

United States

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TYPES OF DISPUTE RESOLUTION

1. Please give a brief overview of the main dispute resolution methods used in your jurisdiction to settle large commercial disputes, identifying any recent trends.

Litigation

Civil litigation is the primary method for resolving large commercial disputes. Procedures differ from court to court, but the litigation process is generally defined by the following:

- Initial pleadings.
- Dispositive motion practice.
- Submission of a joint discovery plan by the parties.
- Mandatory disclosure of key information and evidence.
- Written discovery, including document requests and interrogatories.
- Fact and expert deposition discovery.
- Further dispositive motion practice.
- Trial to adjudicate disputed facts.
- Appeals.

For complex disputes, the most time-consuming and expensive aspect of litigation is the discovery process, which often creates disputes over the quality and quantity of information disclosed by one party to another. Recent trends in litigation relate to considering effective ways to manage the discovery process, including the proper preservation, collection and production of electronically stored information.

Alternative dispute resolution (ADR)

ADR is an umbrella term covering any dispute resolution method other than traditional court litigation. State and federal courts generally welcome ADR as a positive alternative to litigation. Indeed, the Alternative Dispute Resolution Act requires all federal courts to establish some form of ADR (28 U.S.C. § 651 *et seq.*). The two most common ADR methods are mediation and arbitration:

- **Arbitration.** In arbitration, parties agree to submit their dispute to a neutral third party or panel to hear their dispute and issue a final decision on the merits. Private parties often consider arbitration a cost-efficient alternative to traditional litigation. Therefore, a growing number of contracts contain arbitration clauses requiring the parties to submit any disputes to binding arbitration. Courts strictly enforce clauses that require parties to submit their disputes to arbitration (9 U.S.C. § 1 *et seq.*).

For more information on arbitration in the US, see the *PLC Cross-border Dispute Resolution Handbook 2010/11 Volume 2: Arbitration, Country Q&A, United States*.

- **Mediation.** The parties can submit their dispute to a neutral third party called a mediator. However, unlike arbitration, the mediator generally has no authority to issue a binding decision on the merits. Instead, the mediator attempts to help the parties negotiate a settlement.

COURT LITIGATION - GENERAL

2. What limitation periods apply to bringing a claim and what triggers a limitation period? Please briefly set out any different rules for particular areas of law relevant to large commercial disputes, for example contract, tort and land disputes.

Limitation periods for particular claims vary from state to state. Lawyers must consult the law of the state where the claim is filed. For example, the limitation period for a breach of contract claim is:

- Six years in New York.
- Four years for a written contract and two years for an oral contract in California.

In general, the limitation period begins to run at either the:

- Time when a claim accrues.
- Time when the injury is suffered.

In some cases, it may not be reasonably possible for a person to discover the existence or cause of an injury until a long time after the injury occurs. In these cases, a claim can be filed within a certain period of time after the injury is discovered or reasonably should have been discovered.

For an action to be dismissed as time-barred, litigants must raise the statute of limitations as an affirmative defence, requiring it to be plead in responsive pleadings (*Rule 8(c), Federal Rules of Civil Procedure (FRCP)*).

3. Please give a brief overview of the structure of the court where large commercial disputes are usually brought. Are certain types of dispute allocated to particular divisions of this court (for example, IP, competition or maritime disputes)?

The US has a dual judiciary system:

- Federal courts.
- State courts.

Both have jurisdiction over large commercial disputes. Generally, federal courts have limited jurisdiction, while state courts have general jurisdiction over any type of case that does not fall within

the exclusive jurisdiction of the federal courts. However, most large commercial cross-border disputes meet federal jurisdictional requirements and are heard in federal court.

The rules in the state courts largely mirror those in the federal courts, as provided in the FRCP.

Federal courts

Federal district courts have jurisdiction over two categories of cases:

- **Diversity of citizenship.** These cases involve disputes between citizens of different states and disputes between US citizens and foreign citizens. The amount in dispute must exceed US\$75,000 (about EUR58,600). If the issues concern matters of state law, the federal courts are often required to apply state law.
- **Federal question.** These cases involve certain claims arising under federal law, including:
 - suits between states;
 - claims against the government based on contracts, statutes or the US Constitution;
 - cases involving ambassadors and other high-ranking public figures;
 - federal crimes, defined by or mentioned in the US Constitution, or those defined and/or punished by federal statute;
 - bankruptcy;
 - patent, copyright and trade mark cases;
 - admiralty and maritime claims;
 - anti-trust claims;
 - securities and banking regulation, including securities fraud and other securities law violations;
 - other cases specified by federal statute.

State courts

The state court systems vary. Many systems provide courts of general jurisdiction and courts limited to disputes involving smaller amounts or specific issues. For example, in some states the courts are divided into courts of equity or law, depending on the nature of the relief sought. For example:

- In Delaware, corporate governance matters are usually resolved in the Chancery Court, which is widely considered to be the best forum for resolving corporate disputes.
- In New Jersey, the Chancery Division handles cases seeking equitable relief, such as injunctions or decrees directing someone either to act or to refrain from acting.
- In New York, major commercial lawsuits, whether for equitable or monetary relief, are assigned to a commercial division of the New York State Supreme Court. The subject matter of the cases must be commercial, including:
 - a breach of contract or fiduciary duty;
 - fraud or misrepresentation;
 - business torts (for example, unfair competition);
 - disputes involving the sales of assets or securities;
 - corporate restructuring;
 - partnership, shareholder, joint venture and other business agreement disputes;

- trade secrets;
- restrictive covenants;
- employment agreements not including claims that principally involve alleged discriminatory practices;
- malpractice by accountants, actuaries or lawyers arising out of representation in commercial matters;
- applications to stay or compel arbitration, or disaffirm an arbitration award;
- transactions involving commercial real property;
- shareholder derivative actions;
- commercial class actions;
- business transactions involving or arising out of dealings with commercial banks and other financial institutions;
- internal affairs of business organisations.

Unless otherwise noted, the answers to the following questions relate to the procedures that apply in federal courts, where most large commercial cross-border disputes are adjudicated.

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

Generally, lawyers must have a licence to practice law in the state in which they wish to appear. They obtain a licence by passing a state-administered bar exam. Because each state has its own bar, a lawyer who is admitted to practice in one state is not automatically allowed to practice in another. However, some states have reciprocal agreements that allow lawyers from other states to practice without sitting for another full bar exam.

A lawyer who is not licensed in a particular state, but who wishes to represent a client in a particular matter in that state, can petition the court to provide direct representation *pro hac vice* (that is, for this occasion). A number of jurisdictions require that the non-local lawyer partner be accompanied by a local counsel for the purposes of:

- Service of process.
- Attendance at court.
- Assumption of responsibility.

Federal courts have their own admission requirements, which differ from district to district. Once admitted to the state bar, admission to the bar of a federal district or appellate court of the same state can be granted on:

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

Generally, federal courts also allow a lawyer admitted in a different jurisdiction to appear *pro hac vice* for a specific matter.

Foreign lawyers without bar admission to a US state cannot conduct cases in state or federal courts. However, several states allow foreign-educated lawyers to sit for the bar exam. Others provide licences for foreign legal consultants (that is, lawyers from

other countries with limited permission to practise, for example, in relation to their home country's laws only).

FEES AND FUNDING

5. What legal fee structures can be used? For example, hourly rates, task-based billing, and conditional or contingency fees? Are fees fixed by law?

Clients and lawyers can usually agree to any fee arrangement they wish, if the fee is not excessive or unconscionable. Fee structures include:

- Hourly rates.
- Task-based or flat fees.
- Contingency fees based on a percentage of the monetary recovery.
- A combination of the above.

Hourly rates are the most common fee structure in large commercial disputes. However, alternative fee arrangements (AFAs), such as reduced hourly rates with a contingent bonus, have become increasingly popular.

The legal fees charged for commercial disputes vary widely among lawyers and are not set by courts or legislation. In some cases, statutes for certain types of actions permit the courts to award lawyers' fees to the prevailing party. In addition, some contracts between parties specifically provide for the award of lawyers' fees if there is a dispute between the parties.

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

Funding

The parties usually bear their own costs as they are incurred. If a lawyer accepts the case on a contingency basis, the client agrees to pay either:

- Nothing but the lawyer fees out of the ultimate recovery of damages, if any.
- The costs and the lawyer fees out of the ultimate recovery of damages, if any.

Insurance

Third parties, such as insurance companies, can also fund litigation costs. For example, many corporations are required to fund the defence of their directors and officers when those employees are sued in their official capacities. Therefore, corporations often purchase insurance to pay for these expenses. While controversial, other types of third-party litigation funding are increasingly popular in the US (for example, investment groups whose primary purpose is to fund corporate litigation 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?

Court proceedings are generally open to the public. This includes papers filed with the court. However, in large commercial cases, the parties usually agree on protective orders, signed by the court. These protect the confidentiality of information exchanged in the litigation. In certain circumstances, parties file papers with the court under seal, usually with the court's permission, to prevent public disclosure.

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. However, certain rules relating to the preservation of evidence apply once a party learns of the potential litigation against it. Specifically, parties must institute "litigation holds" to preserve paper or electronic evidence in anticipation of litigation, including suspending usual document retention rules. These "litigation holds" typically take the form of a document retention memo sent to all individuals likely to have responsive information, setting out detailed instructions about preserving documents potentially relevant to the lawsuit. If the court finds that a party has destroyed evidence (spoliation of evidence), it has broad discretion to impose sanctions. This includes giving an adverse-inference instruction allowing the jury to infer that the evidence was harmful to the party that destroyed it.

In addition, a party must ensure that written representations made to the court are made to the best of its knowledge, information and belief, formed after an inquiry reasonable in the circumstances (*Rule 11, FRCP*). The representations must not be made for any improper purpose. In addition, the legal contentions must be warranted by existing law and/or be non-frivolous in nature, and the factual contentions must have or be likely to have evidentiary support. The court can penalise violations of Rule 11 of the FRCP.

9. Please briefly set out the main stages of typical court proceedings, including the time limits (if any) for each stage, any penalties for non-compliance and the role of the courts in progressing the case. In particular:

- How a claim is started.
- How the defendant is given notice of the claim and when the defence must be served.
- Subsequent stages.

Starting proceedings

Proceedings are started by filing a complaint, which sets out the claimant's case against the defendant. In general, the complaint must include (*Rule 8, FRCP*):

- A description of the parties.
- The basis for jurisdiction.
- A clear and concise statement of the facts supporting the claims at issue.
- A short and plain statement of the claims.
- A demand for the relief sought.

Some causes of action, such as fraud, have heightened pleading requirements.

Notice to the defendant and defence

Once the complaint is filed, the claimant must serve on the defendant a (*Rule 4, FRCP*):

- Summons (issued by the court clerk).
- Copy of the complaint.

The deadline for service varies among state courts. In federal courts, the claimant must serve the defendant within 120 days of filing the complaint. The parties can negotiate extensions for this and all other deadlines listed below.

Subsequent stages

The defendant must answer, move or otherwise respond to the complaint within 21 days of the service of the complaint. An answer admits or denies the allegations in the complaint and must include affirmative defences and counterclaims. Alternatively, before answering the complaint, a defendant can choose to move to dismiss the complaint on a number of grounds, including (*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.

If a motion to dismiss is denied, the defendant has 14 days after the denial to submit an answer to the complaint.

Shortly after this initial pleadings stage, the parties present a joint discovery plan to the court. The court then issues a scheduling order setting out deadlines for subsequent proceedings. These proceedings are generally defined by the following:

- Written discovery, including document requests and interrogatories.
- Mandatory disclosure of key information, documents and expert opinion evidence.
- Fact and expert deposition discovery.
- Dispositive motion practice.
- Trial to adjudicate disputed facts.

INTERIM REMEDIES

10. What actions can a party bring for a case to be dismissed before a full trial (for example, summary judgment or for a claim to be struck out)? On what grounds must such a claim be brought? Please briefly outline the procedure that applies.

A party can seek to dismiss a case before a full trial through filing a motion:

- **To dismiss.** This must be filed before the defendant serves an answer to the complaint and is based on one of the defences

listed in Rule 12(b) of the FRCP. The most common basis for this motion is the failure to state a claim on which relief can be granted. This challenges the legal sufficiency of a claim based on the pleadings alone (*Rule 12(b)(6), FRCP*).

- **For judgment on the pleadings.** This also challenges the legal sufficiency of the complaint without reliance on matters outside the pleadings. However, unlike a motion to dismiss, it is filed after the answer to the complaint has been filed (*Rule 12(c), FRCP*). If matters outside the pleadings are presented, the motion is usually converted into one for summary judgment.
- **For summary judgment.** This determines whether the claim should go to a jury (*Rule 56, FRCP*). The party filing the motion must demonstrate that there is no genuine issue of material fact and that the party is entitled to judgment as a matter of law. Unlike the other types of motions, a party can rely on evidence outside the pleadings, such as affidavits from witnesses, 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?

Typically, a defendant cannot apply for an order for the claimant to provide security for its costs. Preliminary injunctions and temporary restraining orders (*see Question 12*) are the exception to this general rule.

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

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

Parties can obtain a preliminary injunction or temporary restraining order in appropriate circumstances (*Rule 65, FRCP*). A preliminary injunction is only granted on notice. A temporary restraining order can be granted without notice on the same day. It remains in force until a hearing is held in relation to the request for a preliminary injunction.

A party must show all of the following:

- An irreparable harm is likely to occur if the relief is not granted.
- The underlying claim is likely to succeed on the merits.
- The balance of equities tips in its favour.
- An injunction is in the public interest.

A party seeking a temporary restraining order must demonstrate that the risk of irreparable harm is immediate.

The party seeking a preliminary injunction or temporary restraining order must give security sufficient to pay the costs and damages of the opposing party if the court determines that the party was wrongfully enjoined or restrained.

In addition to interim injunctions enjoining or restraining a party from acting, injunctions can also compel a party to do something.

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

- Are they available and on what grounds must they be brought?
 - Can they be obtained without prior notice to the defendant and on the same day in urgent cases?
 - Do the main proceedings have to be in the same jurisdiction?
 - Does attachment create any preferential right or lien in favour of the claimant over the seized assets?
 - Is the claimant liable for damages suffered as a result of the attachment?
 - Does the claimant have to provide security?
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Attachment is governed by Rule 64 of the FRCP. A claimant can acquire a pre-judgment lien on the defendant's property, on posting a bond. In general, attachment can be awarded if it would be authorised under the law of the state in which the federal court is located.

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

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

The applicable law varies from state to state. If wrongfully attached property is not recoverable, the measure of damages is generally the value of the property plus interest.

14. Are any other interim remedies commonly available and obtained? If yes, please give brief details.

No other interim remedies are commonly available.

FINAL REMEDIES

15. What remedies are available at the full trial stage (for example, damages and injunctions)? Are damages just compensatory or can they also be punitive?

A range of remedies are available to a successful party, depending on the cause of action and the facts in issue. The remedies available for a particular claim are determined by the applicable substantive law.

The most common remedy sought in commercial cases is money damages. Litigants can recover their actual damages for past and future harm. Damage must be proven with reasonable certainty. Punitive damages are also available in certain cases to punish wilful and malicious conduct.

Some other types of remedies that may be available are:

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

EVIDENCE

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

A party's disclosure obligations are very broad and are generally governed by Rule 26 of the FRCP. Before a request for discovery has been made, party must produce all documents, electronically stored information and tangible things that it both (*Rule 26, FRCP*):

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

The parties can then request discovery regarding any non-privileged matter that is relevant to any party's claim or defence (*FRCP*). Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence (that is, a party seeking discovery need not establish the admissibility of the evidence sought, as long as it can explain how the discovery could lead to other evidence that is admissible). Courts can order discovery of any matter relevant to the subject matter involved in the action. In relation to documents in particular, Rule 34 of the FRCP sets out the procedure through which a party can request documents, electronically stored information and/or tangible things from another party. A non-party can also be compelled to produce documents through the service of a subpoena under Rule 45 of the FRCP.

However, there are limits designed to preserve party and court resources, and to avoid abuse or harassment. The court has broad discretion to limit (or expand) the scope of discovery in a particular case either:

- *Sua sponte* (that is, on its own motion).
- In response to a motion to compel or a motion for a protective order.

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

A party's discovery obligation is ongoing throughout the case. A party has a duty to supplement its responses if it learns at any time that any aspect of its disclosure is incorrect or incomplete (*Rule 26, FRCP*).

17. Are any documents privileged (that is, they do not need to be shown to the other party)? In particular:

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

Privileged documents

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

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

Lawyer-client privilege applies to communications between a lawyer and his client made for the purpose of securing legal advice. The privilege applies whether the lawyer is in-house or with an external law firm.

If information is withheld on the basis of these or any other applicable privilege, the party must both:

- Disclose the fact that information is withheld.
- Identify, typically in a privilege log, the information being withheld and the basis for the withholding.

The privilege can then be challenged.

Other non-disclosure situations

Rule 5.2 of the FRCP governs privacy protections for filings made with a federal court. Certain information (such as a person's social security number and the name of a minor) can be redacted before a document is publicly filed. The rule also allows parties to seek permission to file unredacted documents under seal. This shields the document from public view. Litigants are often permitted to publicly file a redacted version of a document, while filing the non-redacted version under seal. However, the litigant must demonstrate to the court that the information at issue is truly confidential or otherwise worthy of protection.

The most common method of dealing with confidential or private information is through a stipulated protective order. The parties can negotiate and agree on confidentiality procedures for the handling of confidential information, and ask the court to "so order" it. 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 are filed under seal.
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18. Do witnesses of fact give oral evidence or do they just submit written evidence? Is there a right to cross-examine witnesses of fact?

Witnesses are typically expected to give oral testimony at a trial, unless there are extraordinary circumstances. If the trial is

not before a jury, some courts prefer that parties submit direct testimony in the form of a written witness statement, but still allow live cross-examination. Every witness of fact that provides testimony is subject to cross-examination.

Before providing testimony at a trial, witnesses are typically asked to provide sworn testimony at a deposition (that is, give testimony outside of court). The parties can take ten seven-hour depositions without leave of court (*Rule 30, FRCP*). The depositions can be of parties or of third-parties, whose appearance at the deposition can be compelled by subpoena. These limits can be altered by agreement of the parties or by leave of court.

Both state and federal courts have substantive rules of evidence that govern the admissibility of oral and written evidence.

19. In relation to third party experts:

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

Testifying experts are typically retained and paid by the parties who offer their opinions. Parties must both (*Rule 26(a)(2), FRCP*):

- Disclose to the other side 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.

The timing for expert disclosures is usually provided for in the court's scheduling order. If it is not, reports are due 90 days before trial. Rule 26(a)(2) of the FRCP is usually strictly enforced. Therefore, it is important to ensure that the expert report discloses all of the opinions and subject areas on which the expert is expected to testify. Expert reports are often supplemented in response to the opinions of other experts, and as the trial date draws closer.

An expert must appear for a deposition once his expert report has been provided. Parties cannot usually obtain discovery or a deposition of an expert who is both:

- Retained by a party as a consultant.
- Not expected to testify at trial.

A party can file a motion to strike the opposing party's expert witness because the expert lacks the requisite expertise or his opinions are not reliable or relevant.

Courts can appoint experts to provide them with independent advice. This is rare but occurs occasionally in cases involving complex technology, such as patent cases or toxic tort matters.

APPEALS

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

- To which courts can appeals be made?
- What are the grounds for appeal?
- Please briefly outline the typical procedure and timetable.

The federal courts have a three-tier system that consists of the District Courts (trial courts), the Circuit Court of Appeals and the Supreme Court.

Appeal from a trial court

If judgment in the trial court was entered based in whole or part on a jury verdict, then a party's first right of review is to the trial judge in the district court. A party must file with the trial judge, within 28 days of judgment being entered, either or both:

- **A motion for judgment as a matter of law (JMOL) (Rule 50, FRCP).** A JMOL motion is granted if a trial judge determines that a reasonable jury did not have legally sufficient evidence to find the way that it did. Once the JMOL motion is decided, any party can appeal to the appropriate court of appeals. In relation to a trial without a jury, a party can appeal directly to the court of appeals after judgment is entered by the court. A party can also appeal the final disposition of a case on a summary judgment motion or motion to dismiss. Appeals are a matter of right. A party can appeal a judgment based on alleged errors of law, facts or procedure that were properly preserved at trial. Different standards of review apply to different alleged errors, with findings of fact afforded the most deference by the court of appeals.
- **A motion for a new trial (Rule 59, FRCP).** If an appellate court reverses the 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; or
 - direct entry of judgment.

Following review by the court of appeals, the unsuccessful party can apply for review by the Supreme Court by filing a writ of *certiorari*. Appeals to the Supreme Court are discretionary and the Supreme Court agrees to review only a small percentage of the writs of *certiorari* that it receives.

Appeal from a district court

The appellant must file a notice of appeal and assemble all of the materials that will be required by the court of appeals to review the appeal. The appellant may also be required to post a bond or other security. Once the appeal is listed for a hearing at the court of appeals, a briefing schedule is set and the court of appeals has discretion to hear oral argument. The appellate

process usually takes several months and can take more than a year, depending on the schedules of the court and the parties. A motion to expedite a hearing can be granted for cause.

COSTS

21. 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 (for example, any pre-trial offers to settle)?

Unless a statute or order contains rules to the contrary, costs (apart from the lawyers' fees) are awarded to the prevailing party (*Rule 54, FRCP*). 28 U.S.C. § 1920 specifies the types of costs that can be included in the judgment, including:

- Filing fees.
- Transcript costs.
- Similar administrative costs.

Lawyers' fees are not usually recoverable by the prevailing party, unless a specific statute applies or there are extraordinary circumstances (such as if a claim was filed in bad faith).

A party who rejects an offer of judgment under Rule 68 of the FRCP must pay the offeror's costs incurred after the offer was made, if the rejecting party ultimately obtains a judgment that is less favourable to him than the offer.

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

Pre- and post-judgment interest is usually awarded on amounts recovered, depending on the circumstances. There are statutory interest rates applicable in most jurisdictions.

If the judgment is appealed and then affirmed, interest is owed from the date of judgment.

ENFORCEMENT

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

A money judgment is enforced by writ of execution. The procedure for obtaining a writ is determined by state law. If a party fails to pay a money judgment, a federal court can order seizure of the defaulting party's property (*Rule 70, FRCP*). The prevailing party can obtain a writ to compel performance if both:

- A judgment requires a party to do something other than pay money.
- The party fails to comply within the time specified.

No actions can be taken to enforce a judgment until 14 days have passed after its entry (*Rule 62, FRCP*). On motion, the court can stay execution of a judgment pending appeal. In this case, a court typically requires the appellant to obtain a bond securing the judgment.

CROSS-BORDER LITIGATION

24. Do local courts respect the choice of law in a contract (that is, if the parties agree that the law of a foreign jurisdiction will govern the 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 choice of law selected by the parties to a contract, if both:

- The chosen law bears a reasonable relationship to the contract and the parties.
- There is no violation of public policy.

However, the parties cannot usually contract out of laws implementing strong federal or state public policy, including the following:

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

25. Do local courts respect the choice of jurisdiction in a contract (that is, if the parties agree that claims will be brought in the courts of a foreign jurisdiction)? Do local courts claim jurisdiction over a dispute in some circumstances, despite the choice of jurisdiction?

State and federal courts generally enforce forum selection clauses, unless enforcement is deemed unfair, unreasonable or unjust.

The courts can consider whether:

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

26. If a foreign party obtains permission from its local courts to serve proceedings on a party in your jurisdiction, please briefly outline 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 should comply with either the:

- HCCH Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters 1965 (Hague Service Convention).
- Rules of the state in which the US defendant resides.

In addition, a foreign party can seek 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*).

27. Please briefly outline 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?

The federal district court of the district in which a person resides or is located can order a witness to provide testimony, a statement, a document or other thing for use in a proceeding in a foreign or international tribunal (*28 U.S.C. § 1782*). This includes in relation to criminal investigations conducted before formal accusation.

Procedurally, the order can both:

- Be made on the application of any interested person.
- Direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.

The practice and procedure of the foreign jurisdiction can be applied in obtaining the evidence. However, to the extent the order does not prescribe otherwise, the discovery must be obtained under the FRCP.

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

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

The holder of a final and conclusive foreign judgment in its favour can file a suit before a US competent court, to determine whether the foreign judgment has effect in the US. Each state has its own laws governing enforcement. However, most states have adopted a version of the Uniform Foreign Money Judgments Recognition Act 1986 (*13 U.L.A. 149*). This 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.

ALTERNATIVE DISPUTE RESOLUTION

29. What are the main alternative dispute resolution (ADR) methods used in your jurisdiction to settle large commercial disputes? Please briefly outline the procedures that are typically followed and any rules that apply.

The primary methods of ADR used are:

- Arbitration.
- Mediation.
- Early neutral evaluation.
- Mini-trial.

All of these procedures involve the participation of a third-party neutral to assist in resolving a dispute.

ADR procedure is very flexible and largely agreed between the parties. Arbitration is usually used as a binding method of dispute

resolution. Early neutral evaluation, mediation and mini-trial are usually non-binding and designed to facilitate settlement.

There are no universally accepted procedures for any of these ADR methods and the flexibility they provide is one of the most appealing aspects of ADR. Private parties often consider ADR to be a cost-effective and efficient method of dispute resolution. Federal courts strongly encourage parties to consider ADR in addition to, or as an alternative to, litigation.

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

Parties can agree privately to use ADR, either:

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

Each district court is required by federal statute to both:

- Devise and implement its own ADR programme.
- Encourage and promote the use of ADR.

Courts can compel litigants to participate in non-binding ADR, such as mediation or early neutral evaluation, 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.

31. Is ADR confidential?

ADR is usually confidential in relation to both:

- The public.
- Any further judicial proceedings.

However, no federal statute ensures the confidentiality of arbitration or other ADR procedures. Therefore, the parties should agree in writing on specific and clear confidentiality provisions.

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?

The parties and the neutral agree on the way evidence is received. Many arbitrations are conducted like trials with live oral witness testimony. However, mediations tend to be conducted based on written submissions. Depending on the type of ADR used and the understanding and agreement of the parties, materials and statements made during an ADR may be protected from disclosure in a related judicial proceeding.

33. How are costs dealt with in ADR?

The parties and the neutral can determine how costs are dealt with. Contractual clauses sometimes provide for the award of costs (including lawyers' fees). If there is no contractual clause dealing with this, the neutral has discretion.

34. Is ADR used more in certain industries? If yes, please give examples.

ADR provisions are often found in consumer, employment, financial services and brokerage contracts.

35. Please give brief details of the main bodies that offer ADR services in your jurisdiction.

The most commonly used arbitral bodies are the:

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

The most commonly used arbitral bodies for resolution of international disputes are the:

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

There are also many lawyers in private practice, including retired federal and state judges, who serve as arbitrators or mediators in large or small commercial disputes. These individuals are usually very experienced in helping parties to resolve their disputes and are flexible in designing a procedure that will best serve the parties' needs.

REFORM

36. Please summarise any proposals for dispute resolution reform and state whether they are likely to come into force and, if so, when.

There are various tort reforms discussed. The general idea is to impose limits that would make it harder for individuals to sue businesses for injuries. Proposals include:

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

While tort reform is often discussed and has widespread support, there is a lack of clear focus or understanding. This makes any significant reform unlikely in the near future.

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