

## Chapter 2 - Courts and Alternative Dispute Resolution

### LEARNING OBJECTIVES

#### The Judiciary's Role

- Judicial Review
  - **Judicial review** is the process by which a court decides on the constitutionality of legislative enactments and actions of the executive branch.
- The Origins of Judicial Review in the United States

#### Basic Judicial requirements

- Jurisdiction
  - **Jurisdiction** is the power of a court to hear a dispute and render a legally binding verdict.
  - *In personam* jurisdiction is the power of a court to compel the presence of the parties, including corporations, to appear before the court and to litigate.
  - Jurisdiction over persons or property
    - *In rem* jurisdiction: Court's power to decide issues relating to property.
    - **Long arm statutes** are used by courts for non-resident parties based on "minimum degree of contact" with state.
    - For corporations, courts usually have jurisdiction in the state where they were incorporated, principal place of business, places goods in stream of commerce or actively advertises.
  - Jurisdiction over subject matter
    - Subject Matter limitations on the types of cases a court can hear.
    - Usually determined by federal or state statutes, for example bankruptcy, probate, family, or criminal cases.
  - Oral and appellate jurisdiction
    - Court of original jurisdiction is where the case started.
    - Court of appellate jurisdiction has the power to hear an appeal from a lower court.
  - Jurisdiction of the federal courts
    - **Federal question**: cases in which the rights or obligations of a party are created or defined by some federal law.
    - Diversity cases where:
      - The parties are not from the same state, and
      - The amount in controversy is greater than \$75,000.
  - Exclusive versus concurrent jurisdiction
    - **Concurrent**: Jurisdiction that exists when two different courts have the power to hear a case.
    - **Exclusive**: Jurisdiction that exists when a case can be heard only in a particular court or type of court.
- Jurisdiction in Cyberspace

- “Sliding-scale” standard rules for jurisdiction
  - 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.
  - When a defendant merely engages in passive advertising on the Web, jurisdiction is never proper.
- Venue
    - **Venue** is concerned with the most appropriate location for the trial.
    - Courts rarely grant requests for change of venue.
  - Standing to Sue
    - In order to bring a lawsuit, a party must have “standing” to sue.
    - **Standing to sue** is sufficient “stake” in the controversy.
    - Party must have suffered a legal injury.
    - There must be a **justiciable controversy**, a real and substantial controversy.

### **The State and Federal Court Systems**

- Each state has its own court system.
  - There is a system of federal courts.
  - Independent systems deriving authority from Article III, Sections 1 and 2 of the U.S. Constitution
- The State Court Systems
    - Trial courts
      - General or limited jurisdiction.
      - **Small claims courts**: Special court in which parties can litigate small claims without an attorney.
    - Appellate, or reviewing, courts
      - Every state has at least one.
      - Focus on questions of law.
      - Defer to trial court’s finding of facts.
    - Highest state courts
  - The Federal Court System
    - U.S. district courts
    - U.S. courts of appeals
    - The United States Supreme Court
  - Pretrial Procedures
    - Pleadings
      - Plaintiff’s complaint
      - Defendant’s answer
      - Motion to dismiss
    - Pretrial motions
      - Motion for judgment on the pleadings

- Motion for summary judgment
- Discovery
  - Depositions and interrogatories
  - Requests for other information
- Electronic discovery
- Pretrial conference
- Jury selection
  - **Voir dire** is an important part of jury selection in which attorneys question prospective jurors about their backgrounds, attitudes, and biases to ascertain whether they can be impartial jurors.
- At the Trial
  - Opening arguments
  - Directed verdicts
  - Closing arguments and awards
- Posttrial Motions
  - Motion for judgment *n.o.v.* (“notwithstanding the verdict”)
  - Motion for a new trial
- The Appeal
  - Filing the appeal: Briefs pointing out reversible error that require reversal of the trial court’s verdict.
  - Appellate review
    - Courts do not consider new evidence.
    - Only consider briefs and evidence presented at trial.
  - Appeal to a higher appellate court
- Enforcing the Judgment

#### **The Courts adapt to the online world**

- Electronic Filing
  - Federal: Case Management/Electronic Case Files (CM/ECF)
  - States: majority have some form
- Courts Online
- Cyber Courts and Proceedings
  - Someday litigants may use cyber courts.

#### **Alternative dispute resolution**

- Trials are a means of dispute resolution that are very expensive and sometimes take many months to resolve.
- **Alternative dispute resolution** (ADR) is a method to resolve disputes in ways other than the traditional judicial process, and include: negotiation, mediation, and arbitration.
- Negotiation
  - Less than 10% of cases reach trial.
  - **Negotiation** is informal discussion, sometimes without attorneys, where differences

- are aired with the goal of coming to a “meeting of the minds” in resolving the case.
- Successful negotiation involves thorough preparation.
- Mediation
  - **Mediation** Involves a neutral 3<sup>rd</sup> party (mediator).
  - Mediator talks face-to-face with parties (who typically are in different adjoining rooms) to determine “common ground.”
    - Advantages: few rules, customize process, parties control results (win-win).
    - Disadvantages: mediator fees, no sanctions or deadlines.
- Arbitration
  - Many employment contracts have binding **arbitration** clauses.
  - Settling of a dispute by a neutral 3<sup>rd</sup> party (arbitrator) who renders a legally-binding decision; usually an expert or well-respected government official.
  - Arbitrator’s decision is usually final.
  - Arbitration clauses and statutes
    - Uniform Arbitration Act
    - Federal Arbitration Act (FAA)
  - The 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.
  - Mandatory arbitration in the employment context
    - Generally clauses are enforceable.
    - *Gilmer* decision
  - Private arbitration proceedings
    - 2011 new confidential arbitration process established
- Providers of ADR Services
  - American Arbitration Association (AAA)
  - For-profit arbitration services
- Online Dispute Resolution (ODR)
  - Uses the Internet to resolve disputes.
  - Still in its infancy but is gaining momentum.
  - See, e.g., [www.cybersettle.com](http://www.cybersettle.com)