Appeals

Contributing editors
Mark A Perry and Perlette Michèle Jura

GIBSON DUNN

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GETTING THE DEAL THROUGH

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Global overview

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The procedure for appealing adverse decisions is an essential component of the civil justice systems in most countries. A decision by a court of first instance usually produces a winner and a loser, and the losing party will frequently examine its options for review of that decision in the appellate courts.

For commercial or business disputes in which substantial amounts of money or other valuable rights are at stake – the cases that are the focus of this volume – the legal systems in most countries provide for some form of appellate review as a matter of right. In addition, many jurisdictions have several levels of appellate review, with the higher courts exercising discretion over the cases they review.

This volume aims to provide an introduction to the appellate systems in a number of different countries. The focus is on appeals in high-value commercial disputes resolved in the main civil courts of first instance (trial courts) in a country's national or federal system. Appeals of the decisions of arbitral tribunals, regulatory agencies, specialist tribunals and local courts fall outside the scope of the book. So too do appeals involving administrative, criminal and family matters.

Some recurring issues in appellate practice include determining which decisions or rulings are appealable; when and where an appeal may (or must) be filed; and what deference, if any, the reviewing court will give to the judgment of the trial-level adjudicator. Practical considerations include limits on the form and content of written submissions, whether there will be an opportunity to present oral argument, and the scope of the issues that will and will not be considered by an appellate tribunal.

To help elucidate these and other issues, this volume presents a series of questions concerning topics that regularly arise in commercial or business appeals. Experts in each country have responded to these questions and have provided an overview of the appellate process in their jurisdiction. Those interested in learning more are encouraged to contact the chapter authors, or other attorneys in the jurisdiction.

Each chapter focuses on a specific country and includes an overview of the appellate tribunals in that country's national court system, as well as any significant special or local tribunals of which litigants should be aware. Each chapter likewise previews the most important appellate rules, timing and documentation requirements. The chapters also identify how to determine which rulings are appealable rulings, and summarise the limitations on the introduction of new evidence and argument.

The country-specific chapters also address issues that frequently arise at the outset of an appeal, such as securing the judgment and obtaining an injunction or stay. They also summarise the orders that may issue at the conclusion of the appellate process. (For example, whether the appellate courts in a particular country issue reasoned decisions or opinions explaining why an appeal has been sustained or rejected.)

The chapters also address financial aspects of the appellate process, including attorneys' fees, third-party financing and settlement during appeal.

Finally, each chapter discusses what happens if an initial appeal is unsuccessful – specifically, whether another level of appellate review is available.

The following chapters demonstrate how appeals are different to trials in every jurisdiction. Appeals are usually heard by a judge (or, frequently, several judges) without the involvement of a jury or laypersons. There are often restrictions on the factual and legal points that can be made. The submissions, both written and oral, tend to be stylised and must conform to both requirements and customary practice.

Indeed, appellate practice is sufficiently different to trial-level litigation that in many jurisdictions a specialised appellate bar, either formal or informal, has arisen. Companies, organisations and individuals considering an appeal (or being forced to defend an appeal) are generally well-advised to consult with an attorney with experience in the appellate court system involved.

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United States

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

At the federal (national) level, the United States has a three-level court system:

- The courts of first instance are called district courts; there are 94 judicial districts across the country and its territories, with at least one district in each state. A district court case is presided over by a district judge, with or without a jury.
- Commercial cases in district court are appealable as a matter of right to a court of appeals; there are 12 regional circuit courts. Appeals are ordinarily heard by a panel of three circuit judges.
- The Supreme Court has discretionary authority to review cases from other federal courts. The Supreme Court has nine Justices, all of whom typically participate in every case accepted for review.

According to statistics compiled by the federal judiciary, in 2016 there were 59,417 appeals filed in the federal system, of which 34,694 were in non-prisoner civil and administrative cases. Merits decisions were issued in 21,553 non-prisoner civil and administrative cases. Across all cases, civil and criminal, each active judge was responsible in 2016 for an average of 51 signed opinions and 126 unsigned (per curiam) opinions. The median time for completion of a case from the notice of appeal to a disposition on the merits was 7.4 months; most appeals involving complex business disputes take significantly longer to resolve.

Each of the 50 states, and several of the territories, have their own court systems. For the most part, they are organised similarly to the federal system with a trial court of general jurisdiction, an intermediate appellate court that hears appeals as of right, and a supreme court with discretionary review authority. While the rest of this chapter will focus on the federal system, the reader should be aware that there are variations among the state systems. If a party pursues an appeal through decision from a state supreme court and remains dissatisfied with the outcome, its last resort is to seek discretionary review from the United States Supreme Court (the federal Supreme Court, described above).

2 Are there appellate courts that hear only civil matters?

The regional federal courts of appeals hear both civil and criminal matters. There is one specialised appellate court (the Federal Circuit) that hears only patent cases and certain cases involving the government, with no criminal jurisdiction.

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

Appeals from administrative tribunals are sometimes taken to a trial court, after which an appeal proceeds in the ordinary course; in other instances the administrative appeal proceeds directly in the appellate court. The same regional appellate courts that hear other appeals hear administrative appeals as well, although the District of Columbia Circuit hears more administrative appeals than any other court.

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

The Supreme Court and each federal appellate court have separate requirements for admission to practise before them. Generally, formal admission to the bar of an appellate court connotes only that the attorney has been admitted to practise in a jurisdiction for the requisite amount of time, rather than that he or she has any particular appellate expertise. As a result, appellate specialists are generally identified by their experience, reputation and professional affiliations rather than by membership in a formal bar.

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

Appeals in the federal system are relatively uniform and are governed by the Federal Rules of Appellate Procedure, although each regional circuit also has supplemental local rules. Practice among the state appellate courts varies considerably. When practising in a federal or state appellate system, a litigant should check for jurisdiction-specific appellate rules to ensure compliance with all local requirements and timeliness.

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

In the federal system, litigants generally have 30 days to file an appeal in a civil case, or 60 days if the government is a party. However, particular cases may have different deadlines, and attorneys must consult the applicable statutes and rules in every case because timely filing is often a jurisdictional or mandatory prerequisite to maintenance of an appeal.

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

In a civil case, an appeal is generally initiated by filing a notice of appeal with the district court. Some appeals are initiated by filing a petition (for review, or for permission to appeal) directly with the appellate court. The appeal-initiating documentation depends, in significant part, on the nature of the order or decision being appealed.

8 How is the documentation for appeals prepared?

Most court records are computerised, and the federal courts of appeals have direct access to the factual record compiled in the district court. However, the party filing the appeal is responsible for preparing and filing the key parts of the record (usually called the Excerpts of Record or Appendix) to which reference is made in the appellate briefing. The party opposing the appeal may also be responsible for preparing its own separate appendix.

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

Civil cases are appealable as a matter of right to the intermediate appellate court, though litigants can waive their right to appeal by failing to act in a timely manner. Review in the Supreme Court is discretionary.

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

With relatively rare exceptions, only final judgments are appealable as a matter of right in the federal system. The exceptions mainly pertain to legal doctrines (such as immunity or arbitration) that, if successfully interposed, will preclude the trial court proceedings. However, any particular ruling of consequence must be examined to ensure that it is preserved for appeal, immediately or in the future, according to the

relevant substantive and procedural requirements. When both parties take issue with portions of a court's decision, both parties may file a notice of appeal. The court of appeals will consider the legal issues raised by both sides in the same proceeding.

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

The trial court judgment is stayed pending appeal only if the appellant posts a bond or other security, in a form acceptable to the trial court, to protect the prevailing party from the risk of the losing party filing for bankruptcy or defaulting on the judgment. In the absence of such security, the judgment becomes executable even while the appeal is pending. The court may waive the bond requirement in exceptional circumstances or by agreement of the parties.

12 Are there special provisions for interlocutory appeals?

In addition to the established exceptions to the final judgment requirement noted above, the federal courts of appeals have discretionary jurisdiction to hear interlocutory appeals from specified rulings, including orders granting or denying class certification and certain other orders involving controlling questions of law.

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

An order granting, denying, or modifying an injunction is immediately appealable. Both trial courts and appellate courts have the discretionary power to enter stay orders.

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

The judgment is stayed only if the appellant posts an adequate bond or other security. Typically, a court order is required to secure a stay.

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 court of appeals will review legal issues 'de novo' (without deference to the trial court), but its authority to review factual issues is circumscribed. Factual findings by a district judge will be sustained unless 'clearly erroneous', while factual findings by a jury will be sustained if supported by 'substantial evidence'. Evidentiary and most procedural rulings are reviewed for an 'abuse of discretion'. The standard of review can be an important consideration in determining which issues to appeal (or not to appeal), and must be examined carefully in each particular case.

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

The losing party in the court of appeals may petition the Supreme Court for review. The Supreme Court has purely discretionary jurisdiction, and accepts fewer than 100 cases per year (from more than 5,000 petitions filed). The petition process involves a separate round of briefing in which the parties present arguments as to why the Supreme Court should or should not accept review of the case. Cases in which the Supreme Court grants review often involve issues on which there are conflicting decisions among the courts of appeals, a decision by a court of appeals that conflicts with a decision of the Supreme Court, or an important question of federal law that has not yet been addressed by the Supreme Court. The Supreme Court rarely accepts cases involving only a dispute about the application of settled law to a particular set of facts.

Prior to filing a petition with the Supreme Court, a losing party may (but is not required to) ask the court of appeals to review the panel's decision in an 'en banc' hearing involving all of the judges of the court. Such petitions are rarely granted, though if the panel's opinion conflicts with a prior decision by another panel of the same court or a case presents a novel or important issue, a petition for en banc review may be granted.

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

In the federal system, the median time for completion of a case from the notice of appeal to a disposition on the merits is 7.4 months, but most appeals involving complex business disputes take significantly longer to resolve (one to two years is typical). Additionally, the time to disposition varies among the regional circuits. There are no deadlines or formal requirements for the issuance of opinions. The Supreme Court generally issues decisions during the same term (which runs from October to June) during which a case is argued, and some regional circuits follow a similar rule. Other circuits issue decisions when and as the cases are completed.

Update and trends

On 10 April 2017, Neil Gorsuch was sworn in as the ninth Justice of the Supreme Court, filling a vacancy that had existed since February 2016. As of June 2017, there are 132 federal judicial vacancies, many on the courts of appeals. Federal judges must be nominated by the President and confirmed by the Senate to receive a commission; once they take office, they have life tenure.

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

The appellant files a principal brief, which is limited to 13,000 words. The appellee files a responsive brief, also limited to 13,000 words. The appellant files a reply brief, limited to 6,500 words. The court may decide the appeal on the basis of the briefs, or it may hear oral argument (usually limited to 15–30 minutes per side). In the regional courts of appeals, arguments are made to three-judge panels; in the Supreme Court, all nine Justices participate. Oral arguments in federal appellate courts are typically question-and-answer sessions between the judges and counsel, rather than 'arguments' in the traditional sense. No witnesses are called, and no evidence is introduced. Rather, appellate counsel present the case on behalf of their clients, and the judges typically ask questions of both sides.

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

Appeals are generally limited to the evidentiary record that was before the trial court. The most significant exception pertains to information of which an appellate court may take 'judicial notice', which means that it is readily available and not reasonably subject to dispute. For example, a court may take judicial notice of the decisions of another court or of newly enacted legislation.

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?

New evidence must usually be raised in the trial court (on a motion to reopen the judgment), rather than on appeal.

21 May parties raise new legal arguments on appeal?

In general, parties are limited to the legal arguments that were made or decided in the trial court. The appellate court has discretion to consider purely legal arguments made for the first time on appeal.

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

Under the 'American Rule', each party bears its own attorneys' fees, including on appeal, unless a statute or agreement provides otherwise. Costs on appeal are generally taxed against the losing party.

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

The Supreme Court has held that because the public has an interest in judgments, they may not automatically be vacated as part of a settlement agreement. However, in exceptional circumstances, vacatur may be appropriate.

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

No.

25 May third parties fund appeals?

Yes, although this is very much an evolving issue in the United States.

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

Funding sources do not typically need to be disclosed on appeal, although this is very much an evolving area of law in the United States.

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

The Supreme Court writes opinions in all merits cases. It does not explain its refusal to grant petitions for discretionary review. The courts of appeals are not required to write opinions, and they may designate any opinion as for publication (precedential) or not for publication (non-precedential). In general, cases that present novel, recurring or important issues will result in published opinions, whereas routine appeals or those involving only settled issues will likely result in an unpublished disposition. If the outcome is so clear that no opinion is necessary, the court may summarily affirm (or reverse) in a brief order.

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

The Supreme Court and courts of appeals will consider briefs from amici curiae (friends of the court). The government may file an amicus brief in any case. Private parties must either secure the consent of the parties or leave of court in order to file an amicus brief. Amicus briefs can be quite helpful to the courts and litigants in exploring the ramifications or consequences of the issue and decision.

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

In most civil appeals, the court of appeals can affirm the judgment of the trial court; reverse the judgment of the trial court and direct entry of another judgment; or vacate the judgment of the trial court and remand for additional proceedings. In cases involving multiple issues, the court of appeals can affirm the trial court's decision in part and reverse in part. If a case is remanded to the trial court, it almost always goes back to the same judge unless there is clear evidence of bias or misconduct.

* *The authors would like to thank Gibson Dunn associate Samuel D Eisenberg for his assistance with this chapter.*

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