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## CHAPTER 2

# COURTS AND ALTERNATIVE DISPUTE RESOLUTION

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### ANSWER TO CRITICAL ANALYSIS QUESTION IN THE FEATURE

INSIGHT INTO ETHICS—CRITICAL THINKING—INSIGHT INTO THE SOCIAL ENVIRONMENT (PAGE 39)

*If wealthier individuals increasingly use private judges, how will our justice system be affected in the long run?* The government's judicial system may become more focused on other proceedings—criminal trials, for example, or civil appellate matters—rather than civil trials. The private justice system may exist largely to serve the interests of those who pay for it (because the arbitrators, for example, may attempt to rule in favor of those who pay for the arbitrators' efforts).

### ANSWERS TO QUESTIONS AT THE ENDS OF THE CASES

#### CASE 2.1—(PAGE 33)

##### WHAT IF THE FACTS WERE DIFFERENT?

*If Mastondrea had not seen Libgo and Allegro's ad, but had bought a Royal Hideaway vacation package on the recommendation of a Liberty travel agent, is it likely that the result in this case would have been different? Why or why not?* It is not likely that the court would have concluded there was no personal jurisdiction in this case on the basis of the facts stated in the question. It was the defendant hotel's minimum contacts with the state, and its expectations flowing from those contacts, that served as the basis for the court's assertion of jurisdiction. Those contacts included marketing activities, which were part of the arrangements with Libgo and Liberty. Whether Mastondrea acted in response to an ad placed by Libgo or a verbal suggestion made by a Liberty agent would not seem significant.

##### THE GLOBAL DIMENSION

*What do the circumstances and the holding in this case suggest to a business firm that actively attempts to attract customers in a variety of jurisdictions?* This situation and the ruling in this case indicate that a business firm actively attempt-

ing soliciting business in a jurisdiction should be prepared to appear in its courts. This principle likely covers any jurisdiction and reaches any business conducted in any manner.

### **CASE 2.2—(PAGE 45)**

#### **THE ETHICAL DIMENSION**

***Does the holding in this case permit a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void? Is this fair? Why or why not?*** The holding in the *Buckeye* case allows a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void. This may seem unfair at first but, in the words of the Court, “it is equally true that respondents’ approach permits a court to deny effect to an arbitration provision in a contract that the court later finds to be perfectly enforceable.” This is why the Court ruled that arbitration provisions are separately enforceable.

#### **THE LEGAL ENVIRONMENT DIMENSION**

***As indicated in the parties’ arguments and the Court’s reasoning in this case, into what categories can contracts be classified, with respect to their enforceability?*** Initially, the plaintiffs contend that the agreement with the defendant is “criminal on its face” because a certain provision violates a state statute, in which circumstance it would be unenforceable. On appeal, the plaintiffs claim that the contract is void (no contract at all) because of the provision’s asserted illegality. The Court rules on the question of whom, under a particular federal statute, may determine whether the contract in this case is valid (enforceable because it meets all of the requirements of a contract). The Court points out that a contract may be also be voidable (valid but avoidable at the option of one or both of the parties).

### **CASE 2.3—(PAGE 47)**

**1A. *On what argument did Morrison base her appeal of the court’s order to arbitrate her employment-discrimination claims?*** Morrison appealed to the U.S. Court of Appeals for the Sixth Circuit, arguing in part that the cost-splitting provision in Circuit City’s arbitration agreement was unenforceable.

**2A. *Why did the U.S. Court of Appeals for the Sixth Circuit hold in Morrison’s case that the arbitration agreement’s cost-splitting provision was unenforceable?*** The court held that the cost-splitting provision was unenforceable because, regardless of an individual employee’s ability to pay the costs, the provision would deter “similarly situated individuals” from exercising their rights.

## **ANSWERS TO QUESTIONS IN THE REVIEWING FEATURE AT THE END OF THE CHAPTER**

### **1A. *Federal jurisdiction***

The federal district court exercises jurisdiction because the case involves diversity of citizenship. Diversity jurisdiction requires that the plaintiff and defendant be from dif-

ferent jurisdictions and that the dollar amount of the controversy exceed \$75,000. Here, Garner resides in Illinois, and Foreman and his manager live in Texas. Because the dispute involved the promotion of boxing matches with George Foreman, the amount in controversy exceeded \$75,000.

**2A.           *Original or appellate jurisdiction***

Original jurisdiction, because the case was initiated in that court and that is where the trial will take place. Courts having original jurisdiction are courts of the first instance, or trial courts—that is courts in which lawsuits begin and trials take place. In the federal court system, the district courts are the trial courts, so the federal district court has original jurisdiction.

**3A.           *Jurisdiction in Illinois***

No, because the defendants lacked minimum contacts with the state of Illinois. Because the defendants were from another state, the court would have to determine if they had sufficient contacts with the state for the Illinois court to exercise jurisdiction based on a long arm statute. Here, the defendants never went to Illinois, and the contract was not formed in Illinois. Thus, it is unlikely that an Illinois state court would find sufficient minimum contacts to exercise jurisdiction.

**4A.           *Jurisdiction in Nevada***

Yes, because the defendants met with Garner and formed a contract in the state of Nevada. A state can exercise jurisdiction over out-of-state defendants under a long arm statute if defendants had sufficient contacts with the state. Because the parties met Garner and negotiated the contract in Nevada, a court would likely hold these activities were sufficient to justify a Nevada court's exercising personal jurisdiction.

## **ANSWERS TO QUESTIONS AND CASE PROBLEMS AT THE END OF THE CHAPTER**

**2-1A.           *(Chapter 2—Pages 43–45)***

An arbitrator's decision has the binding force of law only because the two parties in an arbitration proceeding agree (contract) to be legally bound by the arbitrator's decision. The success of arbitration, and its status as an alternative to court settlement of disputes, rests on this underlying agreement between the parties to be bound by the results. If a person feels that an arbitrator's opinion is unjust, that person may appeal the dispute to a court. Courts, however, are very reluctant to judge the validity of an arbitrator's decision, which is regarded as final in all cases except where serious misconduct or corruption can be proved.

**2-2A.           **QUESTION WITH SAMPLE ANSWER****

Trial courts, as explained in the text, are responsible for settling "questions of fact." Often, when parties bring a case to court there is a dispute as to what actually happened. Different witnesses have different versions of what they saw or heard, and there may be only indirect evidence of certain issues in dispute. During the trial, the judge and the jury (if it is a jury trial) listen to the witnesses and view the evidence firsthand. Thus, the trial court is in the best position to assess the credibility (truthfulness) of the

witnesses and determine the weight that should be given to various items of evidence. At the end of the trial, the judge and the jury (if it is a jury trial) decide what will be considered facts for the purposes of the case. Trial courts are best suited to this job, as they have the opportunity to observe the witnesses and evidence, and they regularly determine the reliability of certain evidence. Appellate courts, in contrast, see only the written record of the trial court proceedings and cannot evaluate the credibility of witnesses and the persuasiveness of evidence. For these reasons, appellate courts nearly always defer to trial courts' findings of fact. An appellate court can reverse a lower court's findings of fact, however, when so little evidence was presented at trial that no reasonable person could have reached the conclusion that the judge or jury reached.

**2-3A.**           *(Chapter 2—Pages 38–39 & 40–41)*

Using videotapes as official trial reports would give appellate judges an overview of proceedings previously limited to trial judges. This could alter the appellate process by making it easier for an appellate judge to consider the credibility of witnesses and to rule on other matters that are generally considered the province of a trial judge because of his or her presence at the proceedings. This could mean, however, that some unspoken factors—the appearance of a witness, the demeanor of a defendant or a plaintiff, the conduct of an attorney, the reactions of a jury, and so on—could influence appellate judges. But videotapes can be deceptive. For this reason, even if video is put into wide use, appellate courts may limit their consideration of the tapes of trial proceedings to the purposes for which printed trial transcripts are used currently.

**2-4A.**           *(Chapter 2—Pages 31–34)*

Marya can bring suit in all three courts. The trucking firm did business in Florida, and the accident occurred there. Thus, the state of Florida would have jurisdiction over the defendant. Because the firm was headquartered in Georgia and had its principal place of business in that state, Marya could also sue in a Georgia court. Finally, because the amount in controversy exceeds \$50,000, the suit could be brought in federal court on the basis of diversity of citizenship.

**2-5A.**           ***E-Jurisdiction***

*(Chapter 2—Pages 34–35)*

The court denied Boyer's motion to dismiss the complaint for lack of personal jurisdiction. "[T]he likelihood that personal jurisdiction can be constitutionally exercised [in the context of Internet activities] is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." Boyer "posted Internet messages on the Yahoo bulletin board, which included negative information regarding ABFI." He "also sent an e-mail to ABFI's independent auditors, accusing ABFI of 'fraudulent accounting practices' and 'borderline criminal conduct' ... with the understanding that the independent auditors were situated in Pennsylvania." Also, the court held that the e-mail fell under the state's long-arm statute, which, like other states' long-arm statutes, permits the exercise of jurisdiction "where an act or omission outside the Commonwealth [Pennsylvania] causes harm or tortious injury inside the Commonwealth." Finally, the court reasoned that "its exercise of jurisdiction over Defendant Boyer would not necessarily violate traditional notions of fair play and substantial justice. It is true that as a non-resident individual, Boyer will be burdened in being forced to defend himself in Pennsylvania. However, his conduct appears to be directed towards

Pennsylvania where Plaintiff is located and where Plaintiff's auditors are located. Plaintiff's interest in adjudicating its dispute and vindicating its reputation in Pennsylvania appears to be self-evident. ... In addition, it does seem reasonable and fair to require Boyer to conduct his defense in Pennsylvania since that is where he sent the negative e-mail."

## **2-6A. Arbitration**

*(Chapter 2— Pages 43–45)*

The court denied Auto Stiegler's motion. A state intermediate appellate court reversed this ruling, and Little appealed to the California Supreme Court, which held that the appeal provision was unenforceable but which also held that the provision could be cut from the agreement and the agreement could then be enforced. Auto Stiegler argued in part that the "provision applied evenhandedly to both parties." The court stated, "[I]f that is the case, [the defendant fails] to explain adequately the reasons for the \$50,000 award threshold. From a plaintiff's perspective, the decision to resort to arbitral appeal would be made not according to the amount of the arbitration award but the potential value of the arbitration claim compared to the costs of the appeal. If the plaintiff and his or her attorney estimate that the potential value of the claim is substantial, and the arbitrator rules that the plaintiff takes nothing because of its erroneous understanding of a point of law, then it is rational for the plaintiff to appeal. Thus, the \$50,000 threshold inordinately benefits defendants. Given the fact that Auto Stiegler was the party imposing the arbitration agreement and the \$50,000 threshold, it is reasonable to conclude it imposed the threshold with the knowledge or belief that it would generally be the defendant." The court acknowledged that "parties may justify an asymmetrical arbitration agreement when there is a legitimate commercial need," but added that the "need must be other than the employer's desire to maximize its advantage in the arbitration process. There is no such justification for the \$50,000 threshold. The explanation for the threshold ... that an award in which there is less than that amount in controversy would not be worth going through the extra step of appellate arbitral review ... makes sense only from a defendant's standpoint and cannot withstand scrutiny."

## **2-7A. Jurisdiction**

*(Chapter 2— Pages 31–34)*

The court denied Sharman's motion to dismiss. The court explained that "fairness consists principally of ensuring that jurisdiction over a person is not exercised absent fair warning that a particular activity may subject that person to the jurisdiction of a foreign sovereign." Thus, "the touchstone constitutional inquiry is whether the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." In this case, "Sharman provides its KMD software to millions of users every week .... Sharman has not denied and cannot deny that a substantial number of its users are California residents, and thus that it is, at a minimum, constructively aware of continuous and substantial commercial interaction with residents of this forum. Further, Sharman is well aware that California is the heart of the entertainment industry, and that the brunt of the injuries described ... is likely to be felt here. It is hard to imagine on these bases alone that Sharman would not reasonably anticipate being haled into court in California. However, jurisdiction is reasonable for an important added reason: Sharman's effective predecessor, Kazaa BV, was engaged in this very litigation when Sharman was formed. ... Because Sharman has succeeded



Kazaa BV in virtually every aspect of its business, Sharman reasonably should have anticipated being required to succeed Kazaa BV in this litigation as well. If Sharman wished to structure its primary conduct with some minimum assurance that it would not be haled into court in this forum, it simply could have avoided taking over the business of a company already enmeshed in litigation here.”

### **2-8A. CASE PROBLEM WITH SAMPLE ANSWER**

This problem concerns standing to sue. As you read in the chapter, to have standing to sue, a party must have a legally protected, tangible interest at stake. The party must show that he or she has been injured, or is likely to be injured, by the actions of the party that he or she seeks to sue. In this case, the issue is whether the Covingtons had been injured, or were likely to be injured, by the county’s landfill operations. Clearly, one could argue that the injuries that the Covingtons complained of directly resulted from the county’s violations of environmental laws while operating the landfill. The Covingtons lived directly across from the landfill, and they were experiencing the specific types of harms (fires, scavenger problems, groundwater contamination) that those laws were enacted to address. Indeed, this was the conclusion reached by the appellate court in this case. While the trial court found that the Covingtons lacked standing to sue, when the plaintiffs appealed to U.S. Court of Appeals for the Ninth Circuit, that court found that the Covingtons did have standing to assert their claims. The appellate court remanded (sent back) the case to the lower court for a trial.

### **2-9A. Jurisdiction**

*(Chapter 2— Pages 31–34)*

The court found that the defendants’ contacts with Illinois were sufficient to establish personal jurisdiction. The court set out the “sliding scale” standard for exercising jurisdiction over parties whose sole contact with a jurisdiction is over the Web. In this case, among other things, the “[d]efendants maintain websites that fall into the middle ground of the ... ‘sliding scale’ [standard]. These Sites allow visitors to post messages (to which Defendants sometimes respond), purchase books, and make donations.” The court concluded that “[t]hese Sites are a far cry from passive websites.” Their “level of interactivity is enough ... for the court to exercise jurisdiction over Defendants.” The court also pointed out that “[d]efendants’ Internet activities more than satisfy the minimum contacts standard .... By purposefully reaching out to the state of Illinois, and conducting business with Illinois citizens, Defendants are on notice that they may be subject to suit in this state.” In other words, “the exercise of personal jurisdiction over Defendants would be reasonable in this case.”

### **2-10A. Jurisdiction**

*(Chapter 2— Pages 31–34)*

A court can exercise personal jurisdiction over a non-resident defendant under the authority of a long arm statute. First, however, it must be shown that the defendant had sufficient minimum contacts with the jurisdiction in which the court is attempting to assert its authority. Generally, this means that the defendant’s connection to the jurisdiction must be enough for the assertion of authority to be fair. In this case, Texas’s long arm statute applied. The court concluded that Poverty Point had sufficient minimum contacts with Texas based on the workers’ “recruitment in Texas for work in Louisiana” and “their transportation from Texas to Louisiana.” The workers signed their contracts and other employment documents in Texas. The terms of the work were revealed in

Texas. Although the Leals had handled the “recruitment” and transportation of the workers in Texas, the Leals had acted on Poverty Point’s behalf. They had been told “how many workers to hire, when to hire them for, where to send them, ... what information to include in their employment agreements,” what documents to have them sign, and what to have them do in the field at the job site. As for the fairness of requiring Poverty Point to appear in a Texas court, “litigation of this case in Texas would not pose a substantial burden on Defendants. Plaintiffs, however, would be severely hampered in their ability to pursue their claims if they are required to litigate them in Louisiana.” Also, “Texas has an interest in protecting its citizens from exploitation by nonresident employers, particularly when its citizens are the targets of recruitment for out-of-state employment.”

## **2-11A. A QUESTION OF ETHICS**

**a.** A court can generally exercise personal jurisdiction over a defendant that has had minimum contacts with the forum “necessary to have reasonably anticipated being haled into court there.” After minimum contacts have been established, a court can consider whether the exercise of personal jurisdiction comports with “traditional conceptions of fair play.”

In this case, the court held that “Rosedale’s representations—which were made as part of a national campaign to induce persons, including Bragg, to visit Second Life and purchase virtual property—constitute sufficient contacts” to support the exercise of personal jurisdiction. The court compared these efforts to an advertising campaign that, for example, urges viewers to call a toll-free phone number to place orders. “This inducement destroys any semblance of ... passive advertising,” which might consist of generalized product promotion that would not support an assertion of jurisdiction.

It was the interactive nature of the marketing scheme, not the Web site, on which the court based its holding. “Rosedale’s personal role was to bait the hook for potential customers to make more interactive contact with Linden by visiting Second Life’s web-site. Rosedale’s activity was designed to generate additional traffic inside Second Life. He was the hawker sitting outside Second Life’s circus tent, singing the marvels of what was contained inside to entice customers to enter. Once inside Second Life, participants could view virtual property, read additional materials about purchasing virtual property, interact with other avatars who owned virtual property, and, ultimately, purchase virtual property themselves. Significantly, participants could even interact with Rosedale’s avatar on Second Life during town hall meetings that he held on the topic of virtual property.”

As for fairness, the court focused chiefly on the burden that would be imposed on Rosedale to make an appearance. Rosedale did not claim that he could not afford to appear “or that he would otherwise be irreparably prejudiced by litigating” in Pennsylvania. Rosedale had lawyers “on both coasts.” Weighed against Rosedale’s burden was Pennsylvania’s interest in protecting its residents from “allegedly misleading representations that induce them to purchase virtual property” and in vindicating their rights.

**b.** Under the Federal Arbitration Act (FAA), a court must compel the arbitration of a dispute if there is a valid agreement to arbitrate that covers the dispute. In this case, the court focused primarily on the validity of the agreement.

A critical factor was the manner in which Linden presented the “Terms of Service” (TOS). A participant was effectively told to “take it or leave it”—one who de-

clined could not gain access to Second Life. There was no opportunity for negotiation so that even a participant like Bragg, who was an experienced attorney, could not use his or her skills to negotiate different terms. And there was no reasonable market alternative—Second Life was the only virtual world to recognize its participants' rights in virtual property.

As for the specific TOS, including the arbitration provision, the court emphasized that Linden allowed itself a range of remedies to resolve disputes while limiting Bragg and other participants to the sole remedy of arbitration. In the circumstances of this case, Linden froze Bragg's account, kept the funds that Linden determined were subject to dispute, and told Bragg that he could resolve the dispute only by arbitration, subject to whatever "asymmetrical" amendment Linden might choose to impose. Also, limiting venue to "Linden's backyard appears to be yet one more means by which the arbitration clause serves to shield Linden from liability instead of providing a neutral forum in which to [resolve] disputes." Altogether, these terms were one-sided and thus unfair.



## ANSWER TO VIDEO QUESTION NO. 2-12



### *Jurisdiction in Cyberspace*

**(a) *What standard would a court apply to determine whether it has jurisdiction over the out-of-state computer firm in the video?*** A court would apply a "sliding-scale" standard to determine if the defendants (Wizard Internet) had sufficient minimum contacts with the state for the court to assert jurisdiction. Generally, the courts have found that jurisdiction is proper when there is substantial business conducted over the Internet (with contracts, sales, and so on). When there is some interactivity through a Web site, courts have also sometimes held that jurisdiction is proper. Jurisdiction is not proper, however, when there is merely passive advertising.

**(b) *What factors is a court likely to consider in assessing whether sufficient contacts existed when the only connection to the jurisdiction is through a Web site?*** The facts in the video indicate that there might be some interactivity through Wizard Internet's Web site. The court will likely focus on Wizard's Web site and determine what kinds of business it conducts over the Web site. The court will consider whether a person could order Wizard's products or services via the Web site, whether the defendant entered into contracts over the Web, and if the defendant did business with other Montana residents.

**(c) *How do you think the court would resolve the issue in this case?*** Wizard Internet could argue that the site is not "interactive" because software cannot be downloaded from the site (according to Caleb). That would be the defendant's strongest argument against jurisdiction. The court, however, would also consider any other interactivity. The facts state that Wizard has done projects in other states and might have clients in Montana (although Anna and Caleb cannot remember). If Wizard does have clients in Montana who purchased software via the Web site, the court will likely find jurisdiction is proper because the defendant



purposefully availed itself of the privilege of acting in the forum state. Also, if Wizard Internet regularly enters contracts to sell its software or consulting services over the Web—which seems likely, given the type of business in which Wizard engages—the court may hold jurisdiction is proper. If, however, Wizard simply advertises its services over the Internet and persons cannot place orders via the Web, the court will likely hold that this PASSIVE advertising does not justify asserting jurisdiction.