

Jersey

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TYPES OF DISPUTE RESOLUTION

1. Please give a brief overview of the main dispute resolution methods used in your jurisdiction to settle large commercial disputes, identifying any recent trends.

Large commercial disputes in Jersey are generally resolved through litigation before the Royal Court. However, mediation is becoming an increasingly common method of alternative dispute resolution (ADR). *Sinel v Goldstein* illustrated the Royal Court's frustration with costs in civil disputes and prompted an amendment to Jersey's Royal Court Rules in 2004, allowing the court to stay pending litigation to allow parties to mediate to achieve settlement. A successful party can be deprived of all or part of its costs if it unreasonably refuses to engage in mediation (*Bespoke Investments Limited v Lincoln Nominees Limited [2005] JRC 090*).

The court has also stated that litigants and counsel must remember that mediation is often a cost-effective and appropriate way to resolve disputes, and counsel should routinely consider whether it is suitable.

At any stage of the proceedings, the court can on its own motion, or on the application of any party, stay the proceedings for a period it thinks fit to enable the parties to attempt settlement through ADR (*Royal Court Rule 6/28*). This includes "any method of resolving disputes otherwise than through the normal trial process". The court can also require the parties to report on progress and can make appropriate directions about case management.

COURT LITIGATION - GENERAL

2. What limitation periods apply to bringing a claim and what triggers a limitation period? Please briefly set out any different rules for particular areas of law relevant to large commercial disputes, for example contract, tort and land disputes.

There is little statutory framework for limitation periods. Therefore, in some cases, it is unclear when claims are prescribed. Prescription periods in Jersey are, in most cases, based on case law rather than statute.

The majority of commercial claims are based on tort and contract law. The prescription period for tort claims is three years from

the date on which the cause of action accrued (*Law Reform (Miscellaneous Provisions) (Jersey) Law 1960*). The prescription period for contract claims is regulated by Jersey customary law and is ten years from accrual of the cause of action.

3. Please give a brief overview of the structure of the court where large commercial disputes are usually brought. Are certain types of dispute allocated to particular divisions of this court (for example, IP, competition or maritime disputes)?

The answers to the following questions relate to procedures that apply in the Royal Court.

The Royal Court is the principal court of Jersey and has the following divisions:

- Héritage (dealing with property issues).
- Family.
- Probate.
- Samedi (which deals with all other matters).

Large commercial disputes are generally heard in the Samedi division and are usually listed before the Bailiff, Deputy Bailiff or a Commissioner. Questions of fact are decided by a permanent panel of Jurats and questions of law are determined by the judge. Jurats are generally persons of high standing within the local community and are not legally qualified.

4. Which types of lawyers have rights of audience to conduct cases in courts where large commercial disputes are usually brought and what requirements must they meet? Can foreign lawyers conduct cases in these courts?

Only locally qualified Jersey advocates have rights of audience in the Royal Court. Generally, most Jersey advocates have practised in a foreign jurisdiction before re-qualifying in Jersey. Re-qualification involves a series of six exams covering the Jersey constitution and legal system, civil and criminal procedure, wills and probate, the law in relation to real property, contract and one choice from family law, trusts or company law. Before being called to the bar, the individual must work in a local firm for at least two years.

FEES AND FUNDING

5. What legal fee structures can be used? For example, hourly rates, task-based billing, and conditional or contingency fees? Are fees fixed by law?

Fee arrangements are generally set between the advocate and his client, generally with time-based charging. Conditional or contingency fees are prohibited by the Jersey Law Society Code of Conduct. A Legal Aid scheme is available to individuals satisfying the appropriate means test, but is different to the structure in England and Wales. In Jersey, depending on an individual's earnings, a person is charged a percentage of a fixed hourly rate. Those who fall below the threshold are exempt. Legal Aid, which receives no state funding, is a significant burden on the legal profession.

6. How is litigation usually funded? Can third parties fund it? Is insurance available for litigation costs?

Funding

A company or an individual not in receipt of legal aid generally fund their own litigation.

Insurance

Funding can be provided by insurers, but this depends on whether the client's policy covers the relevant claim and whether there is a cap on legal fees payable. There is no after the event insurance cover.

COURT PROCEEDINGS

7. Are court proceedings confidential or public? If public, are the proceedings or any information kept confidential in certain circumstances?

In large commercial cases, the general rule is that all court proceedings are conducted in public, unless otherwise ordered by the court or on the application of one or other of the parties. If a party wants a hearing conducted in private, the court has to be satisfied that the need for confidentiality outweighs the public interest in access to open justice. In certain circumstances, judgments may be anonymised.

8. Does the court impose any rules on the parties in relation to pre-action conduct? If yes, are there penalties for failing to comply?

There are no pre-action protocols such as those in England and Wales in relation to civil litigation.

9. Please briefly set out the main stages of typical court proceedings, including the time limits (if any) for each stage, any penalties for non-compliance and the role of the courts in progressing the case. In particular:

- How a claim is started.
- How the defendant is given notice of the claim and when the defence must be served.
- Subsequent stages.

Starting proceedings

Legal proceedings in the Royal Court can be commenced by a summons, order of justice or representation. A summons is only used when suing for a liquidated sum, and generally most actions are started by an order of justice, which sets out the plaintiff's (claimant's) claim and is signed by the locally qualified advocate or solicitor.

Notice to the defendant and defence

If proceedings are commenced by summons, service by post is permissible. However, an order of justice must be served personally on the defendant.

Subsequent stages

On service of the order of justice, the defendant is served with a summons giving a date for appearance before the Royal Court. The matter is then tabled by the plaintiff for a Friday afternoon and the matter may be placed on the pending list as evincing an intention to defend, or adjourned. If the matter is placed on the pending list, the defendant has 21 days to serve their answer. The plaintiff then has 21 days to file their reply. If the defendant does not appear, judgment can be taken in his absence. The matter then proceeds through the usual stages of discovery and so on until the matter settles or the parties are ready for trial.

INTERIM REMEDIES

10. What actions can a party bring for a case to be dismissed before a full trial (for example, summary judgment or for a claim to be struck out)? On what grounds must such a claim be brought? Please briefly outline the procedure that applies.

Numerous interim remedies are available on the application of either party before trial.

Summary judgment or strike out

If the defendant fails to file an answer, the plaintiff can apply for judgment in default. A party can also apply to strike out the other's case, because the opposing pleading:

- Discloses no reasonable cause of action or defence.
- Is scandalous, frivolous or vexatious.
- May prejudice, embarrass or delay the fair trial of the action or any other proceedings.
- Is otherwise an abuse of court process.

It is also possible to apply for strike out on the grounds that two months have passed since the close of pleadings and no summons for directions has been issued. A claim can also be struck out for want of prosecution.

A summons must be issued and an affidavit filed in support. All applications must be made on notice to the other party (two clear days' notice).

11. Can a defendant apply for an order for the claimant to provide security for its costs? If yes, on what grounds?

If a plaintiff resides outside Jersey, it is possible for a defendant to make an application for security for costs. This application is made by summons with an affidavit in support. The application should be made as soon as possible; later applications are less likely to be successful. The ordinary rule is that where a party is a non-resident and has no assets in the jurisdiction, an order for security for costs is made, unless it is unjust or oppressive to do so or there are special circumstances, for example, threat to liberty. The court also considers the ease with which any judgment is able to be enforced in another jurisdiction. It is established practice that security for costs is not normally ordered against a plaintiff residing in the jurisdiction.

12. In relation to interim injunctions granted before a full trial:

- Are they available and on what grounds are they granted?
 - Can they be obtained without prior notice to the defendant and on the same day in urgent cases?
 - Are mandatory interim injunctions to compel a party to do something available in addition to prohibitory interim injunctions to stop a party from doing something?
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Jersey is a Norman customary law jurisdiction. While the courts have historically recognised the French concept of *saisie conservatoire*, the Royal Court has adopted injunctions identical to those in England and Wales namely, Mareva (freezing), Anton Piller (search) and Norwich Pharmacal (disclosure) orders.

Interlocutory injunctions are usually available provisionally, pending the main hearing and are usually aimed at preserving the status quo. An application is made by way of an order of justice signed by the Bailiff. Freezing injunctions and Anton Piller orders are generally all made *ex parte*, usually because the relief sought is an injunction to prevent the dissipation of assets or the

destruction of evidence. There is a strict duty on the applicant to give full and frank disclosure.

The principles on which the court decides whether an injunction should be granted are based on *American Cyanamid v Ethicon [1975]* as applied in *Alpha Print v Alphagraphics [1989]*. The questions that should be asked are:

- Is there a serious case to be tried (for example, a case which is not frivolous or vexatious)?
- Where does the balance of convenience lie?

It usually takes about 48 hours from instruction to receiving the court order.

The court has discretion to grant a mandatory injunction in an interlocutory application, but only in unusually strong, clear (that is, exceptional) cases and only if convinced that the trial court will affirm the decision.

13. In relation to interim attachment orders to preserve assets pending judgment or a final order (or equivalent):

- Are they available and on what grounds must they be brought?
 - Can they be obtained without prior notice to the defendant and on the same day in urgent cases?
 - Do the main proceedings have to be in the same jurisdiction?
 - Does attachment create any preferential right or lien in favour of the claimant over the seized assets?
 - Is the claimant liable for damages suffered as a result of the attachment?
 - Does the claimant have to provide security?
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When applying for a Mareva injunction the applicant must:

- Make full and frank disclosure of all material matters in his knowledge.
- Give particulars of his claim against the defendant (including grounds and amount) and fairly state the points against him.
- State his grounds for believing that the defendant has assets within the jurisdiction.
- Explain why there is a risk of dissipation of assets, apart from the defendant being beyond the jurisdiction.
- Give an undertaking in relation to any damages incurred by the defendant if the plaintiff's claim proves unjustified.

14. Are any other interim remedies commonly available and obtained? If yes, please give brief details.

A procedure particular to Jersey is the Clameur de Haro, which is a type of interim injunction that can be raised by an aggrieved party, and which must subsequently be confirmed by the court. It allows the claimant to obtain an immediate injunction without the assistance or authority of an officer of justice. The Clameur can be raised for the protection of real property against a person wrongfully claiming a possessory right of any nature in real property, but it can only be raised by a person in possession of the land in question.

The procedure is that the aggrieved person must go down on one knee, bare headed, and hands clasped and say “*Haro, Haro, Haro, à l’aide mon prince on me fait tort*” in the presence of two witnesses and in the hearing of the perpetrator of the wrong.

FINAL REMEDIES

15. What remedies are available at the full trial stage (for example, damages and injunctions)? Are damages just compensatory or can they also be punitive?

The following remedies are available to the Royal Court at the full trial stage:

- Compensatory damages.
- Account of profits.
- Declarations.
- Final injunctions.
- Seizure of assets and execution of judgments against real and personal property.
- Tracing remedies.

EVIDENCE

16. What documents must the parties disclose to the other parties and/or the court? Are there any detailed rules governing this procedure?

The court can order “any party to any proceedings to furnish any other party with a list of the documents which are or have been in his or her possession, custody or power relating to any matter in question in the cause or matter and to verify such list by affidavit” (*Rule 6/17(1) of the Royal Court Rules 2004*). The obligation in Jersey is wider than under Part 31 of the Civil Procedure Rules of England and Wales and the definition of documents is extremely wide-ranging. It includes not only hard copy documentation such as letters, faxes, and so on, but also anything on which information is recorded, for example, compact discs, USB drives, videos or computer hard drives.

The test for relevance is set out in *Victor Hanby Associates v Oliver [1990] JLR 337*: “the material sought had to relate to

matters pleaded in the forthcoming action, and the test was satisfied if the documents contained information which may - not which must - have enabled the party requiring disclosure to advance his case or to damage that of his adversary”.

17. Are any documents privileged (that is, they do not need to be shown to the other party)? In particular:

- **Would documents written by an in-house lawyer (local or foreign) be privileged in any circumstances?**
 - **If privilege is not recognised, are there any other rules allowing a party not to disclose a document (for example, confidentiality)?**
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Privileged documents

Any documents regarded as privileged do not need to be disclosed, although their existence must be noted in the affidavit of discovery (*Rule 6/17(3), Royal Court Rules*). They do not need to be produced for inspection, but the basis for any objection to a document’s production must be explained. The principle grounds are usually legal professional privilege and/or litigation privilege.

Other non-disclosure situations

This covers anything which is not relevant to a question between the parties to the proceedings.

18. Do witnesses of fact give oral evidence or do they just submit written evidence? Is there a right to cross-examine witnesses of fact?

At trial, witnesses of fact give oral evidence. However, it is possible for their affidavit evidence, or witness statement once sworn, to be admitted as their evidence in chief at the discretion of the trial judge. The witness is then open to oral cross-examination. At interlocutory hearings however, the witness’ evidence is generally confined to the contents of their affidavit and they are not usually exposed to live questioning.

19. In relation to third party experts:

- **How are they appointed (for example, are they appointed by the court or by the parties)?**
 - **Do they represent the interests of one party or provide independent advice to the court?**
 - **Is there a right to cross-examine (or reply to) expert evidence?**
 - **Who pays the experts’ fees?**
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Appointment procedure

There is no formal appointment procedure. The parties are responsible for appointing experts. The parties can instruct an expert jointly, or each party can appoint their own expert.

Role of experts

The question of whether an individual is able to give expert evidence depends on whether it can be shown that:

- The person has relevant expertise in an issue in the case; and
- He is aware of his primary duty to the court if he gives expert evidence.

The court must be confident that the expert's opinions are independent.

Experts usually include a standard paragraph in their report confirming their understanding that their duty is to the court. At trial, the expert's role is to assist the court with understanding key issues that the court would struggle to understand without their assistance.

Right of reply

Expert witnesses are subject to cross-examination in the same way as lay witnesses.

Fees

The party instructing an expert is responsible for the expert's fees. A party's expert fees form part of the costs that can be recoverable from his opponent if he is successful in the proceedings.

APPEALS

20. In relation to appeals of first instance judgments in large commercial disputes:

- To which courts can appeals be made?
- What are the grounds for appeal?
- Please briefly outline the typical procedure and timetable.

Appeals from decisions of the Royal Court are made to the Court of Appeal of Jersey. The ultimate Court of Appeal is the Privy Council.

Appeals to the Court of Appeal are made as of right, but leave to appeal is required where the order appealed:

- Is a consent or costs order.
- Concerns a dispute with a monetary value of less than £3,000 (about US\$1,454).
- Is an interlocutory order or judgment.

The grounds for appeal are:

- The judge misdirected himself in relation to the law.
- In exercise of discretion, the judge took into account matters he ought not to, or failed to take into account those he should.

- The decision is plainly wrong.

Notice of appeal must be served within one month of the date of the order or judgment being appealed. The applicant must then apply within seven days of serving the notice to set the matter down.

COSTS

21. Does the unsuccessful party have to pay the successful party's costs and how does the court usually calculate any costs award? What factors do the court consider when awarding costs (for example, any pre-trial offers to settle)?

The Royal Court has absolute discretion for an award of costs. However, the general rule is that costs follow the event and the unsuccessful party is normally ordered to pay the successful party's costs of the action, to be agreed or assessed. The usual order is for payment of recoverable costs, which are calculated at a rate less than that ordinarily charged by advocates (generally about 60% to 70% of the actual costs incurred). If there is sufficient justification, the court can order the unsuccessful party to pay the successful party's costs on an indemnity basis, so the actual costs (within reason) are treated as recoverable.

Where a payment into court has been made which is greater than the sum finally awarded by the court, the costs liability of the payer into court stops at the date the payment in was made. This is also the same for Calderbank offers (that is without prejudice offers made to settle before the trial), provided the following conditions are satisfied:

- The offer should be expressed in clear terms, setting out those parts of the claim to which it applies, whether it takes account of any counterclaim and whether it is inclusive of interest.
- The offer should be open for acceptance for a reasonable period and otherwise accord with the substance of a Calderbank offer.
- The offer should be genuine and not a sham.
- The defendant should clearly be good for the money at the time when the offer was made.

The behaviour of all parties to the proceedings is taken into account by the court in the exercise of its discretion on costs.

22. Is interest awarded on costs? If yes, how is it calculated?

Under the Interests on Debt and Damages (Jersey) Law 1996, interest can accrue on judgment debts, defined to include any sum of money ordered to be paid by a court on giving judgment including costs, charges or expenses.

Simple interest accrues at the rate set by the court. This is currently 2% above the UK banks' base rate from time to time, during the period for which interest runs, and calculated on a daily basis.

ENFORCEMENT

23. What are the procedures to enforce a local judgment in the local courts?

The act of court obtained following a court judgment is available two days after the hearing. The judgment creditor provides the act to the Viscount's department for enforcement. Payment can still be made direct to the creditor for about ten days until the Viscount's department take action.

The Viscount's department can either take an arrest of wages (if provided for in the judgment), or take and sell the judgment debtors movable property to satisfy the debt.

While it is usual to enforce judgments against a person's movable property, it is also possible to enforce against immovable property through certain insolvency procedures.

CROSS-BORDER LITIGATION

24. Do local courts respect the choice of law in a contract (that is, if the parties agree that the law of a foreign jurisdiction will govern the contract)? If yes, are there any areas of law in your jurisdiction that apply to the contract despite the choice of law?

The Royal Court respects the choice of law made by parties in contractual arrangements. The court may be unable to respect the choice of law for public policy reasons, or as a result of statutory intervention.

25. Do local courts respect the choice of jurisdiction in a contract (that is, if the parties agree that claims will be brought in the courts of a foreign jurisdiction)? Do local courts claim jurisdiction over a dispute in some circumstances, despite the choice of jurisdiction?

The Royal Court also respects the parties' choice of governing jurisdiction in a contract. If the parties have agreed to the non-exclusive jurisdiction of a foreign court, factors identifying Jersey as the appropriate or convenient forum are considered by the court in support of an argument that proceedings ought to be heard by it and not a foreign court on ordinary principles (that is, *forum conveniens*).

26. If a foreign party obtains permission from its local courts to serve proceedings on a party in your jurisdiction, please briefly outline the procedure to effect service in your jurisdiction. Is your jurisdiction party to any international agreements affecting this process?

The ability of foreign courts to serve in Jersey is governed by the Service of Process and Taking of Evidence (Jersey) Law 1960. This law distinguishes between circumstances where there is a letter of request from a foreign court/tribunal and where a request has been made in the presence of a convention with the relevant foreign country.

Where there is a letter of request (with an English translation), service is effected through the Viscount by delivering to and leaving with the person to be served a copy of the process (with any translation). Once this has been done, the Viscount returns a copy of the process to the Bailiff with a record of service. The Bailiff then sends the Secretary of State a copy of the process, the Viscount's record of service and a certificate of service under seal.

Where there is a convention in force with the foreign country, the request is received by the Attorney General and service is effected by the Viscount in the same manner as when there is no convention with the foreign country. The Viscount's record of service is then forwarded to the requesting consular authority by the Attorney General.

Jersey is a member state of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965.

27. Please briefly outline the procedure to take evidence from a witness in your jurisdiction for use in proceedings in another jurisdiction. Is your jurisdiction party to an international convention on this issue?

Any request to take evidence from a witness in Jersey for use in another jurisdiction is governed by the Service of Process and Taking of Evidence (Jersey) Law 1960. This provides that the application must be made to the Royal Court, which decides which procedures are to be followed.

Jersey is a member state of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970.

28. What are the procedures to enforce a foreign judgment in the local courts?

The Judgments (Reciprocal Enforcement) (Jersey) Law 1960 (as amended) (1960 Law) provides for the registration and enforcement in Jersey of judgments given in the superior courts of countries which give reciprocal treatment to judgments given in Jersey. The reciprocating countries and their superior courts are:

- England and Wales: House of Lords, Court of Appeal, High Court of Justice.
- Scotland: Court of Session, Sheriff Court.
- Northern Ireland: Supreme Court of Judicature.
- Isle of Man: Her Majesty's High Court of Justice (including the Staff of Government Division).
- Guernsey: Royal Court, Court of Appeal.

The judgment creditor must apply to the Royal Court within six years of the date of the judgment itself or, where the judgment has been appealed, the date of the last judgment in the appeal proceedings. The application, supported by affidavit evidence and

exhibiting a certified copy of the foreign judgment, is made *ex parte* to the Judicial Greffier, an officer of the Royal Court who is similar to a Master in the English High Court. A foreign judgment is not registered if, at the date of the application, it has been wholly satisfied, or could not be enforced by execution in the foreign country itself. To be registered, the judgment must be for a money sum and must be final and conclusive between the parties.

Once registered, a written notice of registration must be served on the judgment debtor, who has usually 14 or 28 days, subject to any extensions, in which to apply to set aside the registration. A registered judgment cannot be enforced until that time period has expired or any application to set aside the registration has been disposed of. At this point, it can be enforced in the same way as a judgment given in Jersey.

In relation to foreign judgments to which the 1960 Law does not apply, the foreign judgment creditor must sue in Jersey on the foreign judgment.

ALTERNATIVE DISPUTE RESOLUTION

29. What are the main alternative dispute resolution (ADR) methods used in your jurisdiction to settle large commercial disputes? Please briefly outline the procedures that are typically followed, and any rules that apply.

The principle ADR method used by parties (excluding arbitration) is mediation.

It is a voluntary, informal and confidential process in which parties' discussions and negotiations are assisted by an experienced mediator (usually a lawyer). Procedure at mediation is as agreed between the parties, but is usually guided on the day by the mediator. Discussions are without prejudice, giving the parties freedom to explore potential settlement options before incurring (or continuing to incur) significant litigation expenses. In certain disputes, the parties sometimes submit to expert determination, and are bound by the experts' decision.

30. Does ADR form part of court procedures or does it only apply if the parties agree? Can courts compel the use of ADR?

A significant development in the mediation culture in Jersey has been the introduction of rules both in the Royal Court and the Petty Debts Court, under which the procedures of both courts permit proceedings to be stayed to allow an attempt at mediation. The courts cannot compel ADR, but a strong recommendation can persuade the parties to participate. Refusal to participate can persuade the court to exercise its discretion on costs.

31. Is ADR confidential?

As ADR is voluntary, it is usually governed by an agreement in writing between the parties. It is common for these agreements to provide for privacy and confidentiality. Even if the agreement is not in writing, communications directed in achieving a compromise attract the "without prejudice" privilege on ordinary principles.

32. How is evidence given in ADR? Can documents or admissions made or produced in (or for the purposes of) the ADR later be protected from disclosure by privilege?

As ADR is governed by the parties' agreement, any written agreement dealing with the process is likely to deal with the use of documents and other information communicated during the ADR after the process. Further, the without prejudice privilege is relevant to whether production of any particular document can be compelled after the ADR process is complete.

33. How are costs dealt with in ADR?

Costs are usually shared by the parties according to an agreement reached before ADR has begun.

34. Is ADR used more in certain industries? If yes, please give examples.

There are no particular industries in which ADR is favoured.

35. Please give brief details of the main bodies that offer ADR services in your jurisdiction.

There are no organised groups offering ADR services in Jersey, but local mediators and arbitrators are available. It is more common for parties to use mediators and arbitrators based in the UK.

REFORM

36. Please summarise any proposals for dispute resolution reform and state whether they are likely to come into force and, if so, when.

There are no significant law reform proposals relating to dispute resolution currently being considered in Jersey.

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