CHAPTER 12
COMMERCIAL LITIGATION IN THE UNITED STATES
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Doing business is not always easy. Disputes often occur between companies, or between a company and its customers. Sometimes these disputes cannot be resolved and lead to lawsuits. In the United States, courts have well-established procedures for resolving disputes, the highlights of which are outlined below.

1. START OF A LAWSUIT

The United States has both state and federal courts. State courts are those established and administered by each of the 50 states (states of Washington, Oregon, New York, etc.). Each state has a set of trial courts, where most cases originate and where decisions are first entered. Each state also has appellate courts, where any party who lost at the trial level can, under some circumstances, ask a higher court to review and/or change the lower court result.

The federal courts have a similar structure, and are established by the national government. The federal trial courts are called District Courts, and there is at least one District Court in each state. There are also federal appellate courts, called Courts of Appeals. Like the state courts, the losing party in a District Court matter can usually seek review of the lower court result at the applicable Court of Appeals. The federal courts are organized geographically into twelve Circuits, plus a Circuit which hears appeals in specialized cases such as those involving patents.

In both the federal and state systems, a case starts with the filing of an initial document called a complaint. A complaint contains an outline of the facts upon which the plaintiff (the person starting the lawsuit) bases its claims and the legal theories under which the plaintiff seeks relief. A complaint does not need to state all the facts, only enough to put the defendants (the persons being sued) on notice of the nature of the claims being asserted.

Each defendant responds to the complaint with a document called an answer. The answer is required to admit or deny the factual allegations in the complaint. It also must assert any technical legal barriers to the plaintiff's claims (such as the suit is barred by a statute or other legal requirement) that the defendants intend to invoke. A defendant may also assert claims against the plaintiff; these are called counterclaims.

A number of factors influence which court can preside over a particular dispute. One important factor is the nature of the dispute. Many disputes involve ordinary business or consumer matters. Examples include breach of contract claims or claims based on a defectively made product. These disputes are generally decided using a particular state's law, rather than federal or nationwide legislation. Under most circumstances, such claims will start and ultimately be resolved in state courts. However, if the dispute involves enough money, and if the parties come from different states or countries, the case can be heard in a federal District Court in two ways. First, the plaintiff can start the case there by

filing a federal court complaint. Second, even if the case starts out in a state court, the defendant can move it to federal court at the beginning of the case.

The federal court system will also generally preside over cases that involve nationwide laws passed by the U.S. Congress (for example, federal copyright, patent or other intellectual property laws) or cases brought under the U.S. Constitution. These cases are said to involve "federal questions." They may be filed in a District Court regardless of the amount at stake, and – even if they start in a state court – they can be (and often are) moved to District Court.

2. LOCATION OF CASE

Where a case will be heard in the United States depends largely on facts about the parties, and how the case arose. Two principles are involved.

The first principle is so-called personal jurisdiction. Put simply, for a court – federal or state – to have the power to hear a case, the defendant must have some minimal connection with the state in which the court is located. The defendant need not have an office, or conduct regular and ordinary business in the state for personal jurisdiction to exist. However, there must be sufficient actions (for example, shipping products into the state or soliciting business from state residents) so that it is fair for a defendant to expect that the defendant might be sued in that state for matters arising out of the connecting activity.

Merely having personal jurisdiction over a defendant will not, however, assure that a court will keep the case. Under some circumstances, a defendant may convince the court that the case would be better and more efficiently handled in a court located in another place. Courts decide such matters based on a number of factors such as where most of the witnesses reside, what jurisdiction's law will govern, the hardship on the plaintiff in having to litigate far from home, and the convenience of the parties. In most cases, the plaintiff's choice of forum will prevail, but a motion to change venue can often be worth pursuing. Winning such a motion can raise the costs of litigation for a plaintiff to the point where the plaintiff may find it uneconomical to pursue the case. Also, if the court where the case started is perceived as for some reason unfriendly to the defendant, having the case go elsewhere can be seen as an important strategic move. Finally, procedural differences can affect the outcome of the case sometimes, so that one court is much better for a defendant than another.

If the parties to a lawsuit have an enforceable arbitration agreement, that agreement will usually prevent a lawsuit from proceeding if one of the parties asks the Court to enforce the agreement.

3. EARLY DISMISSAL OF CASE

Litigation anywhere is expensive, and – from the defendant's point of view – generally has no particular benefit. So one of the first questions many defendants ask is: Is there some method to end the case early in the process? The answer to this question can sometimes be "yes." Both federal and state courts have established procedures for requesting early dismissals of the case. Such requests are in written form, called a "motion." In one type

of motion, the defendant argues that even accepting the facts asserted in the complaint as true, the law simply does not allow such a claim. Each case, of course, is different and has to be analyzed on its own facts and applicable law. However, there are at least two benefits to making such motions where there is some reasonable basis to do so. First, the motion may win; that could be the end of the case. Second, the plaintiff is obligated to respond to the motion, and the response must include both the plaintiff's position on the applicable law and a legal rationale for why the plaintiff should be allowed to continue the case. In other words, an early motion to dismiss forces the other side to reveal more about its case. This information can assist later in the defense of the case, even if the motion to dismiss the case at the beginning fails.

4. GATHERING FACTS

Assuming an early motion to dismiss is not successful, the case enters a second phase, in which the parties seek out the facts the plaintiff needs to prove its claims at trial, and the defendant needs to resist the claims. This stage is called "discovery", and it is the element of U.S. litigation that causes foreign parties the greatest concern. U.S.-style discovery is wide-ranging and invasive, and allows factual inquiries that are much more broadly based than in most other countries. This has the advantage of allowing the parties access to information that might be unavailable in other systems, but that can often be crucial to proving a claim or a defense. The process is quite expensive. Examples of discovery tools available in most U.S. courts include:

- Requiring each party (and third persons who are not parties) to provide relevant documents and electronically stored data;
- Requiring a party to provide written answers to written questions;
- Requiring a witness (whether employed by a party or not) to submit to questioning by the lawyers for the parties, under oath and in advance of the actual trial; and
- Requiring a party to admit or deny the truth of certain statements propounded to the party.

Each of these tools has its uses, and the decision on whether and how to use them depends on the circumstances of each case. However, most cases will involve at least three and often all of them.

5. TRIAL AND AFTERWARDS

Most commercial cases do not involve a trial. Some cases are dismissed after the discovery phase, if it becomes clear there is insufficient support for the asserted claims. Similar to the early testing of claims discussed above, a request for dismissal on this basis is presented by a motion, called a "summary judgment" motion. The moving party must show that the important facts are not in dispute and, given those facts, there is no claim under the controlling law. Motions for summary judgment can be defining moments in cases. If even partially successful, they can force a plaintiff into settlement. If unsuccessful, they can cause a defendant who was reluctant to pay any money to reconsider that position and perhaps settle the case.

Most commercial cases are resolved by motions or by settlement. Otherwise, the issues in the case are resolved by a trial, either with or without a jury. A jury is a group of ordinary citizens who determine the disputed factual questions in the case. A jury will be used if any party asks for one, but some claims cannot be submitted to or resolved by a jury. In general, cases involving requests for money damages can (and often do) involve juries. On the other hand, cases are decided by a judge alone when the only relief requested is a court order to do (or not to do) something (so-called injunctive relief), or a request for the court to declare the parties' rights.

At the end of the trial, a decision is rendered, either by judge or a jury if there is one, and a judgment entered that reflects who won and who lost. If the case goes no further, a variety of mechanisms can be used to enforce the judgment. For example, if the plaintiff wins and is awarded a sum of money, court rules and statutes provide tools to uncover and seize the defendant's assets to pay the plaintiff the sum owed. If the defendant wins, the plaintiff's case is over, at least at the trial court level. No matter who wins, a case can continue if the losing side appeals.

An appeal court is generally limited to considering whether or not the trial court correctly applied the law, either before or during the trial. Such courts are usually required to accept the facts proved at trial. Not every case is appealed, and most appeals are not successful. However, if a party and the party's counsel believe strongly that an error of law was made, an appeal is that party's chance to have the mistake corrected.

6. RESOLVING DISPUTES OUTSIDE THE COURT

One does not always need to use the public court system to resolve a dispute. There are two alternate ways in which private parties can handle disputes they are unable to resolve on their own.

First, the parties may seek the assistance of a mediator. A mediator is a person trained in helping parties settle disputes. The mediator does not decide the case, but instead seeks to help the parties reach agreement. Hence, this process only resolves a dispute when all parties agree. Mediation can be fruitful before a dispute turns into formal court litigation, and we recommend considering it at the outset. However, early mediation is often unsuccessful, for a number of reasons. One is that not all the relevant facts are available because there has been no discovery. Another is that the parties and their attorneys may have strong and differing views about what the law requires. If a judge has not yet given guidance on these legal differences, then the parties may not be able to resolve their dispute. Some of the litigation process may therefore be necessary before mediation can be successful. At some point, almost all cases go through a mediation process; some cases involve multiple attempts at mediation. Many courts now require mediation prior to a trial taking place.

The second way for parties to resolve disputes without litigation is to have the dispute decided privately, by one or more arbitrators. An arbitrator is essentially a private judge, who is usually a lawyer or an expert in the subject of the dispute. To use arbitration, the parties to a dispute must all agree to it. Sometimes this agreement is contained in a contract

between the parties. Indeed, if a contract has such a provision, U.S. courts will (with narrow exceptions) refuse to hear the case and will order the parties to arbitrate the dispute. The arbitration process can be very similar to a lawsuit in a court, with some important exceptions.

- Arbitrations are generally private, not public;
- The parties pay the arbitrators, while judges are employed by the government;
- The discovery process in arbitration is often limited;
- There are no juries in arbitrations; and
- The grounds on which to appeal an arbitration decision are very limited.

7. RECURRING EARLY CONSIDERATIONS

In any dispute being resolved in the United States, there are a number of issues that parties should consider very early in the process. These include the following:

- Whether or not the matter is covered by insurance. If so, the insurer(s) should be put on notice as soon as possible. Often, insurers will direct how the matter is handled and/or pay for attorneys representing one or more parties.
- Preservation of evidence. Once a claim is known to a party, that party often has the obligation to preserve all relevant or potentially relevant evidence. This often requires segregation of electronic materials so they are not altered, as well as changes to automatic deletion protocols.
- Considering counterclaims. If a party is being sued, that party will want to determine quickly if it has any claims it wants to assert in the same proceeding against the other party.
- Hiring counsel. It is critical that experienced counsel be hired quickly to preserve the party's legal position in the proceeding, to advise on local practice, and to help guide early strategic decision-making.

8. CONCLUSION

Litigation in the United States can be complex and expensive. It is, however, more manageable than is often believed. More important, the prospect and management of litigation are part of the price of doing business in one of the world's largest markets. Understanding the U.S. litigation process and the choices to be made in it are important steps in such management.

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