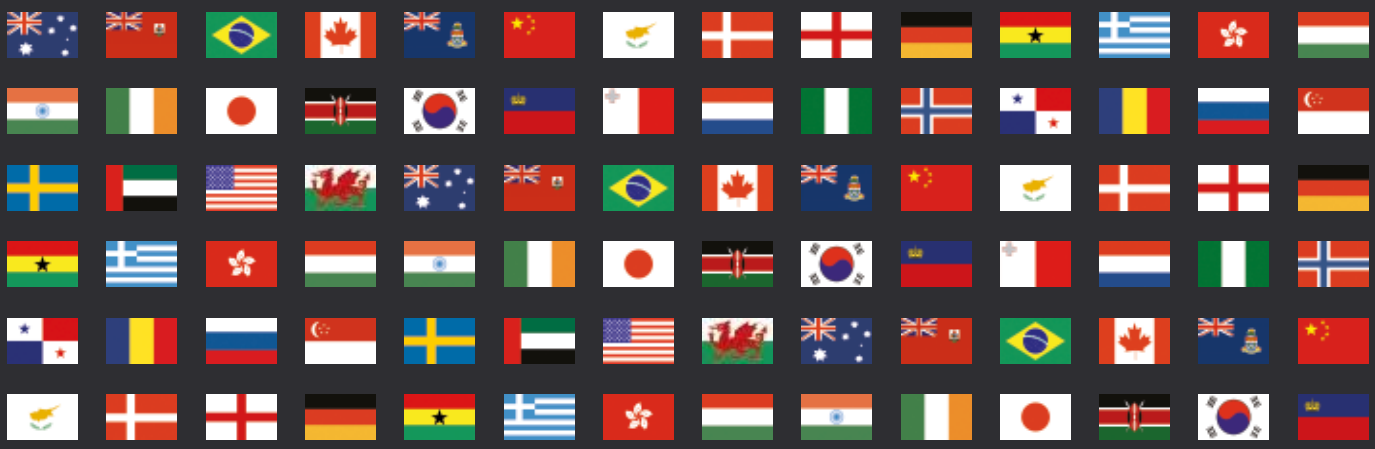
Dispute Resolution 2019

Contributing editors
Martin Davies and Kavan Bakhda



LEXOLOGY®
Getting The Deal Through

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.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

First published 2003
Seventeenth edition
ISBN 978-1-83862-126-1

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

Dispute Resolution 2019

Contributing editors
Martin Davies and Kavan Bakhda
Latham & Watkins

Lexology Getting The Deal Through is delighted to publish the seventeenth edition of *Dispute Resolution*, which is available in print and online at www.lexology.com/gtdt.

Lexology 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 Lexology 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 India and Kenya.

Lexology 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.lexology.com/gtdt.

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.

Lexology 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, Martin Davies and Kavan Bakhda of Latham & Watkins, for their continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

London
June 2019

Reproduced with permission from Law Business Research Ltd
This article was first published in July 2019
For further information please contact editorial@gettingthedealthrough.com

Contents

Norway

Terje Granvang
Arntzen de Besche Advokatfirma AS

LITIGATION

Court system

1 | What is the structure of the civil court system?

The Norwegian courts are composed of the Supreme Court, six district appeal courts and 66 local or city courts. The courts are administered by the National Court Administration. There are no subdivisions of the courts according to subject matter, nature or size of claim, etc.

The Supreme Court has 20 judges appointed by the cabinet. The Supreme Court is divided into two chambers, each of five judges. The high chamber of the Supreme Court is presided over by 11 judges. The High Chamber deals with cases of particular importance, for example, judicial review cases. In very unique cases, the Supreme Court handles disputes as a plenary court.

The district appeal court is set with three judges in each case. The district appeal court has the authority to appoint expert judges in addition to the legal judges.

The local or city courts rule in each case with only one judge. The court has the authority to appoint expert judges.

In addition, Norway has a few special courts such as the court of impeachment, the Labour Court (handling trade union disputes) and several land consolidation courts. There are approximately 428 conciliation boards (one in each municipality). There are no specialist commercial or financial courts.

As a main rule, civil disputes begin at the conciliation board. Exceptions apply to lawsuits against the government and public bodies, family matters (divorces, child support, etc) and in cases where the dispute pertains to values in excess of 125,000 kroner and both parties are represented by legal counsel. The conciliation board has the power to pass judgment if both parties agree to let the board rule in the matter and in disputes pertaining to values less than 125,000 kroner. The main purpose of the conciliation board is to attempt mediation. If the parties do not succeed in finding an amicable solution or the board refuses to pass judgment, the plaintiff has the option to bring the matter before the local or city court. If the matter brought before the court is of lesser value than 125,000 kroner, the court will handle it as a small claims matter under a set of simpler procedural rules with the aim to reduce costs and simplify the proceedings. All decisions by the local or city courts may be appealed to the appeal court. The appeal court has the power to reject cases where the value of the dispute is less than 125,000 kroner. Moreover, the appeal court may reject an appeal if the court finds it obvious that the appeal cannot succeed. This option is rarely used by the court in practice. The Supreme Court only handles matters of principal interest. Rejection of appeals is quite common. In 2016, the Supreme Court has handled 61 civil appeals. One case was heard by the court in plenary session and three cases by the High Chamber. A total of 362 appeals were rejected.

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

The jury only appears in criminal cases. The judge's role is to judge on the basis of the facts and evidence presented by the parties in court during the proceedings. The judge has the authority to order the parties to produce evidence and to clarify matters, and may question parties and witnesses during trial, but has no inquisitorial role beyond the duty of ensuring that the case is properly managed. Judges on all levels are appointed by the government by royal decree. The appointment is based on a recommendation by the appointment council (AP). The AP consists of three judges, one solicitor, one civil servant with a law degree and two non-lawyers. There is a move to promote diversity as to gender and professional background.

Limitation issues

3 | What are the time limits for bringing civil claims?

There are no specific time limits for bringing claims under the procedural rules. The statute of limitations applies to claims. The nature of the claim will decide when the limitation period (normally three years) starts running. The parties may agree to suspend time limitation, but only for a maximum of three years at a time. The agreed-upon extension period must not exceed 10 years from the date the claim otherwise would have been time-barred.

Pre-action behaviour

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

In all disputes the claimant is statutory obliged to notify the other party in writing of the intent to file a lawsuit and to specify the claim and its basis. If the potential dispute is between private parties, the notification must be sent on paper, unless other agreements have been entered into or the normal communication between the parties is electronic. The receiver of the notification shall, according to law, decide whether to accept or dispute the claim in whole or partially. If disputed, the claimant shall receive a reason for the dispute and must also, if a counterclaim will be lodged, notify the claimant in writing thereof. Both parties are under the obligation to present important evidence during this phase.

Both parties are also under the obligation by law to attempt to resolve the matter outside of court.

Breach of these obligations does not have any consequences mandated by the law, but may influence the court's decision to shift costs.

With the exceptions mentioned above, the main rule is that claims are brought before the conciliation board before being taken to the courts. The notification described here must also be sent prior to filing a claim before the conciliation board.

Starting proceedings

5 | How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

Civil proceedings before the courts (after unsuccessful handling by the conciliation board) are commenced by lodging a writ of summons directly to the lowest court (local or city court). The writ of summons is required to state the claim, the facts forming the basis for the claim and the legal arguments supporting the claim. The exhibits that the facts described in the writ are based on are to be attached as appendices to the writ. In some courts, the writ of summons and its exhibits may be filed electronically at the plaintiff's option. The court fee for filing a lawsuit will be billed automatically at a later stage.

Timetable

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

The writ of summons is served by the court upon the defendant shortly after the filing with the court. If the defendant is represented by legal counsel, the serving of the writ takes place by regular mail. The legal counsel for the defendant will then sign a form confirming the receipt of the writ of summons and return this form to the court. Within three weeks of the date of signing for the receipt of the writ of summons, the defendant must submit a defence. This time period can be extended by filing of an application to the court. A three-week extension is normally granted. Further extensions require the consent of the plaintiff. Subsequent to the defence, the parties normally file one additional plea each. There are no limits as to the number of pleadings a party may file. Shortly after filing of the defence statement, the court will summon the parties to a case management conference (CMC) as described in question 7. The case preparations are normally finished two weeks before trial. At this date, the parties are not allowed to present further evidence to the court with a few exceptions. The parties are also normally ordered by the court to file a skeleton brief with a summary of the main factual and legal arguments that will be presented in court, a list of the evidence that will be presented and the statement of claim. The plaintiff will also have to present to the court a plan for the trial with details on how the scheduled time is to be shared between the parties, which has been agreed with the defendant.

The court is statutorily obliged to ensure that the trial (oral hearing) takes place within six months after the date of lodging of the writ of summons. In extraordinary cases this rule is not followed. The appeal courts are having capacity issues in listing the disputes in a timely manner. Very few civil appeals are heard by the court within the six-month deadline. Measures have been taken to speed up the process and some improvement has taken place lately.

Case management

7 | Can the parties control the procedure and the timetable?

The timetable is controlled by the court. Extension of the deadline for filing the defence is granted subject to the defendant's application.

Once the defence has been received by the court, the judge responsible for the case will summon the counsel to a CMC. The CMC is in practice normally a conference call. Physical meetings are common only in extraordinary cases. The client is normally not present at the CMC. The agenda for the CMC is mandated in the Civil Procedure Act. The main issues are voluntary mediation, scheduling of trial, the evidence to be submitted and potential appointment of expert judges.

Evidence – documents

8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

Before the writ of summons is lodged, both parties are obliged to inform the other party of important documents and other evidence that the party is aware of and that one could not assume that the other party is not familiar with. This applies even if the document or evidence is unhelpful to the disclosing party's case. Pending trial, the same applies.

Evidence – privilege

9 | Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Very few documents are privileged. Exceptions apply; for example, for documents and evidence pertaining to national security, certain confidential documents or evidence pertaining in particular to public bodies and evidence deriving from church ministers, legal counsel, physicians, midwives, nurses, etc. The attorney–client privilege applies to Norwegian as well as foreign lawyers. The same also applies within certain limits to in-house lawyers.

Evidence – pretrial

10 | Do parties exchange written evidence from witnesses and experts prior to trial?

Exchange of witness statements is uncommon in Norway. Statements from experts, however, are more common and are normally exchanged between the parties before trial. A party using an expert witness may, however, elect not to file a written report and instead rely on the expert witness to deliver an oral statement during trial only.

Evidence – trial

11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

As a main rule, factual witnesses only give oral evidence during trial. If an expert witness has prepared a written report that has been filed prior to trial, the expert witness must appear in court for cross-examination.

Written evidence has to be documented in court. In some cases, on-site inspections will be arranged by the court and all the involved parties and their counsel.

Interim remedies

12 | What interim remedies are available?

Interim freezing injunctions are available for Norwegian and foreign claimants. Search orders are not available in civil cases.

Remedies

13 | What substantive remedies are available?

Punitive damages are not available. Interest (not compounded) is payable on a judgement for money according to the Act pertaining to interest on overdue payment. As of 1 January 2018, the interest rate is 8.5 per cent.

Enforcement

14 | What means of enforcement are available?

A claim for payment of money is as the main rule enforceable within two weeks after the passing of the judgment. If the judgment is appealed,

the enforcement is blocked until all appeals are exhausted. However, the claimant may apply the court for a security for the claim to be registered on property owned by the debtor. If court decisions (that are not appealed or final) are disobeyed, the claimant may ask the court for enforcement of the judgment. Such enforcement depends of the nature of the judgment, but may include putting the claimant in possession of specific items or forced sale of debtor's property to settle the claim covered by the judgment.

Public access

15 | Are court hearings held in public? Are court documents available to the public?

Court hearings are public. The court may in rare instances decide to close the doors.

The pleadings, witness statement, etc, are not available to the public. The only document that is available to the public is the skeleton brief that each party is ordered to file two weeks before trial. The skeleton brief is a one or two-page document summing up the main legal and factual grounds for the claim made in the case.

Costs

16 | Does the court have power to order costs?

The court has the power to shift costs. The main rule is that the losing party is ordered to pay the costs incurred by the winning party. Costs are only awarded to the extent the court deems the costs necessary. The courts are strict as to the level of costs and a winning party normally must expect to carry part of the costs itself, at least in larger cases with a high cost level.

If the plaintiff is a foreign national from outside the EU, the plaintiff may, upon demand made in the defence statement, be ordered by the court to put up security for the defendant's potential costs.

Funding arrangements

17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, 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? May a party to litigation share its risk with a third party?

'No cure, no pay' arrangements are allowed. Contingency arrangements where the lawyer gets a cut or percentage of the award are not allowed. Cases where the lawyer only gets paid if the case is won and costs shifted in favour of his or her party (type of pro bono) are allowed.

Proceedings made possible by third-party funding are allowed. The underlying agreement between the party and the funder is not a matter for the court to know or opine on.

Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

Insurance to cover a party's legal costs and the potential liability for an opponent's costs is available for potential defendants.

Class action

19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

The concept of class actions was introduced in Norway in 2005. Class action lawsuits require that the claimants have claims based on uniform (or predominantly uniform) facts and legal grounds. Additional requirements are that the claims can be handled under the same procedural rules, the class action procedure is deemed to be the best way to handle the dispute and the court is able to appoint a group representative according to section 35-9 of the Civil Procedure Act. A class action proceeding is conducted by a group representative appointed by the court on behalf of the group.

Appeal

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

All city court judgments can be appealed to the district appeal court within one month as of the date the city court judgment was served upon the parties. The grounds for appeal may be the facts, legal grounds or procedural. In some special cases, the one-month deadline for an appeal is shorter. The right to appeal can be waived. If the right to appeal is waived before the judgment is passed by the court, the waiver needs to be mutual to be valid. Counter-appeals can be lodged after the one-month deadline if the other party has appealed within the deadline. Judgments regarding claims less than 125,000 kroner must obtain a special consent by the appeal court for the appeal to be handled by the appeal court. The appeal court may also dismiss the appeal if the court unanimously deems it obvious that the appeal cannot be successful. This right to dismiss appeals is very rarely used by the court.

Appeal court judgments can be appealed to the Supreme Court. In some very special cases a city court judgment may also be appealed directly to the Supreme Court. In order for an appeal to be advanced to the Supreme Court, the appeal needs the Supreme Court Appeal Board's consent. Most appeals are dismissed without handling.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

Foreign judgments are only recognised and enforceable in Norway if the parties have submitted to the jurisdiction of the foreign court issuing the particular judgment, or an international convention or treaty has been entered into with one or more foreign states obligating Norway to this effect. Norway (not being an EU member) is a signatory to the Lugano Convention. The Lugano Convention regulates the recognition and enforcement of civil judgments among EU member states and, inter alia, Norway as one of the EFTA member states. There is also a convention entered into between the Nordic countries regarding recognition of civil judgments.

Foreign proceedings

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

Norway is a party to the 1970 Hague Convention on the Collection on Evidence Abroad in Civil and Commercial Matters. The Convention mandates that courts in other member states may request evidence taken in Norway.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

The Norwegian Arbitration Act of 2004 is based upon and closely follows the UNCITRAL Model Law. There are few significant differences between the Arbitration Act and the Model Law. One major difference is, however,

that the Norwegian Arbitration Act does not require that arbitration agreements are entered into in writing.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

The Arbitration Act does not require a certain form of the arbitration agreement. It can be entered into orally or in writing. In practice, most arbitration agreements are written.

Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, 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?

If the arbitration agreement is silent on the matter, the number of arbitrators to be appointed is always three.

If the parties fail to agree on the appointment of arbitrators, the parties appoint one arbitrator each. The deadline for appointing an arbitrator is one month after the other party requested appointment of arbitrators. The two party-appointed arbitrators jointly appoint the third arbitrator. If the appointment of arbitrators according to this principle is not possible, each party can file a motion before the court and ask the court to appoint the missing arbitrator.

Appointment of an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubt as to the arbitrator's impartiality or independence or if the arbitrator does not possess qualifications agreed between the parties. Moreover, challenging the appointment of an arbitrator on these grounds is only an option when the challenging party became aware of such circumstances after the appointment has been made.

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

The parties to the arbitral proceedings shall as a general rule cooperate to appoint the arbitrators. If the proceedings are subject to the rules of the Oslo Chamber of Commerce, there is a pool of candidates available to choose from. This pool normally meets the needs of most types of arbitration. In private arbitral proceedings there is no pool of candidates and the parties are free to appoint whomever they desire, including foreign candidates. In Norway a typical arbitral panel consists of a high-level judge as chair, one commercial lawyer and one person from academia (normally a law professor).

Arbitral procedure

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

The Arbitration Act contains a number of substantive rules for the procedure to be followed. These provisions are only applicable to the extent the arbitration agreement is silent or to the extent the parties cannot agree on the procedure. Section 21 contains the main rule mandating that the arbitral tribunal decides how to handle the case based on what the tribunal deems appropriate. If the parties have not agreed on venue, language, deadlines for filing of the writ of summons, statement of defence, etc, it is within the authority of the tribunal to decide on such matters.

Court intervention

28 | On what grounds can the court intervene during an arbitration?

The regular courts do not have the authority to intervene during an arbitration.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

The arbitral tribunal may have the power to urge (or order) the parties to undertake certain measures, such as preserve assets or produce evidence. However, an 'order' to this effect is not enforceable. Failing to comply with an 'order' made by the tribunal may, of course, influence the tribunal's assessment of the evidence produced by the reluctant party. The parties can also ask the court to assist in the collection of evidence, such as ordering a party to produce documents, obtain depositions.

Award

30 | When and in what form must the award be delivered?

The award is rendered after the trial is finished and must always be in writing. There are no rules setting a deadline for when the award must be delivered.

The main rule is that the award is signed by all of the arbitrators. If there is more than one arbitrator it is, however, sufficient that a majority of the arbitrators have signed the award, provided that the reason why the award has not been signed by all arbitrators is given in the award.

Appeal

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

An award from the arbitral tribunal is final and cannot be appealed, unless otherwise agreed by the parties. The award can, however, be challenged and set aside by the regular courts. Grounds for setting an arbitral award aside are that:

- one of the parties to the arbitration agreement lacks legal capacity;
- the arbitration agreement is invalid;
- the party bringing the action for setting aside the award was not given sufficient notice of the appointment of arbitrator or the arbitration or was not given an opportunity to present his or her views on the case;
- the award falls outside the scope of the jurisdiction of the tribunal; or
- the composition of the tribunal or the arbitral procedure was contrary to law or the agreement between the parties, and this has had an impact on the award.

Legal action to set aside an arbitral award shall be brought before the regular courts no later than three months after the party received the arbitral award.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

Foreign and domestic awards are recognisable and enforceable in Norway and will follow the same procedural tracks as regular court judgments that are enforced. The award will, however, not be recognised and enforced if the dispute could not have been settled by arbitration under Norwegian law, or if recognition and enforcement would be contrary to public policy.

Costs

33 | Can a successful party recover its costs?

The parties are jointly and severally liable for the costs of the arbitral tribunal, unless otherwise agreed between the parties and the tribunal.

The tribunal shall, upon motion by a party, shift costs as the tribunal deems right. In practice this means that the losing party is ordered to pay all of the other party's costs and expenses in addition to the costs of the tribunal. If a case is only partially lost or partially won, the tribunal may deem that costs are not to be awarded and the costs of the tribunal split equally between the parties. Adjustments may also take place if costs claimed by the winning party are deemed to be unreasonably high. Only costs deemed to have been necessary are recoverable. The costs are limited to legal fees and direct costs such as copying, travel, etc. Third-party funding costs are not recoverable.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 | What types of ADR process are commonly used? Is a particular ADR process popular?

The purpose of the Conciliation Board mentioned above is to attempt to find amicable solutions to civil disputes of all kinds (with certain exceptions). The courts (not the Supreme Court) offer court-led mediation, which statistically proves to have been a successful process after it was introduced about 20 years ago. A potential trend is that private ADR is increasingly attempted in complex commercial matters.

Requirements for ADR

35 | Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

In arbitration there is no obligation to consider ADR before or during proceedings. In civil disputes it is required that the parties have investigated if it is possible to resolve the matter before initiating legal proceedings.

All kinds of mediation are always voluntary. The courts do not have the power at any stage to compel the parties to participate in an ADR process. The same applies for arbitration.

MISCELLANEOUS

Interesting features

36 | Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

No.

Terje Granvang
tg@adeb.no

Bygdøy Allé 2
0204 Oslo
Norway
Tel: +47 23 89 4000
Fax: +47 23 89 4001
www.adeb.no

Other titles available in this series

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
Defence & Security Procurement
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
Gaming
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
Litigation Funding
Loans & Secured Financing
M&A Litigation
Mediation
Merger Control
Mining
Oil Regulation
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 Procurement
Public-Private Partnerships
Rail Transport
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
Sovereign Immunity
Sports Law
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Technology M&A
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

lexology.com/gtdt

ISBN 978-1-83862-126-1