

PLAIN TALK ABOUT SUING OR BEING SUED IN THE UNITED STATES

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INTRODUCTION

The United States is a nation of lawyers and lawsuits. Lawyers play a much more active role in the business process in the U.S. than they do anywhere else in the world. For companies with substantial business in the U.S., litigation is usually not a "once in a lifetime" occurrence. Rather, it is a part of doing business. When a business dispute arises which cannot be resolved amicably (either with or without the involvement of attorneys), the threat of litigation or litigation itself usually follows.

In the vast majority of disputes, the threat of litigation is enough to produce a resolution. Yet a substantial number of such disputes do result in litigation being initiated. Even in such cases, the overwhelming majority are settled or otherwise disposed of before a trial, so that a judge or jury never have an opportunity to decide the cases on the merits.^{2/}

The U.S. legal system for resolving business disputes is often a surprise, if not a rude shock, to non-U.S. companies facing it for the first time. This pamphlet takes a look at that system from the standpoint of a "first-timer" and addresses, in non-legal terms, some of the more important aspects of that system.

We begin with a brief overview of the judicial setting and the principal players in that setting, American lawyers. Next, we examine the broad bases for U.S. jurisdiction over non-U.S. persons. We then take a look at the process itself, including the peculiarly American phenomena of legal fees, pretrial discovery and punitive damages. Finally, we look at alternatives to formal litigation.

The emphasis is on the practical. It is not our purpose to defend or criticize the system. Whatever is said, it is certain that the American legal system functions best when all participants fully understand its benefits and limitations.

THE SETTING

I. **The courts.** Governmental power in the U.S. is dispersed in accordance with the principle of federalism - largely autonomous state governments operate under the umbrella of an equally autonomous national or "federal" government. The judicial system in the U.S. reflects this federalism and includes both state courts and federal courts.^{3/} In the case of a business dispute between an U.S. company and a non-U.S. company, there usually is no single court in which a lawsuit must be brought. At the very least, as long as the matter in controversy exceeds the jurisdictional minimum for federal court, there likely is proper

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^{2/} As an example, in the twelve months ending December 31, 2002, there were approximately 256,000 civil actions filed or pending in the U.S. district courts, but there were only about 4500 civil trials in those courts that year.

^{3/} There are also a wide variety of federal and state administrative courts and tribunals which resolve disputes through non-jury trials. Litigation before administrative courts and tribunals is important and can involve non-U.S. participants. While administrative litigation is not the focus of this article, much of what is said in this article is equally applicable to such litigation.

jurisdiction in at least one state court and one federal court. If companies with multi-state operations in the U.S. are involved in the lawsuit, there may be a number of state and federal courts in which the suit could properly be filed.

For a non-U.S. litigant, federal courts traditionally have been preferable to state courts. Federal courts tend to be less parochial than state courts, they are used to dealing with out-of-state parties, and the backlog of cases is generally smaller than in state courts. In some localities, particularly commercial centers, there is virtually no practical difference between the quality of federal and state courts. Moreover, in the federal district courts located in the major urban areas, rapidly expanding criminal dockets and shortages of federal judges have adversely impacted the time and attention that federal judges are willing and able to devote to purely commercial disputes. This unfortunate trend is largely the result of increasing "federalization" of crimes that would otherwise have been handled in state courts. A non-U.S. litigant must carefully evaluate the choice of federal versus state court.

There is not a separate career track for judges in the U.S. system. Judges are, for the most part, selected from the ranks of practicing attorneys. At the federal level, judges are appointed for life by the President. At the state level, judges are either appointed or elected.

The federal judiciary is divided at the trial court level into federal "districts," none of which covers more than one state, but many of which comprise only part of a state. The federal district courts interpret and apply the U.S. Constitution, laws passed by the U.S. Congress, the regulations promulgated by the agencies of the federal government, and treaties between the U.S. and other nations. The federal courts also have "diversity" jurisdiction over disputes between citizens of the U.S. and citizens of other nations, and over disputes between citizens of different states, provided that the matter in controversy meets the jurisdictional minimum value (presently \$75,000). In such "diversity" cases, the federal courts may apply and decide issues of state law. There are also a number of "specialty" federal courts, such as the Court of International Trade (dealing primarily with customs disputes), the Court of Federal Claims (primarily for taxpayer disputes with the Internal Revenue Service and disputes between the federal government and public contractors), and the Bankruptcy Courts (which are subsidiary to the district courts).

Each of the fifty states, the District of Columbia, Puerto Rico and the Pacific territories has its own state court system, consisting of trial and appellate courts. The state courts interpret and apply the "common law" of the respective states, and state common law governs most of the fundamental legal relationships between businesses and individuals, such as contracts, property rights, and torts. While there are many unifying themes in the common law of the various states, and while the common law of the states on commercial matters in particular has become increasingly homogeneous in the latter half of this century, there are still many significant substantive and procedural differences among the states. State courts also interpret and apply state statutes and regulations as well as the state and federal constitutions.

A non-U.S. party sued in the U.S. is not necessarily bound by its adversary's selection of a particular court as the forum for the action. For example, if the plaintiff initiates the suit in a state court, the non-U.S. defendant may be entitled to "remove" the action to a federal court. Similarly, if the action is initiated in a federal district court that is particularly inappropriate for the case or inconvenient for the non-U.S. defendant, the defendant may be able to obtain transfer of the action to a more appropriate or convenient federal judicial district in the U.S.

The state and federal judicial systems have separate routes for appeals. In the federal system, district court judgments may be appealed to the federal circuit Courts of Appeals. There are thirteen such federal circuits. Except for the District of Columbia Circuit (which, by virtue of its location, handles a large proportion of civil cases in which the federal government is a party), and the Federal Circuit (which has jurisdiction over appeals from a number of specialty federal courts and federal administrative bodies), each circuit encompasses federal districts in several states. Once a case is decided by a Court of Appeals, a party may petition the U.S. Supreme Court to review the decision (this is called a petition for a "writ of certiorari"). However, the U. S. Supreme Court grants such petitions in a very small proportion of cases, so that the Court of Appeals is frequently the court of last resort in federal cases. On questions of federal law, a federal district trial court is obligated to follow the precedents of the federal circuit in which it is located,

which may differ to some extent from the "law" in other federal circuits.^{4/}

Each state court system also consists of trial courts and intermediate and senior courts of appeal. The names of these courts differ from state to state, as do the rules regarding the jurisdiction of the appellate courts. A party aggrieved by a trial court judgment will generally have a right to appeal to the intermediate appellate court, whose decisions are generally appealable to the state's highest court of appeals. The decisions of the appellate courts of a state are the "last word" on issues of state common law or state statutory law. However, cases decided by the state appellate courts involving rights under the U.S. Constitution, the validity of federal statutes or treaties, or the validity of state statutes under the U.S. Constitution or federal laws, may be reviewed by the U.S. Supreme Court on writ of certiorari. Once again, only a small percentage of petitions for such review are granted.

Appeals in either the federal or state system are time-consuming. The appellate process can easily take years.

II. American Attorneys. According to the American Bar Association, as of December 31, 2002, , there were 1,058,662 lawyers in the U.S., most of whom are in private or corporate practice. The U.S. legal system does not separately license litigators as do some systems. In theory, any licensed U.S. attorney can represent a party in court proceedings. However, litigation is a sufficiently specialized practice area so that only attorneys with litigation experience (or attorneys in association with litigators) should properly take on such representation. An attorney in the U.S. is admitted to practice, in the first instance, by the licensing authorities in an individual state. An attorney may thereafter seek admission to the bar of other states, but examination requirements, costs, and/or business situs requirements of state bar licensing authorities generally discourage U.S. attorneys from becoming fully licensed to practice law in more than one or two states. By contrast, once an attorney is licensed to practice by the authority of a state, it is very easy for that attorney to obtain admission to practice in the federal court(s) located in that state and in other states. Additionally, while an attorney must be admitted to practice in the particular state or federal court in which a particular case is being litigated, state and federal courts routinely grant permission for out-of-state or out-of-district attorneys to represent a client in a particular case, provided that the attorney does so in association with a "local" attorney. Many law firms in the U.S., by working with local lawyers as needed, now have national litigation practices.

A U.S. lawyer-litigator typically works on the basis of either (i) an hourly fee plus reimbursable expenses or (ii) a contingency based on a percentage of the recovery (if any) or (iii) some combination of both. Hourly fees can range from \$50 to \$500+, depending on experience, location and the specialty. The range of fees suggests, correctly, that fee-setting is something less than a scientific process. Contingent fees can range from 10% to 40% of the recovery, again depending on a variety of factors including the length of the matter and the amount of work that is required. High legal fees are a source of concern, and not just for clients. The U.S. legal profession, as a whole, is concerned about the perception that only lawyers benefit from litigation.

The level of legal fees is compounded by the "American Rule" with respect to recovery of legal fees. As a general matter, in U.S. litigation each party bears its own fees, win or lose. This means that a party may successfully defend a meritless lawsuit and yet suffer the out-of-pocket cost of paying lawyers to defend it. It also means that a plaintiff prevailing in a completely meritorious action will still have to absorb the cost of its attorney's fees. There are some statutory causes of action that expressly alter the American Rule and permit recovery of attorney's fees by the prevailing party, but those are exceptional circumstances. Similarly, the American Rule can be waived if there is malicious conduct on the part of the other party, but those situations are also few and far between.^{5/}

^{4/} Resolving significant conflicts between and among federal circuits on important issues of federal law is an area where the U.S. Supreme Court does regularly assert its jurisdiction in an effort to maintain a relatively high level of consistency in federal law.

^{5/} The American Rule is the subject of ongoing debate, and has for some time been under attack by the

he bottom line, as American attorneys are fond of saying, is that litigation in the U.S. is expensive. That does not mean that it has to be an expense which is out of control or unrelated to achievement of the ultimate objective - an objective which, always is a commercial goal. The secret of working with American attorneys is to not be intimidated by the process. An even better kept secret is that most American attorneys prefer to work with clients who are not so intimidated. Certain guidelines should help a prospective client in that regard.

First, negotiate a fee structure which is acceptable and fair to both parties. Experienced U.S. lawyers will have no objection and will appreciate a client's concerns in this regard. Second, insist on at least a preliminary budget for the matter. Apart from the financial concerns which this exercise addresses, it forces the attorney and client to begin to address the commitments of time which constitute the hidden expense of litigation. Third, work with the attorney at the outset to develop a strategic plan or overview of the dispute. Review and revise that plan throughout. Complex commercial litigation often becomes so littered with trees that everyone loses sight of the forest. Working against a plan with stated goals provides a benchmark for decision-making at various crucial stages. These would be prudent steps in any commercial relationship, and a lawyer-client relationship in commercial litigation should be no different.

THE BROAD REACH OF U.S. JURISDICTION

Non-U.S. companies doing business in the U.S., selling products that will be used in the U.S., and engaging in transactions with U.S. companies, are likely to find themselves subject to the jurisdiction of the U.S. courts. This is particularly true if the non-U.S. company actually has offices and/or employees in the U.S., but may also be the case for a non-U.S. company with absolutely no physical presence in the U.S. Through the operation of "long-arm statutes," U.S. courts may exercise broad jurisdiction over entities located outside of a particular state or federal district. Such long-arm jurisdiction is tempered by constitutional principles of "due process"; these principles prevent a party from being hauled into court in a forum with which it lacks certain minimum contacts.

A civil action in the U.S. is generally initiated by the plaintiff filing a Complaint with the court, and the plaintiff then is obligated to serve a Summons and the Complaint upon the defendant. The U.S. is a signatory to the "Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters," commonly known as the "Hague Convention." For the signatory nations, the Hague Convention provides a mechanism that helps ensure the ability of civil litigants to effect service of process upon each other. A party initiating an action in a U.S. federal court is obligated to utilize a method of service authorized by the Hague Convention when serving process upon a party located in a nation that is a signatory to the Convention. Some of the methods authorized by the Hague Convention can be rather cumbersome, however, and U.S. litigants are apt to try to avoid its use if possible. Thus, a U.S. plaintiff will prefer to effect service upon a defendant in the U.S. In the case of a non-U.S. company which has an office in the U.S. or which has a U.S. subsidiary, service of process is likely to be made upon the company through its U.S. office or subsidiary. Even where process cannot be served in the U.S., plaintiffs from the U.S. will try to use the least cumbersome method of service outside of the country. In situations in which the law of the other nation does not prevent it, service of process may be accomplished by mail pursuant to various state and federal rules.^{6/}

advocates of "litigation reform." The U.S. Congress has tried to eliminate the American Rule, at least in federal cases involving products liability and negligence, but has had little, if any, success. Changing the American Rule for actions in state courts arising under state law would have to be done by the individual states.

^{6/} In an effort to simplify and reduce the expense of initiating a lawsuit in federal court, changes made to the Federal Rules of Civil Procedure in 1993 created a mechanism whereby a plaintiff can request that a defendant waive formal service of a summons and complaint. This mechanism can be particularly attractive to a plaintiff initiating an action against a non-U.S. company located outside of the U.S., because it can, if agreed to by the defendant, relieve such a plaintiff of the burden it would otherwise bear of effecting service of process outside of the U.S. through the use of the Hague Convention or other cumbersome and possibly expensive means. A request for waiver of formal service of process need only be transmitted by mail or "other reliable means" (perhaps even by facsimile transmission). A party

Non-U.S. companies which are majority-owned by another nation or political subdivision of a nation, or which constitute an organ of such nation or political subdivision, may be immune from the jurisdiction of U.S. federal and state courts under the principle of "sovereign immunity." There are several exceptions to this principle, however. For example, immunity does not apply if the civil action is based upon (a) commercial activity carried on in the U.S. by the non-U.S. entity, (b) an act performed in the U.S. in connection with a commercial activity of the non-U.S. entity elsewhere, or (c) an act outside the territory of the U.S. in connection with a commercial activity of the non-U.S. entity elsewhere and that act causes a direct effect in the U.S. Sovereign immunity will not apply if it has been waived explicitly (e.g., by an express provision in a contract) or by implication. Even in those cases in which a non-U.S. entity which is owned or is the instrumentality of a foreign state is not protected from suit by sovereign immunity, the company may have the benefit of special procedural protections under the Foreign Sovereign Immunities Act when it is sued in the U.S. These protections include special requirements for service of initial process upon the entity, an enlarged time period for the entity to respond to the Complaint, and limitations on the plaintiff's ability to obtain a jury trial.

THE PROCESS

I. Pre-trial Discovery. The most unique, and expensive, feature of the U.S. civil justice system is pre-trial discovery. Discovery is a process in which each party to a lawsuit gets an opportunity to learn about the evidence that will be relied upon by opposing parties in the lawsuit and to try to uncover relevant evidence in the possession of its opponents or third parties. The theory behind discovery is that complete disclosure facilitates settlement and makes the actual trials fairer and more efficient. In practice discovery does often achieve those goals but at a high cost in terms of money and time.

Discovery is of two basic types - written discovery (consisting of interrogatories and requests for documents) and depositions.⁷ Parties are given broad authority to request the production of documents by opposing parties. A party has very limited ability to resist such requests. While these requests are supposed to be relevant to the subject matters in dispute, you must assume that every document in your files of even tangential relevance to the case will be produced to your opponent. You may be able to obtain confidential treatment of some of your documents, meaning that opposing parties will not disclose them to others outside the lawsuit, but this will not prevent the opposing parties from seeing and relying on them. Interrogatories are written questions propounded by one party to another party in a lawsuit. Among other things, these questions may seek evidentiary information, may seek the identity of witnesses, and may seek explication of the factual bases for causes of action.

Depositions are oral cross-examinations of witnesses under oath outside of court. Depositions are conducted by the attorneys and the proceedings are recorded, generally by a court reporter. If you are a litigant in a U.S. action, your officers and employees may be deposed by opposing counsel in circumstances where there is little restriction as to relevancy and materiality of the questions. While your officers and employees outside of the U.S. may generally not be compelled to travel to the U.S. to submit to deposition, they may be required pursuant to letters rogatory or the law of the nation in which they are found to submit to a deposition or examination (orally or in writing) in their own nation.

In many of the federal courts, the rules governing discovery were recently changed in an effort to speed up the process. The changes require a party to disclose (without any request from the other party and

located outside of the U.S. is under no obligation to agree to such a request, and is not subject to any penalty or sanction for refusing to so agree. In any particular case, there may be certain advantages or disadvantages to agreeing to a request for waiver of service, so a non-U.S. company receiving a request for waiver of service should consult with U.S. counsel before taking any action on the request. By the same token, this procedure can also be a useful tool for a non-U.S. company initiating an action in federal court in the U.S.

⁷ Other forms of discovery, e.g., physical inspection and requests for admission, are also permissible.

relatively soon after the litigation is commenced) a substantial amount of information relevant to the contested issues in the case, and to make such disclosure soon after the case is initiated. Among other things, the required disclosure must include identities of all relevant witnesses, production of all documents relevant to contested issues, and a greater scope of information regarding opinions of expert witnesses.

Parties to a lawsuit in the U.S. may also conduct discovery against so-called "third" parties, persons who are not plaintiffs or defendants but who may have information bearing on the subject matter of the litigation. Third-party discovery can be particularly vexing to a non-U.S. person. If that person does business in the U.S. sufficient to convey jurisdiction on the U.S. courts, it may be the target of subpoenas for both documents and witnesses, including those located outside the U.S. Even if that person has no contact with the U.S., third-party discovery may still be available through the more formal and cumbersome letters of request and letters rogatory procedures of the Hague Evidence Convention. Thus, even though the person has no direct interest in the U.S. litigation it may be compelled to seek U.S. counsel to resist or restrict third-party discovery in order to reduce or eliminate the considerable burden, to maintain confidentiality or to protect proprietary rights.

Most of the expense associated with litigation in the U.S. -- and expense includes lost time and inconvenience to company officers and employees as well as money -- is created by the discovery process, a process that can consume many months and often years.

II. Measures of Damages and Causes of Action. In an ordinary commercial dispute, one would think that the damages would be those losses incurred by the other party's failure to honor its business obligation. Those damages, called actual damages in U.S. law, are at the base of every lawsuit, and most commercial lawsuits have at their core some sort of contractual obligation. But as U.S. law has developed, the measures of damages as well as the potential causes of action have multiplied to the point where a basic breach of contract action limited to the actual damages incurred is now the exception rather than the rule.

A peculiarity of Anglo-American law is the theory of punitive or exemplary damages. Under this theory, a court or jury can award a plaintiff damages over and above, indeed in many multiples of, the actual damages incurred in those types of actions which involve a high degree of culpability, negligence or other willful misconduct on the part of the defendant. A breach of contract action would not support punitive damages, but an action maintaining fraud on the part of the defendant would. Since most U.S. courts allow plaintiffs to plead different, and even inconsistent, theories of liability in a single action, simple commercial disputes often find themselves cast as matters of fraud or other so-called "tort" causes which would support a claim for punitive damages.

The issue of punitive damages is very visible in the U.S. at the present time, primarily because of large jury verdicts in product liability and medical malpractice cases, and is the subject of substantial criticism. But absent legislative action at the federal and state levels, there is likely to be little change.⁸ As one justice of the U.S. Supreme Court stated (in an opinion upholding the award of punitive damages against an incidental party to the transaction in an amount four times the actual damages incurred), a "harsh or unwise procedure is not necessarily unconstitutional."

Punitive damages are also allowed under a number of statutes on the "private attorney general" theory. Under this theory, if a plaintiff enforces a public policy at his or her own expense, that plaintiff should be entitled to a bonus - typically, three times the actual damages - for taking that risk. What this means is that our basic breach of contract action, with a fraud count added, now has counts added for such things as violations of the U.S. antitrust (competition) laws or the most decidedly American of all causes of action, a "RICO" claim. "RICO" is the Racketeering Influenced and Corrupt Organizations Act, a federal statute intended to reach the otherwise lawful commercial activities of organized crime. RICO permits a civil litigant to seek triple damages for a "pattern of racketeering activity," with the latter defined in such a way that it encompasses many allegations of fraud. More than one non-U.S. person has been surprised to see a

⁸ Some states have in fact enacted laws limiting the amount of punitive damages that can be awarded in certain types of cases.

complaint in an otherwise unremarkable commercial dispute which alleges that the person is a "racketeer," but such are the opportunities and risks of the U.S. legal system.

III. Trial by Jury. Jury trials are available for most civil actions if either party so requests. The unpredictability of U.S. juries is perhaps the greatest weapon of a plaintiff. Americans from all walks of life are summoned for jury service. Court clerks generally rely on voter registration rolls, motor vehicle licensing lists, and/or tax rolls to obtain names and addresses of potential jurors. Trial juries are selected in court by the attorneys for the parties from an array of potential jurors. The attorneys may challenge potential jurors for good cause and may exercise a limited number of discretionary challenges. While jury selection has become more sophisticated in recent years, and some attorneys have taken to retaining professional consultants (often psychologists) to help screen jurors, the process is still more of an art than a science.

Although statistics indicate that fewer and fewer cases reach trial, those that do reach trial are increasingly decided by juries.^{9/} A trial by jury may have more value as a threat than as a reality, however. A substantial number of cases are still tried in front of a judge, and even in cases where trial by jury is authorized, the final decision in the case is often made by a judge. For example, when there are no material issues of fact in a case, so that the dispute is solely one of legal interpretation, a judge may decide the merits of the case on summary judgment before trial. Similarly, if a judge determines during the course of a trial that there are no material facts in dispute, or that the evidence adduced by a party is legally insufficient to support a claim, the judge may direct a verdict. Even after a jury renders a verdict, it is subject to modification or vacation by the trial judge if it is clearly contrary to the weight of the evidence or is legally insupportable.

IV. Privilege. While the rules of discovery, as described above, are quite broad, a party may prevent certain information classified as privileged from being discovered by the opposing party. In the litigation context, the attorney-client privilege is particularly important. The advice, recommendations and opinions communicated to a client by its attorney are generally considered privileged, and need not be disclosed to opposing litigants in discovery. However, documents prepared by or for an attorney in anticipation of litigation are considered attorney "work product," and such documents may in certain limited instances be subject to discovery by an opposing party to the extent that such documents do not disclose the impressions, conclusions, opinions, or legal theories of the attorney. In particular, factual material collected by an attorney or for an attorney in anticipation of litigation may be discoverable if such material cannot otherwise be obtained without "undue hardship."

ALTERNATIVES TO FORMAL LITIGATION

For purely commercial disputes, the chief alternative to a lawsuit is binding arbitration. Arbitration is not as quick or inexpensive as many believe, but it is often preferable to the courts. In an arbitration, the parties present their evidence and legal arguments to an arbitrator or panel of arbitrators, much as they would present such evidence and arguments to a judge and/or jury. The difference is that the deciders-of-fact are chosen by the parties pursuant to a previously agreed upon procedure. Parties may provide in their contracts and agreements that disputes arising thereunder will be resolved by arbitration, or they may agree later to arbitrate a dispute that has arisen under a contract which does not have an arbitration clause. Parties can utilize one of several arbitration services, such as the American Arbitration Association and the International Chamber of Commerce International Court of Arbitration, or the parties can select their own panel of arbitrators. Arbitration agreements are in great favor in the courts of the U.S. (since they help reduce court congestion), and the courts construe such agreements liberally. Arbitration generally cuts down on the scope and length of pre-trial discovery and is not subject to court calendar congestion problems. Additionally, the parties can usually select arbitrators who are attorneys or other professionals with relevant technical experience.^{10/}

^{9/} Of the 12,536 civil cases tried in federal courts in 1988, 7,088 were decided by a judge and 5,448 were decided by a jury. Of the 4497 civil cases tried in federal courts in 2002, 1547 were decided by a judge and 2950 were decided by a jury.

^{10/} A relatively new, but increasingly available option for arbitration is the use of former judges as arbitrators. The judges are generally former state court judges, though some former federal court and federal administrative judges also

Even in cases in which the parties have not provided for arbitration, there are other alternative dispute resolution (ADR) methods which may help short-cut the litigation effort. Many state and federal courts are experimenting with or have adopted ADR as a formal part of the pre-trial process for civil actions. Parties can agree to utilize these methods in the absence of an established court program. ADR methods include mediation (in which a trained mediator attempts to work with the parties to negotiate a settlement of the case), non-binding arbitration (in which the result of the arbitration is not legally enforceable, but is used by the parties as an advisory opinion to help determine the contours of a settlement), and mini-trials (in which the parties make a summary presentation of their respective cases to a trier of fact selected by the court, with the verdict to then be used by the parties to help guide a settlement).

CONCLUSION

A non-U.S. company whose business dealings will put it into a position to sue or be sued in the U.S. should either be prepared to deal with the U.S. system of civil justice or should provide for arbitration in its underlying contracts and agreements.

A lawsuit in the U.S. can take on a life of its own, ebbing and flowing at the various stages. It can and will engage the precious time and energies of management personnel. Because of its adversarial nature, it can become an emotional matter, a contest of wills, a "grudge match." It can endanger or destroy long-standing commercial and, perhaps, personal relationships.

This is no more than fair warning. The challenge for parties to such litigation is to stay on an even course and recognize that the lawsuit is really a commercial matter. In its own way, the U.S. legal system is designed to encourage or force a commercial resolution of disputes that is as fair as possible to both sides. If litigation is approached on an informed basis, a fair resolution of the dispute will be the result more often than not.

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participate. Though many of these former judges have "retired" from the bench, the former judges are not necessarily elderly. State court judges generally have defined terms and are subject to reappointment or reelection, so many have been "retired" involuntarily while still relatively young. Some judges (including federal judges) resign the bench prematurely in order to earn the higher salaries that may be available to them in the private sector. Several organizations have been created to market the services of these former judges and, if the parties desire, to administer the dispute resolution proceedings in which they preside.
