

Litigation and enforcement in United States: overview

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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 and these are most commonly resolved through courts or alternative dispute resolution (ADR). In court proceedings, lay juries decide questions of fact while judges decide questions of law. In some cases, judges rule on both the facts and law; these are called bench trials. In arbitrations, a panel of between one and three professional decision-makers decide the fact and legal issues.

While procedures and terminology vary by jurisdiction, litigation, both in court and arbitration, generally involves the following steps:

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

Most cases do not reach trial, as they are resolved through motions to dismiss the case, summary judgment or settlement. For large commercial litigation, discovery can be costly, especially for large corporations (which often find themselves as defendants) because of the voluminous records they keep, e-mails, contracts and similar materials that may be relevant to a dispute. Defendants are often 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 as 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.*). The Federal Arbitration Act specifically governs arbitrations and codifies a strong federal preference for arbitrations (*9 U.S.C. § 9*). See Questions 30 and 31.

COURT LITIGATION

Limitation periods

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 vary by state. 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 (that is, the defendant committed the alleged wrongdoing).
- The plaintiff realises he suffered an injury after the claim accrued.

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.

Court structure

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, in most cases 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.** In most cases, for diversity jurisdiction to exist, the parties must be "completely diverse"; the dispute must be between citizens of different states or US persons and foreign persons. In most cases, the amount at stake in the dispute must, at least potentially, be greater than US\$75,000. If the dispute implicates state law, the federal court must apply the law of the state.

- **Class action diversity jurisdiction.** Federal jurisdiction also exists for certain cases called "class actions", in which the claim involves at least 100 plaintiffs and the total amount in controversy exceeds US\$5 million. Under this form of jurisdiction, the parties must be "minimally diverse": the state of one plaintiff must be different from the state of at least one defendant.
- **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 this type of 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.

Rights of audience

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?**

Rights of audience/requirements

In general, a lawyer appearing in a state court must be licensed to practice 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 practice in one state can obtain admission and therefore practice in the other state.

If a lawyer is not licensed to practice 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

Foreign lawyers not admitted to the bar of a US state cannot practice 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?**

In the US, each party pays its own legal fees. This is commonly called the "American Rule".

As a general matter, ethical rules (which vary state-by state) govern fee arrangements. Those rules generally 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 or in the manner in which fees are split (for example, for referrals). Generally, however, the attorney and client can adopt any fee arrangement they wish, provided the client is fully informed of the arrangements. 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, although flat fee and other alternative arrangements are increasingly common.

No rules or legislation govern the fees lawyers can charge clients, beyond the requirement that they are not excessive or unconscionable. In some cases, statutes permit the court to award attorneys' fees to the successful party (*see Question 22*). 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 American Rule provides that the parties bear their own litigation costs as they incur them (*see Question 5*). Large commercial cases are most often funded by the clients directly, through hour-based billings. Many alternative fee arrangements exist however.

Contingency fees

The most common alternative is the contingency fee, in which the attorney receives a percentage of the ultimate winnings. This generally applies only to plaintiffs, as defendants generally do not recover an award.

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.

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.

Indemnification

Sophisticated commercial entities often include indemnification agreements in contracts with business partners and vendors. Under those agreements, terms of contracts often provide that the partner or vendor will pay the costs, including attorneys' fees and damages awards, that arise out of lawsuits relating to the subject of the contract.

Other sources

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.

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.

In large-scale 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 secrets or confidential business or proprietary information, is not made public. Confidential information is often at issue in disputes between high-tech companies, especially in California (especially Silicon Valley). Due to the frequency of such lawsuits in certain jurisdictions, some courts provide model protective orders that other jurisdictions also use. The Northern District of California (home of Silicon Valley), is one such jurisdiction with a model protective order commonly used across the US.

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?

Courts generally do not impose any rules on the parties in relation to pre-action conduct with one major exception: that parties preserve evidence once they learn of a potential litigation. Specifically, parties 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. These sanctions can be severe, ranging from monetary penalties to permitting the jury to draw an adverse inference that the evidence was harmful to the party that destroyed it, to issuing (in the most severe cases) a judgment against the party that hid or destroyed evidence. Even in cases where the spoliation is unintentional, some courts may still impose sanctions.

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

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

Response to the complaint. The defendant must respond to a complaint with an answer or motion to dismiss 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*). These grounds generally contend that, as a matter of law, the claimant does not state facts that can support a lawsuit against the defendant.

If the defendant's motion 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.

If the defendant's motion 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.

Discovery and fact development. If the court does not dismiss the case, the next step is discovery, that is, the collection and exchange of factual information in support of the claims and defences asserted in the complaint and answer.

During discovery, the parties request information and documents from one another. They may also interview witnesses in sworn deposition testimony. The parties also hire and depose expert witnesses to help develop particularly complicated factual issues, which often arise in large commercial disputes. Expert testimony can be given on many areas, including financials, scientific issues and medical records.

The discovery process can take up to several years, depending on the complexity of the case, though it typically lasts about one year in most courts. The discovery stage often proves the most costly part of litigation. It is for this reason that defendants in large commercial disputes are more likely than in other cases to seek dismissal of the case early.

Summary judgment. After discovery concludes and the parties have developed the facts, defendants (and sometimes plaintiffs) ask for summary judgment, that is, a resolution of the case before trial. Similar to a motion to dismiss, a motion for summary judgment asks the court to find that one of the parties prevails, as a matter of law, on the claims or defences of the case. The key difference from a motion to dismiss, however, is that the court assesses the claims in light of the available facts (rather than based solely on the allegations of the complaint, as in a motion to dismiss). If the court determines that no factual issues will affect the outcome, then the court will grant summary judgment on some or all of the issues in the case.

Trial. If the case is not resolved on summary judgment, then it goes to trial. In a trial, each side presents its case to a jury and judge (or just a judge, in some cases). Trials involve often-elaborate presentations of each side's interpretation of the facts, including opening statements by the lawyers, questioning of witnesses and closing arguments.

Once the parties have presented their cases, the jury or judge makes the final determination of the questions in the case. That decision (the verdict) represents the final decision in the case.

Appeal. The party that loses at any stage, motion to dismiss, summary judgment or trial, has a right to appeal to the Court of Appeals or state equivalent. The appellate court reviews key issues and affirms or reverses the trial court's decision. If the court reverses, it can send it back to the judge to revisit the issue (or entire case) in light of the appellate court's decision, or direct a judgment or verdict.

If a party wishes to appeal that decision further, it may seek review by the US Supreme Court (or state equivalent), but reviews to those highest courts are discretionary in all but a very limited number of cases.

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.

Motion to dismiss

The defendant must file this before it answers the complaint. The grounds for a motion 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

A motion for judgment on the pleadings 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, although exceptions exist for preliminary injunctions and temporary restraining orders (*see Question 12, Availability and grounds*). In appeals from damages awards, the appealing party may be required to post a bond in the amount of the award pending resolution of the appeal.

12. What are the rules concerning interim injunctions granted before a full trial?

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. To obtain a temporary restraining order, a party must show the following:

- 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 issued only with advanced notice to the other party to allow time to defend against the action. A temporary restraining order can be granted without notice on the same day, but requires a showing of extraordinary need for emergency relief.

13. What are the rules relating to interim attachment orders to preserve assets pending judgment or a final order (or equivalent)?

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 notified 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.

As with temporary restraining orders, same-day attachments require a showing of extraordinary need for emergency relief.

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

Disclosure

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 and these obligations are governed by Rule 26 of the Federal Rules of Civil Procedure (FRCP).

Before any request for discovery is made, parties must make "initial disclosure". That is, they must produce all documents, electronically stored information and tangible things that are in its possession, custody or control, and that may be used to support its claims or defences.

In addition to initial disclosure, the parties can request discovery of any non-privileged material that is relevant to any party's claims or defences. Relevant information need not be admissible at trial to be discoverable; rather, a party may seek information so long as it is reasonably likely to lead to the discovery of admissible evidence. Courts can order discovery of any matter relevant to the subject matter involved in the action.

The FRCP provide for specific forms of discovery and these forms are tracked throughout state courts. For example, 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. Rule 30 governs depositions and Rule 33 provides for written interrogatories.

As discovery is costly, the Rules impose restrictions to preserve resources, to protect from disclosure of sensitive or privileged information, and to avoid abuse or harassment. For example, parties have a presumptive right to object to intrusive, irrelevant, privileged or otherwise overbroad requests, as well as a right to require the party requesting discovery to engage in good faith negotiations to narrow the requests. The court also has discretion to limit (or expand) discovery either by application by a party (through a motion to compel or for protective order) or on the court's own initiative.

Privileged documents

17. Are any documents privileged? If privilege is not recognised, are there any other rules allowing a party not to disclose a document?

Privileged documents

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

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

Attorney-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 external counsel.

If a party invokes this privilege, it 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 attorney 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.

The 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.

Many other privileges exist depending on the state, but these are the most commonly invoked in commercial litigation.

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 is filed under seal.

Examination of witnesses

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?

Oral evidence

Witnesses typically give oral testimony. In the discovery phase, this is called "deposition", and the purpose is to take the testimony of a witness potentially used by the opposing party to understand that party's position. In some cases (such as when deposition is impossible), witnesses may provide written testimony during discovery, called "deposition by written exam".

Right to cross-examine

During trial, witnesses typically provide live 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.

Third party experts

19. What are the rules in relation to third party experts?

Appointment procedure

Experts giving evidence are usually retained and paid by the parties offering their opinions. In general, 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 successful claimant may recover its expert fees as part of a statutory right to recover costs (*see Question 22*).

APPEALS

20. What are the rules concerning appeals of first instance judgments in large commercial disputes?

Which courts

Appellate court structure. 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

Initial review by trial 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*).

Appeal. 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.

Different standards of review apply to different alleged errors. Findings of fact are given the most deference; questions of law, the least. 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, within 30 days.

- 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.

After the Notice of Appeal has been filed, deadlines for briefing are triggered. The appellant must file a brief arguing the issues for appeal within 30 days of the notice. The respondent can then file a brief opposing the appeal within 30 days of the opening brief and the appellant can file a response brief within 14 days. In most cases, the court will grant extensions liberally, though the court will not grant extensions for certain urgent issues, such as the appeals arising from the grant or denial of injunctive relief.

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 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 (CAFA) has increased defendants' ability to successfully do so. Under CAFA, defendants have the right to remove class actions to federal court when the number of potential plaintiffs is greater than 100, the parties are "minimally diverse" and the total aggregated amount in controversy exceeds US\$5 million (*see Question 3*).

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:

- **Predominance.** Common issues among the class members will predominate over questions affecting only individual members.
- **Superiority.** 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.

In states that have not explicitly codified class action rules, such as California, the state courts follow federal precedent and effectively incorporate the federal class action 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 successful 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 contractual 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, although 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 may seize the party's property under writ of execution, the procedure for which is determined by state law (*Rule 70, FRCP*).

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?

See *Question 25*.

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 Hague Convention on Private International Law (HCCH) Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters 1965 (Hague Service Convention).
- 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 California and 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 state 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.

Three requirements govern 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 Federal Rules of Civil Procedure.

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

Enforcement of a foreign judgment

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

The US is not a party to any treaty or convention governing foreign judgments. However, procedures exist for parties to seek enforcement. 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*), which 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? What proportion of large commercial disputes is settled through ADR?

ADR is the increasingly preferred method of resolving commercial disputes. The main methods of ADR used in the US include:

- **Mediation.** This method involves a confidential process in which a neutral third party helps the parties to reach a negotiated agreement. The mediator may in some cases express its view as to what a fair settlement may be but does not issue a binding judgment. Mediation is the most common form of ADR.
- **Arbitration.** This method involves a confidential proceeding in which a dispute is resolved by a neutral third party adjudicator, whose decision is final and binding by virtue of the parties' agreement or a legislative provision. Due to its potential to resolve disputes more efficiently than litigation, many contracts provide that the parties must submit their disputes to binding arbitration. Federal and state law strongly favours arbitration and nearly always enforce an arbitration agreement.
- **Early neutral evaluation.** Frequently known as "rent-a-judge", early neutral evaluation 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.

Each ADR organisation has its own rules, though they tend to follow loosely the procedures for federal courts, that is, they require a complaint, response, discovery and hearing.

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 before a dispute arises (for example, by contract), or after a dispute arises.

Under the Alternative Dispute Resolution Act, all federal courts must establish some form of ADR (*28 U.S.C. § 651 et seq.*). If the parties agree to arbitration, then the Federal Arbitration Act (or its state law equivalents) apply and govern the procedural aspects of the arbitration. 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 submitted 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, 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 what the contract provides and whether the underlying claims allow for fee recovery.

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

Many bodies offer ADR services. For general commercial disputes, the most common bodies include the American Arbitration Association (AAA), Judicial Arbitration and Mediation Services (JAMS) and ADR Services. Many industry-specific bodies govern ADR for particular fields. For example, the Financial Services Regulatory Authority (FINRA) deals with arbitrations involving claims relating to investment houses and banks.

PROPOSALS FOR REFORM

35. Are there any proposals for dispute resolution reform? If yes, when are they likely to come into force?

Due to budget issues hitting federal and state court systems across the country, courts are increasingly favouring ADR, and especially arbitration. Put simply, the state court system does not have the financial or human resources to adequately resolve civil disputes, so the systems are adapting through moves to private dispute resolution systems.

This development means that sophisticated parties to disputes involving commercial or civil matters now frequently "opt out" of the judicial system by voluntarily electing arbitration or some other form of ADR.

These events have had three major consequences:

- ADR providers have experienced enormous growth in the number and variety.
- The law in this area has been developing rapidly. Issues frequently addressed by appellate courts in this area include the enforceability of pre-dispute agreements to arbitrate future disputes, especially in the employment context.
- As more and more disputes are resolved via arbitration or other forms of ADR, both the arbitral organisations and the courts have become more receptive to allowing appeals from arbitration awards to be heard on their full merits (as opposed to narrow procedural grounds that traditionally colour arbitration appeals).

Therefore, several arbitral organisations have adopted rules (which may be implemented on an optional basis by the parties) that would allow for appeals from arbitration awards to be heard on their full merits. One example is American Arbitration Association Rule A-10, which allows a party to appeal from an arbitration award where the award is based on an error of law that is material and prejudicial; or determinations of fact were made by the arbitrator that were clearly erroneous. Other arbitral organisations, such as the Judicial Arbitration and Mediation Services and the Centre for Dispute Resolution, have enacted similar optional rules.

Practical Law Contributor profiles



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Areas of practice. Directors and officers litigation; insurance coverage and recovery; international litigation; securities, shareholder and partnership litigation.

Recent transactions

- Representing assignee of construction lender in connection with claims against loan guarantors for breach of guarantees on a defaulted construction loan. The case was tried to judgment in the Los Angeles Superior Court, resulting in a decision by the Court awarding to the client about US\$23 million, representing a full recovery under the guarantees.
- Representing Jacques Cousteau and The Cousteau Society in a highly publicised trade mark infringement and dilution action involving the right to use the name of "Cousteau"; defendants included Jean-Michel Cousteau, Post Ranch Inn and the owner of the Cousteau Fiji Islands Resort. Obtained preliminary injunction from US District Court barring use of the name by the resort; parallel proceedings in Fiji.
- Representing a major institutional lender in connection with federal court litigation arising out of defaulted US\$30.5 million construction loan. Litigation included lender liability action brought by the borrower against the client and fraud action brought by the client against the general contractor for the project. Achieved summary judgment on borrower's lender liability claim and highly successful resolution of client's fraud action claim against general contractor.
- Successful defense of celebrity Tony Robbins in connection with high-profile claims asserted by former Robbins franchisees for fraud, R.I.C.O. and other claims arising out of acquisition by plaintiffs of franchise; plaintiffs had their complaint dismissed with prejudice and were ordered to pay Robbins money as part of settlement; case generated three published US District Court opinions in client's favour.
- Three-month "bet the company" jury trial defending German media giant Bertelsmann and its executives in connection with a US\$3.5 billion lawsuit by former promoters and developers of an electronic commerce joint venture for a share of the venture's profits.

Publications

- *Numerous business and legal publications, including the International Financial Law Review, Executive Counsel, Risk & Insurance and Global Counsel.*
- *Publications included in professional publications in the UK, Germany, France, Mexico, Japan and in other countries.*
- *Avoiding and Resolving Disputes In International Commercial Litigation, International Law for CEOs: Lessons From Leading International Lawyers, 2013.*
- *International Service of Process, Transatlantic Commercial Litigation and Arbitration, Oceana, 2004.*
- *Chapter on dispute resolution in California, Law Business Research's annual treatise on International Dispute Resolution, 2013.*



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Professional qualifications. J.D., The University of Chicago Law School, 2008 (admitted in California, US)

Areas of practice. Consumer class actions; privacy and technology; speech and communications; appeals.

Recent transactions

- Representing a pioneering behavioural advertising developer and online partners in the defence of a nationwide class actions alleging privacy violations under the Electronic Communications Privacy Act and Stored Communications Act concerning use of respawning unique identifiers ("zombie cookies") on mobile devices. Result: actions dismissed.
- Representing a leading company in production of breast cancer drugs, in a prosecution of defamation claims against a former employee and purported co-inventor for blogging untrue comments about the company. Result: pending.
- Representing a leading provider of subscription-based streaming videos, in the defence of national class actions claiming violation of disability anti-discrimination under ADA and state discrimination statutes relating to Internet-based closed captioning practices. Result: obtained dismissals without leave to amend of class claims (Cullen v. Netflix, Inc., 880 F.Supp.2d 1017 (N.D. Cal. 2012); Cullen v. Netflix, Inc., No. 5:11-cv-01199, 2013 U.S. Dist. LEXIS 4246 (N.D. Cal. Jan. 13, 2013)) and favourable industry-leading captioning settlement.
- Representing officers of a bankrupt real estate investment company, in the defence of adversary proceedings in allegations of breach of fiduciary duties and mismanagement of corporate assets. Result: pending.
- Representing a pro bono inmate client in the appeal of summary dismissal of due process and equal protection claims arising from government's failure to comply with terms of mediated agreement concerning prison transfer procedures. Result: pending.

Publications

- *TroyGould PC Client Alert, Reasonable Expectation of Privacy can Defeat Class Certification, February 2014.*
- *BNA Privacy and Data Security, Privacy Class Actions: Current Trends and New Frontiers in 2013, 1 July 2013.*
- *Practicing Law Institute, Tracking and Targeting Customers and Prospects Online, on Mobile Devices, and in Social Media, October 2013.*
- *Morrison & Foerster LLP Client Alert, Comcast Corp. v. Behrend: Courts Must Assess Merits of Plaintiffs' Damages Evidence at Class Certification, 28 March 2013.*
- *Comment, Technology, Politics, and the New Space Race: The Legality and Desirability of Bush's National Space Policy Under the Public and Customary International Laws of Space, 8 Chicago J. Int'l Law 681, 2008.*
- *Bender's Labor & Employment Bulletin, D.C. Circuit Rules that Secondary Union Boycotts Are Entitled to First Amendment Protection, 1 August 2007.*