This document is a resource tool only. The information was compiled in 2015, and this survey was updated in 2016. Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.

CHANNEL ISLANDS

Responses submitted by:
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1. Would your jurisdiction be described as a common law or civil code jurisdiction?

Common law jurisdiction

2. What method of adjudication is used (adversarial, inquisitorial, other or hybrid)?

Adversarial

3. What are the qualifications of the adjudicator (judge – elected, appointed; jury; other)?

The Bailiff is the jurisdiction's senior Judge. The Bailiff is, *ex officio* a Judge of the Court of Appeal and that Court's president. He also sits in the Royal Court, either as a single Judge or presiding over certain sittings with the Jurats (see below). The Bailiff is appointed by the Crown and holds position until retirement age. The Bailiff has a Deputy, the Deputy Bailiff.

In addition, there are a number of Judges of the Royal Court who are appointed by the Court itself, and Lieutenant Bailiffs, who are appointed by the Bailiff and may not serve for longer than the duration of the office of the Bailiff who appointed them. Some of these, typically Queen's Counsel from England and Wales, are resident outside of the Island.

Finally, there are the Jurats of the Royal Court who are elected by the States of Election. There is no jury system in Guernsey and so the Jurats act as one, and are Judges of fact in both civil and criminal cases. However in civil cases, many matters are presided over by a single Judge.

4. Are there any procedures available for specialized courts (i.e. commercial court, employment, environmental)?

The Royal Court in Guernsey has unlimited jurisdiction in both civil and criminal disputes. The Magistrate's Court has jurisdiction to determine more minor criminal matters and civil disputes of under £10,000. There are presently no specialised Courts as such, apart from the Matrimonial Causes Division. Separate from the Court's system there is a statutory Employment Tribunal.

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5. Is arbitration an option and when? If so, what rules are typically used?

The primary source of domestic arbitration law in Guernsey has been, until very recently, the *Arbitration (Guernsey) Law, 1982* ("the 1982 Law"). The 1982 Law deals with both domestic arbitration proceedings as well as the enforcement of certain foreign arbitration awards. In addition, the (English) *Arbitration (International Investment Disputes) Act 1966* was incorporated into domestic Guernsey law by the Arbitration (International Investment Disputes) (Guernsey) Order 1968 ("the Order").

Guernsey is also a party to the New York Convention. The UK extended the territorial application of the Convention to Guernsey on 19 April 1985. Enforcement of Convention awards was incorporated in domestic Guernsey law by the 1982 Law which also provides for the enforcement of awards by parties to the *Convention on the Execution of Foreign Arbitral Awards* signed at Geneva on 16 September 1927 (the Geneva Convention) and the *Protocol on Arbitration Clauses of 24 September 1923*. The Channel Islands branch of the Chartered Institute of Arbitrators is the leading arbitral institution.

However, whilst an increasing number of disputes have been referred to arbitration in Guernsey, in recent years, the perception has remained that the 1982 Law is out-dated in comparison to modern arbitration procedures and the legislative frameworks of other jurisdictions (such as England and Wales). Parties to commercial agreements have therefore been reluctant to incorporate any terms which provided that Guernsey be the seat of arbitration. One of the key attractions of arbitration is the likely costs saving when compared with litigation. However, where the power of the arbitral tribunal is limited, there is a risk of procedural error, and, in turn, the potential for wasted time and costs.

Following a recent proposal, the States of Guernsey has now approved legislation which will more closely reflect the provisions of the UK *Arbitration Act 1996* and the UNCITRAL Model Law on International Commercial Arbitration. *The Arbitration (Guernsey) Law 2016* ("the 2016 Law") seeks to address the shortfalls of its predecessor by codifying well-established legal rules and principles, increasing the scope of party autonomy, strengthening the powers of the tribunal and restricting judicial intervention. The intention is to align the arbitration procedures in Guernsey more closely with those jurisdictions in which arbitration is more readily used as a form of ADR, due to the comprehensive and efficient framework in place to facilitate the process. Hopefully once the 2016 Law is in force, we will see commercial parties placing more confidence in the process by agreeing arbitration clauses which specify Guernsey as the seat of arbitration, as it can certainly prove a very effective process for resolving potentially very costly disputes.

6. Will the Courts enforce an arbitration agreement to preclude other forms of litigation?

There are provisions which permit a party to apply to the Royal Court for a stay of Court proceedings where there is an arbitration agreement/clause. Such an application must be made before the party delivers pleadings or takes any other steps in the Court proceedings. Further, the *Trusts (Guernsey) Law, 2007,* contains provisions which explicitly provide for the arbitration of trust disputes. Such provisions are not often found in the trust legislation of other jurisdictions.

A domestic arbitration award will be enforced in the same way as a Royal Court judgment. However, leave of the Court must first be sought to enforce it in such a manner. Foreign arbitration awards may also be enforced under procedures set out within the 1982 Law. The Royal Court generally encourages ADR and so is likely to look favourably on enforcing arbitration awards.

Being an important jurisdiction for investment funds, insurance, the fiduciary sector, banking and asset management, there

are a considerable number of legal agreements concluded each year under Guernsey law and/or involving Guernsey entities. Many such agreements will include arbitration clauses and, accordingly, arbitration is likely to increase as an important form of dispute resolution within Guernsey, particularly as it is recognised and supported by the legislature and the judiciary.

7. For Court proceedings, is mediation mandatory, either before or after filing of a claim or complaint?

No.

However, The Royal Court has a duty under the Royal Court Civil Rules (RCCR) to actively manage cases which includes encouraging the parties to use any appropriate form of ADR. Mediation often occurs, with both locally-based mediators and mediators from other jurisdictions, particularly England, being used regularly. The Royal Court's duty extends to facilitating the use of ADR and, accordingly, civil proceedings will often be stayed to allow the parties to mediate.

8. What is the process for pre-hearing fact discovery (if any)?

The commencement of civil proceedings requires particulars of claim to be pleaded which will include an outline of the facts and matters relied upon. A defence must be constructed in a similar manner. The facts must then be proved at trial although, as in England, witness statements are used in Interlocutory proceedings. If a case is insufficiently particularised further information (previously known as further and better particulars) may be requested.

Are there provisions for mandatory document disclosures?

Yes. Disclosure is mandatory in accordance with the RCCR.

It is usual for parties to litigation to agree or be ordered to provide disclosure of relevant documents as part of the litigation procedure. There are two general forms of disclosure, standard disclosure and specific disclosure.

When giving standard disclosure, a party must disclose all documents on which it relies, those which adversely affect its own case, any documents which adversely affect another party's case and any documents which support another party's case. A document is defined as *'anything in which information of any description is recorded'*. This will includes electronic documents, emails and other information which may be retained in a non-hard copy form (for example voice recordings).

Additionally, the disclosure obligations refer to documents which are in a party's control, or which have been in its control. This includes documents which the party does or did possess, those which it has, or has had, the right to possess and documents which the party has, or has had, a right to inspect or take copies of.

Documents will be privileged from disclosure where they either attract legal advice privilege or litigation privilege.

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With extremely limited exceptions (e.g. cases of personal injury or death), it is not possible to obtain pre-action disclosure of documents, nor is it possible to obtain orders for disclosure of documents from third parties as part of the disclosure process. There are, however, other forms of relief available from the Court in the appropriate circumstances, which may result in the Court ordering such disclosure of documentation.

Whilst there are not yet any practice directions or rules of Court relating to electronic disclosure, the use of electronic disclosure is becoming much more common and this is likely to continue and develop.

The duty of disclosure is a continuing one that binds the parties until the end of proceedings.

Is there provision for oral examinations of the parties or others?

The position until recently was that, subject to some very specific exceptions, evidence of all witnesses should be given orally at trial. However, Guernsey's civil evidence law, which came into force in 2011, provided for written witness statements, served in the proceedings, to stand as that witness' evidence-in-chief. At trial, the witness will confirm that the statement stands as his evidence-in-chief, but will be permitted in some circumstances to expand upon it if necessary to deal with matters which have arisen since it was sworn.

Generally, oral evidence is only given at trial. The Royal Court has limited jurisdiction to order a party to provide oral evidence at an interlocutory stage where that party has filed a witness statement or affidavit.

Are there limits on the length of oral examinations?

There are no provisions regarding the length of oral examinations although the Court has inherent power to control its own process.

Are witness statements or summaries to be provided before the hearing?

Yes. The Court will direct, where appropriate, that witness statements or affidavits are to be filed either at an interlocutory stage or prior to trial.

9. What is the process for pre-hearing expert disclosure (if any)?

(a) Are expert reports or written summaries required to be exchanged?

Expert reports must be exchanged unless a Single Joint Expert is used.

(b) Are the parties entitled to conduct a pre-hearing oral examination of opposing experts?

No

(c) Are there provisions requiring experts to meet and narrow issues before the hearing?

Yes. The Court will usually direct that experts meet to narrow issues and a joint statement be prepared setting out the issues that are agreed or not agreed.

10. Are there other notable discovery rules?

No.

11. Is there a prehearing conference (for trial management, settlement or other purposes)? Who conducts it? How long before the hearing?

The RCCR are premised on an overriding objective that the Court must manage cases justly, proportionately, fairly, expeditiously and ensuring that the appropriate resources are given to the case. With that in mind, a considerable number of case management powers exist. They stipulate that the Royal Court shall actively manage cases and then go on to provide a non-exhaustive list of 13 examples of active case management, including encouraging the parties to use alternative dispute resolution, setting time limits, controlling the progress of the case and considering whether the likely benefits of taking a particular step will justify its cost.

In the majority (but not all) of civil cases a case management conference (CMC) takes place. At a case management conference the court is obliged to give directions as to:

- disclosure and inspection of documents (if any),
- provision of experts reports,
- exchange of witness statements; and
- the provision of agreed statements of fact, issues and law, as may be appropriate to the particular case.

In some cases, a pre-trial review (PTR) will be held.

12. Can a prehearing motion for judgment be brought? If so, what is the threshold test for judgment?

An application for Summary Judgment may be made on the whole or part of a claim or on a particular issue. The grounds of such application are that the other party has no real prospect of succeeding on the claim or issue and that there is no other compelling reason why the claim or issue should be disposed of at a trial.

13. Is there a process for obtaining pre-hearing rulings with respect to evidence admissibility including admissibility of expert testimony? What is the process and when does it occur?

No. The process for determining issues of admissibility takes place at the trial itself.

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14. What is the standard for admissibility of expert evidence?

There is no 'standard' regarding admissibility of expert evidence, but the general rules on costs encourage parties to instruct only those experts that have adequate and valuable knowledge and experience in their area of expertise. Should a party wish to call an expert or adduce an expert's report, then they will need the permission of the court to do so. The Court may order that a single joint expert be used. It is important to note that experts owe their duties to the Court and not the party instructing them. The expert evidence should be restricted to that which is reasonably required to resolve the proceedings.

15. Does the Court have the power to appoint its own experts? Under what circumstances and what type?

Although typically the parties will appoint their own choice of expert, the Court as noted above, can appoint a single joint expert. In such circumstances, the court can limit the amount to be paid in fees and expenses to that expert, and direct the parties to pay that into court. The Court may also, in exceptional circumstances, appoint its own experts.

16. Does your jurisdiction protect privilege? If so, what privileges are protected from disclosure (attorney client / legal advice; documents prepared in anticipation of litigation; settlement discussions; other)?

Yes. Guernsey protects privilege. There are 3 different types of privilege, legal advice, litigation and common interest.

However where a party inadvertently discloses a privileged document, this may be used with leave of the Court.

17. If privilege is not protected, are there other protections from disclosure (i.e. privacy) that could prevent disclosure of otherwise privileged information, and what is the basis for those protections?

N/A

18. Who determines privilege disputes, or disputes with respect to other forms of protection described in 17 above?

The Court.

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19. Briefly describe the trial process?

This will vary slightly from case to case but the following would be regarded as typical.

(a) Are there opening submissions, in what form and of what length?

Opening submissions are made orally and supported by written 'skeleton arguments' which are provided to the Court in advance.

(b) What is the order of presentation of witnesses?

1. Claimant's witnesses of fact
2. Defendant's witnesses of fact
3. Claimant's expert witnesses
4. Defendant's expert witnesses.

(c) Who conducts examination and in what order?

The examinations are conducted by the advocates representing each party in the case (see question 36). After the Claimant's opening and Defendant's opening (if applicable), examination-in-chief is conducted by the Claimant's advocate (however witness statements usually stand as the examination-in-chief so it is not normally oral). This is followed by cross-examination by advocate(s) for the opposing party(ies). The Claimant's advocate is then usually given the opportunity to conduct a re-examination of the witnesses. This process is then repeated for the Defendant's witnesses.

(d) What is the process for closing submissions?

The same process as that for the opening submissions although it is usually the Defendant's advocate who will begin. Written submissions may also be filed with leave of, or at the request of, the Court.

20. Please identify any other notable trial procedures.

None

21. Who bears the burden of proof of liability? Causation? Damages? What is the standard of proof for each?

The person asserting a fact or matter bears the burden of proof, on the balance of probabilities.

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22. What heads of damage are recoverable (compensatory, pre-judgment interest, punitive damages, other)?

There are two main heads of damages:

1. General damages – these are damages which cannot be quantified because they compensate for general losses.

2. Specific/Liquidated damages – these are damages which are quantified or quantifiable, usually to compensate for a financial loss.

The jurisdiction to order punitive damages exists but is rarely invoked.

23. If punitive damages are available, what is the threshold for recovery, and range of awards?

As in England & Wales, damages are intended to be compensatory and are not punitive in commercial disputes.

24. Are there time limits for bringing claims? Responding to claims? Please describe.

Rather than limitation, the expiration of claims under Guernsey law is based on prescription. Where an action is outside of the limitation period it creates a bar to the remedy, whereas prescription extinguishes the claim and prohibits the right to commence proceedings. The prescription periods relevant to commercial disputes in Guernsey are as follows:

- **Contract**: six years from the date of breach.
- **Tort**: six years from the date that the relevant actionable damage occurred (with the exception of fatal accident and personal injury cases, which have a three-year prescription period).
- **Personal actions** (including breach of a fiduciary duty by a director) or actions involving movable property, unless expressly subject to a different period: six years.
- **Claims against trustees**: three years from delivery of the trustee's final accounts or from the beneficiaries' knowledge of the breach, whichever is sooner (except for cases of fraud, wrongful interference or conversion, in which case there is no prescription period).

Prescription can be interrupted (by way of an *empêchement d' agir*) either by right (for example, where the claimant is a minor and does not have the capacity to bring a claim) or by fact (where, for example, the claimant has no knowledge or awareness of the claim). There is a large body of authority on this area of Guernsey law, and modern day cases involving *empêchement* largely relate to personal injury and professional negligence disputes.

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25. What are the requirements to establish jurisdiction over a foreign defendant in your court? Can a foreign defendant request that the court decline jurisdiction on the basis that there is a more convenient forum?

An application for the leave of the Royal Court is required before any Guernsey proceedings can be served outside the Bailiwick.

The claimant must satisfy the Court that it has a good cause of action. The affidavit must establish the country in which the defendant is or is likely to be found, that the matter is properly justiciable before the Royal Court and is a proper one for service out of the jurisdiction.

Recent cases relating to service and notice have shown the Royal Court to be very flexible on this topic including making orders for service to take place by e-mail and through publication in a newspaper in the believed locality of the intended recipient.

Challenges may be made to the jurisdiction of the Court and a party may seek to set aside service or stay proceedings on the grounds of jurisdiction.

26. Are there procedures for a defendant to bring other potentially responsible parties into the proceeding? Briefly describe.

The RCCR provide that:

(1) Where in any action the defendant claims -

(a) against a person not a party to the action, any contribution or indemnity,

(b) against any such person, any relief or remedy relating to or connected with the original subject-matter of the action and substantially the same as some relief or remedy claimed by the plaintiff, or

(c) that any question or issue relating to or connected with the original subject-matter of the action should be determined not only between the plaintiff and himself, but also between either or both of them and a person not a party to the action -

The defendant may add that person as a third party by serving upon him a Summons.

(2) The Court may then make such order as it thinks just in relation to the addition of the third party as to –

(a) the filing of pleadings,
(b) the delivery of affidavits, and
(c) any other incidental matter.

(3) Where a third party is added, he shall from that time be a party to the action as if he were a defendant sued in the ordinary way by the party who added him, and the provisions of RCCR shall apply accordingly.

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27. Are legal costs recoverable by either party? If so, under what circumstances, and how is the amount calculated? (i.e. is it a loser pays costs system).

The awarding of costs in Guernsey is at the complete discretion of the court but it is generally a loser pays system.

Accordingly, costs typically follow the event and the unsuccessful party pays the successful party's costs (or in practice the proportion of them allowed after the cost assessment exercise on the recoverable basis). In some cases, the Court will order costs on the indemnity basis.

In awarding costs, the court will take into account, among other things, the conduct of the parties (hence indemnity cost awards have been made, but are rare), and any payments into court or other offers to settle prior to the trial, particularly if they match or exceed the amount awarded at trial.

28. Are contingency fees allowed?

No.

29. Is third party funding of claims permitted? Under what circumstances?

Yes. In certain circumstances funding for litigation is permissible in Guernsey as long as such funding does not constitute unlawful maintenance. This means that a litigant can be funded as long as it retains control of the litigation and gains the benefit of a substantial proportion of any award made.

30. Are class or multi-party actions allowed? Under what circumstances? For what types of claims?

Representative proceedings are possible but it is considered that US-style class actions would be discouraged. When numerous persons have the same interest in any proceedings, the proceedings may be pursued by or against any one or more of them as representing all, or as representing a certain group of them. A judgment or order given in such proceedings is binding on all persons represented, but cannot be enforced without leave of the court against someone who was not a party.

31. Can claims be commenced by a consumers association or other representative organization? Under what circumstances?

No.

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32. On average, how long does it take to get to trial/final hearing, and what factors can affect that?

Time frames depend on a multitude of factors, including the complexity and value of the case, the number of parties, the parties' desire to negotiate/mediate, the Court's availability to hear matters, the availability of witnesses, the volume of documents disclosed at the discovery stage and a number of other factors, including the sum of money at stake. Most matters should be disposed of at trial between 18 and 30 months after the commencement of proceedings.

33. Is an appeal process available (distinguish between final and interlocutory/procedural orders as needed)? Who hears the appeal? How are they appointed? What are their qualifications?

Appeal from a first instance decision of the Royal Court is to the Guernsey Court of Appeal. Full hearings of the Court of Appeal are presided over by three judges (often UK-based Queen's Counsel), although a Court of Appeal judge (usually the President) can sit alone to deal with interlocutory applications. As well as hearing appeals from the Royal Court, the Court of Appeal also has the jurisdiction to grant leave to appeal from the Royal Court, or leave to appeal decisions made in the Court of Appeal.

The final route of appeal in Guernsey is to the Judicial Committee of the Privy Council in London.

Grounds for appeal

Generally, in order to appeal from the Royal Court to the Court of Appeal, leave is required. Initially, leave to appeal is sought from the judge at first instance. If that is refused, a renewed application may be made to a single judge of the Court of Appeal. If that is refused, a further renewed application may be made to the full Court of Appeal. The appeal must have a realistic/reasonable prospect of success if leave is to be granted, or the case must concern an issue where it is in the public interest to be heard. An appeal from a judgment at trial does not in most circumstances require leave.

Grounds of appeal are as follows:

- The judge was wrong in law;
- The judge/jurats wrongly exercised their discretion (for example by wrongly relying on facts, or wrongly taking certain factors into account);
- The decision of the jurats was against the weight of the evidence or that there was insufficient evidence for the jurats to reach the decisions they did; and
- The decision of the jurats is inconsistent with either the finding of fact or their acceptance of the evidence.

There are two categories of appeals to the Privy Council:

- Appeals as of right; and
- Appeals by special leave.

It is for the Court to determine which category is applicable in the circumstances. An application for leave as of right can only be made against a final decision, and not an interlocutory decision. Additionally, if no amount is in dispute, the

appeal cannot be brought as of right. Further, there must be a point of law of great and general public importance.

If the leave to appeal has been refused by the Court of Appeal a potential appellant must apply for special leave to appeal from the Judicial Committee of the Privy Council.

Time limits

An appeal to the Court of Appeal must be brought within one month of the order of the Royal Court (note that there is some debate as to whether a fully reasoned judgment is required but it is thought that a decision of the Court, and not a judgment, is what is required to start the time running), although this is frequently extended to allow the question of leave to be determined. The Court of Appeal has recently held that it can determine the question of leave and the substantive question of the appeal itself in a rolled-up hearing if appropriate.

As there are no procedural rules in relation to appeals from the Court of Appeal, the Court has held that an appeal as of right must be made within reasonable time. If the Court of Appeal refuses leave to appeal to the Privy Council, then an application for permission to appeal must be filed within 56 days from the date of the order or decision of the Court of Appeal, or the date that the Court of Appeal refuses permission to appeal (if later). If a respondent wishes to object then their notice of objection must be made within 14 days of service of the application for permission. There are detailed Privy Council rules regarding the lodging of notices of appeal if permission is granted.

34. Are hearing rooms available for electronic trials or appeals (i.e. where documents and transcripts are presented on computer monitors; witnesses can testify by video conference)?

Yes. Documents and live transcription may be presented on computer monitors in the Court. Witnesses may also, in limited circumstances, give evidence by video conference.

35. What is the practice regarding the use of graphics, computer animation, power point and the like, in trials? In appeals?

This has not arisen. However, it is considered that the Court might be receptive to the practice if a good reason could be demonstrated.

36. Will the lawyer at trial be the same as the one responsible for pre-trial procedures? Is there a solicitor / barrister distinction?

Only Guernsey Advocates have rights of audience in Guernsey courts. Therefore, it will often be the same lawyer at trial who is responsible for pre-trial procedures. It is common for foreign lawyers to sit with Guernsey Advocates in a support role.

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37. What are the contributory negligence laws in your jurisdiction? Is there a comparative fault assessment, joint and several or proportionate liability among tortfeasors? Does a plaintiff's negligence reduce or eliminate liability of defendants named in the litigation?

The law of contributory negligence is now statute based. It is no longer a defence to an action: instead, it is generally determined on a comparative fault basis. Where a person suffers damage as a result partly of his own fault and partly as the fault of another, damages are reduced to such extent as a court thinks just and equitable. In simple terms, damages are apportioned according to the relative levels of responsibility.

38. Is service of a complaint issued outside your country permitted in your country by "informal" means, or must the Hague Convention be followed?

Guernsey is party to the Hague Convention. However, service by other, informal means is permitted provided it is effective in accordance with the law of the jurisdiction where service is affected.

39. Do your laws prohibit export of relevant documents from your jurisdiction for the purposes of litigation outside your jurisdiction? (Consider privacy rules)

Where the Court has granted leave for service outside of the jurisdiction, other documents in connection with the proceeding can be served in the same manner.

The documents will be subject to the privilege and there is also an implied undertaking of confidentiality, though an application may be made to the Court for permission to disclose.

40. Please point out any litigation Best Practices employed by Courts in your jurisdiction but not yet referenced in the survey.

None.

41. Are there any significant areas in which you believe the playing field between plaintiff and defendant is not level that you think need to be addressed?

No.

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42. Are there legislative efforts under way that address any of the litigation practices in your country?

The RCCR are kept under constant review and regard is always had to any changes that take place in England & Wales.