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The Legal 500 Country Comparative Guides

United States
LITIGATION

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This country-specific Q&A provides an overview of litigation laws and regulations applicable in United States.

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1. What are the main methods of resolving disputes in your jurisdiction?

In the United States, litigation, arbitration, mediation and informal negotiation are the primary dispute resolution methods. Over the last few decades, there has been a considerable rise in the use of arbitration, and mandatory arbitration provisions have become a common feature in many employment and consumer contracts.

2. What are the main procedural rules governing litigation in your jurisdiction?

Where a commercial claim is brought in federal court, the procedural rules governing such claims are found in the Federal Rules of Civil Procedure (the "FRCP"). Each federal district may promulgate rules to supplement, and in some instances to modify, the FRCP, and each individual judge within each district may also promulgate rules governing proceedings in her courtroom. State commercial claims are governed by the procedural rules of the state in which the claim is litigated.

3. What is the structure and organisation of local courts dealing with claims in your jurisdiction? What is the final court of appeal?

Federal courts have a three-tiered system comprised of trial courts, known as District Courts, intermediate Courts of Appeals and a final court of appeal, known as the Supreme Court. Local state courts also generally have a three-tiered system comprised of a trial court, an intermediate appellate court and a final court of appeal, often known as the state's Supreme Court (though in New York, the Supreme Court includes the trial courts and intermediate appellate courts; the highest court is the New York Court of Appeals).

4. How long does it typically take from commencing proceedings to get to trial in your jurisdiction?

In federal court, the median time from filing a civil lawsuit to trial was 33.8 months in 2022. In state court, the time to trial may be longer or shorter, depending on the jurisdiction.

5. Are hearings held in public and are documents filed at court available to the public in your jurisdiction? Are there any exceptions?

There is a strong presumption that court proceedings in the U.S. are public, and that documents filed with the court are accessible by the public. U.S. courts recognize a common law right to inspect and copy public records and documents, including filed records and documents. However, this right is not absolute, and courts have authority to deny access where court files may be used for improper purposes or where certain privacy concerns exist (e.g., medical records or competitively sensitive information). Where sensitive information is to be filed, parties often have the option to file such information under seal, allowing access to the court and related personnel but withholding the information from the public. While the U.S. Supreme Court has recognized a presumptive First Amendment right of access to judicial proceedings in criminal cases, it has not directly addressed whether this right applies to civil proceedings. Some state courts (e.g., the California Supreme Court) have interpreted the First Amendment right of access to apply to civil as well as criminal proceedings. Nonetheless, courts generally permit the public to attend civil hearings and restrict access only in limited circumstances (e.g., where certain privacy concerns or genuine concerns about disclosure of trade secrets or similarly sensitive information exist).

6. What, if any, are the relevant limitation

periods in your jurisdiction?

Limitations periods typically vary by type of claim and jurisdiction. For example, in New York, breach of contract claims have a six-year statute of limitations, but in California such claims have only a four-year statute of limitations for written contracts and a two-year statute of limitations for oral contracts. By contrast, trade secret misappropriation claims must be commenced in both New York and California within three years after the plaintiff discovers (or should have discovered) the misappropriation. The availability of a longer limitations period may encourage a party to bring suit in one jurisdiction rather than another. Federal courts deciding state law claims will look to state law for the applicable statutes of limitations. Many state and federal claims, particularly claims for fraud or misrepresentation, may be subject to the "discovery rule" for determining the applicable limitations period, such that the period does not begin to run until the plaintiff discovers or should have discovered facts giving rise to her claim. Some types of claims may be subject to statutes of "repose", which impose an absolute bar to claims commenced more than a certain period of time after the occurrence of the conduct that gives rise to the claim, regardless of when the claim is discovered.

7. What, if any, are the pre-action conduct requirements in your jurisdiction and what, if any, are the consequences of non-compliance?

Generally there are no pre-action conduct requirements before commencing a commercial lawsuit. There are occasionally administrative orders and statutes at the state level that require mediation for certain commercial disputes. For example, Delaware passed the "Delaware Voluntary Alternative Dispute Resolution Act" in 1995, requiring parties to attempt mediation of certain commercial disputes before going to court. Likewise, in 2017, the Commercial Division in the New York County Supreme Court established a pilot project that automatically assigns newly filed commercial cases (excluding those in which a self-represented person is a party) to a Justice outside of the Commercial Division for mandatory mediation. In 2019, the program was expanded to make other categories of cases eligible for the program, including insurance cases and cases brought under the Uniform Commercial Code. In addition, parties may be compelled to arbitrate disputes concerning contracts with mandatory arbitration provisions, given the strong judicial presumption in favor of arbitration provisions and support of arbitration as a means of commercial dispute resolution.

8. How are proceedings commenced in your jurisdiction? Is service necessary and, if so, is this done by the court (or its agent) or by the parties?

In federal court, a lawsuit is commenced by the filing of a complaint with the court. The plaintiff (or its agent) must also serve a copy of the complaint, along with a summons, on the defendant. In most circumstances, the plaintiff will serve the complaint on the defendant directly, rather than through an attorney's office. The process for commencing commercial disputes in state courts is determined by each state's procedural rules but is generally consistent with the federal procedure, as the majority of states have adopted all or substantially all of the FRCP. In order to avoid dismissal, the complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief; detailed factual allegations are generally not required. However, for commercial disputes alleging fraud or mistake, a heightened pleading standard applies and a plaintiff must plead with particularity the circumstances constituting fraud or mistake.

9. How does the court determine whether it has jurisdiction over a claim in your jurisdiction?

To hear a claim, courts in the United States must have both subject matter jurisdiction (authority to hear cases of a particular type) and personal jurisdiction (authority to exercise power over a particular person or entity). Federal courts are courts of limited jurisdiction; thus, a party seeking adjudication of her claims in a federal forum must establish a basis for federal subject matter jurisdiction. Federal subject matter jurisdiction is established for two types of cases: (1) cases "arising under" federal law, where a cause of action is derived directly from a federal law or implicates a significant federal interest and requires determination of a federal question; or (2) diversity jurisdiction, where parties are "diverse" in citizenship (meaning that no plaintiff shares the same state citizenship with any defendant) and the amount in controversy exceeds $75,000. In contrast, most state courts are courts of general jurisdiction, and thus have subject matter jurisdiction over all cases, including commercial disputes. Federal and state courts must also have personal jurisdiction over the defendant. According to the U.S. Supreme Court, to establish personal jurisdiction, the plaintiff must present facts demonstrating: (1) proper service; and (2) that the defendant has "certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial

justice.'" The Supreme Court has recognized two variations of personal jurisdiction: (1) "general" (or "all purpose") jurisdiction where the defendant's affiliations with a state are so "continuous and systematic" to render them "essentially at home in the forum state" – for a corporation, usually limited to its state of incorporation or principal place of business; and (2) "specific" (or "case-linked") jurisdiction, where the suit "arises out of or relates to the defendant's contacts with the forum".

10. How does the court determine which law governs the claims in your jurisdiction?

In commercial litigation, in cases not involving a federal question, a court will determine which state's substantive law(s) will apply to the claims alleged in the complaint. To the extent the case concerns a federal question, federal substantive law applies. In certain instances, the parties may have negotiated in advance the state's law that will apply to any contractual dispute by including a choice-of-law provision in the governing contract. Some state courts may be reluctant to apply choice-of-law provisions to extracontractual rights at issue in a commercial dispute.

11. In what circumstances, if any, can claims be disposed of without a full trial in your jurisdiction?

Courts may dismiss an action without a full trial pursuant to motion practice. For example, a defendant can make a motion on the pleadings seeking to dismiss for failure to plead a claim adequately in the complaint, or for a procedural defect. Any party can also move for summary judgment, arguing that there are no material facts in dispute such that the court may adjudicate or dismiss the action as a matter of law. As a general matter, motions to dismiss occur early in the case, often before discovery has taken place. Motions for summary judgment tend to be made after discovery is completed. In addition, courts may dismiss an action under the following circumstances: (1) court lacks jurisdiction to hear the claims, (2) plaintiff lacks standing to assert the claims, (3) failure to prosecute, including situations where there is a lengthy period of inactivity in a case or where the plaintiff is unprepared for trial or refuses to proceed with trial; and (4) failure to comply with a court order or rule, including scenarios where there are repeated failures to appear at hearings and depositions.

12. What, if any, are the main types of interim remedies available in your jurisdiction?

Two types of interim remedies available in the U.S. are temporary restraining orders and preliminary injunctions. A temporary restraining order forbids a person from engaging in some threatened action where the moving party can show, among other things, it will be irreparably injured by such action. Likewise, a preliminary injunction is a provisional remedy that a court grants to protect a plaintiff that demonstrates a likelihood of success on the merits from irreparable injury. The court issues an order preserving the status quo until it is able to make a final decision on the merits. In addition, parties may seek prejudgment seizures, such as a writ of attachment. A writ of attachment allows a plaintiff to levy on the defendant's property to ensure that a judgment against the defendant can be satisfied by showing that (1) the claim is for a specific or easily ascertainable amount of money based on a contract; and (2) there is a high likelihood of prevailing on the claims.

13. After a claim has been commenced, what written documents must (or can) the parties submit in your jurisdiction? What is the usual timetable?

In federal court, after service of a summons and complaint, the defendant must serve an answer or other response, such as a motion to dismiss, within 21 days. If the plaintiff requests that the defendant waive service and the defendant agrees, the defendant need not serve an answer to the complaint until 60 days after the request was sent. If the Defendant moves to dismiss and the motion is denied, the defendant must serve its answer within 14 days of the notice of the court's decision. If a defendant intends to assert a claim against the plaintiff arising out of the same transaction or occurrence that is the subject of plaintiff's claim, the defendant must assert such claims ("compulsory counterclaims") in its answer. If a defendant intends to assert against the plaintiff a claim the subject of which is independent of plaintiff's claim, then the defendant has a choice of inserting the claim in the pending litigation or pursuing a separate action. To the extent a defendant asserts a claim against the plaintiff in the pending action, the plaintiff must respond to the counterclaim within 21 days. General pleading rules for commercial litigation in state courts are determined by each state's procedural rules but are generally consistent with federal procedures.

14. What, if any, are the rules for

disclosure of documents in your jurisdiction? Are there any exceptions (e.g. on grounds of privilege, confidentiality or public interest)?

Federal procedural rules require a mandatory meeting (a "Rule 26(f) conference") pursuant to which litigants must meet and confer (i) to discuss the nature and basis of their claims and defenses, and possibilities for a prompt settlement of the case, (ii) make or arrange for the mandatory disclosures required by the procedural rules and (iii) develop a discovery plan. At or within 14 days after the parties' Rule 26(f) conference, parties must make the following disclosures: (i) the name, address and telephone number of each individual likely to have discoverable information, (ii) a copy of all documents and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses and (iii) a computation of each category of damages claimed by the disclosing party. Once discovery commences, the parties can serve requests for production of documents on one another. A party must respond to requests for production by providing responses and objections indicating what the party agrees to produce, and then producing responsive, nonprivileged documents. Attorney-client communications protected by the attorney-client privilege and materials prepared in anticipation of litigation under the work product doctrine may be withheld; however, the withholding party may be required to furnish a log of such documents to the other side. Assuming good cause can be shown, trade secrets and other types of confidential business information may be protected from abuse or misuse resulting from the discovery process through the issuance of protective orders.

15. How is witness evidence dealt with in your jurisdiction (and in particular, do witnesses give oral and/or written evidence and what, if any, are the rules on cross-examination)? Are depositions permitted?

Facts possessed by a witness are ordinarily offered through live testimony of that witness at trial. However, there are circumstances (e.g., where a witness is unavailable to testify at trial) where such testimony can be offered into evidence through entry of the witness's deposition, in lieu of, or in addition to, the witness's live testimony. Witnesses are subject to cross-examination, and the cross-examination is limited to the subject of the direct examination or issues affecting the witness's credibility. U.S. commercial litigation permits parties to conduct pre-trial, recorded interrogations (i.e., depositions) of witnesses and potential witnesses, which may distinguish U.S. commercial litigation from litigation elsewhere.

16. Is expert evidence permitted in your jurisdiction? If so, how is it dealt with (and in particular, are experts appointed by the court or the parties, and what duties do they owe)?

Expert evidence is permitted in both federal and state jurisdictions. In federal jurisdictions, expert witnesses can be hired by parties or appointed by the court. Court-appointed experts must advise the parties of any findings that the expert makes, may be deposed by any party, may be called to testify by the court or any party and may be cross examined by any party. If a party hires an expert witness, that party must disclose the expert's identity to the other parties at least 90 days before trial or, if the evidence is intended solely to contradict evidence on the same subject matter identified by another party, within 30 days after the other party's disclosure. The party must also accompany its disclosure with a written report signed and prepared by the expert, unless otherwise ordered by the court. The report must include a complete statement of all opinions the expert will express and the basis for them, the facts or data considered by the expert in forming them, any exhibits that will be used to summarize or support them, the expert's qualifications, a list of other cases in which the expert testified as an expert and a statement of the compensation the expert will be paid for the study and testimony. The trial court is then charged with determining whether an expert's testimony is admissible, which requires an assessment of the scientific validity of the expert's work. Expert witnesses are handled similarly in state courts, but the rules governing disclosures and admissibility may differ by jurisdiction. For example, in New York, parties must make expert disclosures, but they are not subject to the same stringent disclosure deadlines as in federal jurisdictions.

17. Can final and interim decisions be appealed in your jurisdiction? If so, to which court(s) and within what timescale?

Final and interim decisions of the federal district courts can be appealed to a federal court of appeals. Final decisions are appealable automatically (as of right), and notice of appeal must be given within 30 days after entry of the district court's judgment. Generally, interim (or "interlocutory") decisions are not appealable unless the

district court judge indicates that the decision involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from the decision may materially advance the ultimate termination of the litigation. The federal court of appeals has discretion to hear those interim appeals. Certain other interim decisions, such as those granting, continuing, modifying, refusing or dissolving injunctions, are appealable as of right and do not require approval from the district court or the court of appeals. Decisions by the federal courts of appeals can be appealed to the U.S. Supreme Court. Generally, there is no right of appeal to the Supreme Court. However, a party may petition for a writ of certiorari requesting that the Supreme Court review the circuit court's decision, and the Supreme Court may grant or deny the petition at its discretion. A petition for a writ of certiorari must be filed within 90 days after entry of the lower court's judgment. State court appellate procedures vary by jurisdiction. Certain decisions by the courts of last resort in any state may be appealed to the U.S. Supreme Court.

18. What are the rules governing enforcement of foreign judgments in your jurisdiction?

There are no international treaties or federal laws requiring U.S. federal courts to enforce foreign judgments. However, many states have adopted the Uniform Foreign Money Judgments Recognition Act (the "UFMJRA"). Under the UFMJRA, courts will generally recognize foreign judgments for a sum of money. U.S. courts will also generally recognize foreign declaratory judgments and injunctions. However, there are situations in which U.S. courts will not enforce foreign judgments, including when the judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with due process, or when the foreign court did not have personal jurisdiction over the defendant.

19. Can the costs of litigation (e.g. court costs, as well as the parties' costs of instructing lawyers, experts and other professionals) be recovered from the other side in your jurisdiction?

Generally, prevailing parties in the U.S. can recover only court costs (which are typically nominal) from the opposing side, including clerk fees and compensation for court-appointed experts and interpreters. However, parties generally cannot recover attorney's fees or expert fees unless the statute underlying the action provides for fee shifting. Certain U.S. statutes, such as the federal antitrust laws, allow parties to recover attorney's fees.

20. What, if any, are the collective redress (e.g. class action) mechanisms in your jurisdiction?

The Federal Rules of Civil Procedure permit class actions in federal courts only if (1) the size of the class is so numerous that it would be impractical to bring all class members before the court as individual parties, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class and (4) the representative parties will fairly and adequately protect the interests of the class. There are additional requirements regarding the permissible types of class actions. Most states have adopted similar rules, but the requirements can vary by jurisdiction.

21. What, if any, are the mechanisms for joining third parties to ongoing proceedings and/or consolidating two sets of proceedings in your jurisdiction?

In federal court, third parties can join an ongoing proceeding as plaintiffs so long as (1) they assert any right to relief with respect to or arising out of the same transaction, and (2) any question of law or fact common to all plaintiffs will arise in the action. There are similar requirements for joining third parties as defendants. In some circumstances, the court may order that a third party must be joined either as a plaintiff or a defendant as a condition for proceeding with the case. Federal court proceedings may be consolidated if they involve a common question of law or fact. If the cases are pending in multiple federal districts, a judicial panel will decide whether the actions should be consolidated for pre-trial proceedings and the jurisdiction in which the cases should be consolidated. After consolidated pre-trial proceedings, the presiding judge will remand each case to its originating district for trial, unless otherwise dismissed. Generally, state jurisdictions have similar mechanisms for joinder of parties and case consolidation.

22. Are third parties allowed to fund litigation in your jurisdiction? If so, are there any restrictions on this and can third party funders be made liable for the costs

incurred by the other side?

There is no federal prohibition on third parties funding litigation, but certain states outlaw the practice. In federal court, third-party funders may potentially be made liable for the costs (including attorney's fees) incurred by the opposing party if such costs are imposed as a sanction for misconduct under FRCP 11 and if the funder is found to have substantially controlled the litigation. There is an ongoing debate as to whether courts should require parties to disclose third-party funders. The Northern District of California recently adopted a rule mandating parties to disclose the identity of third-party funders in proposed class actions, making it the first federal district to do so.

23. What has been the impact of the COVID-19 pandemic on litigation in your jurisdiction?

At the height of the pandemic, U.S. federal courts and most state courts operated primarily remotely, conducting telephonic and video conference hearings. Many jury trials were initially postponed, though some courts successfully held remote trials. Some courts suspended all non-emergency in person proceedings and restricted the filing of nonessential matters as well. Seemingly as a result, the median time from filing a civil lawsuit in federal court to commencement of trial rose by 4.3 months from 2020 to 2021. Now however, it appears that most courts have returned to in person judicial proceedings, especially trials. Some judges continue to use remote proceedings, reflecting a significant change from pre-pandemic norms.

24. What is the main advantage and the main disadvantage of litigating international commercial disputes in your jurisdiction?

The main advantage is that the United States has a sophisticated judiciary with experience resolving a broad range of commercial disputes and expertise on commercial matters and U.S. litigation rules enable exhaustive pretrial evidence gathering. The main disadvantages are that there are potentially many jurisdictions from which litigants can choose—each with its own laws and procedures – and litigation in U.S. courts usually consumes a great deal of time and expense before a final decision is reached. Potential litigants must think carefully about which U.S. jurisdiction would be best suited to resolve their disputes, including how various claims are defined and when the statute of limitations period will run in a given jurisdiction, and whether litigation is likely to secure a reasonably prompt and cost-effective resolution of the dispute.

25. What is the most likely growth area for commercial disputes in your jurisdiction for the next 5 years?

Antitrust-related litigation has grown in recent years, and that trend looks like it will continue. In the last two years, federal regulators from the FTC and DOJ have brought a number of high profile cases seeking to block proposed mergers in the tech, healthcare and agriculture industry, among others. The FTC and DOJ have also set out to revise their enforcement policies and launched a process to update the non-binding, but extremely influential, Horizontal and Vertical Merger Guidelines, which set out the agencies' framework for evaluating most transactions. Separately, securities litigation also remains strong, and is returning to pre-COVID levels.

26. What, if any, will be the impact of technology on commercial litigation in your jurisdiction in the next 5 years?

Technology—particularly automation and artificial intelligence—will continue to streamline the litigation process. For example, some law firms now utilize artificial intelligence to assist in reviewing documents for discovery, a development necessitated by the rise of massive electronic document productions. Additionally, as remote virtual depositions and court hearings have gained acceptance amid the COVID-19 pandemic, we anticipate that law firms' and courts' reliance on and utilization of technology in areas of litigation beyond document discovery will accelerate in the coming years.

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