IN-DEPTH

# Dispute Resolution

## USA

LEXOLOGY

# Dispute Resolution

EDITION 17

Contributing Editor

**Damian Taylor**

Slaughter and May

In-Depth: Dispute Resolution (formerly The Dispute Resolution Review) provides an indispensable overview of the civil court systems in major jurisdictions worldwide. It examines the key aspects of each jurisdiction's dispute resolution rules and practice, and developments over the past 12 months. It is also forward-looking, with astute analysis of likely future trends and developments.

**Generated: February 20, 2025**

# USA

**Timothy G Cameron** and **Michael Cheng**
Cravath, Swaine & Moore LLP

## Summary

# Introduction

The US court system comprises a federal system and 50 state systems. Within each of these systems, the courts are generally divided into three levels: trial courts, intermediate appellate courts and courts of last resort.

## The federal court system

Article III of the US Constitution allows only certain kinds of cases to be heard by the federal courts. In general, these courts are limited to cases that involve issues of US constitutional law, certain disputes or suits between citizens of different states,[1] disputes or suits between US citizens and non-US citizens and issues that involve federal law.

The trial court level comprises 94 district courts. There is at least one federal district court in each state. Some less populous states, such as Alaska, have only one district court. More populous states, such as California and New York, have multiple district courts within the state.[2] Within each district court there are multiple district court judges.[3] Bankruptcy courts are separate units of the district courts. There are also two special trial courts that have nationwide jurisdiction over certain types of cases: (1) the Court of International Trade, which hears cases involving international trade and customs issues; and (2) the Court of Federal Claims, which hears cases involving claims for money damages against the United States, disputes over federal contracts, unlawful 'takings' of private property by the federal government and a variety of other claims against the United States.

Decisions of the federal district courts may be appealed to federal circuit courts of appeals. Certain types of federal district court rulings may be appealed immediately as of right; others are immediately appealable only with leave of court and otherwise may be appealed only after a final judgment is entered by the district court.[4] There are 13 circuit courts of appeals. Each federal circuit court of appeals hears appeals from multiple district courts.-[5] For the most part, courts of appeals comprise districts that are geographically close to one another.[6] The exception is the Court of Appeals for the Federal Circuit, whose jurisdiction is based wholly on subject matter rather than geographical location. The Court of Appeals for the Federal Circuit hears all appeals from any of the federal district courts in which the action has included a complaint arising under the patent laws. The Court of Appeals for the Federal Circuit also hears all appeals from the Court of International Trade and the Court of Federal Claims.

The Supreme Court, which consists of nine justices, is the court of last resort in the federal system. The Supreme Court is primarily an appellate court but has original jurisdiction over a very limited number of cases.[7] In most cases, there is no automatic right of appeal to the Supreme Court. However, a party may file a petition for a writ of *certiorari* requesting that the Supreme Court review rulings of the circuit courts of appeals, and the Supreme Court may, at its discretion, grant the petition and review the ruling from the court below. The Supreme Court typically grants less than 1 per cent of *certiorari* petitions filed each year, most of which involve important questions about the Constitution or federal law.[8]

District court judges, courts of appeals judges and Supreme Court justices are nominated by the President of the United States and, after hearings by the Senate

Judiciary Committee, confirmed by the US Senate. Once confirmed, they hold lifetime appointments.[9]

### State courts

Each state has its own court systems, which are governed by its state constitution and its own set of procedural rules. As a result, it is very important, in practice, to check each state's rules and procedures, as they may vary from state to state in significant respects.

As in the federal system, cases in state court generally begin at the trial court level. Many states have specialised trial courts that hear cases related to a very specific area of the law. These courts can include probate courts, family law courts, juvenile courts and small claims courts.

In many states, the next level in the court system is an intermediate court of appeals, which hears appeals from the trial courts. Some states additionally have a supreme court that provides the final review of the decisions of the trial court.[10]

Unlike federal judges, who are appointed and generally hold life terms,[11] many state court judges are elected for a set term by the voters of the district in which the court resides. Thus, those state court judges, in an election year, must campaign for re-election and win the election to retain their judgeship.[12]

The state of Delaware is notable in the area of corporate law. Delaware is the favoured state of incorporation for many US businesses, with over half of the Fortune 500 companies claiming Delaware as their legal 'home'. Delaware has a special court, the Court of Chancery, devoted to hearing cases involving corporate law disputes. These cases are heard by judges (called chancellors or vice chancellors) who specialise in corporate law. As a result, the Delaware courts are viewed as having particular expertise in the area of corporate law, and their decisions concerning corporate governance and corporate transactions are closely watched, both in the United States and overseas.

### Alternative dispute resolution procedures

Alternative dispute resolution (ADR) mechanisms include arbitration and mediation. ADR mechanisms are used by mutual agreement of the parties.[13] They are discussed in more detail below.

## Year in review

Notable decisions of 2024 include the following cases.

### Securities and Exchange Commission v. Jarkesy

In *Securities and Exchange Commission v. Jarkesy*,[14] the Supreme Court considered whether the Seventh Amendment's right to a jury trial 'entitles a defendant to a jury trial when the SEC seeks civil penalties . . . for securities fraud'.[15] The Court decided that it does.[16] The Court held that civil penalties for securities fraud are akin to fraud actions

at common law, meaning that such actions 'implicate[] the Seventh Amendment',[17] and the '"public rights" exception to Article III jurisdiction' does not apply because such actions are beyond 'any of the distinctive areas involving governmental prerogatives where . . . a matter may be resolved . . . without a jury'.[18] For that reason, the Seventh Amendment applied to the case, and a jury trial was 'required'.[19]

Under existing legislation, the SEC had the option of bringing enforcement proceedings in federal court (with a jury) or via an in-house adjudication before an SEC administrative law judge (with no jury), with one possible remedy being civil penalties.[20] For decades, the SEC had to go to federal court to seek civil penalties, but Congress's 2010 enactment of the Dodd-Frank Act authorised the SEC subsequently to seek civil penalties in-house.[21] In the present case, the SEC initiated in-house enforcement proceedings against Respondent George Jarkesy, Jr, and his firm, Patriot28, LLC, for alleged securities fraud, a process that ultimately resulted in the imposition of a US$300,000 penalty.[22] Jarkesy and Patriot28 sought judicial review in the Fifth Circuit Court of Appeals, which vacated the SEC's order on the ground that the they were entitled to a jury trial and that in-house, juryless adjudication violated their rights under the Seventh Amendment.[23] The Fifth Circuit then denied rehearing *en banc*, and the Supreme Court granted certiorari to decide the matter.-[24]

The Supreme Court first addressed the question of whether the suit at issue 'implicate[d] the Seventh Amendment'.[25] It concluded that it did.[26] The Seventh Amendment 'preserve[s]' the 'right of trial by jury' in '[s]uits at common law'.[27] According to the Court's precedent, because the Seventh Amendment's use of 'common law' draws a 'contradistinction' to equity, admiralty, and maritime jurisprudence,[28] statutory claims that are 'legal in nature' fall under the Seventh Amendment.[29] That determination turns on whether the cause of action and remedy are analogous to those traditionally part of the common law, as opposed to equity.[30] Here, the Court found it critical that the remedy sought—civil penalties—was punitive and deterrent in nature rather than restitutionary, and that there was a 'close relationship' between federal securities fraud and common law fraud.[31] These two factors led to the Court's conclusion that federal securities fraud actions are 'legal in nature'.[32] The 'statutory nature of the claim was not legally relevant'; civil penalties are historically viewed as a 'type of action in debt' requiring a jury trial.[33]

Under Supreme Court precedent, the 'public rights' exception concerned cases that 'historically could have been determined exclusively' by the legislative and executive branches[34] that required 'no involvement by an Article III court'.[35] The boundaries of this exception are 'not "definitively explained"', but it has included such areas as the collection of internal revenue, the imposition of tariffs, and tribal relations.[36] The SEC argued that federal securities fraud was a public right because it was created by regulatory legislation promulgated by the federal government, but the Supreme Court dismissed this argument. 'Even when an action "originate[s] in a newly fashioned regulatory scheme", what matters is the substance of the action, not where Congress has assigned it.'[37] Because this case concerned an antifraud provision, it had its roots in the common law; thus, Congress's decision to assign adjudication to an administrative agency could not operate to 'siphon [the] action away from an Article III court'.[38]

## Loper Bright Enterprises v. Raimondo

In *Loper Bright Enterprises v. Raimondo*,[39] the Supreme Court considered whether to overrule its 1984 decision in *Chevron USA Inc v. Natural Resources Defense Council, Inc*,[40] which 'required courts to defer to "permissible" agency interpretations of the statutes those agencies administer' even when the reviewing court disagreed with the agency's interpretation.[41] The Supreme Court overruled *Chevron*, holding that '[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority'.[42]

*Chevron* had established a 'two-step framework' for courts 'to interpret statutes administered by federal agencies'.[43] At step one, the reviewing court would ask 'whether Congress ha[d] directly spoken to the precise question at issue'.[44] If Congress's intent was 'clear', then the inquiry would end, and Congress's intent would control.[45] But if the statute was determined to be '"silent or ambiguous with respect to the specific issue" at hand', the reviewing court would proceed to step two.[46] There, the court would determine whether the agency's interpretation was 'based on a permissible construction of the statute'.[47] If so, the court would defer to the agency's interpretation.[48] The Supreme Court's decision in *Loper* means that this framework will no longer be applied.

Petitioners in *Loper* consisted of six small businesses in the Atlantic herring fishery in two separate lower-court cases.[49] All had been subject to regulation by the National Marine Fisheries Service (NMFS) that would have required them to pay for observers on board their fishing vessels and challenged the validity of the NMFS's interpretation, arguing that the Magnuson-Stevens Act (MSA) did not authorise the NMFS to require them to pay for observers on board their ships[50] when it merely enumerated three scenarios where such a practice was mandatory and was silent as to other scenarios.[51] The district and circuit courts in both cases upheld the NMFS's regulation and held against petitioners.[52] The Supreme Court granted certiorari to decide 'whether *Chevron* should be overruled or clarified'.[53]

In its decision, the Supreme Court highlighted the role of the Administrative Procedure Act (APA) as 'the fundamental charter of the administrative state'[54] and the courts' role therein as the decider of '"all relevant questions of law" arising on review of agency action',[55] reflecting the 'traditional understanding of the judicial function' that courts 'exercise independent judgment' in interpreting statutes.[56] This role, moreover, was to be played by courts notwithstanding any congressional delegation of discretionary authority to a regulatory agency.[57] However, *Chevron*, in the Court's view, was fundamentally inconsistent with the APA.[58] By requiring courts to defer to an agency's interpretation when a statute is ambiguous rather than using the tools of statutory interpretation to determine the best reading of the statute, *Chevron* essentially counselled abdication of the judicial role prescribed by the APA[59] and created a departure from courts' ordinary interpretive duties in cases not involving agencies.[60]

Respondents marshalled a number of arguments in opposition, but the Court found none of them persuasive. First, the argument that statutory ambiguities were implicit delegations from Congress to agencies did not sway the Court, which pointed out that this presumption was fictional.[61] In the Court's view, ambiguities were often the product of Congress's inability to resolve a question or simply the unintentional by-product of the legislative process, making them weak grounds for handing over the reins of statutory interpretation to specialist agencies.[62] Second, the Court found arguments based in agencies' technical subject-matter expertise unpersuasive because it viewed agencies as having no expertise

in *interpreting statutes*, while courts routinely interpret technically involved statutes.[63] For those reasons, the Court found that the previous practice of deferring to agency interpretations of ambiguous statutes could not be sustained and overruled *Chevron*.[64]

### Macquarie Infrastructure Corp v. Moab Partners LP

In *Macquarie Infrastructure Corp v. Moab Partners, LP*,[65] the Supreme Court considered whether the securities fraud provisions of Section 10(b) of the Securities Exchange Act of 1934 and the thereunder-promulgated SEC Rule 10b-5(b) extend to 'pure omissions', as opposed to 'half-truths'.[66] The Court concluded that they do not.[67] In the words of the Court, '[p]ure omissions are not actionable under Rule 10b-5(b)'.[68]

Petitioner Macquarie Infrastructure Corp. owned a 'subsidiary that operates large "bulk liquid storage terminals" within the United States', whose 'single largest product' was a fuel oil that had become subject to a 2016 United Nations regulation that would effectively ban its use worldwide beginning in 2020.[69] Macquarie did not disclose this information until 2018, when it announced that its subsidiary's business had declined in part due to the upcoming ban, and its stock price dropped by over 40 per cent.[70] Plaintiff Moab Partners sued Macquarie, contending that it was required to disclose this information under the SEC's Item 303, which 'requires companies to "[d]escribe any known trends or uncertainties . . . reasonably likely to have a material favorable or unfavorable impact"' on their performance.[71] Moab contended that Macquarie's failure to disclose this required information constituted securities fraud under Section 10(b) and Rule 10b-5.[72] The United States District Court for the Southern District of New York dismissed the complaint, and the Second Circuit Court of Appeals reversed.[73] The Supreme Court granted certiorari.[74]

The Supreme Court unanimously held for Macquarie, relying on a plain reading of the statute.[75] Rule 10b-5(b) prohibits 'mak[ing] any untrue statement of a material fact or [] omit[ting] to state a material fact necessary to make the statements made . . . not misleading'.[76] In the Court's view, 'the Rule requires identifying affirmative assertions (i.e., "statements made") before determining if other facts are needed to make those statements "not misleading"'.[77] By contrast, in the case of a 'pure omission', there was nothing that had already been stated, such that something else could be required to be stated to render it complete or not misleading.[78] The Court emphasised that '§ 10(b) and Rule 10b-5(b) do not create an affirmative duty to disclose any and all material information'.[79]

Moab argued that because 'reasonable investors know that Item 303 requires . . . disclos[ure of] all known trends and uncertainties', no predicate statement was needed.[80] The Court rejected this argument because it would 'read[] the words "statements made" out of Rule 10b-5(b) and shift[] the focus of that Rule and § 10(b) from fraud to disclosure'.[81] Moab further argued that the Court's position would create a broad loophole in the SEC's disclosure regulations, but the Court dismissed this argument because 'Item 303 violations that create misleading half-truths' are already actionable by private parties, and the SEC itself 'retains authority to prosecute violations of its own regulations', including Item 303.[82]

## Court procedure

This section focuses on the procedures applicable in federal courts.[83]

## Overview of court procedure

The procedures used in civil cases in the federal district courts are set forth in the Federal Rules of Civil Procedure (FRCP).[84] The Federal Rules of Appellate Procedure govern the procedures used in the federal courts of appeals,[85] and the Rules of the Supreme Court govern Supreme Court procedure.

## Procedures and time frames

A lawsuit is commenced by the filing of a complaint with the court,[86] a copy of which must be served, along with a summons, on the defendant.[87] The defendant responds to the complaint by serving a responsive pleading, called an answer, which may include defences and counterclaims.[88] Alternatively, the defendant may, rather than directly responding to the allegations in the complaint, move to dismiss the action on a variety of grounds, including lack of jurisdiction, improper venue or insufficient service of process.[89]

Following this initial pleading phase, the parties usually engage in discovery (including document production and depositions). The FRCP provide for depositions,[90] production of documents, including electronically stored information[91] and written discovery.[92] The discovery phase can be an extremely time-consuming and expensive process, depending upon the complexity of the issues, the amount of potentially responsive documents and the number of potential witnesses.[93]

There is a special procedure for multidistrict litigation (MDL) cases (i.e., cases involving common issues of law and fact pending in multiple federal districts). Under 28 USC Section 1407, cases pending in multiple judicial districts may be consolidated in one court for pretrial proceedings only, and then remanded to the originating court for trial. There is a judicial panel on MDL (the Judicial Panel on Multidistrict Litigation, or JPML), which decides whether cases should be consolidated under the MDL procedure and, if so, where they should be transferred.[94]

Following the completion of discovery (including discovery related to expert witnesses, if any), and before the case proceeds to trial, any party may move for summary judgment on some or all of the claims. The court shall grant summary judgment if the moving party shows, based on material in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions and interrogatory answers, that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law.[95]

Unless the court grants summary judgment resolving all claims, the case (unless settled) will proceed to trial. Depending upon the type of claims involved, the trial may be conducted before a judge or jury. The right to a jury in civil cases is provided by the Seventh Amendment to the Constitution, which preserves the right to a jury for 'suits at common law'. Generally speaking, suits at common law involve claims for monetary damages, as opposed to claims for equitable, non-monetary relief, such as injunctions. Claims for equitable relief are generally tried by the judge, without a jury.

The length of any given lawsuit from time of filing to start of trial varies widely depending on a number of factors, including the type of action (civil or criminal), the complexity of the issues in the action and the judge to whom the action is assigned. In federal court, the median time from filing to disposition of a civil case was 10.4 months in 2021–2022.[96] For civil cases that proceeded to trial, however, the median time from filing to trial was 33.8 months in 2021–2022.[97]

Prior to a trial, the FRCP provide for forms of interim relief upon a proper showing by the moving party. Under FRCP 65, a court may issue a preliminary injunction, prior to a full trial on the merits.[98] To do so, the moving party must demonstrate that it is likely to succeed on the merits, that it will suffer irreparable harm absent preliminary relief, that the balance of equities favours injunctive relief and that an injunction is in the public interest.[99]

## Class actions

Class actions are permitted in the United States and are expressly authorised under FRCP 23 and various state law analogues. Class actions may be permitted 'only if':

1. the case involves plaintiffs so numerous that it would be impractical to bring them all before the court;
2. there are questions of law or fact common to the class;
3. the claims or defences of the representative parties are typical of the claims or defences of the class; and
4. the representative parties will fairly and adequately protect the interests of the class.[100]

In addition, even assuming that the foregoing prerequisites to maintaining a class action are satisfied, FRCP 23(b) imposes additional requirements regarding the permissible types of class actions.

## Representation in proceedings

The right of self-representation is a long-standing right in the United States.[101] The US Judiciary Act, the Code of Conduct for United States Judges, the FRCP, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence and the Federal Rules of Appellate Procedure address the rights of the self-represented litigant in several places. In some situations, however, self-represented appearances are not allowed. For example, although an owner may represent a solely owned business or partnership, only a licensed attorney may represent a corporation.

## Service out of the jurisdiction

FRCP 4 governs the service of a complaint upon a defendant, including service upon defendants located outside the United States. FRCP 4(f) sets forth that, unless federal law provides otherwise, an individual – other than a minor, an incompetent person or a person whose waiver has been filed – may be served at a place not within any judicial district of the United States:

1. by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorised by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;
2. if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice;
3. as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction; and
4. as the foreign authority directs in response to a letter rogatory or letter of request,
5. or, unless prohibited by the foreign country's law, by:
    - delivering a copy of the summons and of the complaint to the individual personally;
    - using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or
    - by other means not prohibited by international agreement, as the court orders.

Rule 4 of the FRCP applies to natural persons as well as corporations.

The Hague Service Convention typically provides the exclusive means for service of US process in other countries that are party to the Convention.[102] Article 1 of the Convention states that it 'shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad'.[103] In 2017, the US Supreme Court held that the Hague Service Convention permits service by mail if the receiving state has not objected to service by mail and service by mail is authorised under otherwise-applicable law.[104]

## Enforcement of foreign judgments

The United States is not a signatory to any treaty that requires the recognition or enforcement of foreign judgments.[105] Nor is there any federal constitutional provision or federal statute requiring a foreign court judgment to be given full faith and credit by US federal courts. Instead, state law generally governs the recognition and enforcement of foreign judgments.

Generally, however, US courts follow the principle of international comity. Under that principle, courts should recognise and enforce foreign court judgments where:

> *[T]here 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 its full effect.*[106]

To invoke that principle, the holder of a foreign judgment or decree may file suit seeking to enforce it before a competent US court.

## Assistance to foreign courts

Litigants in foreign countries that are parties to the Hague Evidence Convention may obtain evidence in the United States pursuant to the procedures contained in the Convention.[107] Federal courts provide assistance to foreign courts pursuant to 28 USC Section 1782, under which parties or other interested persons involved in a proceeding in a foreign or international tribunal can make a request to a federal district court for an order compelling discovery from a person or entity that resides or is found in the district in which the court sits. District courts have broad discretion in determining whether to grant discovery requests under Section 1782.[108]

## Access to court files

There is a presumption of, and right to, public access to court records.[109] This presumption is broad and enforcement of the right does not require a proprietary interest in the document or a showing of need for it (e.g., a need to use it as evidence in a lawsuit). The philosophy underlying the presumption of public access to court records (as well as public access to court proceedings generally) is that transparency promotes accountability and public confidence in the judicial system.[110] Issues have arisen over whether this presumption extends to documents and other material produced in discovery. The Supreme Court has held that, because non-filed discovery documents are not a traditionally public source of information, and may only tangentially relate to the underlying case, such documents are not subject to access rights.[111] In contrast, access to filed discovery material is generally held to be subject to the right, but limitations apply. Most notably, judges have broad discretion under the FRCP, as well as analogous state procedural rules, to issue orders that protect case-related information from unauthorised disclosure.[112] Protective orders are commonly used in litigation to protect commercially sensitive or other sensitive information from public disclosure. Many courts have procedures for filing court papers under seal under certain circumstances.[113]

## Litigation funding

Centuries ago, litigation funding by unrelated third parties was forbidden. Champerty (where the third party provides money to a litigant in exchange for a share of the proceeds of the claim) and maintenance (where the third party provides money to continue the litigation) were offences at common law. Today, rules governing third-party funding of litigation are more flexible.[114] Although still not prevalent, third-party litigation financing – the practice of providing money to a party to pursue a potential or filed lawsuit in return for a share of any damages award or settlement – is becoming more common in the United States. Under these arrangements, litigation-financing companies may provide financing for a variety of litigation costs, including attorneys' fees, court fees and expert witness

fees. The rules governing these financial arrangements vary from state to state, with some states still strictly prohibiting such arrangements.

# Legal practice

## Conflicts of interest and ethical walls

No single code of professional conduct or other set of rules applies to the conduct of attorneys in the United States. Rather, the ethical rules applicable to practising attorneys are determined by the individual states in which lawyers practise or the courts before which they appear. However, the American Bar Association's Model Rules of Professional Conduct (MRPC) provide the model on which many states base their ethical rules. The MRPC covers a broad range of conduct, including attorney competence,[115] diligence,[116] duty of confidentiality[117] and conflicts of interest.[118]

Generally, a conflict of interest is present if:

> *(1) the representation of one client will be directly adverse to another client even if the matters are unrelated; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.*[119]

Notwithstanding the foregoing, MRPC 1.7(b) does allow an attorney to represent a client despite the existence of a conflict of interest if certain conditions are met. Both clients must give informed consent to the representation after full disclosure of the conflict.[120] In many circumstances, an advance consent to future unknown conflicts will be effective as well. Under what is sometimes called the 'firm unit rule', all lawyers of a firm are typically conflicted because of a current client conflict if any lawyer's activities, including activities before that lawyer joined the firm, create a conflict, unless appropriate waivers are received.[121] In a few jurisdictions, 'ethical walls' allow firms to avoid disqualification if the conflict is a result of work done by a laterally hired lawyer before they joined their present firm and, more generally, 'ethical walls' can avoid firm-wide conflicts related to personal relationships of lawyers or past work by former government officials who join a firm.

## Money laundering, proceeds of crime and funds related to terrorism

Title III of the USA PATRIOT Act, the International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001, is intended to facilitate the prevention, detection and prosecution of international money laundering and the financing of terrorism. It amends portions of the Money Laundering Control Act of 1986 and the Bank Secrecy Act of 1970 (BSA).[122] The BSA and the USA PATRIOT Act cover financial institutions and require such entities to have anti-money laundering programmes and customer identification programmes.

Lawyers are not expressly covered by the USA PATRIOT Act or the BSA. However, criminal laws prohibiting the laundering of money apply to all individuals, including lawyers. A lawyer or law firm (like any other business) may be required to report large payments of cash or currency (i.e., payments in excess of US$10,000) made by clients.[123]

## Documents and the protection of privilege

### Privilege

Certain communications between a lawyer and client are protected from disclosure by the attorney–client privilege: 'The attorney–client privilege is the oldest of the privileges for confidential communications known to common law.'[124] The policy underlying this privilege is encouragement of open and honest communication between lawyers and their clients, 'thereby promot[ing] broader public interests in the observance of law and administration of justice'.[125] The privilege applies to:

1. a communication;
2. made between a lawyer and a client;
3. in confidence; and
4. for the purpose of seeking, obtaining or providing legal assistance to the client.[126]

The privilege extends only to communications, not to the underlying facts.[127] When the client is a corporation, the privilege is commonly viewed as a matter of corporate control.-[128] In other words, corporate management, or the 'control group', including the officers and directors, decide whether to assert or waive the privilege. However, the attorney–client privilege does extend to mid-level and lower-level employees of a company.[129]

There are some exceptions to the application of the attorney–client privilege. For example, communications in furtherance of a crime or fraud, or the post-commission concealment of the crime or fraud, are not privileged. A corporation's right to assert the attorney–client privilege is not absolute; an exception to the privilege applies when the corporation's shareholders wish to pierce the corporation's attorney–client privilege. In addition, if two parties are represented by the same attorney in a single legal matter, neither client may assert the attorney–client privilege against the other in subsequent litigation if the subsequent litigation pertains to the subject matter of the previous joint representation. This latter exception is known as the common interest exception. Another important consideration is that of waiver: the disclosure of privileged communications to third parties is often deemed to have waived the privilege such that those communications, and in some cases others on the same subject, are no longer protected from disclosure to others.

In addition, certain other communications between an attorney and a client may not fall within the privilege because they do not pertain specifically to legal advice. For example, the general nature of the services performed by the lawyer, including the length of the retention, is generally not immune from disclosure.

Complications may arise with respect to communications with in-house counsel. A communication relating to corporate legal matters between a corporation's in-house counsel and outside counsel is normally protected by the attorney–client privilege.[130-] However, when the communication is between a representative of the corporation and the in-house lawyer, the privilege extends only to any legal advice sought or rendered; it does not protect communications that are strictly business-related.

The work product doctrine, which is separate and distinct from the attorney–client privilege, provides that materials prepared by an attorney in anticipation of litigation or trial may be immune from discovery. The work product doctrine protects materials prepared by an attorney in anticipation of litigation or trial, regardless of whether those materials or their contents are provided or communicated to the client (or whether the litigation or trial actually occurs). The doctrine also covers materials prepared in anticipation of litigation or trial by agents (e.g., accountants or other third-party advisers) acting under the direction of an attorney. The rationale underlying the work product doctrine, as articulated by the US Supreme Court, is the need for 'a lawyer [to] work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel'.[131] The Supreme Court further observed: 'Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.'[132]

Disclosure of work product materials to a third party (other than the client) may not waive the protection afforded under this doctrine, as long as the receiving party shares a common interest with the disclosing party (e.g., both parties are defendants in pending litigation). However, materials protected from disclosure by the work product doctrine may be subject to disclosure under certain circumstances. Under Rule 26(b)(3)(a) of the Federal Rules of Civil Procedure (FRCP), materials protected by the work product doctrine may be discoverable if the opposing party shows a 'substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means'.

## Production of documents

FRCP 26(b)(1) permits discovery of

> any nonprivileged matter that is relevant to any party's claim or defence and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

The FRCP provide a full range of pretrial discovery devices, including discovery of expert opinions, depositions, interrogatories, production of documents, inspections and requests for admissions.[133] Parallel state codes of civil procedure provide for similar discovery devices, generally subject to similarly liberal standards of relevance.

A party must produce all documents responsive to a document request that are in the party's 'possession, custody, or control'.[134] The fact that such documents may be located

in a foreign country does not bar their discovery if the test of possession, custody or control is otherwise satisfied. If a domestic parent corporation, for example, is deemed to control its foreign subsidiary (because, for example, the parent controls the board of directors of its subsidiary), then the domestic parent may be compelled to produce documents located at its foreign subsidiary's offices.

FRCP 34 expressly applies to electronically stored information.[135] Limits on discovery (and e-discovery in particular) generally turn on whether 'the information is not reasonably accessible because of undue burden or cost'.[136] In the context of e-discovery, courts have articulated various formulations of this standard.[137]

Litigants in the United States are subject to an affirmative obligation to preserve relevant evidence, including electronically stored information, once a lawsuit is commenced or the prospect of litigation becomes reasonably imminent. In the civil litigation context, once litigation is commenced, or reasonably anticipated, a corporation must suspend its routine document retention and destruction policies and put in place a 'litigation hold' to ensure the preservation of relevant documents.[138]

Failure of a party to produce relevant documents, or failure to preserve relevant evidence once a lawsuit is commenced or litigation becomes reasonably imminent, may result in severe sanctions for the party and the party's counsel.[139] Recent court decisions have imposed harsh penalties on parties, as well as their lawyers, for failing to preserve and produce relevant documents. A 'failure to adopt good preservation practices' may support a finding of gross negligence in the context of e-discovery obligations.[140]

Complications sometimes arise where the documents sought are located in a country whose laws protect the documents from disclosure. US courts generally balance the following factors in deciding whether a requesting party is entitled to information sought in discovery where that information is subject to the conflicting laws in a foreign jurisdiction:

1. the significance of the discovery and disclosure to issues in the case;
2. the degree of specificity of the request;
3. whether the information originated in the jurisdiction from which it is being requested;
4. the availability of alternative means of securing the information sought in the discovery request; and
5. the extent to which non-compliance would undermine the foreign sovereign's interest in the information requested.[141]

## Alternatives to litigation

### Overview

Given the time, disruption and expense associated with litigation, some parties opt to settle their disputes out of court through ADR procedures. Arbitration and mediation are the most common alternatives.

## Arbitration

Arbitration is the submission of a dispute to one or more impartial persons for a final and binding decision. Through contractual provisions or other agreement, the parties may control the range of issues to be resolved, the scope of relief to be awarded and many procedural aspects of the process, including the location of the arbitration, the language in which the hearing will be conducted and the length of the hearing. In the United States, agreements to arbitrate are enforced (in the absence of special circumstances, such as showing of fraud) under the Federal Arbitration Act. Parties may elect to arbitrate their claims with the assistance of recognised arbitral instructions, such as those of the International Chamber of Commerce or the American Arbitration Association, or the parties may devise their own set of rules for how the arbitration will be conducted.

The arbitration process may be a cost-effective option for parties, owing to its speed relative to a traditional lawsuit. In a contractual arbitration provision, parties may predetermine the qualifications and experience of an arbitrator. Many arbitration provisions specify that the parties shall agree upon a mutually acceptable arbitrator. Unlike judges, who are randomly assigned cases without regard to background or expertise, arbitrators are often designated or chosen precisely because they have particular expertise in the matters to be arbitrated. In addition, unlike court proceedings, arbitration proceedings are confidential, with no right of public access.

Arbitration proceedings may be completed in a matter of months, resulting in lower attorneys' fees and other expenses, through a reduced emphasis on evidentiary processes. In particular, arbitration procedures typically provide less opportunity for discovery, including a more limited exchange of documents, fewer (if any) depositions and little or no written discovery (such as interrogatories and requests for admission).

Arbitration awards are binding and are vacated only under limited circumstances, as outlined in state and federal arbitration laws. Once an award is entered by an arbitrator or arbitration panel, it must be confirmed in a court of law. Once confirmed, the award is then reduced to an enforceable judgment, which may be enforced by the winning party in court like any other judgment. In the international context, enforcement of foreign arbitral awards is governed by the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the New York Convention. US courts will not enforce foreign arbitral awards under the Convention where the award is made in a state that is not a party to the Convention or does not reciprocally enforce US awards.[142] Generally speaking, however, arbitration awards are more easily enforced than judgments of foreign courts.

There are some drawbacks to arbitration. Most notably, generally there is no right of appeal of an arbitrator's award. In addition, the truncated discovery mechanism that is often used in arbitration may limit a party's ability to discover evidence in the possession of an adversary that would be important in litigating the case.

## Mediation

Mediation is a voluntary process in which parties to a dispute work together with a neutral facilitator — the mediator — who helps them reach a settlement.[143] Unlike litigation or

arbitration, mediation is not an adversarial process. The mediator does not decide the case. The results of mediation are binding only if and when parties enter into a settlement contract.

A mediation process can be scheduled at any time during arbitration or litigation. Parties generally save money through reduced legal costs and staff time. Similar to arbitrators, mediators are often selected based on their specialised expertise in the issues subject to mediation. Generally, information disclosed at a mediation may not be divulged as evidence in any subsequent arbitral, judicial or other proceeding.

## Outlook and conclusions

The Supreme Court has several interesting cases on its docket for the upcoming year. For example, in *Waetzig v. Halliburton Energy Services, Inc*, the Court will decide whether, under the Federal Rules of Civil Procedure, a Rule 41 voluntary dismissal without prejudice qualifies as a 'final judgment, order, or proceeding' under Rule 60(b), which governs relief from a judgment or order. In *BLOM Bank SAL v. Honickman*, the Court will decide whether Rule 60(b)(6) permits plaintiffs to seek post-judgment vacatur in order to replead their case. And in *Medical Marijuana, Inc v. Horn*, the Court will decide whether economic harms resulting from personal injuries constitute injuries to 'business or property by reason of' the defendant's acts when a civil plaintiff seeks treble damages under the Racketeer Influenced and Corrupt Organizations Act (RICO).

### Endnotes

**1** A corporation, whether domestic or foreign, is deemed a citizen of both its state of incorporation and the state in which its principal place of business is located. See 28 USC Section 1332(c)(1). ^ Back to section

**2** For example, New York has four districts: the Southern, Northern, Eastern and Western Districts. ^ Back to section

**3** In the US District Court for the Southern District of New York, which is one of the four federal district courts in the state of New York, there are currently 44 district court judges and 17 magistrate judges. Magistrate judges are judges appointed to assist district court judges in the performance of their duties. See 28 USC Section 636 (establishing jurisdiction, powers and assignment of federal magistrates). ^ Back to section

**4** See generally 28 USC Section 1291 (conferring appellate jurisdiction for final decisions); 28 USC Section 1292 (conferring appellate jurisdiction for certain interlocutory decisions). ^ Back to section

**5** For example, the Court of Appeals for the Second Circuit hears appeals from the federal district courts in the Southern, Northern, Eastern and Western Districts of New York, as well as the District of Connecticut and the District of Vermont. ^ Back to section

**6** For example, the Court of Appeals for the Ninth Circuit generally encompasses districts in the western portion of the United States. ^ Back to section

**7** For example, the Supreme Court has original jurisdiction over disputes between two or more states. See US Const Article III, Section 2, cl 2. ^ Back to section

**8** During the 2021 term, for example, the Supreme Court received 4,900 filings and heard arguments in 70 cases. See https://www.supremecourt.gov/publicinfo/year-end/2022year-endreport.pdf. ^ Back to section

**9** Federal district and circuit judges and Supreme Court justices ('Article III judges') hold life appointments, US Const Article III, Section 1, cl 1. But non-Article III judges (e.g., tax judges, bankruptcy judges and magistrate judges) generally do not. For example, bankruptcy judges are appointed for 14-year terms, 28 USC Section 152. ^ Back to section

**10** Even the nomenclature of state high courts varies from state to state. New York, for example, has a three-tier court system. However, the lowest level, the trial court level, is called the supreme court, the intermediate appellate level is called the appellate division and the court of last resort is the New York Court of Appeals. ^ Back to section

**11** As discussed previously, federal district and circuit judges and Supreme Court justices ('Article III judges') hold life appointments, US Const Article III, Section 1, cl 1. Non-Article III judges generally do not. ^ Back to section

**12** In 2009, the Supreme Court held, in *Caperton v. Massey*, 129 S Ct 2252 (2009), that the due process clause of the Constitution may require a judge to recuse himself or herself under certain circumstances, including in the context of an election campaign. The Court found 'that there is a serious risk of actual bias – based on objective and reasonable perceptions – when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent', id. at 2263 and 2264. ^ Back to section

**13** Many commercial contracts, for example, contain express provisions to submit any claims arising from the contract to arbitration, rather than court litigation. ^ Back to section

**14** 144 S. Ct. 2117 (2024). ^ Back to section

**15** id. at 2127. ^ Back to section

**16** ibid. ^ Back to section

**17** ibid. ^ Back to section

**18** ibid. ^ Back to section

**19** ibid. ^ Back to section

**20** id. at 2125. ^ Back to section

**21** id. at 2126. ^ Back to section

**22** id. at 2126–27. ^ Back to section

**23** id. at 2127 (citing 34 F.4th 446 (5th Cir. 2022)). ^ Back to section

**24** ibid. ^ Back to section

**25** id. at 2128. ^ Back to section

**26** id. at 2131. ^ Back to section

**27** id. at 2128 (quoting US Const Amend VII). ^ Back to section

**28** id. (quoting *Parsons v. Bedford*, 28 U.S. 433, 446 (1830)). ^ Back to section

**29** id. (quoting *Granfinanciera, SA v. Nordberg*, 492 U.S. 33, 53 (1989)). ^ Back to section

**30** id. at 2129. ^ Back to section

**31** id. at 2129–31. ^ Back to section

**32** id. at 2131 (quoting Granfinanciera, 492 U.S. at 53). ^ Back to section

**33** id. at 2129. ^ Back to section

**34** id. (quoting *Stern v. Marshall*, 564 U.S. 462, 493 (2011)). ^ Back to section

**35** id. at 2132. ^ Back to section

**36** id. at 2132–33. ^ Back to section

**37** id. at 2135 (quoting *Granfinanciera*, 492 U.S. at 52). ^ Back to section

**38** id. at 2136 (citing *Granfinanciera*, 492 U.S. at 52). ^ Back to section

**39** 144 S. Ct. 2244 (2024). ^ Back to section

**40** 467 U.S. 837 (1984). ^ Back to section

**41** *Loper*, 144 S. Ct. at 2254. ^ Back to section

**42** id. at 2273. ^ Back to section

**43** id. at 2254. ^ Back to section

**44** id. (quoting *Chevron*, 467 U.S. at 842). ^ Back to section

**45** id. (quoting *Chevron*, 467 U.S. at 842). ^ Back to section

**46** id. (quoting *Chevron*, 467 U.S. at 843). ^ Back to section

**47** id. (quoting *Chevron*, 467 U.S. at 843). ^ Back to section

**48** ibid. ^ Back to section

**49** id. at 2255, 2256. ^ Back to section

**50** id. at 2256. ^ Back to section

**51** id. at 2255. ^ Back to section

**52** id. at 2256, 2257. ^ Back to section

**53** id. at 2257. ^ Back to section

**54** id. at 2261 (quoting *Kisor v. Wilkie*, 588 U.S. 558, 580 (2019)). ^ Back to section

**55** id. (quoting 5 U.S.C. § 706). ^ Back to section

**56** id. at 2262. ^ Back to section

**57** id. at 2263. ^ Back to section

**58** id. at 2265. ^ Back to section

**59** ibid. ^ Back to section

**60** id. at 2266. ^ Back to section

**61** id. at 2265. ^ Back to section

**62** id. at 2265–66. ^ Back to section

**63** id. at 2266–67. ^ Back to section

**64** id. at 2272–73. ^ Back to section

**65** 601 U.S. 257 (2024). ^ Back to section

**66** id. at 259–60. ^ Back to section

**67** id. at 260. ^ Back to section

**68** id. at 260, 266. ^ Back to section

**69** id. at 261. ^ Back to section

**70** ibid. ^ Back to section

**71** id. at 260 (quoting 17 C.F.R. § 229.303(b)(2)(ii)). ^ Back to section

**72** id. at 261. ^ Back to section

**73** id. at 261–62. ^ Back to section

**74** id. at 262–63. ^ Back to section

**75** id. at 264. ^ Back to section

**76** id. at 263 (quoting 17 C.F.R. § 240.10b-5(b)). ^ Back to section

**77** id. at 264. ^ Back to section

**78** ibid. ^ Back to section

**79** id. (quoting *Matrixx Initiatives, Inc v. Siracusano*, 563 U.S. 27, 44 (2011)). ^ Back to section

**80** id. at 265. ^ Back to section

**81** ibid. ^ Back to section

**82** id. at 265–66. ^ Back to section

**83** State court procedures are similar in many respects, but each of the 50 states has its own set of procedural rules. ^ Back to section

**84** In addition, each individual federal district may promulgate rules to supplement, and in some instances modify, the FRCP, and each individual judge within each district may promulgate rules governing proceedings in his or her courtroom. ^ Back to section

**85** Each circuit court of appeals may promulgate its own rules to supplement the Federal Rules of Appellate Procedure. ^ Back to section

**86** See FRCP 3. ^ Back to section

**87** See FRCP 4. ^ Back to section

**88** See FRCP 12. The time within which to serve the answer is provided in Rule 12(a) and varies from 21 days to 90 days (in the case of a defendant who was served outside the United States) (FRCP 12(a)). In practice, extensions of these periods are often obtained. ^ Back to section

**89** See FRCP 12(b). ^ Back to section

**90** Depositions typically involve live testimony given under oath. See FRCP 30. Under limited circumstances, depositions may be conducted by submitting questions to the deponent in writing in advance of the deposition. See FRCP 31. ^ Back to section

**91** See FRCP 34. ^ Back to section

**92** See FRCP 33 (providing that a party may serve written interrogatories (i.e., written questions) on any party, and requiring the party upon whom the interrogatories are served to answer them); FRCP 36 (providing that a party may, in writing, request the other party to admit, among other things, 'facts, the application of law to fact, or opinions about either'). ^ Back to section

**93** Recently adopted amendments to the FRCP attempt to reduce the burden of discovery by, among other things, scaling back the scope of permissible discovery by adopting the proportionality rule, pursuant to which the scope of discovery sought must be proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources and the importance of the discovery in resolving the issues and whether the burden or expense of the proposed discovery outweighs its likely benefit. The amendments also limit the use of depositions (FRCP 30) to reflect the proportionality rule of FRCP 26. ^ Back to section

**94** 28 USC Section 1407(c). ^ Back to section

**95** See FRCP 56. ^ Back to section

**96** See https://www.uscourts.gov/sites/default/files/fcms_na_distprofile0630.2022_0.pdf. ^ Back to section

**97** ibid. ^ Back to section

**98** See FRCP 65. ^ Back to section

**99** *Winter v. Nat Res Def Council, Inc*, 555 US 7, 20 (2008). ^ Back to section

**100** See FRCP 23. ^ Back to section

**101** See*Faretta v. California*, 422 US 806, 812 (1975) ('In the federal courts, the right of self-representation has been protected by statute since the beginnings of our Nation.'). ^ Back to section

**102** See Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, 15 November 1965 (Hague Service Convention), [1969] 20 UST 361, TIAS No. 6638. ^ Back to section

**103** Under the Supremacy Clause of the US Constitution, 'the Convention pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies'. See *Volkswagenwerk Aktiengesellschaft v. Schlunck*, 486 US 694, 699 (1988). ^ Back to section

**104** See *Water Splash, Inc v. Menon*, 137 S Ct 1504, 1513 (2017). ^ Back to section

**105** However, many of the individual 50 states in the United States have adopted the Uniform Foreign Money-Judgments Recognition Act. See e.g., NY CPLR 5401 et seq. ^ Back to section

**106** *Hilton v. Guyot*, 159 US 113, 202 (1895). ^ Back to section

**107** *Societe Nationale Industrielle Aerospatiale v. US Dist Ct for S Dist of Iowa*, 482 U.S. 522, 533 (1987) ('[B]oth the discovery rules set forth in the Federal Rules of Civil Procedure and the Hague Convention are the law of the United States'). ^ Back to section

**108** See *Intel Corp v. Advanced Micro Devices Inc*, 542 US 241 (2004). In March 2021, the US Supreme Court granted certiorari in the case *Servotronics Inc v. Rolls-Royce PLC* to determine whether 28 USC Section 1782(a) authorises a district court to render assistance in discovery for use in a foreign or international arbitral tribunal. See 141 S. Ct 1684 (2021). However, in September 2021, the US Supreme Court dismissed the case following a request by both parties involved in the case. ^ Back to section

**109** *Nixon v. Warner Communications Inc,* 435 US 589, 597–99 (1978). Some states have 'sunshine laws' that recognise, and in some instances expand, this right. ^ Back to section

**110** See *US v. Amodeo*, 71 F3d 1044, 1048 (2d Cir 1995). ^ Back to section

**111** See *Seattle Times Co v. Rhinehart*, 467 US 20 (1984). ('A litigant has no First Amendment right of access to information made available only for purposes of trying his suit'); see also *Zemel v. Rusk*, 381 US 1, 17 (1965) ('The right to speak and publish does not carry with it the unrestrained right to gather information'). ^ Back to section

**112** See FRCP 26(c) (protective orders). ^ Back to section

**113** Many courts that permit filing to be made under seal require that a public version of the document be filed with the court. These public versions redact information that is protected from disclosure, such as financially or commercially sensitive information. ^ Back to section

**114** The issue of litigation funding was addressed by the US Supreme Court in 2008 in *Sprint Communications Co v. APCC Services Inc*, 128 S Ct 2531 (2008). There, the Court held that an assignee of a legal claim for money had standing to pursue that claim in federal court, even when the assignee had promised to remit the proceeds of the litigation to the assignor, id. Noting that, prior to the seventeenth century, a suit like the one before the Court would not have been allowed, id. at 2536, the Court went on to trace the history of assignment of legal claims and concluded that 'history and precedents . . . make clear that courts have long found ways to allow assignees to bring suit', id. at 2541. The Court held that 'lawsuits by assignees, including assignees for collection only' are 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process', id. at 2542. ^ Back to section

**115** MRPC 1.1. ^ Back to section

**116** MRPC 1.3. ^ Back to section

**117** MRPC 1.6. ^ Back to section

**118** MRPC 1.7–1.11. ^ Back to section

**119** MRPC 1.7. ^ Back to section

**120** MRPC 1.7(b)(4). ^ Back to section

**121** MRPC 1.8, which addresses specific rules related to conflicts of interest, provides that 'While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.' ^ Back to section

**122** 31 USC Section 5311 et seq. ^ Back to section

**123** 26 USC Section 6050I. ^ Back to section

**124** *Upjohn Co v. US*, 449 US 383, 389 (1981). ^ Back to section

**125** ibid. ^ Back to section

**126** See McCormick on Evidence Section 87, n.19 (7th ed, June 2016). ^ Back to section

**127** id. at Section 89. Thus, a party cannot conceal a fact from disclosure merely by communicating it to his or her lawyer. 'A fact is one thing and a communication concerning that fact is an entirely different thing.' Upjohn Co, 449 US at 395, 396. ^ Back to section

**128** See McCormick on Evidence Section 87.1 (7th ed, June 2016). ^ Back to section

**129** id. ^ Back to section

**130** See *Upjohn Co v. US*, 449 US 383 (1981). ^ Back to section

**131** *Hickman v. Taylor*, 329 US 495, 510 (1947). ^ Back to section

**132** id. at 511 ('This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs and countless other tangible and intangible ways.'). ^ Back to section

**133** See FRCP 26–36. ^ Back to section

**134** FRCP 34. ^ Back to section

**135** FRCP 34(a)(1)(A). ^ Back to section

**136** FRCP 26(b)(2)(B). ^ Back to section

**137** See, for example, *Zubulake v. UBS Warburg LLC*, 217 FRD 309, 318 (SDNY 2003) ('undue burden' should turn on whether the information sought is kept in accessible form); see generally The Sedona Principles: Best Practices Recommendations & Principles For Addressing Electronic Document Production (June 2007), Principle 2 ('cost, burden, and need' for electronic data must be balanced); Principle 8 (the primary source of electronic data should be active data; resort to disaster recovery backup tapes should be required only upon a showing of need and relevance that outweigh the cost and burdens of retrieval). ^ Back to section

**138** See *Zubulake v. UBS Warburg LLC*, 220 FRD 212 (SDNY 2003); see also The Sedona Guidelines: Best Practice Guidelines & Commentary For Managing Information & Records in the Electronic Age (November 2007), Guideline 5 ('An organization's policies and procedures must mandate the suspension of ordinary destruction practices and procedures as necessary to comply with preservation obligations related to actual or reasonably anticipated litigation, government investigation or audit.'). ^ Back to section

**139** See FRCP 37. ^ Back to section

**140** See *Chin v. Port Auth of New York*, 685 F3d 135, 162 (2d Cir 2012). ^ Back to section

**141** See Restatement (Third) of Foreign Relations Law Section 442(1)(c) (1987). ^ Back to section

**142** See Convention on the Recognition and Enforcement of Foreign Arbitral Awards art XIV, 10 June 1958, 21 UST 2517, 330 UNTS 38. ^ Back to section

**143** There are numerous private organisations that offer mediation services. ^ Back to section

CRAVATH

**Timothy G Cameron** tcameron@cravath.com
**Michael Cheng** mcheng@cravath.com

Cravath, Swaine & Moore LLP