GETTING THE DEAL THROUGH

# Dispute Resolution

## in 46 jurisdictions worldwide

**Contributing editor: Simon Bushell**

**2007**

*Published by*
*GETTING THE DEAL THROUGH*
*in association with:*

Amarchand Mangaldas
Anderson Mōri & Tomotsune
Araújo e Policastro Advogados
Bedell Cristin
Castrén & Snellman Attorneys Ltd
Charles Adams, Ritchie & Duckworth Attorneys at Law
Dillon Eustace
Dr Dr Batliner & Dr Gasser
Dr Kamal Hossain and Associates
Edwards Angell Palmer & Dodge LLP
ELIG Lokmanhekim Içtem Gürkaynak Attorneys-at-Law
Fulbright & Jaworski LLP
Gadens Lawyers
Gleiss Lutz
Haavind Vislie AS
Harry Elias Partnership
Herbert Smith LLP
Hiswara Bunjamin & Tandjung
Hoet Peláez Castillo & Duque
Hogan & Hartson LLP
Jenner & Block LLP
Konecna & Safar, vos
Law Offices of Charles H Camp
LawFed Rubino-Sammartano e Associati
Lenz & Staehelin
Mayora & Mayora, SC
McMillan Binch Mendelsohn LLP
MENA Legal in association with SALGER Rechtsanwälte
Monereo, Meyer & Marinel-lo
O'Melveny & Myers LLP
Odvetniki Selih & partnerji
Ozannes
Patrikios Pavlou & Co
Schönherr Rechtsanwälte GmbH
Skudra & Udris
Sofunde, Osakwe, Ogundipe & Belgore
Stibbe
Tanasescu, Leaua, Cadar & Asociatii
Von Wobeser y Sierra SC
Wardyński & Partners
Werksmans Attorneys

GLOBAL ARBITRATION REVIEW
THE INTERNATIONAL JOURNAL OF PUBLIC AND PRIVATE ARBITRATION

# Florida

**Daniel E González and Parker D Thomson**
Hogan & Hartson LLP

## Litigation

### 1 Court system

What is the structure of the civil court system?

The Florida Constitution vests judicial power in a Supreme Court, district courts of appeal, circuit courts and county courts. Florida is divided into twenty judicial circuits, each composed of at least one county. Those circuits are organised into five appellate districts composed of multiple counties.

The Florida Supreme Court, the court of last resort in Florida, is composed of seven justices. The jurisdiction of the Florida Supreme Court is primarily set forth in the Florida Constitution, and includes situations of mandatory review (eg, death sentences, district court decisions declaring a state statute or provision of the state constitution invalid) and discretionary review (eg, district court decisions that expressly declare valid a state statute or conflict with prior decisions of a district court of appeal or the Florida Supreme Court on the same issue). The Florida Supreme Court also is responsible for the administration of Florida's judicial system, including resolving disciplinary issues with the bench and Bar, and is empowered with rule-making authority for the practice and procedure of law in all state courts.

The district courts of appeal have jurisdiction to hear civil and criminal appeals from final judgments or orders of trial courts and have the power of direct review of administrative actions. Three judges must consider a case before a district court of appeal; the concurrence of two is necessary for a decision. Occasionally, a district court sits en banc, in which case a majority must endorse the decision.

Circuit courts are commonly referred to as the courts of general jurisdiction, because most civil and criminal cases originate at this level. On the civil side, circuit courts hear, among other cases, disputes involving more than US$15,000, tax disputes and actions concerning real property. The number of judges in each circuit is determined by law and is based on the population and caseload of the circuit.

County courts are courts of limited jurisdiction, hearing disputes involving US$15,000 or less, traffic offences, evictions, misdemeanours and violations of municipal and county ordinances. As with the circuit courts, the number of judges on the county courts depends on the population and caseload of each county.

Civil litigation may also occur in the federal courts in Florida, but because federal courts have limited jurisdiction, they may only hear certain claims. As in all states, some claims filed in a Florida state court may be 'removed' to the federal court if there is diversity of citizenship and the amount in controversy exceeds US$75,000, or if the claim involves a federal question.

Pursuant to the Class-Action Fairness Act of 2005, in the case of class actions filed after 18 February 2005, federal courts may hear a claim under its diversity jurisdiction if the amount in controversy exceeds US$5 million, at least one-third of the plaintiff class members are not citizens of the forum state, and at least one class member and one defendant are from different states. A federal court may have discretion to decline jurisdiction if less than two-thirds of the class members are from the forum state.

### 2 Judges and juries

What is the role of the judge and, where applicable, the jury in civil proceedings?

Judges must decide controversies fairly and impartially, consistent with established rules of law. In jury trials, the judge is responsible for deciding questions of law presented at the trial and for stating the law to the jury. The jury is responsible for deciding issues of fact. If there are no material issues of fact, the judge may decide the case on her own. In bench trials, the judge decides issues of law and fact. Although they normally do not do so, judges may also question a witness to clarify testimony, or may call witnesses, whom all parties may then cross-examine.

### 3 Limitation issues

What are the time limits for bringing civil claims?

The Florida Statutes prescribe time limits for the commencement of various civil actions. For example:

| Claim | Years |
|---|---|
| Breach of written contract | 5 |
| Negligence | 4 |
| Intentional torts | 4 |
| Products liability | 4 |
| Property damage | 4 |
| Actions not covered by specific statutory provision | 4 |
| Wrongful death | 2 |
| Specific performance of contract | 1 |

Limitations for other actions are detailed in the Florida Statutes. In Florida, parties may not include a contractual provision that fixes the period of time within which an action arising out of the contract may be begun at a time less than the one provided by the applicable statute of limitations.

## 4 Pre-action behaviour

Are there any pre-action considerations the parties should take into account?

Parties contemplating a civil action should determine whether it is appropriate to file the action given the statutes and agreements on which the action is based. Prior to filing, parties should determine whether the action belongs in state or federal court, as well as the proper venue of the action. Additionally, some types of actions (eg, actions for medical malpractice) require specific pre-suit investigation and notice. An attorney should verify whether any such pre-suit requirements apply to the contemplated claim(s) before filing suit.

Under Rule 1.290 of the Florida Rules of Civil Procedure, it is possible to take depositions before the initiation of a civil action. The moving party seeking a pre-action deposition must show: (i) that the movant expects to be a party to an action cognisable in a court of Florida, but is presently unable to bring the action or cause the action to be brought; (ii) the subject matter of the expected action and the movant's interest in it; (ii) the facts which the movant desires to establish by the proposed testimony and reasons for desiring to perpetuate it; (iv) the names or descriptions of the expected adverse parties and their addresses, if known; and (v) the names and addresses of the potential deponent and the substance of the testimony that the movant seeks to gain from that deposition.

## 5 Starting proceedings

How are civil proceedings commenced?

In Florida, a civil action commences when a complaint or petition is filed; ancillary proceedings commence when a writ is issued or when the party initiating the action files a pleading.

## 6 Timetable

What is the typical procedure and timetable for a civil claim?

After commencement of the civil action the plaintiff must serve the defendant with the initial process and pleading within 120 days of its filing. If this deadline is not met, the court will dismiss the action without prejudice, unless the plaintiff can show good cause or excusable neglect for the failure to serve the defendant. Once the defendant is served, the defendant has 20 days in which to answer the complaint. Thereafter, any other pleading (ie, cross-claims, counterclaims, and third-party complaints) must be answered within 20 days. A defendant may bring responsible third-parties into the action by filing a third-party complaint within 20 days of the defendant's answer; after that 20-day period, the defendant may still bring in a third party with leave of the court.

Under the Federal Rules of Civil Procedure, applicable when a civil action is filed in or removed to federal court, the defendant must also answer within 20 days of service and may assert a variety of defences to the action under Rule 12.

In general, time is flexible – the Florida and Federal Rules of Civil Procedure give courts discretion to enlarge deadlines and parties are expected to confer with the court to determine how the action will progress. Many courts use case management conferences, at which the court will schedule important aspects of the civil action (eg, trial date, discovery deadlines, etc).

## 7 Case management

Can the parties control the procedure and the timetable?

Yes. Rule 1.200 of the Florida Rules of Civil Procedure anticipates that parties will confer with each other and with the court to schedule trial procedures. In federal courts, there is significantly less leeway for the parties to control the timetable.

## 8 Evidence

What is the extent of pre-trial exchange of evidence? Is there a duty to preserve documents and other evidence pending trial? Are any documents privileged? Would advice from an in-house lawyer also be privileged? How is evidence presented at trial? Do witnesses and experts give oral evidence?

Discovery is the process of gathering evidence in preparation for trial. In Florida, parties may obtain discovery regarding any non-privileged matter that is relevant to the subject matter of the pending civil action. Either party may obtain discovery to support their own claim or rebut the claim of the opposing party. Furthermore, if the information requested in discovery may eventually lead to the discovery of admissible evidence, the party from which the information is requested may not refuse to produce the requested material on the grounds that it may be inadmissible at trial.

Parties may obtain discovery using one or a combination of the following methods: oral or written depositions; production of documents or things; permission to enter upon land or other property for physical inspection and other purposes; physical and mental examinations; written interrogatories; and requests for admission.

If a party possesses evidence that is, or may be, favourable to the other party, the destruction or loss of that evidence raises an adverse inference, unfavourable to the party failing to produce the evidence. In certain circumstances, a party may also be tortiously liable for spoliation of evidence.

Generally, a trial court possesses a substantial amount of discretion on evidentiary matters. Trial court decisions on evidentiary matters are treated deferentially by the appellate courts, which will often refuse to overturn the trial court's judgment unless there was a clear error or an abuse of discretion.

Documents prepared by attorneys in the course of litigation are protected by the attorney-client or work-product privilege and do not have to be produced, except in very rare situations. Through a number of specific statutes, Florida recognises other evidentiary privileges, for example the journalist, psychotherapist-patient, priest-penitent, husband-wife, trade secret and accountant-client privileges. Advice rendered by an in-house lawyer (local or foreign) is presumed privileged. This presumption may be overcome in certain circumstances, however, such as if the business entity sought advice from in-house counsel that was determined to be business advice rather than legal advice.

Witnesses and experts generally give oral evidence, though upon stipulation or by necessity, witnesses or experts may give written testimony. An important concern is that the adversary has the opportunity to cross-examine the witness.

## 9 Interim remedies

What interim remedies are available?

A variety of interim remedies exist in Florida. For example:

- **Temporary injunctions:** used to preserve the status quo pending final determination or final outcome of the cause or until full relief can be granted following a hearing;

- **Mandatory injunctions**: used to require performance of an affirmative act that is essential to preserve the status quo.
- **Prejudgment replevin**: used to ensure that property is not destroyed, concealed or removed from the jurisdiction during the pendency of an action. Prejudgement attachment of property and garnishment of wages may also be available under limited circumstances.
- **Notice of lis pendens**: used to record notice of pending litigation involving a piece of real property, asking a potential buyer to be aware of that pending litigation and act accordingly.

## 10 Remedies

What substantive remedies are available?

Florida courts may award actual damages and punitive damages. Actual losses are not necessarily restricted to the actual loss in time or money – they may include amounts for pain and suffering, mental anguish and suffering, and disabilities and permanent disfigurement. Actual losses are not dependent on proof of malice.

Juries may award punitive damages to the prevailing party in any tort action, in accordance with statutory and common law. While Florida courts have abandoned the view that punitive damages must bear a reasonable relation to actual damages, the US Supreme Court has held that excessive punitive damages may violate the Due Process Clause of the Fourteenth Amendment.

Courts may, depending on statutory or common law, award attorneys' fees, court costs, interest and/or declaratory, injunctive or equitable relief.

## 11 Enforcement

What means of enforcement are available? What sanctions are available in the event a court order is disobeyed?

In the case of a money judgment, the court may enforce through execution, a writ of garnishment, or other appropriate processes or proceedings. To recover property the court may issue a writ of possession for real property and a writ of replevin, garnishment, or distress for other types of property. If a court, in its final judgment, orders specific performance or the performance of an act, it must specify a time during which the act must be performed and, if disobeyed, the court can hold the disobedient party in contempt or may appoint a third party to perform the act. If the judgment is for the conveyance or transfer of real property, the judgment has the effect of a duly executed and recorded conveyance, transfer, release, or acquittance.

## 12 Public access to court records

Are court hearings held in public? Are courts documents available to the public?

Yes. The Florida Supreme Court has held that there is a strong presumption that court hearings are open. Under very limited circumstances (eg, to protect trade secrets) that are rarely invoked, courtroom proceedings may be closed by a court 'gag order'. Special proceedings, such as those involving juveniles, may also be closed. Court documents are considered public records and, unless a court orders otherwise, are available without restriction to the public at large.

## 13 Inter partes costs

Does the court have power to order costs?

Florida law permits the 'prevailing party' to recover court costs, but follows the 'American Rule' with respect to attorneys' fees – the prevailing party may not be awarded attorneys' fees unless there is a specific statutory or contractual provision authorising the award.

## 14 Fee arrangements

Are 'no win, no fee' agreements or other types of contingency fee arrangements available to parties? May parties bring proceedings using third party funding? If so, may the third party take a share of any proceeds of the claim?

Contingency fee arrangements are allowed in Florida, except in domestic relations and criminal cases. The Florida Rules of Professional Conduct require that a contingency fee arrangement be in writing, and set forth specific binding guidelines for such fee arrangements, including the permissible percentage.

Under Florida law, a third party may finance a party's litigation costs. In the event that a party chooses to finance litigation through the use of a 'litigation loan', for example, the third party may take the share of proceeds contemplated in the loan agreement. Attorneys, however, may not finance their clients' litigation (though an attorney may enter into a contingency fee agreement and may advance costs and expenses conditioned on repayment after conclusion of the matter).

## 15 Appeal

On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

Parties may appeal to the Florida Supreme Court under limited circumstances. The Florida Supreme Court has mandatory review and discretionary review. Because discretionary review in the Florida Supreme Court is rarely granted, the pertinent district court of appeal is usually a case's final arbiter.

The district courts of appeal have jurisdiction to hear appeals from final orders of the trial courts and certain non-final orders of the circuit courts (eg, decisions regarding venue, jurisdiction, injunctions, etc). The circuit courts have jurisdiction to hear appeals from final orders entered by lower courts, such as county courts and administrative agencies.

Appeals of federal court decisions proceed through the federal judiciary; federal courts have limited jurisdiction to hear appeals from the state court system.

## 16 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

Florida has enacted the Florida Enforcement of Foreign Judgments Act and the Uniform Out-of-Country Foreign Money-Judgment Recognition Act. The latter act sets out a list of reasons because of which a court may refuse to recognise a foreign judgment. In general, the test of whether a foreign judgment will be recognised is whether a Florida judgment would be enforced if the foreign court were asked to do so under the same circumstances.

**17 Foreign proceedings**

Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

Under Florida's Uniform Foreign Depositions Law, witnesses summoned by the court of a foreign jurisdiction may be compelled to testify as if the action were occurring in Florida.

## Arbitration

**18 UNCITRAL Model Law**

Is the arbitration law based on the UNCITRAL Model Law?

The Florida Arbitration Code (FAC) is modelled on the Uniform Arbitration Act. Other statutes provide procedures for the arbitration of certain types of disputes (eg, arbitrations regarding oil spills, public utilities and state roads). If the dispute involves interstate commerce, then the Federal Arbitration Act (FAA) supersedes the FAC because of the Supremacy Clause of the US Constitution.

The Florida International Arbitration Act (FIAA) is based on the UNCITRAL Model Law. The FIAA is intended to resolve disputes arising out of international relationships and applies to disputes between two or more individuals, at least one of whom is not a resident of the US. Under certain specifically delineated circumstances, the FIAA may apply even if the dispute arises between citizens of the US.

**19 Arbitration agreements**

What are the formal requirements for an enforceable arbitration agreement?

The FAC applies only where the parties agree in writing to submit to arbitration any dispute existing between them at the time of the agreement or where the parties include a provision in a written contract stipulating that arbitration will be used to resolve disputes arising from the contract.

**20 Choice of arbitrator**

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

Courts must appoint at least one arbitrator where the agreement lacks a method for the selection of arbitrators, if the agreed upon method cannot be followed for any reason, or if an arbitrator who has been appointed fails to act and his or her successor has not been appointed. Court-appointed arbitrators have powers as if named or provided for in the contractual provision or arbitration agreement.

Under the FAC, an arbitrator may only be challenged if he or she demonstrates 'evident partiality'. Courts have not expected complete neutrality where arbitrations are appointed by parties to the dispute – courts expect such arbitrators to behave as "partisans only one step removed from the controversy". The standard for challenging an arbitrator is high – the arbitrator must have acted with "overt corruption or misconduct in the arbitration itself".

The FAA allows a court, once petitioned, to appoint a sole arbitrator if the parties do not have an agreement on point.

**21 Procedure**

Does the domestic law contain substantive requirements for the procedure to be followed?

The FAC contains a number of substantive requirements for the procedure to be followed. The arbitrators are required to appoint a time and place for the hearings and notify the parties at least five days before the hearing; parties are entitled to present evidence material to the dispute and cross-examine witnesses at the hearing. The FIAA gives the arbitration tribunal much procedural leeway, allowing it to "conduct the arbitration as it deems appropriate, including determination of the language to be used", unless the FIAA or written agreement provides otherwise. Under the FAC and FIAA, a party has the right to representation by counsel; the right to counsel may not be waived in a contractual provision.

The FAA provides for the appointment of an arbitrator and for the subpoena of third parties to attend the hearings and produce documents. The parties to the dispute may choose the rules governing procedure.

**22 Court intervention**

On what grounds can the court intervene during an arbitration?

Under the FAC, courts have jurisdiction to enforce the arbitration agreement or contractual provision providing for arbitration, to enter judgment on an arbitral award and to vacate, modify or correct an arbitral award as provided for in the FAC.

Under the FIAA, courts may assist in the process of taking evidence, if such assistance is sought by the arbitrators. During arbitration, courts are empowered to appoint successor arbitrators if the underlying agreement lacks a procedure; grant interim relief; and, in certain circumstances, a deadline for the issuance of an arbitral award. Without authorisation from the arbitral tribunal, under the FIAA, parties may seek interim relief on their own.

**23 Interim relief**

Do arbitrators have powers to grant interim or conservatory relief?

The FAA and FAC are silent regarding the arbitrator's power to grant interim relief. The FIAA gives the arbitral tribunal the power to grant interim relief "as it considers appropriate".

**24 Award**

When and in what form must the award be delivered?

Under the FAC, the arbitral award must be in writing and must be signed by the arbitrators. The arbitral tribunal must then deliver the award to the parties. The arbitration tribunal must render an award by the deadline provided in the agreement or, if the agreement is silent, within such time as the court orders on application of a party. Parties may agree in writing to extend this deadline before or after it has expired.

Under the FIAA, the arbitral tribunal must issue its award within the time specified by the parties or, in the absence of such specification, as the tribunal determines appropriate. The tribunal may issue, in addition to final awards, interim, interlocutory, or partial awards. Awards from the tribunal must be in writing, state the date and place of issuance, and must be signed prior to issuance by each member of the tribunal unless, in the case of a tribunal with more than one member, the award is signed by a majority of the members and an explanation is given for each missing signature. The tribunal must then deliver the award to the parties. The tribunal must issue a written statement of the

reasons for an award only if all parties agree or if the tribunal determines that a failure to do so would jeopardise the recognition or enforcement of the award. Under certain circumstances, the arbitral tribunal may make its award public.

Under the FAA, the arbitral award must be in writing.

## 25 Appeal

On what grounds can an award be appealed to the court?

Under the FAC, courts will vacate an arbitral award if the arbitrators acted with overt corruption or misconduct during the course of the arbitration; if there was evident partiality by an arbitrator; if the arbitrators exceeded their powers; if the arbitrators refused to postpone a hearing upon a sufficient showing; or if the arbitrators refused to hear evidence material to the controversy. Arbitral awards are reviewable and modifiable by the court if there was an evident miscalculation or mistake in the award; if the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; and if the award is imperfect as a matter of form, not affecting the merits of the controversy. Courts must modify and correct the award to effect its intent.

Under the FIAA, courts may vacate a final award if there was no written undertaking to arbitrate, if there was fraud in the inducement of that undertaking, or if a panel determined that the dispute was non arbitrable; if the challenging party was not given notice of the appointment of the arbitral tribunal or of the arbitral proceedings; if the arbitral tribunal conducted its proceedings so unfairly as to substantially prejudice the rights of the challenging party; if there was corruption in the proceedings; if a neutral arbitrator had a material conflict of interest with the party challenging the award; if the award resolves a dispute which the parties did not agree to refer to the tribunal; or if the tribunal was not properly constituted.

Under the FAA, courts may vacate awards that were procured by corruption, fraud or undue means; that resulted from evident partiality or corruption in the arbitrators; that were rendered after the arbitrators refused to hear material evidence; or that result from the arbitrators exceeding their powers.

## 26 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

Under the FAA, parties can enforce foreign (ie, where the seat of the arbitration is outside of the US), non-domestic (rendered in the US, but bears a reasonable relationship with one or more foreign states) and domestic arbitral awards that involve commerce. To be enforceable, foreign awards must be rendered in a state that is a contract party to the New York or Panama Conventions. Domestic awards that do not involve commerce are governed by the arbitration law of the state where the award was rendered.

Parties have one year to confirm a domestic award and three years to confirm a foreign or non-domestic award falling under the New York and Panama Conventions. Parties seeking enforcement of an award may petition the court for confirmation of the award. The petition should be accompanied by the original arbitration agreement and the original of the award, or certified copies.

Parties opposing enforcement must show why the award should not be enforced or why it should be set aside, corrected, or modified. Courts can refuse to enforce a foreign award, in accordance with article 5 of the New York and Panama Conventions, or a domestic award, in accordance with section 10 of the FAA, if the arbitration was conducted unfairly, though courts interpret 'unfairness' very narrowly. Domestic awards can also be set aside for additional common law reasons.

Awards rendered under the auspices of the International Centre for the Settlement of Investment Disputes cannot be challenged in the courts because US law provides that those awards "create a right arising under a treaty of the United States" and are tantamount to the final judgment of a court.

In Florida, the enforcement of domestic and international arbitration awards is governed by the FIAA. As with the FAA, domestic and international arbitration awards become court-enforced after a petition is made to the court and the court enters a judgment confirming, modifying or correcting the award.

HOGAN & HARTSON

**Contacts: Daniel E González** **e-mail: degonzalez@hhlaw.com**
**Parker D Thomson** **e-mail: pdthomson@hhlaw.com**

Mellon Financial Center
1111 Brickell Avenue
Suite 1900
Miami
Florida 33130
United States

Tel: +1 305 459 6500
Fax: +1 305 459 6550
Website: www.hhlaw.com

**27 Costs**

Can a successful party recover its costs?

Under the FAC, arbitrators have the power to award costs, not including attorneys' fees, in the arbitration award. Under the FIAA, the arbitrators have discretion to award costs, including attorneys' fees, as the arbitral tribunal "deems appropriate". Under the FAA, a prevailing party may only recover costs if the agreement expressly provides for that.

## Alternative dispute resolution

**28 Obligatory ADR**

Is there a requirement for the parties to litigation or arbitration to consider alternative dispute resolution before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process? What types of ADR process are commonly used? Is a particular ADR process popular?

In many circuits there is mandatory mediation of cases. Generally, there is no obligation to arbitrate. Nevertheless, courts may refer any contested civil action filed in a circuit or county court to non-binding arbitration, in accordance with the rules set forth by the Florida Supreme Court. If a party requests a trial de novo after the non-binding arbitration, it may be assessed costs if the judgment at the trial de novo is not more favourable than the award of the arbitral tribunal. In Florida, courts may order parties to participate in an ADR process. Mediation is the most frequently employed and most popular ADR process.

## Miscellaneous

**29** Are there any specific features of the dispute resolution system not addressed in any of the previous questions?

No.