Dispute Resolution

Contributing editors
Martin Davies and Kavan Bakhda

2018

GETTING THE DEAL THROUGH

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Dispute Resolution 2018

Contributing editors

Martin Davies and Kavan Bakhda

Latham & Watkins

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Preface

Dispute Resolution 2018

Sixteenth edition

Getting the Deal Through is delighted to publish the sixteenth edition of *Dispute Resolution*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Bermuda, Ghana, Greece, Korea and United Arab Emirates.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Martin Davies and Kavan Bakhda of Latham & Watkins, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
June 2018

United States – New York

Robert M Abrahams, Robert J Ward and Caitlyn Slovacek

Schulte Roth & Zabel LLP

Litigation

1 Court system

What is the structure of the civil court system?

New York has both state and federal courts. New York state courts have general jurisdiction over most matters occurring within the state or involving citizens of New York, while the federal courts have more limited jurisdiction. See the 'United States – Federal Law' chapter for more about the federal court system.

The New York civil state court system is complex and consists of a tiered court structure. The trial court of general jurisdiction is the Supreme Court, but there are also a number of trial courts whose jurisdiction is limited to hearing cases of smaller amounts. The next tier consists of intermediate appellate courts, making up the appellate divisions. The final tier is the highest court, the Court of Appeals.

In general, cases in New York will start in one of the trial courts. As mentioned above, the general civil trial court in New York is the New York Supreme Court, which can hear almost every type of civil and criminal case. Supreme Court jurisdiction includes cases above certain monetary amounts (typically US$25,000) or requests for equitable relief, such as an injunction. The Supreme Court in many counties also has a specialised commercial division that handles complicated commercial cases. For smaller cases in New York City, the Civil Court decides lawsuits involving claims for damages up to US$25,000 and includes a small claims part for cases involving amounts up to US$5,000 and another part for housing-related matters concerning landlords and tenants. Outside New York City there are district courts, city courts and town and village courts that hear smaller claims.

In addition, there are several speciality trial courts in New York, including the Court of Claims, which has exclusive authority over claims seeking money damages against the state of New York and jurisdiction over claims against certain state-related entities; the Surrogates Court, which hears matters related to validity of wills and the administration of estates; and the Family Court, which hears divorce cases, matters related to children and other family matters.

Above the trial courts, the intermediate appellate courts review appeals originating from the trial courts. The Appellate Term reviews cases originating from certain lower courts such as the New York City Civil Court, the district, city or town and village courts. The principal appellate court is the Appellate Division, which consists of four departments that geographically divide the state. The Appellate Division hears civil and criminal appeals from the Supreme Court trial courts, as well as civil appeals from the appellate terms and certain county courts.

New York's highest court is the Court of Appeals. The Court of Appeals is a court of very limited jurisdiction. It hears civil and criminal appeals from the state's intermediate appellate courts, and in certain instances appeals from the trial courts.

New York also has four federal district courts that geographically divide the state (Northern, Eastern, Southern and Western). The Southern and Eastern Districts cover the greater New York City area. Appeals from any of the districts are heard by the United States Court of Appeals for the Second Circuit, which sits in New York City. The Second Circuit also hears appeals from the Connecticut and Vermont federal district courts. The United States Supreme Court, the highest federal court, may review by petition decisions rendered by the Second Circuit. For more information about the federal court structure, see the 'United States – Federal Law' chapter.

2 Judges and juries

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

The role of judge and jury varies depending on the nature of the matter before the court. In New York, any party may demand a trial by a jury of six persons for any claims that are legal in nature, as opposed to claims in equity. Claims that are legal and triable by a jury generally include those seeking money damages. Even if the parties have a right to a jury, they may waive that right and proceed without a jury. In a jury case, the jury decides questions of fact and the judge decides questions of law, including the admission of evidence and procedural issues.

On the other hand, if the nature of the claim sounds in equity or requests equitable relief, such as an injunction or a declaratory judgment, or if the parties waive the right to a jury trial, the case will be heard as a bench trial – a judge without a jury. During a bench trial, a judge will decide both questions of fact and law.

The role of the judge will also vary depending on the personality and style of the judge. Some judges will use every opportunity to intervene in a matter, while others will more passively let a case unfold.

The selection of justices for New York trial courts, the Supreme and county courts, occurs primarily through partisan elections. The appellate courts and limited jurisdiction courts use an assisted appointment method. For example, Appellative Division justices are first nominated by a commission composed of a selection of current Supreme Court justices. Then the Governor appoints a justice from among the nominee candidates. Court of Appeals judges are selected through the same process as the Appellate Division, except for the additional requirement that the Senate consents to the gubernatorial appointment.

Due to concerted efforts in the nomination and appointment processes, the composition of the bench has become increasingly diverse in recent years.

3 Limitation issues

What are the time limits for bringing civil claims?

New York has a complex statutory scheme that sets forth different limitations periods, referred to as statutes of limitations. The applicable statute of limitations varies depending on the nature of the claim. The limitations period generally begins to run from the time the action accrues. Some common New York statutes of limitations are:

- three years for actions based on tort claims such as personal injury or injury to property (except for some intentional torts such as defamation, for which a one-year limitations period applies);
- six years for actions based on contractual obligations, or actions based on a bond or note; and
- six years or two years for actions alleging fraud (the time within which the action must be commenced is the longer of six years from the date the cause of action accrued or two years from the time the plaintiff discovered the fraud, or could with reasonable diligence have discovered it).

Parties may also enter into tolling agreements to stay the running of the limitations period. This is often done while parties are discussing settlement.

4 Pre-action behaviour

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

There are no pre-action considerations, with one limited exception. Under New York Civil Practice Laws and Rules (NY CPLR) section 3102(c), before an action is commenced a party may request a court order to seek disclosure to aid in the bringing of an action to preserve information or to aid in an arbitration. These pre-action requests are very rarely granted.

5 Starting proceedings

How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

A party may commence a civil action by purchasing an index number, and then filing either a summons and complaint or a summons with notice (a summons without a complaint) with the county clerk. The party must then serve the summons and complaint or summons with notice upon all defendants within 120 days. Service may be accomplished in various ways, depending on the type and location of the defendant.

The summons identifies the name of the case, the name of the court, the index number, the date filed, the name of the plaintiff and plaintiff's lawyer, and the name of the defendant or defendants. Where, as is usual, a complaint is also served, the complaint sets out the plaintiff's claims against the defendant and the relief sought by the plaintiff. A summons with notice, which is rarely used, includes a summons, and instead of a complaint attaches a brief description of the case and relief the plaintiff is seeking.

After the completion of service, an affidavit attesting to proper service should be filed with the court. If service is not made within 120 days the court, upon motion, may dismiss the action. The court may also, upon a showing of good cause, approve an extension for the time to complete service of up to 60 additional days.

For proceedings seeking a judgment for the payment of a note, the plaintiff may commence an expedited proceeding by serving a summons and notice of motion for summary judgment along with the supporting papers in lieu of a complaint (see NY CPLR section 3213).

In general, the courts are able to efficiently and effectively address their caseloads. An action may be commenced in various different courts depending on the disputed issue. By categorising cases and providing specialised courts, the New York court system is able to more easily address the increasing caseloads. For example, in the counties that hear the highest number of commercial disputes there are commercial division courts that deal only with such matters. Moreover, the courts will also suggest cases to be referred to alternative dispute resolution or designate certain issues to be decided by administrative judges to ease docket congestion.

6 Timetable

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

In general, after receiving service of process, a defendant has between 20 and 40 days (depending on the method of service and type of proceeding) to respond by filing an answer or a motion to dismiss the complaint with the court. Any allegations in the complaint not denied in the answer are deemed admitted. Unlike in federal court, in New York state courts, related counterclaims by the defendant do not have to be filed at this time, but if a defendant chooses to file counterclaims they would generally be filed along with the answer. Either party may also join third parties to an action, who may be liable for a portion of the original claim or against whom a party may have additional claims related to the same transaction.

Under the New York Uniform Court Rules (NYCRR), parties can request a preliminary conference with the court any time after the completion of service (22 NYCRR section 202.12). Soon after such request is filed, the court will notify all parties of a scheduled conference date. At the conference, counsel should be prepared to discuss matters, including the simplification and limitation of legal issues, establishing a timetable for the completion of all disclosure proceedings, and the establishment of the method and scope of any electronic discovery. At the conclusion of the conference, the court will issue a preliminary conference order, which is a written order including stipulations of counsel that sets forth a timetable for all forms of discovery, the timing for summary judgment motions and the time for the filing of a note of issue, which is the document that informs the court that the parties have completed discovery and are ready for trial.

7 Case management

Can the parties control the procedure and the timetable?

Subject to approval by the court, parties can agree to amend the preliminary conference order. Parties may also make a motion to the court to request extensions of the scheduling deadlines.

8 Evidence – documents

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

There is an affirmative duty to preserve documents. Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy to put in place a 'litigation hold' to ensure the preservation of relevant documents. The scope of discovery is very broad, and includes documents that may not be helpful to a party's case. Generally, parties serve upon each other written requests for documents related to the claims or defences. Parties are required to produce all documents responsive to such requests that are within their possession, custody or control, and not privileged or otherwise immune from disclosure. Parties may object to the scope and nature of the requests. The court, upon motion, will resolve any disputes regarding the document requests.

9 Evidence – privilege

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

New York provides protection from disclosure for several categories of privileged documents. The most commonly invoked privileges are the attorney–client privilege and the attorney work-product doctrine. The attorney–client privilege protects confidential communications between an attorney and his or her client made for the purpose of facilitating or rendering legal advice. The attorney–client privilege can be applied to in-house counsel communications so long as the in-house lawyer is working in his or her capacity as a legal adviser, not a business adviser. The attorney work-product doctrine protects documents or communications created by counsel in anticipation of litigation. Unlike the attorney–client privilege, the work-product doctrine only affords a qualified protection; a court can order disclosure of work product if the requesting party can demonstrate substantial need or undue hardship.

New York also recognises the common interest and joint defence privileges as an extension of the attorney–client privilege. The common interest and joint defence privileges protect attorney–client privileged information shared between parties and their attorneys with a common interest in an actual or potential litigation against a common adversary. A few other non-attorney related privileges are recognised in New York. The spousal privilege protects communications between spouses. The physician–patient privilege protects communications between medical providers and patients. The clergy–penitent privilege protects communications between clergy members and penitents.

10 Evidence – pretrial

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

New York does not require written statements from lay witnesses before trial. Instead, parties are generally entitled to take oral depositions of lay witnesses before trial. Although not required, written witness statements may be submitted in the form of affidavits or declarations in support of pretrial motions.

On the other hand, expert witnesses are required to file written reports or disclosures setting forth the basis for their opinions before trial and may also be required to attend depositions. Expert witnesses will also provide oral testimony at trial.

11 Evidence – trial

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

Trials are conducted through the presentation of live oral testimony from both lay and expert witnesses. Both sides are allowed to ask questions of the witnesses. The party who calls a witness will typically start with a direct examination of the witness followed by a cross examination by the opposing party, and then re-redirect and possibly recross. If a witness is unavailable for trial, deposition testimony may be admitted in certain circumstances. Documents and objects may also be presented at trial as evidence.

12 Interim remedies

What interim remedies are available?

There are four types of interim remedies available in the New York state courts. First, when a party is seeking a money judgment, the courts may issue an order of attachment against property, including, in particular, bank accounts, for the purpose of securing a final judgment (similar to a *Mareva* injunction). The party seeking the attachment must demonstrate that there is a risk that the judgment will not be satisfied; for example, such risk may occur when the defendant is a foreign corporation not qualified to do business in the state, or the defendant is about to remove assets from the state with the intent to defraud creditors.

Second, a party may obtain emergency relief through the issuance of a preliminary injunction, upon showing that a party threatens or is about to do an action that, if committed or continued during the pendency of the case, would cause injury or suffering tending to render a final judgment ineffectual. A temporary restraining order may also be granted pending a hearing for the preliminary injunction if it appears that immediate and irreparable injury, loss or damage will result before the hearing on the injunction can occur.

Third, the courts may order a temporary receivership. If a party can demonstrate a danger that property will be removed from the state, or lost, or materially injured or destroyed, the court may appoint a person (the receiver) to take control of designated property and see to its care during the course of a litigation or appeal.

Fourth, a party may file a notice of pendency for actions involving real property in which the title, possession or use and enjoyment of real property may be affected. The notice is filed with the county clerk and puts the world on notice that there is dispute over the potential rights regarding a specific piece of a real property.

Some provisional remedies may also be available in support of foreign proceedings. For example, an order of attachment may be issued pending an arbitration in a foreign country or to enforce a foreign money judgment under NY CPLR section 6201.

13 Remedies

What substantive remedies are available?

In civil actions in New York, the courts may order both legal and equitable remedies.

Legal remedies include money damages, including:

- compensatory damages;
- consequential damages;
- punitive damages (not available on contract claims);
- penalties;
- interest; and
- liquidated damages.

Equitable remedies include:

- temporary, preliminary and permanent injunctions;
- accounting, rescission, reformation of contracts and imposition of constructive trusts; and
- declaratory judgments and orders of specific performance.

New York statutorily provides for the payment of interest on litigated obligations. The timeline for accrual (whether post-judgment or pre-judgment) depends on the type of action. The rate of interest is fixed at 9 per cent per year unless otherwise provided by statute.

14 Enforcement

What means of enforcement are available?

Enforcement is usually achieved through supplementary proceedings in which the judgment creditor uses a series of devices to collect payment of the judgment. The first such device is a restraining notice, which is issued by the judgment creditor's attorney and served upon the judgment debtor or a garnishee (a person holding property belonging to the debtor). The notice enjoins the person served from transferring the debtor's property except to the sheriff or pursuant to a court order. The creditor can compel disclosure of the location of the debtor's assets without leave of the court for all matters relevant to the satisfaction of a judgment. The creditor can serve subpoenas on the judgment debtor or the debtor's friends, relatives or garnishees who may have information on the debtor's assets, including the debtor's bank, accountant, broker and employer. The subpoena can request attendance for the taking of a deposition, production of books and papers or responses to written questions. Once the assets are found, the creditor can request a turnover order instructing the debtor or garnishee to deliver assets or make payment to the creditor. A party who refuses to obey a turnover order may be found in contempt and fined or imprisoned until it obeys.

15 Public access

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

Court hearings in New York are, except in rare instances, open to the public, as are the documents filed with the court. Under certain rare circumstances, the court at its discretion may order some records and hearings to be sealed. Particularly, courts will seal matters regarding confidential or sensitive business information, such as those involving trade secrets, or information necessary to safeguard national security.

16 Costs

Does the court have power to order costs?

As is typical throughout the United States, New York courts generally do not have the power to award attorneys' fees and costs to the prevailing party. If however, the parties have provided in a contract for fee shifting, that arrangement can be enforced by the courts. The courts may also award a limited amount of costs and fees related to the proceeding to the prevailing party. Article 82 of the NY CPLR limits the costs awarded to US$200 if the case terminates before the note of issue is filed, an additional US$200 if the case terminates after the note of issue is filed but before trial, and an additional US$300 if the case has gone to trial.

17 Funding arrangements

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

Lawyers are allowed to establish contingency fee arrangements for most civil matters, except for cases involving a fee prohibited by law or a rule of court, a fee based on fraudulent billing, or in certain domestic relation matters. A contingency fee arrangement must be in writing. Lawyers are prohibited from sharing fees with non-lawyers.

There is no per se prohibition against parties using third-party funding. New York, however, does enforce a narrow construction of champerty and maintenance rules. New York Judiciary Law section 489 prohibits a 'third person' from buying or taking an assignment of a bond, promissory note, bill of exchange, book debt or thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon. Alternatively, a party may share the risk with a third party through an insurance policy or indemnification agreement.

18 Insurance

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

Insurance is available and commonly used to cover both the costs of defence (the legal costs) and payment of a judgment or settlement amount.

19 Class action

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

Class actions are a fairly common way for litigants with similar claims to seek collective redress. To sue as a class in New York, members must establish:

- numerosity – a class so numerous that joinder of all members, whether otherwise required or permitted, would be impractical;
- commonality – there are questions of law and fact common to the class that predominate over any questions affecting only individual members;
- typicality – the claims or defences of the representative parties are typical of the claims or defences of the class;
- adequacy – the representative parties will fairly and adequately protect the interest of the class; and
- superiority – the class action is superior to other available methods for fair and efficient adjudication of the controversy.

In addition to class actions, shareholders of a corporation or members of an unincorporated association may bring a collective action on behalf of the corporation or association, known as a derivative action, to enforce a right that the corporation or association may properly assert but has failed to assert.

20 Appeal

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

New York is unique as to appealability, making a broad range of intermediate or 'interlocutory' trial court orders immediately appealable without waiting for a final judgment. Article 57 of the NY CPLR sets forth various categories of interlocutory orders that are appealable by right to the Appellate Division, including trial court orders regarding determinations on provisional remedies, substantive rights and statutory provisions. Trial court orders not appealable by right may still be appealed, if the party seeking to appeal is granted permission by the court that originally issued the order. All final orders and judgments are appealable by right to the Appellate Division.

Additionally, article 56 allows certain orders to be appealed by right to the Court of Appeals. For example, Appellate Division orders where there is dissent by at least two justices on questions of law may be appealed directly to the Court of Appeals. In addition, final trial court orders or Appellate Division orders where there have been determinations regarding the construction of the state or federal constitution can be appealed to the Court of Appeals. Otherwise, appeals may be taken to the Court of Appeals after first seeking permission from the Court of Appeals or the Appellate Division. The Court of Appeals is the court of last resort in New York; there are no additional state courts available to review appeals after the Court of Appeals.

21 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

Unless a treaty with a foreign country specifically requires it, New York is not compelled to recognise and enforce non-money judgments except for those that fall under the doctrine of comity. As for money judgments, New York has adopted the Uniform Foreign Country Money Judgments Act under article 53 of the NY CPLR. The Act dictates in detail the types of foreign money judgments that will be recognised. Generally, foreign judgments rendered under a system substantially similar to the American system will be recognised. However, judgments rendered under a system that does not provide for impartial tribunals or procedures compatible with the requirements of due process or by foreign courts that did not have personal jurisdiction over the defendant will not be recognised.

If a party is seeking to obtain a money judgment in New York, it can take advantage of an expedited procedure under NY CPLR section 3213, which allows filing and service of a summons along with a motion for summary judgment in lieu of a complaint, skipping over the normal initial step of filing and serving a summons and complaint.

22 Foreign proceedings

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

The same disclosure methods available for domestic actions may be used for proceedings pending in foreign jurisdictions. Under NY CPLR section 3102(e), a mandate, writ or commission issued by a foreign jurisdiction, requiring the testimony of a witness in the state, will be enforced to compel a witness to appear and testify in the same manner and by the same process employed for the purpose of taking testimony in domestic actions.

Arbitration

23 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

Arbitration law in New York is not based on the UNCITRAL Model Law. Rather, it is largely governed by contractual agreement and non-court affiliated arbitral associations. Court intervention is limited to determining if the dispute is arbitrable, whether the arbitration was sought in a timely manner and if the arbitrator's award should be confirmed (into a judgment), modified or vacated (see article 75 NY CPLR).

24 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

An agreement to arbitrate must be in writing, but the writing does not need to be signed (NY CPLR section 7501). An agreement to arbitrate is viewed as a contractual arrangement and must satisfy all other legal requirements for any contract. New York does not require any particular form or words to make a valid arbitration agreement.

25 Choice of arbitrator

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

Typically, parties will contractually agree to adopt the rules and procedures of one of the well-known arbitral associations such as the American Arbitration Association (AAA), JAMS or the International Chamber of Commerce's International Court of Arbitration (ICC). Arbitral associations often provide default rules and procedures for the appointment of an arbitrator. Parties may also stipulate to their own terms for choice of an arbitrator in the arbitration clause. If the arbitration agreement does not provide a method for the appointment, or if the agreed method fails, the court, upon application, may appoint an arbitrator (NY CPLR section 7504).

A party may seek judicial intervention to challenge the appointment of an arbitrator on the grounds that the arbitrator lacks impartiality or fails to meet the contractual standards. If a party seeks judicial intervention after the award, it may be burdened with the presumption that it knowingly waived the disqualifying relationship and proceeded without objection. Therefore, an early request to a court for intervention is advisable.

26 Arbitrator options

What are the options when choosing an arbitrator or arbitrators?

The available arbitrator options will depend on the chosen arbitral association or the court. Generally each arbitral association or court maintains a roster of available mediators and arbitrators. Eligibility for such rosters is based on each association or court's own criteria and

evaluation. For example, the Commercial Division of the New York County Supreme Court maintains a list of over 250 individuals that, among other qualifications, have received mandatory mediation training. Typically, the arbitral tribunal can provide arbitrators with sufficient knowledge or experience to address the complexity of the issues presented.

27 Arbitral procedure

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

The AAA, JAMS, ICC or other administering arbitral association typically provides procedural rules that apply to the conduct of the arbitration unless otherwise stipulated by the parties. Some arbitral associations such as the AAA provide different sets of rules depending on the type of the matter (labour, construction, commercial, international, etc). In the absence of a chosen arbitral association or procedural rules stipulated by the parties, article 75 NY CPLR provides a few basic rules. Before the hearing, the appointed arbitrator must swear an oath to decide the controversy faithfully and fairly. The arbitrator must choose a time and place for the hearing and properly notify all parties. The parties are entitled to be heard, to present evidence and to representation by an attorney. There must be a majority decision among arbitrators to determine any questions or render any awards (NY CPLR section 7506). The rest of the procedure is left up to the arbitrator or panel's discretion.

28 Court intervention

On what grounds can the court intervene during an arbitration?

Most court intervention (which will be at the trial court level) occurs at the outset of the arbitration proceeding or after the final arbitration award. At the outset, a party may request court intervention to compel or stay arbitration proceedings. The courts may determine the arbitrability of the issue and the timeliness of the dispute. During an arbitration, the court may intervene at the request of the parties. Parties may request provisional remedies such as orders of attachment or preliminary injunctions. After the arbitration award, parties typically apply to the court to confirm, modify or vacate an award.

29 Interim relief

Do arbitrators have powers to grant interim relief?

The major arbitral associations typically grant arbitrators the authority to issue interim relief. A party may, however, prefer to seek interim relief from the courts, which typically can rule on interim relief more quickly. The courts may direct disclosure to aid in the arbitration and provide provisional remedies if necessary (NY CPLR section 3102(c) et seq, 7502).

30 Award

When and in what form must the award be delivered?

Each arbitral association has different rules regarding when and in what form an award will be delivered. Otherwise, the award must be delivered in accordance with the time fixed by the agreement, if any. Sometimes an award can be as simple as a determination of how much is owed by one party to another. When an arbitral association's rules have not been adopted, and the agreement does not state a fixed time for the award, the court may order a time for the delivery of an award. A court-ordered award shall be in writing, signed and affirmed by the arbitrator, and delivered either personally or by registered or certified mail (NY CPLR section 7507).

31 Appeal

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

A party can seek to vacate or modify an award on very limited grounds. An award will be vacated if a party can demonstrate that it was prejudiced by:

- corruption, fraud or misconduct in procuring the award;
- partiality of the arbitrator appointed as neutral; or
- the arbitrator, or agency or person making the award, exceeded his or her power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made (NY CPLR section 7511).

Additionally, a party may seek to vacate an award under the doctrine of manifest disregard of the law or evidence. This doctrine is severely limited, and applicable only in rare circumstances in which there is an egregious impropriety on the part of the arbitrators. Errors or misunderstandings of the applicable law generally do not fall under the doctrine.

Once a party has sought redress in the court system, all the normal rights of further appeal attach to any order from the lower court.

32 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

Foreign and domestic awards are enforced through the courts. Once a domestic award is final, a party may seek confirmation of the award within one year after its delivery. Upon confirmation, the court will issue a judgment. That judgment is afforded all the same remedies and enforcement mechanisms as a judgment originally issued by the court (NY CPLR section 7514).

A foreign arbitral award will be treated much the same as a foreign judgment in New York. A non-money award may be enforced under the doctrine of comity, while article 53 of the NY CPLR permits the enforcement of a money award rendered by a substantially similar system of due process.

33 Costs

Can a successful party recover its costs?

Similar to court costs and attorneys' fees in civil litigation, a successful party is not generally entitled to the costs associated with the action. However, the arbitration clause in the agreement between the parties may provide for the allocation of costs. In the absence of a specific agreement regarding the costs, the arbitrator, as allowed by arbitration associations and the court, may, with discretion, award costs as part of the final award. Court-appointed arbitrators are not allowed to award attorneys' fees, unless provided by the arbitration clause (NY CPLR section 7513). However, some arbitral associations (for example, the AAA) allow arbitrators to award reasonable costs for legal representation of the successful party. Lastly, the court, upon application, may reduce or disallow any fee or expense it finds excessive, or allocate it as justice requires.

Alternative dispute resolution

34 Types of ADR

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

Mediation is the most common ADR process used in New York. The New York court system offers parties access to various ADR services including civil mediation, civil neutral evaluation, summary jury trials and civil arbitration. New York has established a state ADR office within the Division of Court Operations. The state ADR coordinator works with judges, courts, administrators and members of the Bar to design dispute resolution programmes. The ADR office also oversees many community dispute resolution centres (CDRCs). The CDRCs primarily mediate cases referred by local courts and offer other dispute resolution services.

35 Requirements for ADR

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

In general, parties are not required to consider ADR before or during proceedings, with a few limited exceptions. For example, in disputes regarding attorneys' fees between US$1,000 and US$50,000, an attorney must notify the client about the right to use the Attorney–Client Fee Dispute Resolution Program before bringing the matter to court

(22 NYCRR section 137). In addition, the New York Supreme Court Commercial Division may direct parties to a court-appointed mediator for the purpose of resolving some or all of the issues presented in the litigation (22 NYCRR section 202.70(g) Rule 3).

Miscellaneous

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

No.

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