THE DISPUTE RESOLUTION REVIEW

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Editor
Damian Taylor

THE LAWREVIEWS

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Chapter 28

UNITED STATES

Timothy G Cameron[1]

I INTRODUCTION TO THE 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: 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 federal circuit courts of appeals. There are 13 circuit courts of appeals. Each federal circuit court of appeals hears appeals from multiple district courts.[5] For the most part, courts of appeals comprise districts that are

1 Timothy G Cameron is a partner at Cravath, Swaine & Moore LLP.

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 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 44 district court judges and 15 magistrate judges. Magistrate judges are judges appointed to assist district court judges in the performance of their duties.

5 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.

geographically close to one another.[6] 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 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 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 rulings of the circuit courts of appeals, and the Supreme Court may, at its discretion, grant the petition and review a ruling from the court below. The Supreme Court typically grants less than 1 per cent of certiorari petitions filed each year, usually in cases involving important questions about the Constitution or federal law.[8]

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 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 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 the intermediate court of appeals, which hears appeals from the trial courts. Some states have a supreme court that provides a final review of the decisions of the trial court.[9]

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.[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

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 2018 term, for example, the Supreme Court heard argument in 73 cases. See www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf.

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*, 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

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.[11] They are discussed in more detail in Section VI.

II THE YEAR IN REVIEW

Notable decisions of 2020 include the following cases.

i Liu v. SEC[12]

In *Liu*, the US Supreme Court considered whether and to what extent the Securities and Exchange Commission (SEC) may obtain disgorgement from a court as equitable relief for a securities violation.[13]

The disgorgement in *Liu* arose from a 'scheme to defraud foreign nationals'.[14] Charles Liu operated a fund under the EB–5 immigrant investor programme, which offers the opportunity of permanent residency to foreigners who make large investments in the funds that are part of the programme.[15] Liu misappropriated millions of dollars that had been invested in the fund, and the SEC brought a civil action alleging that he violated Section 17(a) of the Securities Act of 1933, which prohibits the making of false statements in a securities offering.[16] The District Court found for the SEC, ordering, among other things, that Liu disgorge the full amount investors had paid into the fund.[17] The Ninth Circuit affirmed.[18] In challenging the decision, Liu argued that the SEC lacked the authority to award disgorgement, and that the disgorgement award failed to account for his legitimate business expenses.[19]

The US Supreme Court held that a disgorgement award that does not exceed a wrongdoer's net profits and that is awarded for victims is a permissible equitable remedy under the Securities Exchange Act.[20] The Court first looked at whether disgorgement is

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.

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

12 140 S.Ct. 1936 (2020).

13 id at 1941.

14 id.

15 id.

16 id.

17 id at 1942.

18 id.

19 id.

20 id at 1937.

a kind of 'equitable relief' that can be awarded under the Act at all.[21] The Court noted that the term should be interpreted in light of equity practice, which 'long authorized courts to strip wrongdoers of their ill-gotten gains'.[22] The Court explained that even though courts have used various names for that remedy – including restitution, disgorgement and accounting for profits – it has been a functionally consistent part of equity practice and so is a type of available equitable relief.[23] The Court then identified three limitations on this disgorgement remedy. [24] First, disgorgement should be restricted to what 'may be appropriate or necessary for the benefit of investors'.[25] Second, disgorgement should be limited only to the profits obtained by each individual defendant.[26] And third, disgorgement must be limited to 'net' profits, deducting the legitimate business expenses of the wrongdoer.[27]

ii GE Energy Power Conversion France SAS, Corp v. Outokumpu Stainless USA, LLC[28]

In GE Energy, the US Supreme Court considered whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) permits a non-signatory to an arbitration agreement to compel arbitration based on the state law doctrine of equitable estoppel.[29]

Outokumpu Stainless USA, LLC operated a steel plant in Alabama with three cold rolling mills.[30] Before the plant had been completed, Outokumpu's predecessor ThyssenKrupp had entered into three contracts with FL Industries, Inc for the construction of the mills.[31] Each contract contained a clause requiring that disputes be arbitrated in Germany under German law.[32] FL Industries then entered into a subcontractor agreement with GE Energy for the provision of nine motors to power the mills.[33]

After the motors failed, Outokumpu sued GE Energy, which moved to dismiss and compel arbitration in reliance on the arbitration clauses in the FL Industries and ThyssenKrupp agreements.[34] The district court granted GE Energy's motion to compel, concluding that Outokumpu and GE Energy were parties to and could enforce those agreements, even though they had not signed them, under the state law doctrine of equitable estoppel.[35] The Court of Appeals for the Eleventh Circuit reversed, concluding that the New York Convention

21 id.
22 id.
23 id. at 1937, 1943.
24 id. at 1937.
25 id at 1947.
26 id. at 1942.
27 id. at 1950.
28 140 S.Ct. 1637 (2020).
29 id. at 1640.
30 id.
31 id.
32 id.
33 id.
34 id.
35 id.

allows enforcement of an arbitration agreement only by the parties that actually signed that agreement, and that allowing GE Energy to compel arbitration through equitable estoppel would impermissibly contradict the Convention's signatory requirement.[36]

The US Supreme Court found in favour of GE Energy and reversed.[37] The Court began with the text of the Federal Arbitration Act, which states that arbitration agreements may be enforced using state law doctrines like equitable estoppel, which allows for contract enforcement by a non-signatory.[38] The Court then considered whether using equitable estoppel to enforce an arbitration agreement conflicts with the New York Convention, and concluded that it does not, as the Convention's text is silent as to whether non-signatories may enforce arbitration agreements under domestic estoppel doctrines, and other aids to interpreting the Convention do not militate against enforcement.[39]

iii Romag Fasteners, Inc v. Fossil Group, Inc[40]

In *Romag*, the US Supreme Court considered whether a winning plaintiff in a trademark infringement suit must show that the defendant wilfully infringed her trademark before she may recover the profits that the defendant created through that infringement.[41] The Court held that the plaintiff need not make that showing.[42]

The plaintiff Romag had signed an agreement with the defendant Fossil under which Romag would provide snap fasteners for use in Fossil's handbags.[43] In time, Romag learned that the factories producing Fossil's handbags were using counterfeit Romag fasteners, and that Fossil was not stopping them from doing so.[44] Romag sued Fossil for trademark infringement, and while the jury found that Fossil had indeed infringed Romag's trademark, it also found that Fossil had not infringed wilfully.[45] Romag asked for an award of the profits that Fossil obtained through infringement, but Fossil argued that Romag could not obtain that award without showing that the infringement was wilful, and the lower courts agreed.[46]

The US Supreme Court reversed, concluding that the language and context of the statute governing remedies for trademark violations worked against any wilfulness requirement for an award of profits.[47] The language stated that when there was a violation of the provision of the trademark statute that Fossil violated, or wilful violation of a different provision, then 'the plaintiff shall be entitled . . . subject to the principles of equity, to recover . . . defendant's profits'.[48] The Court observed that by specifically distinguishing violations and wilful violations, the language suggests that profits should be available upon showing Fossil's violation alone, without wilfulness.[49] The Court also observed that the trademark

36 id.
37 id.
38 id. at 1643.
39 id. at 1645-47.
40 140 S.Ct. 1492 (2020).
41 id. at 1494.
42 id. at 1497.
43 id. at 1494.
44 id.
45 id.
46 id.
47 id. at 1494-96.
48 id. at 1494-95.
49 id. at 1495.

statutes more generally exhibit considerable care about the circumstances in which plaintiffs must prove defendants' mental states to prevail; in that context, the fact that the statute governing remedies does not specifically mention a mental state requirement for profits looks intentional.[50] Finally, the Court reasoned that the principles of equity do not include a wilfulness requirement for profits, as equitable opinions about awarding profits were split on the existence of that requirement.[51] The Court acknowledged that although wilfulness is not a requirement for profits, it may nevertheless be a factor relevant to whether profits should be awarded.[52]

iv Intel Corp v. Sulyma[53]

In *Intel*, the US Supreme Court considered whether a plaintiff has actual knowledge of a fiduciary breach under the Employee Retirement Income Security Act of 1974 (ERISA) when she is notified of that breach in disclosures that she received but did not or cannot recall reading.[54] The Court held that the plaintiff does not obtain actual knowledge in those circumstances.[55]

If a retirement plan is governed by ERISA, it must have a fiduciary who has a duty to manage the plan prudently in the interest of the plan's participants.[56] If a participant obtains actual knowledge that the fiduciary has breached that duty, and wants to bring suit, ERISA provides that the participant must sue within three years of the time she obtained such knowledge.[57] Sulyma, a participant in a relevant plan, sued the plan's fiduciary, alleging that the fiduciary had breached its duty by overinvesting the plan's assets in alternatives to stocks and bonds.[58] The fiduciary replied that the suit was untimely because more than three years prior to the suit, Sulyma had been provided with disclosures explaining the extent of the fiduciary's investment in alternatives.[59] The fiduciary maintained that provision of the disclosures was sufficient to demonstrate that Sulyma had actual knowledge of the alleged breach of duty; Sulyma, meanwhile, testified that he had never seen those disclosures and did not know how exactly the plan was invested until relatively shortly before bringing suit.[60] The lower courts sided with Sulyma and held that disclosure alone did not suffice to show that he had 'actual knowledge' of the alleged breach of duty.[61]

The US Supreme Court affirmed the lower courts, holding that the plain meaning of actual knowledge is knowledge that is actual.[62] The Court observed that the fiduciary's argument was based on the concept of constructive knowledge, and that provisions throughout ERISA distinguished between actual knowledge – meaning knowledge that exists in fact – and constructive knowledge that people should have obtained in light of the

50 id.
51 id. at 1497.
52 id.
53 140 S.Ct. 768 (2020).
54 id. at 773.
55 id.
56 id. at 774.
57 id.
58 id.
59 id.
60 id.
61 id. at 773.
62 id. at 775-76.

circumstances, regardless of whether they in fact obtained it.[63] In light of the clear meaning of actual knowledge, the Court rejected the fiduciary's arguments that ERISA's structure, purpose and history suggested that actual knowledge should always be inferred when plan participants were provided with disclosures describing alleged breaches of duty.[64]

III COURT PROCEDURE

This section focuses on the procedures applicable in federal courts.[65]

i Overview of court procedure

The procedures used in civil cases in the federal district courts are set forth in the Federal Rules of Civil Procedure (FRCP).[66] The Federal Rules of Appellate Procedure govern the procedures used in the courts of appeal,[67] and the Rules of the Supreme Court govern Supreme Court procedure.

ii Procedures and time frames

A lawsuit is commenced by the filing of a complaint with the court,[68] a copy of which must be served, along with a summons, on the defendant.[69] The defendant responds to the complaint by serving a responsive pleading, called an answer, which may include defences and counterclaims.[70] 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.[71]

Following this initial pleading phase, the parties usually engage in discovery (including document production and depositions). The FRCP provide for depositions,[72] production of documents, including electronically stored information,[73] and written discovery.[74] The

63 id. at 777.

64 id.

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

66 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.

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

68 See FRCP 3.

69 See FRCP 4.

70 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.

71 See FRCP 12(b).

72 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.

73 See FRCP 34.

74 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').

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.[75]

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 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 litigation, which decides whether cases should be consolidated under the MDL procedure and, if so, to which district they should be transferred for consolidated pretrial proceedings.[76]

Following the completion of discovery, including discovery related to expert witnesses, if any, a case in which there are genuine disputed issues of material fact 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.

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), 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 8.9 months in 2019–2020.[77] For civil cases that proceed to trial, however, the median time from filing to trial was 27.7 months in 2019–2020.[78]

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.[79]

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 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.[80] Even assuming that the foregoing prerequisites

75 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, 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.

76 28 USC Section 1407(c).

77 See www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf.

78 id.

79 See FRCP 65.

80 See FRCP 23.

to maintaining a class action are satisfied, FRCP 23(b) imposes additional requirements regarding the permissible types of class actions, and various federal laws impose additional requirements and limitations on class action suits asserting particular types of claims.

iv Representation in proceedings

The right of self-representation is long-standing.[81] 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. 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.

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 authorized 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 Service Convention typically provides the exclusive means for service of US process in other countries that are party to the Convention.[82] 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'.[83] In 2017, the US Supreme

81 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.').

82 See Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965 (Hague Service Convention), [1969] 20 U.S.T. 361, T.I.A.S. No. 6638.

83 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).

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.[84]

vi Enforcement of foreign judgments

The United States is not a signatory to any treaty that requires the recognition or enforcement of foreign judgments.[85] 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.

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.*[86]

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.[87] Federal courts provide 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.[88]

viii Access to court files

There is a presumption of and right to public access to court records.[89] 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

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

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

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

87 *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').

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

89 *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.

court proceedings) is that transparency promotes accountability and public confidence in the judicial system.[90] 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 are not a traditionally public source of information, and may only tangentially relate to the underlying case, such documents are not subject to access rights.[91] 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.[92] 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.[93]

ix Litigation funding

For centuries, 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.[94] 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.

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

91 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 U.S. 1, 17 (1965) ('The right to speak and publish does not carry with it the unrestrained right to gather information').

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

93 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.

94 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. at 2542.

IV LEGAL PRACTICE

i Conflicts of interest and ethical walls

No single code of professional conduct or other set of rules governs the conduct of attorneys throughout the United States. Rather, the ethical rules applicable to practising attorneys are determined by the individual states in which lawyers practise. However, the American Bar Association's Model Rules of Professional Conduct (MRPC) provide the model on which many states base their ethical rules. The MRPC cover a broad range of conduct, including attorney competence,[95] diligence,[96] duty of confidentiality[97] and conflicts of interest.[98]

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 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'.[99] 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.[100] 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.[101] 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 current firm. The rules governing conflicts of interest vary widely among the different US states.

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).[102] 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.[103]

95 MRPC 1.1.

96 MRPC 1.3.

97 MRPC 1.6.

98 MRPC 1.7–1.11.

99 MRPC 1.7.

100 MRPC 1.7(b)(4).

101 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'.

102 31 USC Section 5311 et seq.

103 26 USC Section 6050I.

V DISCOVERY METHODS

i Overview of discovery

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.[104] Parallel state codes of civil procedure provide for similar discovery devices, generally on liberal grounds of relevance.

ii Production of documents

A party must produce all documents responsive to a document request that are in the party's possession, custody or control.[105] The fact that such documents are 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 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.[106] Limits on discovery (and e-discovery in particular) generally turn on whether the information is not reasonably accessible because of undue burden or cost.[107] In the context of e-discovery, courts have articulated various formulations of this standard.[108]

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

104 See FRCP 26–36.

105 FRCP 34.

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

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

108 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 ('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).

ensure the preservation of relevant documents.[109] One recent case identified certain acts that may support a finding of gross negligence in the context of e-discovery obligations, including failure to adopt good preservation practices.[110]

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.[111] Recent court decisions 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.[112]

VI THE PROTECTION OF PRIVILEGE

i Attorney–client 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 communications known to common law.'[113] 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'.[114] 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.[115] The privilege extends only to communications, not to the underlying facts.[116] When the client is a corporation, the privilege is commonly viewed as a matter within corporate

109 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.').

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

111 See FRCP 37.

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

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

114 id.

115 See *McCormick on Evidence* Section 87, n.19 (7th ed, June 2016).

116 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.

control.[117] 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.[118]

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 to have waived privilege and 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 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 outside counsel is normally protected by the attorney–client privilege.[119] 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.

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 the need for 'a lawyer [to] work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel'.[120] 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.'[121]

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

117 See *McCormick on Evidence* Section 87.1 (7th ed, June 2016).

118 id.

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

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

121 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.').

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'.

VII 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 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.

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 an award is made in a state that is not a party to the Convention or does not reciprocally enforce US awards.[122] 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.[123] Unlike litigation or arbitration, mediation is not an adversarial process. The mediator does not decide the case. The results of mediation are binding only if and when parties enter into a settlement contract.

A mediation process can be scheduled at any time during arbitration or litigation. It is becoming common for US courts to require parties to cases before them to engage in mediation. By enhancing the prospects for an early settlement, mediation offers the possibility of saving the parties' money through reduced legal costs and staff time and distraction. Like arbitrators, mediators are often selected on the basis of their specialised expertise in the issues subject to mediation. Generally, mediation proceedings are confidential, and information disclosed at a mediation may not be divulged as evidence in any subsequent arbitral, judicial or other proceeding.

VIII OUTLOOK AND CONCLUSIONS

The Supreme Court has several interesting cases on its docket for the upcoming year. For example, in *Henry Schein Inc. v. Archer and White Sales Inc*, the Court will decide whether an arbitration agreement that exempts certain claims from arbitration negates an otherwise clear and unmistakable delegation of arbitrability to an arbitrator. In *Ford Motor Company v. Montana Eighth Judicial District Court*, the Court will determine whether a state court may exercise personal jurisdiction over a non-resident defendant when none of the defendant's contacts with the state caused the plaintiff's claims. And in *Republic of Hungary v. Simon*, the Court will assess whether a court can abstain from exercising jurisdiction on comity grounds in a case arising out of the expropriation exemption of the Foreign Sovereign Immunities Act, where the plaintiffs have made no attempt to exhaust their local remedies in the foreign country.

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

123 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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