

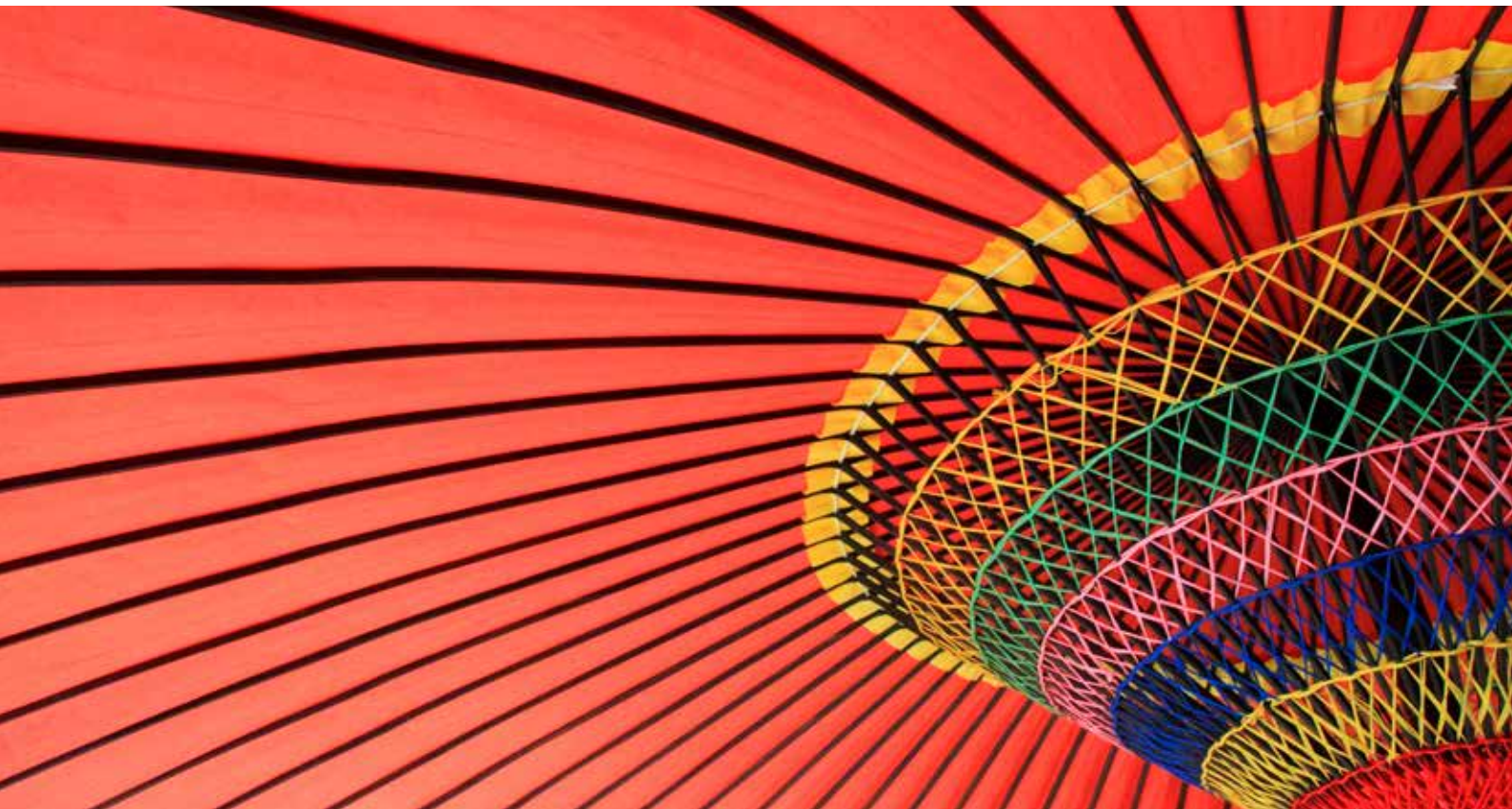


HERBERT
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GUIDE TO DISPUTE RESOLUTION IN ASIA PACIFIC 2021

A MULTIJURISDICTIONAL GUIDE

LEGAL GUIDE
ELEVENTH EDITION



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Introduction

Welcome to the eleventh edition of our “Guide to Dispute Resolution in Asia Pacific”.

Readers of the previous editions will know that the Guide is intended to provide our clients with a concise and accessible overview of some of the practical issues involving both litigation and arbitration across the region. This new edition has been revised and updated to take into account key developments across 19 jurisdictions in Asia Pacific and covers two new issues: the existence of specialised international courts and the process of settlement in each jurisdiction featured in the Guide.

The Guide will be of particular interest to clients engaging in cross-border activities across the region. There is always a risk that such cross-border business activities will give rise to disputes resulting in either litigation or arbitration in a jurisdiction with which you are unfamiliar. There are some significant differences between the dispute resolution systems of the various jurisdictions covered in this Guide.

Several matters will be of particular importance to parties depending on whether they are planning to bring proceedings or are likely to face proceedings. For example, a potential claimant or plaintiff will want to know about the existence of limitation periods in which a claim needs to be brought or the enforceability of a judgment or arbitration award in jurisdictions in which the potential defendant is likely to have assets. You will want to know about the likely duration of any court proceedings, which may range from a number of months to several years depending on the jurisdiction. Where you are involved in ongoing litigation or arbitration but decide that you wish to settle the matter, you will want to know if court approval is required to settle or discontinue an action before trial or whether the settlement of an action is confidential. Of considerable importance will also be the question whether and to what extent you are going to be required to disclose your documents and may see your opponent’s evidence prior to trial. Some jurisdictions operate on the principle that parties only need to disclose evidence on which they wish to rely (eg, China, Korea and Thailand) whereas other jurisdictions (eg, Hong Kong and Singapore) require parties to disclose all relevant documents, including documents that may be damaging to the disclosing party’s case. The procedural rules of the former jurisdictions will often provide for a more limited pre-trial disclosure of (witness and expert) evidence, whereas the latter jurisdictions are likely to follow the “all cards on the table” approach and will require parties to exchange full written witness statements and expert reports before trial.

These and other aspects of litigating and arbitrating across the Asian-Pacific jurisdictions will not only be of interest to you once you are faced with a dispute, but also at the stage of negotiating contracts and deciding on whether to include jurisdiction or arbitration clauses in favour of a particular jurisdiction.

The Guide owes much to the co-operation of the law firms who have contributed chapters on their respective jurisdictions. We would like to express our gratitude to them for their input. As always, we welcome any feedback from readers. Please contact us or one of the Herbert Smith Freehills contacts listed on the back of the Guide if you have any suggestions or comments.



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Litigation

1. What is the structure of the legal profession?

Similar to the US, Australia is a federation of states and territories and is consequently governed by an overarching national Federal Government (Commonwealth) and individual governments of each state and territory (for the purposes of this Guide, states encompasses both states and territories). The legal profession is governed at the state level and, as such, natural persons are admitted as lawyers to a state's supreme court. Further, "legal practitioners", as each state's legislation defines them, may only engage in legal practice if they have been issued with a practising certificate. A practising certificate issued in one state also permits legal practitioners to practice in any other state.

Legal practitioners practice as either solicitors or barristers. Solicitors are generally responsible for providing legal advice, drafting legal documents and may also represent clients in court (solicitors have a right of audience in any Australian court, but in practice solicitor advocacy work is generally limited to summary matters). Solicitors instruct barristers on their clients' behalf in relation to more complex advocacy work. Barristers, on the other hand, are limited to advocacy and advice work. Both solicitors and barristers are permitted direct access to clients, however, direct access by barristers is uncommon.

Members of the judiciary are appointed by the executive branch of government, specifically, on the recommendation of the Attorney-General in each jurisdiction. To be appointed as a justice of the High Court of Australia and the Federal Court of Australia, a person must:

- be or have been a judge of another Australian court; or
- be enrolled as a legal practitioner for at least five years.

Mandatory retirement ages apply for judges in each jurisdiction, ranging from 65 to 72 years. Judges may generally be removed from office for proved misbehaviour or incapacity.

Foreign registered lawyers may only practice in Australia if they register in a state or do not practice for more than 90 days over any 12 month period. Foreign lawyers are limited to practising foreign law, but may advise on the effect of Australian law if the giving of advice on Australian law is necessarily incidental to the

practice of foreign law and the advice is expressly based on advice given on the Australian law by an Australian legal practitioner who is not an employee of the foreign lawyer.

Individuals who are party to proceedings are permitted to conduct proceedings on their own behalf. In very exceptional circumstances, a court may grant leave for an individual to be represented by a non-lawyer. Corporations must be represented by a lawyer in proceedings.

2. What is the structure of the court system? Is there a rule of precedent by which lower courts are bound by the decisions of higher courts?

As outlined above, Australia is governed federally and at the state level. Accordingly, Australia's judiciary comprises a federal court system and eight state court systems, each of which operates under the common law tradition (as opposed to civil law).

The High Court of Australia is the highest court in Australia (under both the federal and state court systems). It is the final avenue of appeal from decisions of the Federal Court of Australia and the states' respective supreme courts. Special leave is required before the High Court will hear appeals, which is generally only granted if:

- a question of law of public importance is raised;
- the matter involves conflicts between Australian courts; or
- it is in the "interests of the administration of justice".

The High Court also has original jurisdiction to hear matters such as those involving constitutional challenges, international treaties or where the Commonwealth is a party.

The federal court system consists of the Federal Court, the Federal Circuit Court and the Family Court, which hear matters regarding federal legislation, such as corporations law, taxation, bankruptcy, intellectual property, competition law, industrial law, privacy, administrative law, family law, human rights, and migration.

Each state consists of a supreme court, a local/magistrates (inferior) court and most also have a district/county (intermediate) court. The supreme courts determine matters

at first instance and also hear appeals from the lower courts. State courts hear most criminal matters and civil matters relating to commercial disputes, common law, equity, deceased estate matters and land and environmental matters. The court which hears these matters at first instance is generally determined by monetary thresholds, which range from \$50,000 to \$250,000 in the inferior courts and \$750,000 to unlimited in the intermediate courts. The supreme courts do not possess monetary jurisdictional limits.

A number of specialist courts and tribunals also exist at both the federal and state level.

In each court system, the doctrine of precedent applies and lower courts are bound by the decisions of higher courts. This extends to courts of one state being bound by a decision of the High Court on appeal from a decision of another state. The High Court is bound by its past decisions. The High Court may also refer to precedent from foreign jurisdictions (eg, the UK, New Zealand, Canada and occasionally the US), although these decisions are not binding.

3. What is the role of the judge (and, where applicable, the jury) in civil proceedings?

Civil proceedings are generally determined by a judge or judges in Australian courts. The default position in Australian courts is that matters are heard without a jury. However, most courts permit parties to either elect trial by jury (particularly in defamation cases) or apply to the court for trial by jury, which will be granted in exceptional circumstances. In civil proceedings without a jury, judges are tasked with determining both questions of fact and law. When present, juries bear the responsibility of deciding questions of fact.

As Australian courts operate under the common law tradition, proceedings are adversarial rather than inquisitorial. Consequently, parties must gather evidence based on their own investigations and judges (and, where applicable, the jury) determine matters based only on evidence produced before the court. There is some scope for judicial notice (ie, the court finding the existence of facts not established by evidence), but this is very limited.

4. What are the time limits for bringing civil claims? What procedural steps need to be taken to stop time limits from running?

Legislation in force in each state governs time limits for particular causes of action. There is no broad federal legislation governing time limits. However, states' limitations legislation may apply to courts exercising federal jurisdiction. Further, some federal statutes contain their own limitation periods.

Most commonly, the limitation period (including in claims for contract and tort) is six years. This is increased to 12 or 15 years (depending upon the state) for breaches of deeds and specialties. Personal injury claims have a limitation period of only three years. Time limits for most equitable claims have developed according to equitable principles and are not governed by the various statutes.

In Australia, limitation periods are considered part of the substantive law of a jurisdiction. Therefore, limitation periods of the state where a cause of action arises will apply even when the claim is brought in another state.

Time begins to run on limitation periods at the moment a cause of action accrues. Time stops running at the commencement of proceedings, which occurs when originating process is issued by the court (provided that it is served within the required period of time).

Even where time limits have expired, courts have the discretion to extend or postpone the time to commence proceedings.

5. How are civil proceedings commenced and served, and what is the typical procedure which is then followed?

Civil proceedings are commenced by filing the appropriate originating process with a court. In the Federal Court, proceedings are commenced by an application in the prescribed form and in the state courts, proceedings are commenced by varying combinations of statements of claim, writs, summons and originating motions. Across the jurisdictions, the type of originating process is to be chosen by the plaintiff and will depend on the type of relief sought and whether the action is factually simple or complex. Filing fees are payable to the court on filing of the originating process. The originating process contains details of the parties to the proceedings, the claim and remedy sought by the plaintiff. A pleading of facts and issues alleged must be provided in either the originating process or an affidavit in support.

After the originating process is filed, a sealed copy should be served on the defendant(s). In the supreme courts, the time limit for service varies from 6 to 12 months after the originating process has been filed. When urgent interlocutory relief is sought, the time for service may be shortened and even dispensed with altogether until interlocutory orders have been made.

Throughout the Australian jurisdictions, originating process may variously be served on the defendant by way of personal service, registered post to the defendant's address, leaving a copy of the process at the defendant's address or by substituted service where the court approves an alternative method on the basis that it is impracticable to effect service in the prescribed manner.

A defendant acknowledges service of the originating process and its intention to respond by entering an appearance (by filing a notice of appearance or defence) within the prescribed time limit. A defence allows a defendant to admit and deny claims, plead collateral matters, raise questions of law and raise cross-claims. Before filing a defence, a defendant may request that the plaintiff provide particulars (details of material facts) to enable the defendant to identify the case required to be met by the pleadings.

Once a defence has been filed, the plaintiff has the option to file further pleadings if they wish to admit certain facts alleged in the defence or object on a point of law.

6. What is the extent of pre-trial exchange of evidence, and how is evidence presented at trial at trial?

Prior to trial and after all pleadings have been filed, the court will generally order that each party provide each other party with a list of documents in their custody, power or control which are relevant to matters in issue as disclosed in the pleadings

(including those documents which are unhelpful to the party's case). The other parties are then permitted to inspect each of the documents contained in the list (except for documents protected by legal professional privilege and there may be some restrictions that apply to commercially sensitive documents). Documents disclosed during discovery may be relied upon at trial. Legal practitioners have a duty to advise clients of their discovery obligations.

In some circumstances, a limited form of discovery may be ordered before proceedings are commenced and against persons not party to the proceedings in order to determine the identity and whereabouts of persons and to decide whether or not to commence proceedings at all.

Discovery is a costly and time consuming aspect of civil proceedings and there have been attempts in recent times to reduce the burden it imposes on parties. For example, in the Equity Division of the Supreme Court of New South Wales, orders for discovery will not be made until the parties have filed and served their evidence.

Pre-trial evidence is given by factual witnesses (who have direct knowledge of relevant facts) and experts (who address matters of technical knowledge and opinion) in the form of written statements and, depending on the jurisdiction, these will be in the form of a sworn affidavit or an unsworn witness statement. Experts' evidence is usually annexed to their affidavit or witness statement in the form of an expert's report. The written statements of factual and expert witnesses will generally stand as the witnesses' evidence-in-chief at trial which means that witnesses are not required to repeat all of their evidence orally at trial. Instead, witnesses will usually be cross-examined by the opposing party on their written statements, with the party who called the witness being allowed to re-examine on issues raised in cross-examination. In some jurisdictions, there is an emerging view that evidence-in-chief that is likely to be the subject of cross-examination should be presented orally at trial, rather than as written statements.

The prevalence of a case management practice known as "hot tubbing" has increased in some jurisdictions. This involves experts on each side giving their evidence and being cross-examined simultaneously and also allows experts to cross-examine each other. This process allows the presiding judge to confine dialogue to the real and disputed issues of the case.

7. To what extent are the parties able to control the procedure and the timetable? How quick is the process?

The procedure for the conduct of litigation is dictated by the court rules of each jurisdiction and the directions given by the courts in exercise of their case management powers. A court directs parties to put in place steps that must be completed before the matter reaches trial.

Parties to proceedings have limited ability to control the procedure and timetable. Parties will receive timetabling directions from the court in relation to all aspects of the litigation process, for example, the time by which a defence must be filed. Following these directions, the parties are permitted to agree on extensions of time for the obligations previously directed by the court. The court will usually accept agreements on extension of time but it is ultimately at the discretion of the court. Some reason may dictate that the

extension should not be allowed, for example, when the matter is not progressing in a timely fashion. When the parties cannot agree on timetabling, each party presents their preferred timetabling to the court and the presiding judge sets the timetable (often favouring a compromise).

The length of the litigation process varies greatly and is primarily dependent on the complexity of each particular case. A matter can take between months to years from the issue of proceedings to trial. Once proceedings have commenced and a defence (and a possible reply from the plaintiff) has been filed (see question 5 above), the court will give directions as to the timing of discovery and the filing of evidence. After each party has put in its evidence, the court will set a hearing date.

8. What interlocutory or interim remedies are available to preserve the parties' interests pending judgment?

Australian courts have the ability to make a number of interlocutory and interim remedies to preserve the status quo of parties before proceedings are finally determined. Interlocutory orders will often be made in the absence of the party affected by the order (ex parte) because notifying the party would defeat the object of the application.

Courts have the power to grant:

- interim injunctions (orders requiring a person to do, or refrain from doing, a particular action);
- freezing orders (preventing a party from removing assets from the jurisdiction where there is significant risk of this occurring); and
- *Anton Piller* orders (an ex parte injunction which compels a defendant to permit the plaintiff to inspect the defendant's premises for the purpose of discovering and potentially removing material relevant to the plaintiff's case. It may be made where there is a significant risk of evidence being destroyed).

Courts may also grant any of the abovementioned interlocutory remedies in aid of foreign proceedings (including arbitral proceedings) which have been or are to be commenced outside Australia and are capable of giving rise to a judgment or arbitral award which may be enforced in Australia.

Plaintiffs who are granted interlocutory relief are usually required to give undertakings as to damages. Undertakings as to damages have the effect that any party that suffers loss as a result of an interlocutory order must be compensated for such loss if they are ultimately successful at trial.

9. Are there procedures available for judgment to be obtained without proceeding to trial, for example, on the ground that it is believed there is no defence to the claim? If so, at which stage of the proceedings should such procedures be invoked?

If a defendant fails to enter an appearance after having been served with originating process (see question 5 above), the court can make a discretionary determination in favour of the plaintiff before trial is commenced. This is known as default judgment and is based on a failure to comply with the procedural requirements of proceedings. Once default judgment is entered, the plaintiff may enforce the judgment

debt against the defendant (see question 15 below). On application by the defendant, the court also has the discretion to set aside default judgment if the interests of justice require that the defendant be permitted to contest the plaintiff's claim. To demonstrate this, the defendant must show that there is a defence based on the merits of the case and that there is sufficient explanation as to why they failed to file a defence.

An order for summary judgment is also available to all parties before trial. Orders for summary judgment are generally made quite early in the proceedings (before the discovery phase). An order granting summary judgment is at the court's discretion and will be given if there is no issue of fact involved, the points of law are clear and there is no real question to be tried. A plaintiff may seek summary judgment when there is no real defence to the claim made by the plaintiff, or when there is no defence except as to the amount of damages claimed. A defendant may seek summary judgment when the plaintiff has no reasonable cause of action, proceedings are frivolous, vexatious or are an abuse of process of the court or there is non-appearance at a hearing by the plaintiff.

10. What substantive remedies are available?

The primary substantive remedy in civil proceedings is monetary damages. Monetary damages are compensation for loss which place a plaintiff in the position they would have occupied had the legal wrong not occurred. In exceptional cases, exemplary or punitive damages which aim to punish the defendant will also be awarded, in addition to compensating the plaintiff for their loss. A defendant's actions must have been particularly egregious for an award of exemplary damages to be made.

Other forms of relief are available, but only where damages are inadequate to right the wrong that has occurred. These types of relief are known as equitable remedies. Equitable remedies include:

- injunctions;
- specific performance (an order requiring fulfilment of obligations under a contract);
- account for profits; and
- rectification (variation of a document to record terms of an agreement as originally intended by the parties).

Also available are declarations (pronouncements by the court of a party's rights without any coercive orders) and specific remedies contained in statute.

11. Are there specific rules or a protocol on e-disclosure or the disclosure of electronic documents?

Each court has specific rules governing discovery. Courts generally expect parties to consider the use of technology in improving the efficiency of discovery and reduce costs, including in respect of the production of discoverable information and the creation of lists of documents. Where discoverable documents are stored electronically, it is expected that discovery and production of such information be given electronically.

In addition, courts have issued practice directions to provide guidance on the disclosure of electronic documents. Generally, parties are encouraged to agree to an electronic document management production (or electronic exchange protocol). This protocol outlines the terms under which information may be electronically exchanged between the parties, such as the format, the disclosure of any meta-data, the document descriptions for any lists of documents and the use of technology assisted review. For example, the Federal Court has developed a template Standard Document Management Protocol, which outlines the fundamental considerations for parties to consider and agree, and may be customised to suit the circumstances of any given case.

12. How is the trial conducted?

Trials are usually heard by a judge alone and without adjournments (unless granted by the court). Save in exceptional circumstances where private hearings may be ordered, a trial is conducted in open court which means that hearings are open to the public.

The trial is usually commenced with the plaintiff's counsel opening the plaintiff's case (unless the plaintiff does not bear the onus of proof on any issue, in which case the defendant will open). The opening speech typically outlines the case to be made and the evidence on which the party intends to rely. Following the opening, the party's evidence is led by calling witnesses and tendering any documents or exhibits. Witnesses give their evidence-in-chief and opposing parties have the right to cross-examine the witnesses on their answers (see question 6 above). Re-examination is permitted in relation to matters on which witnesses were cross-examined. After the presentation of a party's evidence, they close their case and no more evidence may be produced.

The same process is followed by each other party to the case.

Once each party has presented their case, each party has the right to address, sum up his/her case and attempt to persuade the court that a decision should be found in his/her favour.

Judgment is then handed down by the court, either immediately (in simple cases) or at a later date (in more complex cases). In either case, the trial judge is required to give reasons for his/her decision.

13. Is court approval required to settle or discontinue an action before trial? Is settlement of an action confidential? Are there special rules or principles that apply to enforcement or setting aside of settlement agreements?

Parties to civil proceedings typically enter into a contractually binding agreement to settle the proceedings. The terms of settlement are usually kept confidential by agreement.

Court approval is generally not required, however there are exceptions under certain statutes and court rules. For example, class action proceedings may not be settled or discontinued without court approval. This applies, not only to complete settlement of proceedings, but also settlement of claims against joint respondent or settlement of any substantive claim against a respondent. An application for approval of a settlement must not be determined unless notice has been given to group

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