

United States – California

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Litigation

1 Court system

What is the structure of the civil court system?

In the US, there are parallel state and federal court systems, consisting in each case of a trial court, an intermediate appellate court and a Supreme Court. While there are a number of 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, among other trial courts, the Los Angeles Superior Courts.

Each appellate district may be further sub-divided 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.

2 Judges and juries

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 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).

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.

3 Limitation issues

What are the time limits for bringing civil claims?

California’s CCP sets out the limitations 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 CCP section 337.

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.

4 Pre-action behaviour

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 either because of the nature of the claim or the underlying agreement.

Some kinds of civil claims, including those against governmental 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.

5 Starting proceedings

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

A 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.

6 Timetable

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 are set.

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

7 Case management

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.

8 Evidence - documents

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

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 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 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, eg, Formal Opinion No. 2015-193 of the Standing Committee on Professional Responsibility of the California State Bar.

9 Evidence - privilege

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 to 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 Legislature that mediation confidentiality not be applied for purposes of supporting or defending a claim of attorney malpractice connected to the mediation.

10 Evidence - pretrial

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. Parties are not required to identify the expected subject matter of any of the witness' anticipated trial testimony.

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.

11 Evidence – trial**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.

12 Interim remedies**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 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 not enforced by their foreign counterparts with respect to property located in other jurisdictions.

13 Remedies**What substantive remedies are available?**

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

As to monetary damages, the court's award of such 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 generally 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.

14 Enforcement**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 party do, or refrain 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 do, or refrain 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.

15 Public access**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 court filings that are filed by parties 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.

16 Costs**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 electronically stored information (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, under 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.

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

Contingent fee agreements are authorised in California. Such 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 prohibitions 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 communications between a claimant and a litigation funding firm is subject to protection from discovery by reason of the work product doctrine.

18 Insurance

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, as well as 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 obligated 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 obligated 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).

19 Class action

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)).

As perhaps a harbinger of things to come, a proposed bill was recently introduced into the US Congress whose purpose is to reform class action litigation. The author of the bill, Rep Rob Goodlatte (R Va), was also one of the authors of the Class Action Fairness Act, which was enacted in 2005. The pending bill introduced by Rep Goodlatte goes much further in making the prosecution of class action litigation more difficult.

There is now a widespread perception among businesses of all sizes that class action practice, especially in California, has become abusive. Among other things, it is widely perceived that many of these suits are contrived by plaintiffs' counsel in order to generate fees and do not confer any meaningful benefits on the class members.

The key highlights of the proposed bill include the following:

- restrictions on fee awards to class counsel, so that the amount of such fee awards will in no event exceed the total amount of money directly distributed to and received by all class members;
- requiring the existence of third-party litigation funding – that is, disclosure of the identity of any person or entity (other than a class member or class counsel) who has a contingent right to receive compensation from any settlement or judgment in the action;
- requiring that an order certifying a class not be issued unless the party seeking to maintain such class action affirmatively demonstrates that each proposed class member suffered 'the same type and scope of injury as the name class representative'; and
- requiring disclosure and prohibition of conflicts, especially where any proposed class representative or named plaintiff is a relative of, a present or former employee of, or a present or former client of class counsel.

Although the proposed bill was only recently introduced, and has not been passed by Congress or become law, its introduction reflects a swing of public sentiment in reaction to perceived class action abuses.

20 Appeal

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.

21 Foreign judgments

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 US. 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.

22 Foreign proceedings

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 US.

Arbitration

23 UNCITRAL Model Law

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.

24 Arbitration agreements

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 a particular types of claims. Recent California appellate decisions have applied the Court's ruling in *Conception* to enforce agreements to arbitrate. *Iskarian v CLS Transportation Los Angeles, LLC*, 59 Cal 4th 348 (2014) (FAA pre-empts prohibition of class action waivers in employment cases). But see *McGill v Citibank, NA*, 2 Cal 5th 945 (2017), declaring to be unenforceable pre-dispute arbitration provisions that waive the right to seek to public injunctive relief – ie, injunctive relief that has the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public.

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).

Another issue that the appellate courts in California dealt with in 2017 was 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); *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).

Finally, the California Legislature passed a law prohibiting mandatory pre-dispute arbitration provisions in contracts for goods or services in certain specified instances. Under the new law, which amends Civil Code sections 51.7, 52 and 52.1, any waiver of the right to seek judicial redress must be knowing, voluntary and expressly not made as a condition of entering into a contract or as a condition of providing or receiving goods or services. This new law applies to all agreements entered into, modified, renewed or extended on or after 1 January 2015. As the US Supreme Court has made it clear that courts applying the FAA will invalidate state laws that single out arbitration agreements for special burdens or scrutiny, it is uncertain whether this law will survive any future US Supreme Court challenge.

25 Choice of arbitrator

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

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.

26 Arbitrator options

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), etc) 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.

27 Arbitral procedure

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 such issues 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 Cal 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 2d 806 (2017)).

28 Court intervention

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.

29 Interim relief

Do arbitrators have powers to grant interim relief?

Depending on the rules of the arbitral organisation, interim relief can be granted in arbitration. Such 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).)

30 Award

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.

31 Appeal

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.

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 court 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 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.

32 Enforcement

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. As noted above, 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 US has not affected the enforcement procedures for foreign or domestic awards. Inasmuch as there is a separation of powers as between the executive and judicial branches of government, the enforcement of foreign and domestic awards is governed by the pertinent statutes and the judicial interpretations of those statutes.

33 Costs

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.

Noted in response to question 16 are some recent statutory enactments that allow for the costs incident to the production or management of ESI.

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

34 Types of ADR

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 ICC, 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 either be 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.

35 Requirements for ADR

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

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

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.

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 AAA 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 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).



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