The Dispute Resolution Review

Seventh Edition

Editor
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EDITOR'S PREFACE

The Dispute Resolution Review covers 48 countries and territories. Disputes have never respected national boundaries and the continued globalisation of business in the 21st century means that it is more important than ever before that clients and lawyers look beyond the horizon of their home jurisdiction.

The Dispute Resolution Review is an excellent resource, written by leading practitioners across the globe. It provides an easily accessible guide to the key aspects of each jurisdiction's dispute resolution rules and practice, and developments over the past 12 months. It is written with both in-house and private legal practitioners in mind, as well as the large number of other professionals and businesspeople whose working lives bring them into contact with disputes in jurisdictions around the world.

This Review is testament to the fact that jurisdictions face common problems. Whether the issue is how to control the costs of litigation, which documents litigants are entitled to demand from their opponents, or whether a court should enforce a judgment from another jurisdiction, it is fascinating to see the different ways in which different jurisdictions have grappled with these issues and, in some cases, worked together to produce a harmonised solution to international challenges. We can all learn something from the approaches taken by the 48 jurisdictions set out in this book.

A feature of some of the prefaces to previous editions has been the impact that the turbulent economic times were having in the world of dispute resolution. Although at the time of writing the worst of the global recession that gripped many of the world's economies has largely passed, it is has left its mark. Old and new challenges and risks remain in many parts of the world such as renewed speculation on the future of the eurozone, the sanctions imposed on Russia, and falls in the price of oil. In some regions, the 'green shoots' of recovery have blossomed while in others they continue to need careful nurturing. Both situations bring their different challenges for those involved in disputes and, while the boom in insolvency-related disputes and frauds unearthed in the recession remain, the coming year could see an increase in investment and acquisitions with a subsequent focus on disputes concerning the contracts governing those investments.

I would like to express my gratitude to all of the contributors from all of the jurisdictions represented in *The Dispute Resolution Review*. Their biographies start at p. 739 and highlight the wealth of experience and learning from which we are fortunate enough to benefit. I would also like to thank the whole team at Law Business Research, in particular Nick Barette, Eve Ryle-Hodges and Shani Bans, who have impressed once again in managing a project of this size and scope, and in adding a professional look and finish to the contributions.

Jonathan Cotton
Slaughter and May
London
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Chapter 47

UNITED STATES

Nina M Dillon and Timothy G Cameron[1]

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

The United States court system comprises a federal system and 50 state systems. Within each of these systems, the courts are generally divided into three levels: trial courts, intermediate appellate courts and courts of last resort.

i The federal court system

Article III of the US Constitution allows only certain kinds of cases to be heard by the federal courts. In general, these courts are limited to cases that involve issues of US constitutional law, certain disputes or suits between citizens of different states,[2] disputes or suits between US citizens and non-US citizens, and issues that involve federal law.

The trial court level comprises 94 district courts. There is at least one federal district court in each state. Some less populous states, such as Alaska, have only one district court. More populous states, such as California and New York, have multiple district courts within the state.[3] Within each district court there are multiple district court judges.[4] Bankruptcy courts are separate units of the district courts. There are also two special trial courts that have nationwide jurisdiction over certain types of cases:

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2 A corporation, whether domestic or foreign, is a deemed a citizen of both its state of incorporation and the state in which its principal place of business is located. See 28 USC, Section 1332(c)(1).

3 New York, for example, has four districts: the Southern, Northern, Eastern and Western Districts.

4 For example, in the US District Court for the Southern District of New York, which is one of the four federal district courts in the state of New York, there are currently 28 judges.

the Court of International Trade, which hears cases involving international trade and customs issues; and the Court of Federal Claims, which hears cases involving claims for money damages against the United States, disputes over federal contracts, unlawful 'takings' of private property by the federal government and a variety of other claims against the United States.

Decisions of the federal district courts are appealed to a federal circuit court of appeals. There are 13 circuit courts of appeal. Each federal circuit court of appeals hears appeals from multiple district courts.[5] For the most part, courts of appeal comprise districts that are geographically close to one another.[6] The exception is the Federal Circuit Court of Appeals, whose jurisdiction is based wholly on subject matter rather than geographical location. The Federal Circuit Court of Appeals hears all appeals from any of the federal district courts in which the action included a complaint arising under the patent laws. The Federal Circuit Court of Appeals also hears all appeals from the Court of International Trade and the Court of Federal Claims.

The US Supreme Court, which consists of nine justices, is the court of last resort in the federal system. The Supreme Court is primarily an appellate court but has original jurisdiction over a very limited number of cases.[7] In most cases, there is no automatic right of appeal to the Supreme Court. However, a party may file a petition for a writ of certiorari requesting that the Supreme Court review the ruling of the circuit court of appeals, and the Supreme Court may, at its discretion, grant the petition and review the ruling from the court below. The Supreme Court typically grants less than one per cent of certiorari petitions filed each year, most of which involve important questions about the Constitution or federal law.[8]

District court judges, courts of appeal judges and Supreme Court justices are nominated by the President of the United States and, after hearings by the Senate Judiciary Committee, confirmed by the United States Senate.

ii State courts

Each state has its own court systems, governed by its state Constitution and its own set of procedural rules. As a result, it is very important, in practice, to check each state's rules and procedures, as they may vary from state to state in significant respects.

As in the federal system, cases in state court begin at the trial court level. Many states have specialised trial courts that hear cases related to a very specific area of the law.

5 For example, the Court of Appeals for the Second Circuit hears appeals from the federal district courts in the Southern, Eastern, Northern and Western Districts of New York, as well as the District of Connecticut and the District of Vermont.

6 For example, the Court of Appeals for the Ninth Circuit generally encompasses districts in the western portion of the United States.

7 For example, the Supreme Court has original jurisdiction over disputes between two or more states.

8 During the 2012 term, for example, the Supreme Court heard argument in 77 cases. www.supremecourt.gov/publicinfo/year-end/2014year-endreport.pdf.

These courts can include probate courts, family law courts, juvenile courts and small claims courts.

In many, but not all, states, the next level in the court system is the intermediate court of appeals, which hears appeals from the trial courts. Some states have a Supreme Court that provides the final review of the decisions of the trial court.[9]

Unlike federal judges, who are appointed, many (but not all) state court judges are elected for a set term by the voters of the district in which the court resides. Thus, state court judges, in an election year, must campaign for re-election and win the election to retain their judgeship.[10]

The state of Delaware is notable in the area of corporate law. Delaware is the favoured state of incorporation for US businesses, with over half of the Fortune 500 companies claiming Delaware as their legal 'home'. Delaware has a special court, the Court of Chancery, devoted to hearing cases involving corporate law disputes. These cases are heard by judges (called 'chancellors' or 'vice chancellors') who specialise in corporate law. As a result, the Delaware courts are viewed as having particular expertise in the area of corporate law, and the decisions of the Delaware courts are closely watched, both in the United States and overseas.

iii ADR procedures

Alternative dispute resolution (ADR) mechanisms include arbitration and mediation. ADR mechanisms are used by mutual agreement of the parties.[11] They are discussed in more detail below.

9 Even the nomenclature varies from state to state. New York, for example, has a three-tier court system. But the lowest level, the trial court level, is called the Supreme Court, the intermediate appellate level is called the Appellate Division and the court of last resort is the New York Court of Appeals.

10 In 2009, the Supreme Court held, in *Caperton v. Massey*, 29 S Ct 1187 (2009), that the due process clause of the US Constitution may require a judge to recuse himself or herself under certain circumstances, including in the context of an election campaign. The Court found 'that there is a serious risk of actual bias – based on objective and reasonable perceptions – when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent'. Id. at 2257-58.

11 Many commercial contracts, for example, contain express provisions to submit any claims arising from the contract to arbitration, rather than court litigation.

II THE YEAR IN REVIEW

Notable decisions of 2014 include the following cases.

i BG Group PLC, v. Republic of Argentina[12]

In a 7–2 decision, the Supreme Court held that the applicability of a local litigation requirement contained in an arbitration provision in an investment treaty should be interpreted by arbitrators in the first instance, and US courts must review the arbitrators' interpretation with deference. The dispute involved the Republic of Argentina and a UK company. Article 8 of an investment treaty between the United Kingdom and Argentina contains a dispute resolution provision, applicable to disputes between one of those nations and an investor from the other.[13] The provision authorises either party to submit a dispute 'to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made' (i.e., a local court) (Article 8(1)).[14] And it provides for arbitration '(1) where, after a period of 18 months has elapsed from the moment when the dispute was submitted to the competent tribunal ... the said tribunal has not given its final decision'; or '(2) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute' (Article 8(2)(a)).[15] The treaty also entitles the parties to agree to proceed directly to arbitration (Article 8(2)(b)).[16] The Supreme Court found that 'the local litigation requirement is highly analogous to procedural provisions that both this Court and others have found are for arbitrators, not courts, primarily to interpret and to apply'.[17] As a result, reviewing courts 'cannot review the decision *de novo*. Rather, they must do so with considerable deference'.[18]

ii Daimler AG v. Bauman[19]

In *Bauman*, Argentinean residents brought suit against a German corporation under the Alien Tort Statute (ATS) and the Torture Victims Protection Act (TVPA), alleging that its wholly-owned Argentinean subsidiary collaborated with state security forces to kidnap, detain, torture and kill the plaintiffs or their relatives during Argentina's 'Dirty War'.[20] Specifically, the complaint alleged that during Argentina's 1976–1983 war, Daimler's Argentinean subsidiary, Mercedes–Benz Argentina (MB Argentina) collaborated with state security forces to kidnap, detain, torture and kill certain MB Argentina workers, among them, plaintiffs or persons closely related to plaintiffs.[21]

12 134 S. Ct. 1198 (2014).
13 Id. at 1203.
14 Id.
15 Id.
16 Id.
17 Id. at 1207-08.
18 Id at 1210.
19 134 S. Ct. 746 (2014).
20 Id. at 751.
21 Id.

Damages for the alleged human-rights violations were sought from Daimler under the laws of the United States, California and Argentina.[22] Jurisdiction over the lawsuit was predicated on the California contacts of Mercedes–Benz USA, LLC (MBUSA), a subsidiary of Daimler incorporated in Delaware with its principal place of business in New Jersey. MBUSA distributes Daimler-manufactured vehicles to independent dealerships throughout the United States, including California.[23] The Supreme Court framed the issue on appeal as 'whether the Due Process Clause of the Fourteenth Amendment [of the United States Constitution] precludes the District Court from exercising jurisdiction over Daimler in this case, given the absence of any California connection to the atrocities, perpetrators, or victims described in the complaint'.[24] The Court held that jurisdiction was not permissible under the circumstances. After reviewing its prior precedents, the Court determined that the proper test to apply is 'whether [a] corporation's affiliations with the State are so "continuous and systematic" as to render [it] essentially at home in the forum State'.[25] The Court, in addition, stated that 'the transnational context of this dispute bears attention'.[26] Noting that 'Recent decisions of this Court ... have rendered plaintiffs' ATS and TVPA claims infirm,'[27] the Court observed that 'Other nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case.'[28] Accordingly, 'Considerations of international rapport thus reinforce our determination that subjecting Daimler to the general jurisdiction of courts in California would not accord with the "fair play and substantial justice"[29] due process demands.'

iii Octane Fitness, LLC v. ICON Health Fitness, Inc[30] and Highmark, Inc v. Allcare Health Management Systems[31]

The Supreme Court decided two cases concerning procedural aspects in patent infringement cases, both of which involved an award of attorneys' fees. In *Octane Fitness*, the Court held that an 'exceptional' case (i.e., one that justifies an award of attorneys' fees) is 'simply one that stands out from others with respect to the substantive strength of a party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated'.[32] 'District courts may determine whether a case is "exceptional" in the case-by case exercise of their discretion, considering the totality of the circumstances, as in the comparable context of the

22 Id.
23 Id.
24 Id.
25 Id. at 761 (citations omitted).
26 Id. at 762.
27 Id. at 762-63.
28 Id. at 763.
29 Id.
30 134 S. Ct. 1749 (2014).
31 134 S. Ct. 1744 (2014).
32 134 S. Ct. 1756.

Copyright Act' and 'there is no precise rule or formula for making these determinations, but instead equitable discretion should be exercised in light of the considerations we have identified'.[33] The Court also held that litigants need not establish their right to attorneys' fees by 'clear and convincing' evidence; rather, 'preponderance of the evidence' is the appropriate standard.[34] In the *Highmark* case, the Supreme Court, following its decision in *Octane*, held that, because an award of attorneys' fees falls within a court's discretionary powers, any review of an award of attorneys' fees is reviewable on appeal only for an 'abuse of discretion'.[35]

iv PPL Corp v. Commissioner of Internal Revenue

In a 9–0 decision, the Supreme Court held that the United Kingdom's one-time 'windfall tax' was in nature an 'excess profits tax', and, as such, could be credited against the taxpayer's United States income taxes.[36] The Court noted that the 'predominant character' of a tax, or the normal manner in which a tax applies, is controlling,[37] and that 'the way a foreign government characterises its tax is not dispositive with respect to the US creditability analysis'.[38] It held that 'the economic substance of the UK windfall tax is that of a US income tax. [even though the Labour government characterised it as a tax on the difference between two values] ... Therefore, the tax is creditable under Section 901 of the Internal Revenue Service Code.'[39]

III COURT PROCEDURE

This section will focus on the procedures applicable in federal courts.[40]

i Overview of court procedure

The procedures used in federal district courts are set forth in the Federal Rules of Civil Procedure (FRCP).[41] The Federal Rules of Appellate Procedure (FRAP) govern the procedures used in the courts of appeal,[42] and the Rules of the Supreme Court govern Supreme Court procedure.

33 Id.

34 Id. at 1758.

35 143 S. Ct. at 1748.

36 133 S. Ct. 1897 (2013).

37 Id. at 1901.

38 Id. at 1902.

39 Id. at 1907.

40 State court procedures are similar in many respects, but each of the 50 states has its own set of procedural rules.

41 In addition, each individual federal district may promulgate rules to supplement, and in some instances to modify, the FRCP, and each individual judge within each district may promulgate rules governing proceedings in his or her courtroom.

42 Each Circuit Court of Appeals may promulgate its own rules to supplement the FRAP.

ii Procedures and time frames

A lawsuit is commenced by the filing of a complaint with the court,[43] a copy of which must be served, along with a summons, on the defendant.[44] The defendant responds to the complaint by serving a responsive pleading, called an answer, which may include defences and counterclaims.[45] Alternatively, the defendant may, rather than directly responding to the allegations in the complaint, move to dismiss the action on a variety of grounds, including lack of jurisdiction, improper venue or insufficient service of process.[46]

Following this initial pleading phase, the parties usually engage in 'discovery' (including document production and depositions). The FRCP provide for depositions,[47] production of documents, including electronically stored information,[48] and written discovery.[49] The discovery phase can be an extremely time-consuming and expensive process, depending upon the complexity of the issues, the amount of potentially responsive documents and the number of potential witnesses.[50]

There is a special procedure for multidistrict (MDL) cases (i.e., cases involving common issues of law and fact but pending in multiple federal districts). Under 28 USC Section 1407, cases pending in multiple judicial districts are consolidated in one court for pretrial proceedings only, and then remanded to the originating court for trial. There

43 See FRCP 3.

44 See FRCP 4.

45 See FRCP 12. The time within which to serve the answer is provided in Rule 12(A) and varies from 20 days to 90 days (in the case of a defendant who was served outside the United States) (FRCP 12(a)). In practice, extensions of these periods are often obtained.

46 See FRCP 12(b).

47 Depositions typically involve live testimony given under oath. See FRCP 30. Under limited circumstances, depositions may be conducted by submitting questions to the deponent in writing in advance of the deposition. See FRCP 31.

48 See FRCP 34.

49 See FRCP 33 (providing that a party may serve written 'interrogatories' (i.e., questions) on any party, and requiring the party upon whom the interrogatories are served to answer them); FRCP 36 (providing that a party may, in writing, request the other party to admit, among other things, 'facts, the application of law to fact, or opinions about either').

50 Permits class certification only if 'the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members'. Recently proposed amendments to the Federal Rules of Civil Procedure attempt to reduce the burden of discovery by, among other things, scaling back the scope of permissible discovery by adopting the 'proportionality rule', pursuant to which the scope of discovery sought must be proportional to the needs of the case, considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. The proposed amendments also seek to limit the number and duration of depositions.

is a judicial panel on multidistrict litigation, which decides whether cases should be consolidated under MDL and where to transfer the cases.[51]

Following the completion of discovery, including discovery related to expert witnesses, if any, a case proceeds to trial. Depending upon the type of claims involved, the trial may be conducted before a judge or jury. The right to a jury in civil cases is provided by the Seventh Amendment to the US Constitution, which preserves the right to a jury for 'suits at common law'. Generally speaking, suits at common law involve claims for monetary damages, as opposed to claims for equitable, non-monetary damages, such as injunctions.

The length of any given lawsuit from time of filing to start of trial varies widely depending on a number of factors, including type of action (civil or criminal), complexity of the issues in the action and the judge to whom the action is assigned. In federal court, the median time from filing to disposition of a civil case was 8.9 months in 2009.[52] For civil cases that proceed to trial, however, the median time from filing to trial was 25.3 months in 2009.[53]

Prior to a trial, the FRCP provide for forms of interim relief upon a proper showing by the moving party. Under FRCP 65, a court may issue a preliminary injunction, prior to a full trial on the merits, where a plaintiff shows that it will sustain irreparable harm (i.e., harm that cannot be remedied by monetary compensation) if an injunction does not issue.

iii Class actions

Class actions are permitted in the United States and are expressly authorised under FRCP 23 and various state law analogues. Class actions may be permitted 'only if' the case involves plaintiffs so numerous that it would be impractical to bring them all before the court; there are questions of law or fact common to the class; the claims or defences of the representative parties are typical of the claims or defences of the class; and the representative parties will fairly and adequately protect the interests of the class.[54] In addition, even assuming that the foregoing prerequisites to maintaining a class action are satisfied, FRCP 23(b) imposes additional requirements regarding the permissible types of class actions.

iv Representation in proceedings

The right of self-representation is long-standing.[55] The US Judiciary Act, the Code of Conduct for United States Judges, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence and the Federal Rules of Appellate Procedure address the rights of the self-represented litigant in several places.

51 28 USC Section 1407(c).

52 See www.uscourts.gov/cgi-bin/cmsd2009.pl.

53 Id.

54 See FRAP 23.

55 See *Faretta v. California*, 422 US 806, 813 (1975) ('In the federal courts, the right of self-representation has been protected by statute since the beginnings of our Nation.')

In some situations, self-represented appearances are not allowed. For example, an owner may represent a solely-owned business or partnership. However, only a licensed attorney may represent a corporation.

v Service out of the jurisdiction

FRCP 4 governs the service of a complaint upon a defendant, including service upon defendants located outside the United States. FRCP 4(f) sets forth that:

> *Unless federal law provides otherwise, an individual – other than a minor, an incompetent person, or a person whose waiver has been filed – may be served at a place not within any judicial district of the United States:*
>
> *(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorised by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;*
>
> *(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:*
>
> *(A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;*
>
> *(B) as the foreign authority directs in response to a letter rogatory or letter of request; or*
>
> *(C) unless prohibited by the foreign country's law, by:*
>
> *(i) delivering a copy of the summons and of the complaint to the individual personally; or*
>
> *(ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or*
>
> *(3) by other means not prohibited by international agreement, as the court orders.*

Rule 4 of the FRCP applies to natural persons as well as corporations.

The Hague Convention typically provides the exclusive means for service of US process in signatory states. Article 1 of the Convention states that it 'shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad'.[56]

vi Enforcement of foreign judgments

The United States is not a signatory to any treaty that requires the recognition or enforcement of foreign judgments.[57] Nor is there any constitutional basis or federal statute requiring a foreign court judgment to be given full faith and credit by US federal courts.

Generally, however, US courts follow the principle of international comity. As announced by the Supreme Court over a century ago, international comity should be followed in those cases where:

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56 The Supremacy Clause of the US Constitution pre-empts all US laws and rules to the contrary. See *Volkswagenwerk Aktiengesellschaft v. Schlunck*, 486 US 694, 699 (1988).

57 However, many of the individual 50 states in the United States have adopted the Uniform Foreign Money-Judgments Recognition Act (UFMJRA).

> *There has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting that trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow its full effect.*[58]

Procedurally, the holder of a foreign judgment or decree may file suit before a competent US court, which will determine, in accordance with the principles of international comity, whether to recognise and enforce the judgment.

vii Assistance to foreign courts

Litigants in foreign countries that are parties to the Hague Convention may obtain evidence in the United States pursuant to the procedures contained in the Convention. Federal courts provide international assistance to foreign courts pursuant to 28 USC Section 1782, under which parties or other interested persons involved in international proceedings can make a request to a federal district court for an order compelling discovery from a person or entity that resides or is found in the district in which the court sits. District courts have broad discretion in determining whether to grant discovery requests under Section 1782.[59]

viii Access to court files

There is a presumption of public access to court records.[60] This presumption is broad and enforcement of the right does not require a proprietary interest in the document or a showing of need for it (e.g., a need to use it as evidence in a lawsuit). The philosophy underlying the presumption of public access to court records (as well as public access to court proceedings) is that transparency promotes accountability and public confidence in the judicial system.[61] Issues have arisen over whether this presumption extends to documents and other material produced in discovery. The US Supreme Court has held that, because non-filed discovery documents do not shed light on the performance of the judicial function (on which the right of public access is based), such documents are not subject to common law access rights.[62] In contrast, access to filed discovery material is generally held to be subject to the common law right, but limitations apply. Most notably, judges have broad discretion under the FRCP, as well as analogous state procedural rules, to issue orders that protect case-related information from unauthorised disclosure.[63]

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58 *Hilton v. Guyot*, 159 US 113 (1895).

59 See *Intel Corp v. Advanced Micro Devices Inc*, 542 US 241 (2004).

60 *Nixon v. Warner Communications Inc*, 435 US 589, 597-99 (1978). Some states have 'sunshine laws' that recognise, and in some instances expand, this right.

61 See *US v. Amodeo*, 71 F3d 1044, 1048 (2d Cir 1995).

62 See *Seattle Times Co v. Rhinehart*, 467 US 20 (1984).

63 See FRAP 26(c) (protective orders).

Protective orders are commonly used in litigation to protect commercially sensitive or other sensitive information from public disclosure. Many courts have procedures for filing court papers under seal under certain circumstances.[64]

ix Litigation funding

Centuries ago, litigation funding by third parties was forbidden. 'Champerty' (providing a party to litigation money in exchange for a share of the proceeds) and 'maintenance' (providing a party money to continue the litigation) were offences at common law. Today, rules governing third-party funding of litigation are more flexible.[65] Although still not common, third-party litigation financing – the practice of providing money to a party to pursue a potential or filed lawsuit in return for a share of any damages award or settlement – is becoming more prevalent in the United States. Under these arrangements, litigation-financing companies may provide financing for a variety of litigation costs, including attorneys' fees, court fees and expert-witness fees. The rules governing these financial arrangements vary from state to state, with some states still strictly prohibiting such arrangements.

IV LEGAL PRACTICE

i Conflicts of interest and ethical walls

No single code of professional conduct or other set of rules applies to the conduct of attorneys in the United States. Rather, the ethical rules applicable to practising attorneys are determined by the individual states in which the lawyer is practising. However, the American Bar Association's Model Rules of Professional Conduct (MRPC) provides the model on which most states base their ethical rules. The MRPC covers a broad range

64 Many courts that permit filing to be made under seal require that a 'public' version of the document be filed with the court. These public versions 'redact' information that is protected from disclosure, such as financially or commercially sensitive information.

65 The issue of litigation funding was addressed by the Supreme Court in 2008 in *Sprint Communications Co v. APCC Services Inc*, 128 S Ct 2531 (2008). There, the Court held that an assignee of a legal claim for money had standing to pursue that claim in federal court, even when the assignee had promised to remit the proceeds of the litigation to the assignor. Id. Noting that, prior to the 17th century, a suit like the one before the court would not have been allowed, id. at 2536, the Court went on to trace the history of assignment of legal claims and concluded that 'history and precedents ... make clear that courts have long found ways to allow assignees to bring suit'. Id. at 2541. The Court held that 'lawsuits by assignees, including assignees for collection only', are 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process'. Id.

of conduct, including attorney competence,[66] diligence,[67] duty of confidentiality[68] and conflicts of interest.[69]

Generally, a conflict of interest is present if '(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that representation of one or more clients will be materially limited by the lawyer's responsibility to another client, a former client or a third person or by a personal interest of the lawyer'.[70] Notwithstanding the foregoing, MRPC 1.7(b) does allow an attorney to represent a client despite the existence of a conflict of interest if certain conditions are met. Both clients must consent to the conflict after full disclosure.[71] Under what is sometimes called the 'firm unit rule', all lawyers of a firm are typically disqualified because of a current-client conflict if any lawyer is disqualified.[72] In some jurisdictions, 'ethical walls' allow firms to avoid disqualification if the conflict is a result of work done by a laterally hired lawyer before he or she joined his or her present firm.

ii Money laundering, proceeds of crime and funds related to terrorism

Title III of the USA Patriot Act, International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001, is intended to facilitate the prevention, detection and prosecution of international money laundering and the financing of terrorism. It amends portions of the Money Laundering Control Act of 1986 and the Bank Secrecy Act of 1970 (BSA).[73] The BSA and the USA Patriot Act cover 'financial institutions' and require such entities to have anti-money laundering programmes and customer identification programmes.

Lawyers are not expressly covered by the USA Patriot Act or the BSA. However, criminal laws prohibiting the laundering of money apply to all individuals, including lawyers. A lawyer or law firm (like any other business) may be required to report large payments of cash or currency (i.e., payments in excess of $10,000) made by clients.[74]

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

Certain communications between a lawyer and client are protected by the attorney–client privilege. 'The attorney–client privilege is the oldest of the privileges for confidential

66 MRPC 1.1.

67 MRPC 1.3.

68 MRPC 1.6.

69 MRPC 1.7-1.11.

70 MPRC 1.7.

71 MRPC 1.7(b)(4).

72 MRPC 1.8, which addresses specific rules related to conflicts of interest, provides that 'While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.'

73 31 USC Section 5311 et seq.

74 26 USC Section 60501.

communications known to common law.'[75] The policy underlying this privilege is encouragement of open and honest communication between lawyers and their clients, 'thereby promot[ing] broader public interests in the observance of law and administration of justice'.[76] The privilege applies to: (1) a communication; (2) made between a lawyer and a client; (3) in confidence; (4) for the purpose of seeking, obtaining or providing legal assistance to the client.[77] The privilege extends only to communications, not to the underlying facts.[78]

When the client is a corporation, the privilege is commonly viewed as a matter of corporate control.[79] In other words, corporate management or the 'control group', including the officers and directors, decide whether to assert or waive the privilege. However, the attorney–client privilege does extend to mid-level and lower-level employees of a company.[80]

There are some exceptions to the application of the attorney–client privilege. For example, communications in furtherance of a crime or fraud, or the post-commission concealment of the crime or fraud, are not privileged. A corporation's right to assert the attorney–client privilege is not absolute; an exception to the privilege applies when the corporation's shareholders wish to pierce the corporation's attorney–client privilege. In addition, if two parties are represented by the same attorney in a single legal matter, neither client may assert the attorney–client privilege against the other in subsequent litigation if the subsequent litigation pertains to the subject matter of the previous joint representation. This latter exception is known as the 'common interest' exception. Another important consideration is that of waiver: privileged communications that are disclosed to third parties are often deemed 'waived' and no longer protected from disclosure to others.

In addition, certain other communications between an attorney and a client may not fall within the privilege because they do not pertain to legal advice. For example, the general nature of the services performed by the lawyer, including the length of the retention, are generally not immune from disclosure.

Complications may arise with respect to communications with in-house counsel. A communication relating to corporate legal matters between a corporation's in-house counsel and the corporation's outside counsel is normally protected by the attorney–client privilege.[81] However, when the communication is between a representative of the corporation and the in-house lawyer, the privilege extends only to any legal advice sought or rendered; it does not protect communications that are strictly business-related.

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75 *Upjohn Co v. US*, 449 US 383, 389 (1981).

76 Id.

77 8 J. Wigmore, Evidence, Section 2292 (McNaughton rev 1961).

78 Id. Thus, a party cannot conceal a fact from disclosure merely by communicating it to his or her lawyer. 'The fact is one thing and a communication concerning that fact is an entirely different thing.'

79 Id.

80 Id.

81 See *Upjohn Co v. US*, 449 US 383 (1981).

Separate and distinct from the attorney–client privilege, materials prepared by an attorney in anticipation of litigation or trial may be immune from discovery under what is known as the 'work product doctrine'. The work product doctrine protects materials prepared by an attorney in anticipation of litigation or trial, regardless of whether those materials or their contents are provided or communicated to the client. The doctrine also covers materials prepared in anticipation of litigation or trial by agents (e.g., accountants or other third-party advisers) acting under the direction of an attorney. The rationale underlying the work product doctrine, as articulated by the US Supreme Court, is based upon the need for 'a lawyer [to] work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel'.[82] The Supreme Court further observed: 'Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.'[83]

Disclosure of work product materials to a third party (other than the client) may not waive the protection afforded under this doctrine, as long as the receiving party shares a 'common interest' with the disclosing party (e.g., both parties are defendants in pending litigation). However, materials protected from disclosure by the work product doctrine may be subject to disclosure under certain circumstances. Under Rule 26(b)(3)(a) of the FRCP, materials protected by the work product doctrine may be discoverable if the opposing party shows 'a substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means'.

ii Production of documents

FRCP 26(b)(1) permits discovery of 'any matter, not privileged, that is relevant to the claim or defence of any party ... Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.' The FRCP provide a full range of pretrial discovery devices, including discovery of expert opinions, depositions, interrogatories, production of documents, inspections and requests for admissions.[84] Parallel state codes of civil procedure provide for similar discovery devices, on similarly liberal grounds of relevance.

A party must produce all documents responsive to a document request that are in the party's 'possession, custody or control'.[85] That documents are located in a foreign country does not bar their discovery. Rather, it is the determination of the 'control' issue that dictates the outcome. If a domestic parent corporation, for example, is deemed to control its foreign subsidiary (because, for example, the parent controls the board of directors of its subsidiary), then the domestic parent may be compelled to produce documents located at its foreign subsidiary's offices.

82 *Hickman v. Taylor*, 329 US 495, 510 (1947).

83 Id. 'This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs and countless other tangible and intangible ways.'

84 See FRCP 26-36.

85 FRCP 34.

FRCP 34 expressly applies to electronically stored information.[86] Limits on discovery (and e-discovery in particular) generally turn on whether 'the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation and the importance of the proposed discovery in resolving the issues'.[87] In the context of e-discovery, courts have articulated various formulations of the 'burden versus benefit' standard.[88]

Litigants in the United States are subject to an affirmative obligation to preserve relevant evidence, including electronically stored information, once a lawsuit is commenced or the prospect of litigation becomes reasonably imminent. In the civil litigation context, once litigation is commenced, or reasonably contemplated, a corporation must suspend its routine document retention and destruction policies and put in place a 'litigation hold' to ensure the preservation of relevant documents.[89] One recent case articulated certain acts that support a finding of gross negligence in the context of e-discovery obligations.[90] These acts include: failure to issue a written litigation hold; failure to identify all of the key players and to ensure that their electronic and paper records are preserved; failure to cease the deletion of email or to preserve the records of former employees that are in a party's possession, custody or control; and failure to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.[91]

Failure of a party to produce relevant documents, or failure to preserve relevant evidence once a lawsuit is commenced or litigation becomes reasonably imminent, may result in severe sanctions for the party and the party's counsel.[92] Recent court decisions

86 FRCP 34(a)(1)(A).

87 FRCP 26(b)(2)(B).

88 See, for example, *Zubulake v. UBS Warburg LLC*, 217 FRD 309 (SDNY 2003) ('undue burden' should turn on whether the information sought is kept in 'accessible' form); see generally The Sedona Principles: Best Practices Recommendations & Principles For Addressing Electronic Document Production (June 2007), Principle 2 ('cost, burden and need' for electronic data must be balanced); Principle 8 ('primary source' of electronic data should be 'active' data; resort to disaster recovery backup tapes should be required only upon a showing of need and relevance that outweigh the cost and burdens of retrieval).

89 See *Zubulake v. UBS Warburg LLC*, 220 FRD 212 (SDNY 2003); see also The Sedona Guidelines: Best Practice Guidelines & Commentary For Managing Information & Records in the Electronic Age (November 2007), Guideline 5 ('An organisation's policies and procedures must mandate the suspension of ordinary destruction practices and procedures as necessary to comply with preservation obligations related to actual or reasonably anticipated litigation, governmental investigation or audit.').

90 See *Pension Committee v. Banc of America Securities, LLC* et al., 685 F Supp. 2d 456 (SDNY 2010).

91 Id. at 471.

92 See FRCP 37.

have imposed harsh penalties on parties, as well as their lawyers, for failing to preserve and produce relevant documents.

Complications sometimes arise where the documents sought are located in a country whose laws protect the documents from disclosure. US courts generally balance the following factors in deciding whether a requesting party is entitled to information sought in discovery where that information is subject to the conflicting laws in a foreign jurisdiction:

a the significance of the discovery and disclosure to issues in the case;
b the degree of specificity of the request;
c whether the information originated in the jurisdiction from which it is being requested;
d the availability of alternative means of securing the information sought in the discovery request; and
e the extent to which non-compliance would undermine the foreign sovereign's interest in the information requested.[93]

VI ALTERNATIVES TO LITIGATION

i Overview

Given the time, disruption and expense associated with litigation, some parties opt to settle their disputes out of court through alternative dispute resolution procedures. Arbitration and mediation are the most common alternatives.

ii Arbitration

Arbitration is the submission of a dispute to one or more impartial persons for a final and binding decision. Through contractual provisions or other agreement, the parties may control the range of issues to be resolved, the scope of relief to be awarded and many procedural aspects of the process, including the location of the arbitration, the language in which the hearing will be conducted and the length of the hearing. In the United States, agreements to arbitrate are enforced (in the absence of special circumstances, such as showing of fraud) under the Federal Arbitration Act. Parties may elect to arbitrate their claims with the assistance of recognised arbitral instructions, such as those of the International Chamber of Commerce or the American Arbitration Association, or the parties may devise their own set of rules for how the arbitration will be conducted.

The arbitration process generally offers parties cost-effectiveness owing to its speed relative to a traditional lawsuit. Parties, in a contractual arbitration provision, may predetermine the qualifications and experience of an arbitrator. Many arbitration provisions specify that the parties shall agree upon a mutually acceptable arbitrator. Unlike judges, who are randomly assigned cases without regard to background or expertise, arbitrators are often designated or chosen precisely because they have particular expertise in the matters to be arbitrated. In addition, unlike court proceedings, arbitration proceedings are confidential, with no right of public access.

93 See Restatement (Third) of Foreign Relations Law Section 442(1)(c) (1987).

Arbitration proceedings may be completed in a matter of months, resulting in lower attorneys' fees and other expenses, through a reduced emphasis on evidentiary processes. In particular, arbitration procedures typically provide less opportunity for discovery, including a more limited exchange of documents, fewer (if any) depositions and little or no written discovery (such as interrogatories and requests for admission).

Arbitration awards are binding and are vacated only under limited circumstances, as outlined in state and federal arbitration laws. Once an award is entered by an arbitrator or arbitration panel, it must be 'confirmed' in a court of law. Once confirmed, the award is then reduced to an enforceable judgment, which may be enforced by the winning party in court like any other judgment. In the international context, enforcement of foreign arbitral awards is governed by the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the New York Convention. US courts will not enforce foreign arbitral awards under the Convention where the award is made in a state that is not a party to the Convention or does not reciprocally enforce US awards.[94] Generally speaking, however, arbitration awards are more easily enforced than judgments of foreign courts.

There are some drawbacks to arbitration. Most notably, there generally is no right of appeal of an arbitrator's award. In addition, the truncated discovery mechanism that is often used in arbitration may limit a party's ability to discover evidence in the possession of an adversary that would be important in litigating the case.

iii Mediation

Mediation is a voluntary process in which parties to a dispute work together with a neutral facilitator – the mediator – who helps them reach a settlement.[95] Unlike litigation or arbitration, mediation is not an adversarial process. The mediator does not decide the case. The results of mediation are binding if and when parties enter into a settlement contract.

A mediation process can be scheduled at any time during arbitration or litigation. Parties generally save money through reduced legal costs and less staff time. Like arbitrators, mediators are often selected on the basis of their specialised expertise in the issues subject to mediation. Generally, information disclosed at a mediation may not be divulged as evidence in any subsequent arbitral, judicial or other proceeding.

VII OUTLOOK AND CONCLUSIONS

The Supreme Court has several interesting business cases on its docket this year. Among other things, the Court will hear a major challenge to the rules set by President Obama related to limits on emissions of mercury and other toxic pollutants from coal-fired power plants. The cases the Supreme Court agreed to hear are *Michigan v. Environmental Protection Agency*, *Utility Air Regulatory Group v. Environmental Protection Agency*, and

94 See, for example, *Martinez v. Columbian Emeralds, Inc*, No. 03-2587, 2009 WL 578547 (VI 4 March 2009).

95 There are numerous private organisations that offer mediation services.

National Mining Association v. Environmental Protection Agency. The court consolidated the cases for a single one-hour argument. In *North Carolina Board of Dental Examiners v. Federal Trade Commission*, the Court will address the scope of the state action doctrine, which is an exception to the antitrust laws that permits states to substitute their own regulations in place of free-market competition. The Court will also tackle an important procedural issue this term. In *Dart Cherokee Basin Operating Co v. Owens*, the Court will decide whether a defendant seeking removal of a case from state to federal court is required to include evidence supporting federal jurisdiction in the notice of removal, or whether it is enough to allege the required 'short and plain statement of the grounds for removal'. Finally, the Court will once again address issues related to the Patient Protection and Affordable Care Act (also referred to as 'Obamacare') in the case of *King v. Burwel*.

Appendix 1

ABOUT THE AUTHORS

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Nina M Dillon is a senior attorney in Cravath's litigation department. She has a broad litigation practice, with experience in patent law, antitrust law, contract law and internal and government investigations.

Ms Dillon was born in Devon, Pennsylvania. She received a BA from the University of North Carolina at Chapel Hill in 1986 and a JD with honours from the University of North Carolina School of Law in 1991, where she was a member of the Journal of International Law and Commercial Regulation. Ms Dillon joined Cravath in 1991. Ms Dillon left the firm in 2000, rejoined in 2005 and was elected a senior attorney in 2008. She is admitted to practise before the US Court of Appeals for the Third Circuit and the US District Court for the Southern District of New York.

TIMOTHY G CAMERON

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Timothy G Cameron is a partner in Cravath's litigation department. His practice encompasses a broad range of litigation that in recent years has included: general commercial litigation; securities litigation; shareholder derivative litigation; arbitration (domestic and international); alien tort claims and international torts; and tax litigation.

Mr Cameron has particular expertise representing non-US clients in a wide variety of litigation (including class actions) in federal and state courts in the United States, and in arbitration. He has extensive experience dealing with complicated cross-border issues that can arise involving non-US defendants, including jurisdictional issues, reconciling a defendant's document preservation, collection and production obligations with the potential application of local (non-US) law, class certification issues involving foreign putative class members and the difficulties of obtaining testimony from witnesses located outside the United States.

Mr Cameron was born in Auckland, New Zealand. He received his LLB (Hons)/BCom degree in 1994 from the University of Auckland, New Zealand; an MComLaw degree with first-class honours in 1997 from the University of Auckland, New Zealand; and an LLM degree in 1998 from the University of Chicago Law School.

From February 1994 to September 1997, Mr Cameron practised law at Russell McVeagh McKenzie Bartleet & Co, in Auckland, New Zealand. He joined Cravath in 1998 and became a partner in 2005.

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