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United States

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MAIN DISPUTE RESOLUTION METHODS

1. What are the main dispute resolution methods used in your jurisdiction to settle large commercial disputes?

Litigation

Most large commercial disputes in the US are resolved through civil litigation. In most litigation proceedings lay juries decide questions of fact while judges decide questions of law. However, bench trials where judges rule on the facts and law do take place. While procedures and terminology vary by jurisdiction, litigation generally involves the following steps:

- Initial pleadings (*see Question 9*).
- The discovery process (*see Question 16*).
- Applications to dismiss the case (*see Question 10*).
- Trial to adjudicate disputed facts.
- Appeals (*see Question 20*).

Most cases do not reach trial, as they are resolved through applications to dismiss the case or settlement. For large commercial litigation, discovery can be costly. Defendants in particular are eager to end a case through applications to dismiss before discovery, because the high costs associated with discovery increase pressure to reach a settlement. Recent trends in litigation include moves towards effective ways to manage discovery, including preservation and storage of large amounts of electronically stored information.

Alternative dispute resolution (ADR)

ADR encompasses all dispute resolution methods other than traditional litigation. Numerous types of ADR exist, with arbitration and mediation being the two most common. Courts encourage ADR to resolve disputes more quickly and efficiently. The Alternative Dispute Resolution Act requires all federal courts to establish some form of ADR (*28 U.S.C. § 651 et seq.*):

- **Mediation.** In mediation, a third party mediator facilitates negotiation, helping the parties reach their own agreement. A mediator has no authority to issue a binding judgment. However, the mediator may in some cases express its view as to what a fair settlement might be.
- **Arbitration.** In arbitration, the parties agree that an independent arbitral tribunal will hear their dispute. Unlike a mediator, an arbitrator typically has the power to issue a binding judgment. Because of its potential to resolve disputes more efficiently than litigation, many contracts provide that the parties must submit their disputes to binding arbitration.

COURT LITIGATION - GENERAL

2. What limitation periods apply to bringing a claim and what triggers a limitation period?

The limitation periods that apply to different causes of action are different in different states. For example, the limitation period on a breach of contract action in New York is six years, while in California the limitation period is four years for a written agreement and two years for an oral agreement. Federal statutes have their own varying periods of limitation for violations of them. In most cases, limitations periods start to run when either:

- The claim accrues.
- The injury is suffered.

In certain cases a person may not be able to discover the existence or cause of an injury until long after the event leading to the injury occurred. In these cases, the person can file a claim within a reasonable time from when he discovered the injury, or should have discovered the injury with reasonable diligence.

Expiration of the limitation period is considered an affirmative defence, and the defendant must raise it to bar the claimant's claim (*Rule 8(c), Federal Rules of Civil Procedure (FRCP)*). If the defendant fails to raise the defence of the limitation period in its responsive pleadings, it is waived.

3. What is the structure of the court where large commercial disputes are usually brought? Are certain types of dispute allocated to particular divisions of this court?

The US has a dual court system of federal and state courts. Federal courts have limited jurisdiction to hear certain types of cases (*see below*), while state courts have general jurisdiction to hear most cases that come before them. However, most large commercial cross-border disputes meet federal jurisdictional requirements and are heard in federal courts.

Federal courts

Federal courts can hear cases that meet the requirements for diversity or federal question jurisdiction:

- **Diversity jurisdiction.** For diversity jurisdiction to exist, the dispute must be between citizens of different states or US persons and foreign persons. The amount at stake in the dispute must, at least potentially, be greater than US$75,000 (as at 1 February 2011, US$1 was about EUR0.7). If the dispute implicates state law, the federal court must apply the law of the state.

- **Federal question jurisdiction.** Federal question cases involve disputes that arise under federal law. Unlike diversity jurisdiction cases, there is no minimum amount that must be in dispute in a federal question case.

When federal courts hear claims based on federal law, those courts have supplemental jurisdiction to hear related state law claims included in the complaint.

State courts

Each state has its own state court system, and the systems vary. Many states have municipal and other courts that hear smaller disputes and specific issues. Some states divide their court systems on the basis of the type of relief sought. For example:

- The Delaware Court of Chancery handles disputes involving corporate governance. These courts are widely considered the best forum for such cases. A large percentage of US companies incorporate in Delaware, partly to access the Delaware Court of Chancery, regardless of where they base their operations.
- In New York, major commercial lawsuits, whether for equitable or monetary relief, are heard in the commercial division of the New York State Supreme Court. The subject matter of the case must be commercial.

The answers to the following questions relate to procedures that apply in federal courts, unless otherwise stated.

4. Which types of lawyers have rights of audience to conduct cases in courts where large commercial disputes are usually brought? What requirements must they meet? Can foreign lawyers conduct cases in these courts?

In general, a lawyer appearing in a state court must be licensed to practise in that state. Typically a lawyer obtains a licence by passing a state-administered bar exam. Some states have agreements that provide for reciprocity with other states, so that a lawyer authorised to practise in one can obtain admission and therefore practise in the other.

If a lawyer is not licensed to practise in a state, he can apply to a court to provide direct representation, by making an application to be admitted for that particular case only. However, a number of states require that an attorney admitted in this way associate himself with local counsel.

The requirements for admission to federal district courts vary by district. Once a lawyer is admitted to the state bar, admission to the bar of a federal district can be granted on the basis of:

- Payment of a fee.
- Taking an oath of admission.
- Sponsorship of a lawyer admitted to that bar.

Generally, federal courts also allow a lawyer admitted in a different jurisdiction to appear *pro hac vice* (in a particular case).

Foreign lawyers not admitted to the bar of a US state cannot practise in state or federal courts. However, several states allow foreign-educated lawyers to sit for their bar exams. Some states also license foreign legal consultants, allowing foreign attorneys to provide limited legal advice. States' rules governing foreign legal consultants vary widely, but all states that license them at least permit them to give advice regarding the laws of the country in which they were originally licensed.

FEES AND FUNDING

5. What legal fee structures can be used? Are fees fixed by law?

Ethical rules provide that a lawyer cannot charge a client a fee that is excessive or unconscionable. There may be additional ethical restrictions on, for example, a lawyer accepting an interest in a client's property or in the subject matter of a lawsuit. Generally, however, the attorney and client can adopt any fee arrangement they wish. Common fee structures include:

- Hourly rates.
- Task-based or flat fees.
- Contingency fees, where the lawyer agrees in advance to accept a percentage of any recovery as payment.

In large commercial disputes, most clients pay their attorneys on an hourly basis. Alternative fee arrangements, such as reduced hourly rates with a contingent bonus for the lawyer based on the outcome of a case, are also available.

No rules or legislation govern the fees lawyers can charge clients, beyond the requirement that they be not excessive or unconscionable. In some cases, statutes permit the court to award attorneys' fees to the prevailing party. Some contracts between parties specifically provide for the award of lawyers' fees if there is a dispute between the parties.

6. How is litigation usually funded? Can third parties fund it? Is insurance available for litigation costs?

Funding

The parties bear their own litigation costs as they incur them. If a lawyer agrees to a contingency fee, the client either:

- Pays no fees during the litigation, but pays the lawyer a percentage out of any recovery.
- Pays the costs and the lawyer fees out of any recovery.

Other methods of funding litigation on the claimants' side are gaining popularity. For example, many hedge funds have units that invest in corporate litigation on the claimants' side in exchange for a percentage of the recovery.

Insurance

Third parties, such as insurance companies, can fund litigation costs. Many corporations provide in their certificates of incorporation that they defend their directors and officers against lawsuits alleging wrongdoing in those employees' official actions. Directors and officers (D&O) insurance is available to cover these litigation costs.

COURT PROCEEDINGS

7. Are court proceedings confidential or public? If public, are the proceedings or any information kept confidential in certain circumstances?

The general rule is that court proceedings are public. The opinions and orders of the court and each party's filings are public, and the public can attend court proceedings. However, in large commercial litigation the parties usually agree on protective orders, which the court then issues. These orders provide that certain information exchanged by the parties, such as trade secret or confidential business or proprietary information, be not made public. In some additional circumstances, the parties can file papers under seal with the court, which keeps the filings confidential.

8. Does the court impose any rules on the parties in relation to pre-action conduct? If yes, are there penalties for failing to comply?

Generally courts do not impose any rules on the parties in relation to pre-action conduct. However, there are rules that require parties to preserve evidence once they learn of a potential litigation. Specifically, parties should disseminate internal "litigation hold" memos to employees likely to possess information relating to the matter at issue, instructing them to preserve relevant documents. If a court finds that a party has destroyed evidence (called spoliation), it can impose sanctions, including permitting the jury to draw an adverse inference that the evidence was harmful to the party that destroyed it. Even in cases where the spoliation is unintentional, some courts may still impose sanctions.

9. What are the main stages of typical court proceedings? In particular:

- **How is a claim started?**
- **How is the defendant given notice of the claim and when must the defence be served?**
- **What are the subsequent stages?**

Starting proceedings

A claimant commences proceedings by filing a complaint, which states the nature of the action and provides some information about the case. A complaint must include (*Rule 8, FRCP*):

- A description of the parties.
- The basis of the court's jurisdiction over the case.
- A clear and concise statement of the claimant's claims against the defendant and the key facts supporting them.
- A demand for relief.

Additionally, for certain types of actions the claimant must meet heightened pleading requirements. For example, a claimant who alleges fraud by the defendant must state the circumstances of the fraud with particularity (*Rule 9(b), FRCP*).

Notice to the defendant and defence

After the claimant files the complaint, it must serve a summons issued by the court clerk and a copy of the complaint on the defendant. In federal courts, the claimant generally must complete service within 120 days of filing the complaint, but the court may extend this deadline if the parties agree to it or if the claimant shows good cause for the delay.

The claimant can ask the defendant to waive formal service of process. If the defendant refuses to waive and gives no good cause for the refusal, the court must require the defendant to pay the costs of formal service.

Subsequent stages

The defendant must respond to a complaint with an answer or application within 21 days of service. An answer admits or denies the allegations in the claimant's complaint, and includes any affirmative defences or counterclaims by the defendant against the claimant. Affirmative defences the defendant fails to raise in its answer are waived. Before answering, the defendant can also move to dismiss on various grounds under Rule 12(b) of the FRCP (*see Question 10*). If the defendant's application to dismiss is denied, it has 14 days after the denial to answer the complaint.

If the defendant fails to respond to the claimant's complaint altogether, the court may enter a default judgment for the claimant.

If a defendant's application to dismiss is granted, the case ends, although the claimant may be able to re-file its complaint and restart the proceedings, depending on the circumstances.

Assuming the court does not dismiss the case, the next step is for the parties to present a discovery plan to the court. The court then establishes deadlines for subsequent proceedings in the case. These proceedings are usually as follows:

- Written discovery (requests for the production of documents).
- Mandatory disclosure of key information, documents and expert opinion evidence.
- Fact and expert deposition discovery.
- Applications to resolve the case without a trial.
- Trial to adjudicate disputed facts.

INTERIM REMEDIES

10. What actions can a party bring for a case to be dismissed before a full trial? On what grounds must such a claim be brought? What is the applicable procedure?

A party can seek to dismiss a case before full trial through the following applications.

Application to dismiss

The defendant must file this before it answers the complaint. The grounds for an application to dismiss include (*Rule 12(b), FRCP*):

- Lack of subject-matter jurisdiction.
- Lack of personal jurisdiction.

- Improper venue.
- Insufficient process.
- Insufficient service of process.
- Failure to state a claim on which relief can be granted.
- Failure to join a party.

The most common basis for an application to dismiss is the claimant's failure to state a claim on which relief can be granted. This application attacks the legal sufficiency of the claimant's claim. A court rules on this application based on the pleadings alone.

Judgment on the pleadings

This also attacks the legal sufficiency of the claimant's claim based on the pleadings alone, but the defendant files it after filing its answer.

Summary judgment

The party filing this application must demonstrate that there is no genuine issue of material fact and that the party is entitled to judgment as a matter of law (*Rule 56, FRCP*). A party can cite evidence outside the pleadings for this application, including witness affidavits, documents and deposition testimony.

11. Can a defendant apply for an order for the claimant to provide security for its costs? If yes, on what grounds?

In general a defendant cannot apply for an order for the claimant to provide security for the defendant's costs, but there is an exception for preliminary injunctions and temporary restraining orders (*see Question 12*).

12. In relation to interim injunctions granted before a full trial:

- **Are they available and on what grounds are they granted?**
- **Can they be obtained without prior notice to the defendant and on the same day in urgent cases?**
- **Are mandatory interim injunctions to compel a party to do something available in addition to prohibitory interim injunctions to stop a party from doing something?**

Availability and grounds

Parties can obtain preliminary injunctions or temporary restraining orders in certain circumstances. A temporary restraining order maintains the status quo until the court can rule on a request for a preliminary injunction. A party must show:

- Irreparable harm if relief is not granted.
- A likelihood of success on the merits of the underlying claim.
- The balance of the equities favours an injunction.
- An injunction is in the public interest.

A party seeking a preliminary injunction or temporary restraining order must give security in an amount the court considers proper to pay costs and damages incurred by the other party, if it turns out to have been wrongfully enjoined or restrained (*Rule 65(c), FRCP*).

Prior notice/same-day

A preliminary injunction is only issued with notice, while a temporary restraining order can be granted without notice on the same day.

Mandatory injunctions

In addition to injunctions that restrain a party from acting, injunctions can also compel action by a party.

13. In relation to interim attachment orders to preserve assets pending judgment or a final order (or equivalent):

- **Are they available and on what grounds must they be brought?**
- **Can they be obtained without prior notice to the defendant and on the same day in urgent cases?**
- **Do the main proceedings have to be in the same jurisdiction?**
- **Does attachment create any preferential right or lien in favour of the claimant over the seized assets?**
- **Is the claimant liable for damages suffered as a result of the attachment?**
- **Does the claimant have to provide security?**

Availability and grounds

A claimant can acquire a pre-judgment lien on the defendant's property, on posting a bond. If attachment is sought in a proceeding in federal court, attachment is generally governed by the law of the state in which the federal court sits (*Rule 64, FRCP*).

Prior notice/same-day

In some states it is possible to obtain an order of attachment on the same day without prior notice to the defendant. New York law permits courts to grant an order of attachment without prior notice to the defendant, and at any time before or after service of the summons (*§ 6211, NY CPLR*). A New York court may grant an order of attachment on the same day that the application is filed. In California there is a presumption that attachment will occur after a noticed application hearing, but a court can order attachment without notice if the claimant can show a danger that the property would no longer be available to attach if there were a delay (*§ 485.010, Cal. CCP*). California law also permits attachment on the same day.

Main proceedings

Although a state court can generally order attachment only over property within that state, all relevant proceedings do not necessarily need to be in the same jurisdiction. For example, New York courts can order attachment where the claimant seeks to enforce a foreign judgment entitled to recognition in New York courts (*§ 6211, NY CPLR*).

Preferential right or lien

Attachment imposes a pre-judgment lien on the defendant's property.

Damages as a result

If the claimant obtains attachment improperly, the defendant can recover damages from the bond posted by the claimant and sue for:

- Wrongful attachment.
- Abuse of process.
- Malicious prosecution.

Security

The claimant must post a bond as security.

14. Are any other interim remedies commonly available and obtained?

No other interim remedies are commonly available.

FINAL REMEDIES

15. What remedies are available at the full trial stage? Are damages just compensatory or can they also be punitive?

Depending on the law governing the case, a number of different remedies may be available, including money damages and injunctive relief. In large commercial actions the remedy most commonly sought is money damages. Claimants sue to remediate past and future harm, and the goal is generally to put the claimant in the condition it would have been in had the harm not occurred. In certain cases of bad conduct by the defendant, punitive damages may also be available.

Other types of relief are:

- Declaratory judgment.
- Injunctive relief.
- Costs.
- Rescission of a contract.
- Specific performance of a contract.
- Accounting of the finances of a partnership, corporation or other legal entity.
- Disgorgement or restitution of wrongfully obtained funds.

EVIDENCE

16. What documents must the parties disclose to the other parties and/or the court? Are there any detailed rules governing this procedure?

A party has broad obligations to disclose. Generally these obligations are governed by Rule 26 of the FRCP. Before any request for discovery is made, parties must produce all documents, electronically stored information and tangible things that it both:

- Has in its possession, custody or control.
- May use to support its claims or defences.

The parties can then request discovery of any non-privileged material that is relevant to any party's claims or defences. Relevant information need not meet the standard for admissibility at trial to be discoverable, so long as it appears reasonably calculated to lead to the discovery of evidence that would be admissible. Courts can order discovery of any matter relevant to the subject matter involved in the action. Rule 34 of the FRCP sets the procedure through which a party can request documents, electronically stored information and/or tangible things from another party. A non-party can be subpoenaed to produce documents under Rule 45 of the FRCP.

There are limits on discovery to preserve party and court resources, and to avoid abuse or harassment. The court has discretion to limit (or expand) discovery either:

- On its own initiative (*sua sponte*).
- In response to an application to compel or an application for a protective order.

Courts balance the burden on the party against whom the discovery is sought against the reasonableness and likely benefit of the discovery.

Parties have ongoing discovery obligations. A party must supplement its responses if it learns that its disclosure is incorrect or incomplete (*Rule 26, FRCP*).

17. Are any documents privileged? In particular:

- **Would documents written by an in-house lawyer (local or foreign) be privileged in any circumstances?**
- **If privilege is not recognised, are there any other rules allowing a party not to disclose a document (for example, confidentiality)?**

Privileged documents

Parties can withhold from discovery documents and information that are covered by various privileges, including:

- Lawyer-client privilege.
- Lawyer work product doctrine.
- Joint defence privilege.

Lawyer-client privilege applies to communications made in confidence between a lawyer and his client for the purpose of obtaining legal advice. The privilege applies irrespective of whether the lawyer is in-house or outside counsel. A party must disclose that it is withholding information based on this privilege, and must typically identify the information withheld and the basis for withholding it in a privilege log.

As its name suggests, the lawyer work product doctrine protects from disclosure documents evidencing a lawyer's thoughts

and strategy, even though the documents discuss facts that themselves are not exempt from disclosure.

A joint defence privilege permits co-defendants or a defendant and a non-party with a common interest to have conversations and exchange information, without disclosing to the claimant the substance of the conversation or information.

The US does not explicitly recognise a "without prejudice" principle, as many common law countries do. However, settlement discussions between parties are generally inadmissible as evidence.

Other non-disclosure situations

In addition to non-disclosure of confidential information, courts can issue protective orders to preserve the confidentiality of private information. Parties often negotiate and agree on confidentiality procedures, and then request the court to order them. These protections can include:

- Limiting who can view confidential information.
- Limiting how confidential information can be used.
- Requiring that pleadings and documents containing confidential information be filed under seal.

18. Do witnesses of fact give oral evidence or do they just submit written evidence? Is there a right to cross-examine witnesses of fact?

Witnesses give oral testimony. If the trial is not before a jury some judges will accept direct testimony in the form of a written statement, but will still allow live cross-examination. Every witness of fact who provides testimony can be cross-examined. Usually, witnesses can also be deposed before a trial as part of pre-trial discovery.

19. In relation to third party experts:

- **How are they appointed?**
- **Do they represent the interests of one party or provide independent advice to the court?**
- **Is there a right to cross-examine (or reply to) expert evidence?**
- **Who pays the experts' fees?**

Appointment procedure

Experts giving evidence are usually retained and paid by the parties offering their opinions into evidence. Parties must both:

- Disclose the identity of any expert witness they intend to use.
- Provide a written report, prepared and signed by the expert, containing:
  - a complete statement of all opinions the witness will express and the basis and reasons for them;
  - a list of all data and materials considered in forming the opinions; and
  - information regarding the expert's background and experience.

Role of experts

Typically parties retain experts to either consult or provide evidence for their side. In some large cases judges have appointed expert panels to advise the court. However, this is unusual as it casts the court as an investigator, which is not the standard role for courts in the US.

Right of reply

Expert witnesses giving evidence can be cross-examined like other fact witnesses. However, consulting experts who do not offer opinions to the court cannot be cross-examined.

A party can apply to strike out the other party's expert on the basis that the person is not qualified, or the opinions offered are not relevant or reliable.

Fees

Generally each side pays the costs of its experts. In some cases, such as securities cases, expert evidence may be necessary to prove the claimant's claim. In certain cases a prevailing claimant may recover its expert fees as part of a statutory right to recover costs.

APPEALS

20. In relation to appeals of first instance judgments in large commercial disputes:

- **To which courts can appeals be made?**
- **What are the grounds for appeal?**
- **What is the time limit for bringing an appeal?**

Which courts

Although each state has its own individual appeal system, most have a three-tier structure of a trial court, an intermediate appeal court, and a supreme court.

The federal court system tracks this three-tier structure, consisting of the District Courts (trial courts), Circuit Courts of Appeals, and the Supreme Court.

Grounds for appeal

A party has a right to appeal a judgment of a federal district court. If the judgment in the district court was entered on a jury verdict, a party has a right to review by the trial judge by filing either or both:

- An application for judgment as a matter of law (JMOL) (*Rule 50, FRCP*). A JMOL application is granted if a trial judge determines that a reasonable jury did not have legally sufficient evidence to find the way that it did.
- An application for a new trial (*Rule 59, FRCP*).

If a party is unsuccessful in the district court, it has a right to appeal any judgment or order of that court to the circuit court of appeals. A party can appeal a judgment based on alleged errors of law, facts, or procedure that were preserved at trial (making an oral objection typically preserves an issue). Different standards of review apply to different alleged errors, with findings of fact given the most attention. If the circuit court of appeals reverses the district court's judgment, it can:

- Order a new trial.
- Direct the trial court to determine whether a new trial should be granted.
- Send the case back for further proceedings.
- Direct entry of judgment.

Following the circuit court of appeals review, the unsuccessful party can apply for discretionary review by the Supreme Court by filing a writ of *certiorari* (that is, a quashing order). The Supreme Court reviews only a small percentage of the writs of *certiorari* it receives.

Time limit

To secure an appeal, an appellant must:

- File a notice of appeal from a judgment or order of the district court.
- Assemble the materials required by the circuit court of appeals to review the district court proceedings, including a transcript of those proceedings.
- If required by the court, post a bond or security.

Once the appeal is scheduled for hearing, the appellant must file a brief arguing the issues for appeal. The respondent can then file a brief opposing the appeal, and the appellant can file a response brief. The court has discretion to hear oral arguments. Generally, the court can either affirm or reverse the district court's decision. If it reverses the district court's decision, the case is often sent back for re-trial.

CLASS ACTIONS

21. Are there any mechanisms available for collective redress or class actions?

Class actions lawsuits can be brought in either state courts or in federal courts (*Rule 23, FRCP and 28 U.S.C.A. § 1332(d)*). Typically, federal courts are thought to be more favourable for defendants, and state courts more favourable for claimants. Class action cases are frequently filed initially in state court. The defendant will often try to remove the case to federal court, and the Class Action Fairness Act of 2005 has increased defendants' ability to successfully do so.

Under federal law, for a lawsuit to be permitted to proceed as a class action, the suit must have the following characteristics:

- **Numerosity.** The class must be so large as to make individual suits impractical.
- **Commonality.** There must be questions of law or fact common to the class.
- **Typicality.** The claims or defences of the representative parties must be typical of the claims or defences of the class.
- **Adequacy.** The representative parties will fairly and adequately protect the interests of the class.

The party seeking certification of a class must also show, among other factors, that either:

- Common issues among the class members will predominate over questions affecting only individual members.
- The class action, instead of individual litigation, is a superior vehicle for resolution of the disputes at hand.

At least 35 states have adopted class action rules that track the federal rules.

COSTS

22. Does the unsuccessful party have to pay the successful party's costs and how does the court usually calculate any costs award? What factors does the court consider when awarding costs?

The default rule is that the prevailing party recovers its court costs, but not its lawyers' fees. Court costs can include filing fees, trial and deposition transcript expenses, and similar administrative costs. In certain situations, a successful claimant can recover lawyers' fees:

- Where the laws of a state permit recovery of lawyers' fees, such as in a contract dispute.
- Under federal anti-trust statutes.
- Under most state consumer protection statutes.
- In a class action, where a claimant's lawyers can be awarded fees out of the class recovery.

A successful defendant can rarely recover lawyers' fees, though such fees are awarded where a claimant brings claims in bad faith.

23. Is interest awarded on costs? If yes, how is it calculated?

Courts generally award both pre- and post-judgment interest on any amounts recovered by a claimant. In most jurisdictions, statutory rates apply.

If a judgment is appealed and then affirmed, interest is owed from the date of the judgment. Further, if an appeal is dismissed or affirmed, the appellant must cover the costs. If the judgment is reversed, the respondent must cover the costs.

ENFORCEMENT OF A LOCAL JUDGMENT

24. What are the procedures to enforce a local judgment in the local courts?

If a party fails to pay a money judgment obtained in a federal court, the court can order seizure of the party's property

(*Rule 70, FRCP*). This order is obtained by writ of execution, and the procedure for obtaining a writ is determined by state law.

If a party fails to comply with a judgment or order requiring specific performance within the time specified, a prevailing party may obtain a writ to compel that performance.

If a third party aids in defying the judgment, the court can hold that person in contempt of court. State courts have similar procedures for attachment and contempt.

CROSS-BORDER LITIGATION

25. Do local courts respect the choice of governing law in a contract? If yes, are there any areas of law in your jurisdiction that apply to the contract despite the choice of law?

State and federal courts generally respect the substantive law selected by the parties to a contract, provided the chosen law bears a reasonable relationship to the contract and the parties, and there is no oppression or violation of public policy. The parties cannot contract around laws that implicate or implement strong federal or state public policy. Such laws include:

- Anti-trust law.
- Certain statutory employment rights.
- Securities regulation.
- Consumer protection.
- Health and safety regulation.

26. Do local courts respect the choice of jurisdiction in a contract? Do local courts claim jurisdiction over a dispute in some circumstances, despite the choice of jurisdiction?

State and federal courts generally respect the forum selected by the parties to a contract, even a foreign forum selection, provided that enforcement is not unfair, unreasonable or unjust. To determine this, courts consider whether:

- The forum selected bears a reasonable relationship to the transaction.
- The agreement was entered into under fraud, duress, or undue influence.
- The forum is so inconvenient that it deprives the claimant of a remedy.
- Enforcement contravenes any public policy of the selected forum.

27. If a foreign party obtains permission from its local courts to serve proceedings on a party in your jurisdiction, what is the procedure to effect service in your jurisdiction? Is your jurisdiction party to any international agreements affecting this process?

Service on a US defendant in foreign proceedings can be secured by one of three methods:

- Complying with the HCCH Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters 1965.
- Complying with the service rules of the state in which the US defendant resides.
- Securing a court order from the federal district court of the district in which a person resides, to serve any document issued in connection with a proceeding in a foreign or international tribunal (*28 U.S.C. § 1696*).

State rules governing service of process vary. For example, in New York a claimant can:

- Serve a defendant personally, by delivering and mailing the summons to the defendant's dwelling, or serving an agent designated for service of process.
- Post a copy of the summons to the defendant's place of business, if other methods fail.
- Petition a New York court to order a suitable method of service.

28. What is the procedure to take evidence from a witness in your jurisdiction for use in proceedings in another jurisdiction? Is your jurisdiction party to an international convention on this issue?

A federal district court can order a witness to provide evidence, a statement, a document or other thing for use in a proceeding in a foreign or international tribunal (*28 U.S.C. § 1782*). A proceeding in a foreign or international tribunal can include a criminal investigation conducted before formal accusation, and even an international arbitral body.

There are three basic requirements that must be met for a federal district court to be authorised to grant a request to compel discovery in the US (*28 U.S.C. § 1782*):

- The person from whom discovery is sought "resides or is found" in the district of the court to which the request or application is made.
- The evidence sought is "for use in a proceeding in a foreign or international tribunal".
- The request or application is made by the foreign or international tribunal or by "any interested person".

Unless the court orders otherwise, discovery must be obtained according to the procedures in the FRCP.

The US is a party to the HCCH Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970 (Hague Evidence Convention).

29. What are the procedures to enforce a foreign judgment in the local courts?

A party seeking to enforce a foreign judgment must file a case before a state or federal court. The laws of each state determine the enforceability of a judgment of a foreign court in that state, and a federal court applies the law of the state in which it sits. Most states have adopted a version of the Uniform Foreign Money Judgments Recognition Act 1986 (*13 U.L.A. 149*). This statute requires states to give effect to foreign judgments if an exemplified copy of the foreign judgment is registered with the clerk of a court with competent jurisdiction.

Enforcement of a foreign arbitration award in US courts is governed by the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention).

ALTERNATIVE DISPUTE RESOLUTION

30. What are the main alternative dispute resolution (ADR) methods used in your jurisdiction to settle large commercial disputes? Is ADR used more in certain industries?

The main methods of ADR used in the US include:

- **Arbitration.** This method involves a confidential proceeding in which a dispute is resolved by a neutral third party adjudicator, whose decision the parties to the dispute have agreed, or legislation has decreed, is final and binding.
- **Mediation.** This method involves a confidential process in which a neutral third party, who has no decision-making power, helps the parties to reach a negotiated agreement. It is the most common form of ADR.
- **Early neutral evaluation.** This method involves a confidential process in which a neutral third party gives a preliminary, non-binding assessment of facts, evidence, and/or legal merits.
- **Mini-trial.** This method involves a confidential settlement process in which the parties present highly summarised versions of their respective cases to a panel composed of officials who represent each party and a third party official (a neutral). The panel has authority to settle the dispute.

The rules applicable to the above ADR methods are generally laid out by the various ADR organisations. However, these are default rules and parties can, and regularly do, alter the rules by agreement. Except for arbitration and mini-trial, these ADR methods are not usually binding.

31. Does ADR form part of court procedures or does it only apply if the parties agree? Can courts compel the use of ADR?

Parties can agree privately to use ADR, either:

- Before a dispute arises, for example, through a contractual provision.
- After a dispute arises, as a procedure to resolve the dispute.

Under the Alternative Dispute Resolution Act, all federal courts must establish some form of ADR (*28 U.S.C. § 651 et seq.*). Even without an agreement between the parties, the court can order the parties to engage in ADR as a prerequisite to a trial on the merits. However, courts cannot deny litigants their right to have their cases finally decided by a court of their choosing, unless a contractual agreement provides otherwise.

32. How is evidence given in ADR? Can documents produced or admissions made during (or for the purposes of) the ADR later be protected from disclosure by privilege? Is ADR confidential?

The parties' agreement typically governs the use and submission of evidence. The agreement, whether a clause in a contract or a post-dispute stipulation, either sets the rules or refers to the rules of a particular arbitral body. Generally, arbitrations are conducted in a manner similar to trials and include oral submissions, while mediations tend to be conducted based on written submissions.

In general, ADR is confidential. Materials and statements made during ADR are generally protected from disclosure in a related judicial proceeding, although the parties are free to agree otherwise.

33. How are costs dealt with in ADR?

The parties and the neutral person are free to determine how fees and costs are handled. In non-binding ADR methods, parties typically split the neutral person's fees and each party covers its own costs. In binding ADR methods, such as arbitration, arbitrator fees are typically calculated on an hourly basis or by a fixed scale that takes into account the amount in dispute and other factors. A successful party in an arbitration can seek to recover its fees and costs depending on:

- Applicable substantive law.
- Cost-shifting provisions in the arbitration agreement.
- Procedural rules governing the arbitration.

34. What are the main bodies that offer ADR services in your jurisdiction?

The main ADR bodies used in the US include the:

- American Arbitration Association (AAA).
- Judicial Arbitration and Mediation Services (JAMS).
- Financial Industry Regulatory Association (FINRA).

The main arbitral bodies used for resolution of international disputes include the:

- International Centre for Dispute Resolution of the AAA.
- International Centre for Settlement of Investment Disputes (ICSID).
- International Chamber of Commerce (ICC).
- London Court of International Arbitration (LCIA).

PROPOSALS FOR REFORM

35. Are there any proposals for dispute resolution reform? Are they likely to come into force?

Federal reforms

In the federal system, the Foreign Corrupt Practices Act (FCPA) has been targeted for reform. The Justice Department and the Securities and Exchange Commission's recent aggressive and tougher enforcement of the 34-year-old law has raised US business concern over its impact. Advocates for reform argue that the act may be making US businesses less competitive. Suggested reforms include:

- Clarifying the FCPA's definition of a "foreign official" to distinguish from employees of state-owned companies.

- Permitting firms with excellent compliance programmes to fight the imposition of criminal liability based on the actions of rogue employees.

While the President has not taken a public position in favour of amending the act, several US senators have indicated an interest and significant lobbying efforts are underway.

State reforms

In the state systems, multiple legislatures are considering various tort reforms. Advocates for reform generally seek to impose limits that would make it harder for individuals to sue businesses for injuries. Suggested reforms include:

- Damage caps.
- Procedural limits on the ability to file claims.
- Heightened pleadings requirements.

While tort reform is often discussed and has widespread support, there is a lack of clear focus or understanding. Any reform in the near future is likely to be piecemeal rather than comprehensive.

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Recent transactions

- Representing the Bank of New York Mellon in a US$2 billion suit by noteholders seeking recovery of investment losses with Medical Capital, where the Bank served as indenture trustee.
- Representing the Royal Bank of Canada in a US$200 million suit by Wisconsin school districts relating to failed synthetic CDO transactions.
- Representing UBS in a US$2 billion suit brought by the Madoff Trustee.
- Representing the Trust Company of the West in suits concerning failed CDO transactions.
- Representing Citigroup in litigation relating to the proposed merger of RehabCare and Kindred.

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