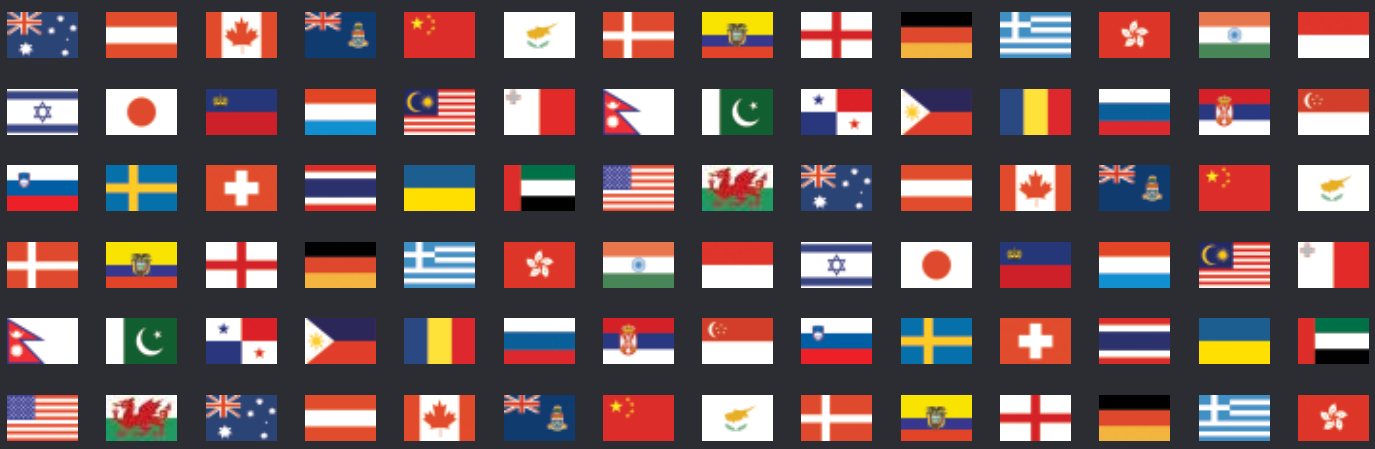
Dispute Resolution 2021

Contributing editors
Martin Davies and Alanna Andrew



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Getting The Deal Through

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Lexology 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 Lexology 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 Israel, New York, Slovenia and Ukraine.

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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.

Lexology 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 Alanna Andrew of Latham & Watkins LLP, for their continued assistance with this volume.

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Getting The Deal Through

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For further information please contact editorial@gettingthedealthrough.com

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United States – California

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LITIGATION

Court system

1 | What is the structure of the civil court system?

In the United States, there are parallel state and federal court systems, consisting in each case of a trial court, an intermediate appellate court and a Supreme Court. Although there are important differences between the two systems, the focus of this chapter is the California state court system.

The trial court in the state court system is the Superior Court. Each county in the state has its own set of Superior Courts. These are the courts of primary jurisdiction for all civil disputes involving amounts in controversy in excess of US$25,000. See the California Code of Civil Procedure (CCP), section 86.

Trials and pretrial matters are generally supervised by a single, all-purpose Superior Court judge who is assigned to the case at the inception of the proceeding. Litigants have the ability to exercise one peremptory challenge to the assignment of such a judge.

The next level up is the California Court of Appeals, which is the state's intermediate appellate court. There are six districts of the Court of Appeals, which have jurisdiction over appeals arising from the Superior Courts located within certain geographic regions of the state. Thus, for example, the Second Appellate District is the appellate district that handles appeals arising from the Los Angeles Superior Courts.

Each appellate district may be further subdivided into divisions, which are individual units of three-judge panels who hear appeals. Thus, an appeal from a judgment rendered by the Los Angeles Superior Court will mandatorily be heard by one of the divisions of the Second Appellate District.

The California Supreme Court represents the top level of appellate review in California. The Supreme Court is based in San Francisco and consists of seven justices, who participate together in connection with the determination of matters as to which the court has granted review or has otherwise determined to hear.

The California court system does not include specialist commercial or financial courts.

Judges and juries

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

The traditional distinction between the role of the judge and jury in civil matters is that, while the jury determines all issues of fact, the judge controls all issues of law. The judge exercises this function, in part, by ruling on jury instructions and on motions for directed verdict or non-suit.

During the course of the trial, the judge is permitted to ask questions of witnesses, although most judges exercise this right sparingly. Unlike the practice in many civil law countries, the judge does not perform an inquisitorial or fact-finding role during a civil trial.

The right to a jury trial in a civil matter is guaranteed under both the US and California Constitutions. The principal exceptions are where the underlying right or claim is equitable in nature or where the parties have stipulated to arbitration or some other recognised alternative dispute resolution (ADR) procedure. Importantly, and in the absence of an enforceable arbitration provision, pre-dispute jury trial waivers are not enforceable in California. See *Grafton Partners, LP v Superior Court* 36 Cal 4th 944 (2005). Even where the parties' contract contains a choice of law providing for the application for the law of another state, and where the law of that other state permits pre-dispute jury trial waivers, California courts will still decline to enforce pre-dispute jury waivers. *Rincon EV Realty LLC v CP III Rincon Towers, Inc,* 8 Cal App 5th 1 (2017).

Judges who sit on the state court's trial bench (the Superior Court) may in some cases be appointed by the Governor or compete in a general election for 'open' seats. As to those judges who are appointed by the Governor, there is strong impetus for the appointment of 'diverse' candidates.

Limitation issues

3 | What are the time limits for bringing civil claims?

California's CCP sets out the limitation periods that apply to particular claims or causes of action. For example, under section 339(1) of the CCP, an action for negligence is governed by a two-year statute of limitations. By contrast, an action for breach of a written contract is governed by a four-year statute of limitations as provided by section 337 of the CCP.

Importantly, these time limitations may have different rules pertaining to the accrual of the limitations period. For example, a cause of action for breach of contract generally begins to run from the time of breach, irrespective of whether the plaintiff had actual or constructive knowledge of the breach. By contrast, some causes of action in tort do not accrue until the plaintiff either knows or should have known of the underlying injury or circumstances giving rise to the claim.

Parties may suspend, or toll, the running of particular statutes of limitation by agreement. Thus, it is not uncommon for parties who are exploring settlement to enter into a 'tolling agreement', whereby the running of the statutes of limitations is tolled during the time such an agreement remains in effect.

Pre-action behaviour

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

Normally there are no prerequisites to filing suit. However, certain pre-action steps may be required to be undertaken by a plaintiff because of the nature of the claim or the underlying agreement.

Some kinds of civil claims, including those against government entities such as cities, counties and the state, require that the plaintiff assert an administrative claim, and have that claim denied, before

bringing a civil suit. In addition, the pursuit of certain employment claims sometimes requires that the former employee obtain a 'right to sue' letter from the California Labor Commissioner.

Alternatively, there may be pre-suit requirements set out in the parties' underlying contract or agreement. For example, a loan agreement or promissory note may require that the payee or beneficiary give the borrower or obligor a written demand for payment, and an opportunity to cure, before filing suit. Other agreements may require pre-suit mediation or resort to some other form of ADR before bringing civil litigation.

As to orders at the inception of a case concerning disclosure of documents, witnesses or other information, this is an area where state and federal practice differ.

Under state court practice, the disclosure of documents, witnesses and other information is generally controlled by the discovery process – that is, the party seeking the production of documents, the identification of witnesses or other information is obliged to serve formal requests concerning same on the adverse party.

In federal court, by contrast, rule 26 of the Federal Rules of Civil Procedure requires voluntary disclosure near the inception of a case (and in any event before either side may commence formal discovery) of the documents on which a party will rely; the names and identities of key witness; and other basic information that is supportive of the underlying claim or defence. Although this disclosure under rule 26 may be supplemented, documents or witnesses not disclosed by a party through this means may be excluded at trial.

For both claimants and defendants, all litigants must maintain and preserve electronic records, including emails. The failure of a party-litigant to preserve those records, and the consequent loss of those records, could result in the court giving a jury instruction concerning spoliation of evidence, which could adversely affect that party-litigant's credibility in the eyes of the jury.

For parties who are sued in state court, an initial strategy call will be whether there are any opportunities to change the forum for the litigation. Defendants ought to evaluate whether there are any opportunities to have the case sent to arbitration; removed to a federal court; or transferred to a court in another jurisdiction. Defendants should also consider at the outset of litigation whether there are any coverage opportunities under any policies of liability insurance.

For parties initiating litigation, the selection of forum is critical at the outset. In addition, plaintiffs need to give consideration at the outset to the availability of provisional remedies, such as injunctions and pre-judgment attachment, as the issuance of such provisional remedies often has an outcome-determinative impact on the course of the litigation.

Starting proceedings

5 | 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 civil action is commenced by filing suit and causing the summons and complaint to be served on the defendants. Parties joined as defendants in a civil action in California generally learn of the pendency of the suit when they are formally served with the summons and complaint. Under California Rule of Court 3.110(b), service of the complaint must be accomplished within 60 days after the filing of the complaint, and proof of service attesting to same must be filed with the court within that time period.

The state court system in California has been facing chronic fiscal problems for a number of years. This has resulted in judges pushing civil cases into mediation or other forms of ADR in an effort to relieve this pressure on the court's docket. By contrast, the accepted wisdom is that the dockets of California's federal courts are not as congested. In addition, it is widely believed that federal court judges are more inclined to dispose of cases before trial by way of granting motions to dismiss or motions for summary judgment.

Timetable

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

Under the CCP, the plaintiff in a civil suit must effectuate service of the summons on the defendant within 60 days after the filing of suit. Following the effectuation of service, the plaintiff may commence discovery against the defendant after the passage of a statutory 10-day hold period, which itself can be modified by the court (see CCP section 2031.020(b)).

Early on in the proceeding, the court normally holds a case management conference (CMC) at which the trial date and various pretrial dates and deadlines may be set.

In Los Angeles Superior Court, the timeline to reach trial is approximately 16 to 18 months after the filing of a civil complaint.

Case management

7 | Can the parties control the procedure and the timetable?

The parties, through their counsel, will have input at the CMC concerning the setting of trial and pretrial dates, but ultimately the judge will have the final say concerning both the setting of those dates and the pace at which the action proceeds to trial.

Evidence – documents

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

In federal court cases, the parties are mandated under rule 26 of the Federal Rules of Civil Procedure to exchange documents early in the case. By contrast, there is no such requirement in state court practice for the voluntary exchange of documents at or near the inception of the case. Instead, production of documents in state court practice is generally governed by formal discovery.

There is a duty on the part of parties to preserve evidence, especially electronically stored information (ESI), when a claim is asserted or a suit is brought. Based on recent appellate precedent, most notably *Zublake v UBS Warburg* (217 FRD 309 (2003)), parties have an affirmative obligation to preserve ESI once litigation is filed (and in some circumstances even before that), and a failure to do so can have catastrophic consequences.

Even as to information or documents not consisting of ESI, a party could face a claim of spoliation of evidence if that party fails to preserve evidence pending trial. Such a claim could be asserted either by way of an affirmative cause of action or, more commonly, by the adverse party either commenting to the jury on, or obtaining a jury instruction about, that failure to preserve evidence. In either event, such failure to preserve evidence pending trial could create enormous substantive and atmospheric problems for the party who fails to preserve such evidence.

Importantly, and as regards ESI, a California lawyer's responsibility is not fully discharged by simply instructing a client to comply with e-discovery rules. The duty extends to the attorney's obligation to make sure that the client follows through thoroughly with respect to the disclosure and production of such evidence. See, for example, Formal Opinion No. 2015-193 of the Standing Committee on Professional Responsibility of the California State Bar.

Evidence – privilege

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

There are both common law and statutory privileges that apply to evidence in the form of documentary evidence and testimony. The most notable of these privileges is the attorney–client privilege, which is codified in California Evidence Code section 950 et seq.

Where this privilege is invoked in connection with the production of documents, the party invoking the privilege must ordinarily supply the other side with a 'privilege log' that identifies the documents withheld on this ground by date, author, recipient and, in some cases, subject matter. See CCP section 2031.240 and *Hernandez v Supreme Court* (112 Cal App 4th 285, 291–292 (2003)). The furnishing of such a 'privilege log' is required so that the party who has propounded the document request will have the ability to test the application of the privilege in respect of particular documents. Where the parties are unable to informally resolve their disputes concerning the application of the privilege, the court or a discovery referee may sometimes conduct an in camera review of the documents. Importantly, the California Legislature in 2017 amended CCP 2016.080 to authorise the use of informal, court-supervised discovery conferences to streamline the process of enforcing rights to civil discovery.

The advice of in-house counsel is normally privileged from disclosure by the attorney–client privilege. In some cases, however, in-house counsel will serve both a legal and non-legal role. In those cases, the court will often have to ascertain the predominant role that individual was serving before determining the application of the privilege. See *Chicago Title Ins Co v Supreme Court* (174 Cal App 3d 1142, 1151-1152 (1985)).

There is another privilege that is becoming increasingly significant in California. Cal Evidence Code section 1119 bars the introduction of anything said, or anything communicated in writing, if the statement was made, or the writing was prepared 'for the purpose of or in the course of a mediation'. The California Supreme Court has ruled in *Cassel v Superior Court*, 51 Cal 4th 113 (2011) that this privilege trumps a client's ability to sue his or her lawyer for malpractice on account of the lawyer's alleged conduct during the course of a mediation. In 2017, the California Law Revision Commission proposed a recommendation to the government that mediation confidentiality not be applied for purposes of supporting or defending a claim of attorney malpractice connected to the mediation.

In 2019, a new statute came into force with regard to mediations. The statute requires an attorney representing a client participating in a mediation to provide that client with a written disclosure. That disclosure, which must be signed by the client prior to the commencement of mediation, must contain the confidentiality restrictions pertaining to mediation that are contained in California's Evidence Code.

Evidence – pretrial

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

Witness lists and trial exhibits (other than those for impeachment) are normally exchanged shortly before trial. The parties are not required to identify the expected subject matter of any of the anticipated trial testimonies of the witnesses.

In the case of expert witnesses, CCP section 2034 governs their identification and disclosure. In brief, any of the parties to a civil lawsuit may issue an expert witness 'demand' to the other parties. The issuance of such a demand requires all parties to identify any expert witnesses they anticipate calling in the case and to specify the subject areas of each expert's anticipated testimony. Except in very narrow circumstances, experts not properly identified in response to a party's 'demand' will not be permitted to testify at trial.

In 2019, California's Code of Civil Procedure, which governs procedures in state trial court, was amended to allow parties to stipulate to an initial disclosure requirement modelled after rule 26 of the Federal Rules of Civil Procedure.

If the parties opt in by stipulation to this requirement, they would be required to exchange information at the inception of litigation. That information will include the identity of all persons likely to have discoverable information, along with the subjects of that information, that the disclosing party may use to support its claims or defences; a copy or description of all documents, including electronically stored information, that the disclosing party has in its possession, custody or control that may be used to support its claims or defences; insurance agreements; and indemnification agreements.

This new state court procedure is triggered only by agreement of the parties, whereas the disclosure requirements under rule 26 of the Federal Rules of Civil Procedure are mandatory.

Evidence – trial

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

Evidence at trial is presented by oral testimony of witnesses, including experts. In addition, evidence at trial usually also includes documentary evidence.

The plaintiff normally presents its case first, which is then followed by the defendant's case. Rebuttal evidence is then presented after the defendant's case.

Interim remedies

12 | What interim remedies are available?

There are several pre-judgment remedies available in civil cases in California.

Where the plaintiff sues in contract for a liquidated amount, the plaintiff may apply for a writ of attachment. This is a pre-judgment remedy that operates to create a lien on some of the defendants' assets pending the conclusion of trial. Thus, if a writ of attachment is levied on a defendant's bank account, only the sums in that account over and above the amount of writ will be available for the defendant's use pending trial.

A party seeking a writ of attachment will typically at the same time request the issuance of a temporary protective order (TPO). The TPO enjoins a defendant from transferring, hypothecating or pledging a particular piece of property (which is often also the subject of an accompanying attachment application) pending the outcome of the case.

There are various instances where the appointment of a receiver is indicated. For example, where a loan secured by real estate is in default, the lender will often bring suit for judicial foreclosure and seek the appointment of a receiver. In such instances, the appointment of a receiver will effectively divest the borrower of control over the real estate collateral pending the outcome of the suit.

Finally, various forms of injunctive relief are also available in civil lawsuits, although the *Mareva* order, or 'freeze order', available in UK courts is not available in California. By contrast, the attachment and TPO remedies discussed above run only against specific items of property. In addition, and again unlike a *Mareva* order, pre-judgment or interim remedies issued by US courts are typically not enforced by their foreign counterparts with respect to property located in other jurisdictions.

Remedies

13 | What substantive remedies are available?

The typical remedies available in civil proceedings are money damages, injunctive relief and declaratory relief.

The court's award of money damages may also include recovery of costs (which are normally recoverable as a matter of right by statute), pre-judgment interest (also recoverable as a matter of right by statute where the amount of the money damages was in a liquidated amount at the time of filing) and attorneys' fees (but only where the recovery of attorneys' fees is authorised by the parties' contract or available by statute). Punitive damages are also recoverable, but only in tort actions or where otherwise available by statute. In this regard, recent decisions of the US Supreme Court have placed constitutional limits on the permissible amount of punitive damages in relation to actual damages.

Enforcement

14 | What means of enforcement are available?

A distinction must be made between disobedience or non-compliance with a money judgment and disobedience or non-compliance with a court order requiring that a party does, or refrains from doing, certain things.

There is no sanction for a party's failure to satisfy a money judgment. Instead, the judgment creditor has certain rights to levy execution or otherwise enforce a money judgment, but the judgment debtor incurs no direct sanction for resisting such enforcement efforts.

The disobedience of a court order requiring that a party does, or refrains from doing, certain things, however, subjects the non-complying party to the possibility of contempt. In this regard, contempt proceedings are quasi-criminal in nature, and the non-complying party may be subjected to fines or imprisonment, or both, for its disobedience.

Public access

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

Except in extraordinary circumstances, civil proceedings are open to the public, as are the pleadings or other court filings in a civil action, which are available to public view, inspection and copying. Thus, in keeping with the strong public policy favouring access to court records, judicial records may be sealed only if the court finds 'compelling reasons'; see, for example, *Pintos v Pac Creditors Ass'n*, 605 F3d 665, 677-78 (9th Cir 2010). In this regard, a litigant's desire to avoid embarrassment or annoyance caused by public disclosure of court records is not considered to be a sufficiently compelling reason to warrant the sealing of the record of legal proceedings (*Oliner v Kontrabecki*, 745 F3d 1024 (9th Cir 2014)).

In some cases, the parties will seek to 'seal' some or all of their pleadings or court filings. In some cases, this is done to shield trade secrets or other proprietary information from public disclosure. The procedure for filing pleadings under court seal is set out in the California Rules of Court.

Costs

16 | Does the court have power to order costs?

Costs incurred by a prevailing party in civil litigation are recoverable as a matter of right in California (see CCP section 1032). Those costs are claimed by the prevailing party by filing a cost bill following entry of judgment. Importantly, the costs recoverable under this procedure are limited in nature (for instance, filing and motion fees), and do not normally include attorneys' fees, which are only recoverable where specifically authorised by statute or the parties' underlying agreement.

Section 1030 of the CCP permits the superior court to order a non-resident plaintiff (including a foreign corporation) to post a bond to secure the payment of the defendant's costs and attorneys' fees. The threshold requirement for obtaining such relief is relatively low, namely that the plaintiff resides out of state or is a foreign corporation, and there is a 'reasonable possibility' that the defendant will prevail. The purpose of this provision is to enable a California resident to secure the recovery of its costs (and, where authorised, its attorneys' fees) against an out-of-state or foreign plaintiff. Although CCP section 1030 is a state statute, the federal courts have the inherent power to require plaintiffs to post security for costs and typically follow the forum state's practices in this area.

In a recent development, the California Supreme Court decided that a party who is dismissed from a lawsuit pursuant to a settlement agreement is entitled to the recovery of statutory costs under CCP section 1032(a)(4). See *DeSaulles v Community Hospital of the Monterey Peninsula*, 62 Cal 4th 1140 (2016).

There have been two recent developments concerning the recovery of costs, particularly as they relate to ESI.

CCP section 1033.5 was recently amended to allow for the recovery (as part of the costs awarded to a prevailing party) of fees 'for the hosting of electronic documents if a court requires or orders a party to have documents hosted by an electronic filing service provider'.

In addition, CCP section 1985.8, which applies to subpoenas seeking ESI, allows the court in particular circumstances to allocate the cost of the retrieval and production of ESI from a third-party custodian of the ESI to the party who serves the subpoena seeking those records.

Funding arrangements

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

Contingent fee agreements are authorised in California. Those agreements typically allow counsel for a prevailing party to share in some percentage of that party's recovery.

Third-party litigation funding arrangements are also permitted. Under such an arrangement, a third party will provide financing to the plaintiff or its counsel for the prosecution of the lawsuit in exchange for a percentage interest in the recovery.

Although no appellate cases in California have directly addressed these issues, other state courts have expressly found that third-party funding arrangements are enforceable and do not violate the early common law prohibition on champerty. See, for example, *Charge Injection Technologies v DuPont*, 2016 Del Super LEXIS 118. Indeed, another Delaware case, *Carlyle Investment Management LLC v Moonmouth Company, SA*, 2015 Del Ch LEXIS 42 held that communication between a claimant and a litigation funding firm is subject to protection from discovery by reason of the work product doctrine.

Finally, a group of US Senators have introduced proposed new legislation concerning litigation funding arrangements. That proposed legislation would mandate disclosure of both the existence and terms of any litigation funding agreements in any federal class action or multi-district litigation.

Insurance

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

There are various forms of liability insurance that may provide for both the funding of a party's defence in a lawsuit and any indemnity payment that an insured party may make – for example, a payment in settlement or a payment to satisfy a judgment.

Typical forms of such liability insurance include commercial general liability (CGL) insurance and directors' and officers' (D&O) liability insurance. Where it is triggered, CGL insurance usually obligates an insurer to defend its insured in the litigation and also to pay those amounts (within the policy limits) that its insured becomes legally obliged to pay. By contrast, D&O insurance usually provides reimbursement to an insured entity for sums advanced by that entity for the defence of its directors and officers.

Importantly, as a matter of both statute and public policy, punitive damages are not insurable under California law. Thus, even though a liability carrier may be obliged to defend its insured in respect of all causes of action (whether covered or uncovered) that are asserted against its insured (*Buss v Superior Court*, 16 Cal 4th 35 (1997)), the liability carrier will ordinarily issue a 'reservation of rights' as to those claims that include a request for punitive damages or that are otherwise not covered under the policy.

In 2014, the California Supreme Court issued an important decision that limited an insurer's duty to defend advertising injury claims (*Hartford Casualty Ins v Swift Distribution*, 59 Cal 4th 277 (2014)).

Class action

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

Class actions are permitted in California. Class litigation is permitted where the following are applicable:

- commonality – there must be one or more legal or factual claims common to the entire class (in some cases, it must be shown that the common issues will predominate over individual issues, such as the amount of damages due to a particular class member);
- adequacy – the representative parties must adequately protect the interests of the class;
- numerosity – the class must be so large as to make individual suits impractical (in other words, that the class action is a superior vehicle for resolution than numerous individual suits);
- typicality – the claims or defences must be typical of the plaintiffs or defendants. See *Vasquez v Superior Court* (4 Cal 3d 800 (1971)); and
- ascertainability – there is some case authority suggesting that a class should not be certified unless its members are 'ascertainable'. See *Xavier v Phillip Morris USA, Inc*, 787 F Supp 2nd 1075, 1089 (ND Cal 2011).

In addition to the state court rules, there is a federal statute, the Class Action Fairness Act of 2005 (CAFA), which is found at United States Code (USC) sections 1332(d), 1453 and 1711–1715. This statute expands federal subject matter jurisdiction over certain large class action lawsuits. As a general matter, this statute allows removal to federal court of certain class actions that are originally filed in state court. The principal purpose of the statute is to curtail 'forum shopping' by plaintiffs in friendly state courts by expanding federal subject-matter jurisdiction.

In a recent case, CAFA's 'mass action provision' was applied where numerous individual actions were sought to be coordinated under applicable state court procedures. In the case, the Ninth Circuit held that the action was properly subject to removal to federal court (*Corber v Xanodyne Pharmaceuticals*, 771 F.3d 1218 (9th Cir 2014)).

Appeal

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

Under state procedural rules, there is an automatic right to appeal an appealable order or judgment. Where the underlying order is not directly appealable, such as a discovery order or an order denying a motion for summary judgment, a party may seek discretionary appellate review by way of a petition for writ of mandate. Because such petitions are rarely granted, the main avenue for obtaining appellate review is by way of a direct appeal, which is usually prosecuted at the conclusion of a civil action.

Even though parties to a civil case may have an automatic right to seek appellate review, the scope of appellate review is often quite narrow. Thus, an appellate court will not ordinarily engage in an independent weighing of the facts, evaluation of the evidence or gauging of the credibility of the witnesses. Thus, appellate review from a judgment following a jury verdict will often be limited to alleged errors of law committed by the trial court, such as errors in the jury instructions. By contrast, where the issue is one of pure law, such as an appeal following the granting of summary judgment, the standard of review will be that of de novo review – that is, the Court of Appeal will review the matter in the first instance and will not be bound by the determinations of the lower court.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

As to the enforcement in the US of money judgments that have been issued by foreign courts, California has adopted the Uniform Foreign Money Judgment Recognition Act of 1962. See CCP section 1713 et seq. That statute allows a party who has been awarded a final money judgment by a foreign court to apply for recognition of that judgment in the United States. Once recognition has been obtained, the judgment may be enforced in the same manner as a judgment issued by a US court. According to its terms, this statute applies to any foreign money judgment that is final, conclusive and enforceable where rendered even though an appeal may be pending or the judgment is subject to appeal. However, there are several enumerated grounds for non-enforcement of a foreign money judgment.

Foreign proceedings

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

The controlling statute here is a federal statute 28 USC section 1782. In brief, that statute provides that a US district court may entertain a request from a litigant involved in a pending foreign proceeding to compel a person residing within the district court's jurisdiction to provide testimony or produce documents for use 'in a proceeding in a foreign or international tribunal'. As the foregoing statute is federal in nature, the applicable case law in this area derives entirely from litigation in the federal courts. Put differently, California's superior courts effectively have no role in the area of compelling the production of testimony or documentary evidence in aid of litigation pending outside the United States.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

No. As more fully discussed below, a distinction needs to be made in the procedural law applicable to arbitration and the substantive law governing a claim that is in arbitration.

At the threshold, the applicable procedural law governs such matters as the enforcement of arbitration provisions found in the contract or agreement between the parties, and also the enforcement of awards rendered after arbitration. In this regard, there are three primary sources for this procedural law in connection with arbitration proceedings taking place in California or governed by its law. First, there is a federal statute, the Federal Arbitration Act, 9 USC section 1 et seq, which in some cases will pre-empt contrary state procedural rules. Second, there is the California Arbitration Act, which is found at CCP sections 1280 et seq. Third, the arbitral organisation itself may have rules governing the appointment of arbitrators, the conduct of the hearing and similar issues.

As distinct from these procedural rules, the substantive law to be applied in an arbitration proceeding may be California law, federal law, the law of a foreign nation or some other form of substantive law. As arbitration is ordinarily a matter of contract, it is typical that the parties' contract will specify the substantive law to be applied. In the absence of such an express election, the arbitrator may be obliged to apply conflicts of law principles to determine the substantive law to be applied.

Arbitration agreements

24 What are the formal requirements for an enforceable arbitration agreement?

An agreement to arbitrate a dispute is typically embodied in a provision in a written contract between the parties. See CCP section 1281.

In this regard, the US Supreme Court decision in *AT&T Mobility v Conception*, 563 US 321, 131 S Ct 1740 (2011) held that the Federal Arbitration Act (the FAA) pre-empts state laws that prohibit outright the arbitration of particular types of claims. Recent California appellate decisions have applied the Court's ruling in *Conception* to enforce agreements to arbitrate (*Iskanian v CLS Transportation Los Angeles, LLC*, 59 Cal 4th 348 (2014) (FAA pre-empts prohibition of class action waivers in employment cases)). However, *McGill v Citibank, NA*, 2 Cal 5th 945 (2017), declared pre-dispute arbitration provisions that waive the right to seek public injunctive relief – namely injunctive relief that has the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public – to be unenforceable.

There is also an important decision from 2020. In *Victrola 89, LLC v Jaman Properties 8, LLC*, B295439 (Cal Ct App 2020), the court made clear that parties can provide that their agreement to arbitrate will be subject to the Federal Arbitration Act (FAA) in lieu of state court procedural rules. In that case, the pertinent agreement provided that 'enforcement of this agreement to arbitrate shall be governed by the Federal Arbitration Act'. In these circumstances, the court concluded that the moving party's motion to compel arbitration would be governed by the FAA instead of state procedural rules.

This decision is important because it sanctions the use of the arbitration-friendly FAA rules in lieu of state procedural rules where the parties expressly provide for that. In view of the perceived hostility on the part of California appellate courts toward the enforcement of pre-dispute arbitration provisions, this decision provides a basis for increasing the likelihood that such provisions will in fact be enforced.

The appellate courts in California are also coming to grips with the enforceability of browserwrap agreements. These agreements are typically found on websites in the form of 'terms and conditions' for website use. In one recent case, the court declined to compel a claimant to pursue his claim via arbitration where the arbitration provision was contained in such a browserwrap agreement. The court held that the website at issue failed to put a reasonably prudent user on inquiry notice of the terms of the supposed contract. For this reason, the court declined to compel arbitration of the claim. *Long v Provide Commerce*, 245 Cal App 4th 855 (2016). See also *Norcia v Samsung Telecommunications*, 845 F3d 1279 (9th Cir 2017) (consumer not bound by arbitration provision contained in warranty sheet accompanying product).

Another issue that the appellate courts in California have dealt with is whether non-signatories to an agreement containing an arbitration provision are bound by, or can themselves enforce, the agreement to arbitrate. The key cases in this area included *Garcia v Pexco, LLC*, 11 Cal App 5th 782 (2017) (agent may bind principal to terms of arbitration agreement); *Hutcheson v Eskaton Fountainwood Lodge*, 17 Cal App. 5th 937 (2017) (relative holding healthcare power of attorney not authorised to bind principal to arbitration agreement); and *Jensen v U-Haul Co. of California*, 18 Cal App 5th 295 (2017) (employee was not third-party beneficiary of rental contract and therefore arbitration provision contained therein could not be enforced). See also *Vasquez v San Miguel Produce*, 31 Cal App 5th 810 (2019), rehearing granted (28 February 2019) (an agency or similar relationship between a signatory and one of the parties to an arbitration agreement allows enforcement of the agreement by the non-signatory).

Finally, there have been two highly significant legislative developments in California affecting arbitration.

Assembly Bill 51, signed by California Governor Gavin Newsom in October 2019, prohibits employers from requiring mandatory arbitration agreements from employees. Although enforcement of this new law has been temporarily stayed, its enactment underscores the Californian government's hostility to mandatory arbitration, especially in employment and consumer-related disputes.

Senate Bill 707, also signed by Governor Newsom last year, provides that in the context of employment disputes that are governed by arbitration, employees cannot be required to bear any type of legal costs or expenses incident to the arbitration process. This new law also provides that an employer's failure to pay those arbitration costs or expenses will constitute a material breach of the arbitration agreement.

Choice of arbitrator

25 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?

If the parties' agreement is silent on this point, then the selection and number of arbitrators is ordinarily determined by reference to the arbitral organisation's procedural rules on that subject. In the absence of such rules, CCP section 1282(a) provides for the appointment of a single neutral arbitrator.

As to the parties' right to challenge the appointment of a particular arbitrator, the arbitral organisation's procedural rules will likewise typically address both removal for cause and the right of either party to exercise a peremptory challenge. In the absence of such rules, CCP section 1281.91 sets forth the grounds for the disqualification of an arbitrator.

Arbitrator options

26 What are the options when choosing an arbitrator or arbitrators?

Selection of arbitrators can be governed in a particular case by at least two sets of rules.

First, the controlling arbitration clause may itself (and typically does) specify how many arbitrators are to be selected and the manner of their selection. In addition, the rules of the particular arbitral organisation (eg, JAMS, International Chamber of Commerce (ICC)) that the parties have selected may outline the manner in which arbitrators shall be selected.

In terms of the pool of candidates, there are some arbitral organisations that are focused on, or specialise in, the resolution of disputes in certain substantive areas of the law. For example, the ICC and the International Dispute Resolution division of the American Arbitration Association (AAA) specialise in international or cross-border disputes, and the arbitrators from these organisations generally come from a pool of practitioners, and in some cases former judges, with experience in that specific area.

Outside the international area, the private ADR organisations that have a large presence in California (AAA, ADR Services, JAMS) have a variety of individual neutrals, with each having a particular focus or emphasis on his or her area of practice. There is thus visibility and transparency to individual lawyers and their clients concerning who within these ADR organisations would be the 'right fit' in particular cases.

Arbitral procedure

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

As noted above, both the FAA and the California Arbitration Act address such matters as the enforcement of arbitration provisions found in the contract or agreement between the parties, and also the enforcement of awards rendered after arbitration. As the procedural outcomes under these two statutes may be quite different, practitioners should exercise care in drafting the language in the underlying agreement that contains the arbitration provision.

In this regard, there continue to be unresolved conflicts between state and federal courts concerning issues such as whether state or federal procedures govern the enforcement of arbitration agreements in State Court (*Los Angeles Unified School District v Safety National Casualty Corporation*, 13 Ca App 5th 471 (2017)) and whether state substantive law that disadvantages arbitration is trumped by the FAA (*Kindred Nursing Centers Limited Partnership v Clark*, 197 L Ed 2nd 806 (2017)).

Importantly, California does not recognise or enforce pre-dispute jury trial waivers. Indeed, in a case in October 2019, the California Court of Appeal declined to enforce choice of law and choice of forum provisions in a commercial contract on the ground that such enforcement would lead to the forfeiture of a California resident's right to a jury in connection with a civil dispute *Handoush v Lease Finance Group, LLC, 41 Cal App 5th 729 (2019)*. The case highlights the sanctity of the right to jury trial, which is safeguarded in both the US and California state constitutions.

Court intervention

28 | On what grounds can the court intervene during an arbitration?

Normally, once a matter has been sent to arbitration the role of the court is usually limited to proceedings to confirm or vacate an arbitration award. Resort to court process is allowed where a party to an arbitration seeks interim remedies, such as injunctive relief.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

Depending on the rules of the arbitral organisation, interim relief can be granted in arbitration. Interim relief can be requested from an emergency arbitrator (providing the arbitral organisation allows for such), the arbitral panel itself or the national courts of the country where the arbitration is held.

The key determinant as to the availability of such relief is the language of the arbitration agreement itself, namely, whether it confers power on the tribunal to grant interim measures.

In the absence of such a provision, the CCP contains a carve-out that allows a party to an arbitration proceeding to seek provisional relief in the Superior Court, including the proviso that an application in court for such provisional relief does not waive the applicant's right of arbitration. (See CCP sections 1281.8(b) and (d).)

Award

30 | When and in what form must the award be delivered?

The rules of the arbitral organisation usually specify both the form and the timing of the arbitral award.

In the absence of such rules, CCP section 1283.4 provides that the award must be in writing and include a determination of all the questions submitted to the arbitrators for determination of the controversy. In addition, CCP section 1283.3 provides that the award shall be made within the time fixed in the parties' agreement or, if not so fixed, within such time as the court orders on petition of a party to the arbitration.

Appeal

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

Appellate review of an arbitration award is extremely limited. In the first instance, an arbitration award must be 'confirmed' by the superior court. This means that following the conclusion of the arbitration proceeding, the prevailing party must petition the superior court to 'confirm' the arbitration award, that is, enter it in the form of an enforceable judgment (see CCP section 1285).

In the overwhelming number of instances, the superior court will 'confirm' the arbitration award and enter it as an enforceable judgment. This is because the grounds for vacating (or declining to 'confirm') the award are extremely limited. See CCP section 1286.2. Thus, an arbitration award will not be vacated even where an arbitrator made errors of fact or errors of law. See *Moncharsh v Heily & Blase* (3 Cal 4th 1 (1992)). Put simply, the superior court does not engage in an evaluation of the merits of the controversy when making its determination to confirm an arbitration award. But see *Aspic Engineering and Construction v EEC Centcom Constructors*, 913 F3d 1162 (9th Cir 2019) (where arbitrator's award fails to draw its essence from the parties' underlying agreement, vacation of award is proper).

By contrast where an arbitration agreement provides that the arbitrator's decision may be reviewed by the Superior Court for errors of fact or law, the scope of review will be broader than as otherwise provided under CCP 1286.2. See *Harshad & Nasir Corporation v Global Sign Systems, Inc*, 14 Cal App 5th 523 (2017).

As to whether an order granting or denying a petition to compel arbitration is appealable, the general rule in both state and federal courts is that an order compelling arbitration is not appealable (*Johnson v Consumerinfo.com, Inc*, 745 F3d 1019 (9th Cir 2014); *Bertero v Superior Court*, 216 Cal App 2d 213 (1963)), while at least in state court an order denying a petition to compel arbitration is appealable (*Smith v Superior Court*, 202 Cal App 2d 128 (1962)). In a state court, an appeal from an order denying a petition to compel arbitration will also operate to stay the trial court proceedings as to the party who brought the petition without the appellant having to post a bond.

The role of an appellate court is even more limited. Once an arbitration award is confirmed by the superior court, the appellate court's role is limited to determining whether such confirmation was appropriate. As with the trial court's own confirmation process, the appellate court does not engage in an evaluation of the merits of the controversy when it is asked to review the appropriateness of the trial court's action in confirming or vacating the award.

Enforcement

32 What procedures exist for enforcement of foreign and domestic awards?

Once the hearing has been completed, the arbitration culminates in the arbitrator's issuance of an award in favour of one of the contracting parties.

If the loser pays the award, no further proceedings will presumably be necessary. However, in the event that the winner needs to enforce the award, it will have to file a court action to confirm the award, that is, convert it into an enforceable judgment. If the arbitration provision is governed by the Federal Arbitration Act, that provision should expressly provide that parties agree that any arbitration award shall be judicially confirmed.

At this stage of the proceedings, the loser has few options. The grounds for challenging or setting aside an arbitration award are limited and extremely narrow. A court that is asked to confirm the award will not ordinarily review the merits or overturn the award, even where there have been errors of law or fact.

Nor can the merits of the arbitration award be appealed, except where the arbitration agreement provides that the arbitrator's decision can be reviewed for errors of fact or law (*Harshad & Nasir, supra*, 4 Cal App 5th 523). Thus, ordinarily, once a judgment on the award has been entered, any appeal therefrom will normally be limited to the appropriateness of confirmation, not the underlying merits of the dispute itself.

The recent change in the political landscape in the United States has not affected the enforcement procedures for foreign or domestic awards. Inasmuch as there is a separation of powers between the executive and judicial branches of government, the enforcement of foreign and domestic awards is governed by the pertinent statutes, especially the New York Convention, and the judicial interpretations of those statutes.

Costs

33 Can a successful party recover its costs?

As a general rule, under CCP section 1284.2, each party to the arbitration is required to pay his or her pro rata share of the expenses and fees of the neutral arbitrator unless the parties' agreement otherwise provides.

There have been two recent developments concerning the recovery of costs, particularly as they relate to ESI.

CCP section 1033.5 was recently amended to allow for the recovery (as part of the costs awarded to a prevailing party) of fees 'for the hosting of electronic documents if a court requires or orders a party to have documents hosted by an electronic filing service provider'.

In addition, CCP section 1985.8, which applies to subpoenas seeking ESI, allows the court in particular circumstances to allocate the cost of the retrieval and production of ESI from a third-party custodian of the ESI to the party who serves the subpoena seeking those records.

There are no California statutes or judicial decisions that allow for the recovery of the costs incident to third-party litigation funding.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

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

The main types of ADR besides arbitration are detailed below.

Mandatory pre-arbitration or pre-litigation mediation

The parties can provide that before either can commence arbitration or litigation, they must participate in a mediation process. That process can be entirely informal or supervised by a third-party neutral. If the mediation takes place under the auspices of an arbitral organisation, such as the AAA or the International Chamber of Commerce, the arbitration rules of the pertinent organisation may come into play. In general, having a mediation supervised by a third-party neutral is ordinarily more productive than leaving the parties, who may already be locked into their respective positions, to their own devices.

Reference

Trial by reference is an authorised form of ADR under California law and is described in California Code of Civil Procedure (CCP) sections 638 et seq.

Several cases hold that a valid reference to a retired judge or other referee necessarily entails an enforceable waiver of the parties' right to a jury trial, even though the particular reference provision may not expressly speak to such waiver. See, for example, *O'Donoghue v Superior Court*, 219 Cal App 4th 245 (2013); *Woodside Homes of California v Superior Court*, 142 Cal App 4th 99 (2006). CCP section 645 expressly allows for appellate review of 'the decision of the referee… in like manner as if made by the court'. See also *First Family Ltd Partnership v Cheung*, 70 Cal App 4th 1334 (1999).

Mini-trial

This process can be either binding or non-binding. The concept is that representatives from the two parties involved in the dispute will each make a streamlined presentation of their respective cases to a small decision-making body, which is often composed of an executive from each of the two companies, together with a third-party neutral. After the conclusion of the presentation, the non-litigant executives attempt to work out a solution with the aid of the third-party neutral.

Requirements for ADR

35 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?

Under Rule 3.1380 of the California Rules of Court, the court, on its own motion or at the request of any party, may set one or more mandatory settlement conferences.

MISCELLANEOUS

Interesting features

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

One of the most significant ongoing trends in California is the move toward ADR, and especially arbitration. This move has been given particular impetus over the past few years, as the state has experienced a series of budget crises that have resulted in significant underfunding of the state court system. Put simply, the state court system does not have the financial or human resources to adequately resolve civil disputes.

This development means that sophisticated parties to disputes involving commercial or civil matters now frequently opt out of the judicial system by voluntarily electing arbitration or some other form of ADR.

Two other effects of this trend have been seen. First, there has been enormous growth in the number and variety of ADR providers in California. Second, the law in this area has been developing rapidly. Issues frequently addressed by appellate courts in this area include the enforceability of pre-dispute agreements to arbitrate future disputes, especially in the employment context. See, for example, *Sanchez v Carmax Auto Superstores California*, 224 Cal App 4th 398 (2014). In

addition, there have been several recent decisions from both state and federal courts concerning the interplay between the California Arbitration Act (which is found at CCP section 1280 et seq) and the Federal Arbitration Act (which is found at 9 USC section 1 et seq). See, for example, *Mastick v TD Ameritrade*, 209 Cal App 4th 1258 (2012).

There is another important development arising from this trend. As more and more disputes are resolved via arbitration or other forms of ADR, both the arbitral organisations and the courts have become more receptive to allowing appeals from arbitration awards to be heard on their full merits, as opposed to the more limited grounds set forth in the California Arbitration Act (CAA).

Thus, several arbitral organisations have adopted rules (which may be implemented on an optional basis by the parties) that would allow for appeals from arbitration awards to be heard on their full merits. One example is American Arbitration Association Rule A-10, which allows a party to appeal from an arbitration award where the award is based on an error of law that is material and prejudicial; or determinations of fact were made by the arbitrator that were clearly erroneous. Other arbitral organisations, such as JAMS and CDR, have enacted similar optional rules.

In addition, California law now provides that parties to an arbitration agreement that is governed by the CAA may stipulate to judicial review of their arbitration award. See, for example, *Cable Connection, Inc v DirecTV, Inc*, 44 Cal 4th 1334 (2008); *Harshad & Nasir Corporation v Global Sign Systems, Inc* 14 Cal App 5th 523 (2017). By contrast, parties to an arbitration agreement that is governed by the Federal Arbitration Act (FAA) may not expand the scope of appellate review otherwise available under section 10 of the FAA. See *Hall Street Associates, LLC v Mattel, Inc*, 552 US 576 (2008).

In 2019, the US Supreme Court in *Henry Schein, Inc v Archer and White Sales, Inc* [139 S. Ct. 524] US (2019) is also noteworthy. This decision reaffirmed the principle that parties to an arbitration agreement may properly delegate the question of arbitrability to the arbitrator, as opposed to the Court. The Court went further, clarifying that the courts may not deny a petition to compel arbitration where the party opposing arbitration asserts that the argument that the arbitration agreement applies to the particular dispute is 'wholly groundless'. See also *Sanquist v Lebo Automotive, Inc*, 1 Cal 5th 233 (2016) (issue of who decides whether arbitration agreement provides for class arbitration is one for arbitrator, not the court).

Separate from arbitration, there are two other sets of emerging issues in California.

The first area is in connection with labour and employment disputes. In this area, the California Supreme Court issued a decision in 2018, *Dynamex Operations West, Inc v Superior Court of Los Angeles* (2018) 4 Cal 5th 903, which reversed decades of precedent concerning the classification of workers as either employees or independent contractors. Under *Dynamex,* the court ruled that workers are presumptively employees and not contractors, and it imposed the burden on the hiring entity that classifies a worker as contractor to establish that this classification is supported under the 'ABC' test that it articulated in its decision.

This worker-friendly decision has profound implications for companies like Uber and others in the gig-economy marketplace. Indeed, companies in that marketplace have undertaken efforts to overturn *Dynamex* through the referendum and legislative processes.

In addition to *Dynamex*, there are the recent legislative initiatives Assembly Bill 51 and Senate Bill 707, which impact the ability of employers to enforce mandatory arbitration provisions in connection with labour and employment disputes in California.

Finally, the government recently passed the California Consumer Privacy Act (CCPA), which enacts a comprehensive privacy regime affecting businesses operating in California. Among other things, it requires companies to update their privacy policies and to provide specified notices about their collection of personal information, use and sharing practices. In addition, it provides for a private right of action for individuals affected by data breaches or the compromise of their personal information.

Although the CCPA is too new for there to have been any appellate cases interpreting its provisions, its enactment will undoubtedly spur the filing of privacy-related litigation in California.

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UPDATE AND TRENDS

Recent developments

37 Are there any proposals for dispute resolution reform? When will any reforms take effect?

There are no pending reforms at this time.

Coronavirus

38 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

There have been a number of legislative initiatives prompted by the covid-19 pandemic that have affected dispute resolution in California.

During its 2020 session, the California Legislature enacted two amendments to the California Code of Civil Procedure (CCP) in response to the pandemic.

The first, which is set forth in CCP 2025.310, provides that a deponent or deposing party may elect to conduct a deposition remotely (ie, the deponent need not be physically present with the court reporter during the deposition). As a practical matter, the overwhelming majority of depositions in civil cases are now being entirely conducted virtually (ie, over Zoom or some other platform).

The second legislative initiative involved an amendment to CCP 1010.6, which governs service of notices or documents with respect to a party who has appeared in an action. New subdivisions (e)(1) and (2) of that statute provide that a party who has appeared in an action and is represented by counsel must accept e-service of any notice or document that may be served by mail, express mail, overnight delivery or fax. Again, and as a practical matter, counsel in California are serving notices, pleadings and other documents electronically.

In addition to these legislative initiatives, the Judicial Council of the State of California issued a series of emergency orders that, among other things, extended the statutory time within which a civil case must be brought to trial; provided for the tolling of various statutes of limitations during the time that the Covid emergency measures were in effect; and suspended any rule of the California Rules of Court to the extent that such rule would prevent a court from using technology to conduct judicial proceedings.

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