Litigation and Enforcement in the United States: Overview

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A Q&A guide to dispute resolution law in the United States.

The country-specific Q&A gives a structured overview of the key practical issues concerning dispute resolution in this jurisdiction, including court procedures; fees and funding; interim remedies (including attachment orders); disclosure; expert evidence; appeals; class actions; enforcement; cross-border issues; the use of ADR; and any reform proposals.

Main Dispute Resolution Methods

1. What are the main dispute resolution methods used in your jurisdiction to resolve large commercial disputes?

Large commercial disputes are commonly resolved by litigation or arbitration. The US has independent, though overlapping, state and federal legal systems. Litigants should apprise themselves of the rules of the relevant forum. Both are common law systems.

Parties bring their own claims, collecting and presenting their own evidence and challenging their opponent's evidence in an adversarial process. While judges do not direct the proceedings, they exercise significant control, particularly in relation to discovery, pre-trial and trial management.

Civil cases generally require a preponderance of the evidence to succeed. The standard is satisfied when the party with the burden of proof convinces the fact-finder that their claim is more likely than not to be true. For some claims, such as for fraud, clear and convincing evidence is required, meaning that there must be a high probability that the claim is true. In many commercial disputes, a jury is the trier of fact, and the judge decides matters of law. Juries are comprised of citizens of the state where the court sits and are screened by the court for suitability to serve. Federal jury verdicts require unanimity unless the parties otherwise stipulate, while many states allow a less than unanimous vote. Federal judges are appointed with lifetime tenure. In some state systems, judges are appointed, while in others, judges are popularly elected.

The Federal Arbitration Act provides for arbitration in lieu of judicial resolution. The US has "a national policy favoring arbitration" (*Southland Corp. v. Keating, 465 U.S. 1, 10 (1984)*), and arbitration agreements are respected.

Arbitration tends to be quicker and less formal than a judicial proceeding, with more flexible evidence rules. The arbitration process may be binding or non-binding. When binding, the arbitrator's decision is final and enforceable by a court, with only limited grounds for set-aside.

The use of remote technology in dispute resolution has increased with the 2019 novel coronavirus disease (COVID-19) pandemic. It is highly likely that many of these changes will endure, including increased use of remote technology for depositions and hearings.

Court Litigation

Limitation Periods

2. What limitation periods apply to bringing a claim and what triggers a limitation period?

The period within which a party must bring a claim can be governed by either:

- **Statutes of limitations.** Statutes of limitations govern the time within which to file an action after the cause of action accrues. A cause of action generally accrues, for example, when a breach of contract or injury occurs. However, nearly all jurisdictions have adopted discovery rules that toll accrual of certain claims until the injury is discovered or reasonably should have been discovered.
- **Statutes of repose.** These extinguish a right of action after a specified period of time has elapsed, regardless of whether a cause of action has accrued. Statutes of repose are common in the construction and products liability contexts.

Limitation periods vary both by jurisdiction and by cause of action. For example, New York imposes a six-year statute of limitations for breach of contract actions (*see N.Y. C.P.L.R. 213*) and a three-year statute of limitations for tort actions (*see N.Y. C.P.L.R. 214*).

At the federal level, causes of action created by acts of Congress are generally governed by a four-year statute of limitations unless otherwise specified (*28 U.S.C. § 1658*). State law claims are subject to state statutes of limitations, whether brought in state or federal court.

Court Structure

3. In which court are large commercial disputes usually brought? Are certain types of disputes allocated to particular divisions of this court?

Commercial disputes can be filed in either federal or state courts. In general, federal courts can hear cases:

- Arising under federal law (*U.S. Const. Art. III, § 2; 28 U.S.C. § 1331*).
- In which there is diversity of citizenship between the parties and the amount in controversy exceeds USD75,000 (*28 U.S.C. § 1332*).

State courts, by contrast, can hear any case except cases over which federal courts have exclusive jurisdiction, such as federal copyright and patent claims (*28 U.S.C. § 1338*) and federal antitrust claims (*15 U.S.C. § 15*).

The US federal court system has three levels: trial courts, intermediate appellate courts, and the US Supreme Court. State court systems generally mirror this three-tiered structure, although some states do not have an intermediate appellate court. Further, many state court systems divide their trial courts based on area of law and/or financial threshold. For example, New York has a specialised Commercial Division of its trial court dedicated to complex commercial disputes.

Rights of Audience

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

Rights of Audience/Requirements

To appear in a state court, a lawyer must generally be admitted in good standing to the bar of the state. Out-of-state counsel can seek *pro hac vice* ("for this occasion") admission to appear in a specific case. Similarly, to appear in a federal court, a lawyer admitted to the bar of the state where the federal court sits must seek admission to practise in that federal court. Out-of-state counsel can also seek *pro hac vice* admission.

Individuals can represent themselves in court proceedings, including court hearings. However, legal entities such as corporations must generally be represented by counsel.

Foreign Lawyers

Several states allow foreign lawyers to seek *pro hac vice* admission and/or become licensed as a foreign legal consultant. For example, New York allows attorneys admitted and in good standing in a foreign country to be

admitted *pro hac vice* at the discretion of the court to participate in a matter in which the attorney has been retained. Some states also allow foreign legal consultants to represent clients in court.

Fees and Funding

5. What legal fee structures can be used? Are fees fixed by law?

The most common legal fee structure is the hourly fee, under which the attorney charges a per-hour rate. A variation is the capped fee, which sets a pre-determined cap on the number of hours that the attorney will bill. Attorneys and clients can also agree on a fixed fee based on matter, phase, or task.

Another common alternative to the hourly fee, particularly in personal injury lawsuits and class actions, is a contingency fee, whereby the attorney is paid a percentage of any amount awarded to their client. In this instance, the attorney does not receive payment if the client is not awarded monetary compensation. Some states regulate the percentage attorneys can recover in personal injury cases.

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

Funding

Litigation is typically funded by the parties using their own assets. However, a party can seek financial assistance from outside sources. A party can seek traditional commercial financing (such as a bank loan) or specialised litigation funding. In a litigation funding arrangement, a third party finances some or all of a party's legal expenses in exchange for a share of any proceeds recovered, but is not entitled to repayment if there is no recovery. While litigation funding has gained popularity, there remain open ethical questions that affect the:

- Lawyer's role and responsibilities when referring a client to litigation funding.
- Funder's pre-investment evaluation of a claim and potential post-investment control of the litigation.

Insurance

Insurance is available, subject to various exclusions. For example, commercial general liability policies typically require an insurer to defend an insured against potentially covered claims. Other types of insurance, such as directors and officers liability insurance, generally require the insurer to reimburse the insured for defence costs.

Court Proceedings

Confidentiality

7. Are court proceedings confidential or public? If public, are the proceedings or any information kept confidential in certain circumstances?

Court proceedings are generally open to the public. A court has discretion to close proceedings to public access to protect confidentiality or privacy interests.

Likewise, court records (such as filings and court orders) are generally accessible to the public. However, parties can request the sealing of records that contain confidential information, such as proprietary business information. The standard of review for deciding on whether to seal court records varies by jurisdiction.

Pre-Action Conduct

8. Does the court impose any rules on the parties in relation to pre-action conduct? If yes, are there penalties for failing to comply?

There are numerous rules relating to pre-action conduct. Some of the most significant include the following:

- The exhaustion doctrine requires a party to pursue administrative remedies before seeking judicial review of certain federal and state claims. Failure to comply can result in dismissal of the case.
- The Federal Tort Claims Act (FTCA) requires a claim against the US to be presented to the appropriate federal agency and be finally denied by the agency in writing before a plaintiff can file a lawsuit (*28 U.S.C. § 2675(a)*). Similarly, state laws require plaintiffs to provide notice of claims before bringing suits against the state or a municipality (see, for example, *Mass. Gen. Laws c. 258, § 4; N.Y. Court of Claims Act § 10; N.Y. Gen. Mun. Law § 50-e*). Failure to comply with these requirements can result in dismissal of the case.
- Some state consumer protection statutes require the plaintiff to send a demand letter to the defendant before initiating civil litigation.

Main Stages

9. What are the main stages of typical court proceedings?

Starting Proceedings

A civil lawsuit commences with the filing of a complaint and the payment of a filing fee. Most courts, including all federal courts, generally require that the complaint be filed electronically.

Notice to the Defendant and Defence

The defendant is given notice of the claim through service of process. A defendant is "served" when the plaintiff delivers to the defendant a court summons and a copy of the complaint in accordance with the applicable federal or state procedural rule.

Under the Federal Rules of Civil Procedure, the defendant must be served within 90 days of filing the complaint (*Fed. R. Civ. P. 4(m)*). Once the defendant has been served, the defendant has 21 days to file a responsive pleading (*Fed. R. Civ. P. 12(a)(1)(A)(i)*). Failure to file a responsive pleading can result in default judgment (*see Fed. R. Civ. P. 55*).

Subsequent Stages

Subsequent stages of litigation include the following.

Pre-trial. The pre-trial phase generally consists of discovery and motion practice. Discovery refers to the process through which parties exchange information and obtain evidence from one another. Under the federal rules, discovery generally begins with initial disclosures and a conference among the parties (*Fed. R. Civ. P. 26(a), (f)*). Once the parties have conferred, they can seek discovery in the form of documents, interrogatories, requests for admission, and depositions (*see Fed. R. Civ. P. 30, 31, 33, 34, 36*). State rules are generally similar. See also *Question 16*.

During the pre-trial phase, a party can also file various motions to dispose of the case, including:

- Motions to dismiss.
- Motion for judgment on the pleadings.
- Motions for summary judgment.

(*Fed. R. Civ. P. 12(b), 12(c), 56.*)

At this stage of the litigation, the judge generally has a supervisory role, setting and enforcing the schedule, holding status conferences, and resolving discovery disputes. If the parties file dispositive motions, the judge decides on these motions, typically after oral arguments.

Trial. Civil trials can be held before a jury or before the judge alone (known as a "bench trial"), depending on whether the parties timely request a jury trial in accordance with the relevant federal or state practice. Parties have a constitutional right to a jury for certain claims.

Jury trials generally start with the selection of the jury through a process called *voir dire*. Potential jurors are selected at random from the local community and preliminarily screened for bias. The parties have a limited opportunity to exclude jurors for cause, and depending on the jurisdiction, have a limited number of peremptory challenges. Although counsel generally do not need to explain the basis for exercising a peremptory challenge, counsel cannot base the challenge on race, gender, or ethnic origin (*see Batson v. Kentucky, 476 U.S. 79 (1986) (race); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 129 (1994) (gender); Hernandez v. New York, 500 U.S. 352, 359 (1991) (ethnicity); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991) (extending Batson to civil cases)*). Some courts have applied this rule to include other protected classes, such as sexual orientation (see, for example, *SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 489 (9th Cir. 2014)*).

Once the jury has been selected, the parties give their opening statements, followed by the presentation of evidence and closing arguments. Before the case is submitted to the jury, a party can move for judgment as a matter of law, arguing that no reasonable jury could find for the opposing party (*see Fed. R. Civ. P. 50(a)*). If the motion is denied, the case goes to the jury, which will deliberate in secret and decide on the outcome of the case.

At trial, the judge plays four key functions:

- Presiding over the proceedings and ensuring order.
- Ruling on evidentiary matters, such as objections to questions or evidence.
- Instructing the jury about the applicable law and the standards that it must use in deciding the case.
- In bench trials, serving as fact-finder to decide the case.

Post-trial. Within 28 days of the entry of a federal judgment, a party can file motions, including a:

- Renewed motion for judgment as a matter of law.
- Motion for new trial.
- Motion to alter or amend the judgment.

(*Fed. R. Civ. P. 50(b), 59.*)

A party can appeal the final judgment of a federal district court by filing a notice of appeal, generally within 30 days after entry of the judgment (*Fed. R. App. P. 3, 4*). See also *Question 20* on appeals.

Interim Remedies

10. What steps can a party take for a case to be dismissed before a full trial? On what grounds can such applications be brought? What is the applicable procedure?

Before answering a complaint, a party can move to dismiss claims for:

- Lack of subject matter jurisdiction.
- Lack of personal jurisdiction.
- Improper venue.
- Insufficient process.
- Insufficient service of process.
- Failure to state a claim on which relief can be granted.
- Failure to join a necessary party.

Parties can assert defences either in their responsive pleading or via a motion to dismiss filed before their responsive pleading. However, certain defences are permanently waived unless they are raised in the earlier of a party's responsive pleading or motion. Parties can move for dismissal for lack of subject matter jurisdiction at any time.

After answering but prior to trial, a party can move for summary judgment. To succeed on such a motion, parties must show that there are no contested issues of material fact so that the moving party is entitled to a judgment as a matter of law. Timing limitations on filing summary judgment motions vary in state and federal courts.

11. Can a defendant apply for an order for the claimant to provide security for its costs? If yes, on what grounds?

The ordinary rule in US litigation is that each party pays its own costs in non-frivolous cases. There is no general federal rule or state consensus as to whether and when parties can apply for an order for security for costs, although some federal courts have their own rules authorising security for costs in limited circumstances. In deciding whether to grant security for costs, courts can consider several factors, including:

- The relevant party's financial condition and ability to pay.
- Whether that party is a non-resident or foreign corporation.
- The merits of the underlying claims.
- The extent and scope of discovery.
- The legal costs expected to be incurred.

- Compliance with past court orders.

(*Selletti v. Carey, 173 F.R.D. 96, 100-101 (S.D.N.Y. 1997)*.)

12. What are the rules concerning interim injunctions granted before a full trial?

Availability and Grounds

Parties can obtain temporary restraining orders (TRO) or preliminary injunctions before trial. TROs only remain in effect for a limited period (for example, 14 days), although parties can obtain an extension for good cause. Preliminary injunctions preserve the status quo until final resolution of a case.

The standard for obtaining a TRO or preliminary injunction is generally the same in federal courts and requires parties to show, depending on the circuit, some combination of the following:

- Likelihood of success on the merits.
- Likelihood of suffering irreparable harm if the court does not issue an injunction.
- The balance of equities tips in their favour.
- The injunction is in the public interest.

(*Winter v. NRDC, Inc., 555 U.S. 7, 20 (2008)*.)

See *Standard for Preliminary Injunctive Relief by Circuit Chart*.

State courts generally require parties to satisfy the first two factors of this test, but rules vary as to the other two requirements. Courts can require that the moving party post a bond with the court to compensate the non-moving party for potential damages resulting from a wrongful injunction.

Prior Notice/Same-Day

TROs can be obtained on an expedited basis on the same day. Ordinarily, a party can obtain a TRO without giving notice to the other party only if "immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party ... can be heard in opposition," and the party's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required (*Reno Air Racing Ass'n, Inc. v. McCord, 452 F.3d 1126, 1130-1131 (9th Cir.2006)*).

Courts will not issue preliminary injunctions without formal notice. Some circuits hold that a formal hearing is mandatory (*see Digital Equip. Corp. v. Emulex Corp., 805 F.2d 380, 382 n. 3 (Fed. Cir. 1986)*). Others have left it to the district court to determine the necessity of a hearing (*see Jackson v. Fair, 846 F.2d 811, 819 (1st Cir. 1988)*).

Mandatory Injunctions

Courts generally disfavour mandatory injunctions compelling parties to take certain actions because, unlike prohibitory interim injunctions**,** they go beyond merely maintaining the status quo (*Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 879 (9th Cir. 2009)*). Accordingly, these injunctions are generally only granted where failure to grant the injunctions will result in extreme or very serious damage.

Right to Vary or Discharge Order and Appeals

A TRO can be discharged or modified on motion by the party against whom it was issued but is not appealable. Federal courts and many state courts allow parties to appeal a preliminary injunction immediately after issuance. Under the federal rules, parties must appeal preliminary injunctions within 30 days of issue.

13. What are the rules relating to interim attachment orders to preserve assets pending judgment or a final order (or equivalent)?

Availability and Grounds

Federal courts can issue interim attachment orders if authorised to do so by the law of the state in which they sit (*Fed. R. Civ. P. 64*). Many states authorise various forms of interim attachment. To obtain interim attachment, moving parties must generally demonstrate a significant risk that they will be unable to recover on a final judgment without interim attachment.

Prior Notice/Same-Day

Due process generally requires that parties against whom interim attachment is sought receive notice and the opportunity to be heard before a court can encumber their property. However, courts can allow attachment prior to notice or hearing where an exigent circumstance is shown (*see Connecticut v. Doehr, 501 U.S. 1, 16 (1991)*).

Main Proceedings

Courts have allowed pre-judgment attachment orders in support of substantive proceedings taking place in the courts of another country (*see Barclays Bank, S.A. v. Tsakos, 543 A.2d 802, 805-06 (D.C. App. 1988)*).

Preferential Right or Lien

The priority of an interim attachment lien over others is determined by the priority rules of the state in which the property is located. Generally, a pre-judgement attachment lien has priority over unsecured creditors or liens created or perfected at a later time.

Damages as a Result

Parties seeking attachment are generally liable for all damages that result from attachment if the underlying claim fails or if it is later determined that the party was not entitled to an attachment.

Security

Parties are generally required to post a bond before being able to obtain an attachment (see, for example, *N.Y. C.P.L.R. 6212(b); Cal Code Civ Proc § 489.210*).

14. Are any other interim remedies commonly available and obtained?

Interlocutory injunctions and attachment orders are the only forms of interim remedies generally available in the US.

Final Remedies

15. What remedies are available at the full trial stage? Are damages only compensatory or can they also be punitive?

Damages

Compensatory damages are almost universally available in US proceedings. Punitive damages are available in certain circumstances, including in certain tort cases where the tortfeasor is determined to have acted with intent, malice, or recklessness. Applicable standards of proof vary.

Courts can also award costs and attorney's fees in certain instances, such as where specifically authorised by statute or a contract between the parties (*see Question 22*).

Specific Performance

Courts can order specific performance in breach of contract cases where the aggrieved party shows that monetary damages will not be sufficient to compensate for the other party's breach (for example, where a contract involves unique property). The Thirteenth Amendment to the US Constitution generally prevents courts from ordering specific performance as a remedy for breach of personal services contracts.

Injunctions

Courts can issue permanent injunctions at the conclusion of a trial where parties can show all of the following:

- Damages are not sufficient.

- The absence of an injunction will result in irreparable injury.
- The balance of hardships favours issuance of the injunction.
- The injunction is not against the public interest.

(*eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).*)

Evidence

Document Disclosure

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

Parties generally have a duty to preserve documents relevant to pending or reasonably anticipated litigation. Parties have a limited affirmative disclosure obligation. Once litigation has commenced, parties have various tools to obtain extensive document discovery by formal request (from opposing parties) or subpoena (from non-parties).

Initial Disclosures

In federal court, parties must, within 14 days after an initial conference, disclose:

- All physical and electronic documents that they may rely on at trial to support any claim or defence (or a description of these documents by category and location).
- Copies of insurance agreements that may cover resulting liability.
- Names, addresses, and telephone numbers of witnesses likely to have discoverable information that they may use to support their case.
- A calculation of damages (if damages are sought).

In the absence of a request, a party need not disclose documents helpful to the other side that it does not plan to use to support its own case. State rules vary as to the obligation of parties to make initial disclosures.

Production of Electronic Documents

Parties can seek the production of both hardcopy and electronically-stored documents in document discovery.

Penalties for Non-Compliance

Under federal rules, the courts have wide discretion to impose sanctions on a party that refuses to comply with a discovery order, including dismissal of the case or entry of judgment against the non-complying party. Most states also have rules authorising sanctions against parties that fail to comply with discovery orders.

Time Limits

In federal court, parties must respond to requests for production of documents within 30 days. Under state rules, the time for responding to document requests vary.

Role of the Courts in Discovery

Courts generally expect parties to manage the discovery process independently but can issue protective orders or orders to compel discovery if reasonable efforts to resolve discovery disputes between the parties fail.

Privileged Documents

17. Are any documents privileged? If privilege is not recognised, are there any other rules allowing a party not to disclose a document?

Privileged Documents

Attorney-client privilege. Attorney-client privilege protects from disclosure confidential communications between parties and their attorneys made for the purpose of obtaining legal advice. The privilege can apply to communications with any licensed attorney, whether in-house or outside counsel.

Because this privilege only applies to communications made in confidence, the presence of other parties when a communication is made may destroy the privilege. However, courts have extended attorney-client privilege to communications between a client and third-parties who assist attorneys in providing legal services, such as investigators, accountants and experts. Attorney-client privilege can only be waived by clients.

Work product doctrine. Under the work-product doctrine, parties cannot compel disclosure of documents prepared by an attorney (or at an attorney's direction) in anticipation of litigation (*see Continental Cas. Co. v. Under Armour, Inc., 537 F. Supp. 2d 761, 769 (D. Md. 2008)*). The doctrine has been held to protect work performed by those enlisted by legal counsel to perform investigative or analytical tasks to aid counsel in preparation for litigation. See *Attorney-Client Privilege and Work Product Doctrine Toolkit*.

Settlement offers. The federal rules prevent parties from introducing into evidence statements made in settlement negotiations to prove or disprove the validity of a claim or amount of liability (*FRE 408*). Most states have rules protecting settlement communications from being introduced into evidence.

Other Non-Disclosure Situations

Other forms of privilege include the following:

- Privilege for confidential marital communications (protecting confidential communications between spouses).
- Physician-patient privilege.
- Psychotherapist-patient privilege.
- Clergy-penitent privilege.

State laws vary as to which of these privileges they recognise.

Examination of Witnesses

18. Do witnesses of fact give oral evidence or do they only submit written evidence? Is there a right to cross-examine witnesses of fact?

Oral Evidence

Admissibility and weight. Federal and state courts generally allow witnesses to give oral testimony. In bench trials, some judges require or allow parties to submit written witness affidavits or declarations containing each fact or expert witness's direct or rebuttal testimony (see, for example, *Kislin v. Dikker, 2017 WL 3405533, at *7 (S.D.N.Y. Aug. 7, 2017); Chevron Corp. v. Donziger, 2013 WL 5548913, at *1-2 (S.D.N.Y. Oct. 7, 2013)*). Oral or documentary evidence are not automatically afforded more weight than the other. The role of the fact-finder is to determine the weight to be afforded to evidence.

Scope of fact witness testimony. Under both federal and state rules, non-expert witnesses can generally only testify to facts about which they have personal knowledge, and cannot provide opinion testimony.

Right to Cross-Examine

Parties ordinarily have the right to cross-examine all adverse witnesses. Similarly, judges can generally examine any witness.

Third Party Experts

19. What are the rules in relation to third-party experts?

Federal and state courts ordinarily allow experts to testify if the expert's scientific, technical, or other specialised knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

Appointment Procedure

Both the parties and the court can appoint expert witnesses. In federal court, draft expert reports, whether or not ultimately relied upon, qualify as undiscoverable work product (*see Question 17*). Most states also consider draft expert reports as work product discoverable only when special circumstances make underlying facts unavailable from other sources.

Role of Experts

The role of expert witnesses is to aid the fact-finder in resolving the case. However, experts are usually hired by a given party to give testimony helpful to their case.

Right of Reply

Parties generally have the right to cross-examine expert witnesses regarding the subject matter of their testimony and to otherwise challenge their credibility. Opposing parties can also challenge the conclusions of an expert witness by appointing their own experts, or by introducing extrinsic evidence.

Fees

The party that calls an expert witness to testify pays that expert's fees. A party that chooses to depose an expert witness must pay that expert a reasonable fee for the deposition.

Appeals

20. What are the rules concerning appeals of first instance judgments in large commercial disputes?

Which Courts

Federal and state courts each have their own appellate systems. The Federal Rules of Appellate Procedure govern federal appeals. Appeals from the state trial courts are governed by the rules of appellate procedure of the particular state.

In the federal system, some appeals are available as of right and do not require permission from the court (*Fed. R. App. P. 3, 4*). Appeals are as of right from:

- Final judgments (*28 U.S.C. § 1291*).
- Certain interlocutory orders (*28 U.S.C. § 1292*).
- Final determinations of collateral issues (*see Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)*).

Other appeals, particularly of interlocutory orders not otherwise appealable, are only available with permission. For these, the trial judge must certify that both:

- The order to be appealed involves a controlling question of law as to which there is substantial ground for difference of opinion.
- An immediate appeal from the order may materially advance the ultimate termination of the order.

(*28 U.S.C. § 1292(b).*)

The court of appeals then has discretion whether to hear the appeal.

The states generally follow a similar appeals process, although rules and procedure may vary from state to state.

The US Supreme Court has discretion to hear appeals from both state and federal courts. Its caseload is limited, and only a small percentage concerns large commercial disputes.

Grounds for Appeal

Appeal is generally available on most issues. The standard of review varies depending on whether the appeal concerns a question of law, of fact, or a matter within the court's discretion. Questions of law are reviewed *de novo* without deference to the lower court. Determinations of fact made by a judge are reviewed under the significantly deferential clear error standard, while those made by a jury (whose deliberations are secret) are afforded additional deference and are upheld if supported by substantial evidence. Discretionary judicial decisions are afforded more deference and are only reviewed for abuses of discretion.

Time Limit

If appeal is as of right, a party must generally file a notice of appeal within 30 days after entry of the judgment or order to be appealed (*Fed. R. App. P. 4(a)(1)(A)*). If appeal is within the discretion of the court of appeals, a party must file a petition seeking appeal with the circuit clerk within the time specified by the statute or rule authorising the appeal (*Fed. R. App. P. 5(a) and (b)*).

State rules of appellate procedure generally impose similar time limits.

Class Actions

21. Are there any mechanisms available for collective redress or class actions?

Both the state and federal courts provide for collective redress mechanisms. Rule 23 of the Federal Rules of Civil Procedure governs class actions in the federal courts. The state rules of civil procedure also provide mechanisms for the consolidation of claims into a class. However, federal jurisdiction encompasses most sizable class actions (*28 U.S.C. § 1332(d)*).

Under the federal rules, the following four prerequisites apply to all class actions:

- The class must be so numerous that joinder of all members is impracticable.
- There must be questions of law or fact common to the class.
- The claims and defences of the representative parties must be typical of the claims or defences of the class as a whole.
- The representative parties must be able to fairly and adequately protect the interests of the class.

(*Fed. R. Civ. P. 23(a)(1)-(4).*)

Additional requirements depend on the specific type of class (*Fed. R. Civ. P. 23(b)(1)-(3)*). Class actions can be used for any claims that meet the above requirements. However, courts have acknowledged that certain types of claims are generally unsuitable for class actions (see, for example, *Amchem Prods. v. Windsor, 521 U.S. 591, 624-25 (1997)*).

Class actions typically proceed on an opt-out basis. Once notice of the class action is given, individuals with claims encompassed by it are bound by the action's results unless they affirmatively opt out to seek redress individually.

Class actions can proceed on a fixed fee or contingent recovery basis. Third-party financing of class actions is permitted in the federal system and in most states.

Non-class aggregation by way of federal multi-district litigation is also common. This allows similar claims pending in different districts to be centralised for pre-trial management purposes in one district (*28 U.S.C. § 1407*). Many states, such as New Jersey, provide for similar centralisation, with cases from different local or county courts consolidated for pre-trial proceedings.

Costs

22. Does the unsuccessful party have to pay the successful party's costs and how does the court usually calculate any costs award? What factors does the court consider when awarding costs?

The general rule is that each side pays its own legal fees (*see Baker Botts L.L.P. v. ASARCO LLC, 135 S. Ct. 2158, 2164 (2015)*). However, there are some exceptions under which the prevailing party can recover fees on certain statutory claims. To prevail, a party must obtain at least some relief on the merits of its claim (see *Hewitt v. Helms*, *482 U.S. 755, 760 (1987)*). The parties can also provide for fee-shifting by contract. A court can award fees and/or costs as a sanction for litigation misconduct.

Rule 54(d)(2) of the Federal Rules of Civil Procedure governs the procedure for recovery of attorney's fees in federal court where allowed by statute. Recovery is generally limited to "reasonable" fees (see, for example, *Pennsylvania v. Del. Valley Council for Clean Air, 478 U.S. 546 (1986)*), which is usually fixed in the first instance by the district court judge (*see Perkins v. Standard Oil of California, 399 U.S. 222, 223 (1970)*).

In federal court, certain limited costs other than attorneys' fees are awarded to the prevailing party, unless a federal statute, rule, or court order provides otherwise (*Fed. R. Civ. P. 54(d)(1)*). However, the most costly items, such as expert and discovery costs, are not typically awarded (*28 U.S.C. 1920*).

The district court retains discretion to limit or deny costs to the prevailing party (*Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 441-45 (1987)*). The costs that can be awarded are enumerated in 28 U.S.C. § 1920. A bill of costs must be verified by the party or the party's attorney and filed with the court (*28 U.S.C. § 1294*).

In the state courts, rules regarding fees and costs are largely similar, subject to variations.

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

Interest is awarded on any money judgment recovered in a civil case in a district court (*28 U.S.C. § 1961(a)*). Costs are considered as part of the judgment, and post-judgment interest accrues on the full amount of the award and costs (*28 U.S.C. §§ 1920, 1961*). Post-judgment interest is calculated from the date of judgment at a rate equal to the weekly average one-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve for the calendar week preceding the date of the judgment (*28 U.S.C. § 1961(a)*).

Enforcement of a Local Judgment

24. What are the procedures to enforce a judgment given by the courts in your jurisdiction in the local courts?

The US Constitution requires state and federal courts to recognise and give effect to valid final judgments on the merits issued by other courts in the US (*U.S. Const. art. IV, § 1; see also 28 U.S.C. § 1738*). Recognition is often accomplished through the registration of the judgment in the enforcing court (*28 U.S.C. § 1963*). Where there is no statute providing for registration, or the statute does not apply, a new suit to enforce the judgment can be filed in the jurisdiction where enforcement is sought.

In federal court, a money judgment is enforced by a writ of execution unless the court directs otherwise (*Fed. R. Civ. P. 69*). Discovery is available in aid of the judgment or execution, as provided by the Federal Rules of Civil Procedure or by the procedure of the state where the court is located (*Fed. R. Civ. P. 69(a)(2)*). In addition, courts have the power to attach assets such as real estate, as well as to seize and sell these assets to satisfy a judgment (*Fed. R. Civ. P. 64*).

Similar enforcement procedures generally apply in the state courts. However, state rules may vary, and litigants should be aware of the procedures applicable in the relevant court.

Cross-Border Litigation

25. Do local courts respect the choice of governing law in a contract? If yes, are there any national laws or rules that may modify or restrict the application of the law chosen by the parties in their contract? What are the rules for determining what law will apply to non-contractual claims?

Contractual Choice of Law

Courts will generally enforce a choice of law provision in a contract but may refuse to enforce such a provision where the chosen law has no substantial relationship to the parties or the transaction.

Some states, such as New York and Delaware, will enforce choice of law provisions when such a substantial relationship does not exist, provided that the value of the contract is over a certain amount. For example, a New York statute allows parties to agree that New York law will govern their contract if the contract arises from a transaction covering in the aggregate not less than USD250,000 (*N.Y. Gen. Oblig. Law § 5-1401*). The purpose of this provision is to promote and preserve New York's status as a commercial centre and to offer predictability to the parties.

No Choice of Law and Non-Contractual Claims

When there is no choice of law provision, and in non-contractual claims, the choice of law rules of the state where the court is sitting will determine which law applies (*see Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941)*). Courts generally consider the:

- Location of the particular events giving rise to the dispute (place of contracting/negotiation/performance or place of injury).
- Domicile of the parties.
- Policies of the various jurisdictions at issue.

26. Do local courts respect the choice of jurisdiction in a contract? Do local courts claim jurisdiction over a dispute in some circumstances, despite the choice of jurisdiction?

The US Supreme Court has held that forum selection clauses further vital interests of the justice system (*Atl. Marine Constr. Co. v. United States Dist. Court, 571 U.S. 49 (2013)*). The Supreme Court first acknowledged this principle over 40 years ago, holding that forum selection clauses are an indispensable element in international trade, commerce, and contracting, and the Supreme Court created a presumption favouring their enforcement.

When a plaintiff brings a lawsuit in the US in violation of a foreign forum selection clause, the presumption is that the lawsuit will be dismissed, and that the foreign forum selection clause will be enforced under the doctrine of *forum non conveniens*.

In some instances, however, US courts have refused to enforce forum selection clauses or have construed them narrowly. In those cases, there often is no opportunity to seek pre-trial appellate review (that is, interlocutory review) of a decision that failed to enforce a valid forum selection clause, although one federal circuit court of appeals has held that pre-trial appellate review must be available to review an incorrect failure to dismiss on *forum non conveniens* grounds.

Some US courts have issued anti-suit injunctions prohibiting litigation abroad in violation of a forum selection clause designating a US forum. An anti-suit injunction is an order prohibiting a party from pursuing a matter in a foreign tribunal.

In some instances, state laws invalidate forum selection clauses that relate to specific types of contracts. For example, Texas state law provides a right to void a forum selection clause in a contract for construction or repair of real property within Texas (*Texas Bus. & Com. Code § 272.001*).

27. If a party wishes to serve foreign proceedings on a party in your jurisdiction, what is the procedure to effect service in your jurisdiction? Is your jurisdiction a party to any international agreements affecting this process?

The US is a party to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 (Hague Service Convention). A private individual can be served formally through the US Central Authority. Requests for formal service must:

- Be accompanied by the Hague Service Convention model form.
- Transmitted with a complete translation.
- Include the full name and address of each person or entity to be served.

The Hague Service Convention does not prohibit service of process by mail (*Water Splash, Inc. v. Menon, 137 S. Ct. 1504, 1507 (2017)*). Therefore, international service of process by mail is allowed, provided the requesting state allows service of process by mail. Documents sent by mail must also be translated.

The US is also a party to the OAS Inter-American Convention on Letters Rogatory 1975 for the purposes of legal documents only. Certain provisions of this Convention address the issue of service of process.

28. What is the procedure to take evidence from a witness in your jurisdiction for use in proceedings in another jurisdiction? Is your jurisdiction party to an international convention on this issue?

Federal law allows US district courts to give "interested persons" access to discovery materials for proceedings before "foreign or international tribunals" (*28 U.S.C. § 1782*). Interested persons include litigants, foreign sovereigns, and designated agents of those foreign sovereigns. However, this list is non-exhaustive, and has been found to include the complainant who triggers a European Commission investigation (*Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 256 (2004)*). Foreign tribunals may include investigative magistrates, administrative tribunals, quasi-judicial agencies, and the European Commission when it acts as a first instance decision-maker.

There is currently a circuit split in the US about whether US courts can compel discovery in aid of international commercial arbitration seated abroad. The issue is whether a private international arbitration tribunal qualifies as a "tribunal". Three circuits have held that, to qualify as a tribunal, the foreign or international tribunal must be state-sponsored, and two other circuits have held that a private arbitral tribunal qualifies. The Supreme Court has agreed to decide this issue in *Servotronics, Inc. v. Rolls Royce PLC, 975 F.3d 689 (7th Cir. 2020)*, *cert granted*, No. 20-794 (22 March 2021).

The US is a party to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970 (Hague Evidence Convention). A party can use the procedures outlined in the Hague Evidence Convention to request evidence from a non-party located in a country that is a signatory. The Hague Evidence Convention supports the collection of evidence abroad by creating standardised procedures to be used as an alternative to a jurisdiction's pre-existing procedures, such as diplomatic channels. A party may obtain discovery under the Hague Evidence Convention by a letter of request, which is similar to a letter rogatory. Applying Hague Convention Procedures also makes it possible for foreign individuals and entities to provide information for use in a US lawsuit while complying with their domestic laws.

Enforcement of a Foreign Judgment

29. What are the procedures to enforce a foreign judgment in your jurisdiction?

The enforcement of foreign judgments is governed by the laws of the state where enforcement is sought. A litigant seeking to enforce a foreign judgment, decree or order in the US must file a lawsuit in a court of competent jurisdiction.

The states vary in their approaches. Some states follow versions of model acts, such as the Uniform Foreign Money Judgments Recognition Act 1962 and the Uniform Foreign-Country Money Judgments Recognition Act 2005. Other states rely on the common law to determine whether to enforce a foreign judgment. Under the common law, a foreign judgment that has been issued after a full and fair trial must not be tried anew when that litigant comes to the US to enforce that judgment (*Hilton v. Guyot, 159 U.S.113, 202 (1895)*)

For example, New York traditionally has been a very generous forum in which to enforce judgments for money damages rendered by foreign courts (*Byblos Bank Europe, S.A. v. Sekerbank Turk Anonym Syrketi, 855 N.Y.S.2d 427, 429 (2008)*). New York recognises foreign judgments unless:

- They were rendered in a system that does not provide impartial tribunals or procedures compatible with the requirement of due process of law.
- The foreign court did not have jurisdiction over the defendant.

Alternative Dispute Resolution

30. What are the main alternative dispute resolution (ADR) methods used in your jurisdiction to settle large commercial disputes? Is ADR used more in certain industries? What proportion of large commercial disputes is settled through ADR?

The two principal methods of ADR in the US are arbitration and mediation. Arbitration is typically binding. To resort to arbitration, the parties must have entered into a contract that contains an arbitration clause, or they must agree to submit to arbitration once the dispute arises.

Mediation is typically informal, and the mediator does not issue a binding decision. To resort to mediation, the parties' contract must include a mediation provision, or they must agree to mediate their dispute once it arises.

Parties sometimes resort to mediation at the beginning of a lawsuit or an arbitration to save costs. There are also milestones of a dispute that may trigger a mediation, such as after an arbitral tribunal issues a partial final award. Once an independent fact-finder expresses its views on an aspect of the dispute, the parties often explore the possibility of resolving the remaining aspects of this dispute.

Commercial arbitration is used extensively in the US to resolve a wide array of commercial disputes. The largest caseload relates to the following industries:

- Construction.
- Energy.
- Financial services.
- Life sciences.
- Technology.
- Insurance.
- Aviation/aerospace.
- Entertainment.
- Real estate.

According to the International Arbitration Rules of the International Centre for Dispute Resolution (ICDR), one of the prominent international arbitration organisations in the US, 72% of arbitrations filed with the ICDR settle before the issuance of an award. The median time from filing to settlement is nine months.

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

US courts typically have their own local rules governing ADR.

For example, in the Northern District of California, most cases are assigned to the ADR Multi-Option Program at the beginning of the case. Parties are required to participate in a non-binding ADR process offered by the court. This process can include early neutral evaluation, mediation, or a settlement conference with a magistrate judge. In practice, to opt out of the automatic referral to ADR in the Northern District of California, a party must file a motion with the court and argue that no ADR process will be beneficial or cost-effective.

32. How is evidence given in ADR? Can documents produced or admissions made during (or for the purposes of) the ADR later be protected from disclosure by privilege? Is ADR confidential?

Many parties agree to be guided by the International Bar Association (IBA) Rules on Taking Evidence in International Arbitration, which address the scope of document disclosure. In addition, other arbitration rules provide guidance on the scope of document disclosure and witness evidence such as the:

- Arbitration Rules of the International Chamber of Commerce (ICC).
- ICDR.
- Commercial Arbitration Rules of the American Arbitration Association (AAA).

The disclosure of information in mediation proceedings is more informal. The parties and mediator will typically agree on the scope of document disclosure.

The rules of certain arbitration organisations address confidentiality, although these rules rarely impose confidentiality obligations on the parties themselves (as opposed to confidentiality obligations on arbitrators). Arbitration rules typically provide tribunals with significant discretion to issue confidentiality orders. Certain arbitration rules, such as the ICC Rules, create a presumption that arbitral awards should become public after a period of time without objection from a party. See *Practice Note, Confidentiality in US Arbitration*.

In the US, there is a presumption that any documents filed in court should be accessible to the public. This includes documents filed in connection with a motion to vacate an arbitral award. Accordingly, arbitral awards filed in connection with these types of motions often become publicly available. If confidentiality is essential, this topic should be addressed in the arbitration clause in the parties' contract. For example, the clause may state that, to the fullest extent permissible under applicable law, any documents filed in court in connection with an arbitration proceeding must be filed under seal, or not filed in a public record.

The parties can agree that documents exchanged during mediation proceedings, or for settlement purposes, will be protected from disclosure in a later arbitration. Such an agreement would be consistent with the IBA Rules, which provide that, under certain circumstances, tribunals can exclude from evidence or production documents created in connection with and for the purpose of settlement negotiations.

33. How are costs dealt with in ADR?

In private mediation proceedings, the parties often agree that each side will bear the costs of its own representation, and both sides will share the costs of the mediator.

Most arbitration rules provide arbitrators with significant discretion to allocate costs as part of the final award. The parties can limit that discretion in the arbitration clause.

34. What are the main bodies that offer ADR services in your jurisdiction?

The main arbitration organisations offering ADR services in the US are the:

- ICC (*https://iccwbo.org*).
- AAA (*www.adr.org*).
- ICDR (*www.icdr.org*)
- International Institute for Conflict Prevention and Resolution (CPR) (*www.cpradr.org*).
- JAMS (*www.jamsadr.com*).

Proposals for Reform

35. Are there any proposals for dispute resolution reform? If yes, when are they likely to come into force?

There are regular efforts in state and federal legislatures to reform various areas of dispute resolution. Recent examples include Congressional overhaul of the class action system in 2005. In addition, courts periodically revise the rules of procedure, with input from lawyers, bar associations, and academics.

In 2019, the House of Representatives passed a bill to prohibit:

- Pre-dispute arbitration agreements that force arbitration of future employment, consumer, anti-trust, or civil rights disputes.
- Agreements and practices that interfere with the right of individuals, workers, and small businesses to participate in collective actions regarding such disputes.

The bill was not taken up by the Senate and expired. The bill has been reintroduced in the House, but barring changes to the Senate rules is unlikely to become law.

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Areas of practice. International arbitration; litigation; white collar crime and government investigations.

Recent transactions

- Served as Chair, Sole Arbitrator, Co-Arbitrator, Emergency Arbitrator, Appellate Arbitrator, and counsel in domestic and international arbitrations, including five expedited arbitration proceedings and four emergency arbitration proceedings. Serves as Chair of an international arbitral tribunal in a USD350 million arbitration.
- Represents clients, including major French and other European groups, in international commercial litigation in the US and international corruption investigations. This includes securing a unanimous jury verdict for Orange SA in federal court in San Francisco.
- Represented major groups, such as Air France, Laboratoires Pierre Fabre, Caceis, and Credit Agricole Corporate & Investment Bank in international disputes.
- Hague Convention Commissioner.

Languages. English, French

Professional associations/memberships

- Member of the Executive Committee and a Board member of the New York International Arbitration Center (NYIAC).
- Member of the International Commercial Disputes Committee of the New York City Bar Association.
- Member of the ICC Commission on Arbitration and ADR.
- ICDR Panel of Arbitrators, AAA Commercial Panel of Arbitrators, CPR Panel of Neutrals.
- Member of the International Arbitration Club of New York.
- Fellow of the Chartered Institute of Aribtrators (F. ClArb).

- Member of Paris Place de Droit.

Publications

- Co-authored a multimedia e-book, *Le Procès Civil en Version Originale*, which received the award for best law book of the year from Cercle Montesquieu in France.
- Author of articles published in *Le Monde, Dalloz Avocats, le Code Monétaire et Financier*, *Practical Law*, and the *New York Law Journal*.

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Recent transactions

- Represented US and multinational companies as well as foreign sovereign governments and their instrumentalities in a wide variety of US court litigation and arbitration matters.
- Represented companies and senior executives in US government and internal investigations, particularly concerning government contracting fraud and alleged false claims, as well as alleged violations of US export controls, trade sanctions and the Foreign Corrupt Practices Act and other anti-corruption regimes.
- Advised clients regarding cross-border compliance matters, including compliance with anti-corruption laws, US export control regulations and US trade sanctions. Assisted clients with developing and implementing compliance policies and programs.

Languages. English, Dutch, German, Hindi, French

Professional associations/memberships

- Vice-Chair, American Bar Association's Section of International Law, International Anti-Corruption Committee.

- New York City Bar.

Publications

- *"Law and Practice" Chambers Global Practice Guide – International Arbitration (2019).*
- *"International Trade and Social and Environmental Responsibility; Benchmarks to Standards", Lamy International Contracts (2018).*
- Authored numerous other articles and book chapters published by *Law360*, *LexisNexis*, the *American Journal of International Law*, and *Wolters Kluwer Law & Business*.

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Recent transactions

- Represented clients in investigations by the US Securities and Exchange Commission and Financial Industry Regulatory Authority in matters arising under US securities laws.
- Represented clients in commercial disputes involving the financial industry and thw application of US securities laws.

Professional associations/memberships

- Member, New York City Bar Association Working Group on Business and Human Rights.
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- Federal Bar Council.
- Irish American Bar Association of New York.

Publications

- *"Market Manipulation Investigations", PLI SEC Compliance and Enforcement Answer Book (2021 ed.).*
- *"Securities and Exchange Commission Year in Review: Enforcement Actions and Issues from 2020", The Investment Lawyer (January 2021).*
- *"Lessons From SEC's Bribery Claim Against Ex-Goldman Exec", Law360 (19 May 2020).*

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Recent transactions

- Represented US and multinational companies as well as foreign sovereign governments and their instrumentalities in a variety of US court litigation.
- Represented companies and their officers, directors and others in US government criminal and regulatory investigations involving allegations of health care, securities, and government contracting fraud, and in international anti-corruption, sanctions and export control matters, complex civil litigation, and confidential internal investigations.
- Advised clients regarding cross-border compliance matters, including compliance with the US FCPA and other anti-corruption laws, export control regulations and trade sanctions programmes. Assisted clients with developing and implementing compliance programmes.

Languages. English

Professional associations/memberships

- American Bar Association.
- Federal Bar Association, past-National Vice President for the First Circuit.
- Federal Bar Association, past-President, Massachusetts Chapter.

Publications

- *"DOJ Announces New FCPA Policy," Trade Security Journal (2018).*
- *"Bridging the Cultural Gap in International Arbitrations Arising From FCPA Investigations," Fordham International Law Journal, Volume 39 (2016).*
- *"International and National Anticorruption Laws: An Overview," RMMLF Special Institute, Human Rights Law and the Executive Industries (February 2016).*

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