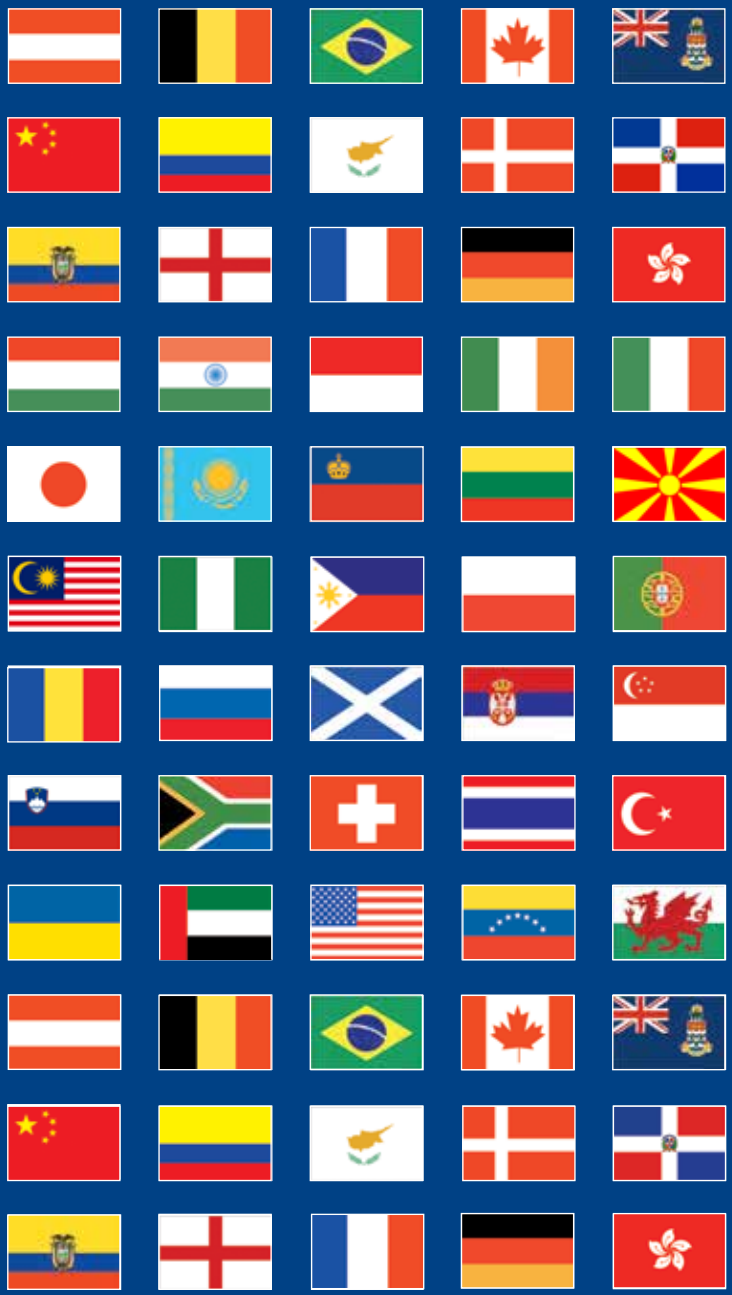
GETTING THE DEAL THROUGH

Dispute Resolution

in 49 jurisdictions worldwide

2014

Contributing editor: Simon Bushell



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Getting the Deal Through is delighted to publish the twelfth edition of *Dispute Resolution*, a volume in our series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 49 jurisdictions featured. New jurisdictions this year include Ecuador, Hong Kong, Indonesia, Kazakhstan, the Philippines, Portugal and the United Arab Emirates.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at www.gettingthedealthrough.com.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would also like to extend special thanks to contributing editor Simon Bushell of Latham & Watkins for his continued assistance with this volume.

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1 What is the structure of the civil court system?

Federal court structure

The United States Supreme Court is the highest federal court and is provided for in article III of the United States Constitution. The Supreme Court consists of the Chief Justice of the United States and eight associate justices. With discretion and within certain guidelines, the Supreme Court reviews a limited number of the cases it is asked to decide. Those cases may begin in state or federal courts, and they usually involve important constitutional or federal law questions.

The Constitution also grants Congress the authority to establish additional federal courts. To date, Congress has established trial and appellate courts below the Supreme Court.

The district courts are the general trial courts of the federal system. Within the limits set by the Constitution and Congress, district courts have jurisdiction over civil and criminal matters arising under federal law. There are 94 district courts throughout the United States with about 3,200 judges. There is at least one district court in each state, the District of Columbia and Puerto Rico. Each district also includes a bankruptcy court.

There are also two special trial courts in the federal system: the Court of International Trade and the Court of Federal Claims. The Court of International Trade has nationwide jurisdiction over cases involving international trade and customs issues. The Court of Federal Claims has nationwide jurisdiction over most claims for monetary damages against the United States, disputes over federal contracts claims, including unlawful 'taking' of private property by the federal government, and a variety of claims against the United States.

Above the trial courts are 12 regional circuits, which each have an appellate court, a United States Court of Appeals. Each such circuit court hears appeals from the district courts located within its circuit, as well as appeals from decisions of federal administrative agencies. The Federal Circuit Court of Appeals has specialised jurisdiction to hear appeals from the Court of International Trade, the Court of Federal Claims and other specific types of cases, such as those involving patent laws.

Federal court jurisdiction

The jurisdiction of United States federal courts, unlike the jurisdiction of the state courts, is limited. The two most common types of civil cases arise under either federal question jurisdiction or diversity jurisdiction. Federal question jurisdiction includes claims involving disputes over federal constitutional issues or federal statutes. Diversity jurisdiction, rather than being based on the subject matter of the claim, depends on the citizenship of the parties. When citizens of different states (United States or foreign) are on opposite sides of the dispute, parties may seek to commence the case in federal court or to remove a case commenced in state court to federal court. To commence or remove a claim based on diversity, there must be complete diversity among the parties. Complete diversity only occurs if no plaintiff and no defendant is a citizen of the same state; this includes the citizenship of corporations that are parties to an action. The citizenship of a corporation for diversity purposes is both its state of incorporation and its principal place of business. For example, if the action includes one plaintiff from the state of Delaware and a corporation that is considered a citizen of Delaware is a defendant, complete diversity does not exist. On the other hand, if plaintiffs are residents of the United States and none of the defendants are citizens of the United States, such as foreign corporate entities, complete diversity will be satisfied. Diversity jurisdiction also requires that the matter in controversy exceed the sum or value of US$75,000.

2 What is the role of the judge and the jury in civil proceedings?

In a civil action, the Seventh Amendment to the Constitution preserves the right to a jury trial for federal actions. In the absence of an express statutory provision, if the action can be fairly characterised as a legal claim that would have been triable by a jury at common law in England in the late 18th century, then such claim can be brought before a jury. A party seeking to invoke its right to jury trial must make a demand that is served on the other parties in the action within 14 days after service of the last pleading directed to the issue to be tried (Federal Rules of Civil Procedure (FRCP) rules 5(d) and 38(b)).

In a jury trial, the jury is responsible for deciding issues of fact. The judge decides issues of law.

3 What are the time limits for bringing civil claims?

The time limits for bringing civil claims are referred to as statutes of limitation. The statutes of limitation depend on the type of claim. A federal court adjudicating state claims will apply the relevant statute of limitations prescribed by the state legislature or state common law. For federal claims, the court will apply the statute of limitations as prescribed by federal statute or federal law. Some common federal statutes of limitation are:

- one year for private actions based on violations of the federal securities laws involving misrepresentations in public statements (eg, Securities Act of 1933 sections 11 and 12);
- two years or five years for private actions based on violations of federal securities laws involving fraud or deceit (eg, Securities Exchange Act of 1934 section 10(b)) (the earlier of two years after the discovery or five years after the violation occurred); and
- four years for private actions based on violations of federal antitrust laws.

Parties may also enter into tolling agreements to stay the running of the limitations period. This is often done while parties are discussing settlement.

4 Are there any pre-action considerations the parties should take into account?

There is only one pre-action consideration regarding discovery that parties should take into account. Parties may petition the court before an action is filed to ask the court for an order authorising the petitioner to depose certain persons in order to perpetuate testimony (FRCP rule 27). However, the petitioner bears the burden of demonstrating the following:

- that the action is cognisable in federal court but the petitioner cannot presently bring it or cause it to be brought;
- the subject matter of the expected action and the petitioner's interest;
- the facts the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it;
- the names or descriptions of persons whom the petitioner expects to be adverse parties; and
- the names and expected substance of each deponent's testimony.

5 How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement?

A civil action is commenced by filing a complaint with the court. On or after filing the complaint, the plaintiff may present a summons to the clerk to obtain a signature or seal. Next, the summons and a copy of the complaint must be served on the defendants within 120 days after the complaint was filed. The method of service varies depending on the type and availability of the defendant. Unless service is waived, proof of service must be filed with the court. The court, upon motion or its own notice, will dismiss the action if service is not completed within 120 days after filing (FRCP rules 3 and 4).

6 What is the typical procedure and timetable for a civil claim?

After process has been served, defendants must serve an answer or motion to dismiss the complaint (a responsive pleading) within 21 days of personal service. If personal service was waived, the defendant has 60 days after the request for waiver to serve a responsive pleading. Under the compulsory counterclaim rule, a party must assert any counterclaim that it has against the opposing party if the claim arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim. Although not required, a defendant may also assert a cross-claim (a claim against another defendant) if the claim arises out of the same transaction or occurrence that is the subject matter of the original action or relates to any property that is the subject matter of the original action (FRCP rule 13). Either party may also join third parties to an action, who may be liable for a portion of the original claim or against whom a party may have additional claims related to the same transaction (FRCP rule 14).

In any action, the court may order the attorneys and unrepresented parties to appear for pre-trial conferences to expedite the disposition of the action, encourage management, discourage wasteful pre-trial activities and facilitate settlement. In most circumstances, parties must confer as soon as practicable – at least 21 days before a scheduling conference is to be held or a scheduling order is due. In accordance with local rules, the district judge or magistrate judge will issue a scheduling order that limits the time to join other parties, amend pleadings, complete discovery and file motions. The scheduling order will be issued within the earlier of 120 days of any defendant being served with a complaint or 90 days after any defendant has appeared in the action. The court may hold a final pre-trial conference to formulate a trial plan (FRCP rule 16).

7 Can the parties control the procedure and the timetable?

Parties must submit discovery plans detailing the timing, form of disclosure and the subject matters to be discovered. The discovery plan should also address whether the parties require an expedited schedule. The court may or may not accept the parties' discovery plan, and some federal courts require extraordinarily short deadlines for pre-trial activity. In all cases, the court will issue a scheduling order addressing such matters. The court, upon request of the parties, may modify the schedule for good cause shown (FRCP rules 16 and 26(f)).

8 Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

There is an affirmative duty to preserve documents and other evidence even before a trial has commenced. Once a party reasonably anticipates litigation, the party must suspend any routine document destruction or retention policies and put in place a process to ensure the preservation of relevant documents. During the course of discovery, parties will make requests detailing the types of documents to be produced by the other side. Before a discovery request is received, all parties must disclose certain information about the location and availability of potentially discoverable information (FRCP rule 26(a)(1)(A)). The scope of discovery is generally very broad, and includes relevant documents that would be unhelpful to a party's case.

9 Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

The admission of evidence in federal courts is governed by the Federal Rules of Evidence (FRE). FRE 501 provides that for federal claims, federal common law governs an assertion of privilege unless the Constitution, federal statute or rules prescribed by the Supreme Court state otherwise. Federal common law recognises, inter alia, the attorney–client privilege and the spousal privilege.

The attorney–client privilege protects confidential communications between an attorney and his or her clients made for the purpose of rendering legal advice. This includes communications with in-house counsel, as long as counsel is acting in its capacity as an attorney. The federal common law also recognises the extensions of the attorney–client privilege, known as the joint defence and common defence privileges. These privileges protect attorney–client privileged information shared between parties and their attorneys with a common interest in an actual or potential litigation against a common adversary.

The federal rules also specifically recognise an attorney-work product protection. The FRCP restrict the discovery of documents prepared in anticipation of litigation. The work product protection, however, may be overcome if the party shows substantial need and cannot without undue hardship obtain the substantial equivalent by other means (FRCP rule 26(b)(3)).

For claims based on state law, state statutory or common law governs the application of privilege (FRE 501).

10 Do parties exchange written evidence from witnesses and experts prior to trial?

Typically, evidence is exchanged before trial in the form of deposition testimony. However, a party may, by written questions, depose any person, including a party (FRCP rule 31). In addition, unless otherwise stipulated by the parties or ordered by the court, any expert witness a party intends to call at trial must provide a written report containing:

- a statement of all opinions and the basis and reasons for them;
- the facts or data relied on to form such opinions;
- any exhibits that will be used to summarise or support such opinions;
- the witness's qualifications, including any publications authored in the previous 10 years;

- a list of cases in which the witness has testified as an expert during the previous four years; and
- a statement of compensation for the study and testimony in the case (FRCP rule 26(a)(2)).

11 How is evidence presented at trial? Do witnesses and experts give oral evidence?

At trial, evidence is typically presented through oral testimony. Both lay and expert witnesses testify. Both plaintiffs and defendants are allowed to ask any witness questions. The party calling a witness will conduct a direct examination of the witness. The opposing party may then conduct a cross-examination of the witness. If a witness is unavailable for trial, deposition testimony may be admitted in certain circumstances. Objects and written evidence may also be presented at trial.

12 What interim remedies are available?

Except to the extent that federal rules apply, federal district courts can utilise provisional remedies available in the state in which the district court is located (FRCP rule 64). Additionally, district courts under the federal rules may order preliminary injunctions. A party seeking a preliminary injunction must demonstrate substantial likelihood of success on the merits, a threat of irreparable harm or injury, that the balance of equities tips in its favour and that the grant of an injunction would serve the public interest. If a party fears that immediate and irreparable injury will occur before a hearing on a preliminary injunction will occur, the party can seek a temporary restraining order either on notice or ex parte (without written notice to the adverse party or its attorney). A temporary restraining order is an extraordinary remedy and is usually only granted in an emergency. For both a preliminary injunction and a temporary restraining order, a moving party must provide the court with security in the amount the court determines is proper to cover the cost and damages sustained by any party if found to have been wrongfully enjoined or restrained (FRCP rule 65).

13 What substantive remedies are available?

The federal courts have the power to grant the same legal and equitable remedies as the state courts, such as money damages, injunctions and specific performance. A federal court reviewing state claims under diversity jurisdiction can award the same remedies available for such claims under state law. Federal claims are usually based upon federal statutes and regulations, which in many cases provide the specific remedies available for such claims. Most statutes provide for legal and equitable remedies similar to those available under state law.

Interest is typically payable on money judgments. The interest rate is not fixed. Instead, the rate allowed on most judgments for civil actions in a federal court can be calculated based on government securities rates as published by the board governors of the Federal Reserve System, for the calendar week preceding the date of the judgment (28 USC section 1961).

14 What means of enforcement are available?

Once a judgment is entered, enforcement is sought through supplementary proceedings. Unless specific federal statutes apply, federal courts will apply the procedure of the state where the court is located for supplementary proceedings. For example, federal courts will follow the local state court rules providing for discovery about a judgment creditor's assets. A money judgment will be enforced through a writ of execution: a court order directing an officer of the court to seize the property of judgment debtor and transfer proceeds to a judgment creditor (FRCP rule 69). The federal courts may also order the performance of specific acts, and if a party fails to comply within the established time the court may, inter alia, order that the act be done by some other person, issue a judgment divesting a party of title in real or personal property, issue a writ of attachment or sequestration, or hold the disobedient party in contempt (FRCP rule 70).

15 Are court hearings held in public? Are court documents available to the public?

Except occasionally, all steps of the federal judicial process are open to the public. The public can usually observe the court sessions, review court calendars, watch a proceeding, and access dockets and case files and records. At certain times, access to court records and proceedings may be limited; for example, in a high-profile trial for which courtroom space is not sufficient to accommodate everyone, the court may restrict access. In addition, the court may restrict access for privacy or security reasons, including actions involving juveniles or confidential informants. Finally, the court may seal certain documents that contain confidential business records (including trade secrets), certain law enforcement reports and juvenile records.

16 Does the court have power to order costs?

Unless otherwise provided by federal statute, the court may, with discretion, order costs – other than attorneys' fees – to the prevailing party (FRCP rule 54(d)). The court may also award reasonable attorneys' fees and other non-taxable costs in a certified class action (FRCP 23(h)). Costs are not synonymous with expenses. Costs are typically limited to court fees and witness fees. However, the court may review requests for unusual costs. In addition, under FRCP rule 11, the court may sanction an attorney, and require a monetary payment to help defray the opposing party's legal expenses if the court finds that rule 11 was violated. Under rule 11, attorneys must certify that the claims were brought in good faith, and the court may sanction an attorney for failure to do so.

A claimant may be required to provide security for defendant's costs when plaintiffs are residents of a foreign country or if provided by federal statute.

17 Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

In most districts, attorney conduct including fee arrangements will be governed consistently with local state rules, but some district courts and courts of appeal have not adopted any rules governing attorney conduct and others may apply federal common law rules. However, under the prevailing state ethics rules that govern attorneys in most districts, attorneys may contract for contingency fee arrangements and recover a percentage of the final award, except in criminal and domestic relations matters. Attorneys may not share fees received with any third parties.

There is no prohibition against legal financing. Investors may provide funding to litigants in return for a percentage of the final award. A party to a litigation may also share its risk through an insurance or indemnification agreement.

18 Is insurance available to cover all or part of a party's legal costs?

Individuals or corporations may obtain insurance to cover both liability and legal costs. However, as a matter of public policy, intentional and criminal acts may not be covered by insurance.

19 May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Litigants with similar claims may pursue a class action in federal courts. Litigants may only sue or be sued as representative parties on behalf of all members if:

- the class is so numerous that joinder of all members is impracticable;
- there are questions of law or fact common to the class;
- the claims or defences of the representative parties are typical of the claims or defences of the class; and
- the representative parties will fairly and adequately protect the interests of the class (FRCP rule 23).

Similarly, a shareholder of a corporation or a member of an unincorporated association may also bring a collective action (commonly known as a derivative action) on behalf of the corporation or association to enforce a right that the corporation or association may properly assert but has failed to enforce. The plaintiff must fairly and adequately represent the interest of shareholders or members who are similarly situated in enforcing the right of the corporation or association (FRCP rule 23.1).

20 On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

Appeals in the federal system are limited, because the circuit courts generally may only review final judgments of the district courts and a few specific interlocutory orders. A district court decision is appealable if it is considered final (28 USC section 1291). There are no statutory definitions of 'final'. The Supreme Court has stated that a final judgment is one that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment' (*Catlin v United States*, 324 US 229 (1945)). Ultimately, whether a judgment is final will largely depend on the case.

The circuit courts may review certain interlocutory orders. Such appealable orders include orders granting, modifying, or refusing injunctions; orders appointing receivers or refusing to wind up receiverships; and decrees determining the rights and liabilities of the parties to admiralty cases (28 USC section 1292(a)). The district court may also certify for immediate appeal certain orders that involve a controlling question of law as to which there is substantial ground for difference of opinion. In order to appeal, after certification by the district court, a party must seek permission from the circuit court to bring such appeal (28 USC section 1292(b)).

Cases from the circuit courts may be reviewed by the Supreme Court pursuant to a writ of certiorari, granted based upon the petition of any party to a civil case or by certification from the Court of Appeals on any question of law (28 USC section 1254). A writ of certiorari is essentially an application to the Supreme Court requesting that the Court review the matter. The Supreme Court does not accept all applications; it typically chooses to hear a small number of cases involving important questions about the Constitution or federal law.

21 What procedures exist for recognition and enforcement of foreign judgments?

There is no general federal statute or treaty on foreign judgments. Under federal common law, foreign judgments may be recognised as long as the judgment appears to have been rendered by a 'competent court, having jurisdiction of the cause and parties, and upon due allegations of proof, and an opportunity to defend against them, and its proceedings are according to a course of civilised jurisprudence, and are stated in a clear and formal record' (*Hilton v Guyot*, 159 US 113, 205-06 (1895)). The requirement of a reciprocal agreement is not straightforward. Federal courts with diversity jurisdiction will typically apply the state law regarding recognition of foreign judgments, and some states have rejected the reciprocity requirement. Meanwhile, federal courts with federal question jurisdiction will apply the federal common law, which does require reciprocity. Until the Supreme Court or Congress provides further guidance, the requirements for the enforcement of foreign judgments will continue to vary across jurisdictions and types of matters.

22 Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

The district courts may, with discretion, issue an order pursuant to a letter rogatory or request made by a foreign or international tribunal, and direct a resident of the district to give testimony, make a statement or produce a document or thing (28 USC section 1782).

Arbitration

23 Is the arbitration law based on the UNCITRAL Model Law?

Congress enacted the Federal Arbitration Act (FAA) in 1925 to validate agreements to arbitrate and to provide mechanisms for their enforcement. The Supreme Court has held that the FAA applies in both federal question and diversity jurisdiction matters, and in some cases pre-empts state statutes precluding arbitration. The FAA is not based on the UNCITRAL Model Law, and differs from it in several ways, including the basis for setting aside an award, the power to modify or correct an award, the procedure for the appointment of arbitrators and the arbitral tribunal's power to rule on its own jurisdiction.

24 What are the formal requirements for an enforceable arbitration agreement?

According to FAA section 2, an agreement will be valid, irrevocable and enforceable, except upon such grounds as exist at law or equity for the revocation of any contract, if there is a written provision or contract evidencing a transaction involving commerce to settle by arbitration a controversy arising thereafter, or a transaction or refusal to perform the whole or part thereof of such contract, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction or refusal. Generally, courts will apply the ordinary state-law principles that govern the formation of contracts to determine the validity of an agreement. An agreement to arbitrate is considered a separate contractual undertaking; the validity of an arbitration clause does not depend on the validity of the underlying contract.

25 If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

Typically, parties will specify the procedure for the appointment of arbitrators, or adopt procedural rules of an administering arbitral institution such as the American Arbitration Association (AAA), JAMS or the International Chamber of Commerce International Court of Arbitration, which provide default rules for the appointment of arbitrators. In the absence of a contractual provision regarding the procedure for the appointment of arbitrators or the adoption of the procedure of an administering arbitral association, the appointment of arbitrators shall be made upon application to the court. The court may designate and appoint any arbitrator or arbitrators as the case may require. If the contract is silent about the number of arbitrators, the court shall appoint a single arbitrator for the action (FAA section 5).

26 Does the domestic law contain substantive requirements for the procedure to be followed?

The domestic statutory law provides almost no requirements regarding the procedure to be followed. The arbitrators once appointed typically control the procedure, conducting the hearings, administering oaths and making awards. The FAA grants an arbitrator or arbitrators the power to summon the attendance of witnesses. The courts defer to the arbitrator on procedural matters.

If the parties have contractually adopted an administering arbitral association's rules, those rules will bind the arbitrator or panel's actions. The AAA provides different rules of procedure depending on the type of case (commercial, construction, labour, international, etc). Any procedural rules in the arbitration agreement will overrule the institutional rules.

27 On what grounds can the court intervene during an arbitration?

Federal courts have jurisdiction to hear arbitration-related issues for matters with federal question jurisdiction or diversity jurisdiction. Judicial intervention is commonly sought when the arbitration demand is made (to compel or stay a proceeding) or after the award (to enforce, modify or vacate). However, during an arbitration, parties may turn to the courts to enforce a subpoena issued by the arbitrator. If a person summoned to testify refuses or fails to appear, the parties may petition the district court in which the arbitrator (or a majority of the arbitrators) sits to compel attendance or punish said persons for contempt (9 USC section 7).

28 Do arbitrators have powers to grant interim relief?

The FAA does not provide for provisional remedies, but the majority view is that arbitrators can and should grant preliminary injunctive relief to preserve the status quo pending arbitration. Likewise, administering arbitral associations often give arbitrators the power to grant interim relief.

29 When and in what form must the award be delivered?

Under the FAA, there are no formal requirements regarding the delivery and form of the award. The rules of the administering arbitral association may require, or the parties may stipulate, that the award be in writing and signed by the majority of arbitrators. The timing of the award may also be governed by the administering arbitral association or the arbitration agreement.

30 On what grounds can an award be appealed to the court?

An award can be appealed to the courts on limited grounds. The FAA lists the following grounds for vacating an award:

- where the award was procured by corruption, fraud or undue means;
- where there was evident partiality or corruption in the arbitrators, or any one of them;
- where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehaviour by which the rights of any party have been prejudiced; or
- where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

Once an action on the award is brought to the courts, the normal rules governing the appeal of a court decision or an order will attach.

31 What procedures exist for enforcement of foreign and domestic awards?

Domestic awards may be enforced under FAA section 9. The party seeking enforcement need not commence a civil action, but rather can make an application to the appropriate federal district for an order confirming the award within one year after the award is issued. The party seeking confirmation must also serve the adverse party with notice of the application.

There are two methods under which foreign commercial arbitral awards may be recognised and enforced. First, as part of the FAA, the United States has adopted the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (9 USC section 201). A party seeking to enforce an award must establish a prima facie case for enforcement under the New York Convention, and provide an original or certified copy of both the award and arbitral agreement to the appropriate judicial forum. Enforcement may be challenged on five grounds:

- absence of a valid arbitration agreement;
- lack of fair opportunity to be heard;
- the award exceeds the scope of the submission to arbitration;
- improper composition of the arbitral tribunal or improper arbitral procedure; and
- the award has not yet become binding or stayed.

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The party opposing enforcement has the burden to prove the invalidity of the award.

Alternatively, the United States has also adopted the Inter-American Convention on International Commercial Arbitration. Foreign commercial arbitral awards will be recognised and enforced on the basis of reciprocity; if the foreign state has ratified or acceded to the Inter-American Convention, such award will be recognised and enforced (9 USC section 304). If both the requirements for the application of the New York Convention and the Inter-American Convention are met, unless expressly agreed otherwise, the Inter-American convention will apply if the majority of parties to the arbitration are citizens of a state or states that have ratified or acceded to the Inter-American Convention or are a member state of the Organization of Americans. In all other cases, the New York Convention will apply (9 USC section 305).

32 Can a successful party recover its costs?

In general, parties normally bear their own costs, unless otherwise agreed in the arbitration clause. The arbitrator may award administrative costs if the parties have contracted for such or the rules of the administering arbitral association so provide. Typically, costs do not include attorneys' fees, but an arbitrator may award attorneys' fees when allowed by the governing law, such as when authorised by a specific statute, when the applicable arbitration rules so provide or as a matter of contract as provided for by the parties.

Alternative dispute resolution

33 What types of ADR process are commonly used? Is a particular ADR process popular?

According to a recent study, all of the federal courts authorise some form of ADR. The types of ADR procedures used in federal courts include mediation, arbitration, early neutral evaluation, summary jury trial and settlement week. The most commonly authorised form of ADR across the district courts is mediation. The next most common forms are arbitration and early neutral evaluation.

34 Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

The requirement to consider ADR varies from court to court. Some district courts require litigants to consider the use of an alternative dispute resolution process. In addition, some district courts mandate that parties in certain cases utilise mediation, early neutral evaluation and, if the parties consent, arbitration. Judges in some districts are authorised to refer cases without party consent to mediation or early neutral evaluation.

Miscellaneous

35 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

No.

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