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Contents

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1. General

1.1 General Characteristics of Legal System

The US legal system is a common law system derived from the English common law system. It is an adversarial system characterised by party-driven discovery and adversarial hearings. The adversarial hearings take the form of either trial by jury or a trial before a judge (a 'bench trial'). The underlying principle of the jury trial is that an individual has the right to be judged by his or her peers. The legal process is conducted through both oral arguments and written submissions.

1.2 Structure of Country's Court System

The US has both federal and state courts.

Federal courts consist of US District Courts – trial courts housed within state borders. Some states are large enough to have multiple district courts. When necessary, the US Judicial Panel on Multidistrict Litigation has the ability to consolidate cases with common questions of fact into a single district court proceeding, in order to promote judicial efficiency and ensure consistent pretrial rulings. The intermediate appellate court is the US Court of Appeals. There are 94 district courts that are organised into 12 appellate circuits. Appeals from the district courts within the federal circuit go to the appellate court of their corresponding circuit. The US Supreme Court is the court of last resort in the US.

Federal courts are typically limited to cases where:

- the US is a party;
- a federal law question arises, including questions relating to the US Constitution;
- parties are diverse in citizenship, including of different states or countries, subject to a minimum amount in controversy; and/or
- the issues at hand fall under specifically enumerated authority, such as bankruptcy, copyright, patent and maritime law.

On occasion, a plaintiff will file a case in state court that could have been filed in federal court. In such instances, a defendant may move the case from state court to district court through a process known as removal. Federal agencies contain administrative courts, which function much like a trial court, but are typically restricted to questions of administrative law from their respective agency. These courts tend to have an appellate process and statutes typically require these administrative remedies to be exhausted prior to filing a lawsuit in a court.

Each of the 50 states in the US has a court system whose structure resembles that of the federal courts and administrative agencies, along with its own applicable laws and procedures. Typically, each state has an initial trial-level court, an intermediate appellate court, and a court of last resort. The matters handled by these courts include anything not specifically delegated to federal jurisdiction, such as family law cases, probate cases, small claims, etc. Some states have courts that only hear a certain type of case, or courts designated to have jurisdiction only over cases where an equitable remedy is sought as opposed to a remedy at law. However, these divisions are jurisdiction-specific.

1.3 Court Filings and Proceedings

Court proceedings in the US, including filings and hearings, are typically open to the public.

Parties can request to have filings made under seal or request protective orders prohibiting the dissemination of information exchanged in discovery proceedings. Courts tend to grant orders for filing documents under seal when such documents include or refer to personal information, confidential information (such as trade secrets or other proprietary information), or when a public filing would undermine the underlying purpose of the filing, such as a whistle-blower action where the complaint may be filed under seal and unsealed at a later date.

1.4 Legal Representation in Court

Lawyers are the legal representatives in the US. Generally, lawyers are required to be licensed in the state in which the litigation occurs, but they can be admitted on a case-by-case basis through a pro hac vice application, which requires lawyers to be licensed and in good standing in another jurisdiction. To be licensed in a state, the lawyer must have graduated from an accredited law school, passed a state-administered exam, and be formally admitted to practice law by the state's relevant authority, typically a state bar association.

Lawyers from other countries that have not been admitted in the US cannot represent a party in litigation. However, some states, including Georgia, allow lawyers from other countries to be licensed as a foreign law consultant, which generally restricts the lawyer to advising only on non-US law.

2. Litigation Funding

2.1 Third-party Litigation Funding

Third-party litigation funding (TPLF) is generally permitted in the US, but the arrangements of the TPLF may be restricted on a state-by-state basis based on the ethical rules of a given jurisdiction. Federal regulations to TPLF have been proposed but none have been implemented. For example, a subcommittee of the US Chamber of Commerce had been delegated the task of collecting information on TPLF and proposed an amendment to Federal Rule of Civil Procedure ('Rule') 26 to require disclosure of *"any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to*

receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise." The reported goals of the proposal are simply to mandate disclosure of TPLF, and not to regulate TPLF. Concerns about conflicts of interest prompt calls for disclosure. It is conceivable that the interests of a third-party funder (ie, a non-party) may be at odds with the interests of the party receiving the funding. Disclosure of TPLF also varies by jurisdiction. In some jurisdictions, local court rules require the disclosure. In others, state law compels the disclosure. There has also been at least one instance where a judge has ordered the disclosure of TPLF to the court so it could analyse the agreements and determine whether conflicts of interest existed.

2.2 Third-party Funding of Lawsuits

The most common types of lawsuits available for TPLF are class action litigation, intellectual property cases, antitrust, product liability claims, and mass torts. Currently, there are no federal restrictions as to the types of cases that are available for TPLF, but states do have certain restrictions on TPLF.

2.3 Third-party Funding for Plaintiffs and Defendants

TPLF is available to both parties, although the majority of TPLF is provided to plaintiffs.

2.4 Minimum and Maximum Amounts of Third-party Funding

There is no set or required minimum or maximum amount that a third-party funder will fund.

2.5 Third-party Funding of Costs

A TPLF funder will consider funding the entire case, from the attorneys' fees to a number of other litigation fees, such as filing fees and expert witness fees.

2.6 Contingency Fees

Contingency fees are permitted and are usually used by plaintiffs' counsel in personal injury cases and tort cases. Contingent fee arrangements provide that a client does not need to pay attorney's fees unless and until the client recovers money for his or her case. This allows a client to forgo payment of an attorney's fees upfront and requires the client to pay those attorney's fees only when a settlement or favourable trial verdict is returned. Depending on the contingency fee arrangement, a client may still need to pay an attorney's out of pocket expenses, such as court filings fees, court reporter fees for depositions, should the case not end favourably for the client. Contingency fees are generally used where the case will go to trial and not in matters where there is no 'win' or 'loss' at stake. The percentage generally allowed for contingency fee arrangements is around 33% of the total recovery amount. Contingency fees are not allowed in criminal defense cases.

2.7 Time Limit for Obtaining Third-party Funding

There are no time limits on when a party to the litigation should obtain TPLF. Generally, TPLF comes in later in the case when funding is needed or the merits of the case are clearer.

3. Initiating a Lawsuit

3.1 Rules on Pre-action Conduct

In many US jurisdictions, a potential plaintiff is required to send a pre-suit notice letter prior to bringing certain actions, such as consumer protection statute-based actions, healthcare liability actions, or other actions as required by law. In addition to a pre-suit notice, some state courts require that administrative proceedings must occur and remedies be exhausted before a lawsuit can be filed. The exact requirements vary by state. The most severe penalty for failure to comply with pre-suit requirements is the dismissal of the case or of certain claims. However, jurisdictions take varying approaches to enforcing penalties. Courts have allowed a plaintiff to voluntarily dismiss a matter, send a proper pre-suit notice, then re-file the complaint. Other courts have allowed the lawsuit to continue but ordered parties to engage in the pre-suit procedures in the interest of securing a speedy resolution.

Typically, there is no strict requirement for potential defendants to respond, but depending on the state's law, doing so may prove beneficial as a way of exploring early resolution. Additionally, the law in some states allows for the limiting of damages recovered by the potential plaintiff if the potential defendant makes an offer, which is rejected, but which the court ultimately finds would have sufficiently compensated the potential plaintiff. The court then has authority to limit the recovery to the amount offered and will also deny any potential requests for attorney's fees.

3.2 Statutes of Limitations

Statutes of limitations in the US vary both by state and type of civil suit. Typically, statutes of limitation range from two years to six years for most actions. The limitation periods begin to run whenever the breach of duty that gives rise to the suit occurs, or when a party knows or should have known about the breach. Generally, the test for personal injury is where a party is aware of an injury and has reason to believe that the injury is related to the defendant's conduct. For construction-related actions, 46 states have what are known as 'statutes of repose', meaning a party may not bring a claim after a set time period regardless of when an injury occurs. 19 states also have statutes of repose for product liability claims.

These statutes typically have exceptions whenever a potential defendant engages in conduct to conceal the breach or injury from the aggrieved party.

3.3 Jurisdictional Requirements for a Defendant

For a defendant to be subject to jurisdiction in a court in the US, two requirements must be met. First, even if the suit is filed in federal court, the state where the lawsuit is filed must have legislation granting jurisdiction over the defendant. Second, even with such legislation, the exercise of jurisdiction over the defendant must comport with due process under the US Constitution. As interpreted by the US Supreme Court, this generally means that jurisdiction can be exercised over a defendant where it is 'at home', or where its suit-related conduct occurred. A landmark 2017 decision, Bristol-Myers Squibb Company v Superior Court of California, San Francisco County, 137 S Ct 1773 (2017), clarified the application of this analysis, holding, in a products liability context, that a state court could not exercise jurisdiction over an out-of-state defendant for claims brought by out-of-state plaintiffs where the injury did not occur in that state.

Legislation conferring jurisdiction over defendants on courts varies by state (although there are many similarities) and, pursuant to Rule 4, federal district courts can exercise personal jurisdiction over defendants to the extent that the state in which they sit allows. However, the question of whether a person is subject to the court's jurisdiction is separate and apart from the question of whether the court has the power to hear the case. To determine whether the court has the power to hear the case, one must review the framework laid out in **1.2 Structure of Country's Court System**, above.

3.4 Initial Complaint

Pursuant to Rule 8, a complaint must include *"a short and plain statement"* showing a party is entitled to the relief sought. Per US Supreme Court precedent, the allegations in the complaint must also contain sufficient factual matter that, if accepted as true, states a claim that is plausible on its face. Typically, state courts have similar requirements.

Rule 15 allows a plaintiff to amend a complaint as a matter of right within 21 days after serving the complaint, or within 21 days after receiving service of a responsive pleading or motion under Rule 12(b), (e) or (f). Otherwise, a plaintiff needs either consent or the court's leave to make an amendment. State courts have varying requirements for an initial complaint that are similar to the federal requirements.

3.5 Rules of Service

To inform an adversary that it has been sued in federal court, a party must comply with Rule 4. The suing party must effect service of process, which consists of a summons from the court and a copy of the complaint. Service of process may be delivered by anyone who is at least 18 years old and not a party to the action, a US marshal or other individual specially appointed by the court. Service may be made by delivering process to the defendant personally, by leaving process at the defendant's home with a capable adult resident of the home, by delivering process to a corporate entity's appointed agent, or other methods permitted in the jurisdiction in which service is effected.

An international party may be sued. In this case, service of process must be effected in a manner allowed by the jurisdiction (ie, country) in which the defendant resides, necessitating an analysis of the target country's laws. The US is a party to the Hague Service Convention, which allows parties to use diplomatic channels to effect service in a foreign country. Many countries are a party to this convention. Unfortunately, this process can be costly and time-consuming. Another alternative is service by mail when this is considered a proper method of service by both the jurisdiction where the case was filed and the target country.

State courts have varying rules on service of a complaint.

3.6 Failure to Respond to a Lawsuit

Pursuant to Rule 55, a defendant, by failing to respond to a lawsuit, enters default. Assuming the defendant is neither a minor nor an incompetent person and the damages sought can be made certain through a computation, a plaintiff may file an affidavit showing the amount of damages due, and the clerk of the court will enter judgement for that amount and costs against the defendant. Where the damages sought cannot be made certain through a computation, a plaintiff must apply to the court for a default judgment. The court will then conduct hearings as needed to determine the damages to which the plaintiff is entitled.

A defendant may file a motion for relief from a default judgment where there is good cause for such motion. The grounds for such a motion are enumerated in Rule 60, which states that relief is available for various reasons, including excusable neglect, fraud/misconduct or other justified reasons.

3.7 Representative or Collective Actions

The US allows collective actions – including class action lawsuits and multidistrict litigation ('MDL') proceedings. Class actions are permitted subject to the framework laid out in Rule 23(a). A class action is permitted when: *"(1) the class is so numerous that joinder of all members is impracticable; (2) there are question of law or fact common to the class; (3) the claims or defense of the representative parties are typical of the claims or defense of the class; and (4) the representative parties will fairly and adequately protect the interest of the class."* Because the claims are pleaded for all affected parties, a party must opt out if they wish to independently adjudicate their claim. Many states have adopted similar rules.

An MDL is another type of collective action allowed in the US. It is governed by 28 USC. Section 1407. The Judicial Panel on Multidistrict Litigation is authorised to establish an MDL by transferring multiple actions to a single district court for pretrial proceedings when there are *"civil actions involving one or more common questions of fact"* pending

in different district courts. These transfers must *"be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions."* If the action is not terminated, it will be remanded, at or before the conclusion of pretrial procedures, to the court where it could have been originally filed or from which it was transferred.

3.8 Requirement for a Costs Estimate

There is generally no requirement for a cost estimate. However, best practices dictate that a lawyer should have frank and honest discussions with a client regarding the costs, value and merit of a case and should renew conversations based on the development of the case. Additionally, a lawyer has an ethical duty to convey settlement offers to the client and discuss accordingly.

4. Pre-trial Proceedings

4.1 Interim Applications/Motions

Parties may make various motions to the court seeking different remedies, such as motions to compel, motions to dismiss (Rule 12(b)), motions for judgment on the pleadings (Rule 12(c)), motions for summary judgment (Rule 56) and motions to strike (Rule 12(f)). The court may grant or deny any motion. Also, any party may request a pretrial conference, or the court may order one, which may be held to expedite the disposition of the case, help the court manage the case and set deadlines and a case schedule, eliminate frivolous claims, facilitate settlement, etc.

4.2 Early Judgment Applications

A party or court may file a motion to strike under Rule 12(f), whereby the court may strike an insufficient defense or any redundant, immaterial, impertinent or scandalous matter from a pleading. A party must file this motion with the court either before its responsive pleading deadline or, if no response is allowed, then within 21 days of being served with the pleading.

A party may also file a motion for judgment on the pleadings pursuant to Rule 12(c), in which the court can only refer to the pleadings documents filed with the court. Under the Rules, there is no timing except that after the pleadings are closed, a party must move for judgment on the pleadings so as to not delay trial. A party can convert a motion for judgment on the pleadings or a motion to dismiss into a motion for summary judgment under Rule 56 if the motion contains matters outside the pleadings for the court to consider. Generally, this involves citing documents outside of the complaint to support a claim or defense for the court to consider in its ruling.

A party can also file a motion to compel, pursuant to Rule 37, which usually involves discovery, whether it be requesting the court to compel the opposing party to provide discovery responses or designate/produce a witness for deposition. A motion to compel requests that the court require a party to produce documentation or information requested through discovery requests and can also request that the non-complying party be sanctioned for non-compliance, which would include attorneys' fees for the time spent to draft and file the motion to compel. There is no timing requirement in serving thee motion to compel but many jurisdictions require the parties meet and confer before a motion to compel is filed.

4.3 Dispositive Motions

A party may file a motion to dismiss in federal court under Rule 12(b). Generally, state and local rules are mirrored after the federal rules. Additionally, a party may assert the following defenses in a motion to dismiss:

- lack of subject matter jurisdiction;
- lack of personal jurisdiction;
- improper venue;
- insufficient process;
- insufficient service of process;
- failure to state a claim upon which relief may be granted; and
- failure to join a party under Rule 19.

A court can grant a motion to dismiss in full, dismissing the entire complaint, or grant it in part, dismissing some but not all of the claims.

Perhaps one of the most useful motions under Rule 12(b) is interpreted by the landmark US Supreme Court decisions of Bell Atlantic Corporation v Twombly, 550 US 544 (2007) and Ashcroft v Iqbal, 556 US 662 (2009). The legal standard for a motion to dismiss pursuant to 12(b)(6) is when a plaintiff has failed to state a claim upon which relief can be granted. Based purely on legal grounds, a party may fail to state a claim where relief may be granted when the facts of the complaint, taken as true, do not legally support the case.

A motion for summary judgment under Rule 56 may also be filed by one or both parties to a lawsuit. Summary judgment, also known as a judgment as a matter of law, is entered by the court for one party against another party prior to trial. Summary judgment could be entered in relation to the entire case, or only certain discrete issues in the case. A motion for summary judgment is a request for the court to rule that the party has no case as there are no facts at issue in the case. Motions for summary judgment are typically filed shortly after the close of all discovery. They assert that no dispute of material fact exists as to the issue(s) raised in the pleadings. Motions for summary judgment are frequently supported by citing particular parts of the materials in the record (ie, pleadings, depositions, affidavits/declarations, admissions, interrogatory answers, etc).

4.4 Requirements for Interested Parties to Join a Lawsuit

Rule 19 governs the rules on joinder. Per Rule 19(a)(1), a party must be joined when, in that person's absence, the court cannot accord complete relief among existing parties; or that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may as a practical matter impair or impede the person's ability to protect the interest; or leave an existing party subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations because of the interest. There are several factors for the court to consider when determining if joinder of a party may be feasible.

4.5 Applications for Security for Defendant's Costs

A defendant may apply for an order for security, but this does not generally happen unless a party is moving for provisional relief (ie, irreparable harm, likelihood of success on the merits of the underlying claim, and balance of equities weighs in favour of the moving party). If that relief is granted then the moving party may need to provide security that would adequately compensate the defendant for its damages as a result of a wrongful injunction.

4.6 Costs of Interim Applications/Motions

Temporary restraining orders (TROs) and preliminary injunctions may be available to a party if they can show irreparable harm, likelihood of success on the merits of the underlying claim, or if the balance of equities weighs in favour of the moving party. Mandatory injunctions, requiring a party to act, may also be available but may require the moving party to make a higher showing of necessity. A court will also consider whether the TRO or injunction would serve the public interest to maintain the status quo of the parties while the court decides the issues. Under Rule 65(b)(2), a TRO is limited to 14 days without a court order or stipulation. State courts may extend the TRO until the motion for injunction is heard by the court. A party may seek a TRO in both state and federal court without notice to the defendant, while preliminary injunctions require notice to all parties. Parties may be able to file temporary, preliminary or permanent injunctions that compel a party to do or refrain from specific acts until the court is able to decide the case.

Interim attachment orders are usually available to ensure that a party does not transfer or otherwise dispose of funds that will satisfy a final judgment. Under Rule 64, the state law where the case is filed will be applied unless a federal statute trumps that state law. These orders will be available based on the likelihood of success on the moving party's claims.

Parties may also have the following interim remedies available:

- garnishment, requiring a third party to pay the money to a party that would otherwise would have been paid to the non-party;
- replevin, which is an order that requires a party to return property to return property wrongfully held or taken;
- receivership, appointment of a third party to take temporary possession of a party's property; and
- notice of pendency, an order over real property, which is the subject of the action, to ensure the full payment of the judgment.

4.7 Application/Motion Timeframe

A party may file an emergency TRO, without notice to the opposing party, requesting that the court grant emergency relief. The request must be accompanied by an affidavit explaining the reason emergency relief is needed, and may require a party to show significant prejudice would occur if notice was required to be given to the defendant. Emergency TROs may be granted that same day and may be granted without notice where the party can establish a strong showing of need. Preliminary injunctions require notice to other parties to allow the party to submit filings in opposition to the injunction.

5. Discovery

5.1 Discovery and Civil Cases

In federal court, discovery is available in civil cases and is governed by Rules 26 to 37. Most states have discovery rules which follow the federal rules to varying degrees. Rule 26(b) describes the scope of discovery and what is exempt from discovery. Parties may obtain discovery regarding any non-privileged matter that is relevant to any claims or defenses and which is proportional to the needs of the case. Courts have the ability to limit discovery that is unnecessary, redundant, or overly burdensome on a party, given its value in comparison to the case and issue. A party may also request a protective order under Rule 26(c) to prevent full or partial discovery of certain information. Rule 26(e) requires a party to continuously supplement discovery and gives a party the chance to correct any incorrect information provided. Rule 26(f) requires parties to meet and confer at the outset of a case to discuss and organise the parties' discovery procedure.

Discovery generally includes both written questions and answers, the production of documents, and the taking of deposition testimony. Rules 30 and 31 set out the deposition rules and process. Parties may take up to ten depositions without leave of court. Attendance of third parties at a deposition may be compelled by subpoena under Rule 45. Written notice of the deposition must be provided to the other parties, including the time and place of the deposition,

the deponent's name and address, and documents required to be produced at the deposition. Rule 30 also includes the length of the deposition (limited to one day of seven hours). A party may file a motion to terminate or stop a deposition if the deposition is conducted in bad faith. Depositions may be taken of individual witnesses or topics directed to an entity.

Rule 33 permits a party to serve up to 25 interrogatories – written questions – on another party. The party receiving the interrogatories must answer and/or object to them within 30 days.

Rule 34 provides that a party may serve requests to produce relevant, non-privileged documents of any type, whether electronically stored or not, on another party. Responses and objections to the requests must be served within 30 days. Parties may also subpoena documents under Rule 45.

Rule 36 provides that a party may serve requests for admission on another party, requesting that a party admit the truth of any matters relating to the facts of the case, the application of law to these facts, and the genuineness of certain documents. The receiving party has 30 days to answer and/or object to the requests.

Rule 37 allows a requesting party to file a motion to compel a non-complying party to produce documents, answer discovery requests, or inspect tangible items or documents. A party can request that the non-complying party be sanctioned by the court for failure to respond to discovery requests or attend a deposition.

5.2 Discovery and Third Parties

Rule 45 allows a party to request documents and serve a subpoena on a third party not named in the lawsuit. Pursuant to Rule 34(c) a non-party may also be required to produce documents and tangible evidence for inspection.

5.3 Discovery in this Jurisdiction

In the US, discovery for civil litigation is broad in comparison to the civil law system, and each state and local court has its own rules on discovery practices for their specific court. Generally, the parties must disclose relevant documents and information regarding the lawsuit, claims and defences.

5.4 Legal Privilege

The US has the attorney-client privilege and the attorney-workproduct privilege. The attorney-client privilege is established when there is communication between a lawyer and a client (person or corporation), where the purpose is to seek or obtain legal advice, this communication is made to a lawyer acting in his/her capacity as a lawyer and is kept in confidence. In this case, the advice must be sought because of a need for legal advice; pure business advice is not generally covered by this privilege.

The attorney-work product privilege applies when a document is prepared at the direction of counsel and/or is prepared in preparation for litigation or for trial and the document is prepared by or for a party to the litigation or for a party's representative (eg, litigant's counsel, paralegal, etc). A document is prepared in anticipation of litigation when there are actual or potential claims of litigation following an event or series of events that could potentially lead to litigation. Litigation need not be imminent or filed; it is enough that the primary purpose for creating the document is to assist in possible future litigation.

External counsel does not generally represent the employee of a corporation, and the attorney-client privilege is therefore only maintained by in-house counsel and the employee of a corporation. There is attorney-client privilege between external counsel and in-house counsel as external counsel is generally providing legal advice directly to in-house counsel. The attorney-client privilege is extended in cases where legal advice is communicated to a corporate employee from external counsel and in-house counsel is also present.

5.5 Rules Disallowing Disclosure of a Document

Parties are allowed to redact certain portions of documents that contain personal identifying information, confidential business information and information subject to the Health Insurance Portability and Accountability Act (which restricts access to individual private medical information). Additionally, parties may seek a protective order under Rule 26(c) to limit discovery of certain privileged information. If the motion is granted, then the non-movant must generally pay the reasonable expenses of the moving parties' fees in drafting the motion for protective order.

There are additional protections for communications between certain parties engaged in certain relationships that also require protection from disclosure, including husband and wife, doctor and patient and religious adviser and advisee.

6. Injunctive Relief

6.1 Circumstances of Injunctive Relief

At its core, the circumstances under which injunctive relief is granted are those where a party has been deprived of its rights, and the injunctive relief typically restores these rights. The precise requirements to obtain a permanent injunction vary by jurisdiction. Generally, a party must, in addition to prevailing on the merits, show that:

- without an injunction, it would suffer irreparable injury or harm for which there is no remedy at law;
- the balance of equity or hardship is in favor of the injunction; and
- it serves the public interest.

Relief afforded by injunctions is classified as either affirmative or negative injunctions. Affirmative injunctions will require the party against which the injunction is ordered to perform or engage in a specified act or activity. A negative injunction has the inverse effect – it prohibits a party from engaging in certain actions or activities.

6.2 Arrangements for Obtaining Urgent Injunctive Relief

Expedient injunctive relief takes two forms: preliminary injunctive relief and temporary injunction, more commonly known as a TRO. In federal court, these injunctions are governed by Rule 65. Rule 65 also requires that a party seeking a preliminary injunction or a TRO posts a security in an amount sufficient to cover any expected damage should a party have been found to be wrongly enjoined.

Preliminary injunctive relief is obtained in the same way as permanent injunctive relief, as explained in **6.1 Circumstances of Injunctive Relief**, above, with the key difference being that instead of prevailing on the merits, a party must establish that it is more likely than not that the party will prevail on the merits. This type of injunctive relief requires notice and provision of the other party with an opportunity to be heard at a hearing. It is intended to preserve the status quo of a situation while the issue is litigated and typically remains in effect until the conclusion of the action, or an order is issued lifting the injunction.

TROs are an ex parte emergency stopgap measure for circumstances in which the threatened harm is so great and so imminent that providing notice to the opposing party and holding a hearing is impractical. Because TROs do not give a party an opportunity to be heard, they are typically only in effect for a short period of time (14 days under Rule 65), until more formal proceedings can take place. The mechanisms for out of hours contact of judges, or, in certain instances, clerks of court, varies by jurisdiction.

6.3 Availability of Injunctive Relief on an Ex Parte Basis

TROs can be obtained ex parte.

6.4 Applicant's Liability for Damages

Rule 65 requires a party seeking a preliminary injunction or TRO to post a bond for security in an amount sufficient to pay for the costs and damages by any party that was found to have been wrongly enjoined. Beyond the security provided in Rule 65, relief for wrongly issued preliminary injunctions or TROs is limited. In the US, instances of additional relief tend to be limited to situations where the injunction vested benefits on the plaintiff by virtue of restraining the defendant's ability to compete (ie, a situation where an injunction temporarily grants a plaintiff monopoly in an industry) or where a defendant is enjoined from using its tax collection or price and/or wage regulation powers.

6.5 Respondent's Worldwide Assets and Injunctive Relief

Generally a court, having equitable powers and personal jurisdiction over a party, may enjoin the party from committing acts elsewhere. However, courts are reluctant to issue such orders when the court anticipates difficulties in securing compliance or when, by issuing the injunction, the court's exercise of power is fraught with possibilities of causing conflict with foreign authorities.

6.6 Third Parties and Injunctive Relief

Generally, a party whose rights have not been adjudicated cannot be subject to injunctive orders. Rule 65(d)(2) states that injunctions only cover *"(A) the parties; (B) the parties' officers, agents, servants, employees, and attorneys; and (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B)."*

6.7 Consequences of a Respondent's Non-compliance

A party that fails to comply with the terms of an injunction can be sanctioned. In fashioning a sanction, the court must consider the harm caused by continued non-compliance and the effectiveness of the contemplated sanction in bringing about the desired result. For violating the terms of an injunction, at its most extreme, a court can imprison parties. A court can also impose fines, strike pleadings or claims or even dismiss entire cases if the violations reach a truly egregious level.

7. Trials and Hearings

7.1 Trial Proceedings

In the US, trials can be held before a judge or before a jury. Trials before a judge are noted as bench trials. Parties must stipulate for a bench trial. For a jury trial, the trial begins with a process called *voir dire*, during which parties work to empanel a jury to serve as a finder of fact. During a trial, each party presents its case with statements, evidence, witnesses and expert witnesses. Each party has the opportunity to cross-examine the opposing party's witnesses and expert witness. After both parties present their case, the jury deliberates after receiving instructions on the law from a judge. The parties wait until the jury returns with a verdict or states that a decision could not be reached.

However, few lawsuits actually go to trial in the US. During the life of a lawsuit, there are several opportunities for resolution before trial. Cases can be resolved early on with a motion to dismiss or after the conclusion of discovery through a motion for summary judgment. Either avenue for early resolution involves disposition of a case through written submissions and occasionally oral argument.

7.2 Case Management Hearings

Many jurisdictions require parties to confer early in the matter and establish a timetable to bring a case to resolution. This is often carried out in federal court through the exercise of Rule 16. Absent orders requiring regular conferences, hearings typically take place as a result of action by the parties. The parties may file motions with the court requesting intervention for discovery disputes, or they may file motions to resolve the case early. However, in the time leading up to trial, parties often file motions to exclude pieces of evidence, preclude certain arguments, and bar the opposing party's expert from providing expert opinions. The length of these hearings varies according to the volume and complexity of motions.

7.3 Jury Trials in Civil Cases

Jury trials are available in civil cases, but not typically in cases where equitable relief is sought. Typically, a party must request a trial by jury, but the exact way in which a request must be made varies by jurisdiction. In some jurisdictions, a party must file a separate written request; in others, a party merely needs to request a jury trial in an initial responsive pleading. In federal court, Rule 48 dictates that juries must be composed of six to twelve members to issue a verdict. Unless parties stipulate otherwise, Rule 48 requires the verdicts to be unanimous. Not all jurisdictions across the US have the same requirements for the number of jurors or unanimous verdicts.

7.4 Rules That Govern Admission of Evidence

The admission of evidence at trial varies by jurisdiction; however, many jurisdictions model their evidentiary rules according to the Federal Rules of Evidence (FRE). Admissibility of evidence in federal court is governed by the operation of three key rules: FRE 401, 402 and 403. FRE 402 states that relevant evidence is admissible except when the rules, among other things, provide that the evidence is inadmissible. Rule 401 states that evidence is relevant when the evidence tends to make a fact more or less probable and the fact is of consequence in determining the action. Rule 403 provides for the exclusion of such evidence when its probative value is substantially outweighed by the danger of causing *"unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."*

FRE 801-807 govern hearsay, or out of court statements. Hearsay not subject to an exception is inadmissible. Rules governing witnesses are contained within FRE 601-615. Opinion and expert testimony are contained in FRE 701-706. Authentication of evidence is governed by FRE 901-903.

An important concept regarding the admission of evidence at trial is the concept of waiver. Parties that do not object to the presentation of evidence or statement at trial in a timely manner may inadvertently waive their right to such objections. Mastery of evidentiary rules is critical to timely objections. Timely objections are also critical because, even if the trial court rules against a party's objection, the objecting party has now put an objection on the record and has preserved the issue for appellate review if needed.

7.5 Expert Testimony

Expert testimony is typically permitted at trial, and can be introduced by the parties. FRE 706 permits a court to appoint an expert. Pursuant to FRE 702, an expert witness is qualified as an expert and may testify in the form of an opinion if:

- their scientific, technical or other specialised knowledge will help the trier of fact understand the evidence or to determine a fact in issue;
- the testimony is based on sufficient facts or data;
- the testimony is the product of reliable principles and methods; and
- the expert has reliably applied the principles and methods to the facts of the case.

The judge serves as the gatekeeper for the admission of expert testimony, and his role is to ensure that it meets the requirements under the rules for qualifications and reliability. In federal court and many jurisdictions across the US, the judge performs this gatekeeping duty pursuant to the US Supreme Court decision in Daubert v Merrell Dow Pharmaceuticals, Inc, 509 US 579 (1993), which provides the analytical framework under which FRE 702 now exists. However, some jurisdictions still rely on the much older approach laid out in Frye v United States, 293 F 1013 (DC Cir 1923).

7.6 Extent to Which Hearings are Open to the Public

Public policy in the US favours public adjudication. After parties have had an opportunity to review a transcript and request redaction to protect certain personal information, transcripts from certain federal court hearings can be retrieved electronically. However, where certain sensitive matters are concerned, a court may grant a motion to seal portions of any proceeding. The process for other jurisdictions varies but generally favours public adjudication.

7.7 Level of Intervention by a Judge

In the US, judges may question counsel for the parties during a hearing where the judge has questions regarding the law or its application to the facts at hand. There is no set rule for whether a judge will give an oral ruling at a hearing or will instead issue a written ruling at a later date – it is largely a matter of the preference of the specific judge.

During a jury trial, judges are not typically as active; the judge's role is predominantly to maintain courtroom order and make decisions regarding law. However, a judge will often discuss legal issues and objections with counsel outside

of the ears of the jury, and will occasionally ask questions of a witness who is testifying on the stand. In a bench trial, the judge also serves as finder of fact.

7.8 General Timeframes for Proceedings

Because various jurisdictions throughout the US employ different procedures, the timeframe for judicial adjudication varies by jurisdiction. Assuming no delay, no protracted motions practice and no administrative proceedings requirements alongside efficient case management, a complex commercial dispute could take as little as two years to resolve by trial. This is dependent on many factors, but it would be rare for a truly complex case to be resolved any faster. Subject to the same variables, a complex commercial dispute trial could take as little two weeks, although some cases can take much longer to go to trial and be tried.

8. Settlement

8.1 Court Approval

Court approval is not always required to settle a lawsuit. Certain cases, such as class actions as per Rule 23, civil rights cases, domestic relations cases involving the division of debt/assets and child custody/support cases, and wrongful death cases where a minor is a beneficiary, require approval by the court for settlement to make sure the settlement is fair and equitable. Where approval is required, the court must review the settlement agreement of the parties and ensure that the parties understand the terms, and that they are bound by the terms. Generally, where approval by the court is required, those cases tend to have a party in a position of disadvantage.

8.2 Settlement of Lawsuits and Confidentiality

The parties can elect to keep the settlement of a lawsuit confidential. Although it is usually the defendant requesting confidentiality of a settlement, there are reasons that plaintiffs would also want to keep the settlement confidential, such as a small settlement, which might lead the public to think that the claim had little to no merit, or to secure admissions from the defendant.

8.3 Enforcement of Settlement Agreements

Settlement agreements are enforced by the courts when there has been a judgment or court order from the court. If a party is not performing under the settlement agreement then the court can enforce the settlement by holding the breaching party in contempt of a court. Additionally, a breaching party may face a civil claim for the breach of settlement agreement.

8.4 Setting Aside Settlement Agreements

Settlement agreements can be set aside for several different reasons, one of which is by misrepresentation or fraud by one party to induce the other party to reach the settlement agreement. For fraud, the following elements must be met:

- knowingly untrue representation of fact by a party;
- such representation being made recklessly; and
- untrue representations being made to deceive the other party and to induce that party to act upon a false basis.

A settlement may also be set aside where the financial conditions of one party have been materially misrepresented so as to secure a lower or higher settlement amount. Additionally, a settlement agreement may be invalidated where the agreement was made under duress, illegality or mistake.

9. Damages and Judgment

9.1 Awards Available to a Successful Litigant

Depending on the claims on which the litigant prevailed, a successful litigant is eligible to receive a monetary award, otherwise known as damages at law. These damages can be categorised into compensatory and punitive damages. Punitive damages are intended to punish the aggravating party and/or discourage similar future conduct.

Compensatory damages are intended to make an injured party whole. These damages provide compensation for what are known as special damages (ie, economic damages) and general damages (ie, non-economic damages such as pain and emotional distress).

Equitable relief is addressed in **11.1 Responsibility for Paying the Costs of Litigation**, below.

9.2 Rules Regarding Damages

Laws regarding limits on recovery vary by jurisdiction. It is therefore critical that a party is aware of limitations on their available recovery. For example, some jurisdictions cap the general damages available for tort or products liability cases. Some states do not allow punitive damages for breach of contract claims. Others cap the amount of punitive damages available by a fixed amount or a set multiple of the compensatory damages awarded, but the fixed amount and multiple can be increased if certain egregious factors are present.

9.3 Pre- and Post-judgment Interest

Pre-judgment interest awards and their corresponding interest rates are jurisdiction-specific items. However, as a general matter, a party is entitled to post-judgment interest in both state and federal courts. In federal cases, 28 USC Section 1961 dictates that interest begins to accrue from the date that judgment was entered, and sets forth the method by which interest is calculated.

9.4 Enforcement Mechanisms for a Domestic Judgment

The specifics of judgment enforcement depend on the relief awarded and the jurisdiction, but monetary awards can generally be satisfied by a writ of execution. A writ of execution

requires local law enforcement to seize property so it can then be sold and the proceeds provided to the prevailing party. Rule 69 authorises the writ of execution to enforce judgements in federal cases; however, the rule notes that such a writ must conform with the procedure of the state (ie, the jurisdiction) in which the court sits. Where a judgment requires that a party perform a specific act, Rule 70 states that the court can order a third party to perform such act at the expense of the non-complying party.

9.5 Enforcement of a Judgment From a Foreign Country

To enforce a foreign judgment in the US, the foreign judgment must be domesticated. Because the US is not a party to treaties regarding the enforcement of judgments from foreign courts, the domestication of a foreign judgment will occur according to the law of the jurisdiction in which the judgment is being domesticated. Many jurisdictions have adopted uniform legislation that will allow the domestication of monetary judgments where the foreign judgment was final, conclusive and enforceable in the jurisdiction it was rendered. However, the same legislation prohibits domesticating a judgment if the foreign court was not impartial, did not offer due process or did not have personal jurisdiction over the defendant.

10. Appeal

10.1 Levels of Appeal or Review Available to a Litigant Party

The intermediate appellate courts of the US are the US Courts of Appeals or the circuit courts. There are 94 district courts that are organised into 12 circuits. Appeals from the district courts within the federal judicial circuit are decided by the 12 courts of appeal and the US Federal Circuit Court. Either party may appeal the verdict of the trial court in civil litigation. The Supreme Court grants certiorari for a small percentage of cases that are appealed from the Circuit Court of Appeals and the Federal Circuit Court. The Supreme Court generally only agrees to hear appeals when they involve an important legal principle, or when two appellate courts have interpreted the law differently. State court appeals are usually made to an intermediate appellate court, and then to a state supreme court. From a state supreme court, a party may petition for a 'writ of certiorari' requesting that the US Supreme Court review the case. The Supreme Court does not need to grant review unless the case falls under a special circumstance where the Court is required by law to hear the appeal.

10.2 Rules Concerning Appeals of Judgments

An appeal on the federal level is usually available after a trial in the district court when the losing party has an issue with the trial court's application of the law or the trial proceedings (ie, finding of fact, admission of evidence, or procedural decision). A party must adequately preserve certain evidentiary and procedural issues raised at trial by objecting on the record during trial. The petitioner may also claim that the law applied violates the US Constitution or a state constitution. Generally, this is the last resort for a party's appeals process, as the Supreme Court does not grant many writs of certiorari.

10.3 Procedure for Taking an Appeal

Pursuant to Rule 4 of the Federal Rules of Appellate Procedure, a party has 30 days after the entry of a judgment to appeal. The district court may allow additional time to file an appeal for good cause or excusable neglect. If the US is a party to the lawsuit, it has 60 days to file an appeal after the entry of a judgment, order, or decree. A party is generally entitled to one appeal as of right. State court time limitations vary from jurisdiction to jurisdiction.

10.4 Issues Considered by the Appeal Court at an Appeal

The appellate courts review the procedures and decisions from trial courts to ensure the fairness of the procedures and that the law was applied correctly. The appellate courts do not hear or retry cases and do not hear witnesses testify. Appeal briefs are submitted to a panel of three judges for review, with some appeals decided based on the written briefs alone and some selected for 15-minute oral arguments from both sides. An appellate court will only review matters originally brought up at the trial court level and will not consider an appellant's argument if it is based on a theory that is first raised on appeal.

10.5 Court-imposed Conditions on Granting an Appeal

Courts may impose certain conditions on granting an appeal by limiting the issues that may be appealed, refusing to hear oral argument, or requiring a party to pay money into a court before the appeal may proceed.

10.6 Powers of the Appellate Court After an Appeal Hearing

The appellate court may review whether the trial court made the correct legal decision in applying the law to the facts and may affirm, modify, vacate, set aside or reverse a lower court's judgment, decree or order. The appellate court may also remand the case to the trial court with the specific order to direct the entry of judgment, decree or order or require that the trial court conduct further proceedings.

11. Costs

11.1 Responsibility for Paying the Costs of Litigation

Under what is colloquially known as the 'American Rule', each party is responsible for paying its own legal costs.

The losing party is not typically required to reimburse the prevailing party for attorney's fees, except where provided otherwise by statute or contractual obligation. Many of the statutes providing fee-shifting are meant to promote public policy by increasing the likelihood that attorneys will agree to represent clients who may otherwise lack the resources to hire an attorney or to bring cases affecting the common good.

In federal court, Rule 54 states that a court *"should"* award costs other than attorney's fees to a prevailing party. The exact costs allowed vary by jurisdiction, but costs enumerated in 28 USC Section 1920 are among those recoverable. Rule 54 also permits the recovery of attorney's fees by motion. Under Rule 11, a party may be sanctioned for litigation conduct and may be ordered to pay *"part or all of the reasonable attorney's fees and other expenses directly resulting from the violation."* The operation of each rule in awarding costs or fees differs but generally provides the party against which fees or costs are assessed an opportunity to be heard if they respond in a timely manner to a notice or a motion alerting them to the possibility that fees or costs may be levied against them. The scope and operation of these statutes varies by jurisdiction.

11.2 Factors Considered When Awarding Costs

The key factor under Rule 54 is, of course, whether a party prevailed. For the purposes of Rule 54, a party prevails whenever it receives substantial relief, even if it does not win every claim. However, courts have wide discretion in imposing costs on a party and will review the submitted costs in detail to determine whether the costs were incurred for reasonable amounts and for items reasonably necessary to the litigation. The court may also consider a party's indigent status in determining whether to issue an order for costs.

11.3 Interest Awarded on Costs

Interest on costs may be allowed by a jurisdiction-specific statute; however, Rule 54 does not contemplate prejudgment interest on costs. Additionally, unless the award of costs is rendered alongside a judgment, an award for costs would not likely be eligible for interest under 28 USC Section 1961.

12. Alternative Dispute Resolution

12.1 Views of Alternative Dispute Resolution in Your Country

ADR is viewed very favourably in the US as it allows parties a cost-effective way to settle disputes without having to pay court and litigation costs. The US Government and many states have enacted legislation that requires the courts to establish ADR methods and/or enforce ADR judgments (ie, Federal Arbitration Act 9 USC Sections 1 et seq). ADR provides a less formal and more relaxed way to resolve issues without needing to clog up the court system, and also provides parties with a flexible way to settle disputes. It is also believed that ADR gets parties to a result more quickly than litigation. Many contracts have a required arbitration or mediation clause to avoid the costs of litigation. The most popular methods of ADR are mediation (a neutral third party facilitates resolution of the dispute), arbitration (parties choose an arbitrator who makes a binding or non-binding decision for the parties) and early neutral evaluation (parties present the case to a neutral party who assesses the likely outcome of claims at trial).

12.2 ADR Within the Legal System

Many courts authorise parties to engage in ADR prior to litigating, and courts may require good faith efforts from both parties to engage in ADR, but a federal court cannot require parties to use ADR to bind the parties to a final result, since consent is needed from all parties involved. Some states require parties to engage in ADR, and compulsory ADR programmes have been established, although courts will not generally force parties to engage in ADR for large commercial disputes given the amount of controversy and complexity of such cases. There are currently no sanctions in the US for unreasonably refusing to engage in ADR.

12.3 ADR Institutions

The courts offering and promoting ADR are well organised and often have ADR structures and programmes available to parties. Generally, ADR programmes will provide a list of known mediators and the courts also provide general instructions on ADR and mediation to the parties. Most courts provide and promote ADR programmes. Online and webinar resources relating to ADR are also provided by the court. Some institutions in the US offering ADR programmes are the American Arbitration Association, JAMS, and The Financial Industry Regulatory Authority.

13. Arbitration

13.1 Laws Regarding the Conduct of Arbitrations

Under federal law, the Federal Arbitration Act (FAA) governs arbitrations. Many states have similar statutes. When conflict arises between state statutes and the FAA, the FAA prevails. Unlike for foreign judgments, the US is a member of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the 'New York Convention'), as enacted into law by the FAA.

Arbitration is a contract-based conflict resolution method, carried out in a similar fashion to trial, but the parties can agree to a less formal or cumbersome process, generally leading to lower costs.

13.2 Subject Matter not Referred to Arbitration

While parties can agree to arbitration to resolve a wide variety of disputes, certain types of disputes where public policy

favours judicial resolution of conflict cannot typically be referred to arbitration. Non-arbitrable matters vary by jurisdiction but commonly include criminal law matters, family law matters and labour-related matters.

13.3 Circumstances to Challenge an Arbitral Award

Under the FAA and many jurisdictions' statutes, an arbitration award can be challenged if the arbitration process was flawed. A party can have an award vacated:

- where the award was obtained by fraud;
- where the arbiter was partial or corrupt;
- where the arbiter abused its authority, resulting in prejudice to a party; or
- where the arbiter exceeded the scope of the arbitration.

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13.4 Procedure for Enforcing Domestic and Foreign Arbitration

To enforce a domestic arbitration award under the FAA, a party must file a petition to confirm the award along with a copy of the arbitration agreement and a copy of the award. An award may be confirmed within a year but any challenges must be brought within three months. For foreign arbitration awards, the New York Convention requires an original or certified copy of the award and the original arbitration agreements, including a sworn translation into English if needed. US courts will not recognise arbitration awards where the party was not given notice of the proceedings or was denied the chance to present its case.