|  |
| --- |
| Chapter 2 |
|  |



**Courts and Alternative Dispute Resolution**

**Introduction**

Despite the substantial amount of litigation that occurs in the United States, the experience of many students with the American judicial system is limited to little more that some exposure to traffic court. In fact, most persons have more experience with and know more about the executive and legislative branches of gov­ernment than they do about the judicial branch. This chapter provides an excellent opportunity to make many aware of the nature and purpose of this major branch of our government.

One goal of this text is to give students an understanding of which courts have power to hear what dis­putes and when. Thus, the first major concept introduced in this chapter is jurisdiction. Careful attention is given to the requirements for federal jurisdiction and to which cases reach the Supreme Court of the United States. It might be emphasized at this point that the federal courts are not necessarily superior to the state courts. The federal court system is simply an independent system authorized by the Constitution to han­dle matters of particular federal interest.

This chapter also covers alternatives to litigation that can be as binding to the parties involved as a court’s decree. Alternative dispute resolution, including online dispute resolution, is the chapter’s third major topic.

Among important points to remind students of during the discussion of this chapter are that most cases in the textbook are appellate cases (except for federal district court decisions, few trial court opinions are even published), and that most disputes brought to court are settled before trial. Of those that go through trial to a final verdict, less than 4 percent are reversed on appeal. Also, it might be emphasized again that in a common law system, such as the United States’, cases are the law. Most of the principles set out in the text of the chap­ters represent judgments in decided cases that involved real people in real controversies.

**Chapter Outline**

**I. The Judiciary’s Role in American Government**

The essential role of the judiciary is to interpret and apply the law to specific situations.

**A. Judicial Review**

The judici­ary can decide, among other things, whether the laws or actions of the other two branches are constitutional. The process for making such a determination is known as judicial review.

**B. The Origins of Judicial Review in the United States**

Judicial review was a new concept at the time of the adoption of the Constitution, but it is not mentioned in the document. Its application by the United State Supreme Court came soon after the United States began, notably in the case of *Marbury v. Madison.*

|  |
| --- |
|  |
| Enhancing Your Lecture— |
|  |
|  *Marbury v. Madison* (1803)  |
|  |
| In the edifice of American law, the *Marbury v. Madison***a** decision in 1803 can be viewed as the key­stone of the constitutional arch. The facts of the case were as follows. John Adams, who had lost his bid for reelection to the presidency to Thomas Jefferson in 1800, feared the Jeffersonians’ antipathy toward business and toward a strong central government. Adams thus worked feverishly to “pack” the judiciary with loyal Federalists (those who believed in a strong national government) by appointing what came to be called “midnight judges” just before Jefferson took office. All of the fifty-nine judicial appointment let­ters had to be certified and delivered, but Adams’s secretary of state (John Marshall) had succeeded in delivering only forty-two of them by the time Jefferson took over as president. Jefferson, of course, re­fused to order his secretary of state, James Madison, to deliver the remaining commissions. |
|  |
| Marshall’s Dilemma |
|  |
| William Marbury and three others to whom the commissions had not been delivered sought a writ of *mandamus* (an order directing a government official to fulfill a duty) from the United States Supreme Court, as authorized by Section 13 of the Judiciary Act of 1789. As fate would have it, John Marshall had stepped down as Adams’s secretary of state only to become chief justice of the Supreme Court. Marshall faced a dilemma: If he ordered the commissions delivered, the new secretary of state (Madison) could simply refuse to deliver them—and the Court had no way to compel action, because it had no police force. At the same time, if Marshall simply allowed the new administration to do as it wished, the Court’s power would be severely eroded. |
|  |
| Marshall’s Decision |
|  |
| Marshall masterfully fashioned his decision. On the one hand, he enlarged the power of the Supreme Court by affirming the Court’s power of judicial review. He stated, “It is emphatically the prov­ince and duty of the Judicial Department to say what the law is. .  .  . If two laws conflict with each other, the courts must decide on the operation of each. .  .  . So if the law be in opposition to the Constitution .  .  . [t]he Court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty.” |
|  |
| On the other hand, his decision did not require anyone to do anything. He stated that the highest court did not have the power to issue a writ of *mandamus* in this particular case. Marshall pointed out that although the Judiciary Act of 1789 specified that the Supreme Court could issue writs of *mandamus* as part of its original jurisdiction, Article III of the Constitution, which spelled out the Court’s original jurisdiction, did not mention writs of *mandamus*. Because Congress did not have the right to expand the Supreme Court’s jurisdiction, this section of the Judiciary Act of 1789 was uncon­sti­tutional—and thus void. The decision still stands today as a judicial and political masterpiece. |
|  |
| Application to Today’s World |
|  |
| Since the *Marbury v. Madison* decision, the power of judicial review has remained unchallenged. Today, this power is exercised by both federal and state courts. For example, as your students will read in Chapter 4, several of the laws that Congress has passed in an attempt to protect minors from Internet pornography have been held unconstitutional by the courts. If the courts did not have the power of judicial review, the constitutionality of these acts of Congress could not be challenged in court—a con­gressional statute would remain law until changed by Congress. Because of the impor­tance of *Marbury v. Madison* in our legal system, the courts of other countries that have adopted a constitutional democ­racy often cite this decision as a justification for judicial review. |
|  |
|  |
|  |
| a. 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). |
|  |

|  |
| --- |
|  |
| Enhancing Your Lecture— |
|  |
|  Judicial Review in Other Nations  |
|  |
| The concept of judicial review was pioneered by the United States. Some maintain that one of the rea­sons the doctrine was readily accepted in this country was that it fit well with the checks and bal­ances designed by the founders. Today, all established constitutional democracies have some form of ju­dicial review—the power to rule on the constitutionality of laws—but its form varies from country to country. |
|  |
| For example, Canada’s Supreme Court can exercise judicial review but is barred from doing so if a law includes a provision explicitly prohibiting such review. France has a Constitutional Council that rules on the constitutionality of laws *before* the laws take effect. Laws can be referred to the council for prior review by the president, the prime minister, and the heads of the two chambers of parliament. Prior review is also an option in Germany and Italy, if requested by the national or a regional govern­ment. In contrast, the United States Supreme Court does not give advisory opinions; be before the Supreme Court will render a decision only when there is an actual dispute concerning an issue. |
|  |
| For Critical Analysis |
|  |
| In any country in which a constitution sets forth the basic powers and structure of government, some governmental body has to decide whether laws enacted by the government are consistent with that con­stitution. ***Why might the courts be best suited to handle this task? Can you propose a better alternative?*** |
|  |

**II. Basic Judicial Requirements**

Before a lawsuit can be heard in a court, certain requirements must be met. These requirements re­late to jurisdiction, venue, and standing to sue.

**A. Jurisdiction**

Jurisdiction is the power to hear and decide a case. Before a court can hear a case, it must have juris­dic­tion over both the person against whom the suit is brought or the prop­erty involved in the suit and the subject matter of the case.

**1. Jurisdiction over Persons or Property**

Power over the person is re­ferred to as *in personam* juris­diction; power over property is re­ferred to as *in rem* jurisdic­tion.

**a. Long Arm Statutes and Minimum Contacts**

Generally, a court’s power is limited to the territorial boundaries of the state in which it is located, but in some cases, a state’s long arm statute gives a court ju­risdiction over a nonresident.

**b. Corporate Contacts**

A corporation is subject to the ju­risdiction of the courts in any state in which it is incorporated, in which it has its main office, or in which it does business.

|  |
| --- |
|  |
| **Additional Background—** |
|  |
| **Long Arm Statutes** |
|  |
| A court has personal jurisdiction over persons who consent to it—for example, persons who re­side within a court’s territorial boundaries impliedly consent to the court’s personal jurisdiction. A state **long arm statute** gives a state court the authority to exercise jurisdiction over nonresident indi­vidu­als under circumstances specified in the statute. Typically, these circumstances include going into or com­municating with someone in the state for limited purposes, such as transacting business, to which the claim in which jurisdiction is sought must relate. |
|  |
| The following is New York’s long arm statute, New York Civil Practice Laws and Rules Section 302 (NY CPLR § 302). |
|  |
| MCKINNEY’S CONSOLIDATED LAWS OF NEW YORK ANNOTATED |
|  |
| CHAPTER EIGHT OF THE CONSOLIDATED LAWS |
| **ARTICLE 3—JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT** |
|  |
| **§ 302. Personal jurisdiction by acts of non-domiciliaries** |
|  |
| **(a) Acts which are the basis of jurisdiction.** As to a cause of action arising from any of the acts enu­mer­ated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent: |
|  |
| 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or |
|  |
| 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or |
|  |
| 3. commits a tortious act without the state causing injury to person or property within the state, ex­cept as to a cause of action for defamation of character arising from the act, if he |
|  |
| (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or |
|  |
| (ii) expects or should reasonably expect the act to have consequences in the state and derives sub­stan­tial revenue from interstate or international commerce; or |
|  |
| 4. owns, uses or possesses any real property situated within the state. |
|  |
| **(b) Personal jurisdiction over non-resident defendant in matrimonial actions or family court proceed**­**ings.** A court in any matrimonial action or family court proceeding involving a de­mand for support, alimony, maintenance, distributive awards or special relief in matrimonial actions may exercise per­sonal jurisdic­tion over the respondent or defendant notwithstanding the fact that he or she no longer is a resident or domiciliary of this state, or over his or her executor or administrator, if the party seek­ing support is a resident of or domiciled in this state at the time such demand is made, provided that this state was the matrimonial domicile of the parties before their separation, or the defendant aban­doned the plaintiff in this state, or the claim for support, alimony, maintenance, distributive awards or spe­cial relief in mat­rimonial actions accrued under the laws of this state or under an agreement executed in this state. |
|  |
| **(c) Effect of appearance.** Where personal jurisdiction is based solely upon this section, an appear­ance does not confer such jurisdiction with respect to causes of action not arising from an act enu­merated in this section. |
|  |

**2. Jurisdiction over Subject Matter**

Subject-mat­ter jurisdiction involves limitations on the types of cases a court can hear.

**a. General and Limited Jurisdiction**

A court of gen­eral jurisdiction can hear virtually any type of case, except a case that is appro­priate for a court of limited jurisdiction.

**b. Original and Appellate Jurisdiction**

Courts of original jurisdiction are trial courts; courts of appel­late juris­diction are reviewing courts.

**3. Jurisdiction of the Federal Courts**

**a. Federal Questions**

A suit can be brought in a federal court whenever it involves a question arising under the Constitution, a treaty, or a federal law.

**b. Diversity of Citizenship**

A suit can be brought in a federal court whenever it involves citizens of different states, a foreign coun­try and an American cit­izen, or a foreign citizen and an American citizen. Congress has set an additional require­ment—the amount in controversy must be more than $75,000. For di­ver­sity-of-citizenship purposes, a corpora­tion is a citizen of the state in which it is incorpo­rated and of the state in which it has its principal place of business.

|  |
| --- |
|  |
| **Case Synopsis—** |
|  |
| **Case 2.1: *Mala v. Crown Bay Marina, Inc.*** |
|  |
| Kelley Mala was severely burned when his boat exploded after being over-fueled at Crown Bay Marina in the Virgin Islands. Mala filed a suit in a federal district court against Crown Bay and sought a jury trial. Crown Bay argued that a plaintiff in an admiralty case does not have a right to a jury trial unless the court has diversity jurisdiction. Crown Bay asserted that it, like Mala, was a citizen of the Virgin Islands. The court struck Mala’s jury demand. From a judgment in Crown Bay’s favor, Mala appealed. |
|  |
| The U.S Court of Appeals for the Third Circuit affirmed that Mala failed to prove diversity “because he did not offer evidence that Crown Bay was anything other than a citizen of the Virgin Islands.” |
|  |
| ............................................................................................................................................... |
|  |
| **Notes and Questions** |
|  |
| ***How did the court’s conclusion in the* Mala *case affect the outcome?*** The court’s conclusion determined the outcome in this case. Mala sought a jury trial on his claim of Crown Bay’s negligence, but he did not have a right to a jury trial unless the parties had diversity of citizenship. Because the court concluded that the parties did not have diversity of citizenship, Mala was determined not to have a jury-trial right. |
|  |
| The outcome very likely would have been different if the court had concluded otherwise. The lower court had empaneled an advisory jury, which recommended a verdict in Mala’s favor. This verdict was rejected, however, and a judgment issued in favor of Crown Bay. On appeal, the U.S. Court of Appeals for the Third Circuit affirmed the lower court’s judgment. |
|  |

|  |
| --- |
|  |
| **Additional Background—** |
|  |
| **Diversity of Citizenship** |
|  |
| Under Article III, Section 2 of the United States Constitution, diversity of citizenship is one of the bases for federal jurisdiction. Congress further limits the number of suits that federal courts might otherwise hear by setting a minimum to the amount of money that must be involved before a federal district court can exercise jurisdiction. |
|  |
| The following is the statute in which Congress sets out the requirements for diversity jurisdic­tion, including the amount in controversy. |
|  |
| UNITED STATES CODE |
|  |
| TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE |
| **PART IV—JURISDICTION AND VENUE** |
| **CHAPTER 85—DISTRICT COURTS; JURISDICTION** |
|  |
| **§ 1332. Diversity of citizenship; amount in controversy; costs** |
|  |
| (a) The district courts shall have original jurisdiction of all civil actions where the matter in contro­versy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between-- |
|  |
| (1) citizens of different States; |
|  |
| (2) citizens of a State and citizens or subjects of a foreign state; |
|  |
| (3) citizens of different States and in which citizens or subjects of a foreign state are additional par­ties; and |
|  |
| (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of differ­ent States. |
|  |
| For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled. |
|  |
| (b) Except when express provision therefore is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to re­cover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. |
|  |
| (c) For the purposes of this section and section 1441 of this title— |
| (1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the in­surer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which ac­tion the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorpo­rated and of the State where it has its principal place of business; and |
|  |
| (2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent. |
|  |
| (d) The word “States”, as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico. |
|  |
| (June 25, 1948, c. 646, 62 Stat. 930; July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub.L. 85-554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub.L. 88-439, § 1, 78 Stat. 445; Oct. 21, 1976, Pub.L. 94-583, § 3, 90 Stat. 2891; Nov. 19, 1988, Pub.L. 100-702, Title II, §§ 201 to 203, 102 Stat. 4646 ; Oct. 19, 1996, Pub.L. 104-317, Title II, § 205(a), 110 Stat. 3850.) |
|  |

**4. Exclusive v. Concurrent Jurisdiction**

When a case can be heard only in federal courts or only in state courts, exclu­sive ju­risdiction ex­ists. Federal courts have exclusive jurisdiction in cases involving fed­eral crimes, bankruptcy, patents, and copyrights; in suits against the United States; and in some areas of admiralty law. States have exclusive jurisdiction in certain subject mat­ters—for example, divorce and adoptions.

When both state and federal courts have the power to hear a case, concurrent jurisdic­tion exists. Factors for choosing one forum over another include—

• Availability of different remedies.

• Distance to the courthouse.

• Experience or reputation of the judge.

• The court’s bias for or against the law, the parties, or the facts in the case.

**B. Jurisdiction in Cyberspace**

The basic question in this context is whether there are sufficient minimum contacts in a jurisdic­tion if the only connection to it is an ad on the Web originating from a remote location.

**1. The “Sliding-Scale” Standard**

One approach is the sliding scale, according to which—

• Doing substantial business online is a sufficient basis for jurisdiction.

• Some Internet interactivity may support jurisdiction.

• A passive ad is not enough on which to base jurisdiction.

**2. International Jurisdictional Issues**

The minimum-contact standard can apply in an international context. As in cyberspace, a firm should attempt to comply with the laws of any jurisdiction in which it targets customers.

|  |
| --- |
|  |
| **Case Synopsis—** |
|  |
| **Case 2.2: *Gucci America, Inc. v. Wang Huoqing*** |
|  |
| Gucci America, Inc., a New York corporation, makes footwear, belts, sunglasses, handbags, and wallets. Gucci uses twenty-one trademarks associated with its goods. Wang Huoqing, a resident of the People’s Republic of China, offered for sale through his Web sites counterfeit Gucci goods. Gucci hired a private investigator in California to buy goods from the sites. Gucci then filed a suit against Huoqing in a federal district court, seeking damages and an injunction preventing further trademark infringement. The court first had to determine whether it had jurisdiction. |
|  |
| The court held that it had personal jurisdiction over Wang Huoqing. The U.S. Constitution’s due process clause allows a federal court to exercise jurisdiction over a defendant who has had sufficient minimum contacts with the court’s forum. Huoqing’s fully interactive Web sites met this standard. Gucci also showed that within the forum Huoqing had made at least one sale—to Gucci’s investigator. The court granted Gucci an injunction. |
|  |
| ............................................................................................................................................... |
|  |
| **Notes and Questions** |
|  |
| ***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 attempting to solicit 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. |
|  |

**3. Minimum Contacts and Smartphones**

When does the use of a phone establish jurisdiction? Is an app’s creator or purveyor subject to jurisdiction anywhere the app is downloaded?

**C. Venue**

A court that has jurisdiction may not have venue. Venue refers to the most appropriate location for a trial. Essentially, the court that tries a case should be in the geographic area in which the incident occurred or the par­ties reside.

**D. Standing to Sue**

Before a person can bring a lawsuit before a court, the party must have standing, which has three elements‑

• *Harm*—The party must have suffered a harm, or been threatened a harm, by the action about which he or she is com­plaining. The controversy at issue must also be real and substantial, as opposed to hy­pothetical or academic.

• *Causal connection*—There must be a causal connection between the injury and the conduct complained of.

• *Likelihood of remedy*—It must be likely, as opposed to speculative, that a favorable court decision will remedy, or make up for, the injury suffered.

**III. The State and Federal Court Systems**

**A. The State Court System**

Many state court systems have a level of trial courts and two levels of appellate courts.

|  |
| --- |
|  |
| **Enhancing Your Lecture—** |
|  |
|  Court Budgets and Access  |
|  |
| In the United States, businesses use the courts far more than anyone else. Most civil court cases involve a business suing another business for breach of contract or fraud, for instance. Additionally, when one company fails to pay another company for products or services, the unpaid company will often turn to the court system. If that firm does not have ready access to the courts, its financial stability can be put at risk. |
|  |
| **Budget Cuts** |
|  |
| According to the National Center for State Courts, since 2009 forty-one state legislatures have reduced their state court services to the public as a result of budget restrictions. Many state courts have cut staff, delayed filling vacancies, and reduced hours of operation. Ten states that have delayed or reduced the number of jury trials. California’s courts have experienced the steepest cuts—nearly $1 billion over six years, $544 million from their budget in 2012 alone. Texas has also experienced large cuts in its court funding in recent years. |
|  |
| **Intellectual Property Disputes** |
|  |
| Today, the value of a company’s intellectual property, such as its copyrights and patents, often exceeds the value of its physical property. Not surprisingly, disputes over intellectual property have grown in number and importance. As a result of the court budget cuts, these disputes also take longer to resolve. In California, for example, a typical patent lawsuit used to last twelve months. Today, that same lawsuit might take three to five years. |
|  |
| If an intellectual property case goes on to an appellate court, it typically adds a three or four more years before the dispute is resolved. In fact, the United States Supreme Court heard a case in 2014 involving a trademark dispute that had been in the courts for more than sixteen years.**a** |
|  |
| Investors are reluctant to invest in a company that is the object of a patent or copyright lawsuit because they fear that if the company loses, it may lose the rights to its most valuable product. Consequently, when litigation drags on for years, some companies may suffer because investors abandon them even though the companies are otherwise healthy. |
|  |
| **Cost to Litigants** |
|  |
| Other types of lawsuits are also taking longer to conclude. Now attorneys must tell businesses to consider not only the cost of bringing a lawsuit, but also the length of time involved. The longer the litigation lasts, the larger the legal bills and the greater the drain on company employees’ time. Roy Weinstein, managing director of Micronomics in California, argues that the economic impact of court delays on businesses is substantial. During the years that a lawsuit can take, some businesses find that they cannot expand or hire new employees, and they are reluctant to spend on additional marketing and advertising. |
|  |
| In fact, it is not unusual for a company to win its case but end up going out of business. As a result of putting its business on hold for years, the company becomes insolvent. |
|  |
| **Disincentive to File** |
|  |
| Facing long delays in litigation with potential negative effects on their companies, business managers are becoming reluctant to bring lawsuits, even when their cases clearly have merit. In Alabama, for instance, the number of civil cases filed has dropped by more than a third in the last few years. |
|  |
| **Cost-Benefit Analysis** |
|  |
| Before bringing a lawsuit, a manager must now take into account the possibility of long delays before the case is resolved. A cost-benefit analysis for undertaking litigation must include the delays in the calculations. Managers can no longer just stand on principle because they know that they are right and that they will win a lawsuit. They have to look at the bigger picture, which includes substantial court delays. |
|  |
| ............................................................................................................................................... |
|  |
| **Critical Thinking** |
|  |
| ***What are some of the costs of increased litigation delays caused by court budget cuts?*** Most attorneys require a retaining fee. The longer this fee is held by the attorney, the higher the present value cost of the litigation. In addition, the opportunity cost of all of the company employees who work on the litigation must be included, too. Also, if there is any negative press during the litigation, that will have an impact on the company’s revenues. Uncertainty about the results of the litigation may cause investors to back away. Uncertainty about the outcome of the litigation may also cause managers to forestall new projects. |
|  |
| ***In response to budget cuts, many states have increased their filing fees. Is this fair? Why or why not?*** Some argue that those businesses that avail themselves of the court system should pay a higher percentage of the actual costs of that court system. Others point out that the higher the costs imposed by the states to those businesses that wish to litigate, the less litigation there will be. And some of that reduced litigation may be meritorious. |
|  |
|  |
| **a.***B&B Hardware Inc. v. Hargis Industries, Inc.,* \_\_\_ U.S. \_\_\_, 135 S.Ct. 1295, 191 L.Ed.3d 222 (2014). |
|  |

**1. Trial Courts**

**a. General Jurisdiction**

Trial courts with gen­eral jurisdiction include county, district, and superior courts.

**b. Limited Jurisdiction**

Trial courts with limited jurisdiction include local municipal courts (which handle mainly traffic cases), small claims courts, and domestic relations courts.

**2. Appellate. or Reviewing, Courts**

In most states, after a case is tried, there is a right to at least one appeal. Few cases are re­tried on ap­peal. An appellate court examines the record of a case, looking at questions of law and procedure for errors by the court be­low. In about half of the states, there is an in­termediate level of appellate courts.

|  |
| --- |
|  |
| **Case Synopsis—** |
|  |
| **Case 2.3: *Johnson v. Oxy USA, Inc.*** |
|  |
| Jennifer Johnson was working for Oxy USA, Inc., when Oxy changed the job’s requirements. To meet the new standards, Johnson took certain courses. Oxy’s “Educational Assistance Policy” was to reimburse employees for the cost. Johnson further agreed that Oxy could withhold the reimbursed amount from her final paycheck if she quit Oxy within a year. When she resigned less than a year later, Oxy withheld that amount from her last check. Johnson filed a claim for the amount with the Texas Workforce Commission (TWC). Without deciding whether Oxy violated its own Educational Assistance Policy as Johnson contended, the TWC ruled that she was not entitled to the unpaid wages. She filed a suit in a Texas state court against Oxy, alleging breach of contract. The court affirmed the TWC’s ruling, holding that Johnson’s claim for breach of contract was barred by *res judicata*. Johnson appealed. |
|  |
| A state intermediate appellate court reversed and remanded. “The TWC did not decide the key question of fact in dispute—whether Oxy violated its own Educational Assistance Policy when it withheld Johnson’s final wages.” Because the question had not been resolved, *res judicata* did not bar the claim. |
|  |
| ............................................................................................................................................... |
|  |
| **Notes and Questions** |
|  |
| ***Forty states have intermediate appellate courts. Ten states—Delaware, Maine, Montana, Nevada, New Hampshire, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming—have only a single level of appeal, which is of course the state’s supreme court.*** ***Why the difference?*** The primary reason that most states have intermediate appellate courts is the size of the state’s caseload. Crowded dockets at the appellate level led to the creation of more courts to relieve the backlog of casework. The chief reason that some states do not have more than one level of appellate resort is that the workload is not seen as heavy enough to warrant the expense. |
|  |
| When the legal systems in the states were formed, a single appellate court was generally considered sufficient. In the nineteenth and twentieth centuries, most states’ caseloads increased significantly. This was due to— |
|  |
| • Population growth.  • Expanded appeal rights in criminal cases.  • More law—statutes, ordinances, rules, regulations, case law, and so on.  • Broadened appellate jurisdiction.  • Increased resort to the courts to resolve social and economic issues. |
|  |

**3. Highest State Courts**

In all states, there is a higher court, usually called the state supreme court. The de­cisions of this highest court on all ques­tions of state law are final. If a federal constitu­tional issue is involved in the state supreme court’s decision, the decision may be appealed to the United States Supreme Court.

**B. The Federal Court System**

The federal court system is also three-tiered with a level of trial courts and two levels of appel­late courts, including the United States Supreme Court.

**1. U.S. District Courts**

Federal trial courts of gen­eral jurisdiction are called district courts. (A district may consist of an entire state or part of a state. A district court has geographical jurisdic­tion corre­sponding to the territory of its district. Congress determines the number of districts.) Trial courts of limited jurisdiction include U.S. Tax Courts and U.S. Bankruptcy Courts.

**2. U.S. Courts of Appeals**

U.S. courts of appeal hear appeals from the deci­sions of the district courts located within their respective circuits. (The U.S. and its territories are divided into twelve judi­cial cir­cuits. The jurisdiction of a thirteenth circuit—the federal circuit—is na­tional but limited to certain subject matter.) The decision of each court of appeals is binding on federal courts only in that circuit.

**3. The United States Supreme Court**

The court at the top of the federal system is the United States Supreme Court to which fur­ther ap­peal is not mandatory but may be possible.

**a. Appeals to the Supreme Court**

A party may ask the Court to issue a writ of *certiorari*, but the Court may deny the peti­tion. Denying a petition is not a decision on the merits of the case. Most petitions are de­nied.

**b. Petitions Granted by the Court**

Typically, the Court grants petitions only in cases that at least four of the jus­tices view as involving important constitutional questions.

**IV. Alternative Dispute Resolution**

The advantage of alternative dispute resolution (ADR) is its flexibility. Normally, the parties them­selves can control how the dispute will be settled, what procedures will be used, and whether the deci­sion reached (either by themselves or by a neutral third party) will be legally binding or nonbinding. Approximately 95 percent of cases are settled before trial through some form of ADR.

**A. Negotiation**

In a negotiation, the parties attempt to settle their dispute informally, with or without attorneys. They try to reach a resolution without the involvement of a third party acting as mediator.

**B. Mediation**

In mediation, the parties attempt to come to an agreement with the assistance of a neutral third party, a mediator. Mediation is essentially a form of “assisted negotiation.” The mediator does not make a decision on the matter being disputed.

**C. Arbitration**

A more formal method of ADR is arbitration, in which a neutral third party or a panel of experts hears a dispute andrenders a decision.The decision can be legally binding. Formal arbitration resembles a trial. The parties may appeal, but a court’s review of an arbitration proceeding is more restricted than a review of a lower court’s proceeding.

**1. The Arbitration Decision**

An arbitrator’s award will be set aside only if—

• The arbitrator’s conduct or “bad faith” substantially prejudiced the rights of a party.

• The award violates public policy.

• The arbitrator exceeded his or her powers.

**2. Arbitration Clauses**

Virtually any commercial matter can be submitted to arbitration. Often, parties include an arbitration clause in a contract. Parties can also agree to arbitrate a dispute after it arises.

|  |  |  |  |
| --- | --- | --- | --- |
|  | | | |
| **Additional Background—** | | | |
|  | | | |
| **ADR and the Courts** | | | |
|  | | | |
| States in which one or more  local **state** court has— | | States in which one or more  **federal** court has— | |
|  | |  | |
| **Arbitration** | **Mediation** | **Arbitration** | **Mediation** |
|  |  |  |  |
| Alabama  Alaska  Arizona  California  Delaware  Florida  Georgia  Hawaii  Illinois  Michigan  Minnesota  Missouri  Nevada  New Hampshire  New Jersey  New Mexico  New York  North Carolina  Ohio  Oregon  Pennsylvania  Rhode Island  Texas  Washington | Alabama  Alaska  Arizona  California  Connecticut  Delaware  Florida  Georgia  Hawaii  Indiana  Illinois  Iowa  Kansas  Kentucky  Louisiana  Maine  Michigan  Minnesota  Missouri  Montana  Nebraska  Nevada  New Hampshire  New Jersey  New Mexico  New York  North Carolina  Ohio  Oklahoma  Oregon  Pennsylvania  Rhode Island  South Carolina  South Dakota  Tennessee  Texas  Utah  Vermont  Virginia  Washington  West Virginia  Wisconsin | Alabama  Arizona  California  Connecticut  Florida  Georgia  Idaho  Michigan  Missouri  New Jersey  New York  Ohio  Oklahoma  Pennsylvania  Rhode Island  Texas  Utah  Washington | California  Delaware  Florida  Indiana  Kansas  Kentucky  Louisiana  Minnesota  Missouri  Nebraska  New Jersey  New York  North Carolina  Ohio  Oklahoma  Oregon  Pennsylvania  Rhode Island  South Carolina  Tennessee  Texas  Utah  Virginia  West Virginia  Washington  Wisconsin |
|  |  |  |  |
| Source: Richard Reuben, “The Lawyer Turns Peacemaker,” *ABA Journal* (August 1996), p. 56. | | | |
|  | | | |

**3. Arbitration Statutes**

Most states have statutes (often based on the Uniform Arbitration Act of 1955) under which arbitration clauses are enforced, and some state statutes compel arbitration of certain types of disputes. At the federal level, the Federal Arbitration Act (FAA), enacted in 1925, en­forces arbitration clauses in contracts involving maritime activity and interstate commerce.

**4. The Issue of Arbitrability**

A court can consider whether the parties to an arbitration clause agreed to submit a par­ticular dispute to arbitration. The court may also consider whether the rules and procedures that the parties agreed to are fair.

**5. Mandatory Arbitration in the Employment Context**

Generally, mandatory arbitration clauses in employment contracts are enforceable.

**D. Other Types of ADR**

New types of ADR have emerged.

• *Early neutral case evaluation*—The parties select a neutral third party (generally an ex­pert in the subject of the dispute) to evaluate their positions. This forms the basis for negotiations.

• *Mini-trial****—***Each party’s attorney argues the party’s case. Typically, a neutral third party (often an expert in the disputed subject) acts as an adviser. If the parties fail to reach an agreement, the adviser renders an opinion as to how a court would likely decide the issue.

• *Summary jury trial*—In this federal alternative, the litigants present their arguments and evidence, and a jury renders a nonbinding verdict. Mandatory negotiations follow.

• *Summary proceedings*

• *Appointment of special master*

**E. Providers of ADR Services**

A major provider of ADR services is the American Arbitration Association (AAA). Most of the largest law firms in the nation are members of this nonprofit association, which settles nearly sixty thousand disputes a year. Hundreds of for-profit firms around the country also provide dis­pute-resolution services.

**F. Online Dispute Resolution**

When outside help is needed to resolve a dispute, there are a number of Web sites that offer online dispute resolution (ODR). ODR may be best for resolving small- to medium-sized business liability claims, which may not be worth the expense of litigation or traditional ADR.

**V. International Dispute Resolution**

International treaties sometimes stipulate arbitration for resolving disputes.

**A. Forum-Selection and Choice-of-Law Clauses**

Parties to international contracts may include forum-selection and choice-of-law clauses to protect themselves if disputes arise.

**B. Arbitration Clauses**

Parties to international contracts may include arbitration clauses to be applied if disputes arise.

|  |
| --- |
|  |
| **Teaching Suggestions** |
|  |
| **1.** Divide students into small groups and assign one of the text chapter’s end-of- chapter problems to each group. Have each group determine whether or not the assigned problem is one that would lend itself to alter­na­tive dispute reso­lution. ***If not, why not? If so, which form of alternative dispute resolution would the group rec***­***ommend?*** |
|  |
| **2.** Obtain a standard arbitration agreement form from a national arbitration organization such as the American Arbitration Association. Ask students to discuss specific features of these agreements and the fac­tors that might make them hesitant to submit a dispute to arbitration. |
|  |
| **3.** Some students may find it enlightening to be reminded the law corresponds to the many ways in which people organize the world. That is, the law includes customs, traditions, rules, and objectives that people have held in different circumstances at different times. While it often seems that the law creates meaningless distinctions, it is in fact the real needs of real people that create them. |
|  |
| **4.** In the courtroom, changes are being wrought by television. There is an increasing re­liance on video testimony. Children who allege physical or sexual abuse, for example, may give video testimony outside a courtroom to be shown during trial proceedings. Lawyers who represent ac­cident victims often commission videos to visually show the court the impact of accident-related in­juries on the daily lives of their clients. In criminal trials, judges have allowed juries to see filmed reenact­ments of crimes. To further blur the line between simulation and reality is the increasing number of cameras that videotape the commission of alleged crimes and other wrongs. ***What effect are these uses of television having on the judicial system? Could jurors watch trials on their televisions at home and reach a verdict by interactive cable? Through a familiarity with movies and TV shows, could jurors come to expect more ex***­***citement than is generated in the usual court***­***room when at least some of the proceeding is on video? Will lawyers argue their cases to ap***­***peal to home audiences? And what effect might all of this have on the U.S. judicial system’s impartiality and fairness?*** |
|  |
| *Cyberlaw Link* |
|  |
| Ask your students to what extent those who send e-mail over the Internet should be liable for the content of their messages in states other than their own (or nations other than the United States). ***Is the existence of a Web site a sufficient basis to exercise jurisdiction?*** |
|  |

**Discussion Questions**

**1. *If a corporation is incorporated in Delaware, has its main office in New York, and does busi***­***ness in California, but its president lives in Connecticut, in which state(s) can it be sued?*** Delaware, New York, and California—a corporation is subject to the jurisdiction of the courts in any state in which it is in­corporated, in which it has its main office, or in which it does business.

**2. *What is the difference between a court of general jurisdiction and a court of limited juris***­***dic***­***tion?*** A court with general jurisdiction can hear virtually any type of case, except a case that is appro­priate for a court with limited jurisdiction. Trial courts with general jurisdiction include county, district, and superior courts. Trial courts with limited jurisdiction include local municipal courts (which handle mainly traffic cases), small claims courts, and domestic relations courts. Thus, for example, small claims disputes are typically as­signed to courts that hear only small claims disputes.

**3. *What is the role of a court with appellate jurisdiction?*** Courts of appellate jurisdiction are re­view­ing courts—they review cases brought on appeal from trial courts, which are courts of original jurisdic­tion. In most states, after a case is tried, there is a right to at least one appeal. An appellate court exam­ines the record of a case, looking at questions of law and procedure for errors by the court below.

**4. *When may a federal court hear a case?*** Federal courts have jurisdiction in cases in which federal questions arise, in cases in which there is diversity of citizenship, and in some other cases. When a suit in­volves a question arising under the Constitution, a treaty, or a federal law, a federal question arises. When a suit involves citizens of different states, a foreign country and an American citizen, or a foreign citizen and an American citizen, diversity of citizenship exists. In diversity suits, there is an additional require­ment—the amount in controversy must be more than $50,000. Federal courts have exclusive jurisdiction in cases involv­ing federal crimes, bankruptcy, patents, and copyrights; in suits against the United States; and in some areas of admiralty law.

**5. *When may the United States Supreme Court hear a case?*** The United States Supreme Court has orig­inal in only a few situations. The Supreme Court can review any case decided by a federal court of ap­peals and any case decided by a state’s highest court in which a federal constitutional issue is involved.

**6. *When may a court exercise jurisdiction over a party whose only connection to the jurisdic***­***tion is via the Internet?*** One way to phrase the issue is when, under a set of circumstances, there are *suf­ficient minimum contacts* to give a court jurisdiction over a remote party. If the only contact is an ad on the Web originating from a remote location, the outcome to date has generally been that a court cannot exercise jurisdiction. Doing considerable business online, however, generally supports jurisdiction. The “hard” cases are those in which the contact is more than an ad but less than a lot of activity.

**7. *How does the process of negotiation work?***  In the process of negotiation,the parties come to­gether in­formally, with or without attorneys to represent them. Within this informal setting the parties air their dif­ferences and try to reach a settlement or resolution without the involvement of independent third parties. Because no third parties are involved and because of the informal setting, negotiation is the sim­plest form of al­ternative dispute resolution.

**8. *What is the principal difference between negotiation and mediation?***  The major difference be­tween negotiation and mediation is that mediation involves the presence of a third party called a mediator. The me­diator assists the parties in reaching a mutually acceptable agreement. The mediator talks face to face with the parties and allows them to discuss their disagreement in an informal environment. The media­tor’s role, however, is limited to assisting the parties. The mediator does not decide a controversy; he or she only aids the process by helping the parties more quickly find common ground on which they can begin to reach an agreement for themselves.

**9. *What is arbitration?*** The process of arbitration involves the settling of a dispute by an impartial third party (other than a court) who renders a *legally binding* decision. The third party who renders the de­cision is called an arbitrator. Arbitration combines the advantages of third-party decision making—as pro­vided by judges and juries in formal litigation—with the speed and flexibility of rules of procedure and evi­dence less rigid than those governing courtroom litigation.

**10. *What kinds of disputes may be subject to arbitration?*** The FAA requires that courts give defer­ence to all voluntary arbitration agreements in cases governed by federal law. Virtually any dispute can be the sub­ject of arbitration. A voluntary agreement to arbitrate a dispute normally will be enforced by the courts if the agreement does not compel an illegal act or contravene public policy.

**Activity and Research Assignments**

**1.** Have students prepare a chart showing the relationships between the various courts having jurisdic­tion in your state. (There is a digest of each state’s courts in *Martindale-Hubbell Law Directory*, which might be placed on reserve in the library.) Assign a few jurisdiction hypotheticals. ***For example—Through which of these courts could a divorce decree be appealed? Which court(s) would have original ju***­***risdiction in a truck accident in***­***volving out-of-state residents (does the dollar amount of injuries and damage make a difference)? Which court(s) would have jurisdiction to render a judgment in a case arising from food poisoning at a local cheeseburger stand that is part of a nationwide cor***­***porate chain? In which court(s) could you file a suit alleg***­***ing discrimination, and if you lost, to which court could you appeal the decision?***

**2.** Ask the class to research the reasons behind the earlier hostility of the courts towards arbitration pro­cedures. ***Were they concerned solely with parties being divested of their rights or did they see ar***­***bitration as a challenge to their own authority?***

**3.** Have students investigate the dispute resolution services discussed in this chapter by going online and reading some the disputes submitted for resolution or the results in individual cases (on the ICANN Web site, for example).

**Explanations of Selected Footnotes in the Text**

**Footnote 5:** In ***International Shoe Co. v. State of Washington,*** 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), the state of Washington sought unemployment contributions from the International Shoe Company based on commissions paid to its sales representatives who lived in the state. International Shoe claimed that its activities within the state were not sufficient to manifest its “presence.” It argued that (1) it had no of­fice in Washington; (2) it employed sales representatives to market its product in Washington, but no sales or pur­chase contracts were made in the state; and (3) it maintained no inventory in Washington. The company claimed that it was a denial of due process for the state to subject it to suit. The Supreme Court of Washington ruled in favor of the state, and International Shoe appealed to the United States Supreme Court.

The United States Supreme Court affirmed the Washington Supreme Court’s decision—International Shoe had sufficient contacts with the state to allow the state to exercise jurisdiction con­stitutionally over it. The Court found that the activities of the Washington sales representatives were “systematic and continu­ous,” resulting in a large volume of business for International Shoe. By conduct­ing its business within the state, the company received the benefits and protections of the state laws and was entitled to have its rights enforced in state courts. Thus, International Shoe’s operations estab­lished “sufficient contacts or ties with the state .  .  . to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligation” that the company incurred there.

**Footnote 9:** In ***Zippo Manufacturing Co. v. Zippo Dot.Com, Inc.,*** 952 F.Supp. 1119 (W.D.Pa. 1997), a federal district court proposed three categories for classifying the types of Internet business contact: (1) substantial business conducted online, (2) some interactivity through a Web site, and (3) passive advertis­ing. Jurisdiction is proper for the first category, improper for the third, and may or may not be appropriate for the second. Zippo Manufacturing Co. (ZMC) makes, among other things, “Zippo” lighters. ZMC is based in Pennsylvania. Zippo Dot Com, Inc. (ZDC), operates a Web page and an Internet subscription news service. ZDC has the exclusive right the domain names “zippo.com,” “zippo.net,” and “zipponews.com.” ZDC is based in California, and its contacts with Pennsylvania have occurred almost exclusively over the Internet. Two per cent of its subscribers (3,000 of 140,000) are Pennsylvania residents who contracted over the Internet to receive its service. ZDC has agreements with seven ISPs in Pennsylvania to permit their subscribers to ac­cess the service. ZMC filed a suit in against ZDC, alleging trademark infringement and other claims, based on ZDC’s use of the word “Zippo.” ZDC filed a motion to dismiss for lack of personal jurisdiction. Holding that ZDC’s connections to the state fell into the first category, the court denied the motion.

**Footnote 19:** Cleveland Construction, Inc. (CCI), was the general contractor on a project to build a grocery store in Houston, Texas. CCI hired Levco Construction, Inc., as a subcontractor to perform excavation and grading. The contract provided that any dispute would be resolved by arbitration in Ohio. When a dispute arose, Levco filed a suit against CCI in a Texas state court. CCI sought to compel arbitration in Ohio under the Federal Arbitration Act (FAA). Because a Texas statute allows a party to void a contract provision that requires arbitration outside Texas, the court denied CCI’s request. CCI appealed.

In ***Cleveland Construction, Inc. v. Levco Construction, Inc.,*** a state intermediate appellate court reversed. The parties had a valid arbitration agreement. If the court applied the Texas statute, it would void the agreement. This, the court decided, “would undermine the declared federal policy of rigorous enforcement of arbitration agreements.” And the FAA, as a federal law, preempted the Texas statute under the supremacy clause.

The United States Supreme Court affirmed the Washington Supreme Court’s decision—International Shoe had sufficient contacts with the state to allow the state to exercise jurisdiction con­stitutionally over it. The Court found that the activities of the Washington sales representatives were “systematic and continu­ous,” resulting in a large volume of business for International Shoe. By conduct­ing its business within the state, the company received the benefits and protections of the state laws and was entitled to have its rights enforced in state courts. Thus, International Shoe’s operations estab­lished “sufficient contacts or ties with the state .  .  . to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligation” that the company incurred there.

***Considering the relative bargaining power of the parties, was it fair to enforce the arbitration clause in this contract?*** Yes, because either party could have refused to agree to the contract when it contained the arbitration clause. Of course, such clauses are likely to be ruled fair and enforceable when the parties are of equal bargaining strength.

***Why do you think that Levco did not want its claim decided by arbitration?*** A party is typically reluctant to enter into a proceeding that he or she (or it) believes will have an unfavorable result. Levco might have had a less complex claim that could have been resolved more favorably in a court, or its claim might have lent itself to a legal, adversarial argument, which would have held less weight in arbitration Arbitration’s disadvantages include the unpredictability of results, the lack of required written opinions, the difficulty of appeal, and the possible unfairness of the procedural rules. Levco might have wanted to avoid arbitration for any or all of these reasons. Also, arbi­tration can be nearly as expensive as litigation, particularly when, as here, its venue is a distant location. Levco may have been simply trying to reduce the duration of the dispute and its cost.

***How would business be affected if each state could pass a statute, like the one in Texas, allowing parties to void out-of-state arbitrations?*** If all states could pass statutes like the one in Texas, many parties would probably be less inclined to transact business. An arbitration provision allows a party to limit the burden and expense of settling any disputes. If another party could freely void such an agreement, there would be a greater risk of arbitration in an inconvenient forum, costly formal litigation, or both. That risk increases the perceived costs of doing business, making the business opportunity less attractive. Thus, many parties may decline to enter contracts without enforceable arbitration provisions.