THE DISPUTE RESOLUTION REVIEW

Fifteenth Edition

Editor
Damian Taylor

THE LAWREVIEWS

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FIFTEENTH EDITION

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This article was first published in February 2023
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Published in the United Kingdom
by Law Business Research Ltd
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK

www.thelawreviews.co.uk

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ISBN 978-1-80449-149-2

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ADVOKATFIRMAET SELMER AS

APOLAT LEGAL

ARIFF ROZHAN & CO

ARIFIN, PURBA & FIRMANSYAH

ARTHUR COX LLP

ASMA HAMID ASSOCIATES

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BAKER MCKENZIE

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YOUNG CONAWAY STARGATT & TAYLOR, LLP

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PREFACE

The Dispute Resolution Review provides an indispensable overview of the civil court systems of 26 jurisdictions. The following chapters aim to equip the curious practitioner with an up-to-date and concise introduction to the framework for dispute resolution in each jurisdiction. Each chapter outlines the most significant legal and procedural developments of the past 12 months and the authors' views as to the big themes predicted for the year ahead. The publication will be useful to anyone facing disputes that cross international boundaries, which is ever more likely in a world that seems to be more interconnected with every passing year.

In compiling the 15th edition of *The Dispute Resolution Review*, I am reminded that despite the variety of legal systems captured in the publication, there is a clear common denominator. All systems are organised and operate to ensure parties have a means of resolving disputes that they cannot resolve themselves. I am reassured that, despite cultural, traditional and legal differences, the jurisdictions represented here are united by this common thread. It reflects an innate, international commitment to the rule of law and the rights of individuals. This edition will be a success if it assists parties to navigate different legal systems to achieve fair and efficient outcomes for whatever dispute they are facing.

Reflecting on the past year, it was only shortly after the previous edition of *The Dispute Resolution Review* went to print that Russia invaded Ukraine, with huge humanitarian, political and economic consequences. The war illustrates the fragility of peace and the rule of law and terrible human suffering that follows in their absence. While the paramount objective must be to restore peace, in commercial disputes terms, the sanctions imposed by both sides created urgent and sometimes novel legal disputes concerning assets that cannot be moved or dealt with, as has the sudden and unexpected rise in commodities prices.

This past year also saw the passing of Queen Elizabeth II. In legal terms, this meant that silks in England and Wales switched from 'Queen's' to 'King's' Counsel, and our own 'Queen's Bench Division' of the High Court reverted to the 'King's Bench Division' for the first time in 70 years.

Looking ahead, there are certainly new challenges on the horizon that will test dispute resolution systems around the world. In the United Kingdom, we have officially entered a period of recession that by some estimates is predicted to last around two years (in stark contrast to the transactional frenzy that followed the pandemic). Other jurisdictions are facing similarly sober economic outlooks, and I expect many practitioners are beginning to experience an increase in contentious restructuring and insolvency matters. For those pursuing such matters through the courts in the United Kingdom, the Supreme Court's October decision in *BTI 2014 v. Sequana* [2022] UKSC 25 provides guidance on when directors should have regard to creditors' interests.

This 15th edition follows the pattern of previous editions, where leading practitioners in each jurisdiction set out an easily accessible guide to the key aspects of each jurisdiction's dispute resolution rules and practice, and developments over the past 12 months. *The Dispute Resolution Review* is also forward-looking, and the contributors offer their views on the likely future developments in each jurisdiction. Collectively, the chapters illustrate a continually evolving legal landscape responsive to both global and local developments.

As always, 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 can be found in Appendix 1 and highlight the wealth of experience and learning from which we are fortunate to benefit. I would also like to thank the whole team at Law Business Research who have excelled in managing a project of this size and scope, in getting it delivered on time and in adding a professional look and finish to the contributions.

Damian Taylor
Slaughter and May
Harpenden
January 2023

Chapter 24

UNITED STATES

Timothy G Cameron and Perry J Goffner[1]

I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

The US 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: 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 may be appealed to federal circuit courts of appeals. Certain types of federal district court rulings may be appealed immediately as of right; others are immediately appealable only with leave of court and otherwise may be appealed only after a final judgment is entered by the district court.[5] There are 13 circuit courts of

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2 A corporation, whether domestic or foreign, is 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 For example, New York has four districts: the Southern, Northern, Eastern and Western Districts.

4 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 44 district court judges and 15 magistrate judges. Magistrate judges are judges appointed to assist district court judges in the performance of their duties. See 28 USC Section 636 (establishing jurisdiction, powers and assignment of federal magistrates).

5 See generally 28 USC Section 1291 (conferring appellate jurisdiction for final decisions); 28 USC Section 1292 (conferring appellate jurisdiction for certain interlocutory decisions).

appeals. Each federal circuit court of appeals hears appeals from multiple district courts.[6] For the most part, courts of appeals comprise districts that are geographically close to one another.[7] The exception is the Court of Appeals for the Federal Circuit, whose jurisdiction is based wholly on subject matter rather than geographical location. The Court of Appeals for the Federal Circuit hears all appeals from any of the federal district courts in which the action has included a complaint arising under the patent laws. The Court of Appeals for the Federal Circuit also hears all appeals from the Court of International Trade and the Court of Federal Claims.

The 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.[8] 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 rulings of the circuit courts 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 1 per cent of *certiorari* petitions filed each year, most of which involve important questions about the Constitution or federal law.[9]

District court judges, courts of appeals 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 US Senate.

ii State courts

Each state has its own court systems, which are 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 generally begin at the trial court level. Many states have specialised trial courts that hear cases related to a very specific area of the law. These courts can include probate courts, family law courts, juvenile courts and small claims courts.

In many states, the next level in the court system is an 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.[10]

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

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

8 For example, the Supreme Court has original jurisdiction over disputes between two or more states. See US Const Article III, Section 2, cl 2.

9 During the 2020 term, for example, the Supreme Court received 5,307 filings and heard arguments in 72 cases. See https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf.

10 Even the nomenclature of state high courts varies from state to state. New York, for example, has a three-tier court system. However, 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.

Unlike federal judges who are appointed, many state court judges are elected for a set term by the voters of the district in which the court resides. Thus, those state court judges, in an election year, must campaign for re-election and win the election to retain their judgeship.[11]

The state of Delaware is notable in the area of corporate law. Delaware is the favoured state of incorporation for many 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 Alternative dispute resolution procedures

Alternative dispute resolution (ADR) mechanisms include arbitration and mediation. ADR mechanisms are used by mutual agreement of the parties.[12] They are discussed in more detail in Section VI.

II THE YEAR IN REVIEW

Notable decisions of 2022 include the following cases.

i ZF Automotive v. Luxshare, Ltd

In *ZF Automotive v. Luxshare, Ltd*,[13] the Supreme Court considered whether federal courts may order discovery in cases before foreign private adjudicatory bodies.[14] The Supreme Court held that 28 USC Section 1782, which permits district courts to order testimony or the production of evidence 'for use in a proceeding in a foreign or international tribunal', does not extend to private adjudications such as arbitrations.[15]

The *ZF Automotive* case arose out of two cases, consolidated for appeal, involving separate private adjudications. The first case involved civil fraud allegations against ZF Automotive (ZF), a US automotive company with a German parent corporation, which sold two business units to Luxshare, a Hong Kong-based corporation.[16] Before initiating an arbitration in Germany, which the parties agreed would be the exclusive forum for dispute resolution, Luxshare filed an *ex parte* motion under Section 1782 seeking information from ZF and two of its senior officers.[17] The District Court for the Eastern District of Michigan ordered ZF

11 In 2009, the Supreme Court held, in *Caperton v. Massey*, 129 S Ct 2252 (2009), that the due process clause of the 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 2263 and 2264.

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

13 142 S Ct 2078 (2022).

14 id. at 2083.

15 id.

16 id. at 2084.

17 id.

to produce documents and one officer to sit for a deposition.[18] The second case involved a dispute between a Russian investor and the country of Lithuania, after Lithuania nationalised a previously private bank called 'Snoras' and commenced bankruptcy proceedings.[19] The Russian investor initiated proceedings against Lithuania under a bilateral investment treaty between Lithuania and Russia designed to promote 'favourable conditions for investments'.[20] The investor chose to proceed with an 'ad hoc arbitration' in accordance with rules set out by the United Nations Commission on International Trade Law (UNCITRAL) and then filed a discovery motion under Section 1782 in the District Court for the Southern District of New York.[21] The District Court granted the investor's request for discovery holding that the ad hoc arbitration panel qualified as a 'foreign or international tribunal'.[22]

The Supreme Court reversed the decision in both cases. The Court held that private adjudicative bodies do not constitute 'foreign or international tribunals' for the purpose of Section 1782 discovery.[23] In its opinion, the Court reasoned that the term 'foreign or international tribunal' is 'best understood as an adjudicative body that exercises governmental authority'.[24] The Supreme Court explained that the purpose of the statute is 'comity', and specifically to 'promote[] respect for foreign governments and encourage[] reciprocal assistance'.[25] However, the Court observed that '[i]t is difficult to see how enlisting district courts to help private bodies would serve that end'.[26] Applying these principles, the Supreme Court held that the arbitral panel in the first case, involving ZF Automotive, was clearly a private dispute resolution organisation and therefore 'does not qualify as a governmental body'.[27] The Court acknowledged, however, that the ad hoc arbitration panel in the second case 'presents a harder question'.[28] Though the ad hoc panel involved a dispute arising under an international treaty brought against a nation state, the Court again concluded that it was 'materially indistinguishable in form and function' from a private arbitral panel and therefore, the parties could not seek assistance from US courts to compel discovery.[29]

18 id. The Sixth Circuit denied ZF's motion to stay the discovery request under previously established precedent in that Circuit permitting Section 1782 discovery in cases before foreign arbitration panels. See *Abdul Latif Jameel Transp Co v. FedEx Corp*, 939 F3d 710 (6th Cir. 2019).

19 id. at 2084-85.

20 id at 2085.

21 id.

22 id. Unlike the Sixth Circuit, *infra* note 18, the Second Circuit had previously held that foreign private arbitration panels do not qualify as 'foreign or international tribunals' under Section 1782. However, the Second Circuit nonetheless affirmed the District Court order granting discovery holding that the particular arbitral panel, formed in accordance with UN arbitration rules, pursuant to a bilateral international treaty and for the purpose of a dispute involving a nation state, constituted an 'international tribunal' rather than a private adjudicatory body.

23 id.

24 id. at 2086.

25 id at 2088.

26 id.

27 id. at 2089.

28 id.

29 id. at 2089-91.

ii Kemp v. United States

In *Kemp v. United States*,[30] the Supreme Court considered the scope of Federal Rules of Civil Procedure (FRCP) Rule 60(b)(1), which permits a party to seek relief from a final judgment for 'mistake', among other things.[31] In particular, the Court considered whether 'mistake' includes a judge's error of law.[32] The Supreme Court held that it does.

The plaintiff in this case, Dexter Kemp, was convicted of drug and gun crimes in 2011.[33] Kemp and his seven co-defendants appealed, and the Eleventh Circuit affirmed their convictions in November 2013.[34] Two co-defendants sought rehearing, which the Eleventh Circuit denied in May 2014.[35] In April 2015, Kemp moved to vacate his sentence under a federal law providing post-conviction relief.[36] The District Court dismissed on the basis that the motion to vacate was untimely, as it was not filed within one year of Kemp's conviction becoming final.[37] Two years later, Kemp sought to reopen consideration of his motion to vacate arguing that the District Court's dismissal relied on a 'mistake' of law under FRCP 60(b)(1) because the Court incorrectly calculated the one year period from the date on which the Eleventh Circuit affirmed Kemp's conviction, rather than the date on which the Eleventh Circuit denied rehearing for his co-defendants.[38] The District Court and Eleventh Circuit denied Kemp's motion, holding that while his claim was cognisable because it involved a 'mistake' within the meaning of FRCP 60(b)(1), the motion was untimely because FRCP 60(c) similarly imposes a one year statute of limitations for any motion to reopen based on mistake.[39] In other words, the District Court agreed that legal error could constitute a mistake, but held that Kemp also filed this second motion too late.

The Supreme Court granted *certiorari* to resolve a 'longstanding disagreement' among the Courts of Appeals regarding whether a judge's error of law constitutes a 'mistake' under FRCP 60(b)(1). The government argued that FRCP 60(b)(1) applies only in the context of an 'obvious legal error' like the 'failure to apply unambiguous law to record facts'.[40] The Supreme Court disagreed. Instead, the Court reasoned that 'nothing in the text, structure, or history of FRCP 60(b) persuades us to narrowly interpret the otherwise broad term 'mistake'

30 142 S Ct 1856 (2022).

31 id. at 1860.

32 id.

33 id.

34 id.

35 id.

36 id. See 28 USC Section 2255. While the underlying action was criminal in nature, a post-conviction motion to vacate is civil.

37 *Kemp*, 142 S Ct at 1860. See 28 USC Section 2255(f) (providing that '[a] 1-year period of limitation shall apply to a motion under this section' and shall generally run from 'the date on which the judgment of conviction becomes final').

38 *Kemp*, 142 S Ct at 1860-61.

39 id. at 1861. FRCP 60(c)(1) provides that a motion brought under FRCP 60(b)(1) must be filed 'no more than a year after the entry of the judgment or order or the date of the proceeding'. FRCP 60(c)(2) provides an exception, requiring only that the motion be made 'within a reasonable time' if the basis for the motion is fraud or misconduct, that the judgment is void or has been satisfied or 'any other reason that justifies relief.' In *Kemp*, '[t]he Eleventh Circuit held that Kemp's reopening motion alleged precisely the sort of judicial mistak[e] in applying the relevant law that Rule 60(b)(1) encompasses,' and thus was subject to FRCP 60(b)(1)'s 1-year limitations period.' *Kemp v. United States*, 142 S Ct at 1861 (citing *Kemp v. United States*, 857 Fed.Appx. 573, 576 (25 May 2021)).

40 *Kemp*, 142 S Ct at 1861.

to exclude judicial errors of law.'[41] Accordingly, the Supreme Court affirmed the Eleventh Circuit holding that Kemp's reopening motion was cognisable as a 'mistake', but time-barred under FRCP 60(c)'s one year statute of limitations.

iii Badgerow v. Walters

In *Badgerow v. Walters*,[42] the Supreme Court considered how federal courts should determine whether they have subject matter jurisdiction in actions to confirm or vacate judgments under Sections 9 and 10 of the Federal Arbitration Act (FAA).[43] Specifically, the Supreme Court considered whether courts may 'look through' to the dispute underlying the arbitration itself, as courts do in the context of motions to compel arbitration under Section 4 of the FAA. The Court held that courts may not use the 'look-through' approach under Sections 9 and 10 as '[t]hose sections lack [Section 4's] distinctive language directing a look-through'.[44]

In this case, Denise Badgerow, a financial advisor, initiated an arbitration against her former employer after she was allegedly improperly terminated.[45] After the arbitrators dismissed her claims, Badgerow filed suit in Louisiana state court seeking to vacate the arbitral decision.[46] Badgerow's employer moved to remove the case to federal court arguing that the District Court had jurisdiction because the underlying dispute involved federal employment claims. Recognising the Supreme Court had previously held that the FAA's provisions authorising petitions to compel arbitration or modify, confirm or vacate arbitral awards 'do not themselves support federal jurisdiction',[47] the District Court evaluated whether it had an independent jurisdictional basis under the look-through approach adopted by the Supreme Court's in a case called *Vaden*.[48] The District Court acknowledged that *Vaden*'s 'reasoning was grounded on specific text' in Section 4, but applied the approach nonetheless to promote 'consistent jurisdictional principles' across the FAA.[49] Agreeing with Badgerow's employer, the District Court held that there was jurisdiction over the petition to vacate, as the underlying dispute involved federal employment claims.

The Supreme Court disagreed and reversed. The Supreme Court reasoned that District Courts are 'courts of limited jurisdiction, defined . . . by federal statute'.[50] Accordingly, the Court carefully reviewed the statutory language of Sections 9 and 10 and noted that it

41 id. at 1865.

42 142 S Ct 1310 (2021).

43 id. at 1314.

44 id.

45 id.

46 id. See 9 USC Section 10(a) (permitting US District courts to vacate an arbitrator's order if (1) procured by corruption, fraud or undue means; (2) there was evident partiality or corruption in the arbitrators; (3) the arbitrators committed misconduct in refusing to postpone the hearing, refusing to hear pertinent, material evidence or misbehaviour otherwise prejudicing the rights of any party; or (4) the arbitrators exceeded their powers, or significantly misused them).

47 *Badgerow*, 142 S Ct at 1316 (citing *Hall Street*, 552 US 576, 581-82 (2008)).

48 id. at 1315. See also *Vaden v. Discover Bank*, 556 US 49 (2009).

49 *Badgerow*, 142 S Ct at 1315 (citing *Badgerow v. Walter*, 2019 WL 2611127, at *2 (ED La 26 June 2019)). The Fifth Circuit affirmed the District Court ruling, relying on recently-issued precedent based on substantially similar reasoning to the District Court in *Badgerow*. See 975 F.3d 469, 472–474 (5th Cir 2020).

50 *Badgerow*, 142 S Ct at 1315.

'contain[ed] none of the statutory language upon which *Vaden* relied'.[51] The Court explained that Congress could have expanded federal jurisdiction over Sections 9 and 10 petitions by 'draft[ing] a global look-through provision' for the FAA, but did not and 'its decision governs'.[52] As a result, parties that petition to modify, confirm or vacate an arbitral award under Sections 9 or 10 of the FAA may only proceed in federal court if there is independent federal jurisdiction on the 'face of the application itself' (e.g., diversity of citizenship).[53] In many cases, 'the action belongs in state court'.[54]

iv Berger v. NAACP

In *Berger v. NAACP*,[55] the Supreme Court considered whether North Carolina state legislators could intervene under the FRCP to defend their state's election laws. The Supreme Court held that North Carolina's legislative leaders were entitled to intervene.[56]

In relevant part, Rule 24(a)(2) of the FRCP provides that a court 'must permit anyone to intervene' who, upon timely motion (1) 'claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest' unless (2) 'existing parties adequately represent that interest'.[57] *Berger* arose after voters in North Carolina amended their state constitution to require photo identification when voting in elections.[58] Pursuant to that amendment, the North Carolina legislature passed SB 824 setting out rules for voting with proper identification.[59] Shortly thereafter, the NAACP sued to enjoin the new state law, arguing that S.B. 824 violated the Federal Constitution.[60] The North Carolina Attorney General, who voted against the law in his previous capacity as a state senator, undertook responsibility for defending SB 824 in court.[61] North Carolina legislative leaders moved to intervene, noting that North Carolina law expressly authorises them, in addition to the attorney general, to defend state law on behalf of the state.[62] The District Court denied their motion, applying a presumption that the attorney general could adequately represent the state's interests.[63] However, as the litigation progressed, North Carolina's Attorney General neglected to vigorously oppose the NAACP's motion for

51 id. at 1317.

52 id. at 1318.

53 id. at 1316.

54 id.

55 142 S Ct 2191 (2022). The full case name has been shortened from *Berger v. North Carolina State Conference of the NAACP*.

56 id. at 2194.

57 Federal courts must also grant intervention to any party that is 'given an unconditional right to intervene by a federal statute.' FRCP Rule 24(a)(1). Federal courts may grant intervention in certain other circumstances, including where a party is 'given a conditional right to intervene by a federal statute' or 'has a claim or defense that shares with the main action a common question of law or fact.' See FRCP Rule 24(b).

58 *Berger*, 142 S Ct at 2194-95. See NC Const Article VI, Section 2(4).

59 id. at 2198. North Carolina's governor vetoed the law after its passage. The North Carolina General Assembly overrode the governor's veto and SB 824 came into effect.

60 id.

61 id.

62 id. See also N.C. Gen. Stat. Ann. Section 1-72.2(a)-(b).

63 id. at 2198-99. See *NC State Conf of NAACP v. Cooper*, 332 FRD 161 (MDNC 2019).

preliminary injunction or to seek a stay after one was granted.[64] The legislative leaders moved again to intervene, which the District Court denied and the Fourth Circuit affirmed.[65] Again, the District Court and the Fourth Circuit held that the legislators could not overcome the 'heightened presumption' that the state's interests were already adequately represented.[66]

The Supreme Court reversed. First, the Supreme Court found that the state legislators clearly claimed an interest sufficient for intervention under FRCP 24 as 'federal courts should rarely question that a State's interests will be practically impaired or impeded if its duly authorized representatives are excluded from participating in federal litigation challenging state law.'[67] Second, the Supreme Court held that, while a presumption of adequate representation may be appropriate in certain cases, it is 'inappropriate when a duly authorized state agent seeks to intervene to defend a state law'.[68] Considering the unusual facts of this case and the necessity that federal courts 'respect [the] sovereign choice' of states, the Court permitted the legislative leaders to intervene.[69]

III COURT PROCEDURE

This section focuses on the procedures applicable in federal courts.[70]

i Overview of court procedure

The procedures used in civil cases in the federal district courts are set forth in the FRCP.[71] The Federal Rules of Appellate Procedure govern the procedures used in the federal courts of appeals,[72] and the Rules of the Supreme Court govern Supreme Court procedure.

64 id. at 2200-01.

65 Before considering the legislative leaders' motion to intervene, a unanimous panel of the Fourth Circuit Court of Appeals reversed the District Court's ruling issuing a preliminary injunction, finding the District Court 'abused its discretion'. id. at 2200. Following that decision, the legislative leaders separately asked a second Fourth Circuit panel to reconsider their motion to intervene, and the Fourth Circuit agreed with the legislative leaders again, holding that the District Court had erred when denying them leave to intervene. id. However, the Fourth Circuit later decided to rehear the matter *en banc* and reversed the panel's decision. id.

66 id. at 2200. See also *North Carolina State Conference of NAACP v. Raymond*, 999 F.3d 915, 927, 932-934 (2021). Six judges dissented in the Fourth Circuit's ruling on rehearing *en banc*.

67 id. at 2201.

68 id. at 2204-05.

69 id. at 2206.

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

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

72 Each circuit court of appeals may promulgate its own rules to supplement the Federal Rules of Appellate Procedure.

ii Procedures and time frames

A lawsuit is commenced by the filing of a complaint with the court,[73] a copy of which must be served, along with a summons, on the defendant.[74] The defendant responds to the complaint by serving a responsive pleading, called an answer, which may include defences and counterclaims.[75] 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.[76]

Following this initial pleading phase, the parties usually engage in discovery (including document production and depositions). The FRCP provide for depositions,[77] production of documents, including electronically stored information,[78] and written discovery.[79] 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.[80]

There is a special procedure for multidistrict litigation (MDL) cases (i.e., cases involving common issues of law and fact pending in multiple federal districts). Under 28 USC Section 1407, cases pending in multiple judicial districts may be consolidated in one court for pretrial proceedings only, and then remanded to the originating court for trial. There is a judicial panel on MDL, which decides whether cases should be consolidated under the MDL procedure and, if so, where they should be transferred.[81]

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 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 relief, such as injunctions.

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73 See FRCP 3.

74 See FRCP 4.

75 See FRCP 12. The time within which to serve the answer is provided in Rule 12(a) and varies from 21 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.

76 See FRCP 12(b).

77 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.

78 See FRCP 34.

79 See FRCP 33 (providing that a party may serve written interrogatories (i.e., written 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').

80 Recently adopted amendments to the FRCP 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 and the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. The amendments also limit the use of depositions (FRCP 30) to reflect the proportionality rule of FRCP 26.

81 28 USC Section 1407(c).

The length of any given lawsuit from time of filing to start of trial varies widely depending on a number of factors, including the type of action (civil or criminal), the 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 10.4 months in 2021–2022.[82] For civil cases that will proceed to trial, however, the median time from filing to trial was 33.8 months in 2021–2022.[83]

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.[84] To do so, the moving party must demonstrate that it is likely to succeed on the merits, that it will suffer irreparable harm absent preliminary relief, that the balance of equities favours injunctive relief and that an injunction is in the public interest.[85]

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':

a the case involves plaintiffs so numerous that it would be impractical to bring them all before the court;

b there are questions of law or fact common to the class;

c the claims or defences of the representative parties are typical of the claims or defences of the class; and

d the representative parties will fairly and adequately protect the interests of the class.[86]

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 a long-standing right in the United States.[87] The US Judiciary Act, the Code of Conduct for United States Judges, the FRCP, 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. In some situations, however, self-represented appearances are not allowed. For example, although an owner may represent a solely owned business or partnership, only a licensed attorney may represent a corporation.

82 See https://www.uscourts.gov/sites/default/files/fcms_na_distprofile0630.2022_0.pdf.

83 id.

84 See FRCP 65.

85 *Winter v. Nat Res Def Council, Inc*, 555 US 7, 20 (2008).

86 See FRCP 23.

87 See *Faretta v. California*, 422 US 806, 812 (1975) ('In the federal courts, the right of self-representation has been protected by statute since the beginnings of our Nation.').

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:

a 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;

b 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;

c as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction; and

d as the foreign authority directs in response to a letter rogatory or letter of request, or, unless prohibited by the foreign country's law, by:

- delivering a copy of the summons and of the complaint to the individual personally;
- using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or
- 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 Service Convention typically provides the exclusive means for service of US process in other countries that are party to the Convention.[88] 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'.[89] In 2017, the US Supreme Court held that the Hague Service Convention permits service by mail if the receiving state has not objected to service by mail and service by mail is authorised under otherwise-applicable law.[90]

vi Enforcement of foreign judgments

The United States is not a signatory to any treaty that requires the recognition or enforcement of foreign judgments.[91] Nor is there any federal constitutional provision or federal statute requiring a foreign court judgment to be given full faith and credit by US federal courts. Instead, state law generally governs the recognition and enforcement of foreign judgments.

88 See Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, 15 November 1965 (Hague Service Convention), [1969] 20 UST 361, TIAS No. 6638.

89 Under the Supremacy Clause of the US Constitution, 'the Convention pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies'. See *Volkswagenwerk Aktiengesellschaft v. Schlunck*, 486 US 694, 699 (1988).

90 See *Water Splash, Inc v. Menon*, 137 S Ct 1504, 1513 (2017).

91 However, many of the individual 50 states in the United States have adopted the Uniform Foreign Money-Judgments Recognition Act. See e.g., NY CPLR 5401 et seq.

Generally, however, US courts follow the principle of international comity. Under that principle, courts should recognise and enforce foreign court judgments where:

> *[T]here has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the 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.*[92]

To invoke that principle, the holder of a foreign judgment or decree may file suit before a competent US court.

vii Assistance to foreign courts

Litigants in foreign countries that are parties to the Hague Evidence Convention may obtain evidence in the United States pursuant to the procedures contained in the Convention.[93] Federal courts provide assistance to foreign courts pursuant to 28 USC Section 1782, under which parties or other interested persons involved in a proceeding in a foreign or international tribunal 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.[94]

viii Access to court files

There is a presumption of, and right to, public access to court records.[95] 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 generally) is that transparency promotes accountability and public confidence in the judicial system.[96] Issues have arisen over whether this presumption extends to documents and other material produced in discovery. The Supreme Court has held that, because non-filed discovery documents are not a traditionally public source of information, and may only tangentially relate to the underlying case, such documents are not subject to access

92 *Hilton v. Guyot*, 159 US 113, 202 (1895).

93 *Societe Nationale Industrielle Aerospatiale v. US Dist Ct for S Dist of Iowa*, 482 U.S. 522, 533 (1987) ('[B]oth the discovery rules set forth in the Federal Rules of Civil Procedure and the Hague Convention are the law of the United States').

94 See *Intel Corp v. Advanced Micro Devices Inc*, 542 US 241 (2004). In March 2021, the US Supreme Court granted *certiorari* in the case *Servotronics Inc v. Rolls-Royce PLC* to determine whether 28 USC Section 1782(a) authorises a district court to render assistance in discovery for use in a foreign or international tribunal. See 141 S. Ct 1684 (2021). However, in September 2021, the US Supreme Court dismissed the case following a request by both parties involved in the case.

95 *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.

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

rights.[97] In contrast, access to filed discovery material is generally held to be subject to the 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.[98] 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.[99]

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.[100] Although still not prevalent, 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 common 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 lawyers practise or the courts before which they appear. However, the American Bar Association's Model Rules of Professional Conduct (MRPC)

97 See *Seattle Times Co v. Rhinehart*, 467 US 20 (1984). ('A litigant has no First Amendment right of access to information made available only for purposes of trying his suit'); see also *Zemel v. Rusk*, 381 US 1, 17 (1965) ('The right to speak and publish does not carry with it the unrestrained right to gather information').

98 See FRCP 26(c) (protective orders).

99 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.

100 The issue of litigation funding was addressed by the US 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. at 2542.

provide the model on which many states base their ethical rules. The MRPC covers a broad range of conduct, including attorney competence,[101] diligence,[102] duty of confidentiality[103] and conflicts of interest.[104]

Generally, a conflict of interest is present if:

> *(1) the representation of one client will be directly adverse to another client even if the matters are unrelated; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.*[105]

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 give informed consent to the conflict after full disclosure.[106] In many circumstances, an advance consent to future unknown conflicts will be effective as well. Under what is sometimes called the 'firm unit rule', all lawyers of a firm are typically conflicted because of a current client conflict if any lawyer's activities, including activities before that lawyer joined the firm, create a conflict, unless appropriate waivers are received.[107] In a few 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 and, more generally, 'ethical walls' can avoid firmwide conflicts related to personal relationships of lawyers or past work by former government officials who join a 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).[108] 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 US$10,000) made by clients.[109]

101 MRPC 1.1.
102 MRPC 1.3.
103 MRPC 1.6.
104 MRPC 1.7–1.11.
105 MRPC 1.7.
106 MRPC 1.7(b)(4).
107 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.'
108 31 USC Section 5311 et seq.
109 26 USC Section 6050I.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

Certain communications between a lawyer and client are protected from disclosure by the attorney–client privilege: 'The attorney–client privilege is the oldest of the privileges for confidential communications known to common law.'[110] 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'.[111] The privilege applies to:

a a communication;
b made between a lawyer and a client;
c in confidence; and
d for the purpose of seeking, obtaining or providing legal assistance to the client.[112]

The privilege extends only to communications, not to the underlying facts.[113] When the client is a corporation, the privilege is commonly viewed as a matter of corporate control.[114] 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.[115]

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: the disclosure of privileged communications to third parties is often deemed to have waived the privilege such that those communications, and in some cases others on the same subject, are 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 specifically to legal advice. For example, the general nature of the services performed by the lawyer, including the length of the retention, is 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 outside counsel is normally protected by the attorney–client privilege.[116] However,

110 *Upjohn Co v. US*, 449 US 383, 389 (1981).
111 id.
112 See *McCormick on Evidence* Section 87, n.19 (7th ed, June 2016).
113 id. at Section 89. Thus, a party cannot conceal a fact from disclosure merely by communicating it to his or her lawyer. 'A fact is one thing and a communication concerning that fact is an entirely different thing.' *Upjohn Co*, 449 US at 395, 396.
114 See *McCormick on Evidence* Section 87.1 (7th ed, June 2016).
115 id.
116 See *Upjohn Co v. US*, 449 US 383 (1981).

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.

The work product doctrine, which is separate and distinct from the attorney–client privilege, provides that materials prepared by an attorney in anticipation of litigation or trial may be immune from discovery. 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 (or whether the litigation or trial actually occurs). 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 the need for 'a lawyer [to] work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel'.[117] 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.'[118]

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 nonprivileged matter that is relevant to any party's claim or defence and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, 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 FRCP provide a full range of pretrial discovery devices, including discovery of expert opinions, depositions, interrogatories, production of documents, inspections and requests for admissions.[119] Parallel state codes of civil procedure provide for similar discovery devices, generally on 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'.[120] The fact that such documents may be located in a foreign country does not bar their discovery if the test of possession, custody or control is otherwise satisfied. If a domestic parent corporation, for example, is deemed to control

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

118 id. at 511 ('This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs and countless other tangible and intangible ways.').

119 See FRCP 26–36.

120 FRCP 34.

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.

FRCP 34 expressly applies to electronically stored information.[121] Limits on discovery (and e-discovery in particular) generally turn on whether 'the information is not reasonably accessible because of undue burden or cost'.[122] In the context of e-discovery, courts have articulated various formulations of this standard.[123]

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.[124]

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.[125] Recent court decisions have imposed harsh penalties on parties, as well as their lawyers, for failing to preserve and produce relevant documents. A 'failure to adopt good preservation practices' may support a finding of gross negligence in the context of e-discovery obligations.[126]

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.[127]

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

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

123 See, for example, *Zubulake v. UBS Warburg LLC*, 217 FRD 309, 318 (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 (the 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).

124 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 organization'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, government investigation or audit.').

125 See FRCP 37.

126 See *Chin v. Port Auth of New York*, 685 F3d 135, 162 (2d Cir 2012).

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

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 ADR 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 may be a cost-effective option for parties, owing to its speed relative to a traditional lawsuit. In a contractual arbitration provision, parties 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.

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.[128] Generally speaking, however, arbitration awards are more easily enforced than judgments of foreign courts.

128 See Convention on the Recognition and Enforcement of Foreign Arbitral Awards art XIV, 10 June 1958, 21 UST 2517, 330 UNTS 38.

There are some drawbacks to arbitration. Most notably, generally there 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.[129] 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 staff time. Similar to arbitrators, mediators are often selected based on 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 cases on its docket for the upcoming year. For example, in *In re Grand Jury*, the Court will consider whether a communication involving both legal and non-legal advice is protected by attorney–client privilege when obtaining or providing legal advice was one of the significant purposes behind the communication. In *Mallory v. Norfolk Southern Railway Co*, the Court will decide whether a state registration statute for out-of-state corporations confers general personal jurisdiction over the registrant. Furthermore, in *Securities and Exchange Commission v. Cochran*, the Court will consider whether federal district courts have jurisdiction to hear claims challenging the constitutionality of the Securities and Exchange Commission's administrative proceedings.

129 There are numerous private organisations that offer mediation services.

Appendix 1

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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.

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ISBN 978-1-80449-149-2

Cravath, Swaine & Moore LLP