Business Law Text and Cases 14th edition Clarkson Solutions Manual

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CHAPTER 2

COURTS AND ALTERNATIVE DISPUTE RESOLUTION

ANSWERS TO CRITICAL THINKING QUESTIONS IN THE FEATURE

MANAGERIAL STRATEGY—BUSINESS QUESTIONS

1A. ***If you were facing an especially complex legal dispute—one involving many facets and several different types of law—would you consent to allowing a U.S. magistrate judge to decide the case? Why or why not?*** Yes. U.S. magistrate judges are selected by federal district court judges through a merit selection process. Applicants are interviewed by a screening committee of lawyers and others from the federal judicial district in which the position will be filled. The committee selects the five most qualified, who are voted on by the district court judges. Political party affiliation plays no part in the process.

No. Because of the selection process for a magistrate judge is not the same as for a district judge, some critics have expressed concerns about the quality of magistrate judges. Some groups, such as People for the American Way, are not in favor of allowing magistrate judges the power to decide cases. These critics believe that because of their limited terms, they are not completely immune from outside pressure.

2A. ***If you had to decide whether to allow a U.S. magistrate judge to hear your case, what information might you ask your attorney to provide concerning that individual?*** Applicants for the position of magistrate judge include attorneys, administrative law judges, state court judges, and others. Important information concerning a judge who hears a specific case might consist of the individual's background, including any area of expertise, and the details of his or her previous decisions—the facts, issues, outcomes, and reasoning—and how those factors might bear on the case at bar.

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ANSWERS TO QUESTIONS AT THE ENDS OF THE CASES

CASE 2.1—LEGAL REASONING QUESTIONS

1A. ***What is "diversity of citizenship?*** Diversity of citizenship exists when the plaintiff and defendant to a suit are residents of different states (or similar independent political subdivisions, such as territories). When a suit involves multiple parties, they must be completely diverse—no plaintiff may have the same state or territorial citizenship as any defendant. For purposes of diversity, a corporation is a citizen of both the state in which it is incorporated and the state in which its principal place of business is located.

2A. ***How does the presence—or lack—of diversity of citizenship affect a lawsuit?*** A federal district court can exercise original jurisdiction over a case involving diversity of citizenship. There is a second requirement to exercise diversity jurisdiction—the dollar amount in controversy must be more than $75,000. In a case based on diversity, a federal court will apply the relevant state law, which is often the law of the state in which the court sits.

3A. ***What did the court conclude with respect to the parties' "diversity of citizenship" in this case?*** In the *Mala* case, the court concluded that the parties did not have diversity of citizenship. A plaintiff who seeks to bring a suit in a federal district court based on diversity of citizenship has the burden to prove that diversity exists. Mala—the plaintiff in this case—was a citizen of the Virgin Islands. He alleged that Crown Bay admitted to being a citizen of Florida, which would have given the parties diversity. Crown Bay denied the allegation and asserted that it also was a citizen of the Virgin Islands. Mala offered only his allegation and did not provide any evidence that Crown Bay was anything other than a citizen of the Virgin Islands. There was thus no basis for the court to be "left with the definite and firm conviction that Crown Bay was in fact a citizen of Florida."

CASE 2.2—CRITICAL THINKING

WHAT IF THE FACTS WERE DIFFERENT?

Suppose that Gucci had not presented evidence that Wang Huoqing had made one actual sale through his Web site to a resident (the private investigator) of the court's district. Would the court still have found that it had personal jurisdiction over Wang Huoqing? Why or why not? The single sale to a resident of the district, Gucci's private investigator, helped the plaintiff establish that the defendant 's Web site was interactive and that the defendant used the Web site to sell goods to residents in the court's district. It is possible that without proof of such a sale, the court would not have found that it had personal jurisdiction over the foreign defendant. The reason is that courts cannot exercise jurisdiction over foreign defendants unless they can show the defendants had minimum contacts with the forum, such as by selling goods within the forum.

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LEGAL ENVIRONMENT

Is it relevant to the analysis of jurisdiction that Gucci America's principal place of business is in New York state rather than California? Explain. The fact that Gucci's headquarters is in New York state was not relevant to the court's analysis here because Gucci was the plaintiff. Courts look only at the defendant's location or contacts with the forum in determining whether to exercise personal jurisdiction. The plaintiff's location is irrelevant to this determination.

CASE 2.3—CRITICAL THINKING

LEGAL ENVIRONMENT

Who can decide questions of fact? Who can rule on questions of Law? Why? Questions of fact can be decided by triers of fact. In a jury trial, the trier of fact.is the jury. In a non-jury trial, it is the judge who decides questions of fact. Rulings on questions of law are made only by judges, not juries.

A question of fact deals with what really happened in regard to the dispute being tried—such as whether a certain act violated a contract. A question of law concerns the application or interpretation of the law—such as whether an act that violated a contract also violated the law. One of the reasons for the distinction between those who can decide questions of fact and those who can decide questions of law is that judges have special training and expertise to make decisions on questions of law that the typical lay member of a jury lacks.

GLOBAL

In some cases, a court may be asked to determine and interpret the law of a foreign country. Some stats consider the issue of what the law of a foreign country requires to be a question of fact. Federal rules of procedure provide that this issue is a question of law. Which position seems more appropriate? Why? Proof of what a foreign law states, and possibly its translation, may be appropriate for a jury to decide, based on a submission of such evidence as a foreign publication of statutes or case law, or the testimony of an expert witness. But the interpretation and application of the law would seem to be most appropriately within the province of a judge.

Under the federal rules of procedure, in a particular case, once the existence and phrasing of a foreign law has been proved, the court has the duty of construing it. The court's construction of the foreign law can be guided by the reasoning underlying similar rules of U.S. common law. Expert witnesses may be consulted, but their opinions are not binding

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 different jurisdictions and

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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.

ANSWER TO DEBATE THIS QUESTION IN THE REVIEWING FEATURE AT THE END OF THE CHAPTER

In this age of the Internet, when people communicate via e-mail, texts, tweets, Facebook, and Skype, is the concept of jurisdiction losing its meaning? Many believe that yes, the idea of determining jurisdiction based on individuals' and companies' physical locations no longer has much meaning. Increasingly, contracts are formed via online communications. Does it matter where one of the parties has a physical presence? Does it matter where the e-mail server or Web page server is located? Probably not.

In contrast, in one sense, jurisdiction still has to be decided when conflicts arise. Slowly, but ever so surely, courts are developing rules to determine where jurisdiction lies when one or both parties used online systems to sell or buy goods or services. In the final analysis, a specific court in a specific physical location has to try each case.

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ANSWERS TO ISSUE SPOTTERS AT THE END OF THE CHAPTER

1A. ***Sue uses her smartphone to purchase a video security system for her architectural firm from Tipton, Inc., a company that is located in a different state. The system arrives a month after the projected delivery date, is of poor quality, and does not function as advertised. Sue files a suit against Tipton in a state court. Does the court in Sue's state have jurisdiction over Tipton? What factors will the court consider in determining jurisdiction?*** Yes, the court in Sue's state has jurisdiction over Tipton on the basis of the company's minimum contacts with the state.

Courts look at the following factors in determining whether minimum contacts exist: the quantity of the contacts, the nature and quality of the contacts, the source and connection of the cause of action to the contacts, the interest of the forum state, and the convenience of the parties. Attempting to exercise jurisdiction without sufficient minimum contacts would violate the due process clause. Generally, courts have found that jurisdiction is proper when there is substantial business conducted online (with contracts, sales, and so on). Even when there is only some interactivity through a Web site, courts have sometimes held that jurisdiction is proper. Jurisdiction is not proper when there is merely passive advertising.

Here, all of these factors suggest that the defendant had sufficient minimum contacts with the state to justify the exercise of jurisdiction over the defendant. Two especially important factors were that the plaintiff sold the security system to a resident of the state and that litigating in the defendant's state would be inconvenient for the plaintiff.

2A. ***The state in which Sue resides requires that her dispute with Tipton be submitted to mediation or nonbinding arbitration. If the dispute is not resolved, or if either party disagrees with the decision of the mediator or arbitrator, will a court hear the case? Explain.*** Yes, if the dispute is not resolved, or if either party disagrees with the decision of the mediator or arbitrator, a court will hear the case. It is required that the dispute be submitted to mediation or arbitration, but this outcome is not binding.

ANSWERS TO BUSINESS SCENARIOS AT THE END OF THE CHAPTER

2–1A. ***Standing***

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 problem, the issue is whether the Turtons had been injured, or were likely to be injured, by the county's landfill operations. Clearly, one could argue that the injuries that the Turtons complained of directly resulted from the county's violations of environmental laws while operating the landfill. The Turtons lived directly across from the landfill, and they were experi-

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encing the specific types of harms (fires, scavenger problems, groundwater contamination) that those laws were enacted to address. Thus, the Turtons would have standing to bring their suit.

2–2A. ***Venue***

The purpose behind most venue statutes is to ensure that a defendant is not "hailed into a remote district, having no real relationship to the dispute." The events in dispute have no connection to Minnesota. The Court stated: "Looked at through the lens of practicality—which is, after all, what [the venue statute] is all about—Nestlé's motion can really be distilled to a simple question: does it make sense to compel litigation in Minnesota when this state bears no relationship to the parties or the underlying events?" The court answered no to this simple question. The plaintiff resides in South Carolina, her daughter's injuries occurred there, and all of her medical treatment was provided (and continues to be provided) in that state. South Carolina is the appropriate venue for this litigation against Nestlé to proceed.

ANSWERS TO BUSINESS CASE PROBLEMS AT THE END OF THE CHAPTER

2–3A. ***Arbitration***

In many circumstances, a party that has not signed an arbitration agreement (Kobe in this case) cannot compel arbitration. There are exceptions, however. According to the court, "The first relies on agency and related principles to allow a nonsignatory (Kobe) to compel arbitration when, as a result of the nonsignatory's close relationship with a signatory (Primenergy), a failure to do so would eviscerate [gut] the arbitration agreement." That applies here. Kobe and Primenergy claimed to have entered into a licensing agreement under the terms of the agreement between PRM and Primenergy. The license agreement is central to the resolution of the dispute, so Kobe can compel arbitration. Similarly, all claims PRM has against Primenergy go to arbitration because the arbitration clause covers "all disputes." That would include allegations of fraud and theft. Such matters can be resolved by arbitration. "Arbitration may be compelled under 'a broad arbitration clause … as long as the underlying factual allegations simply "touch matters covered by" the arbitration provision.' It generally does not matter that claims sound in tort, rather than in contract." The reviewing court affirmed the trial court's decision.

2–4A. **SPOTLIGHT ON NATIONAL FOOTBALL LEAGUE—*Arbitration***

An arbitrator's award generally is the final word on the matter. A court's review of an arbitrator's decision is extremely limited in scope, unlike an appellate court's review of a lower court's decision. A court will set aside an award only if the arbitrator's conduct or "bad faith" substantially prejudiced the rights of one of the parties, if the award violates an established public policy, or if the arbitrator exceeded her or his powers.

In this problem, and in the actual case on which this problem is based, the NFLPA argued that the award was contrary to public policy because it required Matthews to forfeit the right to seek workers' compensation under California law. The court rejected this argument, be-

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cause under the arbitrator's award Matthews could still seek workers' compensation under Tennessee law. Thus, the arbitration award was not clearly contrary to public policy.

2–5A. ***Minimum contacts***

No. This statement alone was insufficient to establish that Illinois did not have jurisdiction over the defendant. The court ruled that Med-Express failed to introduce factual evidence proving that the Illinois trial court lacked personal jurisdiction over Med-Express. Med-Express had merely recited that it was a North Carolina corporation and did not have minimum contacts with Illinois. Med-Express sent a letter to this effect to the clerk of Cook County, Illinois, and to the trial court judge. But that was not enough. When a judgment of a court from another state is challenged on the grounds of personal jurisdiction, there is a presumption that the court issuing the judgment had jurisdiction until the contrary is shown. It was not.

2–6A. ***Arbitration***

Yes, a court can set aside this order. The parties to an arbitration proceeding can appeal an arbitrator's decision, but court's review of the decision may be more restricted in scope than an appellate court's review of a trial court's decision. In fact, the arbitrator's decision is usually the final word on a matter. A court will set aside an award if the arbitrator exceeded her or his powers—that is, arbitrated issues that the parties did not agree to submit to arbitration.

In this problem, Horton discharged its employee de la Garza, whose union appealed the discharge to arbitration. Under the parties' arbitration agreement, the arbitrator was limited to determining whether the rule was reasonable and whether the employee violated it. The arbitrator found that de la Garza had violated a reasonable safety rule, but "was not totally convinced" that the employer should have treated the violation more seriously than other rule violations and ordered de la Garza reinstated. This order exceeded the arbitrator's authority under the parties' agreement. This was a ground for setting aside the order.

In the actual case on which this problem is based, on the reasoning stated here, the U.S. Court of Appeals for the Fifth Circuit reached the same conclusion.

2-7A. **BUSINESS CASE PROBLEM WITH SAMPLE ANSWER—*Corporate contacts***

No, the defendants' motion to dismiss the suit for lack of personal jurisdiction should not be granted. A corporation normally is subject to jurisdiction in a state in which it is doing business. A court applies the minimum-contacts test to determine whether it can exercise jurisdiction over an out-of-state corporation. This requirement is met if the corporation sells its products within the state or places its goods in the "stream of commerce" with the intent that the goods be sold in the state.

In this problem, the state of Washington filed a suit in a Washington state court against LG Electronics, Inc., and nineteen other foreign companies that participated in the global market for cathode ray tube (CRT) products. The state alleged a conspiracy to raise prices and set production levels in the market for CRTs in violation of a state consumer protection statute. The defendants filed a motion to dismiss the suit for lack of personal jurisdiction. These goods were sold for many years in high volume in the United States, including the state of Washington. In other words, the corporations purposefully established minimum contacts in the state of

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Washington. This is a sufficient basis for a Washington state court to assert personal jurisdiction over the defendants.

In the actual case on which this problem is based, the court dismissed the suit for lack of personal jurisdiction. On appeal, a state intermediate appellate court reversed on the reasoning stated above.

2–8A. ***Appellate, or reviewing, courts***

Yes, the state intermediate appellate court is likely to uphold the agency's findings of fact. Appellate courts normally defer to lower tribunals' findings on questions of fact because those forums' decision makers are in a better position to evaluate testimony. A trial court judge or jury, for example, can directly observe witnesses' gestures, demeanor, and other nonverbal conduct during a trial. A judge or justice sitting on an appellate court cannot.

In this problem, Angelica Westbrook, an employee of Franklin Collection Service, Inc., allegedly made a statement during a call to a debtor that violated company policy. Westbrook was fired, and applied for unemployment benefits. Benefits were approved, but Franklin objected. Witnesses at an administrative hearing on the dispute included a Franklin supervisor who testified that she heard Westbrook make the false statement, although she admitted that Westbrook had not been involved in any similar incidents. Westbrook denied making the statement, but added that if she had said it, she did not remember it. The agency found that Franklin's reason for terminating Westbrook did not amount to the misconduct required to disqualify her for benefits and upheld the approval. Franklin appealed. Under the standard for appellate review of findings of fact, the appellate court will likely affirm the agency's findings.

In the actual case on which this problem is based, the state intermediate appellate court to which Franklin appealed the MDES's approval of Johnson's claim upheld the agency's decision.

2–9A. **A QUESTION OF ETHICS—*Agreement to arbitrate***

(a) This is very common, as many hospitals and other health-care provides have arbitration agreements in their contracts for services. There was a valid contract here. It is presumed in valid contracts that arbitration clauses will be upheld unless there is a violation of public policy. The provision of medical care is much like the provision of other services in this regard. There was not evidence of fraud or pressure in the inclusion of the arbitration agreement. Of course there is concern about mistreatment of patients, but there is no reason to believe that arbitration will not provide a professional review of the evidence of what transpired in this situation. Arbitration is a less of a lottery that litigation can be, as there are very few gigantic arbitration awards, but there is no evidence of systematic discrimination against plaintiffs in arbitration compared to litigation, so there may not be a major ethical issue.

(b) McDaniel had the legal capacity to sign on behalf of her mother. Someone had to do that because she lacked mental capacity. So long as in such situations the contracts do not contain terms that place the patient at a greater disadvantage than would be the case if the patient had mental capacity, there is not particular reason to treat the matter any differently.

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ANSWERS TO LEGAL REASONING GROUP ACTIVITY QUESTIONS AT THE END OF THE CHAPTER

2–10A. ***Access to courts***

(a) The statute violates litigants' rights of access to the courts and to a jury trial because the imposition of arbitration costs on those who improve their positions by less than 10 percent on an appeal is an unreasonable burden. And the statute forces parties to arbitrate before they litigate—an added step in the process of dispute resolution. The limits on the rights of the parties to appeal the results of their arbitration to a court further impede their rights of access. The arbitration procedures mandated by the statute are not reasonably related to the legitimate governmental interest of attaining less costly resolutions of disputes.

(b) The statute does not violate litigants' constitutional right of access to the courts because it provides the parties with an opportunity for a court trial in the event either party is dissatisfied with an arbitrator's decision. The burdens on a person's access to the courts are reasonable. The state judicial system can avoid the expense of a trial in many cases. And parties who cannot improve their positions by more than 10 percent on appeal are arguably wasting everyone's time. The assessment of the costs of the arbitration on such parties may discourage appeals in some cases, which allows the courts to further avoid the expense of a trial. The arbitration procedures mandated by the statute are reasonably related to the legitimate governmental interest of attaining speedier and less costly resolution of disputes.

(c) The determination on rights of access could be different if the statute was part of a pilot program and affected only a few judicial districts in the state because only parties who fell under the jurisdiction of those districts would be subject to the limits. Opponents might argue that the program violates the due process of the Fifth Amendment because it is not applied fairly throughout the state. Proponents might counter that parties who object to an arbitrator's decision have an opportunity to appeal it to a court. Opponents might argue that the program exceeds what the state legislature can impose because it does not reasonably relate to a legitimate governmental objective—it arbitrarily requires only litigants who reside in a few jurisdictions to submit to arbitration. Proponents might counter that this is aimed at the reduction of court costs—that the statute rationally relates to a legitimate governmental end. An equal protection challenge would most likely be subject to a similar rational basis test. Under these and other arguments, the reduction of court costs would be a difficult objective to successfully argue against.

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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

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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.

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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

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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).

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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 proceedings. 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

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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."

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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

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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.

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(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.)

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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.

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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




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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.

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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.

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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.

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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

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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.

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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

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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 and renders 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.

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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	Alabama	Alabama	California
Alaska	Alaska	Arizona	Delaware
Arizona	Arizona	California	Florida
California	California	Connecticut	Indiana
Delaware	Connecticut	Florida	Kansas
Florida	Delaware	Georgia	Kentucky
Georgia	Florida	Idaho	Louisiana
Hawaii	Georgia	Michigan	Minnesota
Illinois	Hawaii	Missouri	Missouri
Michigan	Indiana	New Jersey	Nebraska
Minnesota	Illinois	New York	New Jersey
Missouri	Iowa	Ohio	New York
Nevada	Kansas	Oklahoma	North Carolina
New Hampshire	Kentucky	Pennsylvania	Ohio
New Jersey	Louisiana	Rhode Island	Oklahoma
New Mexico	Maine	Texas	Oregon
New York	Michigan	Utah	Pennsylvania
North Carolina	Minnesota	Washington	Rhode Island
Ohio	Missouri		South Carolina
Oregon	Montana		Tennessee
Pennsylvania	Nebraska		Texas
Rhode Island	Nevada		Utah
Texas	New Hampshire		Virginia
Washington	New Jersey		West Virginia
	New Mexico		Washington
	New York		Wisconsin
	North Carolina		
	Ohio		
	Oklahoma		
	Oregon		
	Pennsylvania		
	Rhode Island		
	South Carolina		
	South Dakota		
	Tennessee		
	Texas		
	Utah		
	Vermont		
	Virginia		
	Washington		

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	West Virginia Wisconsin		

Source: Richard Reuben, "The Lawyer Turns Peacemaker," *ABA Journal* (August 1996), p. 56.

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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.

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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 recommend?***

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 excitement than is generated in the usual courtroom when at least some of the proceeding is on video? Will lawyers argue their cases to appeal 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 business 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.

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2. ***What is the difference between a court of general jurisdiction and a court of limited jurisdiction?*** 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 jurisdiction 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.

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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 jurisdiction in a truck accident involving 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 corporate chain? In which court(s) could you file a suit alleging 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 arbitration 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.

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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.

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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.

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ALTERNATE CASE PROBLEM ANSWERS

CHAPTER 2

COURTS AND ALTERNATIVE DISPUTE RESOLUTION

2-1A. ***Arbitration***

The public policy that the court weighed in making its decision included the policy of "not tolerating the knowing misappropriation of state funds by state officials or employees," as well as "[t]he public policy of discouraging fraud," which is "firmly rooted in our common law." The defendant asserted the public policy of discouraging discrimination against the mentally ill. The court considered this policy, but "did not find that Beaudry's discharge was motivated by an intent to discriminate against the mentally ill." In this case, "the policy of minimizing discrimination against the mentally ill did not outweigh the damaging consequences to the concomitant policy goal of refusing to countenance the knowing misappropriation of state moneys." The court vacated the award, the union appealed, and a state appellate court affirmed the trial court's decision.

2-2A. ***Arbitration***

The U.S. Court of Appeals for the Third Circuit held that the arbitration award, requiring Exxon to reinstate Fris, should be vacated as contrary to public policy. The court reasoned that the award "violates a public policy that is both well defined and dominant," that is "that owners and operators of oil tankers should be permitted to discharge crew members who are found to be intoxicated while on duty." The court explained, "An intoxicated crew member on such a vessel can cause loss of life and catastrophic environmental and economic injury. Some of this injury may not be reparable by money damages." The court offered, as an example, harm caused by oil spills. "Moreover," added the court, "it is entirely possible that much of the cost resulting from a major oil spill may fall on taxpayers and those who are injured by the accident."

2-3A. ***Jurisdiction***

The North Carolina state court held that it had personal jurisdiction over the Florida defendants. On appeal, the North Carolina Court of Appeals agreed. The appellate court initially pointed out that a court can assert "personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum

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State. When a corporation purposefully avails itself of the privilege of conducting activities in this State, it is not unreasonable to subject it to suit here." The court pointed out that Health Care advertised Cal-Ban in North Carolina. "Health Care sold the Cal-Ban 3000 capsules to its distributor, defendant CKI Industries, who in turn advertised and sold the drug to defendant Prescott's Pharmacies." The court concluded, "[a]ccordingly," that the defendants "injected Cal-Ban 3000 into the stream of commerce of this State with the expectation that the drug would be purchased by consumers here. The trial court properly exercised personal jurisdiction over defendants."

2-4A. ***Standing to sue***

The court held that the Blues had standing and denied the tobacco companies' motion to dismiss the case. The defendants argued in part that any injury to the plaintiffs was indirect and too remote to permit them to recover, and that it would be too difficult to determine whether the plaintiffs' injuries were due to the defendants' conduct or to intervening third causes. The court reasoned that the damages claimed in this case were separate from the damages suffered by smokers. The plaintiffs "seek recovery only for the economic burden of those medical claims and procedures which they directly paid as a result of tobacco use." The Blues had paid for the smokers' health care, and thus only the Blues could recover those amounts. As to whether the injuries were too remote, the court said that if "as alleged, the defendants conducted a decades long scheme to deceive the American public and its health providers concerning the addictive characteristics and health hazards of their tobacco products, and if they conspired to deprive smokers of safer or less addictive tobacco products, then their actions can properly be characterized as illegal and deliberate criminal fraud." If so, the plaintiffs' injuries would have been foreseeable and direct. The court also noted that the plaintiffs might have reliable statistical and expert evidence to show the percentage of damage caused by the defendants' actions.

Note: The Blues filed suits in three federal district courts. Two of the courts refused to dismiss the suits, applying the reasoning set out above. The third court agreed with the defendants, however. See *Regence Blueshield v. Philip Morris, Inc.,* 40 F.Supp.2d 1179 (W.D.Wash.1999). In that case, the court concluded that the Blues' injuries were "derivative" of personal injuries to smokers because it would be impossible to separate the smokers' injuries from those of the insurers and there would thus be a possibility of "duplicative recovery."

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

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 Common-

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wealth." 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***

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***

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

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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. ***Standing to sue***

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. ***Arbitration***

Based on a recent holding by the Washington state supreme court, the federal appeals court held that the arbitration provision was unconscionable and therefore invalid. Because it was invalid, the restriction on class-action suits was also invalid. The state court reasoned that by offering a contract that restricted class actions and required arbitration, the company had improperly stripped consumers of rights they would normally have to attack certain industry practices. Class-action suits are often brought in cases of deceptive or unfair industry practices when the losses suffered by an individual consumer are too small to warrant a consumer suing. In this case, the alleged added cell phone fees are so small that no one consumer would be likely to litigate or arbitrate the matter due to the expenses involved. Because the arbitration agreement eliminates the possibility of class actions, it violates public policy and is void and unenforceable.

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

Courts apply a minimum-contacts test to determine if they can exercise jurisdiction over out-of-state corporations. The test is usually met if a corporation advertises or sells its products within the state. The test can also be met if the corporation has an ongoing business relationship as shown by frequent transactions with a party within the state.

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Here, IPC, a New Jersey firm, did not advertise or otherwise solicit business in North Carolina. But IPC and Southern Prestige did have an ongoing busienss relationship characterized by thirty-two transactions. Thus, the test for minimum contacts is most likely met, and the court can exercise jurisdiction over the parties.

In the actual case on which this problem is based, IPC asked the court to dismiss the suit, but the court refused. On appeal, a state intermediate appellate court affirmed this decision.

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BUSINESS LAW

TEXT AND CASES

Fourteenth Edition

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CHAPTER 2: COURTS AND ALTERNATIVE DISPUTE RESOLUTION

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§ 1: The Judiciary's Role In American Government (1 of 2)

- **Judicial Review:** The process by which a court decides the constitutionality of legislative enactments and actions by the executive branch.

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The Judiciary's Role In American Government (2 of 2)

- Judicial review was established by the U.S. Supreme Court in *Marbury v. Madison* (1803).
- The power of judicial review is exercised by both federal and state courts.

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§ 2: Basic Judicial Requirements (1 of 19)

- **Jurisdiction:** The authority of a court to hear and decide a specific action.
- Jurisdiction has many dimensions including *in personam*, *in rem*, subject matter, original, and appellate.

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Basic Judicial Requirements (2 of 19)

- ***In Personam* (or Personal) Jurisdiction:** Jurisdiction over any person or business involved in a legal action.
- *In personam* jurisdiction is determined by the geographic area of the person or business.

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Basic Judicial Requirements (3 of 19)

- ***In Rem* Jurisdiction (or "jurisdiction over the thing"):** Court jurisdiction over a defendant's property.
- *In rem* jurisdiction is determined by the geographic location of the property in dispute. A court generally has *in rem* jurisdiction over any property situated within its geographical borders.

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Basic Judicial Requirements (4 of 19)

- **Long-Arm Statutes:** Courts use long-arm statutes for nonresident parties based on activities that took place within the state.
- The defendant must have had sufficient contacts, or *minimum contacts*, with that state to justify the jurisdiction.

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Basic Judicial Requirements (5 of 19)

- **Corporate Contacts:** Corporations are normally subject to personal jurisdiction in the state in which they are incorporated, have their principal office, and/or are doing business.

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Basic Judicial Requirements (6 of 19)

- Courts apply the minimum-contacts test to determine if they can exercise jurisdiction over out-of-state corporations.
  - Example: Does a business actively advertise within a state?

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Basic Judicial Requirements (7 of 19)

- **Subject-Matter Jurisdiction:** The authority of a court to hear and decide *a specific type of dispute*.
- Subject-matter jurisdiction is usually defined in the statute or constitution that created the court.

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Basic Judicial Requirements (8 of 19)

- *Courts of general jurisdiction* can decide cases involving a broad array of issues.
- *Courts of limited jurisdiction* can hear only specific types of cases.
- What are some examples of *general* and *limited* jurisdiction courts?

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Basic Judicial Requirements (9 of 19)

- Subject-matter jurisdiction can be limited by any of the following:
  - Subject of the lawsuit.
  - The sum in controversy.
  - Whether the case involves a *felony* or a *misdemeanor.*
  - Whether the proceeding is a trial or an appeal.

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Basic Judicial Requirements (10 of 19)

- Courts of **original jurisdiction** are those in which the case is heard and decided for the first time.
- Courts of **appellate jurisdiction** have the power to review a prior decision in the same case made by another court.
- Subject-matter jurisdiction of the federal courts is limited to two situations. →

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Basic Judicial Requirements (11 of 19)

- **Federal question** cases that contain disputes which pertain to the U.S. Constitution, acts of Congress, or treaties.
- **Diversity of citizenship** cases in which the parties in the lawsuit are from different U.S. states and/or the United States and a foreign country AND the dollar amount in dispute exceeds $75,000.

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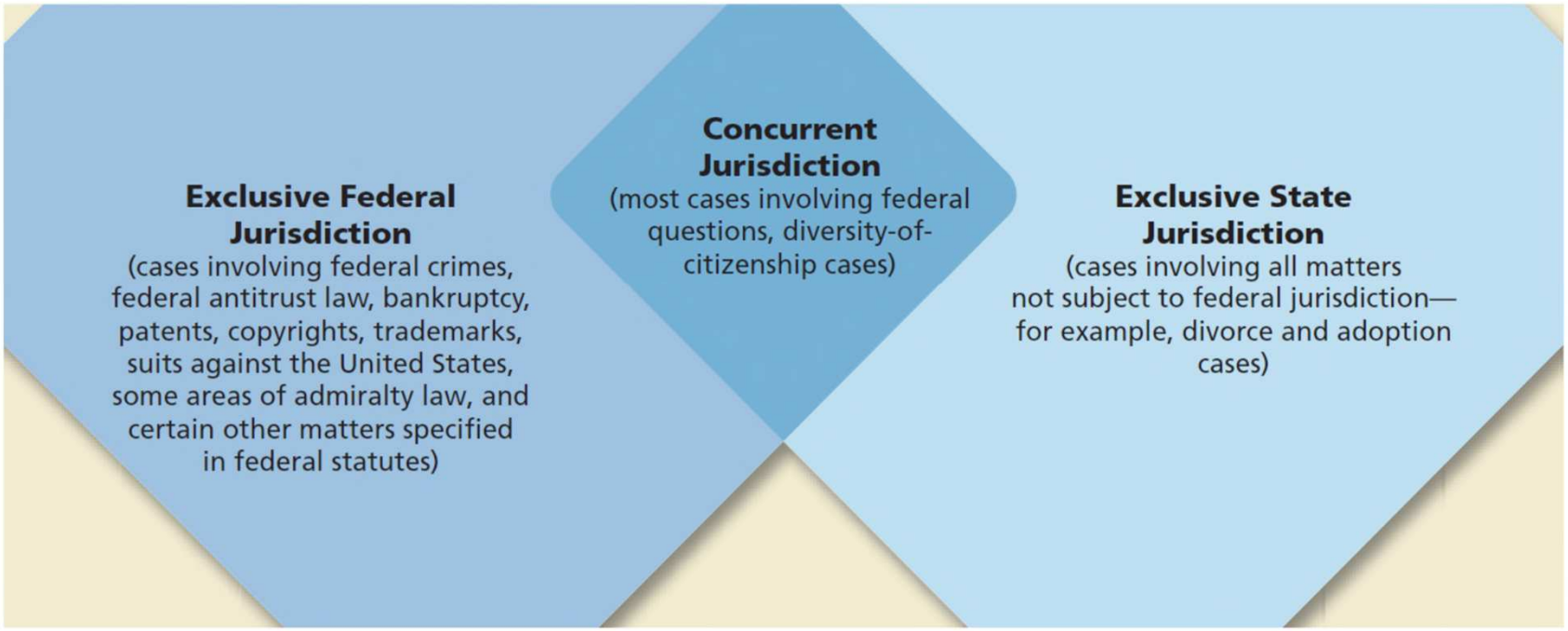
Basic Judicial Requirements (12 of 19)

- **Exclusive jurisdiction:** Only one court (state or federal) has the power (jurisdiction) to hear the case.
- **Concurrent jurisdiction:** More than one court can hear the case.
- What are some examples of *exclusive* and *concurrent* jurisdiction courts?

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Basic Judicial Requirements (13 of 19)

EXHIBIT 2–1 Exclusive and Concurrent Jurisdiction



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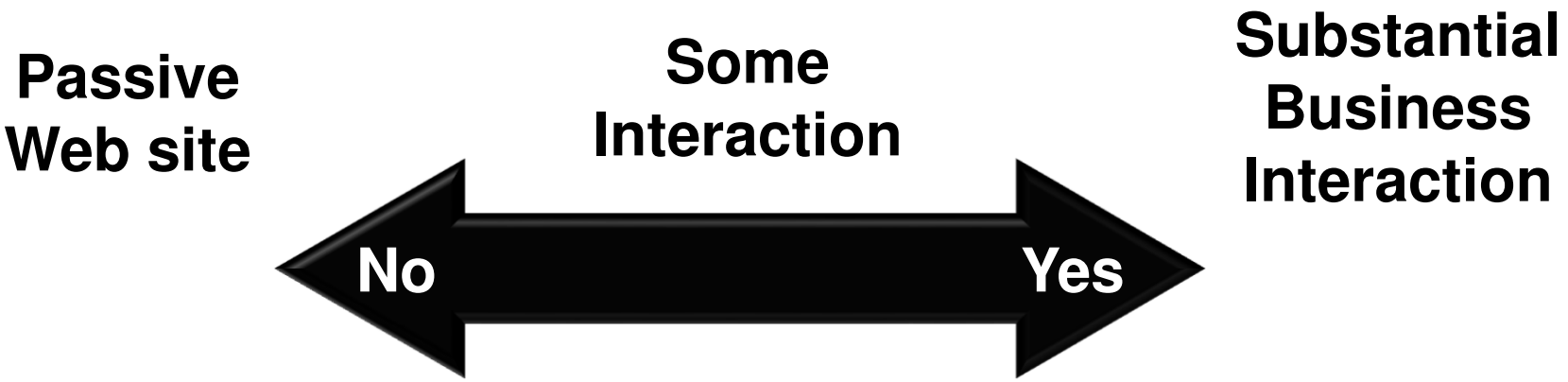
Basic Judicial Requirements (14 of 19)

- **Jurisdiction in Cyberspace:** It can be difficult to determine whether contacts are sufficient for a court to exercise jurisdiction if a defendant's only contacts with the state are through a Web site.

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Basic Judicial Requirements (15 of 19)

- **"Sliding-Scale" Standard:** Three types of Internet business contacts that outline the rules for jurisdiction.



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Basic Judicial Requirements (16 of 19)

- **"Sliding-Scale" Standard:**
  - When the defendant conducts substantial business over the Internet, jurisdiction is proper.
  - When there is some interactivity through a Web site, jurisdiction may be proper, depending on the circumstances.
  - When a defendant merely engages in passive advertising on the Internet, jurisdiction is never proper.

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Basic Judicial Requirements (17 of 19)

- **International Jurisdiction Issues:**
  - Some foreign courts are developing standards that are similar to the *minimum-contacts* requirement in U.S. courts.
  - Business firms have to comply with the laws in any jurisdiction in which they target customers.
  - **Case 2.2 *Gucci America, Inc. v. Wang Huoqing* (2011).**

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Basic Judicial Requirements (18 of 19)

- **Venue:** The most appropriate geographical location for a trial to be held and from which a jury is selected.

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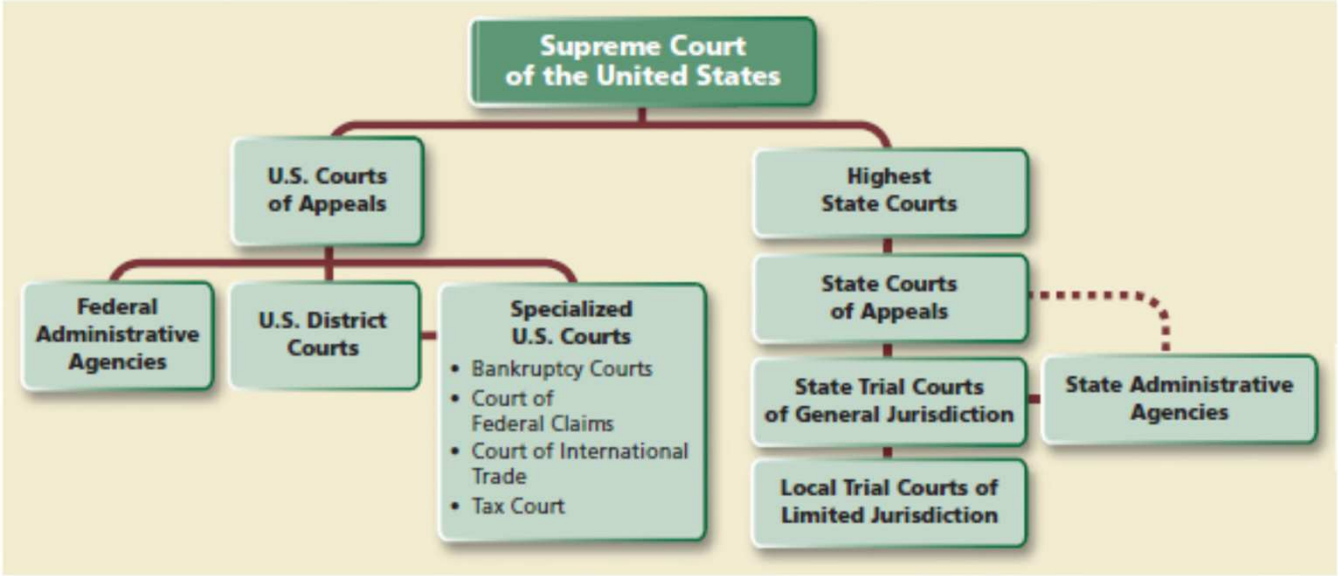
Basic Judicial Requirements (19 of 19)

- **Standing to Sue:** A party must have a *sufficient stake* in the dispute to justify seeking relief through the court system.
- Standing has three elements: *Harm, causation, remedy*

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State and Federal Court Systems (1 of 13)

EXHIBIT 2–2 The State and Federal Court Systems



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State and Federal Court Systems (2 of 13)

- No two state court systems are exactly the same and may include:
  - **Trial courts of limited jurisdiction.**
  - **Trial courts of general jurisdiction.**
  - **Appellate courts.**
  - **The state's highest court.**
- Judges are usually elected by voters.

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State and Federal Court Systems (3 of 13)

State Court Systems:

- **Trial Courts:** These have either general jurisdiction or limited jurisdiction.
- **Appellate Courts:** Every state has at least one court of appeals, or **appellate court**; most states also have an ***intermediate appellate court.***

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State and Federal Court Systems (4 of 13)

State Court Systems:

- Appellate (or reviewing) courts only hear *questions of law*, not *fact* (which are usually determined by juries).
- Only judges—and not juries—can rule on questions of law.

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State and Federal Court Systems (5 of 13)

State Court Systems:

- **Highest State Courts:** Decisions of each state's highest court on all questions of *state* law are final.
- U.S. Supreme Court can overrule decisions on issues that involve *federal* law.

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State and Federal Court Systems (6 of 13)

Federal Court System:

- Basically three-tiered system:
  - U.S. District Courts.
  - U.S. Courts of Appeal.
  - U.S. Supreme Court.

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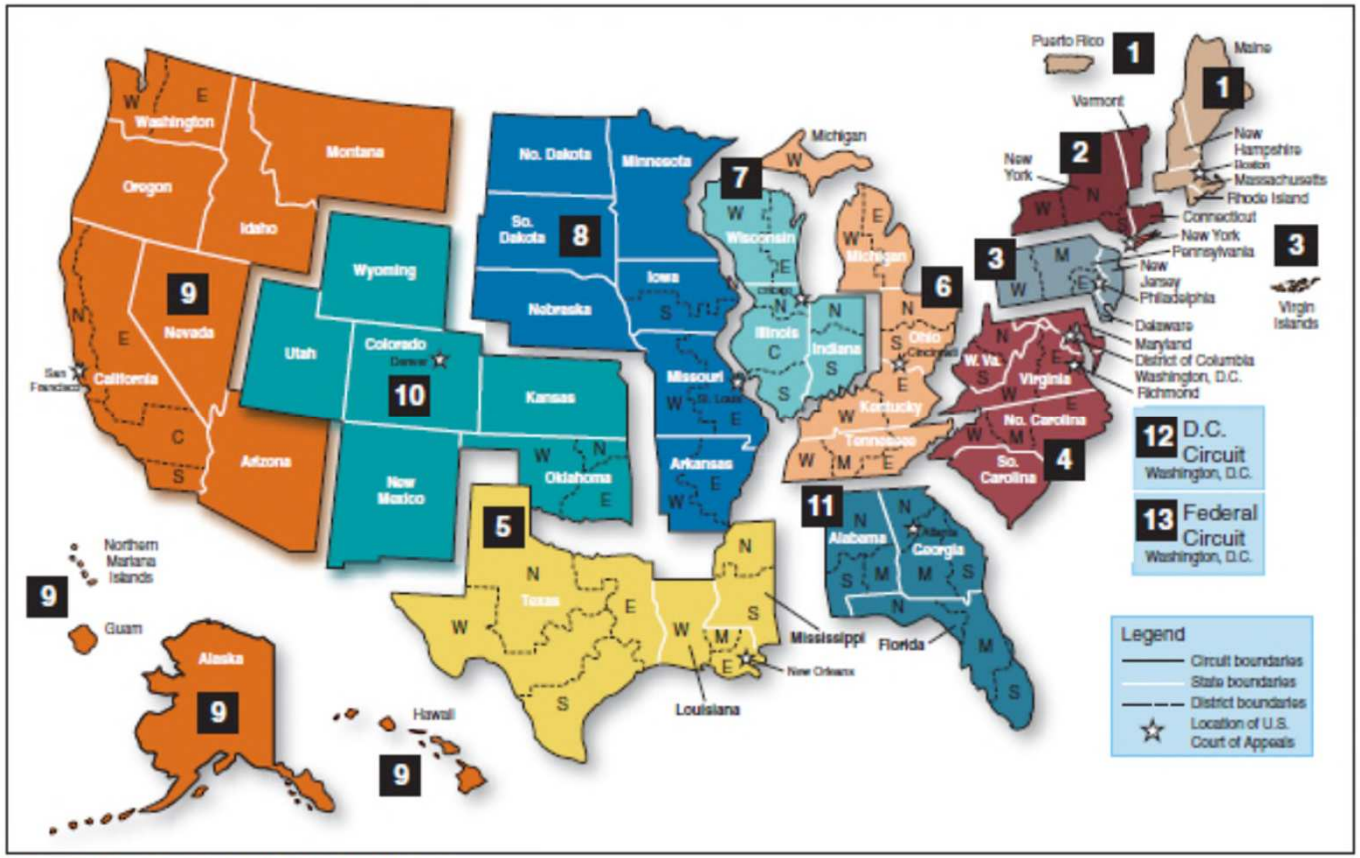
State and Federal Court Systems (7 of 13)

- All federal court judges including Supreme Court justices are appointed by the president of the United States, subject to U.S. Senate confirmation.
- They receive lifetime appointments under Article III of the U.S. Constitution.

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State and Federal Court Systems (8 of 13)

EXHIBIT 2–3 Geographic Boundaries of the U.S. Courts of Appeals and U.S. District Courts



Source: Administrative Office of the United States Courts.

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State and Federal Court Systems (9 of 13)

- **U.S. District Courts:** Trial courts of general jurisdiction. Each state, the District of Columbia, and certain other U.S. territories and possessions have at least one "district."
- **U.S. Courts of Appeals:** Courts that hear appeals from the federal district courts located within their judicial circuits.

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State and Federal Court Systems (10 of 13)

- Circuit courts cover twelve geographic regions, with a thirteenth court—the Federal Circuit—that has national appellate jurisdiction over certain cases.
- Decisions of a circuit court of appeals are binding on all courts within its jurisdiction and are almost always final.

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State and Federal Court Systems (11 of 13)

U.S. Supreme Court:

- It is the "highest court in the land."
- The Court exercises discretionary review over all federal appellate courts as well as state supreme and appellate courts in some circumstances.

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State and Federal Court Systems (12 of 13)

- Most cases reach the U.S. Supreme Court on a **writ of *certiorari***.
- A writ will not be issued unless at least four of the nine justices approve of it **(rule of four)**.

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State and Federal Court Systems (13 of 13)

- Denial of the request to issue a writ of *certiorari* means that the lower court's decision remains the law in that jurisdiction.
- It is not a decision on the merits of the case, an indication of agreement with the lower court's opinion, nor does it carry any value as a precedent.

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§ 4: Alternative Dispute Resolution
(1 of 11)

- Litigation is expensive and time consuming. Years may pass before a case is tried due to the backlog of pending cases in many courts.
- ADR methods are inexpensive, relatively quick, and give parties more control over process.

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Alternative Dispute Resolution (2 of 11)

- Most common ADR methods:
  - **Negotiation.**
  - **Mediation.**
  - **Arbitration.**

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Alternative Dispute Resolution (3 of 11)

- **Negotiation:** Informal settlement talks, sometimes without attorneys, where differences are discussed with the goal of "meeting of the minds" in resolving the case.

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Alternative Dispute Resolution (4 of 11)

- **Mediation:** Utilizes the services of a neutral third party, called a *mediator*. The mediator acts as a communicating agent between the parties and suggests ways in which the parties can resolve their dispute.

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Alternative Dispute Resolution (5 of 11)

- **Arbitration:** Utilizes an *arbitrator* (a neutral third party or a panel of experts) who hears a dispute and imposes a resolution on the parties.
- The arbitrator's decision is called an **award** and is usually the final word on the matter.

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Alternative Dispute Resolution (6 of 11)

- Many commercial contracts contain an **arbitration clause** which specifies that any dispute arising out the contract will be submitted first to arbitration rather than to a court.

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Alternative Dispute Resolution (7 of 11)

- **Arbitration Statutes:**
  - Uniform Arbitration Act of 1955.
  - Federal Arbitration Act.
  - **CASE IN POINT 2.8 *Cleveland Construction, Inc. v. Levco Construction, Inc.* (2012).**

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Alternative Dispute Resolution (8 of 11)

- **Arbitrability:** A court's determination on whether an issue must be resolved through arbitration.
- **Issue of Arbitrability:** No party will be compelled to arbitration unless a court finds the party *consented*, and that they are fair to both parties.

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Alternative Dispute Resolution (9 of 11)

- Other Types of ADR:
  - **Neutral Case Evaluation.**
  - **Mini-Trial.**
  - **Summary Jury Trial.**

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Alternative Dispute Resolution (10 of 11)

- **Providers of ADR Services:** Both government agencies and private organizations provide ADR services.
  - American Arbitration Association (AAA): Nonprofit organization that handles 200,000+ claims a year.
  - Most of the largest U.S. law firms are members of the AAA.

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Alternative Dispute Resolution (11 of 11)

- **Online Dispute Resolution (ODR):** An increasing number of companies and organizations offer dispute-resolution services online.
- Laws of specific jurisdictions are not automatically applied in most online forums but are often based on general, universal legal principles.

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§ 5: International Dispute Resolution

- **Forum selection** and **choice-of-law** clauses in contracts govern the transactions.
- Arbitration clauses are generally incorporated into international contracts.

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