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Contributing Editor:  
**Greg Lascelles**  
Covington & Burling LLP



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### Steptoe

## 1 Litigation – Preliminaries

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

New York is a common law jurisdiction with its roots in English common law. The Civil Practice Law & Rules, supplemented by individual rules for specific courts and judges, governs civil procedure in state courts.

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

New York has trial courts, called Supreme Courts, for each county, that have state-wide jurisdiction in law and equity, and generally hear cases involving damages over \$25,000. There are lower courts that hear civil cases involving damages less than \$25,000. An intermediate appeals court, called the Appellate Division, hears appeals from the Supreme Court and a lower appeals court, called the Appellate Term. The Court of Appeals is the final court of appeal and hears appeals from the State's intermediate appellate courts, and in some instances from the trial courts.

There are also special courts for: (i) family matters; (ii) landlord–tenant/housing matters; (iii) estate administration and probate of wills; and (iv) actions against the State of New York for monetary damages. In several counties, the Supreme Court has a specialised Commercial Division for “commercial cases”, i.e., business disputes in which the amount at issue exceeds \$100,000 (not including interest or attorneys' fees).

### 1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

**Pleadings:** Complaint, Answer, and Reply to Counterclaim, which are statements of the parties' claims and defences “sufficiently particular to give notice of the transactions [or

occurrences ... intended to be proved and the material elements of each cause of action or defence”. CPLR 3013.

**Discovery:** The parties (and third parties) exchange information under court supervision. Information is sought through, among other devices, written questions, witness examinations, and document requests. Discovery can take months to years depending on the size and complexity of the case.

**Motion practice:** The parties can seek judicial relief, including dispositive motions and discovery-related motions.

**Trial:** The parties have a right to a jury trial in most cases, but can waive it.

**Appeals:** The parties can generally appeal trial court orders/judgments as of right to the Appellate Division. Appeals to the Court of Appeals are only on request, except if the Appellate Division was divided or the case concerns the New York or U.S. constitution.

**Enforcement of judgments:** Judgments are enforceable state-wide and are governed by CPLR Articles 51–54.

New York courts do not impose uniform timeframes on litigation; timeframes vary based on complexity and the court's scheduling determinations.

A suit on a promissory note or other instrument for payment of money only (or upon a judgment) may be prosecuted by a summons with a motion for summary judgment instead of a complaint. CPLR 3213. This expedited procedure can save time and costs because it eliminates discovery and trial.

New York's Commercial Division has an Accelerated Adjudication Procedure that requires all pre-trial procedures to be completed within nine months after a Request for Judicial Intervention, with limits on discovery; certain defences are deemed waived. 22 N.Y.C.R.R. § 202.70(g) (Rule 9).

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

New York courts will enforce an exclusive New York jurisdiction clause agreed by a non-New York person or company under General Obligations Law § 5-1402 if the contract also has a New York choice of law clause and concerns a transaction worth at least \$1 million. New York courts will generally enforce exclusive jurisdiction clauses in contracts freely negotiated by the parties, unless the clause is “unreasonable, unjust, in contravention of

public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court”. *KMK Safety Consulting, LLC v. Jeffrey M. Brown Assocs., Inc.*, 72 A.D.3d 650, 651 (2d Dep’t 2010).

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

Costs are generally *de minimis* and are awarded to the prevailing party. A prevailing party may not recover its attorney’s fees except if there is an “unmistakably clear” contractual agreement or in certain limited circumstances provided by statute or court rule. *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, 3 N.Y.3d 592, 597 (2004); *Sage Sys., Inc. v. Liss*, 39 N.Y.3d 27 (2022). There are no rules on budgeting of costs in New York.

**1.6 Are there any particular rules about funding litigation in your jurisdiction? Are claimants and defendants permitted to enter into contingency fee arrangements and conditional fee arrangements?**

There are no statutes or regulations in New York directly applicable to third-party litigation funding. On January 3, 2024, a bill titled New York Consumer Litigation Funding Act (Senate Bill S4146A), aimed at regulating consumer litigation funding, failed to pass in the State Assembly.

New York’s Rules of Professional Conduct prohibit a lawyer from providing financial assistance to a client, with certain limited exceptions. A lawyer may: (1) advance court costs and expenses in contingency fee matters; (2) pay court costs and expenses when representing an indigent or *pro bono* client; and (3) pay court costs and expenses in contingency fee matters. 22 N.Y.C.R.R. § 1200.0 (Rule 1.8(e)). New York’s champerty statute, Judiciary Law §489, prohibits certain types of claim assignments unless consideration of at least \$500,000 is paid. *Justinian Capital SP v. WestLB AG*, 28 N.Y.3d 160 (2016). No court in New York has found the traditional third-party litigation funding model to constitute champerty as of January 2024. There are no rules aimed specifically at litigation funding.

Contingent fees are generally permissible, but New York’s Rules of Professional Conduct prohibit attorneys from collecting “an excessive or illegal fee or expense”. 22 N.Y.C.R.R. § 1200.0 (Rule 1.5(a)). The rules set forth a number of factors to be considered in determining whether a fee is excessive. *Id.*

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

Claims are generally assignable, and non-party litigation funding is permitted. New York’s champerty statute prohibits certain assignments where the only purpose is litigation if the assignment has less than a \$500,000 purchase price. N.Y. Judiciary Law § 489 (2015); see generally *Justinian Capital*, 28 N.Y.3d 160.

**1.8 Can a party obtain security for/a guarantee over its legal costs?**

No, it cannot.

## 2 Before Commencing Proceedings

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

In most cases, initiating papers, typically a summons and complaint, must be served on all defendants or respondents in the manner required by the CPLR. However, there are several exceptions. In tort actions against state and local governments, the plaintiff must serve the government with a notice of claim within 90 days of the date that the claim arises; in wrongful death cases, the notice must be served within 90 days of the appointment of a representative of the decedent’s estate. N.Y. Gen. Mun. L. § 50-e. In medical malpractice cases, a plaintiff’s attorney must attach a certificate of merit to the complaint declaring that he or she has consulted with a physician and that the attorney has concluded there is a reasonable basis for the action. CPLR 3012-A. A pre-suit notice of claim may be required by contract.

**2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?**

Generally, limitations periods are provided by Article 2 of the CPLR and vary between four months and 20 years. A 20-year statute of limitations applies to actions on a bond; actions on a money judgment; actions by the state to recover real property; actions by a grantee of the state to recover real property; and actions or proceedings to enforce an order or judgment awarding support, alimony, or maintenance. CPLR 211. A 10-year statute of limitations applies to actions to recover real property; actions to recover premises after an annulment of letters patent; actions to redeem real property from a mortgage; and actions to recover under an affidavit of support of a non-citizen. CPLR 212. Generally, a crime victim has seven years from the commission of the crime to bring a civil action for damages against a defendant convicted of that crime. CPLR 213-b(1). A six-year statute of limitations applies to: causes of action that existed at common law for which no limitations period is specifically prescribed by law, for example, actions seeking equitable relief; contract actions, whether express or implied with a few exceptions; actions on a sealed instrument; actions on a bond or note for which payment is secured by a real property mortgage, or actions on a bond or note and mortgage so secured, or actions on a mortgage; actions by the state upon spoliation or other misappropriation of public property; actions based on mistake; actions by or on behalf of a corporation against a present or former director, officer or stockholder for an accounting; and actions for fraud. CPLR 213. There is a five-year statute of limitations for divorce or separation. A three-year statute of limitations applies to: actions against a sheriff, constable, or other officer for non-payment of money collected upon an execution; actions to recover upon a liability, penalty, or forfeiture created or imposed by statute; actions to recover a chattel; actions based on damage to property; actions for personal injury; actions for malpractice other than medical, dental, or podiatric malpractice; actions to annul marriage on fraud grounds; actions based on exposure to toxic substances; actions based on exposure to substances found in a federal or state superfund site (due to environmental contamination); and property damage actions by water suppliers resulting from the presence of a contaminant in a water supply source. CPLR 214.

A limitations period of two-and-a-half years applies to actions for medical, dental, or podiatric malpractice. CPLR 214-a. A limitations period of one year applies to: actions for intentional tort, including assault, battery, false imprisonment, malicious prosecution, libel, slander, violation of a right of privacy for unauthorised use of a person's name or picture for commercial purposes, and false words causing special damages; actions upon an arbitration award; retaliatory eviction actions by a tenant against a landlord; actions to recover an overcharge of interest or to enforce a penalty for such overcharge; actions to enforce a penalty given to an informer; certain actions against a sheriff, coroner, or constable; and actions against an officer for the escape of a prisoner arrested or imprisoned by virtue of a civil mandate. CPLR 215. Unless a shorter time is provided in the law authorising the proceeding, a four-month limitations period applies to: CPLR Article 78 proceedings for *certiorari*, prohibition, or *mandamus* against a body or officer; and actions complaining about conduct that would constitute a union's breach of its duty of fair representation. CPLR 217.

An important exception to the six-year general breach of contract statute of limitations is that claims under a sale of goods contract must be brought in four years (UCC §2-725).

Wrongful death claims must be brought within two years of the decedent's death. Estates, Powers and Trusts Law § 5-4.1.

While statutes of limitations generally run from the date of accrual of the claim, they may be tolled by certain conditions. The discovery rule permits a plaintiff to sue within two years of the date the claim is discovered or should reasonably have been discovered, or within the statutory period for that claim, whichever is longer. CPLR 203(g). Other conditions that may permit tolling include incapacity to sue and ongoing violations by the defendant.

The limitations period for actual fraud is six years from the commission of the fraud or two years from the time the fraud was or should have been discovered with reasonable diligence, whichever is longer. For constructive fraud, the limitations period is six years from commission of the wrong without consideration of a discovery period.

New York courts consider time limitations to be procedural, not substantive. *Davis v. Scottish Re Grp. Ltd.*, 30 N.Y.3d 247, 255 (2017). Thus, the New York courts will generally apply New York's statutes of limitations to a case that arose elsewhere.

### 3 Commencing Proceedings

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

Civil proceedings are commenced by filing with the court a summons and complaint or a summons with notice. CPLR 304. This must generally be served on the defendant within 120 days, but the court can extend this time. CPLR 306-B.

Service may be accomplished by personal service upon an individual. CPLR 308. Alternatively, a plaintiff may serve an individual plaintiff by delivering the summons to an individual of "suitable age and discretion" at the individual's place of business, dwelling place or usual place of abode of the person to be served and also mailing the summons to the individual's last known residence or place of business. In such case, service is considered complete 10 days from the filing of an affidavit of service. CPLR 308(2). Where neither of these methods is practicable, service

may be accomplished by affixing the summons to the door of the place of business or dwelling, as well as mailing it. CPLR 308(4). If none of these means are practicable, the court may direct an alternative means of service. CPLR 308(5).

Similar requirements apply to personal service upon: an assistant attorney general of the state; a partner in a partnership; an officer, director, agent, or cashier of a corporation; or certain officials within a government entity. CPLR 307, 309-312. In addition, under the Business Corporation Law (BCL), corporations may be served by personal service on the New York Secretary of State. BCL §§ 306, 307.

Service may also be completed by mail alone, but is only effective if the defendant or its agent mails or delivers an acknowledgment of receipt within 30 days. CPLR 312-A.

Personal service outside the state may be accomplished by the same means, so long as it is accomplished: by a person authorised to make service within the state who is a resident of the state; by any person authorised to make service by the laws of the state or country in which service is made; or by a qualified attorney there. CPLR 313.

Service of foreign proceedings may be effectuated by the means set forth in The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Convention).

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

There are four pre-action provisional remedies:

**Attachment** (CPLR 6201): Seizure of the defendant's property, generally if the defendant might dispose of property to defeat judgment enforcement.

**Preliminary injunction** (CPLR 6301): An order that maintains the *status quo* during the action, generally where the defendant is engaging in activity that could render judgment ineffectual. A court can issue a temporary restraining order that provides for injunctive relief until the injunction application can be decided. To obtain an injunction, a party must demonstrate irreparable harm not compensable in money, likelihood of success on the merits, and a balancing of the equities in its favour.

**Receivership** (CPLR 6401(b)): An order that appoints a temporary receiver of property which is the subject of an action, "where there is danger that the property will be removed from the state, or lost, materially injured or destroyed". CPLR 6401(a). The receiver may take possession of the property and sue for, collect, and sell debts or claims. CPLR 6401(b).

**Notice of pendency** (CPLR 6501): A notice filed with the county clerk in a real property action that alerts affected parties that the judgment demanded would affect the title to, or the possession, use, or enjoyment of the property.

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

The pleadings must have plain and concise statements in consecutively numbered paragraphs and should state each cause of action or defence. CPLR 3014. Complaints and other claims (e.g., counterclaims in an answer) must include a demand for relief. CPLR 3017(a). Claims and defences may be stated alternatively or hypothetically. CPLR 3014. Pleadings may attach documents, which become part of the pleadings. *Id.*

In general, statements in a pleading must be "sufficiently particular to give the court and parties notice of the transactions

[or] occurrences ... intended to be proved and the material elements of each cause of action or defense”. CPLR 3013. Certain claims and defences require pleading with additional particularity, including: claims for libel or slander, fraud or mistake, separation or divorce, or personal injury; actions on a judgment, involving the sale and delivery of goods or performing of labour or services, or based on foreign law; or certain actions for gross negligence or intentional infliction of harm. CPLR 3016.

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

A pleading can be amended once without leave of court: (i) within 20 days after service; (ii) at any time before the period for responding to it expires; or (iii) within 20 days after service of a pleading responding to it. CPLR 3025(a). A pleading can be amended by leave of court or stipulation of all parties, with leave to be “freely given upon such terms as may be just”. CPLR 3025(b). The court may permit pleadings to be amended before or after judgment to conform them to the evidence. CPLR 3025(c).

#### 3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

A party may withdraw a claim without court permission: (i) by serving a notice of discontinuance on all parties before a responsive pleading has been served or within 20 days after service of the pleading; (ii) by stipulation; or (iii) by filing a notice of discontinuance concerning certain real property. CPLR 3217(a). A claim may be discontinued by court order, but once the case has been submitted to the court or jury, stipulation of all parties is required. CPLR 3217(b). Discontinuance is generally without prejudice, but if the claim has previously been discontinued in any prior action the discontinuance may be deemed an adjudication on the merits. CPLR 3217(c).

## 4 Defending a Claim

#### 4.1 What are the main elements of a statement of defence? Can the defendant bring a counterclaim(s) or defence of set-off?

The answer must deny statements in the complaint that the defendant knows or believes to be untrue and specify those statements as to which defendant lacks knowledge or information sufficient to form a belief regarding their truth. CPLR 3018(a). All other statements in the complaint are deemed to be admitted unless no responsive pleading is permitted. *Id.* A defendant may assert any affirmative defences. Certain affirmative defences are waived if not raised in the answer. A defendant may assert counterclaims against the plaintiff and cross-claims against other defendants. A defendant may raise the defence of set-off. CPLR 3018(b), 3019.

Prior to serving an answer, a defendant may move to dismiss any cause of action in the complaint on a variety of available grounds, including: for failure to state a claim, lack of subject-matter jurisdiction, or lack of personal jurisdiction; or because documentary evidence establishes a defence. CPLR 3211(a).

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

The defendant must answer or move to dismiss in 20 days if the

summons is served on the defendant by personal service within New York. CPLR 320(a). For all other means of service, the defendant must respond in 30 days. *Id.* These time limits can be extended by party agreement or court order.

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

A defendant may file a third-party summons and complaint against a party who may be liable in whole or in part for the plaintiff’s damages. CPLR 1007. A defendant may also counterclaim against the plaintiff and cross-claim against another defendant. CPLR 3019.

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

Where a defendant fails to “appear, plead or proceed to trial”, the plaintiff may seek a default judgment within one year. CPLR 3215(a). If the plaintiff fails to apply for a default judgment within one year, the court will dismiss the complaint as abandoned unless cause is shown why the complaint should not be dismissed. CPLR 3215(c).

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

A defendant may dispute the court’s personal or subject-matter jurisdiction. CPLR 3211(a). An objection to the court’s subject-matter jurisdiction is never waived and can be raised at any time; a challenge to personal jurisdiction is waived if not raised in an answer or pre-answer motion to dismiss. CPLR 3211(e).

## 5 Joinder & Consolidation

#### 5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

Parties may join additional parties where a party asserts any right to relief jointly, severally, or arising out of the same transaction or occurrence, or series of transactions or occurrences, if common questions of law or fact would arise. CPLR 1002. The court may join individuals or entities needed for complete relief to be granted, or who might be inequitably affected by a judgment in the action. CPLR 1001(a). When a person who should join as a plaintiff refuses to do so, he or she may be made a defendant. *Id.* If jurisdiction can be obtained only by consent or appearance, the court may permit the action to proceed when justice requires. CPLR 1001(b).

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

A court may consolidate pending actions when they involve common questions of law or fact to avoid unnecessary costs or delay. CPLR 602(a). If the related action is pending in the Supreme Court for another county, the court may remove the action to itself and consolidate it or have it tried together with the action pending before it. CPLR 602(b).

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

A court may order the severance of claims or a separate trial of any claim, or of any separate issue, in furtherance of convenience or to avoid prejudice. CPLR 603. A court may also order the trial of any claim or issue prior to the trial of the others. *Id.*

## 6 Duties & Powers of the Courts

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

Upon the filing of a Request for Judicial Intervention, cases are assigned randomly by the court clerk pursuant to a method authorised by the Chief Administrator. The assigned judge supervises all proceedings in the action subject to a few exceptions, including where the Chief Administrator may authorise new assignments, transfer of any action, or establishment of a dual-track system of assignment. 22 N.Y.C.R.R. § 202.3. A party may seek to have its case assigned to the Commercial Division by filing a commercial division addendum or by letter application within 90 days following service of the complaint. 22 N.Y.C.R.R. § 202.70(d)–(e).

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

A preliminary conference is held within 45 days after the Request for Judicial Intervention is filed. Parties are generally not required to meet and confer prior to a preliminary conference; however, counsel before the Commercial Division must attempt, before the conference, to reach agreement on certain discovery and dispute resolution issues. 22 N.Y.C.R.R. § 202.70(g).

At the preliminary conference, the court can simplify and limit the factual and legal issues, establish a timetable and method for discovery, add necessary parties, settle the action, remove the action per CPLR 325, and take any other action the court deems relevant. 22 N.Y.C.R.R. § 202.12. The court also assigns the case to one of three tracks: expedited; standard; or complex. 22 N.Y.C.R.R. § 202.19. Discovery must be completed within eight months for expedited cases; 12 months for standard cases; and 15 months for complex cases. *Id.*

### 6.3 In what circumstances (if any) do the civil courts in your jurisdiction allow hearings or trials to be conducted fully or partially remotely by telephone or video conferencing, and what protocols apply? For example, does the court – and/or may parties – record and/or live-stream the hearings and may transcriptions be taken? May participants attend hearings remotely when they are physically located outside of the jurisdiction? Are electronic or hard-copy bundles used for remote hearings?

New York's courts went almost entirely virtual in March 2020 due to the COVID-19 pandemic, and for more than a year only limited proceedings were scheduled. Many judges have continued to hold civil non-evidentiary hearings remotely. In Commercial Division cases, the court may conduct an evidentiary hearing or a non-jury trial by videoconference or permit a witness or party to participate via video link, with the consent of the parties. However, the

video technology used must enable: the party and the party's counsel to communicate confidentially; documents, photos, and other items that are delivered to the court to be delivered to the remote participants; interpretation for a person of limited English proficiency; a verbatim record of the trial; and public access to remote proceedings. 22 N.Y.C.R.R. § 202.70 Rule 36.

Hearings are conducted in accordance with the judge's individual rules or as otherwise noticed. Remote hearings are held in accordance with the Judicial Conference's remote broadcast policy using approved audio or videoconferencing platforms, such as Zoom for Government or CourtSolutions. Judges can choose to participate in a programme for the submission of evidence electronically through a Virtual Evidence Courtroom (VEC) located on the NYSCEF website. Currently, VEC functionality is available in Supreme Court, Court of Claims, and some Civil Court cases.

Many New York State Courts use electronic devices to record court proceedings. Parties may obtain transcription services by independent contractors who establish their own rates.

### 6.4 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

A court can hold a party in contempt, which can result in fines or imprisonment. N.Y. Judiciary Law § 753. A court can sanction a party that refuses to comply with a discovery order by resolving issues in favour of the other party, prohibiting the disobedient party from supporting or opposing certain claims or defences, striking parts of pleadings, staying the proceedings until compliance, dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party. CPLR 3126. Frivolous conduct can result in an order to pay the other party's expenses and attorney's fees. 22 N.Y.C.R.R. § 130-1.1.

### 6.5 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

New York courts may dismiss or strike a pleading upon a party's motion or on the court's initiative. CPLR 3211; see CPLR 3126. Cases may be dismissed for want of prosecution. CPLR 3216. Courts may also strike "scandalous or prejudicial matter unnecessarily inserted in a pleading". CPLR 3024.

### 6.6 Can the civil courts in your jurisdiction enter summary judgment?

A court can grant summary judgment if "upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party". CPLR 3212(b). Summary judgment will be denied if there is a material issue of fact. Summary judgment "searches the record": if the court finds a party other than a moving party is entitled to summary judgment, it may enter summary judgment in that party's favour without the necessity of a cross-motion. *Id.*

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

The CPLR authorises the courts to stay proceedings, including:

in conjunction with the removal of a case (CPLR 326); in lieu of dismissing an action based on the pendency of another action between the same parties (CPLR 3211(a)(4)); or to enforce a judgment or order pending appeal (CPLR 5519). CPLR 2201 also gives courts discretion to stay a proceeding in “a proper case”.

Discovery is generally stayed once a party files a motion to dismiss or a motion for summary judgment, but the court may order otherwise. CPLR 3214(b). In Commercial Division cases, discovery is not stayed unless the court orders a stay. 22 N.Y.C.R.R. § 202.70(g), Rule 11(d).

## 7 Disclosure

**7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?**

There is “full disclosure of all matter material and necessary in the prosecution or defence of an action, regardless of the burden of proof”. CPLR 3101(a). Information may be obtained through depositions, interrogatories, demands for addresses, discovery and inspection of documents or property, physical and mental examinations, requests for admission, and subpoenas to third parties. CPLR 3102(a), 2301. Privileged materials and attorney work product may not be obtainable. CPLR 3101(b)–(c). The court may issue a protective order limiting the scope of disclosure. CPLR 3103(a).

Parties to cases involving electronic discovery must confer on anticipated electronic discovery issues during the preliminary conference. 22 N.Y.C.R.R. § 202.12(b). If electronic discovery is reasonably likely to happen, the court considers the factors listed in 22 N.Y.C.R.R. § 202.12(c)(3) in determining the method and scope of the discovery.

In the Commercial Division, parties must confer on anticipated electronic discovery issues prior to the preliminary conference. 22 N.Y.C.R.R. § 202.70, Rule 8. Parties acquiring electronically stored information from non-parties must adhere to the Commercial Division’s Guidelines for Discovery of Electronically Stored Information. 22 N.Y.C.R.R. § 202.70, App’x A.

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

Parties must state the legal ground for withholding each document unless the case is in the Commercial Division. CPLR 3122(b). Parties before the Commercial Division may establish categorical designations for withholding documents. 22 N.Y.C.R.R. § 202.70(g), Rule 11-b(b).

Privileges include those for spouses (CPLR 4502), attorneys, clients and attorney work product (CPLR 4503, 3101(c)), medical practitioners (CPLR 4504), clergy (CPLR 4505), psychologists (CPLR 4507), social workers (CPLR 4508), and rape crisis counsellors (CPLR 4510).

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

Third parties can be required to testify and produce documents through a subpoena. CPLR 2301. Subpoenas are served in the same manner as a summons, and witnesses must be paid a fee and

travel expenses. CPLR 2303(a). A subpoena for the production of documents must be served on all parties simultaneously, and the party receiving the subpoenaed records must deliver a copy of the records to all opposing counsel. CPLR 2305(d).

If electronically stored information is sought from a non-party in the Commercial Division, the party seeking disclosure must follow the Commercial Division’s Guidelines for Discovery of Electronically Stored Information. 22 N.Y.C.R.R. § 202.70, Appendix A.

A witness who refuses to comply can be held in contempt of court. If the witness is a party, the court may also strike his or her pleadings. CPLR 2308(a). The court may issue a warrant directing a sheriff to bring the witness to court or committing the witness to jail until there is compliance. *Id.*

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

The courts supervise disclosure. CPLR 3104. A judge may assign a referee to supervise discovery or permit the parties to stipulate to an attorney referee. *Id.* If a person fails to comply with a discovery request, the court may compel disclosure or find a witness in contempt. CPLR 3124, 2308(a). The court rules on motions regarding disclosure under CPLR Article 31.

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

The courts can issue protective orders limiting the use of information disclosed. CPLR 3103(a). Parties may also agree to limit discovery or the use of discovered information by stipulation. CPLR 2104.

## 8 Evidence

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

Evidence must be relevant and admissible. Evidence is relevant if it tends to prove the existence or non-existence of a fact directly at issue in the case. *People v. Davis*, 43 N.Y.2d 17, 27 (1977). Relevant evidence is generally admissible unless its admission violates an exclusionary rule. *People v. Scarola*, 71 N.Y.2d 769, 777 (1998). A court may exclude relevant evidence if its probative value is outweighed by the prospect of delay, undue prejudice, confusing the issues, or misleading the jury. See *Davis*, 43 N.Y.2d at 27.

Relevant evidence is admissible unless otherwise provided or required by the Constitution of the United States or the Constitution, statutes, or common law of New York State. G.N.Y.E. 4.01(2). Since 2017, New York’s Unified Court System has published the Guide to New York Evidence setting forth New York’s evidentiary rules.

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

Relevant evidence is admissible if the probative value and need for the evidence outweigh the potential for delay, surprise, or prejudice. *People v. Alvino*, 71 N.Y.2d 233 (1987). Evidence subject to special relevance rules includes subsequent remedial measures to prove negligence, offers of compromise or offers to pay medical expenses to prove liability, pleas and plea discussions

as statements of guilt, and liability insurance to prove negligent or wrongful actions. Character evidence and prior crimes are also subject to various restrictions. Hearsay is generally not permitted unless it falls under an exception.

New York follows the Frye standard in determining whether to admit expert testimony. *Giordano v. Market Am., Inc.*, 15 N.Y.3d 590, 601 (2010). To be admissible, an expert's testimony must be grounded on methods that are generally accepted within the scientific community. The party offering the expert bears the burden of proof. *People v. Middleton*, 54 N.Y.2d 42, 49 (1981); *Parker v. Mobil Corp.*, 739 N.Y.S.2d 432, 437 (2d Dep't 2005).

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

Adults are presumed competent to testify as fact witnesses. *Matter of Brown v. Ristich*, 36 N.Y.2d 183, 188 (1975). Fact witnesses may not be paid more than the statutory fee for testimony, but may be compensated for loss of time if the testimony was procured through a subpoena. *Caldwell v. Cablevision Systems Corp.*, 925 N.Y.S.2d 103, 107 (2d Dep't 2011).

Witness statements and depositions must be signed by the witness before an officer authorised to administer an oath. CPLR 3116(a). Depositions may be used to impeach a witness or in lieu of calling a witness if the witness is unavailable. CPLR 3117.

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

See question 8.2 above. Parties must describe in reasonable detail the subject matter and the substance of the facts and opinions on which an expert is expected to testify, the qualifications of the expert, and a summary of the grounds of the expert's opinion. CPLR 3101(d)(1).

In the Commercial Division, parties intending to introduce expert testimony must confer on a schedule for expert disclosure at least 30 days before the end of fact discovery. 22 N.Y.C.R.R. § 202.70(g), Rule 13(c). Disclosure includes identifying the experts, exchanging reports, and deposing the testifying experts. *Id.*

Unlike fact witnesses, who have a public duty to testify, experts have no public duty and cannot be compelled to testify. *Caldwell v. Cablevision Systems Corp.*, 925 N.Y.S.2d 103 (2d Dep't 2011).

Concurrent expert evidence is not permitted in New York.

## 9 Judgments & Orders

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

The courts may enter interlocutory or final judgments. CPLR 5011. They may direct a judgment at one or more of a party's causes of action or towards one or more parties. CPLR 5012. These may be issued during the course of the proceedings, and can deal with pleadings, discovery, and other relief. Courts may also issue declaratory judgments, delineating the rights and other legal relations of the parties. CPLR 3001.

A court may also grant equitable relief in the form of temporary, preliminary, or permanent injunctions, as discussed *supra* in response to question 3.2.

### 9.2 Are the civil courts in your jurisdiction empowered to issue binding declarations as to (i) parties' contractual or other civil law rights or obligations, (ii) the proper interpretation of wording in contracts, statutes or other documents, (iii) the existence of facts, or (iv) a principle of law? If so, when may such relief be sought and what factors are relevant to whether such relief is granted? In particular, may such relief be granted where the party seeking the declaration has no subsisting cause of action, and/or no party has suffered loss, and/or there has been no breach of contract/duty?

Courts may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy, whether or not further relief is or could be claimed. CPLR 3001. Declaratory relief "only provides a declaration of rights between parties" and "cannot be executed upon so as to compel a party to perform an act". *Trovato v. Galaxy Sanitation Servs. of New York, Inc.*, 171 AD3d 832, 834 (2d Dep't 2019). A "request for a declaratory judgment is premature if the future event is beyond the control of the parties and may never occur". *AB Oil Services, Ltd. v. TCE Insurance Services, Inc.*, 188 AD3d 624, 626 (2d Dep't 2020).

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

Courts may award damages and increase an award if permitted by statute. CPLR 4018. They may also grant additional allowances in certain instances. CPLR 8303. In frivolous cases, the court may award the successful party costs and reasonable attorney's fees. See CPLR 8303-A(a).

All monetary awards bear interest from the date of the final judgment. CPLR 5003. A court can award pre-judgment interest depending on the cause of action. CPLR 5001. Interest is computed from the earliest ascertainable date the cause of action existed. CPLR 5001(b). Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date. *Id.* The date from which interest is to be computed shall be specified in the verdict, report, or decision. CPLR 5001(c).

The pre- and post-judgment interest rate on money judgments is 9% per annum, unless otherwise provided by statute or agreement. CPLR 5004.

### 9.4 How can a domestic/foreign judgment be recognised and enforced?

Valid judgments issued by another U.S. state are entitled to full faith and credit and can be enforced in the same manner as a New York judgment. CPLR 5402. Foreign country judgments that are final, conclusive, and enforceable where rendered and grant or deny recovery of a sum of money will also be recognised and enforced, with certain exceptions. CPLR 5302-5304.

A party may apply to a court to confirm an arbitration award. CPLR 7510. Confirmation is a special proceeding that moves directly from pleadings to decision. CPLR 409(b). Foreign arbitration awards are enforceable in New York pursuant to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

### 9.5 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

Most judgments and orders are appealable as of right. Appeal is initiated by notice of appeal. Appeals are generally made to the Appellate Division, but may be made directly to the Court of Appeals in some circumstances. See CPLR 5602.

## 10 Settlement

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

As described in the next section, New York has a strong policy favouring alternative dispute resolution (ADR). Most New York courts offer free or reduced-fee mediation services, and the Commercial Division operates an ADR programme. Some courts require arbitration if the claims amount to less than \$6,000. 22 N.Y.C.R.R. § 28.2.

## 11 Alternative Dispute Resolution

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

The New York State Court System's policy is to encourage resolution of civil legal disputes by methods including mediation, arbitration, neutral evaluation, in-court settlement practices, and summary jury and bench trials. All civil actions or proceedings heard in the Supreme Court, Court of Claims, County Court, Family Court, Surrogate's Court, District Court, City Court, and New York City Civil Court are presumptively eligible for early referral to an ADR process unless otherwise excluded. Courts may refer parties to an ADR process at any time after an action has been commenced and are encouraged to do so at the earliest appropriate opportunity.

Arbitration and mediation are the most common methods of ADR. Arbitration is an informal, private trial-like proceeding in which the parties agree to accept an arbitrator's decision as final. Mediation is a structured settlement discussion in which a neutral mediator assists the parties in attempting to settle a dispute. New York's Unified Court System offers parties access to free or reduced-fee mediation in family law, general civil and commercial law disputes. Neutral Evaluation involves a neutral person with subject-matter expertise who hears abbreviated arguments, reviews the strengths and weaknesses of each side's case, and offers an evaluation of likely court outcomes in an effort to promote settlement. The neutral evaluator may also provide case planning guidance and settlement assistance with the parties' consent.

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

Parties generally agree to arbitration and mediation rules. CPLR Article 75 fills gaps where arbitration agreements are silent. For example, a court can appoint an arbitrator if a selection procedure is not provided for (CPLR 7504). Article 75 also gives the courts power to compel arbitration and enter judgment on arbitral awards.

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

Certain claims that allege a violation of a statute, decisional law, or public policy may not be arbitrable. See *Enlarged City School Dist. Of Middletown New York v. Civil Service Employees Ass'n, Inc.*, 148 A.D.3d 1146, 1148 (2d Dep't 2017).

In 2018, New York enacted CPLR 7515, which provides that mandatory agreements to arbitrate discrimination claims are generally invalid "except where inconsistent with federal law". CPLR 7515. However, every federal district court and all but one state trial court to consider the issue have since held that CPLR 7515 is pre-empted by the Federal Arbitration Act. See, e.g., *Latif v. Morgan Stanley & Co. LLC*, No. 18-cv-11528 (DLC) (S.D.N.Y. June 26, 2019); *Fuller v. Uber Tech. Inc.*, No. 150289/2020, 2020 NY Slip Op 33188(U) (N.Y. Sup. Ct. Sept. 25, 2020). However, see *Newton v. LVMH Moët Hennessy Louis Vuitton Inc.*, No. 154179/2019 (Sup. Ct. N.Y. Cnty. July 10, 2020) (finding CPLR 7515 not pre-empted by the Federal Arbitration Act and applying the rule to deny employer's motion to compel arbitration), rev'd on other grounds by *Newton v. LVMH Moët Hennessy Louis Vuitton Inc.*, 192 A.D.3d 540 (1st Dep't 2021). No federal or state appellate court has yet addressed the issue.

### 11.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, force parties to arbitrate when they have so agreed, or order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

The courts may grant provisional remedies (e.g., attachment or preliminary injunction) in aid of arbitration. CPLR 7502. However, if the arbitration is not commenced within 30 days of granting the provisional relief, the order will expire. *Id.* Parties may also ask a court to compel arbitration or stay an arbitration per CPLR 7503(a)–(b).

The New York State Unified Court System offers parties access to free or reduced-fee mediation and other ADR services in family law, general civil and commercial law disputes.

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

Mediation is usually non-binding and voluntary. Arbitration is typically binding. An arbitration award may be vacated or modified in very limited circumstances under CPLR 7511.

### 11.6 What are the major alternative dispute resolution institutions in your jurisdiction?

The major ADR organisations in New York are the American Arbitration Association, the ICC, and JAMS.



**Chris Paparella** concentrates on financial services litigation and international disputes. He has represented financial institution clients in federal and state court litigation and arbitration involving mortgage-backed securities, securities fraud, lender liability and foreign exchange transactions. Chris argued and won a ground-breaking case in New York's highest court in which he obtained the dismissal of a \$300 million fraud case on the grounds that the assignment of the claims to a litigation funder violated New York's champerty statute. *Justinian Capital SPC v. WestLB AG*, 28 N.Y.3d 160 (2016).

Chris has also represented clients in international and domestic arbitrations in New York, London, Mexico City, Paris, Amsterdam and elsewhere. Chris has developed particular familiarity and skill in the energy and process industries, and has represented participants in offshore and onshore oil and gas production facilities, as well as a variety of downstream process plants and other facilities. Chris has been ranked by *Chambers USA*, *Chambers Global* and *The Legal 500* as one of the leading international arbitration lawyers in the United States.

**Step toe**

114 Avenue of the Americas  
New York, NY 10036  
USA

Tel: +1 212 506 3910  
Email: [cpaparella@step toe.com](mailto:cpaparella@step toe.com)  
URL: [www.step toe.com](http://www.step toe.com)



**Justin Ben-Asher** represents clients in commercial disputes, including in complex multidistrict litigation and international arbitrations. His work spans the aerospace and defence, energy, construction, financial services, and insurance industries, among others.

His *pro bono* legal service includes representation of the City of New York, as well as housing and family court matters. He is a recipient of The Legal Aid Society's Pro Bono Publico Award.

**Step toe**

114 Avenue of the Americas  
New York, NY 10036  
USA

Tel: +1 212 506 3905  
Email: [jbenasher@step toe.com](mailto:jbenasher@step toe.com)  
URL: [www.step toe.com](http://www.step toe.com)



**Niyati Ahuja** is admitted to practise law in India and New York. She represents global corporations in international commercial disputes involving breach of fiduciary duties, shareholder and joint venture disputes, and investment disputes involving breach of stabilisation and concession agreements. She has successfully represented mining companies, banking institutions, and individual investors in high-stakes disputes involving breach of agreements, investment protections, and shareholder disputes. She also represents clients in courts proceedings in aid of arbitration, including seeking discovery pursuant to 28 U.S.C. § 1782 and recognition and enforcement of arbitral awards under the Federal Arbitration Act and the New York Convention, as well as cross-border litigation proceedings. Niyati has experience with arbitrations arising under the rules of, among others, the United Nations Commission on International Trade Law (UNCITRAL), International Chamber of Commerce (ICC), International Centre for Settlement of Investment Disputes (ICSID) and London Court of International Arbitration (LCIA).

Niyati is the founder of Indian Women in International Arbitration, a platform dedicated to empowering and promoting women in the field. She acts as a facilitator for the Young ITA Mentorship Programme and has served as a coach and arbitrator in several international moot court competitions.

**Step toe**

114 Avenue of the Americas  
New York, NY 10036  
USA

Tel: +1 510 570 5831  
Email: [nahuja@step toe.com](mailto:nahuja@step toe.com)  
URL: [www.step toe.com](http://www.step toe.com)

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