

Appeals

Contributing editors

Mark A Perry and Perlette Michèle Jura



2018

GETTING THE
DEAL THROUGH

GETTING THE
DEAL THROUGH 

Appeals 2018

Contributing editors

Mark A Perry and Perlette Michèle Jura
Gibson, Dunn & Crutcher LLP

Reproduced with permission from Law Business Research Ltd
This article was first published in June 2018
For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com



Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

© Law Business Research Ltd 2018
No photocopying without a CLA licence.
First published 2017
Second edition
ISBN 978-1-912377-12-1

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between May and June 2018. Be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Global overview	5	Japan	31
Mark A Perry and Perlette Michèle Jura Gibson, Dunn & Crutcher LLP		Hironobu Tsukamoto and Eriko Ogata Nagashima Ohno & Tsunematsu	
Argentina	6	Philippines	35
Santiago Soria Marval, O'Farrell & Mairal		Ramon G Songco and Jewelle Ann Lou P Santos SyCip Salazar Hernandez & Gatmaitan	
Austria	10	Portugal	39
Lukas A Weber Brauneis Klauser Prändl Rechtsanwälte GmbH Linda Poppenwimmer Staatsanwaltschaft Wien		Fernando Aguilar de Carvalho and Luís Bertolo Rosa Uría Menéndez - Proença de Carvalho	
Brazil	13	Spain	43
Diógenes Gonçalves, Lucas Pinto Simão and Priscilla Martins de Freitas Pinheiro Neto Advogados		Ángel Pérez Pardo de Vera and Francisco Javier Rodríguez Ramos Uría Menéndez	
Bulgaria	18	Switzerland	47
Vania Todorova Stoeva, Tchompalov & Znepolski Attorney Partnership		Nicolas Bracher and Caspar Humm Wenger & Vieli AG	
Denmark	22	United Kingdom	52
Dan Terkildsen Lundgrens		Patrick Doris, Doug Watson and Daniel Barnett Gibson, Dunn & Crutcher LLP	
Germany	26	United States	57
Andreas Klein and Federico Parise Kuhnle White & Case LLP		Mark A Perry and Perlette Michèle Jura Gibson, Dunn & Crutcher LLP	

Preface

Appeals 2018

Second edition

Getting the Deal Through is delighted to publish the second edition of *Appeals*, which is available in print, as an e-book, and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria and Switzerland.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Mark A Perry and Perlette Michèle Jura of Gibson Dunn & Crutcher LLP, for their continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
June 2018

Bulgaria

Vania Todorova

Stoeva, Tchompalov & Znepolski Attorney Partnership

1 Outline and explain the general structure of your country's court system as it relates to the commercial appellate process.

The main piece of legislation that regulates civil and commercial litigation is the Bulgarian Civil Procedure Code, effective as of 1 March 2008 (the CPC).

The competent court of appeal may either be the district or the appellate court, depending on which court heard the case at first instance. Where the regional court acted as first instance (eg, monetary claims under approximately €12,500), appeals shall be lodged with the district court; where the district court acted as court of first instance (eg, monetary claims above €12,500), its decisions may be appealed before the appellate court.

Where a commercial case is heard by the regional court as first instance, the general civil litigation procedure would apply to both trial and appeal instances.

The CPC sets forth a special 'commercial disputes procedure' applicable to commercial cases heard by the district court as first instance, and the appellate court as court of appeal. Within the scope of this procedure fall disputes arising out of or related to:

- commercial deals;
- membership in companies;
- registration of circumstances in the commercial registry;
- privatisation agreements;
- public procurement contracts; and
- unfair competition, abuse of monopoly or dominant position, etc.

The main specifics of this procedure include:

- dual bilateral exchange of written statements of claim and responses between the plaintiff and respondent (as opposed to a one-stage exchange in the general civil litigation);
- preclusion of procedural rights at earlier stages, compared with the general civil litigation;
- the authority of the court to issue a decision without scheduling open hearings, if all evidence is written and collected within the bilateral exchange phase, or if explicitly requested by both parties; and
- shorter terms for exercise of some rights compared to the general civil litigation.

Decisions of courts of appeal (both district and appellate courts and irrespective of the applicable procedure: general or special commercial disputes procedure) may be further appealed before the Supreme Court of Cassation.

2 Are there appellate courts that hear only civil matters?

General civil courts acting as second instance are competent to hear both civil and commercial matters. For higher professional specialisation, courts usually have internal departments consisting of judges who hear commercial matters only.

3 Are appeals from administrative tribunals handled in the same way as appeals from trial courts?

Administrative courts do not hear civil and commercial litigation.

4 Is there a separate appellate bar or other requirement for attorneys to be admitted before appellate courts?

There is no separate appellate bar. Yet, Bulgarian law differentiates between junior attorneys (attorneys of less than two years' professional experience) and attorneys. Junior attorneys may individually represent their clients if the case is under the jurisdiction of the regional and district court, as first and second instance, respectively. Where a district court acts as a court of first instance on a case, junior attorneys may only represent clients together with an attorney. This rule applies to a subsequent appeals as well.

5 If separate jurisdictions exist for particular territorial subdivisions or subject matters, explain their main differences as to commercial appeals.

For practical reasons, Bulgaria is divided into 28 judicial subdivisions (where the 28 district courts are seated) and five appellate subdivisions (where the five appellate courts are seated). The district or appellate court in the territorial subdivision of the first-instance court on the case hears the appeal.

6 What are the deadlines for filing an appeal in a commercial matter?

The general rule is that an appeal may be filed within two weeks as of the date of reception of the first-instance decision.

If the party was prevented from submitting the appeal by significant objective reasons that the party could not overcome, the court might allow renewal of an already expired term.

Where only one of the parties appealed the first-instance decision, the non-appealing party may submit a counter-appeal within the term for response to the initial appeal. The counter-appeal shall not be heard, however, if the initial appeal is withdrawn by the appellant or returned by the court as non-admissible.

Where multiple persons participated as plaintiffs or respondents in the first instance, each of them may join the appeal submitted by another of his or her co-plaintiffs or co-respondents, no later than the first hearing before the court of appeal. Necessary co-parties of an appellant are admitted by the court of appeal ex officio.

Where the decision was pronounced in a commercial dispute procedure without open hearings being conducted, the term for its appeal starts as of the indicated date for its announcement.

7 What are the key steps a litigant must take to commence an appeal?

In order to commence an appeal, a litigant should file a statement of appeal with the court of first instance within the prescribed term.

8 How is the documentation for appeals prepared?

The appellant shall prepare the statement of appeal accompanied by all new written evidence and identifying any new evidence that the appellant desires to be collected by the court of appeal. After receiving the statement of appeal, the court of first instance provides copies of it to the other litigants, who have two weeks to submit their response to the appeal. Once exchange of statements of appeal and responses is finished by the first instance, the latter transmits the record of the case to the court of appeal.

9 In commercial matters, may litigants appeal by right or is appellate review discretionary?

Litigants may appeal by right. The general limitation is that the party shall possess justified interest to appeal (ie, a party may only appeal the part of the decision that is unfavourable for it (or the decision in its entirety, as the case may be)). A party may not appeal only the reasoning of the judgment if the resolution on the case's merits is favourable for it.

10 Can litigants appeal any ruling from a trial court, or are they limited to appealing only final judgments?

Apart from final judgments, parties may also appeal rulings that hinder the development of the case or are explicitly determined by the law as appealable. The first category includes rulings for a temporary halt of procedure or for its termination. Rulings dismissing requests for admission of a third party to participate in the case or for preliminary collection of evidence fall within the second category.

11 In a typical commercial dispute, must a litigant post a bond or provide security to appeal a trial court decision?

Appellants are required to pay a state fee in advance for the appeal hearing. The fee amounts to 2 per cent of the monetary evaluation of the appealed part of the decision (eg, if the adjudication of €30,000 is being appealed, then the state fee would be €600). The fee is payable in advance before lodging the statement of appeal. Appellants are further required to deposit expenses for collection of evidence they required to the bank account of the court.

Indigent persons may be released by the court from the obligation to pay state fees and court expenses. They cannot, however, be released from the liability to reimburse the expenses of the counterparty in the event they lose the case.

12 Are there special provisions for interlocutory appeals?

There are special provisions for appeals against appealable rulings (see question 10). The term for partial appeals is one week as of delivery of the ruling to the party. The counterparty may submit its response within one week as of reception of the partial appeal. The appeal and response are then sent to the court of second instance by the court that issued the ruling appealed.

As a principle, the court of second instance hears partial appeals in a closed hearing. It may gather evidence if it finds it necessary. This court's resolution is obligatory for the court that issued the reviewed ruling. In certain cases, the rulings of the courts of second instance might be further appealed before the Supreme Court of Cassation.

Partial appeals do not stay the execution of the appealed rulings, unless otherwise explicitly provided for under the law, or ordered by the court hearing.

The general appeals procedure applies subsidiarily.

13 Are there special rules relating to injunctions or stays, whether entered in the trial court or on appeal?

Where the claimant believes the enforcement of his or her right might become impossible or very difficult while the case is pending, the claimant may request that judicial security measures be imposed against the defendant. Such measures may include freezing bank accounts, distraint of chattels or real estate of the defendant, or any other appropriate measure in the court's view. The CPC sets forth requirements on the admissibility of such requests. Security measures may be allowed while the case is pending before the first and appellate instances. The defendant may lodge a partial appeal of the measures imposed, but this would not stay the enforcement of the measures or the conduct of the main proceedings. Partial appeals are usually heard in closed hearings. Counterparties are provided with a term for response before the appeal be reviewed.

As far as stays are concerned, a case may be stayed by both first and appellate instances on the grounds explicitly listed in the CPC. Stays are appealable with a partial appeal. Where the stay was ordered by the court of first instance and the court of appeal confirmed it, it may be further appealed before the Supreme Court of Cassation.

Update and trends

The Supreme Court of Cassation opened two new interpretative cases that are relevant to the second-instance procedures on partial appeals.

Interpretative Case No. 6/2017 shall interpret whether courts of appeal shall, ex officio, review the law and facts in regard to partial appeals claiming incorrectness of appealable rulings, or its powers shall be limited to the specific complaints made by the appellant in his or her statement of partial appeal.

Interpretative Case No. 2/2018 shall provide instructions whether a ruling of an appellate court that confirms a district court ruling hindering the development of the case may be appealed before the Supreme Court of Cassation.

14 If a litigant files an appeal in a commercial dispute, does it stay enforcement of the trial court judgment?

In general, an appeal stays the enforcement of the trial court judgment. The plaintiff may request preliminary enforcement where specific statutory requirements are met. Such requests are not usual in commercial litigation, plaintiffs prefer to request judicial security measures. If allowed, preliminary enforcement may be stayed by the counterparty by depositing a due security. Where the first-instance decision is overruled by the court of appeal, the latter would issue a reverse writ of execution for the return of all amounts or objects collected in the preliminary enforcement.

Preliminary enforcement may not be allowed against governmental institutions or certain state medicinal institutions.

15 On an appeal from a commercial dispute, may the first-level appellate court consider the facts and law anew, or is its power to review limited?

The appellate court ex officio reviews the validity of the first-instance decision in its entirety and its admissibility with regard to the part appealed.

With a view to the correctness of the decision (ie, correct establishment of relevant facts, correct application of substantive and procedural law) the court of appeal is limited to the complaints raised in the appeal. Within these limits, the court of appeal considers the facts and law.

As an exception, the court of appeal may ex officio apply mandatory substantive law rules (item 1, Interpretative Decision No. 1/2013 dated 9 December 2013, issued by the Supreme Court of Cassation on Interpretative Case No. 1/2013).

16 If a party is dissatisfied with the outcome of the first-level appeal, is further appeal possible?

Parties dissatisfied with the outcome of the first level appeal may further appeal the appellate decision before the Supreme Court of Cassation.

Cassation appeal is subject to two limitations.

First, the case meets the formal criteria for minimum monetary evaluation of the claim.

Second, cassation appeal, even if admissible, is discretionary. The Supreme Court of Cassation is entitled to select the cassation appeals that it will hear and resolve, applying criteria provided under the CPC.

Discretionary revision was modified with amendments to the CPC, effective as of 31 October 2017. The Supreme Court of Cassation shall admit cassation appeals if the second instance decision is probably invalid or inadmissible or is obviously incorrect. The new provision shall apply only to cassation appeals submitted after 31 October 2017.

The Supreme Court of Cassation is typically a court on correct application of law. It is also competent to establish, on the basis of the evidence already gathered, a factual background different from the one described in the appellate decision.

17 How long do appeals typically take from application to appeal to a final decision?

In recent years, the process has taken between 12 and 18 months.

18 What is the briefing and argument process like in a typical commercial appeal?

Appellants are required to state all complaints they have against the first-instance decision in their statement of appeal. Such complaints may refer to incorrect establishment of relevant facts, incorrect application of substantive law or significant procedural infringements made by the first instance. Appeals usually contain the appellant's view on the facts that should be considered established or the correct interpretation and application of laws.

After the collection of evidence phase is closed, the parties are allowed to provide their legal arguments to the court. These would typically be presented as written observations. Where the case is heard under the commercial disputes procedure, the parties may be allowed by the court to present counter-arguments to the arguments of their adversary's written observations.

19 Are appeals limited to the evidentiary record that was before the trial court, or can new evidence be introduced on appeal?

In general, the evidentiary record is limited to the one before the trial court.

As an exception, the CPC allows the parties to indicate newly discovered facts and new evidence before the court of appeal. Such exceptions are based on two rules. First, the party making the request shall bring it before the court of appeal with the first procedural motion possible (ie, the statement of appeal, if the fact was discovered after the issuance of the first-instance decision, or by the end of the collection of evidence phase in appellate proceedings, if the fact was discovered after the term for submission of the appeal). Second, the request shall state the exact objective reasons that prevented the party from indicating these facts or pieces of evidence within the earlier stages of the process.

Requests for establishment of newly occurred facts (together with the respective evidentiary requests) shall be brought to the court of appeal as soon as such facts may occur.

Parties may also require the gathering of new evidence by the court of appeal that was not admitted by the trial court because of incorrect interpretation of procedural law.

The court of appeal may be of the opinion that the substantive-law qualification of the claim provided by the trial court was incorrect and as a result, the parties were given incorrect instructions with regard to the facts that need to be proven. In such cases, the court of appeal shall ex officio guarantee the application of mandatory substantive rules by giving instructions to the parties on the facts that should be established by them and for the necessity of collection of evidence in this regard (item 1, Interpretative Decision No. 1/2013 dated 9 December 2013, issued by the Supreme Court of Cassation on Interpretative Case No. 1/2013).

Bulgarian law does not limit or exclude certain forms of evidence as non-admissible before the court of appeal. Parties may present or request collection of written documents, material objects or expert witness statements, interrogation of witnesses, etc. The general rules on admissibility of different forms of evidence apply.

20 If litigants uncover new evidence of wrongdoing that they believe altered the outcome of a trial court judgment, can they introduce this evidence on appeal?

Yes. If they can prove before the court of appeal that the evidence was uncovered after the case was resolved by the trial court, that is, they can provide objective reasons why they were unable to introduce this evidence before the trial court.

21 May parties raise new legal arguments on appeal?

The parties may raise new legal arguments with regard to newly occurred or newly discovered facts and their relevance for the merits of the claim.

If the special commercial disputes procedure applies, an objection for a set-off against the claim may be introduced for the first time in the appellate stage, provided that the receivables of the party requesting the set-off were confirmed with an effective judicial decision or execution order.

22 What are the rules regarding attorneys' fees and costs on appeal?

The party for which the appellate decision is unfavourable reimburses the expenses made by the successful party (eg, state and attorney fees, translation expenses and expenses for gathering of evidence).

23 Can parties enter into a settlement agreement to vacate the trial court judgment after an appeal has been taken?

If the parties notify the court that they have reached an out-of-court settlement after the case has been resolved but before the decision comes into effect, the court shall invalidate the decision and terminate the case.

24 Are there any limits on settlement once an appeal has been taken?

Parties may enter into a court settlement as long as its subject matter has not been resolved with a binding judicial decision. Court settlements are made before the court, which should explicitly approve them and prepare written minutes reflecting the contents of the settlement. The court settlement minutes should be signed by the parties and the court.

25 May third parties fund appeals?

This matter is not explicitly regulated by the CPC.

26 If litigation funding is permitted in an appeal, must funding sources be disclosed to the court or other parties to the litigation?

This matter is also not explicitly regulated by the CPC. It should be noted, however, that parties may only be adjudicated court expenses that they prove to have made personally. In this regard, where it is clear from the payment document that the expense was actually incurred by

Stoeva Tchompalov & Znepolski

Attorney Partnership

Vania Todorova

vania.todorova@stzlaw.eu

111 Evlogi and Hristo Georgievi Blvd., 1st floor
Sofia 1504
Bulgaria

Tel: +359 2 954 61 06
www.stzlaw.eu

a third party, the litigant may not expect its adjudication, neither in the litigant's nor the third party's favour.

27 Must appellate courts in your country write decisions explaining their rulings? Can the courts designate the precedential effect of their decisions?

Courts of appeal are required to explain their rulings. Where the court of appeal confirms the first-instance decision, it may also refer to its motives but in all cases is required to provide its own motives on the merits of the appeal.

28 Will the appellate courts in your country consider submissions from non-parties?

No. Submission from non-parties would not be considered.

29 What are the ordinary forms of relief that can be rendered by an appellate court in a civil dispute?

Where the court of appeal orders a decision on the merits of the claim, it has the same powers as the court of first instance. The exact form of relief depends on the type of claim submitted by the plaintiff. If the plaintiff sought the establishment of facts or rights with regard to the defendant, the court may establish such facts or rights to be present with a declaratory decision. Where the plaintiff sought that the defendant be sentenced for specific performance or to compensate the plaintiff for damage caused, the court may order the defendant to do or to refrain from doing something, or to award the compensation sought by the plaintiff. If the plaintiff sought that the court orders certain change in the legal relationship between the plaintiff and defendant (eg, rescind a contract for purchase of real estate or declare final a preliminary contract between the parties), then the judicial decision would have constitutive effect by introducing the respective change.

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes

Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust

Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com