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The International Comparative Legal Guide to:
Litigation & Dispute Resolution 2011

A practical cross-border insight into litigation & dispute resolution

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Chapter 2

U.S. Judicial System

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- There are two parallel court systems in the United States – federal courts and state courts. **(See Appendix 1.)**
  - Cases must remain in the court system in which they originate. A case that is tried in state court must be appealed through the state system; cases that originate in federal district court must be appealed through the federal system. The U.S. Supreme Court, however, can hear both federal and state appeals on questions of federal law.
  - Appeals generally involve issues of law, as fact-finding is typically the province of the trial courts.
  - There are two layers of law in the United States. Each state has its own set of laws that govern citizens, residents, and activities within its borders. There are also federal laws that govern citizens, residents, and activities across the United States. While federal law is not as extensive as state law, there are times when they conflict. When federal law conflicts with state law, federal law wins.
    - State law governs in most circumstances. Federal law is applicable to statutes enacted by Congress or is derived from the Constitution. Federal law deals with only limited, but highly important issues.
- The Supreme Court of the United States – composed of nine judges, who are called Justices – interprets the U.S. Constitution and decides questions of federal law.
  - The U.S. Supreme Court has discretionary review. In order to present a case before the Supreme Court, a party must file a petition for a *writ of certiorari*. The Supreme Court grants *certiorari* only in about 1% of the 7,000 petitions filed annually.
    - *Writ of Certiorari* – a device used by the Supreme Court to direct a lower court to send a particular case to it for review.
  - Supreme Court rulings are binding on all courts in the United States, whether federal or state.
- The Federal Rules of Civil Procedure (FRCP) govern civil litigation in federal district courts. These rules govern the commencement of a lawsuit, filing deadlines, pleading basics, permissible parties, the fact discovery process, trial practice, and post-trial procedures.
  - Most state courts have their own rules of civil procedure. These standards can vary widely from the federal rules.
- The Federal Rules of Evidence govern the admissibility of evidence in federal district courts. These rules address, for example, the admissibility of hearsay, expert opinion, and statistics.
  - The Federal Rules of Evidence do not apply to state courts, but more than 30 states have adopted rules of evidence based on or very similar to the Federal Rules of Evidence.
- There are also criminal laws, which are enforced at both the federal and state levels by federal and state prosecutors, respectively. The Federal Rules of Criminal Procedure govern criminal litigation in federal district courts. Most state courts have their own rules of criminal procedure.
  - In the federal system and in each state, grand juries (made up of ordinary citizens) investigate the criminal charges and determine whether to issue an indictment. Grand juries have the power to issue subpoenas for documents and live testimony. The scope of grand jury subpoena power regarding an international corporation has been disputed from time to time.
  - Criminal defendants are entitled to a trial by jury. The number of individuals on a jury and whether the verdict has to be unanimous vary by jurisdiction.
  - Criminal defendants are also entitled to a defence attorney under certain circumstances.
  - On occasion, a jury trial against a corporation can result in a verdict that can be binding in civil cases. Thus, criminal cases can become quite important.
- Administrative agencies, like the Securities & Exchange Commission, can issue subpoenas and hold administrative hearings. Such hearings are not before judges, but before individuals who work for the agency.
- The vast majority of U.S. civil cases settle – about 95%.
- U.S. trial strategy is heavily driven by individual stages of litigation. The work completed at each phase allows the parties to assess their potential success at securing a favourable settlement and to weigh those factors against the uncertainty and expense of trial.
- Legal fees are not paid by the loser in the U.S. civil litigation system; with limited exceptions, each side pays its own expenses.
- Liberal discovery is a cornerstone of civil litigation in the United States. This means that parties can "discover" *any* relevant information that *could* be admitted at trial – even if it ultimately is inadmissible. This often results in the production of thousands, and sometimes even millions, of documents.
- Discovery primarily is facilitated through three discovery vehicles: interrogatories, depositions, and requests for document production:
  - **Interrogatories** – written questions to the opposing party that must be answered under oath.
  - **Depositions** – witness testimony given under oath and

recorded by a stenographer; a witness can be liable for perjury if there are discrepancies between his deposition testimony and his trial testimony.

- **Requests for Document Production** – as the name suggests, documents must be produced within a specific timeframe, unless the court or parties agree otherwise

- Attorney-client privilege is held by the client and therefore may be waived only by the client. This means that communication between an attorney and his client, in preparation of trial, are confidential and not discoverable at any stage of the trial process.
- In order to obtain punitive damages, the plaintiff must prove that the defendant committed the tort and that the defendant's conduct was willful and wanton.
- Parties can specify, *ex ante*, via contract, how disputes should be resolved. For example, parties can agree to a particular court's jurisdiction and/or application of a particular jurisdiction's laws. Parties can also agree to resolve disputes outside of court – in medication, arbitration, or otherwise. And parties can agree about the specifics of such non-judicial resolutions methods – e.g., location of arbitration, number of arbitrators, limitations on discovery, and confidentiality.

Litigation Overview: Various Aspects of a Civil Case

Complaint

A complaint is the pleading that initiates a civil lawsuit. The complaint outlines the factual allegations underlying the case and notifies the defendant of the claims alleged against him. In addition to listing the causes of action against the defendant, a complaint must establish the court's jurisdiction – or power – over the parties and subject matter of the case.

Statute of Limitations

A claim must be asserted within the particular statute of limitation – that is "no suit shall be maintained on [a] cause[] of action ... unless brought within a specified period of time after the right accrued" (Black's Law Dictionary 927 (6th ed. 1990)). When a statute of limitation expires, a claim still exists; however, the ability to assert the claim lapses. For example, the statute of limitations for most breach of contract actions under New York law is six years from the date that the contract is breached.

Common Causes of Action

A cause of action, or claim, is the legal ground with which a party can file a lawsuit. Common causes of action include:

Negligence: When the failure to act reasonably results in harm to another. In order to be deemed negligent, the defendant must have had a duty to act reasonably toward the plaintiff and must be the cause of the plaintiff's injury.

Elements: (1) A defendant's duty to the plaintiff; (2) breach of this duty; (3) a defendant's breach of duty which caused a plaintiff harm; and (4) as a result the plaintiff suffers harm.

Note: Negligence cases often turn on whether the defendant owed the plaintiff a duty of care, or whether the defendant's conduct was the cause of the plaintiff's injury.

Breach of Contract: When a contract, or bargained-for exchange, is not honored by one or more of the parties.

Breach of Warranty: When a manufacturer or vendor's defective product results in injury to the purchaser. The warranty breached can be an express warranty or an implied warranty.

Product Liability: When an individual is harmed by an unsafe product, they can sue for the defective design, the manufacturing defect, or the marketing defect (failure to warn).

- The aforementioned product liability causes of action usually are pled in conjunction with another cause of action. For instance, negligent failure to warn or breach of warranty for defective design.

Fraud: False representations that cause harm and are made knowingly or with reckless ignorance of their truth or falsity.

Injunctive Relief

Rather than, or in addition to, money damages, a party may also seek injunctive relief. An injunction is a "court order commanding or preventing an action" (Black's Law Dictionary 855 (9th ed. 2009)). A court's decision to grant injunctive relief is a matter of discretion and involves fact-specific inquiries. Courts will not grant injunctive relief when adequate legal remedy is available.

Class Action Lawsuits

A class action lawsuit permits an individual plaintiff to file a lawsuit on behalf of hundreds, or even thousands, of non-parties who have allegedly suffered a common injury from the defendant's conduct. Often these collective lawsuits are the best remedy in cases where individual plaintiff's claims are stronger and more profitable in the aggregate.

The named plaintiff litigates the case, and any eventual damages are divided between non-parties who either opt into the class, or decline to opt out of the class, depending on the case. A plaintiff may

ordinarily bring a class action in federal court, or a defendant may remove a class action to federal court, if the amount in controversy exceeds $5 million in the aggregate.

Shareholder Derivative Lawsuit: If a corporation fails to pursue redress for its own injury, the corporation's shareholders can file a lawsuit on behalf of the injured corporation. In a shareholder derivative suit, the shareholders indirectly assert their rights through the rights of the company.

- A corporation – a legal entity that is separate from its shareholders – can sue for redress when there is an injury suffered to corporate property. If the corporation fails to pursue redress of its injury, the shareholders can file a derivative action on the corporation's behalf.
- Shareholders can file suit directly against corporate directors and officers as individuals for injury suffered by the corporation. In these suits, the shareholders are alleging that the executives' actions or omissions directly caused the company to suffer loss.

Rules in Federal Court – The Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure govern the litigation process in federal district courts. These rules govern the commencement of a lawsuit, filing deadlines, facts to be included in pleadings, permissible parties, the fact discovery process, trial practice, and post-trial procedures.

The federal rules are amended periodically, as such; attorneys must monitor any changes to avoid judicial missteps.

Rule 8 Pleading: The plaintiff does not need to make detailed factual allegations in the complaint. Instead, the complaint need only contain enough factual information to state a claim to relief that is plausible on its face.

This means that a plaintiff is required only to draft a short, plain statement that gives the defendant fair notice of the grounds for the claim, consists of more than labels and conclusory statements, and demonstrates that the plaintiff is entitled to relief.

- A claim is facially plausible when the plaintiff pleads facts that allow the court to draw the inference that the defendant is liable for the alleged misconduct.
- "A well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable and that recovery is unlikely" (*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

Rule 9 Pleading: Allegations of fraud, or those grounded in fraud such as misrepresentation claims, must be pled with particularity. This means that the fraud allegations must be specific enough to give the defendant notice of the particular misconduct alleged.

Averments of fraud must include the who, what, where, when, and how of the alleged misconduct. The plaintiff therefore must explain what is false or fraudulent about the statement or conduct, and why it is false or fraudulent.

Pleading Jurisdictional Facts

The complaint must include a section that explains the basis for the court's jurisdiction over the parties and issues of the case.

The question of whether a court has jurisdiction is an important one. The choice of forum, which can determine the law applied to the facts of the case, is a crucial decision that can significantly alter the outcome of a case.

Local Rules in State Court

State courts may adopt their own rules of procedure. These rules can, and do, vary widely from the rules that govern federal cases. Local rules are extremely important and can affect the outcome of a case; inattention to local rules can result in missed filing deadlines, waiver of time-sensitive defences, and judicial sanctions.

Defendant's Answer

In response to the plaintiff's complaint, the defendant usually files an answer responding to each allegation enumerated. The defendant, however, can avoid having to answer immediately by filing any one of several types of motions to dismiss the complaint. These motions can be dispositive either of the entire case or with respect to specific issues. Certain defences, such as statute of limitations, are affirmative defences that must be asserted in the first responsive pleading.

Jurisdiction

(See Appendix 2.)

A court cannot exercise judicial power over a defendant unless that defendant has submitted to the jurisdiction of that state's courts. Submitting to a court's jurisdiction means that a defendant should not be surprised to be called into that state's courts based on its contact with the forum state.

Courts must have both personal jurisdiction over the parties and subject matter jurisdiction over the disputed issue.

Personal Jurisdiction

Personal jurisdiction is the power of a court over a particular defendant. Because the plaintiff is the master of the complaint – the one who decides when and where to file the case – the act of filing a complaint serves as the plaintiff's consent to that court's jurisdiction.

A court can either have general personal jurisdiction over a defendant or specific personal jurisdiction. See *International Shoe v. Washington*, 326 U.S. 310 (1945).

General Personal Jurisdiction: The defendant's plentiful contacts with the forum state make him subject to the forum state's jurisdiction – even for lawsuits that may be unrelated to the defendant's in-state conduct or transactions.

Plentiful contacts are those that are so substantial and continuous that the defendant should expect to be subject to suit in the forum state.

Example: John Smith lives in State A and owns a restaurant in State B. Jane Doe trips in front of the restaurant and as a result sues John Smith for negligence. Personal jurisdiction is proper either in State B, where the restaurant is located, or in State A, where Smith lives.

Specific Personal Jurisdiction: Jurisdiction arising from specific contacts between the defendant and the forum state. The crucial inquiry is whether the defendant "purposely avail[s][ed]" himself to the benefits and privileges of the forum state.

Example: John Smith is a travelling shoe salesman with an office in State A. Smith passes through State B each week in order to sell shoes in State C. One day, John Smith hits Jane Doe's vehicle in State C and Doe files suit. Personal jurisdiction is proper in State A (general), where his office is located, or State C (specific), the site of the accident. Jurisdiction is not proper in State B, because Smith merely passed through State B to get to State C.

- If, however, the accident occurred in State B, then personal (specific) jurisdiction would have been proper in State B. Jurisdiction (general) may be proper in State C, too, depending on the volume of business that Smith does there.

Consent: A defendant can always consent to litigation in a forum, even if it lacks sufficient contacts with that forum.

Constitutional And Statutory Authority: There must be both constitutional and statutory bases for personal jurisdiction and subject matter jurisdiction.

The due process clause of the U.S. Constitution states the power to

exercise personal jurisdiction over defendants that have a significant relationship to the forum state – e.g. those doing continuous, substantial business in the forum state or those domiciled there.

The state must still confer the statutory authority on the court to exercise personal jurisdiction over the defendant(s). Some states' laws extend this grant to the full extent allowed by the Due Process Clause of the Constitution. Other states limit the jurisdiction of their courts to specific types of contacts between defendants and the forum state.

The necessity for constitutional *and* statutory authority requires a two-part analysis for each defendant. Both of these bases for personal jurisdiction must be pled in the complaint.

Subject Matter Jurisdiction

Subject matter jurisdiction is the power of the court to rule on the particular subject matter of the case; subject matter jurisdiction cannot be consented to or waived.

State courts are courts of general jurisdiction, while federal courts have limited jurisdiction. Due to the limited jurisdiction of federal courts, parties in federal court must have either a federal question at issue or diversity between the parties.

- Subject matter jurisdiction is not waivable and cannot be consented to by the parties. If the parties lack a proper basis for subject matter jurisdiction, a federal court can take note of the lack of subject matter jurisdiction and dismiss the case.

Federal Question Jurisdiction: Requires that there be an issue of federal law on the face of the complaint. This means that at least one cause of action in the complaint must deal with an issue arising under the Constitution or a federal statute or regulation.

- When federal question jurisdiction exists, supplemental jurisdiction allows the parties also to bring state law claims into federal court. The idea behind supplemental jurisdiction is judicial economy; since the parties are already in federal court, they should fully litigate all of the issues that stem from the "same common nucleus of operative facts".

Diversity Jurisdiction: Requires that the parties be citizens of different states and have an amount in controversy that exceeds $75,000.

In a diversity case, a federal court must apply the choice-of-law rules of the state in which it sits. That rule is designed to discourage forum shopping by ensuring that federal decisions mirror state-court ones. Federal courts apply federal law in federal question cases.

- A corporation is a citizen of up to two states: its state of incorporation and the state where it has its principal place of business.

Class Action Fairness Act: in order to file a class action lawsuit in federal court there only needs to be: (1) minimum diversity, which means any plaintiff is from a state different than any defendant; (2) an aggregate claim of at least $5 million; and (3) and more than 100 plaintiffs.

Removal Jurisdiction

Removal occurs when a defendant petitions to move a case from state court to federal district court. Removal is only permitted if the complaint could have originally been filed in federal court (via federal question or diversity jurisdiction).

All defendants must agree to remove the case to federal court, or else it remains in state court.

- The ability to remove a case to federal court is meant to protect the defendant from a foreign and potentially hostile forum. State courts are generally viewed as favourable to plaintiffs, who often are residents of the state. Federal courts, by contrast, are generally viewed as more neutral forums.
- If a case is filed in the defendant's home state court, then the defendant cannot remove the case to federal court – unless there is a federal question – because the defendant is not being subjected to a foreign, potentially biased, forum.

Transfer

In the interest of justice and for the convenience of the parties, a federal district judge can transfer a case to another federal district. Transfer is valid only if it is to a forum in which the plaintiff could have originally filed the case.

- The analysis that the original court would have used to select the applicable law does not change after venue is transferred. The transfer statute was drafted as a "federal housekeeping measure" to make it easier for district court judges to transfer cases. Transfer was not meant to encourage forum shopping by dissatisfied defendants. Therefore, even after a case is transferred, the choice-of-law rules of the original forum apply.

Forum Non Conveniens: When a forum is inconvenient for the parties, or the forum has no apparent ties to either party or the case, the interests of judicial economy and a fair trial allow the case to be dismissed so that it can be refiled in a more convenient forum.

Unlike transfer, once a case is moved on *forum non conveniens* grounds, the new court can use its own choice-of-law rules to select the applicable law that will be applied to the case – even if that law turns out to be less favourable to the plaintiff's chance of recovery.

- *Forum non conveniens* can be raised by either the court or the defendant(s).
- Case Strategy—"*Up, Over, and Out*": the defendant in *Piper Aircraft v. Reyno* used this strategy to *remove* the case *up* from state court to federal district court, *transfer* the case *over* to a different federal district court, and then *forum non conveniens* the case *out* of the United States to Scotland, which was a less favourable forum for the plaintiff due to the lack of generous punitive damage awards (454 U.S. 235 (1981)).
- In Piper Aircraft, Scotland was deemed a more convenient forum for the case because it was the situs of crash; most of the evidence and many of the potential witnesses lived there.

Preemption By Federal Law

Under the Supremacy Clause of the U.S. Constitution, a state law that interferes with, or is contrary to, federal legislation is invalid.

Federal preemption of state law can be either express or implied. There are two types of implied preemption: field preemption and conflict preemption.

Express Preemption: When Congress expressly states its intent that a particular piece of federal legislation should preempt state law.

Field Preemption: When congressional intent to preempt state laws can be inferred because the federal interest is so dominant and sufficiently comprehensive to preclude the enforcement of state law on the same subject. This is a type of implied preemption.

Conflict Preemption: When Congress has not displaced all state law in a given area, yet state laws are nullified to the extent that they actually conflict with federal regulations. This is also a type of implied preemption.

Extraterritorial Jurisdiction

Extraterritorial jurisdiction concerns whether laws from one country will be applied outside that country and upon the citizens of another country. U.S. courts treat laws differently as to extraterritorial application – that is, for example, courts presume that environmental statutes should not be applied extraterritorially, but antitrust laws are applied extraterritorially.

Motions

Motions are a procedural device, in which a party petitions the court – in writing or orally – to rule on a specific issue. Motions practice is a vital feature of civil trial practice in the U.S. judicial system; judgments can be rendered and cases can be dismissed in response to motions.

There are various types of motions, including dispositive motions, which can decide the outcome of a case; motions *in limine*, which ask the court to allow or prevent the introduction at trial of certain evidence; or motions for summary judgment, which ask the court to make an early ruling on the merits of the case, based on the facts then in evidence. Each of these types of motions can be filed by either the plaintiff or the defendant.

Pre-Answer Motions – 12(b) Motions

Pre-answer motions are an alternative to answering the complaint. These motions are governed by Rule 12(b) of the Federal Rules of Civil Procedure. Some of the enumerated 12(b) defences merely alert the court of procedural defects in the plaintiff's case, which can usually be remedied by the plaintiff.

Other 12(b) defences, however, can result in the dismissal of all or parts of the case. For this reason, 12(b) motions can be vitally important. A successful 12(b) motion negates the need to draft and file an answer to the complaint, which may require a defendant to make damaging admissions.

- Procedural 12(b) defences include the defence for insufficiency of service of process, which attacks the manner in which the complaint was served; or the failure to include an indispensible party, which attacks the scope of the plaintiff's suit.
- Substantive 12(b) defences include the lack of subject matter jurisdiction or lack of personal jurisdiction. These defences highlight the court's lack of power over the parties or subject matter. If valid, the court will dismiss the case. The plaintiff will then have to re-file the case in an appropriate jurisdiction.

Waiver of 12(b) Defences: Certain 12(b) defences must be raised in the defendant's first response to the complaint – whether in a motion or in the answer itself – or the court will consider them waived. They are objections to the venue (court), form of process, method of service of process, or the court's personal jurisdiction.

The 12(b)(6) Motion – Failure to State a Claim

A 12(b)(6) motion argues that the plaintiff has failed to allege a legal wrong and therefore cannot ultimately obtain any legal relief. This motion is an attack on the substantive merits of the plaintiff's case and can result in dismissal, although a plaintiff is usually given the opportunity to cure the defect in his claim.

- For the purposes of a 12(b)(6) motion, the court assumes that the facts alleged in the complaint are true and does not consider whether the plaintiff is likely to prove his case.

12(b)(6) Claim Dismissal Standard: Based on the foregoing principles, the court will not dismiss the plaintiff's claim if the "complaint ... [contains] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face" (*Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)) (quotations and citation omitted).

Discovery

Liberal discovery is at the heart of the American civil litigation system; it affords the parties access to any information that may aid them in building a case. To that end, any information that may be relevant to the claims and defences raised in a case is discoverable – even if it is inadmissible at trial.

The discovery rules provide that, "[f]or good cause, the court may order discovery of any [relevant] matter .... Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Privileged information and attorney work products, however, are not discoverable.

This broad access to evidence is meant to make the trial process transparent, by providing each party with access to the same information. Broad access encourages settlement by keeping the parties apprised of the relative strengths and weaknesses of their respective cases.

- Even after discovery disclosures have been submitted, parties have a duty to update their discovery responses.
- The discovery process is directed by the parties rather than the judge. During discovery, the judge merely acts as a referee for any disputes that may arise.
- Discovery in criminal cases is much more limited than civil discovery, which can take years.

Evidence is obtained primarily through the three discovery vehicles: interrogatories, oral depositions, and requests for production.

Interrogatories: One of the easiest discovery tools to employ, interrogatories are written questions that are answered under oath. This relatively inexpensive tool is one of the most efficient means of obtaining the background information that is essential in building a case. Interrogatories are typically used during the early phases of the discovery process.

Interrogatories are also useful in getting a plaintiff to specify the grounds of his claim.

- In federal court, a party has 30 days to respond to interrogatories. A total of 25 interrogatories are permitted per side, but the judge can increase that number at his discretion.

Depositions: This process of questioning a witness, or potential witness, under oath mirrors trial testimony. Attorneys for each party and the witness in question are present, along with a court stenographer and sometimes a videographer. Testimony is given under oath, and a witness is subject to perjury if he gives false or misleading answers.

Depositions allow attorneys to get a sense of the impression that an opponent will make while testifying at trial. Depositions also allow counsel to get a sense of how their own client will do on the stand and the best ways to prepare their client for trial testimony.

- In federal court, each side is allowed to conduct 10 depositions of up to seven hours each. The judge can increase the number of depositions or duration of the questioning, or provide for a second deposition of a witness.
- During a deposition, a witness can be cross-examined by his own attorney. A witness's counsel can object to questions asked during the deposition. Such objections are noted on the record, but the witness must nonetheless answer each question. The witness does not need to answer questions that would violate a privilege.

Requests for Production of Documents (RFPs): At the heart of the open access promoted by discovery, RFPs require an opponent to open their files and produce documents for inspection and

copying. These written requests are not limited to documents but can also reach physical evidence.

A party that objects to production has the burden of convincing the judge that there is good reason to withhold the items in question from its opponent.

RFP production can be an extremely costly process that can unearth thousands – if not millions – of discoverable documents and items. Nonetheless, parties are obligated to produce all documents that fall within the bounds of the request. Failure to produce requested items can result in steep judicial sanctions.

Protective Orders: Even relevant evidence can be withheld "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense".

Court-approved protective orders can be sought to prevent the revelation of intimate facts that should remain private, to shield a party from abusive discovery requests, and to protect proprietary business information.

Preservation of Documents

Litigants have a duty to preserve relevant documents that could be used as evidence in "pending or reasonably foreseeable litigation". Reasonable anticipation of litigation triggers the duty to suspend routine document retention/destruction policies and put in place a "litigation hold".

A party's counsel must oversee compliance with the litigation hold by monitoring the party's efforts to retain and produce relevant documents. A proper litigation hold notice directs employees to preserve all relevant records, and creates a mechanism for collecting and preserving records so they can be searched by someone other than the party's employees. Courts have ruled that corporate employees cannot be relied upon to search records and select responsive documents. Counsel must supervise this process.

The process of preserving documents requires candor and communication between counsel and client. Proper execution ensures accurate discovery disclosures and prevents the imposition of sanctions for discovery abuses.

E-Discovery: Due to the widespread use of electronic communication, electronic discovery has emerged as a burgeoning, quickly evolving area of law. Because e-discovery is a relatively new legal issue, there is still considerable uncertainty about the expectations of electronic document production, and the consequences of failing to meet judicial expectations. The bulk of e-discovery law is coming from judges on the federal court in the Southern District of New York – a common forum for cases involving international parties.

Failure to preserve electronic documents or properly search for electronic records can result in steep sanctions – and foreign parties are expected to abide by the same stringent preservation requirements. Once a party reasonably anticipates litigation, the party must suspend its routine document retention and destruction policy, and put a litigation hold in place. The process of implementing a judicially acceptable litigation hold requires careful coordination with counsel.

Counsel's Role In E-Discovery: Courts have ruled that counsel must supervise discovery – including e-discovery. This process begins with counsel circulating a litigation hold notice once there is a reasonable anticipation of litigation.

In the Internet age, this supervision of document retention and preservation includes becoming fully familiar with the client's document retention policies, speaking with in-house information technology experts, and communicating with "key players" and potential witnesses in the litigation to better understand their retention practices.

Spoliation of Evidence: The destruction or significant alteration of evidence, or failure to preserve property for another's use as evidence, can result in severe sanctions. If the court finds a party guilty of spoliation of evidence, the sanctions can include an adverse jury instruction or payment of the opposing party's discovery expenses (*Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004)) (failure to properly preserve electronic data resulted in extraordinary damages award, after jurors were told to assume missing e-mails were supportive of plaintiff's case).

International Organisations

Sometimes U.S. discovery obligations conflict with international laws. While discovery in the United States is based on the presumption that corporations own the data that is in their possession and control – as is generally true for American companies – corporations in other countries often allow individuals to retain the rights to data pertaining to them, even after that data has been disclosed to a third party. This data protection, which extends to corporate employees, can be an obstacle to the American discovery process.

Moreover, labour laws and blocking statutes can severely limit the discoverable evidence that an adverse party receives from a foreign opponent.

For instance, in the United States, if an employee engages in personal conduct or communications on corporate networks, they waive the right to keep that information private from their employer. Labour laws, however, may bar employer access to employees' private information even if it is held on the employer's network.

Further, discovery directed by a foreign tribunal – via blocking statutes – can prevent the production of evidence that is relevant and discoverable in U.S. litigation.

- Solutions to these conflicts differ depending on the legal restrictions imposed by the country in question. They include obtaining consent from data subjects, requesting that the U.S. court relieve the foreign entity of its discovery obligations, and reviewing and redacting the protected information on foreign soil prior to transfer to the United States.

In these situations, it is imperative that foreign litigants work closely with their U.S. counsel to avoid the imposition of steep discovery sanctions and violation of their own nation's laws.

Privilege

Privilege is the chief limitation to the vast breadth of American discovery; privileged information is not discoverable. Privileged communications include those between a priest and penitent, a doctor and patient, a husband and wife, and a psychotherapist and patient. Most importantly for present purposes, communications between an attorney and client that are made in anticipation of trial are also privileged.

Attorney-Client Privilege

A client's communications with its attorney are protected. This protection is meant to facilitate "full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice" (*Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

This privilege extends only to communications that the client either expressly makes in confidence or reasonably believes are made under circumstances that should remain confidential.

The client is the keeper of the privilege, which means that the attorney cannot reveal the client's confidences without the client's permission. If the client, however, divulges privileged information to an unauthorised third party, the privilege is waived.

In-House Counsel: Legal advice that is incidental to business advice is not protected by the attorney-client privilege. This means that communications between a corporate executives and corporate in-house attorneys is not privileged if the attorney is acting as a business adviser. Generally, courts deem communication between corporate executives and in-house attorneys to be business-related rather than legal. This rule is meant to prevent corporations from using their in-house counsel to cloak otherwise unprivileged information.

Beware: Internal e-mail chatter is discoverable, even if it is between in-house counsel and corporate employees.

- The limits placed on in-house counsel make external counsel a valuable, vital tool in communications between corporate co-defendants, or co-parties, throughout the litigation process. External counsel has the ability to coordinate with the counsel of co-parties and ensure that trial strategy among non-adverse parties is uniform and aligns with the corporation's legal interests.

Attorney Work Product: Materials generated in anticipation of litigation are not discoverable. Memos, briefs, e-mails, and other writings that reflect an attorney's mental impressions, conclusions, opinions, or legal theories are protected by the work-product privilege. This protection extends to information that an attorney obtains from a witness on his client's behalf.

Motions for Summary Judgment

Usually filed at the conclusion of discovery, summary judgment motions ask the court to enter a judgment in favour of either the defendant or the plaintiff without going to trial. The granting of summary judgment can resolve an entire case or merely decide particular issues in a multi-issue case.

Summary judgment is only appropriate if the evidence demonstrates that there are no issues of material fact. For instance, if the evidence demonstrates that the plaintiff cannot prove a vital element of his claim, then the defendant can file a motion for summary judgment. If the plaintiff, however, can show that there is sufficient evidence to persuade a jury to resolve the issue in his favour, then summary judgment must be denied.

- Summary judgment can mitigate the cost of litigation and can conserve judicial resources.
- Many cases settle after summary judgment motions have been submitted but before the judge rules. That is due to the fact that a party, in drafting a summary judgment motion, often evaluates the strength of its case in light of all of the evidence obtained through discovery.

Trial

The U.S. Constitution guarantees a jury trial in many, though not all, civil cases. Where a jury trial is available, if any party invokes that right, the case will be decided by a jury. If no party requests a jury trial, then the case is litigated before a judge in what is known as a bench trial.

A bench trial is preferable if the facts of a case are complex and might be difficult to explain to the ordinary citizens who constitute a jury. Bench trials also are generally shorter. The decision rendered by the finder of fact – judge or jury – is binding on the parties, although parties have the ability to appeal the final ruling.

The federal courts of appeals have automatic review of judgments in civil cases. Likewise, most states have an intermediate appellate court that automatically reviews cases upon the request of a litigant. The U.S. Supreme Court and most state supreme courts, however, have discretionary review, which means they can select the cases that they want to consider for appellate review.

- The general perception is that jurors favour "the little guy" and punish large corporations or monied litigants.
- The introduction of evidence in federal courts is governed by the Federal Rules of Evidence. Each state promulgates their own rules of evidence, although state rules piggyback on the federal rules to some extent.
- There is no fee-shifting in American litigation – each side pays their own expenses. A plaintiff therefore must carefully consider the benefits of filing suit, since even a victory can be costly and fail to net any economic benefit. The absence of fee-shifting also means that some frivolous claims are filed by plaintiffs who know they will not have to pay their opponent's legal fees.

Settlement: Each phase of trial presents an opportunity for the parties to settle; going to trial is an expensive process with an uncertain outcome. Courts broadly encourage settlement.

The American litigation system is in many respects devised to facilitate settlements. Through the various stages of trial, the parties have the ability to assess the strengths and weaknesses of their respective cases, and can easily petition the court for an early judgment (summary judgment motions). As a result, about 95% of cases settle before going to trial.

- Settlements are legally-binding contracts that are usually confidential.

Alternative Dispute Resolution (ADR)

Alternative Dispute Resolution (ADR) enables the parties to resolve their legal issues without having to set foot in court. These non-judicial resolution tools are becoming more popular with judges with heavy caseloads. Some courts, particularly state courts, require parties to attempt to resolve their issues through ADR first.

Parties also are beginning to favour ADR because it presents a quick, cheap alternative to trial. ADR also allow the parties to select a neutral third-party factfinder. This can be beneficial in cases with complex facts or industry-specific cases. Parties often select intermediaries who have expertise in the area of the dispute. There are multiple ADR methods. The most common are mediations and arbitrations.

Mediation: A third-party mediator guides the parties toward a resolution. Mediation is a confidential, collaborative process that is not legally-binding. Mediation agreements can be made legally-binding if they are registered with a court.

A benefit of mediation is that it can preserve a relationship between parties who may want to again work together.

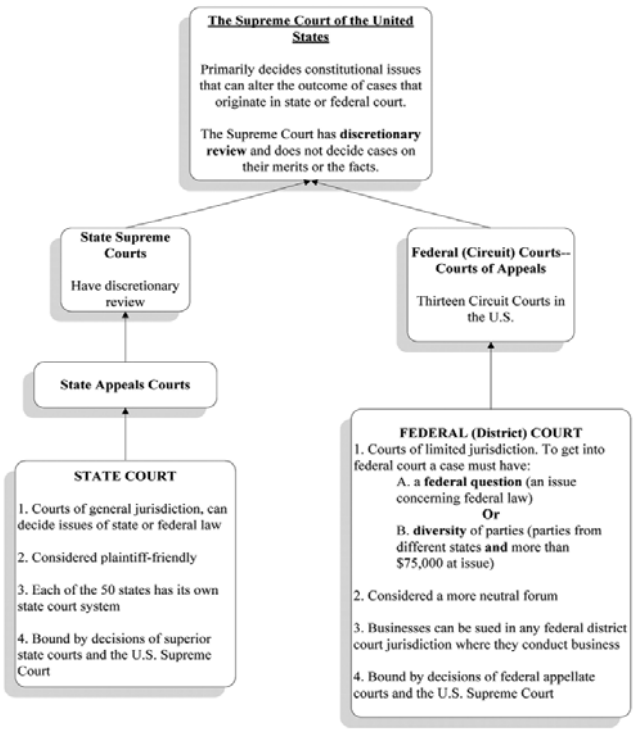
- Mediation agreements – signed before mediation proceedings begin – allow the parties to agree on important procedural issues and decide administrative questions, such as how to pay the mediator.
- Laws governing mediation vary greatly from state to state.

Arbitration: Parties select a third-party arbitrator, who acts as a private judge, to "try" their case. The arbitrator's ruling, which is binding on the parties, is hard to successfully appeal in court.

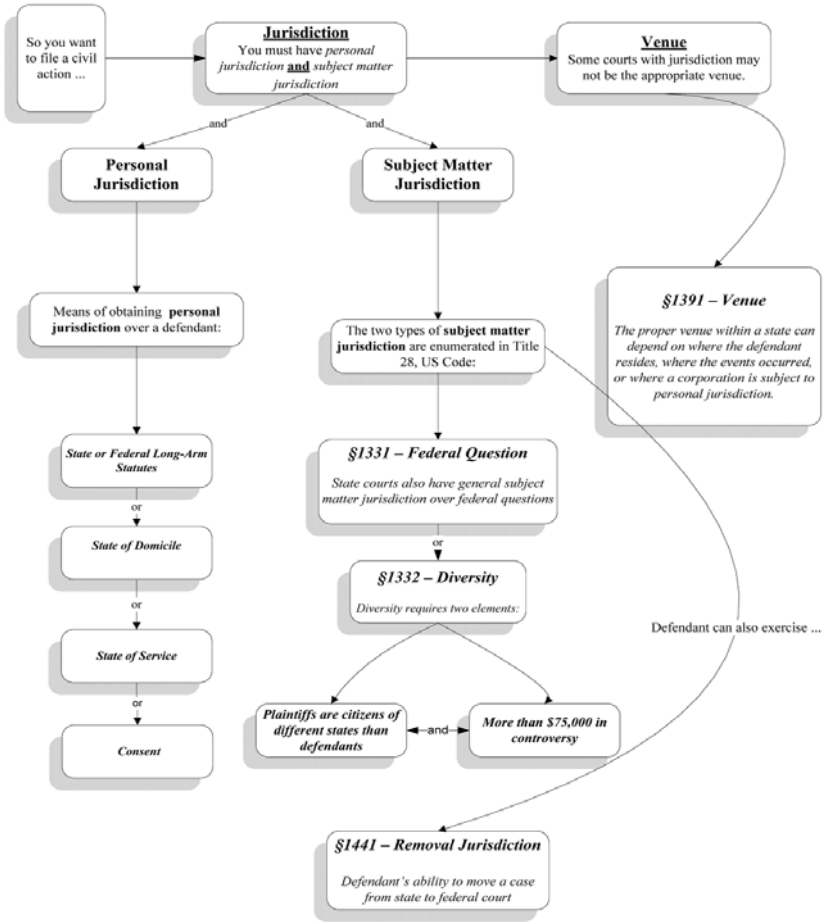
Parties often contractually agree to settle future disputes before an arbitrator. In recent years, however, the enforceability of arbitration clauses has come under scrutiny.

- The law that is to govern an agreement between parties (e.g., federal law or the law of a particular state) should be included in a contract's arbitration provision. If the governing law is omitted, a court or arbitrator will be able to select the governing law after the dispute has commenced. That creates unnecessary uncertainty when conducting business and could lead to adverse results where the law differs from jurisdiction to jurisdiction.

Appendix 1



Appendix 2



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John K. Villa, a partner, was named to National Law Journal's list of "100 Most Influential Lawyers in America" as "the first lawyer that other attorneys and law firms turn to when caught up in the S&L and banking scandals." The PLC Global Counsel's Handbook calls him "an exceptional banking, financial and corporate governance litigator." Chambers says "John Villa is the 'first name to come to mind for financial services litigation matters.'" American Lawyer describes him as "perhaps the premier [legal] malpractice defense lawyer in the nation." Financial Times reports, "John Villa … has a reputation for being the lawyer that law firms turn to when in a spot of bother." He has authored the following treatises: Banking Crimes: Fraud, Money Laundering and Embezzlement (2 vol.) (Thompson-West), Bank Directors' and Officers' and Lawyers' Civil Liabilities (Aspen), and Corporate Counsel Guidelines (2 vol.) (1999), (co-published by Thompson-West and Association of Corporate Counsel (ACC).

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Kannon Shanmugam is a partner at Williams & Connolly, focusing on litigation before the United States Supreme Court and other appellate courts. He has been described as a "wunderkind" (*Am Law Litigation Daily*) and "rising star" (*Legal Times*) of the Supreme Court bar. He has argued ten cases before the Supreme Court, more than any other lawyer in the firm's history except its founder, Edward Bennett Williams. Kannon joined Williams & Connolly in 2008 after serving as an Assistant to the Solicitor General in the Department of Justice. Kannon went to Harvard at age 16, where he majored in classics and graduated *summa cum laude*. After being selected as a Marshall Scholar, he obtained a master's degree in classics from the University of Oxford. He then returned to Harvard Law School and graduated *magna cum laude*. After law school, he served as a law clerk to Justice Antonin Scalia at the United States.

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Vidya Mirmira, a partner at Williams & Connolly, has extensive experience in complex corporate litigation and employment-related matters. She has represented clients at the trial and appellate level. Vidya's litigation experience includes securities and financial services litigation, nationwide pharmaceutical products liability cases, professional malpractice cases, employment matters, and general commercial litigation. Vidya has also prevailed at trial and on appeal on behalf of clients facing serious criminal charges. Vidya graduated *summa cum laude* from Purdue University, with a bachelors of science in electrical engineering and a minor in economics. She then attended the University of Chicago law school, where she co-founded the Chicago Journal of International Law and graduated with honors. Vidya has practiced at Williams & Connolly since 2001. Before joining Williams & Connolly, she was a law clerk to the Honorable Carolyn Dineen King, then Chief Judge of the United States Court of Appeals for the Fifth Circuit.

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