

The Foundation of the International Association of Defense Counsel
SURVEY OF INTERNATIONAL LITIGATION PROCEDURES: A REFERENCE GUIDE

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MALAYSIA

Responses submitted by:

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1. Would your jurisdiction be described as a common law or civil code jurisdiction?

Common law.

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 **Superior Courts** comprise the **High Court**, the **Court of Appeal** and the **Federal Court**. A person is qualified to be appointed as a Judge of the Superior Courts if he or she is a Malaysian citizen and either:

- a lawyer who has practised in any of the Superior Courts for at least 10 years just before his or her appointment; or
- a member of the Judicial and Legal Service or of the legal service of a State for at least 10 years just before his or her appointment.

Please refer to the answer to Question 33 for the manner of appointment of Judges to the Superior Courts.

The **Subordinate Courts** comprise Judges of the **Sessions Court** and the **Magistrates Court**.

Pursuant to Section 59(3) *Subordinate Courts Act* 1948, each **Sessions Court** shall be presided over by a **Sessions Court Judge** appointed by the Yang di-Pertuan Agong on the recommendation of the Chief Judge.

Section 65 of the *Subordinate Courts Act*, 1948 provides that the Sessions Court has jurisdiction to try all actions and suits of a civil nature where the amount in dispute does not exceed RM1,000,000. However, the Sessions Court has no jurisdiction to determine actions, suits or proceedings:

- Relating to immovable property;
- For accounts;
- For declaratory decrees;
- For the issue and revocation of grants of representation of the estates of deceased persons or the administration or

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distribution thereof;

- Where the legitimacy of any person is in question;
- Where the guardianship or custody of infants is in question; and
- Where the validity or dissolution of any marriage is in question.

These are within the jurisdiction of the High Court.

The **Magistrates** are divided into **First Class Magistrates** and **Second Class Magistrates**. **First Class Magistrates** are legally qualified and have greater power than **Second Class Magistrates**.

For the Federal Territory, **First Class Magistrates** are appointed by Yang di-Pertuan Agong on the recommendation of the Chief Judge. In each of the States, they are appointed by the State Authority on the recommendation of the Chief Judge (Section 78 of the Subordinate Courts Act 1948). Pursuant to Section 90 of the *Subordinate Courts Act*, 1948, a **First Class Magistrate** has jurisdiction to hear all actions and suits of a civil nature where the amount in dispute does not exceed RM100,000.

The State Authority may appoint any fit and proper person to be a **Second Class Magistrate** in and for the State (Section 79 of the Subordinate Courts Act 1948). A **Second Class Magistrate** may hear a civil case where the plaintiff seeks to recover a debt or liquidated demand in money payable by the defendant, with or without interest, not exceeding RM10,000.

The Malaysian legal system no longer utilizes juries.

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

Industrial Courts for certain employment matters;

Civil Division and Criminal Division of the High Court;

In Kuala Lumpur, the capital of Malaysia, the Civil Division is further divided by specialty into :-

- Commercial Court
- Civil Court
- Admiralty Court
- Intellectual Property Court
- Islamic Finance / Muamalat Court
- Construction Court

The Civil Division of the Courts apply the procedures stipulated in the *Rules of Court*, 2012 (“RCt”)

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

Yes, when parties have a written arbitration agreement to refer a dispute to arbitration. The New York Convention applies. The *Arbitration Act*, 2005 is applicable where the seat of arbitration is in Malaysia, and is based on the UNCITRAL Model Law. Parties are free to agree to any particular institutional or UNCITRAL rules they wish to adopt in arbitration.

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

Yes. Pursuant to the *Arbitration Act*, 2005, the New York Convention is given effect to. The arbitration agreement is upheld unless found to be null and void, inoperative or incapable of being performed.

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

No. It is not mandatory but may be directed by a Judge with the consensus of the parties.

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

(a) Are there provisions for mandatory document disclosures?

Yes. The Court may at any time order any party to give discovery under **Order 24 Rule 3(1) RCt**. These documents include:

- a) the documents on which the party relies or will rely; and
- b) the documents which could -
 - (i) adversely affect his own case;
 - (ii) adversely affect another party's case; or
 - (iii) support another party's case.

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

No. There are no oral examinations but written interrogatories can be ordered upon application by a party – **Order 26 RCt**

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(c) Are there limits on the length of oral examinations?

Not applicable.

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

Yes. Witness statements are commonly provided in advance of the hearing/trial. Evidence-in-chief of a witness is given by way of witness statement, unless otherwise ordered by the Court or the parties to the action otherwise agree – **Order 38 Rule 2 RCt**

The Court ordinarily directs at case management, convened before the hearing / trial, that parties file a statement of agreed facts, statement of issues to be tried and a summary of each party's respective case – **Order 34 Rule 2 RCt**

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

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

Yes. In respect of Court appointed experts, the Court expert shall send his report to the Court, and the Court Registrar shall in turn send copies of the Court expert's report to the parties or their solicitors. - **Order 40 Rule 2(1) RCt**

In respect of a party's expert report, it is to be exhibited to an affidavit affirmed by the expert as required by **Order 40A Rule 3(1) RCt**. The party relying on the expert report must serve the expert's affidavit exhibiting his report on every other party. The Court may give directions on the time for filing or exchange of parties' expert reports.

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

Yes. In respect of Court appointed experts, a party who wishes to cross-examine an expert on his report before trial may do so upon application to the Court for leave – **Order 40 Rule 4 RCt**

There is no equivalent rule for party appointed experts. However, a party may put to an expert instructed by another party written questions about his report, upon an application to Court for leave within 14 days of service of the other expert's affidavit - **Order 40A Rule 4(1) RCt**

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

Yes – **Order 40A Rule 5(1) RCt**

The Court may, at any stage, direct discussion between experts for the purpose of requiring them to identify the issues in the proceedings and where possible, reach an agreement on issues.

There is no equivalent rule for Court appointed experts, unless specifically ordered by Court.

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10. Are there other notable discovery rules?

Yes. Discovery against non-parties is permissible under **Order 24 Rule 7A RCt** in the following circumstances:

- a) the documents are specified or described;
- b) the documents are relevant to an issue arising or likely to arise out of the claim made or likely to be made in the proceedings; and
- c) the person against whom the order is sought is likely to have or have had them in this possession, custody or power.

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

Yes. Pre-hearing conferences are held, and are called “case management”. They are conducted by the trial Judge or the Registrar. The first case management is usually fixed 1 week after an application or a Writ is filed in Court. The last case management is fixed depending on the status of the case, in readiness for trial. Matters that are dealt with in a case management are as stipulated in **Order 34 Rule 2 RCt**. In between, several attendance at case managements may be required as the case requires.

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

Yes, the Plaintiff may apply for summary judgment premised on Affidavit evidence under **Order 14 RCt**. The Court will grant summary judgment if the defendant cannot successfully raise triable issues.

Order 27 RCt – judgment on admission may be moved by a party where admissions of fact are made by the other party to a cause or matter either by his pleadings or otherwise.

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?

Rulings are made on admissibility of evidence at trial. Common bundles of documents are usually compiled before trial and are categorized under Part A, Part B and Part C pursuant to **Order 34 Rule 2(d) and (e)** which have the following effect:

- Part A – documents agreed on between all parties and this bundle of agreed documents shall be filed by the plaintiff
- Part B – documents where the authenticity is not disputed but the contents are disputed
- Part C – documents where the authenticity and contents are disputed

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The Judge will rule on the admissibility of Part C documents at trial.

However, on an application for discovery, disclosure of specific documents are demanded and the Court may make a preliminary ruling on its relevance or necessity.

Exceptionally, a party may move the Court, prior to trial, to expunge parts of the witness statement if it strays away from the party's pleaded case, or is for other reasons objectionable.

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

So long as the evidence / opinion of an expert is relevant towards proving a fact in issue in the cause or matter, expert evidence is admissible – Sections 45, 46, 47 and 51 *Evidence Act*, 1950

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

Yes. The court has the power to appoint its own expert under **Order 40 Rule 1 RCt**

A Court expert is any person who has such knowledge or experience in connection with a question, that his opinion on it would be admissible in evidence, and includes scientific persons, medical men, engineers, accountants, actuaries, architects, surveyors and other specially skilled persons.

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. Professional communications which include attorney/solicitor-client communication, legal advice, documents prepared in anticipation of litigation, settlement discussions provided that such communications are not made in furtherance of any illegal purpose – Section 126 *Evidence Act*, 1950

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?

Yes. A public officer shall not be compelled to disclose communications made to him in official confidence if he considers that public interest would suffer by the disclosure. Certification that the disclosure of such communication would be detrimental to public interest is required from the relevant public department – Section 124 *Evidence Act*, 1950

Under Section 122 of the *Evidence Act*, 1950, a person who is or has been married shall not be compelled to disclose any communication made to him/her during marriage by any person to whom he/she is or has been married except where :-

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- The person who made it or his/her representative in interest consents; or
- In suits between married persons; or
- Proceedings in which one married person is prosecuted for any crime committed against the other.

Where the production of a document or communication of the contents of the same is contrary to a statutory provision which imposes secrecy such as the *Official Secrets Act*, 1972 - any document specified in the Schedule including any official document, information and material as may be classified by a Minister, the Menteri Besar or Chief Minister of a State or such public officer appointed by the Chief Minister as “Top Secret”, “Secret”, “Confidential” or “Restricted”, as the case may be; and protected from disclosure.

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

Usually, the trial Judge - **Order 24 Rule 13(2) RCt**

19. Briefly describe the trial process?

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

Yes, there are opening speeches under **Order 35 Rule 4 RCt**, usually made orally, sometimes also supported in written form. They are brief.

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

Order 35 Rule 4 RCt

As a general rule, the Plaintiff offers its witnesses for examination first. The Plaintiff has the right to determine the order of the witnesses, where the Plaintiff has more than 1 witness. The Plaintiff then closes its case. The Defendant calls its witnesses next and similarly has the right to determine the order of the witnesses where the Defendant has more than 1 witness. The Defendant then closes its case.

(c) *Who conducts examination and in what order?*

Order 35 Rule 4 RCt

Examination-in-chief is conducted by Counsel of the party who calls the witness. The witness is then cross-examined by Counsel of the adverse/opposing party. Re-examination, (if necessary) of the witness is conducted by Counsel of the party who calls the witness. With leave of the Court, there may be an opportunity for opposing Counsel to further cross-examine on any new evidence raised in re-examination.

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(d) *What is the process for closing submissions?*

Order 35 Rule 4 RCt

Closing submissions are at the conclusion of all evidence, and are generally in the form of concurrent exchange of written submissions, with a right of written reply. Thereafter, the trial Judge would call for oral submissions by Counsel to clarify or highlight the written submissions.

20. Please identify any other notable trial procedures.

Interpreters are allowed to facilitate translation of the testimony of non-English or non-Malay speaking witnesses.

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

The Plaintiff ordinarily bears the burden of proof of liability, causation and damages, on a *balance of probabilities* test. Certain circumstances or cases require the burden to shift between the parties once a *prima facie* case is met by the Plaintiff.

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

Compensatory damages are the norm, and are awarded to place the Plaintiff as far as money can, in the position as if the contract has been performed or the wrong had not occurred.

Nominal damages are ordered where the Plaintiff establishes liability but is unable to prove its loss.

Exemplary or punitive damages can be ordered by the Judge and are granted to punish the Defendant, but this is rare.

Damages for pure economic loss are recoverable.

Section 11 of the *Civil Law Act* 1965 provides that the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages, for the whole or any part of the period between the date when the cause of action arose and the date of the judgment.

Post judgment interest is awarded at such rate as the Chief Justice of Malaysia may from time to time determine - **Order 42 Rule 12 RCt**. Pursuant to **Practice Direction 1 of 2012**, the current rate for post judgment interest is 5%.

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

Punitive or exemplary damages are available and the threshold of recovery is high. They are ordered by the Judge to punish

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the Defendant for high-handed and oppressive behavior which includes the Defendant's motives, conduct or manner in which injury was inflicted on the Plaintiff and/or damage caused.

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

Actions founded on a contract or on tort are time barred after 6 years from the date the cause of action accrued – **Section 6(1) Limitation Act, 1953**

Fraud – Limitation for actions based upon a fraud and/or the fraudulent actions of a Defendant do not run until the Plaintiff discovers the fraud or could with reasonable diligence have discovered it - Section 29(a) Limitation Act, 1953

Action to recover land – 12 years from the date on which the right of action accrued – Section 9(1) Limitation Act, 1953

Proceedings to enforce a judgment must be brought 12 years from the date on which the judgment becomes enforceable and arrears of interest in respect of any judgment debt shall be recovered within six years from the date on which the interest became due - Section 6(3) Limitation Act, 1953

Service of the Writ of Summons – for the purpose of service, the Writ is valid in the first instance for 6 months beginning from the date of its issuance. Where efforts to serve a Writ on a Defendant have been unsuccessful, the Plaintiff may apply to Court for a renewal before expiry of the writ, and the Court may extend the validity of the writ twice (in admiralty actions five times), not exceeding 6 months at any one time – **Order 6 Rule 7 RCt**

Appearance by the Defendant - within 14 days after the service of the Writ / Statement of Claim or, where that time has been extended by Court, to that time as so extended - **Order 12 Rule 4 RCt**

Service of Statement of Claim – the Plaintiff must serve the endorsed Statement of Claim on the Defendant either when the Writ is served on that Defendant, or at any time after service of the Writ but before expiration of 14 days after that Defendant enters an appearance, unless the Court gives leave to the contrary - **Order 18 Rule 1 RCt**

A Defence to a Statement of Claim is to be served by the Defendant before the expiration of 14 days after the time limited for appearance, unless the Court gives leave to the contrary – **Order 18 Rule 2(1) RCt**

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?

The Malaysian Courts will assume jurisdiction in the following circumstances, if:

- a) the cause of action arose;
- b) the Defendant, or one of the several Defendants, resides or has his place of business;
- c) the facts on which the proceedings are based exist or are alleged to have occurred; or

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d) the land the ownership of which is disputed is situated within Malaysia.

The Court may entertain an application to stay proceedings on the basis of *forum non conveniens* if it is established that there is a more convenient forum elsewhere. Where there is a choice of forum clause in the contract, a stay of the Malaysia proceedings brought contrary to the express choice of forum clause, is more likely.

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

Yes. **Order 15 r6(2)(b) RCt** empowers the Court to order any of the following persons to be added as a party, namely:

- (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or
- (ii) any person with whom there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which, in the opinion of the Court, would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

Leave of Court is required for the Defendant to add other persons as a party.

The Court has the power to join a further party as a co-Defendant upon the application of the Plaintiff.

Circumstances may arise where a Defendant, if found liable to the Plaintiff, may have a right to demand a contribution or indemnity from a third person not already a party to the action – **Order 16 Rule 1 RCt**. In doing so, the Defendant must issue a Third Party Notice containing a statement of the nature of the claim made against him, to the Third Party with leave of Court.

Where a Defendant claims against a person who is already a party to the action, any contribution or indemnity he may issue and serve on that a person a Contribution Notice stating his claim to that effect - **Order 16 Rule 8(1) RCt**

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).

Cost of proceedings are usually awarded to the successful party, unless there are special reasons for depriving that party of its costs – **Order 59 Rule 3 RCt** provides for costs to follow the event.

Where there is no order made by Court as to costs, each party bears its own costs.

Party-to-party basis of costs is not the same as solicitor-to-client basis of costs. Party to party costs is about 30% - 50% of a solicitor-to-client costs.

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28. Are contingency fees allowed?

No.

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

No, they are not permitted unless a valid assignment of substantive rights exists, or under a policy of insurance.

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

Yes, **Order 15 Rule 12 RCt** provides for representative proceedings.

This rule allows all members of a class with a common interest and common grievance to institute proceedings representative of certain individuals to seek a relief, which by its nature is beneficial to the entire class

The purpose of this rule is to avoid multiplicity of proceedings where numerous persons have the same interests.

These type of claims include but are not limited to Administration of intellectual / industrial property owners; Bondholders; Club members; Committee members; Debenture holders; Native customary rights holders; Common purchasers; and Underwriters.

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

No. Although they may be added by Court as a party if they have a legitimate interest in the matter, or appoint Counsel to act as *amicus curiae* if permitted by Court.

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

The High Court endeavors to complete a trial within 9 months of the filing of the Writ of Summons. Dependant on the nature and complexity of the case and volume of documents, additional time may be allowed to parties to prepare for trial.

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?

Yes. An appeal from the High Court (HC) to the Court of Appeal (CA) will be heard by a panel of 3 CA judges on interlocutory and final orders, except orders limited only to costs. Subject to leave of the Federal Court (FC), appeals from the CA originating from a HC suit may be lodged with the FC. The appeal at the FC will be heard by a panel of 5 FC judges.

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The manner of appointment of judges of the FC, CA and HC is set out under Article 122B of the *Federal Constitution*. His Majesty, the *Yang di-Pertuan Agong* appoints:

- the Chief Justice of the Federal Court;
- the President of Court of Appeal;
- the two Chief Judges of the High Courts; and
- judges of the Federal Court, the Court of Appeal and the High Court,

on the advice of the Prime Minister after consulting the Conference of Rulers. The Prime Minister consults the Chief Justice, the President of the Court of Appeal and the two Chief Judges, before he tenders his advice in appointing a judge to the Federal Court, the Court of Appeal and the High Courts.

The Prime Minister acts on the recommendation of the Judicial Appointments Commission (JAC). The JAC was established in February 2009 with the coming into effect of the *Judicial Appointments Act*, 2009. The primary function of the JAC is to receive and consider applications from qualified persons to be selected as judges (Section 22). The JAC then selects candidates based on merit (Section 23) and makes a recommendation to the Prime Minister by providing him with the shortlisted candidates for his consideration (Section 26), and advice thereon to His Majesty, the *Yang di-Pertuan Agong*.

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, they are available at trial, but not on Appeal since no fresh evidence is ordinarily admitted on appeal.

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

Not applicable to appeals.

At trial before the High Court, pursuant to the Case Management directions of the trial judge.

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

It is common for a lawyer / Counsel at trial to be the same individual / team responsible for pre-trial procedures, save where a separate / additional lawyer is appointed solely as Counsel for conduct of the trial. There is no solicitor-barrister distinction in Malaysia.

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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?

Common law principles of negligence are applied. Damages will be reduced if contributory negligence is established on the part of the Plaintiff.

In proceedings for contribution between joint / several tortfeasors, the amount of the contribution recoverable from any person is such as may be found by the court to be just and equitable, taking into account the extent of that party's responsibility for the damage, and the Court may exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person to be a complete indemnity. The Court is to have regard both to causation and to the relative blameworthiness of the parties. The damages awarded are subject to reduction for contributory negligence.

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

Service of foreign process is governed by **Order 65 RCt**

Under **Order 65 Rule 2 RCt**, a letter of request from a Court or other tribunal of a foreign country requesting service upon a person in Malaysia must be received by the Minister, who sends the same to the High Court with an intimation that it is desirable that effect should be given to the request. The letter of request must be accompanied by a translation thereof in English, as the case may be. Service will then be effected by the process server of the Court by leaving a copy of it and of the translation with the person to be served.

Order 65 Rule 2A RCt provides for an alternative mode of service of foreign legal process where there is no letter of request sent. Service may be effected in the manner as if it were a Writ of Summons issued in Malaysia.

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

In civil proceedings, upon discovery of documents, solicitors are subject to an implied undertaking not to use a document for any purposes other than those of the proceedings in which it is disclosed. The implied undertaking terminates when the documents are read in court.

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

- a) The assessment of damages may be severed from the trial on liability, and may be conducted by a Registrar or a Judge after the determination of the issue of liability.
- b) Issues may be determined as preliminary issues of law before other issues / trial to avert a prolonged and/or costly

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trial.

- c) Injunctive reliefs, arrest of ships, appointment of Receivers may be sought in aid of recovery of debt / damages.
- d) E-filing of Court papers after working hours of the Court is permissible.
- e) Certificates of urgency are filed to expedite the hearing of interlocutory applications that are urgent.

An Originating Summon may be filed instead of a Writ of Summons where no dispute of fact is involved. No oral testimony is required, and the substantive merits of the case is determined based on Affidavit evidence and submissions on law.

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?

The Italian Civil Procedure and the role of the Judge, if correctly applied do provide a proper balance between the parties.

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

No.

