Costs

The costs, which typically include court, legal and fees incurred by a court-appointed expert, will be allocated to reflect the parties' relative success in the outcome of the proceedings. In specific circumstances, the court may refrain from applying this rule. Court and court-appointed expert fees are recoverable in full. Private expert fees may be recovered only in specific circumstances. Legal representation costs are awarded on the basis of a regulation issued by the Minister of Justice. The regulation provides either for minimum lump-sum remuneration depending on the type of case or minimum remuneration established on the basis of the value of the claim. The courts usually award only this minimum remuneration. In such cases, approximately EUR 1,800 of legal fees may be recovered in commercial matters in which the claim value exceeds approximately EUR 50,000. The regulation also provides for the possibility of increasing

this remuneration up to six times the minimum. However, the courts almost never take advantage of this possibility. If they did, a successful party would be able to recover a maximum of approximately EUR 10,500 in commercial matters in which the claim value exceeds approximately EUR 50,000. Thus the gap between the costs actually incurred and the recoverable costs may be substantial, especially in complex matters.

## 10. Standards of the courts: high value disputes

Polish courts have specific divisions exclusively for commercial cases. The court fees are 5% of the claim value; however they are capped at approximately EUR 25,000. Depending on the amount of work in each court, it may take a significant amount of time for the action to be heard. The courts apply the law relatively predictably and reliably, but may often lack business acumen. The influence of the judgments of the courts of appeal and the Supreme Court issued in other cases is increasing, despite their non-binding nature. There is no bias in favour of debtors; however, they have certain legal instruments which may delay obtaining enforceable judgments as well as the enforcement proceedings. Enforcement against real estate properties takes significantly longer than against other property.

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# Portugal



## 1. Governing law

Without prejudice to international treaties or EU legislation (namely Rome I) (see Annex A below for further details on Rome I), when there is no connection between the choice of law and the contract or the parties and the Portuguese Civil Code is applicable, parties will be required to establish a serious interest in applying the designated law.

## 2. Jurisdiction: parties choose your courts

Without prejudice to international treaties or EU legislation (namely the Brussels Regulation), when neither the parties nor the dispute have any connection with our jurisdiction, and the Portuguese Code of Civil Procedure is applicable, the parties will be required to establish a significant interest in the designated jurisdiction. In very exceptional cases, the choice of jurisdiction can be disregarded if it entails serious inconvenience to one or to both parties. Furthermore, a party's autonomy to choose is only recognised in relation to disposable rights.

## 3. Jurisdiction: parties choose a foreign court

Without prejudice to international treaties or EU legislation (namely the Brussels Regulation), when the Portuguese Code of Civil Procedure is applicable, parties will be required to establish a significant interest in the designated jurisdiction. In very exceptional cases, the choice of jurisdiction can be disregarded if it entails serious inconvenience to one or both parties. Furthermore, a party's autonomy to choose is only recognised in relation to disposable rights.

## 4. State (or sovereign) immunity

As a general rule, in Portugal the state is not entitled to immunity from jurisdiction at all and therefore an express waiver of immunity should not be necessary. For this reason and *a contrario*, there are no reasons for a court to object to a waiver of immunity clause. This being said, it should however be noted that some state property (public utilised assets) cannot be the subject of judicial enforcement.

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

A party may request the court to notify the other party to disclose documents in its possession. Portuguese courts may draw adverse inferences from a party's refusal to disclose a document whose production was requested by the court.

## 7. Class actions

## 8. Enforcement of foreign judgments

Where there is no multilateral or bilateral agreement, or where the Brussels Regulation does not apply, foreign judgments will be recognised in Portugal through *exequatur* proceedings under the Portuguese Code of Civil Procedure, provided the following requirements are met: (i) the document evidencing the judgment raises no doubts with regards to its authenticity and intelligibility; (ii) the judgment is final and conclusive; (iii) the judgment was rendered by a court whose jurisdiction was not established in a fraudulent manner,

and Portuguese courts have no exclusive jurisdiction over the subject matter of the dispute; (iv) the subject matter of the judgment is not being examined or has not been ruled on in proceedings pending in Portugal; (v) proceedings were consistent with due process; and (vi) the judgment is not inconsistent with (Portuguese) international public policy.

## 9. Costs

Litigation costs are allocated based on the proportion of success of each party. If the winning party succeeds 100%, then the losing party bears 100% of court fees and other costs such as expert reports, etc, although reimbursement of attorneys' fees is subject to a maximum amount.

## 10. Standards of the courts: high value disputes

Inefficiency may especially result from two factors: the excessive time taken to get the action heard and the ability of defendants to delay enforcement.

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# Puerto Rico



## 1. Governing law

Dominant contacts impact on the enforceability of choice of law clauses.

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

*Mareva* injunctions are not available, although attachments and garnishments locally may be granted subject to the conditions in category **YELLOW**. Extraterritorial property is not susceptible to a restraint order, unless the plaintiff proves an ownership interest in it.

## 6. Disclosure or discovery of documents in litigation

Discovery in federal courts tends to be broader in practice than in local court cases.

## 7. Class actions

Local and federal jurisdictions have similar practices.

## 8. Enforcement of foreign judgments

*Exequatur* procedure is used in both local and federal courts.

## 9. Costs

Court costs and lay witness fees are allowed as a matter of course. Attorneys' fees can be claimed only by specific statute keyed to subject matter, or upon a finding of temerity/obstinacy.

## 10. Standards of the courts: high value disputes

Efficiency varies substantially among cases and judges. Federal courts tend to be more predictable than local courts, even though there are no juries in local court civil cases. Also, proceedings in local courts are in Spanish, whereas federal court cases are conducted in English.

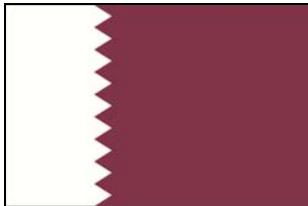
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# State of Qatar



## 1. Governing law

In accordance with normal practice, Qatari courts would usually uphold the contractual choice of a governing law other than Qatari law subject to any provisions which are held to be contrary to Qatari laws or to public order or morality in Qatar.

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

This freedom of contract is underlined by the general principle provided under Article (171) of the Civil Code which sets out that the contract is the law of the contracting parties.

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

Articles 379 and 380 of the Civil and Commercial Procedure Law require reciprocity. In addition, Article 380 of the Civil and Commercial Procedure Law provides that a foreign judgment would not be enforced unless it is ascertained that: (i) the judgment or order was delivered by a competent court of the foreign jurisdiction in question; (ii) the parties to the action were properly served with notice of proceedings and properly represented; (iii) the judgment or order is one that is capable of being executed by the successful party to the proceedings in conformity with the laws of the foreign jurisdiction in question; and (iv) the foreign judgment or order does not conflict with a previous judgment or order of a competent Qatari court and is not contrary to public policy or morality in Qatar.

## 9. Costs

## 10. Standards of the courts: high value disputes

The Qatari courts are known to take an excessive time to get an action heard and enforcement is often slow and unpredictable.

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# Qatar Financial Centre (QFC)



## 1. Governing law

The QFC<sup>01</sup> Court would determine a dispute in accordance with the terms of the agreement of the parties unless the parties' agreement is inconsistent with: (i) public order or policy in the State of Qatar (which includes public order or policy applicable in Qatar and outside the QFC); or (ii) QFC law or regulations.

## 2. Jurisdiction: parties choose your courts

It is the final decision of the QFC Court as to whether a dispute falls within its jurisdiction but the court will take into account the express agreement of the parties.

## 3. Jurisdiction: parties choose a foreign court

The QFC Court may decline jurisdiction if it considers it "desirable" or appropriate, which would usually apply where a contract states that a foreign court is to have exclusive jurisdiction.

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

Each party is only required to disclose documents on which it relies but the QFC Court may give directions as to additional necessary disclosure of documents. Privilege will be respected, subject to the need in exceptional cases to protect the public interest.

## 7. Class actions

## 8. Enforcement of foreign judgments

To date there are no rules or regulations in the QFC on the procedure for the enforcement of foreign court judgments. Paragraph 16 of Schedule 6 of the QFC Law provides that the provisions of the Civil and Commercial Procedure Law shall apply to the claims submitted before the QFC Courts, where the QFC Law and the QFC Civil and Commercial Court Regulations and Procedural Rules are silent on the concerned matter. Therefore, the provisions of Articles (379) and (380) of the Civil and Commercial Procedure Law as set out in paragraph 8 of the State of Qatar survey would apply. This is our view on a possible interpretation, but there is no precedent we can rely on in this respect, the Civil and Commercial Court having only been very recently established in the QFC.

## 9. Costs

Article 33.2 of the QFC Civil and Commercial Court Regulations and Rules of Procedure states that the general practice of the court is to award costs against an unsuccessful party.

01. The QFC is an international financial services centre located within Doha, a municipality (and the capital) of Qatar. It is administered by the QFC Authority, the QFC Regulatory Authority, the Civil and Commercial Court and the Regulatory Tribunal. It is governed by legal and tax regimes that are separate and distinct from those of the State of Qatar.

## 10. Standards of the courts: high value disputes

The number of cases heard by the QFC Civil and Commercial Court is currently very limited, so experience is not vast.

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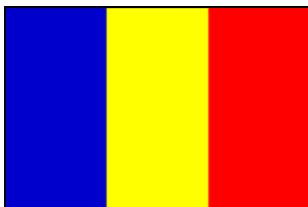
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# Romania



## 1. Governing law

In the past, in a contract with no foreign element (in Romanian, "*element de extranitățe*"), the courts would not apply the chosen foreign law, in accordance with the provisions of Law No. 105/1992 on private international law which was applicable until 1 October 2011, when the new Civil Code entered into force. Nowadays, Rome I applies (see Annex A below for further details on Rome I).

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

According to the provisions of the New Civil Procedure Code which came into force on 15 February 2013, if a clause in an agreement states that a foreign court is to have exclusive jurisdiction over a contract, the Romanian courts vested with the judgment of the claim will not analyse the merits of the case and will dismiss the application as inadmissible. As an EU Member State, Romania is bound by the Brussels Regulation.

## 4. State (or sovereign) immunity

A waiver of state immunity must be expressly given and repeated for each procedure or action, in accordance with the Vienna Convention of 1961, ratified by Romania in 1968.

## 5. Pre-judgment arrests or freezing orders

Depending on the type of interim measure freezing order requested from the court (for example, garnishment, judicial seizure), the competence of the court will vary from one case to another.

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

The jurisprudence in this area has evolved. In the past, scholars and courts stressed that only the claimant could determine the parties to a lawsuit but, nowadays, it is recognised that the court may introduce into the lawsuit certain persons (giving rise to the nature of the claim). However, these persons, once introduced into the lawsuit, have the right either to opt out or to continue. We also stress the fact that there is no limitation concerning the types of dispute where class actions are permitted; they are permitted in any field, notably consumer rights, product liability law, public procurement, tort claims, employment and litigation with the state authorities.

## 8. Enforcement of foreign judgments

The courts will re-examine the merits of the claim only if the wrong conflict rules were applied in matters of civil status and the capacity of Romanian citizens led to a different solution from the one that would have resulted had the right conflict rules been applied.

## 9. Costs

According to the procedural rules, the losing party may be obliged to pay up to 100% of the litigation costs of the winning party, but the court may limit the litigation costs requested by the winning party in accordance with the complexity of the lawsuit, compelling the losing party to pay only a smaller percentage of the winning party's litigation costs (for example, 5%, 10%, 50% or 80%). However, in order to recover the litigation costs, the winning party must provide evidence of these costs.

and expenses. The reduction of the legal costs incurred by the winning party is a common practice by the Romanian courts. The courts are quite reluctant to oblige the losing party to pay the whole value of the court fees of the winning party.

In addition, please bear in mind the fact that the court fees can be requested by the winning party during the litigation for which they were incurred or through a separate application having as its object the recovery of the legal costs. The application shall be lodged after the issuance of a final and binding solution on the merits of the case and should be accompanied by the evidence of the payment of the stamp fee (approx. 1% of the requested value).

## 10. Standards of the courts: high value disputes

There are some negative factors that have to be taken into consideration when referring a claim to the Romanian courts: (i) the excessive time taken to get the action heard; (ii) the long period of time which elapses pending the drafting of the ruling; (iii) the different level of professional training of the judges; (iv) the possibility of the court vested with the judgment of a higher appeal application passing a decision without the summoning and hearing of the parties; (v) problems in the interpretation of legal provisions that might arise in certain matters such as public procurement, competition and telecommunications; and (vi) inconsistent practice due to the fact that the jurisprudence is not recognized as a source of law.

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# Russian Federation



## 1. Governing law

While Russian law does not require that a particular foreign law chosen by the parties to govern the contract should be connected with one of such parties, it is still essential that there should be a "foreign element" in the relevant relationship, ie one of the parties should be foreign or there should be a foreign element in the subject matter of the contract. For example, a pledge of foreign shares entered into between two Russian persons can be governed by foreign law. In addition, Russian court practice has not yet developed clear guidance on the application of "super-imperative" rules of Russian law which should apply regardless of the choice of a foreign law by the parties, and so this issue still remains at the discretion of a particular court reviewing the relevant dispute.

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

There is no clear rule of law in Russia dealing with prorogation agreements where parties submit disputes to the jurisdiction of foreign courts where the relevant disputes do not fall within the exclusive competence of a Russian court. There was guidance issued by the Supreme Arbitrash Court that in such cases Russian courts should apply by analogy the rules related to arbitration clauses. That means that in such cases a Russian court sets aside the relevant claims without consideration provided that: (i) the defendant will request to set aside the case without consideration before making its first statement on the merits of the case; and (ii) the relevant dispute resolution clause is valid and capable of being performed.

## 4. State (or sovereign) immunity

Although Russian law permits sovereign immunity to be waived, a successful litigant petitioning Russian courts to give effect to such a waiver must demonstrate that the waiver was made by the relevant foreign sovereign in accordance with the laws and rules applicable to and binding on it.

## 5. Pre-judgment arrests or freezing orders

Russian law permits applications for pre-trial interim measures but, in practical terms, it is not easy to obtain such measures. The courts will look very closely at the arguments of the plaintiff supporting such measures, which should clearly demonstrate that not taking such measures will lead to dissipation of assets of the defendant and will lead to impossibility of enforcing a judgment once delivered. If such measures are granted by the court, the relevant defendant must file a claim to the same court within two weeks. In practice, the only real chance of obtaining such measures for a defendant is to provide a counter-security in the form of a cash deposit or bank guarantee to secure the possible losses of the plaintiff.

## 6. Disclosure or discovery of documents in litigation

Russian disclosure rules are quite relaxed and the parties are not obligated to disclose all documents relating to the dispute which they possess. However, if a party does not disclose a document the disclosure of which is required by the court (in order to secure evidence requested by the other party or otherwise), a court may rule that such non-disclosed documents support the position and the relevant arguments of such other party.

## 7. Class actions

Russian law permits class actions only in limited types of disputes, and these rules are new and have not yet been properly tested by the courts.

## 8. Enforcement of foreign judgments

The response here will be between **GREEN** and **YELLOW**. The court would normally see whether there is a reciprocity (it may either be assumed unless it is proved that the courts in the relevant country have refused to enforce a judgment of a Russian court, or courts may even require evidence as to whether the courts of the relevant country have ever enforced judgments of the Russian courts). However, if a Russian court decides to enforce a foreign judgment, it will not normally re-litigate it on the merits and will enforce it as if it is a judgment from a country having the relevant treaty with Russia.

## 9. Costs

Russian courts may not order payment of all lawyers' fees of a winning party, but will normally limit them to what in their judgment would constitute reasonable fees.

## 10. Standards of the courts: high value disputes

Again, the answer will be between **GREEN** and **YELLOW**, but closer to **GREEN**. Russian courts have made great progress during the past decade and the Russian court procedure is very fast and transparent (including the putting in place of a system of publication of the majority of judgments rendered including those from the courts of first instance). Also, Russian courts have become more professional in terms of properly applying rules of law, although it still remains an area of risk as well as a corruption factor, which still cannot be fully discounted when facing a dispute in a Russian court.

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# Rwanda



## 1. Governing law

Rwandan courts will generally apply a foreign law as the governing law of a contract if it is expressly chosen by the parties.

## 2. Jurisdiction: parties choose your courts

The Organic Law No 02/2013/OL of 16 June 2013 modifying and completing Organic Law No 51/2008 of 9 September 2008 determining the organisation, functioning and jurisdiction of courts as modified and complemented to date determines the territorial jurisdiction together with the jurisdiction related to subject matter in relation to disputes within our jurisdiction.

## 3. Jurisdiction: parties choose a foreign court

Article 64 of Law No 45/2011 of 25 November 2011 governing contracts states that: "Contracts made in accordance with the law shall be binding between parties. They may only be revoked at the consent of the party or for reasons based on law. They shall be performed in good faith".

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

Reference is made to article 204 (Exequatur) of Law No 21/2012 of 14 June 2012 relating to civil, commercial, labour and administrative procedure which states that, except where international agreements provide otherwise, judgments ruled by foreign courts and foreign deeds issued by foreign officials shall be enforceable in Rwanda through *exequatur* proceedings.

## 9. Costs

## 10. Standards of the courts: high value disputes

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# Saudi Arabia



## 1. Governing law

Saudi Arabian courts will apply only Saudi Arabian law at all times.

## 2. Jurisdiction: parties choose your courts

According to article 28 of the Law of *Shari'ah* Litigation (which functions as Saudi Arabia's code of civil procedure), a Saudi Arabian court shall have jurisdiction over a dispute if the parties agree to submit to such jurisdiction even if in the absence of a connection between the parties or the contract to Saudi Arabia, provided that the dispute falls within the subject matter jurisdiction of the court and is not an action *in rem* relating to land outside of Saudi Arabia.

It is unclear, however, whether the parties can agree to the jurisdiction of the Saudi Arabian court contractually in advance or whether the agreement must take place before the court during the first hearing. We are not aware of a case in which this question was decided, and note in this regard that Saudi Arabian judgments are not generally published or accessible to the public and that judicial precedent is not binding on Saudi Arabian courts.

## 3. Jurisdiction: parties choose a foreign court

Saudi Arabian courts do not recognise choice of law or choice of forum provisions. Therefore, if they believe that they have jurisdiction over a particular dispute under Saudi Arabian procedural rules, they will agree to hear the case regardless of any contractual language to the contrary. The above does not apply, however, to arbitration clauses, which are recognised by Saudi Arabian courts, subject to certain conditions.

## 4. State (or sovereign) immunity

Saudi Arabian courts do not recognise the concept of sovereign immunity.

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

Mandatory disclosure of documents occurs entirely on the order of the court acting in its absolute discretion. Often, the court will order the disclosure of a document on the request of a counterparty, but the court is not obliged to honour such requests, and the court may also order disclosure on its own initiative without the need for a request from one of the parties. There is no concept of privilege under Saudi Arabian law and so protection of confidential information (or lack thereof) rests entirely within the discretion of the court.

## 7. Class actions

There is no concept of class actions under Saudi Arabian law. Rather, each plaintiff must join the case in his individual capacity, either representing himself or represented via a power of attorney. There is, however, a narrow exception to this rule; namely cases involving assets that are owned in common by more than one person but are incapable of being divided, in which case any one of the owners can initiate the suit on behalf of the others without their participation. This sometimes occurs in inheritance disputes.

## 8. Enforcement of foreign judgments

Although provided for in statute, enforcement of foreign judgments is, in practice, not common in Saudi Arabia so far as we are aware, though it should be noted that cases and judgments in Saudi Arabia are generally not published or otherwise available to the public.

## 9. Costs

There are no court costs associated with litigation in Saudi Arabia, though the parties are responsible for the fees and costs of any witnesses or external experts.

Attorney fees can be sought by the prevailing party either as part of the main action or, depending on the court's discretion, through a separate action initiated after the underlying case has been finally resolved. Typically, the court will appoint an external expert to quantify the amount of attorney fees to be awarded.

## 10. Standards of the courts: high value disputes

Commercial disputes are heard by special commercial circuits within the Administrative Court system, also known as the Board of Grievances, though these circuits are in the process of being reorganized into separate commercial courts. Disputes of a banking nature are heard by a special tribunal known as the Banking Disputes Committee, while disputes involving securities are heard by the Committee for the Resolution of Securities Disputes.

Litigation proceedings in Saudi Arabia tend to be slow due to the largely written nature of litigation in commercial and other high value disputes. Periods between hearings are long (up to six months in some cases) and parties are frequently granted extensions of several months to submit written responses. Often, the court is willing to allow the parties to exchange written briefs for long periods without rendering a judgment until one side asks the court to render its decision.

In the past, many have viewed the Saudi Arabian courts as debtor-friendly and particularly unfriendly to banks. This is balanced, however, by the existence of the Banking Disputes Committee, which is thought to take

a more commercial approach towards disputes of a banking nature. In addition, a new Enforcement Law enacted in 2012 grants specialised 'enforcement judges' wide powers to compel parties to abide by monetary judgments and disclose assets, though it is unclear how this law will be applied in practice.

The commercial circuits (soon to be reorganised as commercial courts) are relatively experienced in commercial matters, though their judgments remain entirely subject to principles of *Shari'ah* or Islamic law and relatively few high value, high-end transactions reach the commercial circuits. As a result, many important contractual provisions that are used in high value, high-end transactions are untested or are of questionable enforceability. Adding to the uncertainty is the fact that Saudi Arabia lacks any codified civil or commercial law and that judicial precedents are not generally published or collected in a central location for the public to access.

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# Scotland



## 1. Governing law

Rules on the choice of governing law are contained in Rome I. See Annex A below for further details on Rome I.

Where Rome I does not apply or is silent on an issue, the common law of Scotland applies. Scots common law essentially provides that the contracting parties' intention determines the applicable law. There remains some doubt as to whether this holds true in cases where the factual connection to the choice of law and/or the contract is weak. However, a paucity of cases on this point suggests that the parties' agreement will invariably rule.

The governing law will apply to the rights and obligations of the contract. It will not govern procedure, which is a jurisdictional issue.

## 2. Jurisdiction: parties choose your courts

Different rules apply depending on the domicile of the defender, but the Scottish courts will generally accept jurisdiction over a dispute even where the dispute and/or the contract has no connection with Scotland.

Provided that the defender is domiciled in an EU/EFTA state, the Scottish courts will generally uphold the prorogation in accordance with the Brussels Regulation. In such circumstances, there are exclusive grounds of jurisdiction which would require the Scots courts to decline jurisdiction, such as: (i) the dispute has as its object a right *in rem*, corporate personality issues, the validity of public registers, the validity of certain intellectual property rights, or the enforcement of judgments; or (ii) the contact falls within the scope of the jurisdiction provisions which relate, broadly, to consumer, employment and insurance contracts.

If the defender is domiciled in another part of the UK, the Scottish courts will generally have jurisdiction. The same result usually obtains if the defender is domiciled in a non-EU/EFTA state. In both cases, the court may have exclusive jurisdiction, in accordance with the rules referred to above, save that: (i) there is no specific provision relating to the validity of certain intellectual property rights and (ii) there are no special provisions relating to insurance contracts. See Annex B below for further information on the Brussels Regulation.

Unless the defender is domiciled in an EU/EFTA state, the Scottish courts' exclusive jurisdiction is not presumed – the choice of jurisdiction is rebuttable. Additionally, the Scottish courts may decline jurisdiction on the basis that there is an alternative, more appropriate forum (*forum non conveniens*).

## 3. Jurisdiction: parties choose a foreign court

The Scottish courts will usually decline jurisdiction if the parties have agreed that a foreign court ought to have jurisdiction.

The rules, referred to at Q2 above, which determine when a court must accept jurisdiction over a dispute also circumscribe when the court would decline jurisdiction.

## 4. State (or sovereign) immunity

Scotland applies the UK State Immunity Act 1978 which recognises contractual waivers of immunity and consent to enforcement (subject to certain limitation).

## 5. Pre-judgment arrests or freezing orders

Scottish "freezing orders" are known as "arrestment on the dependence" (applicable to moveable property in the hands of a third party, including debts) and

"diligence on the dependence" (applicable to land). These interim freezing orders may be granted at the court's discretion where the pursuer has shown that: (i) the court writ sets out facts which, if proved, would entitle the pursuer to the remedy sought; (ii) there is a real and substantial risk that the enforcement of any judgment (once obtained) is likely to be defeated or prejudiced by the defendant's insolvency or their having disposed of, mortgaged or otherwise dealt with his assets; and (iii) it is reasonable in all of the circumstances to grant the order.

It is possible to obtain these orders in relation to proceedings taking place outside Scotland under the Civil Jurisdiction and Judgments Act 1982 (Provisional and Protective Measures) (Scotland) Order 1997.

## 6. Disclosure or discovery of documents in litigation

During a court action, a party can apply to the court for an order requiring any other person in Scotland (not just parties to the action) to produce documents. The applicant must demonstrate that the documents are relevant to their written case. If the documents are not produced voluntarily, the person who is believed to have them can be called upon to appear at a hearing, to answer questions about what documents there are, and where they are. The person with the documents may claim that they are confidential, for example if they contain personal data subject to Data Protection, or are subject to legal professional privilege. Scottish courts are willing to grant orders for recovery of documents situated outwith Scotland. However, this will be unenforceable unless the court of the relevant jurisdiction grants an order for enforcement.

## 7. Class actions

Class actions are not possible in Scotland. While cases dealing with common issues or a large number of claimants may be persuasive towards one another as regards general causation, separate actions will be required to establish causation relating to the more specific details of each individual case. Various consultations and papers have been written advocating the introduction of a group litigation procedure into the Scottish legal system. The Scottish Government has announced an intention in principle to implement such a system. However, no steps have as yet been taken.

The form that the new procedure would take is still very much under debate.

However, the Scottish system is very flexible and the courts have devised ways of dealing with cases where a "class action" procedure would be applicable.

When required, the court will create a bespoke process to deal with the practical and procedural aspects of a set of cases which, in another legal system, may fall under a class action.

For example, one case representative of the group of claims will be selected, and an agreement facilitated by the court between the parties with the intention that further cases with the same issues would follow the decision on liability in the sample cases selected for "proof" (trial). In this situation, while the sample cases are being run at court, the remaining cases could either simply be continued alongside the sample cases or a stay (stay in proceedings) could be granted.

## 8. Enforcement of foreign judgments

Technically speaking, a foreign judgment will be enforceable if the Crown is satisfied that there will be substantial reciprocity with the country in question (s.1(1) Foreign Judgments (Reciprocal Enforcement) Act 1933). However, in practice, the requirement of reciprocity is not generally considered as having been satisfied until a convention relating to the reciprocal enforcement of foreign judgments has been concluded. It is worth noting that this does not apply to a foreign judgment for a fixed sum of money in respect of taxes, other similar charges, fines or penalties (s.1(2)(b) Foreign Judgments (Reciprocal Enforcement) Act 1933).

## 9. Costs

The amount of costs due is calculated according to a statutory Table of Fees, and not with reference to the fees that have actually been paid to the solicitors, even if they were all reasonably incurred. Principally, the recoverable costs relate to steps in the court process, correspondence with the opponent, and, if applicable, counsel's fees. At the discretion of the court, a percentage increase may be granted if the case was particularly difficult or important. As a general rule of thumb, recoverable costs might cover 40%-60% of the actual fees paid, but each case is different and as such will be treated independently.

## 10. Standards of the courts: high value disputes

High value disputes in Scotland will be heard in the Court of Session. A statute extending the competence of the Sheriff Court in Scotland from GBP 5,000 to GBP 100,000 has recently been passed and is expected to be in force by early 2015. However, where such cases raise new or complex points of law they should be remitted to the Court of Session.

The Commercial Court is a branch of the Court of Session available for use in disputes which arise out of, or are concerned with "any transaction or dispute of a commercial or business nature". The Commercial Court procedure is designed to provide a more efficient and cost-effective way for commercial disputes to be determined in the Scottish courts. Certain Sheriff Courts also provide for the use of Commercial Court procedure.

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# Senegal



## 1. Governing law

According to the principle of party autonomy and freedom of contract, parties to a contract may choose the applicable law which will be applied by Senegalese judges, insofar as such law is not contrary to public policy and good morals.

However, the law chosen by the parties shall have a connection with the contract or with the parties (article 42 of the COCC, articles 850 and 851 of the Family Code).

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

Senegalese courts nonetheless assume jurisdiction to grant simple provisional measures.

## 4. State (or sovereign) immunity

Senegal does not enjoy jurisdictional immunity.

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

The law, however, allows a party to request that a judge orders the other party to produce evidence which could be relevant for the resolution of the dispute; in such case, it is for the judge to decide.

## 7. Class actions

## 8. Enforcement of foreign judgments

The provisions of article 787 of the Senegalese Code of Civil Procedure list the conditions in which foreign judgments are *res judicata* on Senegalese territory: (i) the decision is rendered by a court which has jurisdiction in accordance with the conflict of jurisdiction rules recognised in Senegal; (ii) the decision applied a law applicable in accordance with the conflict of law rules recognised in Senegal; (iii) the decision is, according to the law of the state where it was rendered, *res judicata* and enforceable; (iv) the parties were validly notified, represented, or declared in default; and (v) the decision is not contrary to Senegalese public policy and does not contradict a Senegalese court's decision being *res judicata*.

## 9. Costs

There is no fixed percentage.

According to the Code of Civil Procedure (Decree No 2013-1071 of 6 August 2013) "the losing party is ordered to pay costs".

It is now possible to obtain an order for payment of costs which could include legal fees.

## 10. Standards of the courts: high value disputes

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# Serbia



## 1. Governing law

The main problem is the reluctance of the Serbian courts to apply foreign law and the lengthy procedure to obtain the content of the foreign law.

## 2. Jurisdiction: parties choose your courts

Parties may choose Serbian courts only when one of the parties has Serbian citizenship or a registered office in Serbia.

## 3. Jurisdiction: parties choose a foreign court

Serbian courts will assume jurisdiction in cases where they have exclusive jurisdiction.

## 4. State (or sovereign) immunity

Serbian courts do not assess the matter of immunity of their own volition; rather they consider the specific motion of the party.

## 5. Pre-judgment arrests or freezing orders

The Serbian court may grant pre-judgment arrests or freezing orders in the form of interim measures and/or injunctions. The condition for granting the interim measure is that the plaintiff proves the existence of obvious risk that assets will be dissipated.

## 6. Disclosure or discovery of documents in litigation

Upon the request of a party, the court may request the disclosure of certain documents from the other party. If the party that has issued the request refuses to disclose, the court will take this into consideration when deciding upon the subject matter by applying the burden of proof rule. The common law concept of a disclosure or

discovery of documents as a separate phase in the proceedings does not exist in the Serbian legal system.

## 7. Class actions

We expect to have more class actions due to changes in the Serbian litigation procedural code and updated consumer protection legislation.

## 8. Enforcement of foreign judgments

Please note that reciprocity is assumed, unless proved otherwise; however, the Serbian courts will never re-examine a case when enforcing a foreign judgment.

## 9. Costs

In principle, the losing party has to bear all of the costs of the winning party (or proportionally to the success ratio in the case).

## 10. Standards of the courts: high value disputes

The courts in Serbia are often overloaded with a large number of disputes, because the same courts deal with both high level disputes and regular disputes. As a corollary, the judges in these courts are quite often unable to dedicate a reasonable amount of time to the disputes that they preside over.

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# Seychelles



## 1. Governing law

Conditions to be met are: (i) the point is specifically pleaded; (ii) the choice of governing law is valid and binding under the laws of the Seychelles; and (iii) recognition is not contrary to public policy in the Seychelles.

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

No precedent in relation to this question.

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

Under the Foreign Judgments (Reciprocal Enforcement) Act 1961, a final and conclusive judgment of a foreign court against a company based upon a transaction document under which a sum of money is payable (not being a sum of money payable in respect of taxes or other charges of a like nature or in respect of a fine or

other penalty) may be enforceable in Seychelles if the foreign court is situated in a country to which the Foreign Judgments (Reciprocal Enforcement) Act (1961) (**1961 Act**) applies.

Under the 1961 Act, a judgment obtained in the superior courts of a country to which it applies would be enforced by the Supreme Court of Seychelles without re-examination of the merits of the case provided that: (i) the judgment is final and conclusive, notwithstanding that an appeal may be pending against it or it may still be subject to an appeal in such country; (ii) the judgment has not been given on appeal from a court which is not a superior court; and (iii) the judgment is duly registered in the Supreme Court of Seychelles in circumstances in which its registration is not liable thereafter to be set aside.

Under Section 4(3) of the 1961 Act, the registration of such a court's judgment in the Supreme Court of Seychelles involves the conversion of the judgment debt into the currency of Seychelles at the rate of exchange prevailing at the date of the foreign court's judgment.

Under the Reciprocal Enforcement of Judgments Act 1922, a final and conclusive judgment of a foreign court against a company based upon a transaction document under which a sum of money is payable may be enforceable in Seychelles if the foreign court is a court to which the Reciprocal Enforcement of Judgments Act (1922) (**1922 Act**) applies. The procedure provided for in the 1922 Act must be followed if the 1922 Act applies. Under the 1922 Act, a judgment obtained in a foreign court to which it applies would be enforced by the Supreme Court of Seychelles without re-examination of the merits of the case provided that the judgment is duly registered in the Supreme Court of Seychelles.

No judgment shall be ordered to be registered under this section if: (i) the original court acted without jurisdiction; or (ii) the judgment debtor, being a person

who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the original court; or (iii) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court; or (iv) the judgment was obtained by fraud; or (v) the judgment debtor satisfies the court either that an appeal is pending, or that he is entitled and intends to appeal against that judgment; or (vi) the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the court.

Where neither the 1922 Act nor the 1961 Act apply, then any final and conclusive monetary judgment from a foreign court for a definite sum against a company based upon a transaction document may be the subject of enforcement proceedings in the courts of Seychelles under the common law doctrine of obligation by action on the debt evidenced by the judgment of such competent foreign court. A final opinion as to the availability of this remedy should be sought when the facts surrounding the foreign court's judgment are known, but, on general principles, we would expect such proceedings to be successful provided that: (i) the foreign court had jurisdiction in the matter and the company either submitted to such jurisdiction or was resident or carrying on business within such jurisdiction and was duly served with process; (ii) the judgment given by the foreign court was not in respect of penalties, taxes, fines or similar fiscal or revenue obligations; (iii) the judgment was not obtained by fraud; (iv) recognition or enforcement of the judgment would not be contrary to Seychelles public policy; and (v) the proceedings pursuant to which judgment was obtained were not contrary to natural justice.

## 9. Costs

## 10. Standards of the courts: high value disputes

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# Singapore



## 1. Governing law

The court will usually give effect to the law chosen even if it has no connection with the contract, in compliance with the principle of party autonomy: ie parties are free to choose the law and terms of their contract. The principle of party autonomy is not absolute. The common law has imposed a limitation that the choice be "*bona fide*, legal and not contrary to public policy" *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277; *Peh Teck Quee v Bayerische Landesbank Girozentrale* [2000] 1 SLR 148.

## 2. Jurisdiction: parties choose your courts

Where the plaintiff has commenced an action in Singapore pursuant to an exclusive choice of Singapore court clause, the defendant has to show strong cause why he should be allowed to breach his contract and force the plaintiff to take his proceedings to a country other than Singapore. What amounts to strong cause depends on the facts of the case (*The Eastern Trust* [1994] 2 SLR 526). If the agreement is the product of actual close negotiations between the parties, the court will be very slow to release the parties from their bargain. If the agreement is a standard clause, especially in complex transactions involving multiple parties where it may be difficult for the defendant to ascertain which country the choice of court clause may point to, or where the defendant may not even be aware that there is a choice of court clause, the court may require less to be shown by way of strong cause. In any event, all factors will be taken into consideration by the court, including factors which were foreseeable by the parties at the time they had agreed to the exclusive choice of court clause. However, such factors are likely to bear less weight than factors which had not been foreseeable.

In *Orchard Capital I Ltd v Ravindra Kumar Jhunjhunwala* [2012] SGCA 16, the Singapore Court of Appeal has

firmly established that the presence of a non-exclusive choice of jurisdiction clause will not, of itself, provide a strong *prima facie* case that the parties deem the designated forum to be the most appropriate forum to adjudicate their dispute in all circumstances. It is just one factor that the court will consider in deciding whether or not the appellant's action should be stayed.

However, it is important to note that such a clause will be given different weight depending on where proceedings have been instituted. Where proceedings are instituted in the named forum (to which the parties have agreed to submit), the party that seeks a stay or otherwise contests the jurisdiction of that forum has a heavy burden to discharge as the parties have by definition agreed contractually that the particular jurisdiction is an appropriate forum. Where proceedings are instituted in a forum other than the named forum, the party that seeks a stay or otherwise contests the jurisdiction of that forum would be in a better position to do so, since it is not seeking to avoid a jurisdiction to which he has contractually agreed to submit.

## 3. Jurisdiction: parties choose a foreign court

A choice of court agreement is an agreement that imposes an obligation on one or both parties to the contract not to commence proceedings in any court other than in the chosen court. In such a case, it would be a breach of a contractual obligation to commence or continue proceedings in a court other than the court of the chosen country. Where a plaintiff commences proceedings in Singapore in breach of a choice of court agreement, the Singapore court will not apply the natural forum test. Although the factors considered are similar, in such a case, the question is whether there are exceptional circumstances amounting to strong cause why the plaintiff should be allowed to carry on his action in Singapore in breach of contract (*Amerco*

*Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd [1975-1977] SLR 258).*

#### 4. State (or sovereign) immunity

The State Immunity Act (Cap. 313) recognises that parties may waive state immunity in certain circumstances.

#### 5. Pre-judgment arrests or freezing orders

To obtain a domestic injunction, the plaintiff must show that he has a good arguable case against the defendant, the defendant has assets within the jurisdiction, and there is a real risk of dissipation of assets from the jurisdiction which would render judgment obtained in the proceedings nugatory. The same principles apply in the case of a worldwide *Mareva* injunction, except that insofar as the defendant's assets within the jurisdiction are concerned, the plaintiff will have to show that there are no and/or insufficient assets within the jurisdiction to satisfy the claim and that there are assets outside the jurisdiction.

#### 6. Disclosure or discovery of documents in litigation

Under the Rules of Court, each party is required to disclose all documents that it relies or will rely on as well as all documents which could adversely affect its own case, adversely affect another party's case or support another party's case. Only privileged documents (such as those covered by lawyer/client privilege or without prejudice communications) are exempted.

#### 7. Class actions

The only form of class actions permitted are representative actions (*Tan Chin Seng & ors v Raffles Town Club Pte Ltd* [2002] SGHC 278 [2003] 3 SLR 307).

#### 8. Enforcement of foreign judgments

Foreign judgments from superior courts of gazetted countries may be registered in Singapore to be enforced. There are two statutory regimes: the Reciprocal Enforcement of Commonwealth Judgments Act and the Reciprocal Enforcement of Foreign Judgments Act. Judgments from other jurisdictions have to be enforced

at common law (ie commence proceedings afresh in Singapore). Under common law, a foreign claimant being the beneficiary of a foreign judgment may apply to the High Court of Singapore for summary judgment under Order 14 of the Rules of Court. Once the existence of the foreign judgment is proved, the burden of proof lies with the defendant to show that one of the defences under private international law applies (ie that the foreign court was not competent to render the judgment due to lack of proper jurisdiction; the foreign judgment was obtained by fraud; or the foreign judgment is contrary to the public policy of Singapore).

#### 9. Costs

The general rule is that costs follow the event. Therefore, the unsuccessful party will usually have to bear the costs (usually on a party-and-party basis) of the successful party. However, the court can make a different order where a successful party has behaved in a blameworthy manner. Where costs are disputed, they are usually taxed by a registrar. An order of costs granted by the court is entirely discretionary both in principle and in quantum. There is no maximum cap on the costs.

#### 10. Standards of the courts: high value disputes

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# Slovakia



## 1. Governing law

The legal position derives from the Rome I Regulation (see Annex A below for further details on Rome I); choice of law is very liberal and mandatory laws (other than consumer rights, employment law, insurance and similar matters) are not interpreted too broadly. For purely internal situations not involving conflicts of law, a choice of foreign law will still be valid, but it will be subject to Slovak mandatory rules.

## 2. Jurisdiction: parties choose your courts

As an EU Member State, Slovakia is bound by the Brussels Regulation (see Annex B below for further information on the Brussels Regulation).

## 3. Jurisdiction: parties choose a foreign court

As an EU Member State, Slovakia is bound by the Brussels Regulation.

## 4. State (or sovereign) immunity

Unfortunately, there is rather limited case law on this subject, which renders it impossible to state a general position. However, as regards assets owned by the Slovak Republic, their immunity from execution is established by provisions of public law and therefore the Slovak courts may have a problem recognising a contractual (private law) waiver by the state of such immunity.

## 5. Pre-judgment arrests or freezing orders

Slovak courts will normally issue provisional measures freezing the defendant's local assets (not assets located abroad), provided that the case is *prima facie* substantiated and there is a relevant risk of the defendant dissipating its assets.

## 6. Disclosure or discovery of documents in litigation

There is no concept of generic disclosure of all relevant documents. The court will usually have to request the disclosure of specific documents relevant to the proceedings.

## 7. Class actions

There is no concept of class actions.

## 8. Enforcement of foreign judgments

The requirement of reciprocity was abolished in 2004. In the case of judgments issued by courts of EU Member States, the Brussels Regulation applies. In the case of other foreign judgments, the Slovak Private International Law Act stipulates only limited barriers to recognition of foreign judgments on the merits (such as exclusive jurisdiction of Slovak courts and public policy). The Slovak court will not re-examine the merits.

## 9. Costs

The losing party usually has to pay the legal fees according to an official tariff, which is based on the amount in dispute or value of the dispute. Normally, the tariff will be significantly lower than the actual fees on the basis of hourly rates charged by major law firms. In some simple but high value cases, the tariff can be several multiples of a standard hourly rate that would be applied by even the best law firms on the market.

## 10. Standards of the courts: high value disputes

Although the costs are not disproportionate and the duration of proceedings is constantly improving, there is still scope for delays and most importantly, most Slovak judges lack the sophistication to adjudicate major commercial disputes.

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# Slovenia



## 1. Governing law

Article 3 of the Code of Obligations, EU Regulation No 593/2008 (Rome I); Chapter Three of the Private International Law and Procedure Act (**PILP**). See Annex A below for further details on Rome I.

## 2. Jurisdiction: parties choose your courts

Where the Brussels Regulation applies, and the parties, regardless of their domicile, have agreed that a court or the courts of Slovenia are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, the courts of Slovenia shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise (Article 25 of the Brussels Regulation). See Annex B below for further information on the Brussels Regulation.

However, where the Brussels Regulation does not apply, according to Article 52, paragraph 3 of PILP, the parties can agree upon the jurisdiction of Slovenia only where at least one party is a citizen of Slovenia or if a legal person is incorporated in Slovenia.

## 3. Jurisdiction: parties choose a foreign court

If both of the parties are Slovenian citizens or legal persons incorporated in Slovenia, they are free to agree upon the jurisdiction of any court of an EU Member State (see for example Article 25 of the Brussels Regulation); on the other hand, should the Slovenian-based parties agree upon a non-EU jurisdiction, such an agreement would not be valid, as according to Article 52, paragraph 1 of PILP the parties can agree upon foreign jurisdiction only where at least one of them is a foreign citizen or a legal person, incorporated under a foreign jurisdiction.

## 4. State (or sovereign) immunity

It is to be noted that no case law exists, but the opinion of legal academia is that the courts should normally give effect to a written waiver in a contract of state immunity from jurisdiction and enforcement over the local assets of a foreign state. The Enforcement and Securing of Civil Claims Act (**ESCC**) specifically provides that enforcement over the assets of a foreign state shall be allowed subject to: (i) a foreign state's explicit consent to such enforcement; or (ii) the prior consent of the Slovenian minister of foreign affairs.

## 5. Pre-judgment arrests or freezing orders

According to the ESCC the claimant must demonstrate that there is a likely risk that because of the defendant's alienation, hiding or other disposal of assets the enforcement of the claim will be rendered impossible or very difficult, unless the claimant is able to show that the defendant would suffer only insignificant damage as a result of the freezing order. If the main action is not yet pending, the courts need not have jurisdiction in the main action and special rules on jurisdiction will apply. On the other hand, if the main action has been initiated, the court which has jurisdiction in the main action will have jurisdiction in respect of the freezing order.

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

Class actions are not permitted under Slovenian law, apart from one exception, set out in the Consumer Protection Act, which transposes Articles 2 and 3 of EC Directive 98/27/EC on injunctions for the protection of consumers' interests.

## 8. Enforcement of foreign judgments

Reciprocity must exist in the case of enforcement of judgments from non-EU countries. For EU countries, the Brussels Regulation applies.

## 9. Costs

Allocation of costs is decided on the basis of success of a party in litigation. Should the party win its claim in its entirety, the losing party shall pay 100% of the winning party's litigation costs. Attorney fees are paid according to a tariff on attorney fees.

## 10. Standards of the courts: high value disputes

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# Somalia



## 1. Governing law

In practice, the application of foreign law is rare within Somalia for many reasons, the predominant one of which is the underdevelopment of the judiciary at the current time.

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

It is not unknown for a Somali court to defer jurisdiction to a foreign court, but it is not commonplace.

## 4. State (or sovereign) immunity

For many development projects (the major contractual disputes currently litigated in Somali courts), the courts do not generally give credence to foreign sovereign immunity despite its inclusion in the Civil Code.

## 5. Pre-judgment arrests or freezing orders

Somali courts do grant pre-judgment orders but there are certain criteria to be met.

## 6. Disclosure or discovery of documents in litigation

Much of the legal limitation is due to the current lack (within Somali society) of documentary evidence in general along with established rules of evidence for a court to verify the authenticity of the documentary evidence.

## 7. Class actions

Class action provisions are included within the Civil Code but we are unaware of their application in practice in any cases of which we are aware.

## 8. Enforcement of foreign judgments

Foreign judgments are legally authorised and routine in practice if the assumptions set out in the question are met.

## 9. Costs

The court does have discretion to assess costs, but it is routine for the losing party to pay a great portion of the costs including an opposing party's attorneys' fees. The courts have a verification role, and whilst the winning party may put before court his estimates, the court might produce whatever number it sees fit.

## 10. Standards of the courts: high value disputes

At this time, the Somali courts are extremely underdeveloped and such disputes are incredibly difficult to litigate in Somali courts for many of the reasons highlighted above.

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# Somaliland



## 1. Governing law

In Somaliland at this time, the application of foreign law interpretive clauses is fairly restrictive.

## 2. Jurisdiction: parties choose your courts

Somaliland courts will generally utilise Somaliland law if there is a connection with the jurisdiction. In any event, it would be rare to choose Somaliland law without a connection to Somaliland.

## 3. Jurisdiction: parties choose a foreign court

Many contracts which have exclusive foreign jurisdiction clauses will be interpreted under Somaliland law and it is rare for the Somaliland judiciary at this time to respect freedom of contract rights over territorial interests in enforcing the contract under Somaliland law.

## 4. State (or sovereign) immunity

Given Somaliland's unrecognised status, there is very little foreign government presence and what presence is here is rarely involved in suits (outside of minor employment disputes) so, at this time, there is insufficient case law and data to support an answer.

## 5. Pre-judgment assets or freezing orders

Somaliland courts do not shy from attaching a defendant's assets. Indeed, it is a very low bar which plaintiffs must meet in order for the court to grant an attachment order.

## 6. Disclosure or discovery of documents in litigation

Although the rules of evidence on this point are fairly unclear, documentary evidence is not routinely utilised in Somaliland courts. Generally there is a strong bias toward witness-based evidence. Courts are generally reluctant to admit documentary evidence and very rarely require mandatory disclosure.

## 7. Class actions

Class actions are contemplated within the procedure and evidence bodies of law, but are rarely utilised by litigants and generally are discouraged by the courts.

## 8. Enforcement of foreign judgments

Somaliland courts do routinely give credence to foreign judgments which meet the requirements posed by the assumptions listed in the question.

## 9. Costs

## 10. Standards of the courts: high value disputes

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# South Africa



## 1. Governing law

Local courts have little experience in applying foreign law and experts in the foreign law will need to be called upon to give evidence relating to the foreign law, failing which our local courts will interpret the foreign law to be the same as South African law.

## 2. Jurisdiction: parties choose your courts

A local court is likely to decline jurisdiction if it considers that in the circumstances it is not the appropriate and convenient court to determine the dispute.

## 3. Jurisdiction: parties choose a foreign court

Our courts will not accept that their jurisdiction has been ousted, but they may be willing to stay proceedings in South Africa pending the outcome of a process initiated in a foreign jurisdiction.

## 4. State (or sovereign) immunity

Our courts will normally give effect to a waiver of state immunity and to enforcement over local assets of a foreign state, but not pre-judgment freezes.

## 5. Pre-judgment arrests or freezing orders

The courts need not have jurisdiction in the main action.

## 6. Disclosure or discovery of documents in litigation

The discovery process is burdensome. It can be costly and time consuming. Correspondence between attorneys and clients is privileged as is without prejudice correspondence between plaintiffs' attorneys and

defendants' attorneys, briefs and instructions to counsel and statements of witnesses.

## 7. Class actions

Class actions are not discouraged by our courts per se but have been inhibited by the lack of law and regulation in this area. However, there have been an increasing number of class actions in our courts recently and the courts have taken significant strides in laying down law and procedural rules in this area. See for example the landmark decision of *Children's Resource Trust v Pioneer Food* (50/2012) [2012] ZASCA 182 (29 November 2012).

## 8. Enforcement of foreign judgments

A provisional sentence summons would have to be issued. The court must be satisfied of certain factors, including whether the judgment would infringe public policy. Certain foreign judgments are only enforceable with the consent of the Minister of Trade and Industry, whose consent is rarely withheld.

## 9. Costs

The tariff relied on is outdated. Normally, the successful party can expect to recover approximately 30% of its costs from the losing party.

## 10. Standards of the courts: high value disputes

Many of our courts are overburdened and inefficiently administered. Some of our judges are inexperienced in high value commercial disputes. Often these types of disputes are referred to private arbitration. The quality of our bench is fairly mixed; however, our appeal court bench is strong.

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# Spain



## 1. Governing law

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

We have found no case law on the above-mentioned query.

## 5. Pre-judgment arrests or freezing orders

The courts need to have jurisdiction in the main action.

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

## 9. Costs

The costs which the winning party obtains are identified for both lawyers and court agents. The final amount to be repaid to the winning party depends on the quantification of the proceedings.

## 10. Standards of the courts: high value disputes

From a general point of view, Spanish courts are currently facing a large workload, which is causing timing problems in the issuance of the relevant judgments.

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# Sri Lanka



## 1. Governing law

## 2. Jurisdiction: parties choose your courts

Our courts may not accept jurisdiction in special cases, for example if another court has exclusive jurisdiction, such as in a dispute relating to rights *in rem* in land, corporate constitutional issues, the validity of entries in public registers, and the validity of registered intellectual property rights.

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

## 9. Costs

## 10. Standards of the courts: high value disputes

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# Sudan



## 1. Governing law

Sudanese law recognizes and respects the choice of governing law by the contracting parties. Section 11(13)(a) of the Civil Transactions Act 1984 (the **CTA**) provides: "Unless otherwise agreed by the parties, contractual obligations shall be governed by the law of the State of domicile when such domicile is common to the contracting parties, and in the absence of common domicile by the law of the State where the contract was concluded" (underline added). However under section 11(13)(b) of the CTA a contract in respect of an immovable property shall be governed by the law of the place where the property is situated.

## 2. Jurisdiction: parties choose your courts

Section 13 of the Civil Procedures Act 1983 provides "Courts of Sudan shall be competent to try a suit not within their jurisdiction if the defendant submits to such jurisdiction expressly or impliedly, and the court shall not on its own motion declare itself incompetent for lack of jurisdiction".

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

Under the Civil Procedures Act 1983, if the claimant convinces the court that the defendant is about to disappear, leave the country or dispose of his assets, the court may order the defendant to provide a guarantor, freeze his assets or arrest the defendant.

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

Under section 306 of the Civil Procedures Act 1983, a foreign decree or order shall not be executed in Sudan unless it satisfies certain conditions, including that: (i) it is made by a competent judicial tribunal; (ii) it does not conflict with a prior decree or order made by courts of Sudan; (iii) it is not contrary to public order or morality in Sudan; (iv) it has not been obtained by fraud; (v) it does not contain a claim founded on a breach of any law in force in Sudan; and (vi) it has been issued in a country which accepts judgments of Sudanese courts for enforcement, and the parties were duly summoned and represented.

## 9. Costs

## 10. Standards of the courts: high value disputes

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# Swaziland



## 1. Governing law

Our courts will respect and enforce the parties' choice of law on the basis that the parties are entitled to agree to anything they choose so long as it does not conflict with public policy and is not against the law.

## 2. Jurisdiction: parties choose your courts

Our courts would generally assume jurisdiction if the parties have chosen that forum for the enforcement of their contract. However, our courts would also need to ensure that any judgment that it gives can be effective and that it is not given simply for academic purposes.

## 3. Jurisdiction: parties choose a foreign court

Where in a contract a foreign court has exclusive jurisdiction and that contract contains a non-variation clause our courts would in all probability refuse to exercise jurisdiction over the matter. However, if the dispute is so well centred in our jurisdiction such that it would in the interests of justice be the appropriate forum to decide a dispute even though the jurisdiction has been ousted by the parties, it may exercise jurisdiction should the dispute be brought before it.

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

Provided that a party can demonstrate that a defendant is dissipating its assets for the purpose of avoiding its creditors, the courts would have no hesitation in granting such an order.

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

A foreign judgment would normally be enforced if the conditions set out in the question are met and in addition there is a certification from the Registrar of the foreign court confirming that the judgment is final and binding, that it has not been appealed against and that the court was seized with jurisdiction when it heard the matter.

## 9. Costs

## 10. Standards of the courts: high value disputes

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# Sweden



## 1. Governing law

Most international contracts and contractual issues will fall under Rome I (see Annex A below for further details on Rome I), or for contracts prior to 17 December 2009, the 1980 Rome Convention on the law applicable to contractual obligations, or otherwise under the 1955 Hague Convention on the law applicable to International Sale of Goods, which are incorporated into Swedish law. The principal rule in these instruments is that an agreement between the parties regarding the choice of law shall be accepted. Rome I/the Rome Convention furthermore allow for the parties to agree that only a part of the contract or certain contractual issues, such as validity, shall be governed by a certain country's law.

The possibility of applying foreign law is restricted by *ordre public, fraude à la loi* (evasion, fraud) and restrictions regarding alien legal rules and legal systems of states that have not been recognised. Furthermore, the Swedish courts are unauthorised to handle foreign public law claims.

## 2. Jurisdiction: parties choose your courts

The Swedish courts may, in most civil cases amenable to out-of-court settlement, assume jurisdiction in accordance with a jurisdiction (or choice of court) agreement between the parties. For cases in which the Brussels Regulation or the Lugano Convention of 2007 are applicable and a jurisdiction agreement fulfils the relevant requirements, the courts must assume jurisdiction. For cases falling outside the said Regulation or Convention, there is no clear case law on the issue, but it is in legal doctrine considered likely that the courts will normally require some (if even the smallest) connection to Sweden to assume jurisdiction, since otherwise there would be no judicial interest for the court to try the case. Swedish courts will not, under the

Brussels Regulation or the Lugano Convention of 2007, assume jurisdiction over a contract if another court has exclusive jurisdiction over it (in cases where the said Regulation and Convention are not applicable it will depend on the circumstances).

## 3. Jurisdiction: parties choose a foreign court

A written agreement of an international nature stating that a foreign court is to have exclusive jurisdiction will, in most civil cases amenable to out-of-court settlement, be accepted by the courts (that will consequently not assume jurisdiction). In addition to the special cases mentioned above, the court will in some cases assume jurisdiction regarding labour law conflicts and cases involving consumer rights.

## 4. State (or sovereign) immunity

There are no laws governing state immunity in Sweden. The case law regarding waivers of immunity is furthermore limited (see RH 79:81 as an example of when a waiver from state immunity from jurisdiction was given effect to by the court). It would seem that Sweden has adopted the principles set forth in the United Nations Convention on Jurisdictional Immunities of States and Their Property, which Sweden has signed and ratified but that is not yet in force. Clearly expressed waivers of immunity should thereby be given effect (see government bill prop. 2008/2009:204 proposing that the UN Convention mentioned above should be incorporated into Swedish law, see also Supreme Court case NJA 2011 page 475 in which the Supreme Court states that the UN Convention in many parts, but not all, represents a codification of international customary law).

## 5. Pre-judgment arrests or freezing orders

Interim enforcement measures are available under chapter 15 of the Code of Judicial Procedure. The most commonly used interim enforcement measure is provisional attachment to secure the enforcement of a claim, which presupposes that a person has shown probable grounds for a claim which is or may be presumed (denoting a rather low degree of probability) to be the subject of legal proceedings or adjudication in other similar form; and that it can reasonably be expected that the defendant, by absconding with or the removal of property, or by other means, will evade payment of the debt. As regards the sabotage risk it is enough for the applicant to show that it is probable that the defendant's actions can have this effect. A security must furthermore be deposited in order for the court to grant the claim. The court does not require jurisdiction in the main action, provided that the judgment can be enforced in Sweden.

## 6. Disclosure or discovery of documents in litigation

Chapter 38 of the Code of Judicial Procedure governs the possibilities for compulsory document production. The law requires that the party applying for compulsory document production identifies the documents (it may be sufficient to describe a specific category of documents). Furthermore, the documents need to be assumed to have relevance as evidence and to be possessed by the party subject to the compulsory disclosure claim. So-called "fishing expeditions" are not allowed by the courts. According to case law the disclosure also has to be proportionate, taking into consideration the relevance of the documents and the burden on the defendant to produce the documents.

## 7. Class actions

The possibilities for class actions are quite generous (although the number of decided cases in the Swedish courts is limited). A class claim can concern any type of civil claim that can be raised in a general court or in the Environmental Courts (excluding claims that shall be raised in other special courts such as the Labour Court or the Market Court). The Swedish law on class actions has been in force since 2003. Claimants must opt in.

## 8. Enforcement of foreign judgments

The enforceability depends on the type of judgment and in what country it was issued. As a general rule foreign judgments are not enforceable in Sweden. In order to recognise and enforce a foreign judgment, explicit support is required in an EU regulation or treaty. However, an exemption from the requirement is made for judgments supported by a prorogation agreement, in which the parties have agreed that the dispute shall be adjudicated by a foreign court (see the Supreme Court case NJA 1973 page 628). The courts do not require reciprocity. A judgment can furthermore, without being recognised, have an evidentiary value in relation to the facts examined in the case as well as to the content of foreign law.

## 9. Costs

If expenses incurred during the proceedings are regarded as litigation expenses, the losing party must reimburse them to the winning party (up to 100%) if they were necessary to secure the latter's rights and can be deemed reasonable. Pursuant to the Code of Judicial Procedure, the following expenses are regarded as litigation costs: expenses for the evidence in a case, expenses for a party's appearance in the action, and his or her work and loss of time, and expenses for the preparation and presentation of the action, including lawyers' fees.

## 10. Standards of the courts: high value disputes

High value disputes are normally handled in arbitration. Nevertheless, Swedish courts are generally deemed as reliable and effective. However, complex commercial disputes tend to take several years, with the risk of appeal. There are no specialised courts for complex commercial disputes.

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# Switzerland



## 1. Governing law

Article 116 Swiss Private International Law Act (**PILA**) states: "The contract is subject to the law chosen by the parties". Swiss courts are used to applying foreign laws. In case of doubt, they can and do resort to the Swiss Institute of Comparative Law ([www.isdc.ch](http://www.isdc.ch)) for a legal opinion on the relevant content of the applicable foreign law.

## 2. Jurisdiction: parties choose your courts

True if one of the parties has its residence/seat in a member state of the Lugano Convention. In other cases, Swiss courts do not need to accept jurisdiction if:

(i) none of the parties has a nexus with the canton of the court chosen (domicile, residence, seat, branch office); and (ii) the applicable law is not Swiss law.

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

See in particular Articles 2 and 23 of the European Convention on State Immunity.

## 5. Pre-judgment arrests or freezing orders

Swiss courts can order interim measures according to Article 261 *et seq.* of the Swiss Civil Procedure Code (**CPC**). In the case of the enforcement of monetary claims, Article 271 *et seq.* of the Swiss Debt Collection and Bankruptcy Act (**DCBA**) are applicable. However, arrests according to Article 271 *et seq.* of the DCBA against a Swiss party are subject to restrictions.

Furthermore, Swiss law only permits orders *in rem* (for example, against a bank account) and not orders *in personam*.

## 6. Disclosure or discovery of documents in litigation

See Article 160(1)(b) of the CPC. Even if a party directly relies in the action on a certain document, a party may have the right to refuse disclosure according to Article 163 CPC. Privileged documents are normally correspondence with lawyers provided it concerns the professional representation of a party or third party.

## 7. Class actions

The Swiss legislature consciously renounced the introduction of "class actions".

## 8. Enforcement of foreign judgments

See Article 25 *et seq.* of the PILA. An exception concerning reciprocity exists in connection with foreign bankruptcy decrees according to Article 166(1)(c) of the PILA.

## 9. Costs

The costs which the losing party has to pay are calculated according to a (cantonal) tariff. In general, the tariff depends on the amount in dispute and it is, especially in international cases, often substantially below the actual litigation costs.

## 10. Standards of the courts: high value disputes

Swiss courts are very professional and have high standards. In particular, there is no bias in favour of Swiss companies as opposed to foreign parties.

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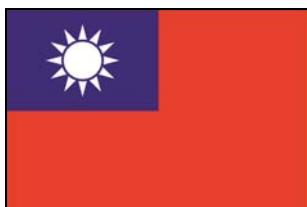
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# Taiwan



## 1. Governing law

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

The court may, at its discretion, allow the petitioner to place a deposit with the court to secure against any potential shortfalls in its reasoning that there is a very clear risk the respondent/defendant will dispose of its assets to the detriment of the petitioner's interest.

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

## 9. Costs

In general, the losing party will be required to pay all court fees incurred, but not the attorneys' fees. However, subject to a cap on the amount and to the discretion of the court, attorneys' fees are considered part of the litigation fees in trials of the third instance in civil cases as well as those in administrative appeals, thus they may be granted to the winning party under those circumstances.

## 10. Standards of the courts: high value disputes

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# Tajikistan



## 1. Governing law

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

The Republic of Tajikistan is a member of the Vienna Convention on Consular Relations dated 24 April 1963. All property relating to official missions of foreign countries are not subject to the jurisdiction of the Tajik courts.

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

As follows from article 220 of the Economic Procedure Code of the Republic of Tajikistan a foreign arbitral award or foreign judgment should be recognized and enforced on the basis of an international treaty to which the Republic of Tajikistan is a party.

## 9. Costs

## 10. Standards of the courts: high value disputes

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# Tanzania



## 1. Governing law

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

The Reciprocal Enforcement of Foreign Judgments Act, cap 8 of the laws has a schedule of those countries whose judgments will be automatically enforced in Tanzania.

## 9. Costs

## 10. Standards of the courts: high value disputes

The Commercial Court is relatively efficient but does not have exclusive jurisdiction and so a lot of commercial cases also go to the general registry, and there they get bogged down by a rather inefficient structure.

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# Thailand



## 1. Governing law

In general, the choice of foreign law to govern a contract would be valid. However, it can be enforceable only if a foreign law is proved to the satisfaction of the court and such law is not contrary to public order or good morals of the people of Thailand.

## 2. Jurisdiction: parties choose your courts

Although there is no explicit law that prohibits the parties from agreeing on jurisdiction, the Supreme Court has held that court jurisdiction is a matter of public order and good morals of the people of Thailand; as such it cannot be an agreement which deviates from the Thai Civil Procedure Code and this may mean such a clause is not recognised.

## 3. Jurisdiction: parties choose a foreign court

Although there is no explicit law that prohibits the parties from agreeing on jurisdiction, the Supreme Court once held that court jurisdiction is a matter of public order and good morals of the people of Thailand; as such it cannot be an agreement which deviates from the Thai Civil Procedure Code.

## 4. State (or sovereign) immunity

Members of diplomatic missions, consulates, and embassies may not waive the immunity by private agreement. A waiver of state immunity can only be done by the home state subject to the domestic law of each state.

## 5. Pre-judgment arrests or freezing orders

A party seeking a freezing order is required to prove certain grounds provided under the Thai Civil Procedure Code, for example, an opposing party intends to dispose of disputed assets or other assets out of the jurisdiction.

## 6. Disclosure or discovery of documents in litigation

The courts have a broad power to summon all documents regardless of whether such documents are marked privileged or attorney-client privileged.

## 7. Class actions

Thailand recently passed a class action law. As at the time of writing, it awaits the King to endorse this law in order for it to become effective and the timing is therefore uncertain. Under the new law, class actions may be brought to court if: (i) the court permits such a claim to be a class action; (ii) the claim is in relation to a tort, contractual breach or dispute under certain laws such as environmental, consumer protection, labour, securities or competition law; and (iii) a plaintiff complies with certain requirements under the class action law.

## 8. Enforcement of foreign judgments

Currently, Thailand is not a member of any treaty in relation to enforcement of foreign judgments, ie at present the Thai courts would not enforce a foreign judgment without a re-examination of the merits of the case but it would be accepted as evidence in court proceedings.

## 9. Costs

The court has discretion to determine litigation costs that should be borne by the losing party, subject to the winning party requesting such relief and the schedule of court fees under the Thai Civil Procedure Code.

## 10. Standards of the courts: high value disputes

Thai courts are quite efficient and reliable in dealing with high value commercial disputes. However, Thai courts have limited experience in resolving disputes concerning certain commercial transactions, in particular those with complicated structures such as derivatives and securities issues. In these cases, it may take time and incur significant costs to obtain a judgment.

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# Togo



## 1. Governing law

However, there may be difficulties in mastering the foreign law applicable to the merits of the case.

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

Article 14 of the Civil Code, in its provisions applicable to Togo, grants Togolese citizens a jurisdictional privilege which they can waive either expressly or implicitly. The choice of a foreign jurisdiction by a Togolese party in a contract will thus be respected. This is because Togolese courts would consider such choice a waiver of the jurisdictional privilege except in specific cases where they have exclusive jurisdiction.

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

The possibility of obtaining provisional measures is provided for in articles 54 and 55 of the Uniform Act of the Organisation for the Harmonisation of Business Law in Africa (**OHADA**) on Simplified Recovery Procedures and Enforcement Measures.

## 6. Disclosure or discovery of documents in litigation

A party invoking evidence shall produce it to the other parties during the trial. Otherwise, the judge may order the production of evidence. The law also governs the production of evidence in the possession of a third party to the trial (articles 109 to 112 of the Code of Civil Procedure) as well as the production of evidence in the

possession of one of the parties (article 113 of the Code of Civil Procedure).

## 7. Class actions

## 8. Enforcement of foreign judgments

For us, enforcement of foreign judgments means the possibility to have them obtain *exequatur*.

## 9. Costs

Article 401 of the Code of Civil Procedure provides that the losing party is ordered to pay costs, except when the court orders that all or part of the costs be borne by a party, through a special and reasoned decision.

## 10. Standards of the courts: high value disputes

The rules do exist, but their application is often subject to certain practices and the subjective discretion of the courts.

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# Trinidad and Tobago



## 1. Governing law

The Unfair Contract Terms Act provides that where a consumer contract purports to apply a foreign law, the Act will apply nonetheless where it appears to the court that the term was imposed for the purpose of evading the Act or, in the making of the contract, one of the parties dealt as a consumer, habitually resident in Trinidad and Tobago and took steps to make the contract there.

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

Foreign exclusive jurisdiction clauses are generally effective and enforceable in Trinidad and Tobago provided the choice of court is *bona fide* and legal and there is no reason for the courts to disregard the clause on the grounds of public policy.

## 4. State (or sovereign) immunity

Our courts have adopted the international principle of restrictive sovereign immunity in international law, providing that in accordance with justice and good sense, there should be no state immunity to acts of commercial nature (as stated by Rajnauth-Lee J in RBTT Trust Limited v Apua Funding Limited).

## 5. Pre-judgment arrests or freezing orders

Our courts will grant a freezing injunction where the claimant demonstrates that he has a good arguable case, there is a real risk that the defendant will move identifiable assets outside the jurisdiction and the claimant can provide an undertaking in damages.

## 6. Disclosure or discovery of documents in litigation

According to Part 28 of the Civil Proceeding Rules (**CPR**), parties to proceedings are required to disclose all documents on which they rely or intend to rely. Documents include anything in which information is recorded, including electronic media.

## 7. Class actions

Part 24 of the CPR provides that where five or more persons have the same or similar interest in proceedings, the court may appoint one or more of those persons or a body having sufficient interest in the proceedings to represent all or some of the persons with a similar or the same interest. Strictly speaking, these are not class action lawsuits *per se*, but rather representative actions, where an order of the court will bind all the persons the representative claimant or defendant represents.

## 8. Enforcement of foreign judgments

There are two ways by which foreign judgments will be enforced in our courts for a fixed sum of money. The Judgments Extension Act provides a system of registration by which judgments of the UK and specified Commonwealth countries having similar reciprocal provisions can be directly enforced in the courts once registered. For judgments of jurisdictions where there is no reciprocal agreement, a common law action on the foreign judgment is another means of enforcement. For example, a successful party seeking to enforce a U.S. judgment must commence a common law action on the basis of that judgment.

## 9. Costs

CPR Parts 66-67 provide that it is within the court's discretion to order costs, with the general rule being that the unsuccessful party pays the costs of the successful party. Costs are quantified in a number of ways, such as in accordance with fixed costs prescribed in the CPR or in accordance with court-approved budgeted costs. Where fixed costs do not apply to proceedings, the general rule is that costs are calculated as a percentage of the value of the claim/proceedings.

## 10. Standards of the courts: high value disputes

Our courts experience varying degrees of delay due to the backlog of cases in the court system. Judges must find the time to deal with the matters before them and, with the large volume of disputes before the court, delay becomes inevitable. Often, however, the speed of litigation depends heavily on the efficiency of the parties themselves. In high value commercial disputes between large corporate entities, judicial bias in favour of either party is rare.

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# Tunisia



## 1. Governing law

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

The lack of jurisdiction must be raised by the defendant before responding on the merits. Tunisian courts do not raise lack of jurisdiction of their own volition.

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

## 9. Costs

## 10. Standards of the courts: high value disputes

The courts do not take into consideration the real litigation costs incurred by the winning party (including lawyers' fees). In practice, the courts order the losing party to pay only an insignificant amount as compensation for the winning party.

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# Turkey



1. Governing law

2. Jurisdiction: parties choose your courts

3. Jurisdiction: parties choose a foreign court

4. State (or sovereign) immunity

5. Pre-judgment arrests or freezing orders

6. Disclosure or discovery of documents in litigation

7. Class actions

8. Enforcement of foreign judgments

9. Costs

10. Standards of the courts: high value disputes

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# Turkmenistan



## 1. Governing law

Turkmenistan law does not restrict the application of a foreign governing law, if it is provided for by international treaties of Turkmenistan, and also the agreement of the parties. In the absence of foreign law norms regulating the disputable relations, the relevant Turkmen law applies. However in practice we are not aware of any case when a foreign governing law was applied in Turkmenistan courts.

## 2. Jurisdiction: parties choose your courts

If it states in the contract that Turkmenistan courts will generally assume jurisdiction over this contract, it will be so. It depends on clauses of the contract. However in practice we are not aware of any case in which Turkmenistan courts assume such jurisdiction.

## 3. Jurisdiction: parties choose a foreign court

The legislation of other states is applied, if it is provided for by international treaties of Turkmenistan, and also the agreement of the parties. The courts in Turkmenistan would decline their jurisdiction if a foreign court had been chosen in the contract.

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

Proofs on case are any actual data on the basis of which the court, in an order defined by the law, establishes the existence or absence of the circumstances proving requirements and objections of the parties, and also other circumstances important for the correct settlement of the dispute.

This data is established by written or material evidence: (i) each party shall prove those circumstances on which he/she refers as to the basis of the requirements and objections; and (ii) proofs are presented by the parties and other persons participating in the case.

## 7. Class actions

The claim can be filed in common by several claimants or to several respondents. Each of the claimants or respondents acts independently in the process. However, in some cases the court may, if the claims of the claimants or alleged liabilities of the respondents are similar, unite several claimants and/or several respondents into a group.

## 8. Enforcement of foreign judgments

## 9. Costs

## 10. Standards of the courts: high value disputes

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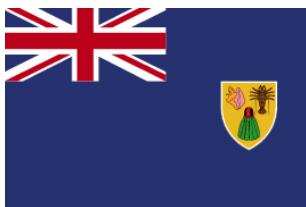


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# Turks & Caicos Islands



## 1. Governing law

Generally speaking the Turks and Caicos Islands will follow the English common law save where local statutes (Ordinances) apply. There are no Ordinances which deal with the issue of governing law and therefore the common law rules will be applied.

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

The Civil Procedure Rules that apply in the Supreme Court of the Turks and Caicos Islands are modelled on the English Rules of the Supreme Court as they were prior to the introduction of the "Woolf reforms" including, but not limited to, the rules with respect to discovery.

## 7. Class actions

We are not aware of any class actions having been pursued in the Turks and Caicos Islands.

## 8. Enforcement of foreign judgments

## 9. Costs

## 10. Standards of the courts: high value disputes

Whilst the Judiciary of the Supreme Court is generally of a high quality, entirely independent, and applies the law consistently and in an even-handed manner the small number of Supreme Court Judges in the Islands and limited resources of the court can, on occasions, lead to matters not being progressed as quickly as litigants may wish.

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# Uganda



## 1. Governing law

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

## 7. Class actions

## 8. Enforcement of foreign judgments

Generally our courts will enforce all judgments obtained in Commonwealth jurisdictions and judgments obtained in jurisdictions with reciprocal provisions for enforcement of Ugandan judgments.

## 9. Costs

Typically the losing party will pay 100% of the winning party's litigation costs including lawyers' fees.

## 10. Standards of the courts: high value disputes

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# Ukraine



## 1. Governing law

## 2. Jurisdiction: parties choose your courts

There is an express rule under Ukrainian law that the courts shall accept jurisdiction if the parties (including foreign parties) specifically submitted to the jurisdiction of Ukrainian courts in their agreement. However, there is no established court practice in cases where both the parties and subject matter of a dispute have no connection with the Ukraine. Usually there is at least some connection with the Ukraine, for example, assets located in the country.

## 3. Jurisdiction: parties choose a foreign court

Other rules may be provided in international treaties ratified by Ukraine, which specifically impose obligations on Ukrainian courts to honour the choice of court agreements. However, Ukraine has in fact very few such international treaties and most of them are with Commonwealth of Independent States countries.

## 4. State (or sovereign) immunity

Ukrainian law requires express consent of a foreign state for jurisdiction and enforcement purposes. It is unclear whether a written waiver in a contract would be sufficient as the courts could potentially require such express consent for each particular instance.

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

The concept of disclosure is undeveloped. The parties could even withhold documents requested by the court with no significant consequences other than a fine.

## 7. Class actions

The concept of class actions is unknown in Ukrainian law.

## 8. Enforcement of foreign judgments

The rules allowing enforcement on the basis of the principle of reciprocity have been introduced only recently and they have not been properly tested yet.

## 9. Costs

Only fees of "advocates" can be compensated and not all Ukrainian lawyers are advocates. The parties should have evidence that they actually incurred all respective costs and the court has discretion to reduce the recovery of litigation costs.

## 10. Standards of the courts: high value disputes

Ukrainian courts are usually efficient and reliable in dealing with low value, straightforward disputes.

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# United Arab Emirates (UAE)



## 1. Governing law

Although Article 19 of the Civil Code recognises the principle of freedom of contract, in practice, the UAE courts are reluctant to recognise the choice of a foreign law and they will not honour any provision of any foreign law which is contrary to public policy in the UAE, or to any mandatory law applicable in the UAE. We would expect that for this purpose public policy would be interpreted in a broad sense to the extent that the courts would not call for expert evidence as to the foreign law, but would, as a matter of practice, apply UAE law. Further, even if a UAE court is prepared to recognise a choice of foreign law, that law must be proven as an issue of fact and might still be ignored by the UAE court.

## 2. Jurisdiction: parties choose your courts

It is extremely rare for UAE courts to be chosen to resolve disputes which do not have a connection with the jurisdiction.

## 3. Jurisdiction: parties choose a foreign court

A UAE court would be likely to accept jurisdiction even if the parties had expressly submitted to the exclusive jurisdiction of a foreign court or tribunal in order to settle that dispute, although a court in the UAE may stay proceedings if concurrent proceedings are being brought elsewhere.

## 4. State (or sovereign) immunity

There is no formal concept of state or sovereign immunity in UAE law. However, with regard to UAE state immunity from enforcement, Article 247 of the Civil Procedure Law states that "without prejudice to the provisions of any other law, the following may not

be confiscated: (1) public assets owned by the State or any of the Emirates...". Public assets are defined as "all real property or moveables owned by the State or public judicial persons, allocated in fact or in law for the public benefit".

In the circumstances, it is unclear whether any waivers of immunity from suit, execution or attachment would be valid and binding under UAE law.

## 5. Pre-judgment arrests or freezing orders

Article 252 of the UAE Civil Procedure Law provides that a party may apply to the UAE courts for a preservatory attachment order over the real estate and moveable property in any circumstance in which it is feared that the relevant party may abscond, or remove or conceal his property. In principle, a party may apply for such an attachment order prior to a claim being filed with the UAE courts.

The relevant test for obtaining an attachment order is strict and narrowly construed. An applicant would have to persuade the UAE court, with support from documentary evidence, that it had a genuine fear that the respondent would abscond, or remove or conceal its property in order to frustrate any subsequent enforcement action.

## 6. Disclosure or discovery of documents in litigation

Note that the concept of "privilege" does not apply in the UAE.

## 7. Class actions

There is no mechanism for collective actions in the UAE.

## 8. Enforcement of foreign judgments

It is difficult to enforce foreign judgments in the UAE. In principle, the UAE courts would enforce foreign judgments provided that certain conditions are met (set out in articles 235-238 of the Civil Procedure Law).

The conditions are:

- the UAE did not itself have jurisdiction over the matter;
- each party had due notice of the dispute and was represented;
- the foreign judgment was final; and
- the judgment does not breach public policy.

Reciprocity between the UAE and the jurisdiction where the judgment originated is also required.

In practice, criteria are applied restrictively and it is unlikely that a foreign court judgment would be enforced by the UAE courts. An attempt to enforce a judgment in the UAE is likely to result in a rehearing of the dispute. The foreign court judgment would only constitute expert evidence of the foreign law before the UAE courts.

## 9. Costs

## 10. Standards of the courts: high value disputes

UAE courts have limited experience of major international commercial disputes due to parties' preferences for the Dubai International Financial Centre (**DIFC**) courts or arbitration. Court proceedings in the UAE are relatively slow and are likely to be unattractive and inefficient for

international parties due to the need to rely upon local law firms (often requiring supervision from international law firms) and translate material to and from Arabic. Case law is not recognised, meaning that the courts' interpretation of statute is often unpredictable. An international commercial party which, for whatever reason, wanted the benefits of court proceedings situated locally would be more likely to opt for the DIFC courts, which provide a specialist common law commercial jurisdiction in the region.<sup>01</sup>

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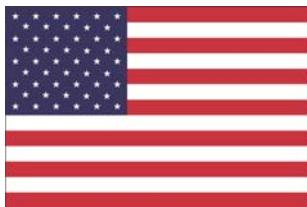
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01. In Abu Dhabi, the creation of a new free zone is underway. The "Global Market" is intended to have much the same function as the DIFC.

# United States – New York



## 1. Governing law

Courts will respect a contractual choice of law provision unless the application of foreign law would conflict with public policy.

overreaching, the trial in the chosen forum would be so difficult and inconvenient that it would effectively deprive the resisting party of his day in court, or enforcement of the clause would contravene a strong public policy of the forum where the suit was brought.

## 2. Jurisdiction: parties choose your courts

Forum selection clauses are presumed valid and will be enforced unless the resisting party shows that enforcement would be unreasonable under the circumstances. Enforcement would not be unreasonable unless the clause was the product of fraud or overreaching, the trial in the chosen forum would be so difficult and inconvenient that it would effectively deprive the resisting party of his day in court, or enforcement of the clause would contravene a strong public policy of the forum where the suit was brought. New York state courts will enforce a forum selection clause, but the federal courts must also consider whether they have jurisdiction under the U.S. Constitution, either because the matter involves a question of federal law or because there is diversity of citizenship of the parties (ie no plaintiff is a citizen of the same state as any defendant). In the typical contract dispute, federal law is not implicated, and determining diversity can be complex, particularly if LLCs are involved, as they are deemed to have the citizenship of their members and the identity of their members is generally secret, therefore a blanket rule cannot be set down that choice of forum in a federal court will be enforceable.

## 4. State (or sovereign) immunity

The Foreign Sovereign Immunities Act of 1976 permits waivers of sovereign immunity, including with respect to pre-judgment attachment of property.

## 5. Pre-judgment arrests or freezing orders

The standards governing pre-judgment attachment of property are governed by state, rather than federal, law and vary somewhat among the states. In general, U.S. states allow pre-judgment attachment of a defendant's property where a plaintiff has an unsecured contractual claim for an easily discernible sum of money and the plaintiff has established a high likelihood of prevailing in the claim.

## 6. Disclosure or discovery of documents in litigation

As a general matter, parties to litigation may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defence. When a party withholds information from discovery on the basis of attorney-client or other privilege, the withholding party must expressly claim the privilege and describe the nature of materials being withheld. See generally Fed. R. Civ. P. 26.

## 3. Jurisdiction: parties choose a foreign court

Forum selection clauses are presumed valid and will be enforced unless the resisting party shows that enforcement would be unreasonable under the circumstances. Enforcement would not be unreasonable unless the clause was the product of fraud or

## 7. Class actions

The standards and procedures governing U.S. federal class actions are set forth in rule 23 of the Federal Rules of Civil Procedure. This is an "opt-out" procedure. Most U.S. states have adopted similar class action procedures for cases being litigated in state courts.

## 8. Enforcement of foreign judgments

Almost all U.S. states have adopted the Uniform Foreign Country Money Judgment Recognition Act (the **UFCMJRA**), which in most cases permits the enforcement of a foreign country money judgment without a review of the merits of the underlying judgment. Under the UFCMJRA, a court may refuse to recognise a foreign judgment only if there were significant procedural or jurisdictional defects in the underlying proceedings.

## 9. Costs

Absent unusual circumstances, each party to litigation must bear its own costs, including attorneys' fees. There are certain statute-based exceptions to this rule, including in relation to the federal antitrust and securities laws.

## 10. Standards of the courts: high value disputes

Although U.S. litigation may be time-consuming and expensive due to busy court dockets and liberal discovery rules, U.S. federal courts are generally sophisticated and well equipped to handle complex commercial litigation involving foreign parties. U.S. state courts are also generally reliable, but have varying degrees of sophistication and experience in handling these types of disputes.

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# Uruguay



## 1. Governing law

Choice of law clauses are not enforceable under Uruguayan law except in the context of an international arbitration clause. Pursuant to mandatory local rules on conflict of laws, party autonomy is not accepted to override applicable law. Therefore a choice of law clause can only be enforced if it is consistent with the law that would be applicable under Uruguayan rules on conflict of laws or it is in the context of an international arbitration clause.

## 2. Jurisdiction: parties choose your courts

As a general rule, local courts will accept or decline jurisdiction based on objective rules on conflicts of laws (and regardless of the parties' will). However, if the contract is binding upon parties domiciled in MERCOSUR countries (Brazil, Argentina, Paraguay or Uruguay) and, under limited circumstances, upon parties domiciled in other countries, choice of forum clauses might be accepted as the Protocol on Contractual Jurisdiction allows the parties to choose the competent court as long as it is the court of a MERCOSUR Member State.

## 3. Jurisdiction: parties choose a foreign court

Although, as a general rule, the courts will not decline jurisdiction in respect of party autonomy, this general rule does not apply if the contract is executed between parties domiciled in one of the four MERCOSUR states and, under limited circumstances, with parties domiciled in other countries. Under the Protocol on Contractual Jurisdiction, choice of forum clauses are allowed as long as the chosen jurisdiction is in a MERCOSUR Member State.

## 4. State (or sovereign) immunity

As long as the waiver is written and clear it will most likely be enforced in Uruguay. (Please note however that this conclusion is based on judicial decisions rendered to date, as there is no act or statute applicable to this matter.)

## 5. Pre-judgment arrests or freezing orders

Pursuant to sections 311, 312 and 313 of the General Code of Procedure injunctions, attachments and other provisional remedies prior to or during litigation can be granted if the applicant shows: (i) the likelihood of success on the merits; (ii) that the defendant is dissipating its assets; and (iii) that a sufficient bond is posted (enough to cover damages the defendant might suffer if the injunction was incorrectly granted and is therefore lifted at a later stage).

## 6. Disclosure or discovery of documents in litigation

A judicial order for production of wide categories of documents might very exceptionally be granted, but there is no specific relevant negative consequence for not complying with the order (section 168 of the General Code of Procedure).

## 7. Class actions

Although formally allowed by the law (sections 42 and 220 of the General Code of Procedure) and not discouraged by the courts, class actions are rare in Uruguay.

## 8. Enforcement of foreign judgments

Pursuant to section 539 of the General Code of Procedure, foreign judgments are enforced, regardless of the existence of a treaty, provided the circumstances listed in the question are shown and the foreign judgment does not manifestly contradict international public policy principles (which in turn are construed very narrowly by local courts).

## 9. Costs

Pursuant to section 56 of the General Code of Procedure, the losing party can be ordered to pay litigation costs and fees only if during the proceedings it behaved improperly or if it was evident that its case had no reasonable legal ground. Orders for costs are very unusual.

## 10. Standards of the courts: high value disputes

Although litigation costs and court fees in Uruguay are rather low (and no bonds or guarantees are required from foreign parties) a highly complex case can take up to six to eight years of litigation to be finally decided. Lack of sophistication of judges on commercial matters is also a factor to take into account. All these reasons make it advisable to submit complex matters to commercial arbitration.

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# Uzbekistan



## 1. Governing law

Uzbek courts lack experience of the application of foreign law. There are several provisions in procedural and material laws that allow courts to apply Uzbek law instead of a foreign law chosen by the parties. For example: (i) an Uzbek court would apply Uzbek law if it is impossible to ascertain the existence or meaning of relevant provisions of the foreign law; and (ii) interpretation of legal terms shall be based on Uzbek law, etc.

## 2. Jurisdiction: parties choose your courts

There is an exhaustive list of cases that are subject to the jurisdiction of the Uzbek courts.

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

Subject to an express written waiver by competent authorities of the foreign state.

## 5. Pre-judgment arrests or freezing orders

## 6. Disclosure or discovery of documents in litigation

The court shall still have the right to request disclosure of any documents relevant to the case.

## 7. Class actions

## 8. Enforcement of foreign judgments

## 9. Costs

## 10. Standards of the courts: high value disputes

Key concerns relate to the proper and predictable application of the law and possible bias in favour of one of the parties.

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# Venezuela



## 1. Governing law

According to Article 29 of the Private International Law Act (*Ley de Derecho Internacional Privado*, 1998), all obligations will be governed by the mutual consent of the contracting parties. This Article reaffirms the principle of the autonomy of the will of the parties, even though there is no link between the contractual obligation and the law chosen by the parties.

## 2. Jurisdiction: parties choose your courts

According to Article 40 of the Private International Law Act (*Ley de Derecho Internacional Privado*, 1998), Venezuelan courts will have jurisdiction over trials initiated for actions involving the following economic content: (i) in matters related to chattel properties and real estate situated in Venezuela; (ii) in matters related to obligations to be performed in Venezuelan territory or if they derive from contracts entered into in Venezuelan territory, or from facts that occurred within the mentioned territory; (iii) when the defendant has been personally served with process within Venezuelan territory; and (iv) when the contracting parties have agreed expressively or implicitly to submit the case to Venezuelan jurisdiction. However, Article 46 of this Act recognizes the effect of the exclusivity of a foreign jurisdiction in matters related to rights over real estate. In this sense, our courts will not accept the submission when it is prohibited by the rule of law of the territory in which the property is located.

## 3. Jurisdiction: parties choose a foreign court

Articles 46 and 47 of the Private International Law Act (*Ley de Derecho Internacional Privado*, 1998) establish some exceptions in which our courts will not decline jurisdiction: (i) in matters related to actions that affect the creation, modification or extinction of rights over

real estate, as long as the rule of law of the territory in which the property is located allows it; (ii) the jurisdiction that corresponds to Venezuelan courts cannot be excluded contractually in favour of foreign courts, or arbitrators deciding abroad, in matters in which the issue refers to a controversy related to rights over real estate situated in Venezuela, or it relates to matters in which the parties are not legally permitted to decide or that it affects essential principles of Venezuelan public policy.

## 4. State (or sovereign) immunity

Venezuelan courts will honour what the Constitution and laws of the foreign state involved determine with respect to the validity of waivers of immunity from jurisdiction and enforcement. So, what will be decided may vary depending on the circumstances.

## 5. Pre-judgment arrests or freezing orders

In accordance with Article 585 of the Venezuelan Civil Procedure Code (*Código de Procedimiento Civil*, 1990), precautionary measures/injunctions can be decreed with respect to property located in Venezuela by the judge when there is a presumption of sufficient legal basis and when the danger of delay in making the decision is attested. Generally, it is necessary that the court has jurisdiction in the main action to grant the precautionary measure/injunction. Venezuelan case law has found that, prior to the constitution of an arbitral tribunal, precautionary measures/injunctions may be requested from the courts without this involving a waiver of the arbitration clause.

## 6. Disclosure or discovery of documents in litigation

In Venezuelan civil procedure legislation, unlike legislation in the common law system, there is no discovery prior to trial. The only time a party can know what the other has in his power is during the trial when the proofs are produced. The only information that must be disclosed to the other party is information requested by one party and admitted as evidence by the court. This means that the party who has the information must provide it but only if asked for it. For that to happen, the requesting party must present proof that the document is in the other party's power. All this happens during the trial.

## 7. Class actions

In Venezuelan legislation, class actions, as established in the common law system, do not exist. However, the Venezuelan Constitution (*Constitución de la República Bolivariana de Venezuela*, 2000) provides for similar kinds of actions called collective rights actions and diffuse rights actions, which up to 2010 were extensively regulated by case law, which was thereafter recognised by the Supreme Tribunal of Justice's Act of 2010. This has determined that individual claims cannot be filed through a collective or a diffuse rights action. If the claim relates to nationally relevant issues, the competent authority to decide the matter is the Constitutional Chamber of the Supreme Tribunal of Justice, but otherwise it would be the lower courts with jurisdiction where the facts occurred.

## 8. Enforcement of foreign judgments

Foreign judgments to be enforced in Venezuela are subject to a prior legal procedure established in the Venezuelan Civil Procedure Code (*Código de Procedimiento Civil*, 1990) and the Venezuelan Private International Law Act (*Ley de Derecho Internacional Privado*, 1998) called *exequatur*, in which the Venezuelan Supreme Tribunal of Justice's verifies if a judgment issued by a foreign court satisfies the requirements that allow its recognition; that is, to grant enforceability in Venezuela. Article 53 of the Venezuelan Private International Law Act (*Ley de Derecho Internacional Privado*, 1998) states the requirements that allow the enforceability of a foreign judgment in Venezuela as follows: (i) it is issued in civil or commercial matters or private legal relations; (ii) it has the force of *res judicata* according to the law of the state of origin; (iii) it does not involve rights over real estate located in Venezuela,

and is not subject to exclusive Venezuelan jurisdiction over the matter; (iv) the court of the foreign state that decided the issue has jurisdiction over the matter in accordance with the Venezuelan Private International Law Act (*Ley de Derecho Internacional Privado*, 1998); (v) the defendant has been duly served with process, and the procedural safeguards to ensure a reasonable possibility of defence have been granted; (vi) it is not incompatible with a previous judgment with force of *res judicata*; and (vii) there is not pending in Venezuelan courts a judgment over the same subject and between the same parties, initiated before the foreign judgment was rendered. However, arbitration awards are not subject to the prior *exequatur* procedure, which means they may be directly enforced.

## 9. Costs

The plaintiff must request in the lawsuit that the defendant be ordered to pay the proceeding costs and expenses, which amount shall not exceed 30% of the value of the amount litigated. The court will determine in conjunction with the decision the amount of the proceeding costs and expenses to be paid by the losing party.

## 10. Standards of the courts: high value disputes

Due to the fact that courts are sometimes not reliable, it is becoming more common to submit important disputes to commercial arbitration in Venezuela.

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# Vietnam



## 1. Governing law

In practice, Vietnamese courts only apply Vietnamese law. Although the Commercial Law permits foreign law to be applied to a contract with a "foreign factor", this foreign law may only be applied if the parties have agreed on arbitration or a foreign court for dispute resolution.

## 2. Jurisdiction: parties choose your courts

Vietnamese courts only accept jurisdiction within the scope expressly set out by the Civil Procedure Code, which does not include jurisdiction merely on the basis of the parties' choice.

## 3. Jurisdiction: parties choose a foreign court

## 4. State (or sovereign) immunity

Vietnamese law is silent on whether state immunity may be contractually waived or Vietnamese courts may give effect to such a waiver. In practice we are not aware of any case where a court has made a decision with regard to a waiver of state immunity.

## 5. Pre-judgment arrests or freezing orders

Vietnamese courts will normally grant a freezing order if the claimant is able to show that it has a good arguable case. A deposit may be required and used to compensate the defendant if the freezing order is later found to be unreasonable and/or unnecessary. The courts must have jurisdiction in the main action, and an order cannot be given in respect of foreign assets of the defendant.

## 6. Disclosure or discovery of documents in litigation

Vietnamese law is silent on the concept of "privileged documents". Any documents relevant to the case may be regarded as evidence.

## 7. Class actions

## 8. Enforcement of foreign judgments

Vietnamese courts, after consultation with the Ministry of Justice and the Ministry of Foreign Affairs, may in theory consider foreign court judgments for recognition and enforcement in Vietnam on a reciprocal basis. However, in practice we are not aware of any such judgment having been recognized and enforced in these circumstances.

## 9. Costs

In general, the losing party only has to pay the court fees, which are calculated by reference to the amount of the claim. Litigation costs, including lawyers' fees, may also be acceptable if the parties have so agreed prior to the dispute.

## 10. Standards of the courts: high value disputes

Civil and commercial proceedings before Vietnamese courts are lengthy and dissatisfying. Vietnamese judges frequently lack knowledge of international and foreign laws and are often incapable of working in foreign languages. There may be a bias in favour of local parties and against foreign parties. Enforcement of judgments may be delayed.

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# Zambia



## 1. Governing law

The principle of freedom of contract is generally upheld. There are specific exceptions for example, disputes concerning local land or alleged breach of fundamental rights and freedoms.

## 2. Jurisdiction: parties choose your courts

## 3. Jurisdiction: parties choose a foreign court

It is not possible to completely oust the jurisdiction of the courts. In some cases, our courts consider that they have jurisdiction unless proved otherwise but before exercising their jurisdiction when a challenge is raised, they will consider if the action has a real and substantial connection to Zambia as well as any other connecting factors.

## 4. State (or sovereign) immunity

## 5. Pre-judgment arrests or freezing orders

More often than not, where there is a fear that the defendant or a party to the proceedings will dissipate waste, damage or alienate property, a party interested in preserving the property can obtain an injunction (rather than a freezing order specifically) to prevent the dissipation, waste, damage or alienation of property pending determination of the dispute.

## 6. Disclosure or discovery of documents in litigation

The parties can make applications for production of documents that they believe are in the possession of the other party.

## 7. Class actions

Class actions in Zambia are in relation to employment claims, for instance, for recovery of benefits by retrenched or retired employees. The claimants are permitted under the High Court Rules Chapter 27 of the Laws of Zambia to authorise a representative from amongst themselves to drive the proceedings.

## 8. Enforcement of foreign judgments

Foreign judgments can be enforced by instituting a civil action under the Foreign Judgments (Reciprocal Enforcement) Act Chapter 76 of the Laws of Zambia where there are reciprocal arrangements between the nations or under the British and Colonial Judgment Act 1922 in respect of English judgments, but such registration may be challenged on grounds provided for in the Act. However, in the recent past the High Court has refused to enforce foreign judgments.

## 9. Costs

Costs are in the discretion of the court; however, the general principle is that costs will follow the event and the successful party will only be deprived of his costs where they have been wasted. Taxations are based on the scale of fees prescribed under the Legal Practitioners Act Chapter 30 of the Laws of Zambia even if the actual costs expended by the successful party exceed the taxed costs. As such, a losing party can end up paying 100% of the successful party's costs in certain instances.

## 10. Standards of the courts: high value disputes

There is a commercial court with four judges which deals with commercial disputes. The commercial court rules are designed to ensure the speedy resolution of disputes and in past experience disputes have been resolved in between eight months and three years. However, there are numerous ways for the parties to delay proceedings.

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# Zimbabwe



## 1. Governing law

Our courts will decline jurisdiction if the contract is governed by a foreign law and refer the parties to the relevant jurisdiction.

## 2. Jurisdiction: parties choose your courts

Apart from submission of the parties to our court's jurisdiction, our courts also take into consideration the doctrine of effectiveness, that is, whether it will be able to enforce its own judgments. The authority for this position of our courts is found in the judgment in *Veneta Mineraria Spa v Carolina Collieries Pty Ltd* 1985 (3) SA 633.

## 3. Jurisdiction: parties choose a foreign court

Our courts will assume jurisdiction notwithstanding the exclusive jurisdiction clause if the parties are avoiding tax or have created an illegal agreement.

## 4. State (or sovereign) immunity

Our courts generally apply restrictive immunity and will only give effect to the waiver insofar as it relates to an act of private law or "*jure gestionis*". In this regard, see the Supreme Court judgment in *International Committee of the Red Cross v Sibanda & anr* SC 48/03.

## 5. Pre-judgment arrests or freezing orders

The courts require that the claimant has a good *prima facie* case to obtain an order for anti-dissipation of assets. See the case of *Knox D'Arcy Ltd and ors v Jamieson and ors* 1996 (4) SA 348 (A).

## 6. Disclosure or discovery of documents in litigation

Parties can withhold some documents with the only restriction being that a party will not be able to use any document that has not been discovered.

## 7. Class actions

In terms of the Class Actions Act (Chapter 8:17) leave of the court must be obtained to institute a class action. The Act also provides for a Class Actions Fund; however, such a fund has not yet been implemented to assist such actions.

## 8. Enforcement of foreign judgments

The requirements for enforcement are stated in *Tiiso Holdings (Pvt) Ltd v Zisco HH – 95-10*. The Civil Matters (Mutual Assistance) Act (Chapter 8:02) is the governing act and provides for enforcement of foreign judgments of designated jurisdictions on a reciprocal basis. This Act repealed the Reciprocal Enforcement of Judgments Act.

## 9. Costs

In some cases the court makes an award of costs in the cause, if the matter is important to the development of our jurisprudence.

## 10. Standards of the courts: high value disputes

The courts have provided channels for urgent hearing of matters where the issues therein have to be determined on an urgent basis.

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# Annex A – Rome I

The EU Regulation known as **Rome I** (Regulation (EC) No 593/2008) applies in all EU Member States, other than Denmark, to regulate the determination of the governing law of contracts entered into on or after 17 December 2009. The starting point under Rome I is party autonomy – so a choice of governing law will generally be upheld by Member State courts applying Rome I. This is, however, subject to certain exceptions:

- Where all elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of law will not prejudice the application of non-derogable laws of that other country.
- Where all elements relevant to the situation at the time of the choice are located in one or more EU Member States, the choice of a non-EU Member State law will not prejudice the application of non-derogable provisions of EU law.
- The chosen law will not restrict the application of overriding mandatory provisions of the law of the forum.
- Effect may be given to overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, insofar as those overriding mandatory provisions render the performance of the contract unlawful.
- The courts hearing a dispute may refuse to apply a provision of the chosen law if such application is manifestly incompatible with the public policy of the forum.
- In relation to the manner of performance and the steps to be taken in the event of defective performance, the Member State courts will have regard to the law of the country in which performance takes place.
- The chosen law may not be applied to determine certain questions in relation to the existence and validity of a contract.
- Certain obligations are covered by other conventions or EU regulations or are outside the scope of Rome I, for example certain matters relating to insolvency, trusts, agency and company law matters. The national law of the Member State hearing a dispute or other EU or international treaties will determine the governing law of those obligations. By way of example in the insolvency context, reorganisation measures introduced by a Member State in respect of credit institutions in financial difficulties may have to be given effect to in other Member States under Directive 2001/24/EC on the reorganisation and winding-up of credit institutions.

For contracts entered into prior to 17 December 2009, EU Member State courts will apply different rules. Some EU Member States will apply the Rome Convention (the predecessor to Rome I) to such contracts. The Rome Convention contains broadly similar rules to those set out in Rome I. Others will apply national law.

# Annex B – the Brussels regime

The EU Regulation known as the **Brussels Regulation**<sup>01</sup> (or **Brussels I**) was, until recently, the key European instrument on jurisdiction and enforcement in civil and commercial matters. This Regulation has recently been updated. The updated (**recast**) Brussels Regulation<sup>02</sup> is applied by Member State courts in respect of proceedings issued on or after 10 January 2015. Unless otherwise specified, all references in this survey to the Brussels Regulation are references to the recast Regulation and the provisions in that instrument.

The Brussels Regulation is applied by all 28 EU Member State courts including more recent accession states such as: Croatia, Cyprus (excluding Northern Cyprus), Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia. The Brussels Regulation was extended to Denmark in 2012.<sup>03</sup> Thus all Member States are subject to the same rules as to jurisdiction and enforcement, at least in respect of defendants domiciled in Member States.

The **Lugano Convention 2007** sets out the rules on jurisdiction and enforcement of judgments for the European Free Trade Association (**EFTA**) countries (except Liechtenstein) and the EU Member States,<sup>04</sup> and its provisions are broadly equivalent to the unamended Brussels Regulation.

## Default rule

If parties (wherever domiciled) litigate before a Member State court, the Brussels Regulation may be relevant. The default jurisdictional rule under the Brussels Regulation is that, subject to certain limited exceptions, persons domiciled in a Member State shall be sued in the courts of that Member State (Article 4). One such exception is where a defendant has agreed that disputes under a commercial contract will be resolved in a particular Member State court or courts (Article 25).

## Article 25 – importance of jurisdiction clauses<sup>05</sup>

The Brussels Regulation specifically recognises and gives effect to jurisdiction or choice of court clauses in favour of a Member State court, even if none of the parties to the jurisdiction clause is domiciled in a

Member State (Article 25). The recitals to the Brussels Regulation underline the importance of party autonomy in forum selection, noting that such a choice of forum "should be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation" (Recital 19). Article 25 refers to jurisdiction clauses specifying a Member State court. The position of jurisdiction clauses in favour of "third state" or non-Member State courts is considered further below.

Article 25(1) of the Brussels Regulation provides that where parties (regardless of domicile) have agreed that a Member State court is to have jurisdiction over any disputes that may arise in relation to a particular legal relationship, that court will have jurisdiction, and its jurisdiction will be exclusive (unless the parties have agreed otherwise). Article 25(1) further provides that the question whether a jurisdiction agreement is null and void as to its substantive validity will be determined under the law of the Member State identified in the jurisdiction agreement. Article 25 sets out certain formalities required for such a jurisdiction agreement. Article 25(5) establishes the principle of "separability". It provides that a jurisdiction agreement which forms part of a contract will be treated as independent of the other terms of the contract, and that its validity cannot be contested solely on the ground the contract is not valid.

There are circumstances when an Article 25 jurisdiction clause may not be effective. For example, if a defendant "enters an appearance" before another court (save to object to the jurisdiction of that court) then he will be taken to have waived his right to rely on the jurisdiction clause in his contract (Article 26). Furthermore, an Article 25 jurisdiction clause may not be effective if a dispute principally concerns a matter where Article 24 of the Brussels Regulation presumes that certain Member State courts have mandatory exclusive jurisdiction. For instance, in proceedings concerning certain rights in relation to real property, the courts where the property is situated have exclusive jurisdiction (Article 24(1)). Similarly, where a dispute concerns corporate decision-making, it is the

courts of the place of incorporation that have exclusive jurisdiction (Article 24(2)).

### Related proceedings pending

Where there is an Article 25 exclusive jurisdiction agreement and there are pending proceedings involving the same parties and the same cause of action before more than one Member State court, even if the court specified in the jurisdiction clause is not first "seised" of the relevant proceedings, it may nevertheless proceed to determine whether or not it has jurisdiction (Articles 29 and 31(2)) and, if it does, determine the case. Unlike other situations, a contractually chosen court is not required by the rules to await the decision on jurisdiction of the court first "seised".

The strict *lis pendens* (related actions) rules in the old Brussels Regulation were interpreted by the ECJ as meaning the courts second seised of proceedings would be required to stay those proceedings, even if the proceedings were brought in the first seised courts in breach of a jurisdiction clause.<sup>06</sup> The rigidity of this old first-in-time rule was frequently abused by potential judgment debtors who commenced proceedings (in breach of contract) in slow-moving courts as soon as a dispute arose, often seeking a declaration of non-liability. When the potential judgment creditor commenced proceedings in the courts chosen in the jurisdiction clause, those courts were forced to stay their proceedings pending a decision on jurisdiction from the court first seised. This tactic is known as an "**Italian torpedo**". Revisions to these rules in the recast Regulation (highlighted above) will mean such tactics are now much less effective (but only when the jurisdiction clause confers exclusive jurisdiction on the chosen courts).

### Third state jurisdiction clauses

While sweeping away the requirement regarding the domicile of the parties, Article 25 remains confined to jurisdiction clauses that designate Member State courts. This restriction means that there is still some uncertainty about the position across Member State courts as to whether or not a jurisdiction clause in favour of a third state (for example, a New York jurisdiction clause) would be respected by them.

Articles 33 and 34 provide Member State courts with discretion to stay proceedings to take into account

proceedings involving the same cause of action and the same parties or related proceedings pending before the court of a third state (ie non-EU Member State) in certain limited circumstances. Such circumstances may include where parties have commenced proceedings in a third state pursuant to a jurisdiction clause in favour of the courts of that jurisdiction. Given the controversial ECJ decision of *Owusu v Jackson*,<sup>07</sup> the question whether or not a Member State court, absent proceedings being commenced first in the third state (ie when Articles 33 and 34 are not engaged), would stay any proceedings commenced before them in breach of a third state jurisdiction clause, is not straightforward.<sup>08</sup> However, recent English authority, *Plaza BV v The Law Debenture Trust Corporation PLC*<sup>09</sup> (although decided under the original Brussels Regulation), suggests that, at least in the view of the English court, a Member State court would be entitled to exercise its discretion to stay its proceedings in these circumstances and respect the parties' choice of a third state court to resolve their disputes. In this decision the English court essentially gave "reflexive" effect to Article 25, extending the principle to apply to non-Member State jurisdiction clauses.

Finally, it is thought that the EU's ratification of the Hague Convention on Choice of Court Agreements of 30 June 2005 (the **Hague Convention**) will also provide greater certainty in this area as between Member States and non-Member State signatories of the Convention. In short, signatory states agree to give effect to exclusive jurisdiction clauses in their favour and to respect exclusive jurisdiction agreements in favour of the courts of other signatory states. They also agree to enforce judgments issued by other signatory states following the resolution of disputes pursuant to such clauses. As noted in the EU Council Decision of 4 December 2014 (by which the European Union approved the Hague Convention), the Hague Convention helps promote "legal certainty for parties that their choice of court agreement will be respected and that a judgment given by the chosen court will be capable of recognition and enforcement in international cases". It is expected that the EU's ratification of the Hague Convention will encourage other jurisdictions to accede to this Convention.

## Enforcement

Under the Brussels Regulation a judgment of a court of a Member State can be recognised and enforced relatively easily in other Member State courts, subject to certain limited exceptions. The grounds upon which a judgment may not be recognised include the ground that recognition is manifestly contrary to the public policy of the Member State in which recognition is sought (Article 45(1)(a)). The policy underpinning these rules is explained in the recitals to the Brussels Regulation, which emphasise the need for "mutual trust in the administration of justice in the Union". As noted above, ratification by the EU of the Hague Convention should aid enforcement of Member State judgments in other signatory states.

## Arbitration

Article 1(2)(d) of the Brussels Regulation excludes arbitration from its scope, and amendments in the recast Regulation seek to underline this separation. Recital 12 states specifically that the Regulation should not prevent the courts of Member States from referring parties to arbitration, from staying or dismissing proceedings in favour of arbitration, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law. Article 73(2) provides that the Regulation "shall not affect the application of the 1958 New York Convention".

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01. Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. This largely superseded the Brussels Convention (the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (27 September 1968)). The Brussels Convention is now generally irrelevant save in relation to some dependant territories.
  02. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012.
  03. See the agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, published on 23 March 2013: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:079:0004:0004:EN:PDF>.
  04. Iceland, Norway and Switzerland.
  05. Article 25(1) states: "If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise".
  06. *Gasser v MISAT* (C-116/02) European Court of Justice, 09 December 2003.
  07. Case C-281/02. The ECJ held that where a defendant was sued on the basis of domicile Member State courts had no discretion to decline jurisdiction on *forum non conveniens* grounds.
  08. On the basis of domicile (or certain other grounds).
  09. [2015] EWHC 43 (Ch).

# Acknowledgements

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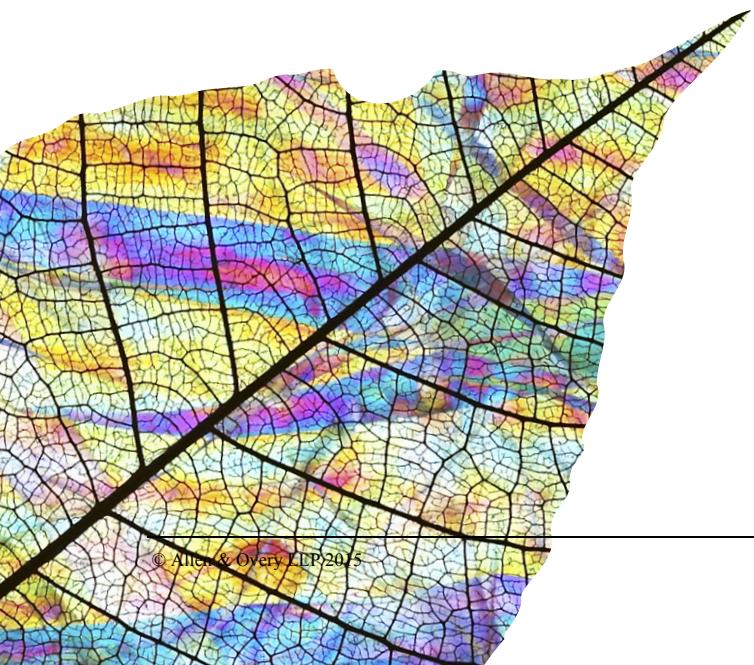
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