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The International Comparative Legal Guide to:

Litigation & Dispute Resolution 2009

A practical insight to cross-border Litigation & Dispute Resolution

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has the USA got? Are there any rules that govern civil procedure in the USA?

The United States is a common-law country, with court systems maintained by the federal government and by each individual state. The federal judiciary's jurisdiction is limited to cases (1) between parties from different states or from foreign countries (where the amount in controversy exceeds $75,000), (2) arising from or involving a question of federal law, (3) where the United States is a party, or (4) involving questions of admiralty law.

Each of the 50 U.S. states maintains its own distinct court system. These courts can hear all civil cases not otherwise subject to exclusive federal jurisdiction.

In the federal courts, the Federal Rules of Civil Procedure ("FRCP") govern. Each state also has its own civil procedure code. In general, federal courts use the FRCP for procedure, and rely on state law to adjudicate the substantive claim. Federal courts may refer to state civil procedure rules, however, to resolve questions delegated by the FRCP to state law (e.g. statutes of limitations, rules for attachment, and rules for execution).

Unless otherwise specified, the discussions below refer only to the federal judicial system.

1.2 How is the civil court system in the USA structured? What are the various levels of appeal and are there any specialist courts?

The federal judiciary has three levels. The 94 district courts, spread throughout the 50 states and the U.S. territories, are the trial courts of the federal system. Each district also has a separate bankruptcy court.

All judgments and final orders of the district courts can be appealed to one of 11 Courts of Appeals. Court of Appeals decisions may be submitted to the Supreme Court for further review, but the Supreme Court accepts only a small percentage of the appeals submitted to it. See question 9.4, below.

In addition to these courts, there are several specialty courts established by the federal executive branch, including immigration courts, tax courts, military courts, the Court of Federal Claims (for claims against the U.S. government), and the Court of International Trade.

Each state has its own court structure for state civil, criminal, and administrative proceedings, but each state must have one supreme court. Decisions of a state supreme court may be appealed directly to the U.S. Supreme Court if they involve questions of federal law (particularly constitutional law).

1.3 What are the main stages in civil proceedings in the USA? What is their underlying timeframe?

The stages of a U.S. litigation will generally include:

- filing and service of a plaintiff's complaint;
- filing and service of a defendant's answer;
- pre-trial discovery (required disclosures, document requests, interrogatories, and depositions);
- trial; and
- judgment.

Cases might also include motion practice, scheduling conferences, court-mandated mediation, pre-trial fact and expert witness statements, and legal briefing. Aside from the deadline for the filing of an answer (due 20 days after the service of the complaint), FRCP 12(a)(1), the timeframe for a U.S. litigation will vary by the complexity of the case.

1.4 What is your local judiciary's approach to exclusive jurisdiction clauses?

Federal courts will generally enforce contractual exclusive jurisdiction clauses, *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984 (9th Cir. 2006), unless enforcement of the clause would contravene a strong public policy of the forum in which suit is brought, or there is a clear showing that enforcement of the clause would be unreasonable under the circumstances. *Canon Latin Am., Inc. v. Lantech (CR)*, S.A., 453 F. Supp. 2d 1357, 1363 (S.D. Fla. 2006).

1.5 What are the costs of civil court proceedings in the USA? Who bears these costs?

The filing fee for a complaint in federal court is $350. Overall costs of litigation, including attorney's fees, vary depending on the complexity of the case, but generally the cost of litigation in the U.S. is comparatively high, owing largely to the cost of mandatory discovery (see section 7, below). Each side is expected to bear its own costs, barring a showing that the litigation was frivolous or filed in bad faith. A limited set of federal statutes creating private causes of action (e.g., civil rights actions) also allow victorious plaintiffs to collect their attorney's fees from defendants.

1.6 Are there any particular rules about funding litigation in the USA? Are there any contingency/conditional fee arrangements? Are there rules on security for costs?

There are no particular rules for funding U.S. litigation. Contingency and conditional fee arrangements are permitted, except for criminal cases. In some legal practices - particularly personal injury - contingency and/or conditional fee arrangements are commonplace.

While each party generally bears its own attorney's fees, a plaintiff could obtain an order for security for its fees where such damages are likely to be granted, and where the losing party cannot or will not pay.

2 Before Commencing Proceedings

2.1 Are there any pre-action procedures in place in the USA? What is their scope?

There are no required pre-action procedures prior to the filing a complaint, except for those established by contract between the parties.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Statutes of limitations are considered substantive rather than procedural, and are therefore governed by the state law that otherwise governs the substance of the case, rather than by the FRCP. The statutes of limitations vary by state; as an example, the following are some of the New York statutes of limitations:

- 20 years: enforcement of a money judgment.
- 10 years: recovery of real property, redemption of mortgage.
- 6 years: breach of contract, fraud, corporate misconduct.
- 3 years: personal injury, products liability.
- 1 year: defamation, libel, slander.

N.Y. C.P.L.R. § 201 et seq. Under New York law, the statute of limitations is computed "from the time the cause of action accrued to the time the claim is interposed." N.Y. C.P.L.R. § 203(a).

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in the USA? What various means of service are there? What is the deemed date of service? How is service effected outside the USA? Is there a preferred method of service of foreign proceedings in the USA?

The United States deems an action commenced when a complaint is filed with the court. FRCP 3. A judge is assigned to the case soon thereafter.

For U.S. defendants, if the defendant does not waive service of the complaint, the plaintiff must serve the defendant with a summons and copy of the complaint within 120 days. FRCP 4(c)(1), (m). Such service may be effected:

- according to the law of the state in which the court sits or where service is made;
- by personal delivery to defendant;
- by delivery to a person of "suitable age and discretion" at defendant's home; or
- by delivery to defendant's authorised agent.

FRCP 4(e). Service is deemed effective on the date the summons and complaint are delivered.

If the defendant is outside the U.S., the plaintiff must attempt service reasonably calculated to give actual notice of the lawsuit. This may be accomplished by:

- internationally agreed means;
- means prescribed by authority of the country in which service is effected;
- personal delivery or delivery via mail requiring the recipient to sign, if permitted by local law; or
- other means as directed by the court.

FRCP 4(f). There is no time limit for service on a foreign defendant. FRCP 4(m).

The United States is a signatory to the Hague Service Convention and the Inter-American Convention on Letters Rogatory. Both treaties provide for service on U.S. defendants in foreign proceedings through the U.S. Central Authority, a division of the U.S. State Department.

3.2 Are any pre-action interim remedies available in the USA? How do you apply for them? What are the main criteria for obtaining these?

A district court cannot issue any order unless an action is pending before it. However, once an action is commenced, the court may grant any remedy that, under the law of the state where the court sits, provides for seizing a person or property to secure satisfaction of the potential judgment. FRCP 64.

Courts may also grant preliminary injunctions - requiring a party to do or refrain from doing a specific act - after notice and a hearing, if the moving party can demonstrate: "(1) a substantial likelihood of success on the merits; (2) irreparable harm to the movant if the injunction is denied; (3) the threatened injury outweighs the harms that the preliminary injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *Wilderness Workshop v. U.S. Bureau of Land Management*, 531 F.3d 1220, 1224 (10th Cir. 2008). If the feared injury would occur immediately - before opportunity for notice and a hearing - the court may grant a temporary restraining order ("TRO") on an ex parte basis. FRCP 65(b).

3.3 What are the main elements of the claimant's pleadings?

U.S. courts require "notice pleading." In other words, a complaint need only be sufficient to put the defendant on notice of the lawsuit and the basic allegations supporting it. The complaint should include:

- a statement of the grounds for jurisdiction;
- a statement of the grounds for relief; and
- a demand for the relief sought.

FRCP 8(a).

The allegations must be "simple, concise, and direct" (FRCP 8(d)(1)); however, conclusory legal assertions without factual support are insufficient. Allegations of fraud or contractual mistake and claims for special damages (out-of-pocket expenses resulting from the breach of contract) must be specifically pleaded. FRCP 9(b), (g).

3.4 Can the pleadings be amended? If so, are there any restrictions?

A plaintiff may amend the complaint once before the defendant

serves an answer. Otherwise, pleadings may be amended by leave of the court - which leave is to be given "when justice so requires" - or with the adverse party's consent. FRCP 15(a).

If the evidence presented at trial does not conform to the issues in the pleadings, the court may allow the parties to amend the pleadings, and should freely do so unless the adverse party (1) objects and (2) satisfies the court that it would be prejudiced by the late amendment and admission of new evidence. FRCP 15(b); *Brandon v. Holt*, 469 U.S. 464, 471 n. 19, 105 S. Ct. 873, 83 L. Ed. 2d 878 (1985).

A party may join any additional claim against an opposing party in its amendment; the additional claim need not be related to the original action. FRCP 18(a).

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

In its answer, the defendant must (1) state its defences to each legal claim asserted against it, and (2) respond to each allegation in the complaint with an admission or denial. FRCP 8(b)(1). A good-faith statement that the party lacks knowledge sufficient to respond to an allegation has the effect of a denial. FRCP 8(b)(5).

The defendant must set forth all affirmative defences in the answer; however, if the plaintiff is otherwise on notice that the defendant will litigate an affirmative defence and will suffer no prejudice, a failure to plead it is not fatal. FRCP 8(c); *Williams v. Ashland Eng'g Co.*, 45 F.3d 588, 593 (1st Cir. 1995). Further, certain defences may be raised by a separate motion to dismiss, prior to serving the answer. Those defences include:

- lack of subject-matter jurisdiction;
- lack of personal jurisdiction;
- improper venue;
- insufficient process;
- insufficient service of process;
- failure to state a claim upon which relief can be granted; and
- failure to join an indispensable party (see question 5.1, below).

FRCP 12(b).

Any counterclaim or set-off that arises out of the same transaction or occurrence as the complaint and does not require adding a party over whom the court does not have jurisdiction must be included in the answer. FRCP 13(a). A defendant may also include in its answer any claims against the plaintiff unrelated to the original action in its answer. FRCP 13(b).

4.2 What is the time-limit within which the statement of defence has to be served?

A defendant must answer within 20 days of being served. If the defendant has waived service, the answer should be served 60 days from the time the waiver request was sent for a domestic defendant, and 90 days for a defendant outside the U.S. FRCP 12(a)(1).

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on liability by bringing an action against a third party?

A defendant can join a third party, alleging the party is liable to the defendant for part or all of the claim against it. If the defendant does so more than 10 days after serving its original answer, it must first obtain leave of the court. FRCP 14(a)(1).

4.4 What happens if the defendant does not defend the claim?

If a party "fail[s] to plead or otherwise defend," the court must enter a default judgment against that party. FRCP 55(a). The court retains discretion to set aside an entry of default for "any other reason that justifies relief." FRCP 55(c), 60(b)(6). However, some courts have limited setting aside default judgments to "extraordinary circumstances." *Budget Blinds, Inc. v. White*, 536 F.3d 244 (3rd Cir. 2008).

4.5 Can the defendant dispute the court's jurisdiction?

A defendant can challenge the court's jurisdiction over either the defendant's person or the subject matter of the suit (arguing, e.g., that the suit does not meet the standard for a lawsuit in federal court discussed in question 1.1, above).

If a challenge to personal jurisdiction does not appear in the defendant's answer, it is generally deemed waived. FRCP 12(g), (h)(1); *Swaim v. Moltan Co.*, 73 F.3d 711, 718 (7th Cir. 1996). However, the defendant may challenge the court's subject matter jurisdiction by motion at any time. FRCP 12(h)(3); L*aughlin v. Kmart Corp.*, 50 F.3d 871, 873-874 (10th Cir. 1995).

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

A defendant may join a third-party defendant as discussed in question 4.3, above.

The court may add parties at any time. FRCP 19-21. If a third party is necessary to the action - i.e., the third party's absence makes it impossible to accord complete relief, the third party's interest in the action would be impaired, or an existing party might be injured by disposition of the action in the person's absence - the third party must be joined if feasible. FRCP 19(a). If such joinder is not feasible, and if the action cannot fairly proceed without the third party, the court may dismiss the action. FRCP 19(b); *Yashenko v. Harrah's N.C. Casino Co.*, 446 F.3d 541 (4th Cir. 2006).

Additional parties may be joined if (1) a question of law or fact will arise in the action that is common to all parties and the additional party, and (2) the same transaction or occurrence gives rise to the right to relief asserted on behalf of each plaintiff/additional party and against each defendant/additional party. FRCP 20(a). The plaintiff may join parties at the outset, or by amending the complaint. See question 3.4, above. A defendant who files a cross-claim or counterclaim (see question 4.1 above) is treated as a plaintiff for these purposes.

If the joinder of all interested plaintiffs to an action would be impracticable due to the large number of plaintiffs, a class action may be filed. In a class action, one representative plaintiff litigates the suit on behalf of all similarly situated plaintiffs, and the judgment will reflect the total amount due to all plaintiffs. FRCP 23.

A third party has a right to intervene in an action when it has an interest in the action that will be damaged if the action is decided in its absence. FRCP 24(a). The court has discretion to permit a third

party to intervene who has a claim or defence that shares a common question of law or fact with the action. FRCP 24(b). In either circumstance, the third party must "timely" move to intervene (although there is no specific deadline), and must serve its motion on all parties. FRCP 24(a)-(c).

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

When two separate actions involving a common question of law or fact are pending, they may be consolidated. FRCP 42(a). In addition, the district court has the discretion, without consolidating the actions, to order "a joint hearing or trial of any or all the matters in issue in the actions," or to "make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." *Id.*

5.3 Do you have split trials/bifurcation of proceedings?

In the interests of efficiency, convenience, or avoiding prejudice, the court may order a separate trial of any issue or issues, or any claim, cross- or counterclaim, or third party claim, on motion of a party or sua sponte. FRCP 42(b); *Chlopek v. Federal Insurance Co.*, 499 F.3d 692, 700-701 (7th Cir. 2007). The court also has the power to order a claim against a party to be severed, resulting in two or more lawsuits where there previously was one. FRCP 21.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in the USA? How are cases allocated?

The federal courts do not have a formal case allocation system, except that cases will be diverted where appropriate to the bankruptcy or other specialty court. See question 1.2, above. For cases falling under the general jurisdiction of the district court, any available district court judge can be assigned. On occasion, the court may assign one judge to hear all cases with particular facts or legal issues in common. For example, all cases against airlines arising from the September 11, 2001 terrorist attacks filed in the Southern District of New York are heard by a single judge. All cases filed in the Southern District of New York against the Republic of Argentina arising from its 2002 debt default are similarly assigned to one judge.

6.2 Do the courts in the USA have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

The FRCP gives the federal courts broad discretion to manage cases, including the power to:

- expedite the disposition of the action;
- establish control over the case by limiting the amount of time to file motions and complete discovery;
- discourage wasteful pre-trial procedures;
- improve the quality of the trial through more thorough preparation; and
- facilitate the settlement of the case, through court-ordered mediation or otherwise.

FRCP 16(a).

The parties may file a wide range of interim applications, including applications for preliminary injunctions and security/attachment (see question 3.2, above), motions to dismiss all or part of the action (see question 6.4, below), motions for full or partial summary judgment (see question 6.5, below), motions to compel discovery (see question 7.4, below), and motions for sanctions for failure to abide by the FRCP. Aside from attorney's fees for the preparation of these motions - which, depending on the motion, could be substantial - there is no additional cost associated with them.

6.3 What sanctions are the courts in the USA empowered to impose on a party that disobeys the court's orders or directions?

A district court may impose monetary or non-monetary sanctions against a party that disobeys its orders. FRCP 11; FRCP 37. Courts have broad discretion to fashion sanctions to fit the specific circumstances of the abuse. *Design Strategy, Inc. v. Davis*, 469 F.3d 284, 294 (2nd. Cir. 2006).

6.4 Do the courts in the USA have the power to strike out part of a statement of case? If so, in what circumstances?

Under the FRCP, a district court has the power to dismiss the whole case or one or more of the claims within a case, on a variety of bases related to a deficiency in the court's jurisdiction or the merits of the case. See question 4.1, above. In extreme cases, a court may issue a sanction order dismissing a case for a party's failure to comply with a rule, practice, direction, or court order. *John's Insulation, Inc. v. L. Addison & Assoc.*, 156 F.3d 101, 110 (1st Cir. 1998).

6.5 Can the civil courts in the USA enter summary judgment?

The FRCP allows a court to enter summary judgment for a plaintiff or defendant without trial. FRCP 56. It may grant summary judgment dispensing with the whole case, or partial summary judgment dispensing with certain claims. FRCP 56(d). The court may grant summary judgment on the motion of either party or sua sponte. FRCP 56(a)-(b); *Celotex Corp. v. Catrett* 477 U.S. 317, 325-326 (1986).

The summary judgment procedure is intended to dispose of cases or claims where no material facts are in dispute, or where the court needs only to resolve a question of law, thereby obviating the need for a trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986).

6.6 Do the courts in the USA have any powers to discontinue or stay the proceedings? If so, in what circumstances?

A plaintiff may voluntarily dismiss an entire case, without a court order, by filing a notice of dismissal before the defendant has filed an answer or a motion for summary judgment. FRCP 41(a)(1). After this time period elapses, an order of the court is necessary to dismiss the entire case. FRCP 41(a)(2).

A plaintiff may dismiss certain claims, without a court order, by amending the pleadings anytime before the defendant serves a responsive pleading. FRCP 15(a). After this period, a plaintiff may dismiss certain claims against a party only with court permission or with permission of the adverse party. *Id.*

The district courts retain broad discretion to manage case proceedings (see question 6.2, above), which includes the power to stay proceedings pending the resolution of other related litigation or arbitration. A court also has the power to stay the effect of its judgments. FRCP 62.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in the USA? Are there any classes of documents that do not require disclosure?

The disclosure process is referred to as "discovery" in the FRCP. The FRCP requires certain initial and pre-trial disclosures, including:

- the identities of any individuals who may possess discoverable information;
- copies of documents that the disclosing party may use to support its claims or defences;
- the identities of witnesses the parties plan to use at trial; and
- an identification of documents the disclosing party plans to present as exhibits at trial.

FRCP 26(a)(1)-(3).

In addition to these required disclosures, parties may request additional information from each other, as long as the information requested appears reasonably calculated to lead to the discovery of evidence admissible at trial. FRCP 26(b)(1). These requests may include demands for witness depositions, written interrogatories, and requests for the production of documents or other material. *Id.* Once a party has received discovery requests, it is required to comply with those requests unless they are overly burdensome or compliance would require the disclosure of privileged information. FRCP 26(b)(2).

7.2 What are the rules on privilege in civil proceedings in the USA?

The scope of privilege in the federal courts depends on the underlying substantive law of the claim presented. For claims arising under federal law, courts use federal common law rules of privilege. *EEOC v. Ill. Dep't. of Employment Security*, 995 F.2d 106, 107 (7th Cir. 1993). If the district court is hearing a state law claim, it will apply that state's privilege law. *Id.* In general, privileged information is not admissible at trial and may be withheld from discovery.

Examples of leading categories of privilege under state and federal law include the attorney-client privilege, the work-product privilege, the privilege against self-incrimination, the doctor-patient privilege, and the spousal privilege.

The FRCP requires the party asserting the privilege to sufficiently describe the documents or other evidence it is refusing to produce. FRCP 26(b)(5). Ultimately, it is within the court's discretion to determine whether a piece of evidence is privileged, and the court can demand to see the allegedly privileged evidence *in camera* before ruling.

7.3 What are the rules in the USA with respect to disclosure by third parties?

The FRCP allows parties to seek discovery from third parties. FRCP 30, 31. In order to procure discovery from a third party, the requesting party should issue a subpoena to the third party compelling the deposition or production of evidence. Attorneys are authorised to issue such subpoenas directly without assistance by the court, but the subpoena has the power of a court order. The subpoena must include information about the issuing court, the case, and the third party ordered to appear. FRCP 45.

7.4 What is the court's role in disclosure in civil proceedings in the USA?

The federal courts are not directly involved in the discovery process, but can issue discovery orders to compel a party to produce requested information, and can rule on challenges to requested discovery. FRCP 37(a). Additionally, the court has the authority, under its case management discretion, to set deadlines for the completion of discovery.

A court may enforce its discovery orders by imposing sanctions and expenses against disobeying parties. FRCP 37(a)(3), (b). Ultimately, a court could order that adverse inferences be drawn at trial against the disobeying party, and could even dismiss the action if the plaintiff is the disobeying party.

7.5 Are there any restrictions on the use of documents obtained by disclosure in the USA?

There are no restrictions on the use of documents obtained through discovery. However, the FRCP allows district courts, in their discretion, to issue protective orders to ensure that parties do not use information received through discovery in any way other than for the purpose of the litigation. FRCP 26(c). On rare occasions, a court will seal evidence, pleadings, and testimony to ensure that they are not made available to the public.

8 Evidence

8.1 What are the basic rules of evidence in the USA?

The federal courts use the Federal Rules of Evidence ("FRE"), which is - like the FRCP - a federal statute. These rules govern (1) relevancy of evidence, (2) privileges, (3) testimony from fact witnesses, (4) opinion and expert testimony, (5) hearsay, (6) authentication and identification of documentary or other tangible evidence, and (7) the admissibility of the contents of writings, recordings, and photographs.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

Types of admissible evidence include testimony from fact and expert witnesses, writings and recordings, and photographs; these latter categories are broadly defined to include electronically stored information. FRE 1001. Evidence in whatever form will only be admitted if it is relevant to the proceedings, not unduly prejudicial, authentic, and not hearsay (testimony based on second-hand information). FRE 402, 403.

The court may admit testimony from an expert in a relevant scientific, technical or otherwise specialised field. FRE 702. The expert's testimony must be based on facts or procedures normally relied upon by experts in the given field, but does not necessarily have to be based solely on otherwise admissible evidence. FRE 703.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

Any party or the court may call fact witnesses, who can testify to matters for which they are deemed competent. FRE 601, 614. In particular, a fact witness can only testify as to events for which he has direct knowledge. FRE 602. The opposing party has the right

to cross-examine any witness called. *Douglas v. Owens*, 50 F.3d 1226, 1230-31 n. 6 (3rd Cir. 1995).

The FRCP permits pre-trial depositions of witnesses. FRCP 30, 31. However, deposition testimony will be admitted at trial only under limited circumstances, particularly for impeachment of the witness's trial testimony. FRE 613. Deposition testimony may also be admitted where the deponent is unable to testify at trial due to death or grave illness. FRE 804.

In general, witness statements from fact witnesses are disfavoured in U.S. courts, which prefer live testimony and cross-examination at trial. However, when submitting a pre-trial motion (particularly a motion to dismiss or a motion for summary judgment), it is common to submit a witness statement describing facts relevant to the motion. Also, courts will often require expert witness statements to be exchanged in advance of trial, to put the opposing party on notice of the expert's planned testimony.

8.4 What is the court's role in the parties' provision of evidence in civil proceedings in the USA?

The courts have the power to issue orders compelling the disclosure of requested discovery (see question 7.4, above), and attorney-issued subpoenas bear the force of a court order.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in the USA empowered to issue and in what circumstances?

District courts are empowered to issue judgments for money damages, specific performance, and declaratory relief. A district court may issue such judgments after trial, or at any point upon a motion for summary judgment.

District courts also have wide discretion to issue a variety of orders in law or equity, including but not limited to orders for:

- injunction;
- security;
- restraint;
- attachment;
- execution;
- discovery compliance;
- subpoena (of witnesses or documents);
- dismissal;
- scheduling; and/or
- mediation.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

District courts have full power to render judgments for damages, including, in some cases, punitive, speculative or special damages. Punitive damages are generally available as punishment for outrageous conduct by the defendant, or where otherwise specified by statute. Speculative damages, such as lost profits, are disfavoured, but may be issued where they can be reliably established and where no other measure of damages is appropriate.

Costs are generally left to each party, but may be awarded in select circumstances. See questions 1.5 and 1.6, above.

For federal lawsuits, the rate of post-judgment interest is governed by statute and varies depending on the weekly average one-year constant maturity U.S. Treasury security yield for the calendar week preceding the judgment. 28 U.S.C. § 1961. Judges retain discretion to award pre-judgment interest in an amount appropriate to the case.

9.3 How can a domestic/foreign judgment be enforced?

Enforcement of district court judgments is governed by the state law where the district court sits or where enforcement is sought. FRCP 64. Generally, when the losing party refuses to pay a money judgment, the judgment creditor can execute on property of the losing party (whereby the property is seized by a sheriff or marshal), establish a lien on real property, or garnish payments owed to the judgment debtor.

There are no treaties between the U.S. and any other countries for the enforcement of foreign judgments. A party seeking to enforce a foreign judgment must file an action in a state or federal district court seeking recognition of that judgment. The enforcement of foreign judgments is governed by state law, which will generally take into account international comity, reciprocity and res judicata.

9.4 What are the rules of appeal against a judgment of a civil court of the USA?

All district court judgments and final orders can be appealed as of right to the Court of Appeals. In addition, any interim order can be referred to the Court of Appeals if it involves a "controlling question of law as to which there is substantial ground for difference of opinion" and where "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

When reviewing district court judgments and orders, the Court of Appeals will apply one of two standards. The Court of Appeals can review any legal determination by the district court de novo, meaning that the Court of Appeals does not have to give any deference to the district court's decision. However, where the district court has resolved a factual dispute, the Court of Appeals will only overturn that determination upon a showing of clear error.

Civil procedure in the Court of Appeals is governed by the Federal Rules of Appellate Procedure.

Review of Court of Appeals' decisions can be sought through a petition for a writ of certiorari to the Supreme Court. However, the Supreme Court grants only a small number of the petitions for writ of certiorari submitted to it, meaning that, practically, most cases cannot be appealed beyond the Court of Appeals.

II. DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of dispute resolution are available and frequently used in the USA? Arbitration/Mediation/Tribunals/Ombudsman? (Please provide a brief overview of each available method.)

The most commonly used methods of alternative dispute resolution ("ADR") in the U.S. are arbitration and mediation.

Arbitration has a long tradition in the U.S. The Federal Arbitration Act ("FAA") was created in 1925 to overcome judicial hostility towards arbitration, and U.S. courts have since routinely upheld and enforced arbitration agreements and awards. The FAA requires that

any doubts as to the arbitrability of certain issues under a legitimate arbitration clause be resolved in favour of arbitration. *Moses H. Cone Mem'l Hosp.l v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). In 1970, the United States adopted the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which further facilitated the use of arbitration in the resolution of transnational disputes.

Mediation is also widely accepted in the U.S., and many district courts and state courts maintain courthouse mediation services to resolve disputes without trial. Mediation is usually confidential and, unless a final agreement is reached, proceeds without prejudice to the parties' respective positions. Unlike arbitration, mediation is non-binding until a final agreement is recorded with the court.

U.S. litigants may also use a hybrid form of mediation and arbitration, "Med-Arb." Med-Arb parties can agree to settle some issues through mediation and others through arbitration, or can agree to use mediation as a precursor to arbitration where, if the mediation fails, unresolved issues will be determined by an arbitrator.

1.2 What are the laws or rules governing the different methods of dispute resolution?

Arbitration statutes have been enacted at both the federal and state levels. The FAA creates substantive federal law that is binding on both federal and state courts, pre-empting any inconsistent state laws, but it does not occupy the entire field of arbitration law. States may, therefore, fill in the gaps left by the FAA with their own legislation, particularly with regard to whether and how courts can assist in arbitral procedures. *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 477 (1989).

Under the FAA, domestic arbitral awards will only be vacated where the award was procured by fraud or corruption, where an arbitrator exhibited "evident partiality," where the arbitrators committed severe misconduct in managing the arbitration, or where the arbitrators exceeded the scope of their powers. 9 U.S.C. § 10(a). There are similarly limited bases for vacating or refusing to enforce an award under the New York Convention. New York Convention Art. V. Notably, mistake of fact or law is not a basis for disregarding an arbitral award under either the FAA or the New York Convention.

1.3 Are there any areas of law in the USA that cannot use arbitration/mediation/tribunals/Ombudsman as a means of dispute resolution?

Given that arbitration is a creature of contract between parties, several categories of legal proceedings cannot be subject to arbitration, including criminal and family law cases. On the other hand, family law cases may be subject to mediation.

2 Dispute Resolution Institutions

2.1 What are the major dispute resolution institutions in the USA?

For private arbitrations or mediations relating to commercial, consumer, or labour and employment disputes, the American Arbitration Association ("AAA") is the most widely used institution. The AAA maintains a division for international arbitration, the International Centre for Dispute Resolution ("ICDR"). Another major American ADR institution, covering both mediation and arbitration, is JAMS, the Judicial Arbitration and Mediation Services. The International Institute for Conflict Prevention and Resolution (CPR) assists parties in non-administered arbitration and mediation.

There are also several specialised, industry-specific arbitral institutions, such as the International Film and Television Alliance ("IFTA") Arbitration. The New York Stock Exchange and National Association of Securities Dealers ("NASD") similarly maintain their own arbitration services for certain kinds of investment disputes.

2.2 Do any of the mentioned dispute resolution mechanisms provide binding and enforceable solutions?

Arbitration awards are binding and enforceable under both the New York Convention and the FAA.

Mediation, on the other hand, does not generally result in enforceable awards. However, if the parties so desire, they can register a mediated agreement with a court to make it legally binding. Otherwise, a mediated settlement agreement can be enforced as a contract.

3 Trends & Developments

3.1 Are there any trends in the use of the different dispute resolution methods?

There is a widely-held perception that U.S.-style discovery is becoming more prevalent in arbitrations, and that measures must be taken to curb the use of such discovery in order to preserve the efficiency of arbitration. The issue has become more critical in recent years due to the heavy use of electronic means of communication by parties. Electronic discovery - whether in court or in arbitration - can bog the parties down in expensive and time-consuming document review.

Thus, in 2008, the AAA's ICDR issued guidelines for the exchange of information in international arbitration, with a focus on electronic information. The guidelines give arbitrators discretion to focus and narrow document requests submitted by parties to limit the time and expense required for electronic discovery. Other arbitral institutions (in the U.S. and elsewhere) are similarly addressing the issue of electronic document exchange in arbitration. It seems likely that as electronic discovery continues to grow more cumbersome, arbitrators and arbitral institutions will seek ways to minimise its impact on the efficiency of arbitration.

3.2 Please provide, in no more than 300 words, a summary of any current issues or proceedings affecting the use of those dispute resolution methods in the USA?

A major question pending before U.S. courts is whether an arbitrator's "manifest disregard of the law" provides a basis for vacating an arbitral award. As discussed above, the FAA provides four bases for vacatur, none of which include disregard of the law. However, federal courts have long held that if an arbitrator exhibits a "manifest disregard of the law," the award could be vacated. Some courts held that the "manifest disregard" standard provided an additional common-law basis for vacatur outside of the FAA, while others argued that the standard developed from the FAA's stated bases for vacatur, particularly those that apply where the arbitrator has committed severe misconduct or exceeded the scope of her powers. *Compare McCarthy v. Citigroup Global Markets, Inc.*, 463 F.3d 87, 91 (1st Cir. 2006) ("manifest disregard" is additional basis for vacatur) to *Kyocera Corp. v. Prudential-Bache*

Trade Servs., Inc., 341 F.3d 987, 997 (9th Cir. 2003) ("manifest disregard" is shorthand for FAA §§ 10(a)(3) and (4)).

In *Hall Street Assoc. L.L.C. v. Mattel Inc.*, 128 S. Ct. 1396, decided in March 2008, the U.S. Supreme Court held that under federal law, the FAA's four statutory provisions are the only bases for vacating an arbitration award. In dicta, the Supreme Court took note of the lower court split about whether "manifest disregard" was an additional basis for vacatur or shorthand for the FAA's standards, without resolving the issue.

U.S. federal and state courts have issued widely disparate decisions on "manifest disregard" since Hall Street. A number of courts have held that, because the FAA does not mention "manifest disregard," the *Hall Street* decision eliminated "manifest disregard" as a basis for vacatur. *See, e.g., Robert Lewis Rosen Assoc. Ltd. v .Webb*, 566 F. Supp. 2d 228 (S.D.N.Y. 2008). Other courts have adopted the position that that "manifest disregard" continues to be a basis for vacatur, as a shorthand method for applying the FAA standards. See, e.g., *Eastern Seaboard Concrete Construction Co. v. Gray Construction Inc.*, 2008 U.S. Dist. LEXIS 33256 (D. Maine 2008). A few courts have even held that "manifest disregard" continues to be a basis for vacatur as an additional basis outside the FAA, regardless of the holding of Hall Street. See, e.g., *Jimmy John's Franchise, LLC v. Kelsey*, 549 F. Supp. 2d 1034 (C.D. Ill. 2008). It remains to be seen how this issue will ultimately be resolved.

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Robert A. Cohen is a partner in Dechert's commercial litigation group and head of the litigation practice in the firm's New York office. He has served several times on the firm's Policy Committee. Mr. Cohen's more than 30 years of dispute resolution experience includes the litigation (including jury trials), arbitration, and mediation of complex commercial matters, including a wide variety of business disputes. He also focuses on matters in the areas of antitrust, intellectual property, products liability, white-collar crime, securities, banking, and international finance. Mr. Cohen has also conducted numerous internal corporate investigations, a topic on which he is also a frequent lecturer. A principal focus of Mr. Cohen's practice in recent years has been litigation, arbitration and enforcement proceedings against foreign governments and government instrumentalities.

Professional Activities

Mr. Cohen is a former chair of the Subcommittee on Litigation of the International Dispute Resolution Committee of the New York State Bar Association's International Law and Practice Section and a member of the Litigation and Antitrust Law Sections of the American Bar Association.

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