Litigation & Dispute Resolution

2017

Sixth Edition

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glg global legal group

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USA

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Efficiency and integrity of process

The American legal system. The American legal system, founded on notions of fairness and due process, is respected throughout the world for its ability to deliver predictable, equitable, and efficient justice. It employs an adversarial model to reach the truth of a matter wherein each litigating party (rather than the court or special prosecutor) bears the responsibility to prove its own case to a jury and/or impartial judge by producing and challenging evidence and legal arguments. American courts adhere to the principle of "*stare decisis*", which is "the idea that today's Court should stand by yesterday's decisions". *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). The rationale behind this rule of law is that it "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Id*.

Natural justice and due process. Similar to principles of natural justice under English law, the American legal system is grounded in several fundamental rights of procedural due process guaranteed by the United States Constitution. In most American legal proceedings, a party is granted, among other rights, the right to an impartial and unbiased judge and (in many cases) jury, to formal written notice of the proceeding and the grounds asserted for it, to an opportunity to object to the proceeding, to obtain evidence prior to trial ("discovery"), to call witnesses and present evidence, to cross-examine adverse witnesses, to a judgment limited by the evidence presented, to be represented by legal counsel, to a record of the proceedings, and to written findings of fact and the reasons for a decision. These protections are afforded equally to corporations and individuals. The discovery process can be the most expensive and important aspect of U.S. litigation. Courts, both state and federal, allow litigants to serve subpoenas and similar requests for documents on people and institutions relevant to the litigation. Litigants are also permitted to take testimony under oath before trial from adverse parties and non-parties in order to obtain the information and evidence necessary to present the litigant's case to the judge and/or jury.

Court systems. The United States comprises a single federal government and 56 separate governments for each of the 50 states, five territories, and the District of Columbia. Each of these entities has its own court system and laws. Because the substantive and procedural laws of each jurisdiction are different, the choice of venue (*e.g.*, a federal court or a state court) for a civil action will usually have a substantial effect on the procedure and outcome of the action. The federal court system and nearly all of the state court systems are divided into three levels that in most cases consist of: (1) a trial court in which either a jury or judge will examine evidence, hear arguments, and make findings of fact, and a judge will apply the law to the factual findings; (2) an intermediate court of appeal in which a panel of judges will

review any appeal from the trial court's decision; and (3) a court of last resort comprised of several judges that may or may not choose to review decisions of the intermediate court. In the federal court system, these three levels consist of 94 federal district trial courts, 13 circuit courts of intermediate appeal, and the United States Supreme Court as the court of last resort, which all operate under uniform sets of rules, such as the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Each state has its own procedural and evidentiary rules, although state rules are often based on and very similar to the federal rules. The federal court system also includes several courts of special limited jurisdiction whose jurisdiction is defined by subject matter, such as the United States Tax Court, the United States Court of Federal Claims, and the United States bankruptcy courts.

Jurisdiction. With some limited exceptions, the jurisdiction of the federal courts is limited to cases arising under federal laws enacted by the United States Congress or cases arising between citizens of different states or a foreign nation. The state courts have jurisdiction over all cases that have a sufficient nexus with the state, regardless of citizenship, arising under either state law or federal law, except where federal law has bestowed exclusive jurisdiction on the federal courts (such as in cases arising under admiralty, bankruptcy, copyright, patent, and tax laws, among others).

Standing. Before a party can initiate a civil action, it must demonstrate that it has "standing" to do so. For civil actions in federal courts and most state courts, this means demonstrating that the party has suffered an "injury in fact" that was caused by the conduct complained of and that can be redressed with a favourable decision from the court. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014). An "injury in fact" must be concrete (not abstract), particularised (identifiable), and imminent (rather than conjectural or hypothetical). *Id*. An allegation of future injury may only suffice if the threatened injury is "certainly impending", or there is a "'substantial risk' that the harm will occur". *Id*. In creating causes of action in the courts, Congress is given wide discretion to identify which injuries will satisfy these standing requirements. "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (citation omitted).

Class actions. Federal and state laws in the United States permit civil actions to be brought by or against representatives of a class of similarly-situated persons on behalf of the absent members of the class. Class actions are appropriate when 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. See Fed. R. Civ. P. 23(a). Class actions may be used to obtain a monetary judgment, injunctive relief, and civil penalties on behalf of the class. Class actions may also be settled and dismissed on a class-wide basis, binding the absent members of the class, but only if the court reviews the settlement and finds the settlement terms are fair, adequate, and reasonable as to the absent class members. See Fed. R. Civ. P. 23(e).

Early resolution of civil actions. When a civil action is filed in federal or state court, the defendant may respond initially by challenging the sufficiency of the complaint on several different procedural and substantive grounds, including lack of subject-matter jurisdiction; lack of personal jurisdiction; improper venue; insufficient service of process; failure to state a claim upon which relief can be granted; and failure to join a necessary party. *See* Fed. R. Civ. P. 12(b). In many cases, courts will stay further proceedings, including discovery, until a challenge to the pleadings is resolved. A civil complaint that fails to state "a plausible

claim for relief" cannot survive dismissal, and "a plaintiff armed with nothing more than conclusions" cannot "unlock the doors of discovery". *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

Alternative resolution of civil actions. Most federal and state courts have implemented requirements and procedures designed to encourage litigants to resolve disputes outside of court through mediation or private arbitration. Litigants may be required to review materials about alternative dispute resolution ("ADR") processes, to discuss settlement options with a court employee, to present the merits of their positions to an early neutral evaluator (ENE), or to attend a mandatory settlement conference with a magistrate judge. Options for ADR are discussed in more detail in the Mediation and ADR section below.

Electronic case filing/searching. The federal court system has adopted an electronic case filing (ECF) system that allows for electronic filing and service of nearly all papers in a federal case. The federal court system has also adopted a document retrieval system (PACER) that allows the public (for a small per document fee) to search for and view nearly all court records going back several years (except for information that a court may have sealed, such as personal private information or highly sensitive corporate trade secrets). Many state court systems have likewise adopted electronic filing and record searching systems that are made available to the public for free or for a small fee. Hence, when litigating in the United States, it should be assumed that the proceedings will become a matter of public record and readily accessible over the internet to anyone, including the media.

Privilege and disclosure

Attorney-client privilege. The American legal system vigorously protects communications between an attorney and a client made for the purpose of giving or receiving legal advice. "[T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981). "By assuring confidentiality, the privilege encourages clients to make 'full and frank' disclosures to their attorneys, who are then better able to provide candid advice and effective representation." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108 (2009). Although robust, the attorney-client privilege can be involuntarily waived and has limits, such as the "crime-fraud exception", pursuant to which there is no privilege over communications made to assist in committing a crime or fraud. *United States v. Zolin*, 491 U.S. 554, 562-63 (1989) (citation omitted) ("The attorney-client privilege must necessarily protect the confidences of wrongdoers, but the reason for that protection − the centrality of open client and attorney communication to the proper functioning of our adversary system of justice − ceases to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing.").

Attorney work product. Related to the attorney-client privilege is the attorney work product doctrine, which the federal courts and most state courts recognise as protecting documents prepared by an attorney in anticipation of litigation, especially documents revealing "the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation". Fed. R. Civ. P. 26(b)(3). Attorney work product generally receives the same protections afforded attorney-client communications.

Corporations. Corporations are treated the same way as individuals under the law with respect to the attorney-client privilege. And communications with a client corporation made for the purpose of giving or receiving legal advice are protected regardless of whether the

legal advice is provided by an outside attorney or an attorney employed by the corporation. Hence, the privilege extends to internal investigations conducted by a corporation at the direction of an attorney for the purpose of giving legal advice, even if the attorney is an employee of the corporation. While courts in some U.S. jurisdictions have held that the privilege only applies if the primary purpose of the communication was a legal purpose rather than a business purpose, others have held that so long as "one of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply." *In re Kellogg Brown & Root, Inc*., 756 F.3d 754, 760 (D.C. Cir. 2014). The participants to a communication do not necessarily need to include an attorney: "communications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege." *Id*. at 758.

Waiver of the privilege. The holder of a privilege (the client) can waive the privilege, either intentionally or unintentionally, by disclosing privileged information to third parties that owe no duty of confidentiality; by relying on privileged communications to support a claim or defence, thereby placing the privileged communications at issue; by failing to take reasonable precautions to maintain the confidentiality of the privileged communication; or by otherwise acting inconsistent with the purpose and protection of the privilege.

Rules of disclosure. A party to litigation is generally entitled to obtain discovery of any information in the possession of adversaries or non-parties "regarding any non-privileged matter that is relevant to any party's claim or defense". Fed. R. Civ. P. 26(b). As this rule indicates, however, disclosure of attorney-client privileged communications and attorney work product cannot be compelled in civil or criminal litigation (unless the privilege has been waived or the crime-fraud exception applies). In the interests of judicial efficiency, federal and some state court rules have been enacted to preserve the privilege despite inadvertent or limited-purpose disclosure during litigation. Under the federal rules, for example, an inadvertent disclosure of a privileged communication does not waive the privilege, and the disclosed communication may be retrieved, if the owner of the privilege took reasonable steps to protect the privilege prior to the disclosure and reasonable steps to rectify the error after discovering the inadvertent disclosure. Fed. R. Evid. 502(b). A court is also free to enter orders that preserve the privilege even where privileged communications are intentionally disclosed for a limited purpose. Fed. R. Evid. 502(d). Using these rules, parties in litigation may stipulate discovery procedures that allow for the disclosure of documents to a litigation adversary without having to conduct a costly attorney review of each document beforehand. Such stipulations are especially convenient in cases involving the exchange of large volumes of electronic documents. Protective orders may also be obtained from a court to prevent or limit the disclosure of confidential proprietary information and other sensitive information. See Fed. R. Civ. P. 26(c).

Settlement and the mediation privilege. All courts in the United States recognise a "mediation privilege" that protects from disclosure any communications made in the context of mediation. Outside the context of mediation, courts in the United States (with some limited exceptions) do not generally recognise a privilege over settlement communications that would prevent such communications from being discovered by a litigation adversary. However, federal and state rules of evidence generally prevent a party from using an opponent's offers of settlement and statements made in the context of settlement negotiations against the opponent to prove liability. See Fed. R. Evid. 408.

Client confidentiality and conflicts of interest. Attorneys in the United States are bound by rules of professional responsibility that require, among other things, the protection of

confidential client communications and the avoidance of conflicts of interest. The specific rules vary by state although many states have adopted the Model Rules of Professional Conduct. Attorneys may only represent clients with potential conflicts of interest after obtaining a written waiver from the affected clients. For instance, if an attorney attempts to represent a party that is adverse to a current or former client in litigation, the court may disqualify the attorney from the representation.

Costs and funding

Each side pays its own fees and costs. The general rule in the American legal system is that each party must pay its own attorney's fees and costs unless a specific statute or court rule provides otherwise or the parties have contractually agreed to a shifting of fees and costs. *See, e.g., Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 550 (2010). Many federal and state statutes allow for the shifting of attorneys' fees and costs to a losing party when doing so would be in the interest of the public good or to deter particularly bad conduct. For example, some federal and state statutes allow courts to shift fees and costs to the losing party where a party has successfully prosecuted an action resulting in the enforcement of important rights affecting the public interest, such as consumer rights or civil rights (See 42 U.S.C. § 1988(b)). Other statutes shift fees and costs where a losing defendant engaged in wilful violations of the law, or where a losing plaintiff has brought a frivolous lawsuit. But even where provided by statute, the shifting of fees and costs is generally left to the discretion of the court, making fee shifting the rare exception rather than the rule.

Contractual fee shifting. To deter litigation and prevent a party from using the threat of expensive litigation as leverage to obtain an unfair advantage in business dealings, many business contracts contain fee-shifting provisions. Such provisions allow the prevailing party in any litigation arising from the contract to recover its litigation fees and costs. Courts will enforce these provisions, and most states (like New York) allow courts to enforce even unilateral, nonreciprocal fee-shifting provisions that allow one contracting party to recover fees in litigation but not the other contracting party. Other states (like California) have enacted statutes that effectively convert nonreciprocal fee-shifting provisions into reciprocal provisions, such that if one party would be allowed to recover its fees by contract after prevailing in litigation, any party to the contract that prevails in litigation may recover its fees.

Funding litigation. For plaintiffs seeking alternative ways to fund litigation, there are several options. Under a contingency fee arrangement, the client will usually agree to pay its attorneys a fixed percentage of any settlement or monetary judgment obtained, often around 30% for cases that end before trial and 40% for cases that end after trial. Another option for plaintiffs is to obtain funding from third-party litigation investment firms who invest in litigation expected to provide a financial return. Match-making firms also exist to help connect plaintiffs with investment firms and individual investors. More recently, some companies have begun offering a crowd-source platform for funding litigation that brings litigation financing opportunities to the masses.

There are fewer options for defendants seeking alternative funding arrangements. This is because, even if they win on the merits, defendants receive no monetary judgment that can be used to pay legal bills, and in most cases the defendant still has to pay its own attorneys' fees and costs. Most corporations and many individuals carry insurance policies designed to cover legal fees for the most common types of claims. Law firms may also use creative payment plans for defence clients that involve flat-fee arrangements, capped arrangements,

and even contingent fee arrangements which vary the fee depending on the results obtained for the client.

Interim relief

Preliminary injunctions. Courts in the United States have the power to enter preliminary injunctions to preserve the *status quo* pending resolution of a lawsuit where a monetary award at the end of the litigation could not redress the plaintiff's injuries. See Fed. R. Civ. P. 65(a). Preliminary injunctions are an "extraordinary remedy never awarded as of right". *Winter v. NRDC, Inc*., 555 U.S. 7, 24 (2008). Parties seeking a preliminary injunction must show that they are likely to succeed on the merits, that they are likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in their favour, and that an injunction is in the public interest. *Garcia v. Google, Inc*., 786 F.3d 733, 740 (9th Cir. 2015). The most important factor is the likelihood of success on the merits. *Id*. Additionally, if a party seeks an injunction that orders the other party to "take action" and do more than maintain the *status quo*, then the party seeking the injunction must establish that the law and facts clearly favour their position, not simply that they are likely to succeed. *Id*. Preliminary injunctions cannot be entered unless the party to be enjoined has been given notice and an opportunity to present evidence in opposition to the requested injunction.

Temporary restraining orders. If there is no time to wait for a hearing and decision on a motion for a preliminary injunction, a court may enter a temporary restraining order to preserve the *status quo*. Such orders may be entered without notice to the party to be restrained if specific facts in an affidavit or verified complaint clearly show that immediate and irreparable injury, loss, or damage will result before the party to be restrained could be heard in response to the motion. *See* Fed. R. Civ. P. 65(b).

Posting bond for interim relief. Courts will usually issue a preliminary injunction or temporary restraining order only if the party seeking the restraint or injunction gives security in an amount that the court considers proper to pay the costs and damages sustained by a party later found to have been wrongfully enjoined or restrained. *See* Fed. R. Civ. P. 65(c).

Range of injunctive relief available. Courts in the U.S. have power to enjoin any action necessary to preserve the *status quo* of the parties prior to final judgment. Courts may also enjoin a party from transferring money or property outside the United States, but only if the party seeking the injunction claims a lien or equitable interest in the money or property. *Grupo Mexicano de Desarrollo v. All. Bond Fund*, 527 U.S. 308 (1999) (assets could not be frozen where no lien or equitable interest was claimed); *Deckert v. Indep. Shares Corp*., 311 U.S. 282 (1940) (freezing assets was allowed as a reasonable measure to preserve the *status quo* pending a final determination of the plaintiff's equitable claims). Courts are also empowered to order many types of prejudgment remedies. Fed. R. Civ. P. 64(a). These additional remedies, which may vary by jurisdiction, include arrest (taking a person into the custody of the court), attachment (taking property into the custody of the court), garnishment (ordering a third party that owes money to the defendant to set aside that money for the benefit of the plaintiff), replevin (order requiring defendant to return personal property to plaintiff), sequestration (removing property from possession of current possessor pending outcome of proceeding), and other corresponding or equivalent remedies. Fed. R. Civ. P. 64(b).

Enforcement of judgments

Enforcement of judgments. The enforcement of a judgment obtained in federal or state court is governed by individual state law. Similarly, the enforcement in the U.S. of a

judgment obtained in the court of a foreign nation is governed by individual state law, as "[t]here is currently no federal statute governing recognition of foreign judgments in the federal courts." *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1212-13 (9th Cir. 2006). Accordingly, enforcement actions must be filed in state court unless the federal courts have jurisdiction to hear the case by virtue of the diversity of citizenship of the parties (i.e., the parties are citizens of different states). State laws usually allow a judgment to be enforced through a variety of mechanisms, including garnishment of wages or income, placing a levy on financial accounts or safety deposit boxes, placing a lien on real property or personal property, or placing a lien on a future monetary judgment. Other ways to collect judgments include seizure orders (which allow sheriffs/marshals to seize property from a private home or business), turnover orders (which require debtors to give property to sheriffs/marshals), and assignment orders (which require debtors to assign ongoing payments, such as royalty payments, to creditors). Additional procedures for enforcing judgments vary from state to state.

Uniform Foreign-Country Money Judgments Recognition Act. In contrast to the federal system, most states have enacted the Uniform Foreign-Country Money Judgments Recognition Act (UFCMJRA) or its predecessor, the Uniform Foreign Money Judgments Recognition Act (UFMJRA), both of which enable parties to enforce foreign judgments in the U.S. Under these laws, a U.S. state court (or federal court sitting in diversity) may enforce a foreign judgment for money damages that is final, conclusive, and enforceable where entered, with some exceptions. *Ohno v. Yasuma*, 723 F.3d 984, 991 (9th Cir. 2013). Those exceptions include judgments rendered: (i) under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law; (ii) judgments where the foreign court did not have personal jurisdiction over the defendant; and (iii) judgments where the foreign court did not have jurisdiction over the subject matter. See, *e.g.*, Cal. Code Civ. Proc. § 1716(b). In addition, a court has discretion to refuse to enforce foreign judgments if it is concerned that the defendant did not receive sufficient notice of the foreign proceeding, if the judgment was obtained by fraud, if the judgment is repugnant to the public policy of the state, if the judgment conflicts with another final judgment, if the foreign proceeding was contrary to a venue agreement between the parties, if the foreign forum was seriously inconvenient for the defendant, if there are substantial doubts about the integrity of the foreign court, or if the judgment violates the freedom of speech and freedom of the press under either the U.S. or individual state Constitutions. See, *e.g.*, Cal. Code Civ. Proc. § 1716(c).

International comity. In cases that are not governed by the UFCMJRA or UFMJRA, courts will follow the principle of international comity. "The extent to which the United States, or any state, honours the judicial decrees of foreign nations is a matter of choice, governed by the comity of nations." *Asvesta v. Petroutsas*, 580 F.3d 1000, 1010 (9th Cir. 2009) (quoting *Hilton v. Guyot*, 159 U.S. 113, 163 (1895)). "Where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact." *Id.* at 1011 (quoting *Hilton*, 159 U.S. at 202-03).

Cross-border litigation

Section 1782 Orders. U.S. federal law allows a party to a foreign judicial proceeding to apply to a federal court in the U.S. for an order to obtain documentary and testamentary evidence from within the court's jurisdiction for use in the foreign proceeding. 28 U.S.C. § 1782. The application may be made directly to a U.S. federal court by the party seeking the evidence or as a letter rogatory or request issued by a foreign tribunal, and there is no requirement of reciprocity with the foreign nation. However, the court is not required to grant the application and has wide discretion in deciding the application. *Intel Corp. v. Advanced Micro Devices, Inc*., 542 U.S. 241, 264 (2004). In exercising its discretion, a court will consider whether the person from whom discovery is sought is a participant in the foreign proceeding, the nature of the foreign proceeding, the receptivity of the foreign court to U.S. federal court judicial assistance, whether the request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies, and whether the request is unduly intrusive or burdensome. *Id*. at 264–65. The same privileges (such as the attorney-client privilege) that apply in U.S. litigation will apply to a Section 1782 order, but the applicant need not prove that the evidence sought is actually discoverable in the foreign proceeding or that it would be discoverable in a hypothetical proceeding in the U.S. *Id*.

The Hague Evidence Convention. Evidence in the U.S. may also be obtained for use in foreign litigation by letters rogatory under the Hague Evidence Convention. In deciding requests under the Convention, courts will consider the importance of the evidence to the foreign proceeding, the degree of specificity of the request, whether the information originated in the U.S., whether there are alternative means to obtain the evidence, and whether denial of the request would undermine important U.S. interests. *Société Nationale Industrielle Aerospatiale v. United States Dist. Court for S. Dist. Iowa*, 482 U.S. 522, 544 n.28 (1987). A Section 1782 order is usually more beneficial to a foreign litigant than a request under the Convention because discovery under Section 1782 is not limited by whether the requested information is discoverable in the foreign proceeding, and because a court considering a Section 1782 order is not required to consider whether the foreign tribunal has subject matter jurisdiction.

International arbitration

Arbitration laws. The Federal Arbitration Act ("FAA") was enacted by the U.S. Congress to "revers[e] centuries of judicial hostility to arbitration agreements." *Scherk v. Alberto-Culver Co*., 417 U.S. 506, 510 (1974). The FAA embodies the "national policy favoring arbitration, and a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary". *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011). The FAA declares all arbitration agreements "valid, irrevocable, and enforceable" as a matter of federal law. 9 U.S.C. § 2. It requires the enforcement of all agreements to arbitrate, even those that require dispute resolution on an individual basis and that prohibit the use of "class action" procedures to aggregate the claims of individuals. *Am. Express Co. v. Italian Colors Rest*., 133 S. Ct. 2304, 2309, 2312 (2013); *AT&T Mobility*, 131 S. Ct. at 1748-49. And the FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed". *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (citing 9 U.S.C. §§ 3, 4). In light of the FAA's "strong national policy favoring arbitration of disputes", "all doubts concerning the arbitrability of claims should be resolved in favor of arbitration." *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 471 (5th Cir. 2002).

International arbitration bodies in the U.S. The U.S. hosts the headquarters of several leading international arbitration bodies, including the International Centre for Dispute Resolution (ICDR) (the international arm of the American Arbitration Association), the International Centre for Settlement of Investment Disputes (ICSID), JAMS International (JAMS), and the International Institute for Conflict Prevention and Resolution (the CPR Institute). In addition, the U.S. hosts offices of the Inter-American Commercial Arbitration Commission (IACAC) and the International Court of Arbitration of the International Chamber of Commerce (ICC).

Enforcement of international arbitration awards. In addition to the FAA, the U.S. is a signatory to international conventions regulating the enforcement of arbitration awards, including the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and the Inter-American Convention on International Commercial Arbitration (the Panama Convention). Under the FAA, a federal court must confirm a foreign arbitration award, unless a party seeking to have the award vacated can establish one of the following: (1) the award was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption in the arbitrators; (3) the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or refusing to hear evidence pertinent and material to the controversy; or of any other behaviour by which the rights of any party have been prejudiced; or (4) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definitive award upon the subject matter submitted was not made. 9 U.S.C. § 10(a). Public policy in the U.S. strongly favours confirmation of international arbitration awards. *Ministry of Def. & Support v. Cubic Def. Sys*., 665 F.3d 1091, 1096 (9th Cir. 2011). "Extensive judicial review frustrates the basic purpose of arbitration, which is to dispose of disputes quickly and avoid the expense and delay of extended court proceedings." *Parsons & Whittemore Overseas Co. v. Societé Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 977 (2d Cir. 1974) (citation omitted). Thus, confirmation proceedings are necessarily "summary" in nature and are "not intended to involve complex factual determinations, other than a determination of the limited statutory conditions for confirmation or grounds for refusal to confirm." *Marker Volkl (Int'l) GmbH v. Epic Sports Int'l, Inc*., 965 F. Supp. 2d 308, 311 (S.D.N.Y. 2013) (citation omitted).

Mediation and ADR

ADR is strongly encouraged and supported by courts in the U.S., and most federal and state courts have implemented ADR procedures and programs. In addition to encouraging ADR options, some courts facilitate their own mediation and settlement programs at no cost to litigants. Depending on the nature of the case, courts may order parties to participate in non-binding ADR with a judicial officer, a court-appointed neutral, or a private neutral retained by the parties. Mediation, arbitration (both binding and nonbinding), and early neutral evaluation ("ENE") are popular forms of ADR in the U.S., and several organisations − such as the American Arbitration Association and JAMS, Inc.) − help supply litigants with private neutrals for these ADR options. In addition, all courts in the United States recognise a "mediation privilege" that protects from disclosure communications made in the context of confidential mediation.

Regulatory investigations

Various federal and state agencies in the U.S. have authority to conduct regulatory investigations to enforce the law in the areas of their jurisdiction. These investigations are

generally non-public unless and until the agency is required to file a formal lawsuit to enforce its orders or a settlement is reached. *See, e.g., Securities v. Jerry T. O'Brien, Inc*., 467 U.S. 735, 737 (1984). An agency's investigative powers typically include the power to compel the production of relevant documents and witness testimony and to hold hearings before an administrative adjudicator and/or commission. *See, e.g.,* 15 U.S.C.S. § 77s(c); 15 U.S.C.S. § 46. Some agencies have authority to seek evidence from entities that reside outside of U.S. territorial boundaries and/or the ability to enlist the aid of a foreign government or agency in the investigation. *See, e.g.,* 15 U.S.C.S. § 46(j)(4). The party that is the target of the investigation is entitled to certain due process rights, including the right to object to the discovery sought by an agency as being improper or beyond the scope of the agency's authority. *See United States v. Morton Salt Co.,* 338 U.S. 632 (1950)*; Okla. Press Pub. Co. v. Walling,* 327 U.S. 186 (1946). The party may also seek to challenge any order or other action of the agency in a court that sits within the Judicial Branch of the applicable federal or state government. *Id.*

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Tony Weibell is a member in the Internet Strategy and Litigation group of Wilson Sonsini Goodrich & Rosati, where he represents some of Silicon Valley's most successful internet and technology companies in complex civil litigation involving consumer class action, e-commerce, intellectual property, privacy, computer fraud, data breach, antitrust, false advertising, and contractual disputes. Mr. Weibell received a J.D., *cum laude*, from Brigham Young University in 2005, an M.S. in Civil and Environmental Engineering from Brigham Young University in 2002, and a B.S. in Civil and Environmental Engineering from Brigham Young University in 2001. For the past three years (2013–2015), Mr. Weibell has been named to the "Rising Stars" list published by *Northern California Super Lawyers.*

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