

THE ABCs OF CROSS-BORDER LITIGATION IN THE UNITED STATES



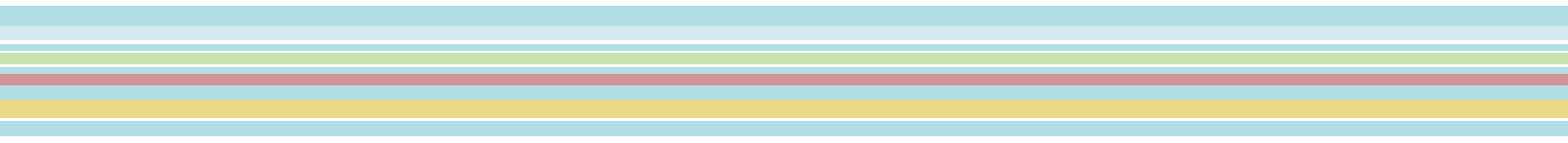
a practice spanning the globe

WASHINGTON, DC  
CALIFORNIA  
NEW YORK  
LONDON  
BRUSSELS

*Conducting business in: Arabic,  
Bengali, Chinese, English, Flemish,  
French, German, Gujarati, Hindi,  
Italian, Japanese, Malay, Marathi,  
Portuguese, Russian, Spanish, and Urdu.*

crowell moring

experience. creativity. results.





can still be down to earth



WITH THE EXPANDING GLOBALIZATION OF BUSINESS,  
NON-U.S. COMPANIES INCREASINGLY ARE FINDING THEMSELVES  
PURSUING OR DEFENDING LEGAL ACTION IN U.S. COURTS

---

---

---

With parallel judicial systems in the state and federal courts, broad discovery tools (including electronic discovery), and a complex maze of procedural and evidentiary rules, successful navigation of the U.S. judicial system requires specialized skill and knowledge. For any company looking to conduct business in the U.S., partnering with experienced legal counsel who can provide an understanding of the U.S. legal system is essential to a proper assessment of risks and opportunities. We are pleased to offer you the following guide as a brief overview of the U.S. judicial system and to highlight specific aspects of U.S. litigation that non-U.S. companies may encounter for the first time.



# the ABCs of cross-border litigation in the United States

Litigation in the U.S. often is a long and expensive process, involving many layers of judicial review and in which an array of legal issues—both procedural and substantive—must be addressed. This guide is not intended to serve as a comprehensive roadmap or instruction manual for the conduct of litigation in the United States. Nor is it designed to provide solutions to every issue a non-U.S. company may face, either as a plaintiff or as a defendant, in U.S. courts. Rather, it is intended to provide an overview of the process, and highlight the kinds of strategic issues that must be addressed.

Every case presents unique legal and practical challenges that must be considered carefully in the context of the U.S. and international legal systems. In all cases, you should consult U.S. litigation counsel for advice on your particular issues.

SHOULD YOU HAVE ANY QUESTIONS,  
PLEASE DO NOT HESITATE TO CONTACT US.

Washington, D.C.

Stuart H. Newberger  
snewberger@crowell.com

Laurel Pyke Malson  
lmalson@crowell.com

Michael L. Martinez  
mmartinez@crowell.com

Aryeh S. Portnoy  
aportnoy@crowell.com

Lisa Savitt  
lsavitt@crowell.com

Katherine J. Nesbitt  
knesbitt@crowell.com

Daniel E. Vielleville  
dvielleville@crowell.com

John Murino  
jmurino@crowell.com

New York

California

London

William J. McSherry, Jr.  
wmcsherry@crowell.com

Kimberley Chen Nobles  
knobles@crowell.com

Jane Wessel  
jwessel@crowell.com

Samaa Haridi  
sharidi@crowell.com

Birgit Kurtz  
bkurtz@crowell.com

# the U.S. legal system

## AN OVERVIEW

*It is often said that the United States is the most litigious society in the world. There may be many reasons for this phenomenon, including the minimal risk of filing a lawsuit in a system where each side pays its own legal fees, the unprecedented breadth and intrusiveness of discovery, the unusually expansive scope of jurisdiction of U.S. courts, or the unique potential for substantial monetary awards and punitive damages. In cases involving foreign governments or government-owned entities, the U.S. judicial system also is unique in its waivers of sovereign immunity in a variety of circumstances. Even where mediation, arbitration, or other alternative dispute resolution mechanisms are pursued, such processes generally follow initiation of a lawsuit in state or federal courts. Whatever the reason, this much is clear: Any company choosing to do business in the United States must be familiar with the U.S. legal system and be prepared to litigate within that system.*

*This guide will provide insight into the nuances of the litigation process in U.S. courts. At the outset, however, it is useful to consider some of the basic elements of the U.S. judicial system and the scope of issues addressed in U.S. courts.*

## THE U.S. JUDICIAL SYSTEM

Almost all litigation in the U.S. takes place either in U.S. federal courts or in the local courts of the 50 states and the District of Columbia. The courts typically have three layers: the trial courts (U.S. district courts and local state courts), the appellate courts (U.S. courts of appeals and state appellate courts), and the U.S. Supreme Court, which generally grants review only to those appeals from the federal and state appellate courts that it determines are of sufficient national importance. Most cases brought in federal court receive final review at the U.S. Court of Appeals stage; most cases brought in state courts are finally reviewed by the local state Supreme Court (sometimes called the state Court of Appeals).

### Broad Scope of Issues

One of the principal reasons there is so much litigation in the U.S. is that there are few limits on the types of cases that may be brought in U.S. courts. Subject to certain jurisdictional rules discussed in more detail below, a broad range of disputes—e.g., contractual disagreements, copyright and trademark infringement issues, labor and employment disputes, consumer fraud and product liability allegations, negligence

and intentional torts (including vicarious liability for the actions of a company's employees)—may be resolved in U.S. courts. Whatever the context, businesses operating in the U.S. must be prepared to defend themselves against a broad range of potential complaints relating to their business operations.

### Sources of Law

The sources of law for cross-border disputes are similarly expansive. Many cases deal with disputes arising under U.S. statutes and regulations, or those of any of the 50 states where individuals or companies act or conduct business. Even where no written (or "codified") laws exist, U.S. courts may follow what is called "common law"—legal principles that have been developed over the years by judges—to resolve commercial and other disputes. In still other cases, litigants may ask a U.S. court to resolve questions arising exclusively under international or foreign laws or treaties. Because of the broad scope of jurisdiction in the U.S. state and federal courts, it is important to understand the substantive rights and defenses available in each of these various areas.

## personal jurisdiction— who can be sued in U.S. courts?

The first question in any litigation is whether the court has the power to resolve the dispute by requiring the defendant to take a particular action. This question is especially significant for non-U.S. defendants, who may be able to avoid litigation altogether if the court determines that they are not subject to its jurisdiction at all. The question of jurisdiction over a person or entity is called “personal jurisdiction.”

This inquiry does not arise usually for the party bringing the lawsuit (the plaintiff) because the plaintiff, by filing the action, voluntarily submits to the jurisdiction of the court where the suit is filed. Still, there are requirements that a plaintiff, too, must satisfy in order to maintain a lawsuit in U.S. courts—the most significant of which is that the plaintiff allege an injury as a result of the action complained of in the lawsuit. This concept commonly is referred to as “standing to sue.”

### “Minimum Contacts”

As a threshold matter, a U.S. court may exercise jurisdiction over a person or company only where that entity has “minimum contacts” with the particular state in which that court sits. These contacts may take a variety of forms, including the commission of some act within the state, contracting for the provision of goods or services within the state, or deriving some benefit from conducting business within the state. Additional examples may include the ownership of property, maintaining a bank account, or placing an item in the stream of commerce with the intention that it be distributed within the state. Additionally, each of the 50 states and the District of Columbia has what is called a

“long-arm statute,” which sets out the circumstances under which an entity is considered subject to the jurisdiction of that state’s courts, even though it is not physically “present” in that state.

In the modern global economy, jurisdictional lines are increasingly blurred, such that it is increasingly difficult for a non-U.S. company to avoid jurisdiction under the theory that it lacks “minimum contacts” with a U.S. forum. In addition to some of the more traditional methods described above, minimum contacts may be established by such basic conduct as using the Internet for business purposes, advertising in the U.S., or conducting business through subsidiaries or agents in the U.S.

Ultimately, whether a non-U.S. party has “minimum contacts” with a forum sufficient for a court to assert personal jurisdiction over it is a highly factual determination that will depend on the circumstances of each case. Those circumstances also may determine how broadly that jurisdiction may extend (e.g., jurisdiction over disputes arising *only* from conduct relating to those contacts, or jurisdiction over *any* dispute involving that non-U.S. entity). Therefore, the question of “minimum contacts” can be a critical threshold issue which ultimately determines whether a dispute involving a non-U.S. party will proceed in a U.S. court.

## JURISDICTION BY CHOICE

The simplest way for a court to exercise jurisdiction over a non-U.S. party is for that party to take some action that the courts deem to constitute “consent” to jurisdiction of the forum. This consent can occur as a result of a voluntary contractual provision, physical presence in the forum, or some other circumstance by which the party avails itself of the privilege of conducting business or other activities within the forum.

In business transactions in the U.S., it is common for at least one side (usually the U.S. business partner) to insist on a “forum selection” clause in the written contract governing the transaction which specifically designates the courts before which a dispute must be resolved. By agreeing to this clause, both parties are deemed to consent to the jurisdiction of the designated courts. Still, as is almost always the case in U.S. litigation, there may be exceptions. For example, a court may consider an argument that the clause should be ignored because the contract was procured by fraud, or that proceeding in the selected forum would be highly unreasonable or unfair. Even in these circumstances, however, the question of whether the clause is valid must be litigated in the U.S. court.

In some cases, the forum selection clause identifies a *non-U.S.* forum for resolving the dispute. The same rules apply in these cases—i.e., the courts generally respect the choice of the parties; however, they also may consider arguments for an exception. One example may be where the purpose of a U.S. law or regulation would be compromised significantly were the case to be resolved in another jurisdiction, with different legal guidelines. Here too, companies must be prepared to litigate at least the procedural issue in a U.S. court.

A litigant also may be considered to have “consented” to personal jurisdiction where it is physically present in the forum. Presence may occur in the ways described above to establish “minimum contacts” with the forum. Presence also may be established simply by appearing in a judicial proceeding. For example, if a party files a lawsuit in a U.S. court or even simply appears to defend a claim it believes to be unfounded, that itself may be enough in certain circumstances to provide personal jurisdiction over the party.

## JURISDICTION BY LAW—SERVICE OF PROCESS

U.S. courts also have little trouble exercising jurisdiction over foreign entities with a minimal nexus to the U.S. when the federal law giving rise to the claim specifically establishes personal jurisdiction over the defendant upon receipt of proper service of process (for a discussion of “service” issues, see below). Some of the most common of these “statutory jurisdiction” provisions facing non-U.S. parties include the Foreign Sovereign Immunities Act, the Clayton Antitrust Act, the Securities Act and the Racketeering-Influenced and Corrupt Organizations Act.

Yet another way a U.S. court may exercise personal jurisdiction over a non-U.S. party is when a plaintiff is able to “serve” that non-U.S. party (i.e., the defendant) in the relevant forum. This form of jurisdiction—often called “tag” or “transient” jurisdiction—applies when a defendant is served (or “tagged”) with a complaint when they are found physically in the forum, even if the defendant’s presence is only temporary or the defendant is simply passing through. There is some debate among courts whether “tagging” a corporate agent is sufficient to confer personal jurisdiction over a corporation, and thus, companies should be aware that this may be a risk.

Whether service is proper can be a critical issue when determining whether a lawsuit may go forward against any defendant, domestic or foreign. “Service of process” is a legal term that simply means the delivery of various court orders required by the relevant rules of law, including subpoenas, writs, and other orders issued in the course of litigation. Note, however, that the requirements for serving the *initial* notice to the

defendant that a lawsuit has been filed against it are usually more rigorous. Service of that “initial notice” (i.e., the Summons and Complaint) both officially notifies the defendant that it has been sued and informs it that the court intends to adjudicate its rights. All courts, state and federal, have elaborate provisions governing service of this initial notice to defendants. Importantly, a failure by a party initiating litigation to properly follow the service rules may result in a dismissal of the case.

Proper methods of service may depend on the nature and location of the defendant, i.e., whether it is an individual, corporation, or government and whether it is present in the United States. Not surprisingly, the rules for serving a corporation or government are more complex than those for serving an individual defendant. Properly serving a corporation in the U.S. generally requires serving one of several specific officers or agents designated by statute. Properly serving a corporation not found in the U.S. requires an even more particularized procedure involving the use of international conventions and government offices designated as conduits for service. The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, to which the U.S. is a signatory, provides methods of service on entities located outside the U.S. that can be used in conjunction with U.S. federal or state rules relating to service of process. Because proper service on a party is so closely tied to the court’s rules for proceeding with litigation, special attention by a legal professional must be paid to service requirements.

# subject matter jurisdiction and venue— what disputes may be brought before U.S. courts, and where?

*In addition to personal jurisdiction over the parties, a U.S. court also must have jurisdiction over the subject matter of the claim for a litigation to proceed. This threshold issue is referred to as the “subject matter jurisdiction” of the court.*

## STATE COURT JURISDICTION

Subject matter jurisdiction in U.S. state courts is extremely broad. In fact, except in limited circumstances where exclusive jurisdiction is vested in the federal courts (e.g., suits against the U.S.

government), almost any dispute, including disputes involving non-U.S. parties, can be brought in the local state courts, assuming the court’s personal jurisdiction requirements are satisfied.

## FEDERAL COURT JURISDICTION

Jurisdiction in the U.S. federal courts is somewhat more restrictive. The federal courts are called courts of “limited jurisdiction” because they are available only for certain limited types of disputes, including cases involving the U.S. or foreign governments, questions relating to international treaties or agreements, cases arising under federal laws or regulations, and cases between residents of different states.

Still, the jurisdiction of federal courts remains broad, especially for disputes between U.S. and non-U.S. parties. The procedural rules governing the federal courts expressly grant subject matter jurisdiction over claims between U.S. and non-U.S. citizens. While the text appears simple, this rule in practice can present many complexities. For example, what is the citizenship of an entity that is incorporated in Hungary but has its primary place of business in the U.S.? What about a corporation that is separately incorporated

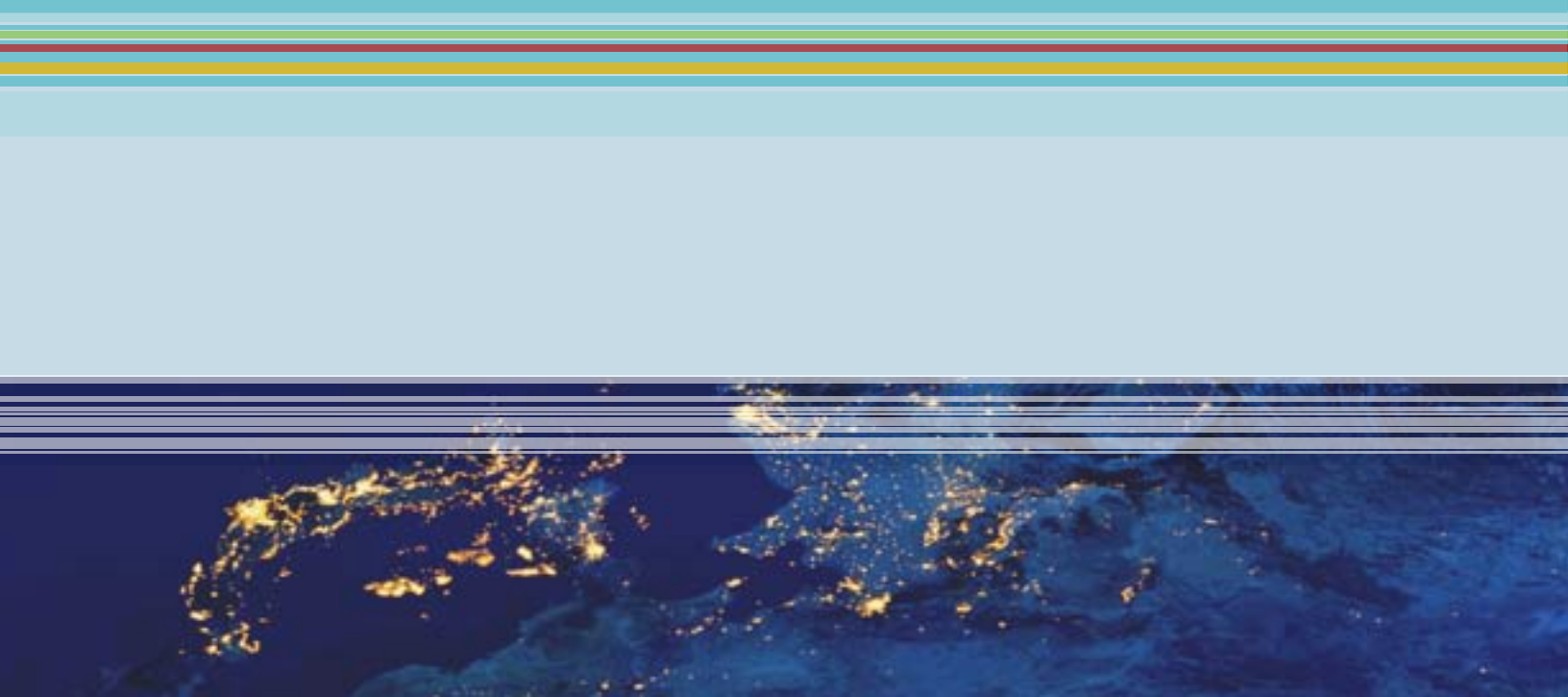
in the U.S. *and* in the EU? There are a range of legal strategies that may be available to a non-U.S. company in this regard. It is important to discuss these options with U.S. counsel to be able to make an informed judgment regarding how to proceed in the U.S. litigation.

It is important to bear in mind that some federal statutes may apply to conduct abroad of both foreign and U.S. corporations. For example, certain federal antitrust laws may apply where the conduct was meant to produce and in fact did produce a substantial effect in the United States. Other examples of laws that may be applied extraterritorially include certain federal securities and international banking laws, the Alien Tort Claims Act, suits against foreign states, various federal civil rights acts, and claims related to international arbitration agreements.

## REMOVAL FROM STATE COURT TO FEDERAL COURT

“Removal” permits defendants sued in state court to “remove” the case from state court, in certain circumstances, so that it may be adjudicated by a federal court. A party sued in state court may favor proceeding in federal court for many reasons: federal courts may be more predictable, consistent, and experienced in certain matters than state courts; however, federal court litigation also may be more

expensive and time-consuming than litigation in the state courts. As usual, with each rule there are exceptions. For example, federal courts in the Eastern District of Virginia are known for moving extremely quickly while some judges in other jurisdictions can take months or even years to resolve threshold questions in a case.



## VENUE AND *FORUM NON CONVENIENS*

Even where personal jurisdiction, subject matter jurisdiction, and venue all are proper, a court nevertheless may conclude, as a matter of law, or even of common sense, that a dispute should be litigated somewhere else. Thus, the non-U.S. litigant may have yet another opportunity to avoid litigation in an unfavorable U.S. court by seeking to transfer the case from one federal district to another, or to have it dismissed in its entirety. This concept—which arises primarily in the federal court system—is referred to as one of “proper venue.”

When considering the proper venue of a lawsuit, courts generally look for a sensible relationship between the dispute and the forum. Thus, while the court may consider many factors in this analysis, the primary issue is whether the forum has some “connection” to the parties or the subject matter of the lawsuit. Where this link does not exist, a court may transfer the case to another forum with a greater interest in the outcome of the dispute, or it may dismiss the case entirely (e.g., so that it may be brought in a more appropriate forum within or outside the U.S.).

Even where venue is technically “proper” because of a reasonable “connection” to the forum, a court nevertheless may transfer or dismiss the case as a matter of common sense or convenience for the parties. Where a defendant is merely seeking to transfer a case—e.g., from one federal district to another—the court will consider whether transfer will promote the “convenience of the parties and witnesses” or will serve the “interests of justice.” This standard is intentionally vague and the determination rests largely within the discretion of the transferring court. The effect of a transfer may be limited, however,

because the mere transferring of a case from one district to another—while changing the court and potential jury pool—often will not impact the law to be applied by the court.

A second, more dramatic, alternative is for the court to dismiss the case on what is called “*forum non conveniens*” grounds. This may occur when the court determines that an adequate alternative forum—frequently outside the U.S.—exists to resolve the lawsuit. In cross-border litigation, this issue commonly turns on questions of the nationalities of the parties, location of the evidence, location and availability of witnesses, respective burdens on the parties of proceeding in the initial forum, and the potential impact of the lawsuit on the relationship between the U.S. and another sovereign nation. Courts also consider whether or how bringing the suit in an alternate forum would impact the substantive rights of the parties—e.g., if one party stands to gain a material advantage in the alternate forum, the court may be more reluctant to dismiss the case. Ultimately, the analysis is an equitable one, but because the remedy is an outright dismissal of the case, U.S. courts generally require that the factors weigh heavily in favor of the alternative forum before granting a motion to dismiss on *forum non conveniens* grounds.

Finally, when considering a legal strategy involving venue, a defendant must be especially mindful of the timing of raising an objection. If not timely raised, an objection to venue or on *forum non conveniens* grounds may be waived by the defendant and an opportunity to transfer or dismiss the litigation potentially lost.

## ANTI-SUIT INJUNCTIONS AND PARALLEL PROCEEDINGS

Assuming the lawsuit proceeds in a U.S. forum, a cross-border litigation may be further complicated by the multidimensional nature of many international disputes. Thus, the same dispute may be the subject of litigation in a U.S. federal district court as well as a lawsuit in a civil law country, and perhaps even an arbitration before an international tribunal. Fortunately, the U.S. judicial system contemplates the potential for these sorts of “parallel proceedings,” and has established tools to assist parties in navigating these complex circumstances to maximize opportunities for fair and uniform process and results.

One of the most common of these tools is the “anti-suit injunction.” An anti-suit injunction is a judicial order preventing a party from initiating or pursuing a particular action in another jurisdiction. Although these orders may give the appearance of an overreaching of judicial power, U.S. courts have issued anti-suit injunctions with some regularity to restrain litigants subject to their jurisdiction from pursuing relief in other forums (including international courts and arbitral

tribunals). Not surprisingly, anti-suit injunctions by U.S. courts often create tensions between judicial and arbitral bodies before which similar disputes have been raised. Still, because the injunction is directed at the litigants themselves rather than the other courts or tribunals, such orders by U.S. courts have binding effect and may impact significantly the positions of the parties in the U.S. litigation.

When deciding whether to prohibit parties from participating in parallel proceedings, U.S. courts apply a flexible standard. Thus, anti-suit injunctions—which are issued pursuant to the court’s inherent powers and the common law, rather than state or federal statutes—reflect primarily the court’s assessment of the risk of duplicative or inconsistent results, the respective public policy interests of the respective jurisdictions, the relationship of each jurisdiction to the facts or parties underlying the dispute, and evidence of any agreement by the parties to litigate the dispute in a particular forum.

# the mechanics of U.S. litigation

There are several significant and distinguishing characteristics of U.S. litigation that must be borne in mind, especially for litigants accustomed to litigating in civil law jurisdictions or other legal systems. First, although there are certain extraordinary circumstances where a party may be compelled to pay an opponent's legal costs, each party in a U.S. litigation (state or federal) generally bears its own costs in connection with a litigated dispute, even if the case is dismissed summarily by the court. Second, the discovery rules in the U.S. can be so burdensome on defendants that plaintiffs often will pursue claims simply because the *threat* of discovery may be sufficient to compel an early out-of-court resolution. Third, most disputes are subject to extensive (and expensive) pretrial motions practice. Indeed, the vast majority of litigation in the U.S. is resolved by settlement, and litigation and trial strategy is largely driven by the parties' ability to utilize strategically the legal process to reach a favorable settlement.

Especially in cross-border disputes, non-U.S. defendants will want to explore every possible opportunity to avoid or cut short litigation in the U.S. in favor of resolution in some other forum. Many of the strategies for achieving this goal are outlined above and companies should consult with U.S. and local counsel to fully understand their range of options.

In reality, however, the likelihood is that the non-U.S. party will be compelled to engage, to some extent, in U.S. federal or state court litigation—from preliminary procedural disputes to litigating the entire case on the merits. Therefore, it is vitally important for companies doing business in the U.S.—and particularly non-U.S. companies that may be less familiar with the U.S. legal system—to appreciate, as much as possible, the litigation environment and its risks and benefits when developing their U.S. business and litigation strategies.

The following sections highlight some of the most basic elements of U.S. litigation practice. Every case is different, however, and will require a careful balancing of strategies to achieve the best result.

## DISCOVERY

Perhaps the greatest difference between litigation in the U.S. and litigation in other jurisdictions is the U.S. discovery rules. While many other legal systems afford parties some opportunity to gather and review information from their adversaries to help analyze their case and prepare for trial, the U.S. legal system permits discovery that is so broad and takes so many different forms that parties who are unfamiliar with the rules and practice often can be blindsided by the U.S. discovery process. The consequences of failing to comply with these complex rules can be significant. Depending on the severity of the offense, U.S. courts have wide discretion to assess monetary sanctions (e.g., civil penalties and attorneys' fees), impose preclusion sanctions (i.e., precluding the use of certain evidence by the offending party), draw adverse inferences, allow the other party virtually unlimited access into the offending party's files, or even—in extreme cases—to award default judgment.

Accordingly, it is important to be familiar with the three basic forms of discovery in the U.S.: Document Requests, Interrogatories, and Depositions.

**Document Requests:** Either party may require its opponent to make available or produce documents related to the case. This process can be extremely burdensome, time-consuming, and expensive because there are very few limits on the categories of documents a party may be required to produce so long as they “may” lead to the discovery of admissible evidence. In complex litigations, it is not uncommon for parties to exchange hundreds of thousands of pages of documents, or more, pursuant to these document requests.

For this reason, negotiating discovery parameters can be very important in complex litigation. By mutual agreement, the parties may agree to limit the scope of discovery to reduce costs and burdens. A party also may seek protection from the court from harassing or overly burdensome discovery requests.

**Interrogatories:** In addition to document requests, parties are entitled to submit written questions to their opponents which, in turn, must be responded to in writing, and under oath, within a limited time period. This process is much less expensive and time-consuming than responding to document requests, but can be similarly intrusive with respect to the information requested. The receiving party can object to the questions if they are overbroad, harassing, or ask for information protected by the attorney-client or similar privileges. Still, the rules are quite liberal, and are designed to encourage a free flow of information between the parties.

**Depositions:** Third, the parties are entitled to take the oral testimony of witnesses they believe possess information relevant to the case. The rules regarding depositions are similarly flexible and the party seeking the information generally is able to select whom to depose, when, and where. Testimony is recorded, under oath, by a court reporter, but the judge generally is not present. The witness's attorney may object to certain questions but, unless there is a danger of violating the attorney-client or similar privileges, the witness generally will be required to answer.

## “E-DISCOVERY”

The burdens of discovery have increased exponentially as a result of the use of electronic communication and document retention systems. Consider how many emails go back and forth each day with respect to a business arrangement or transaction, or how many electronic documents (including previous versions) may exist on the companies' servers. *All* of these documents may be subject to discovery, pending objection by the party requested to produce them. Not surprisingly, the exchange of this electronic data or “e-discovery” can be an attractive discovery tool because this material can be searched, stored, and organized much more easily than boxes of paper, and is much more difficult to destroy.

E-discovery also can be extremely expensive. Because businesses generate staggering amounts of electronic data — including emails, presentations, reports, accounting records, and spreadsheets — responding to e-discovery requests accurately and completely can be very time-consuming and require substantial resources (both internal and external). Responding to e-discovery requests often requires the assistance of outside vendors who are able to capture electronic

material in a comprehensive and efficient manner.

The process can be highly disruptive of the company's daily business operations and can burden the company's data systems by requiring the suspension of document removal protocols throughout the litigation.

For this reason, the Federal Rules instruct parties to address e-discovery issues as early as possible. Parties are encouraged to agree on the scope of e-discovery, including the type of responsive data (e.g., email, PowerPoint presentations), the format in which data will be produced, and where parties should search for responsive data. Most important, parties are encouraged to agree on their duty to preserve discoverable data. Even absent agreement, however, a party's obligation to preserve discoverable data begins when the complaint is filed. For this reason, it is important to contact a lawyer immediately, so that he or she can draft a “legal hold notice” for your company. By distributing a legal hold notice, a party instructs employees to avoid accidentally or purposely destroying any data that could potentially be subject to the litigation.

## PRIVILEGE

Different notions of attorney-client and other litigation privileges in the U.S. and abroad also play an important role in discovery. Generally, confidential attorney-client communications are privileged in the U.S. and protected from discovery. This is equally true of an in-house attorney who is employed by the business he or she represents. However, the rules are not the same in every country. In the E.U., for example, privilege rules require the attorney to be “independent,” thereby removing any privilege from communications from in-house lawyers. When engaging in discovery for a U.S. proceeding, parties may be able to withhold documents that they would not be able to withhold elsewhere in the world.

Conducting proceedings in multiple jurisdictions with different rules can create unique risks. For example, by disclosing material in a non-U.S. proceeding, a party may be deemed to have waived any privilege that otherwise would have been applicable in the U.S. litigation. Developing a proper approach to discovery can be tricky, and it is important to consult counsel who are familiar with the discovery and evidentiary rules in each jurisdiction where litigation currently is proceeding, or may proceed in the future.

## OBTAINING DISCOVERY OUTSIDE THE U.S.

The robust U.S. discovery rules, when applied extraterritorially, can make obtaining discovery abroad a problematic, long, and expensive process. Additionally, the consequences of failing to account for the effect of foreign discovery on U.S. litigation can be significant.

As a general matter, U.S. discovery rules provide for discovery outside the U.S. by the traditional forms described above. Normally, U.S. courts direct that the depositions of foreign persons take place in the U.S., and that the party seeking the deposition bear the financial burden of this discovery. U.S. courts also compel the production of documents located abroad when the custodian of the documents is subject to the court's personal jurisdiction—emphasizing further how critical “jurisdictional” contacts may become in U.S. litigation. Even a non-party foreign corporation may be compelled to produce evidence pursuant to a U.S. court subpoena if that entity is subject to the court's personal jurisdiction. Multinational corporations, in particular, should be mindful of how a court's jurisdictional reach can render discovery much broader and more expensive than anticipated.

U.S. discovery rules also allow litigants to seek discovery through international treaties and conventions, such as the Hague Evidence Convention to which the U.S. is a signatory. The Hague Convention authorizes transmission of Letters Rogatory (also known as “Letters of Request”)—from a domestic court in one signatory nation to a domestic court in another—for the purpose of obtaining evidence without

requiring the requesting party to utilize consular or diplomatic channels. In practice, parties typically file a motion in the U.S. court for a Letter of Request, explaining the reasoning behind the request and specifically describing the desired evidence. If granted, the Letter is transferred to a receiving tribunal in the foreign country, and the receiving tribunal obtains the evidence pursuant to local procedures.

Among the many countries that are signatories to the Hague Convention, there are a variety of approaches taken for accommodating discovery requests. In France, for example, Letters Rogatory are addressed to the designated Central Authority, *Bureau de L'Entraide Judiciaire Internationale*. Once received, the letters are transferred to the appropriate District Attorney who formally requests the evidence from the local court. If oral testimony is requested, French law requires that parties may submit questions, but only the judge may ask the questions of the witness. The judge then summarizes the testimony in a report which the witness signs. Alternatively, China—a recent signatory to the Hague Convention—does not recognize the authority of foreign persons (e.g., U.S. counsel) to take depositions within that country at all. Moreover, scheduling a deposition in China requires a Letter of Request to be transmitted through diplomatic channels, a process that may take more than a year.

Before embarking on the lengthy and expensive process of taking depositions abroad, it is wise to consult competent U.S. counsel, who can help navigate the maze of foreign discovery.

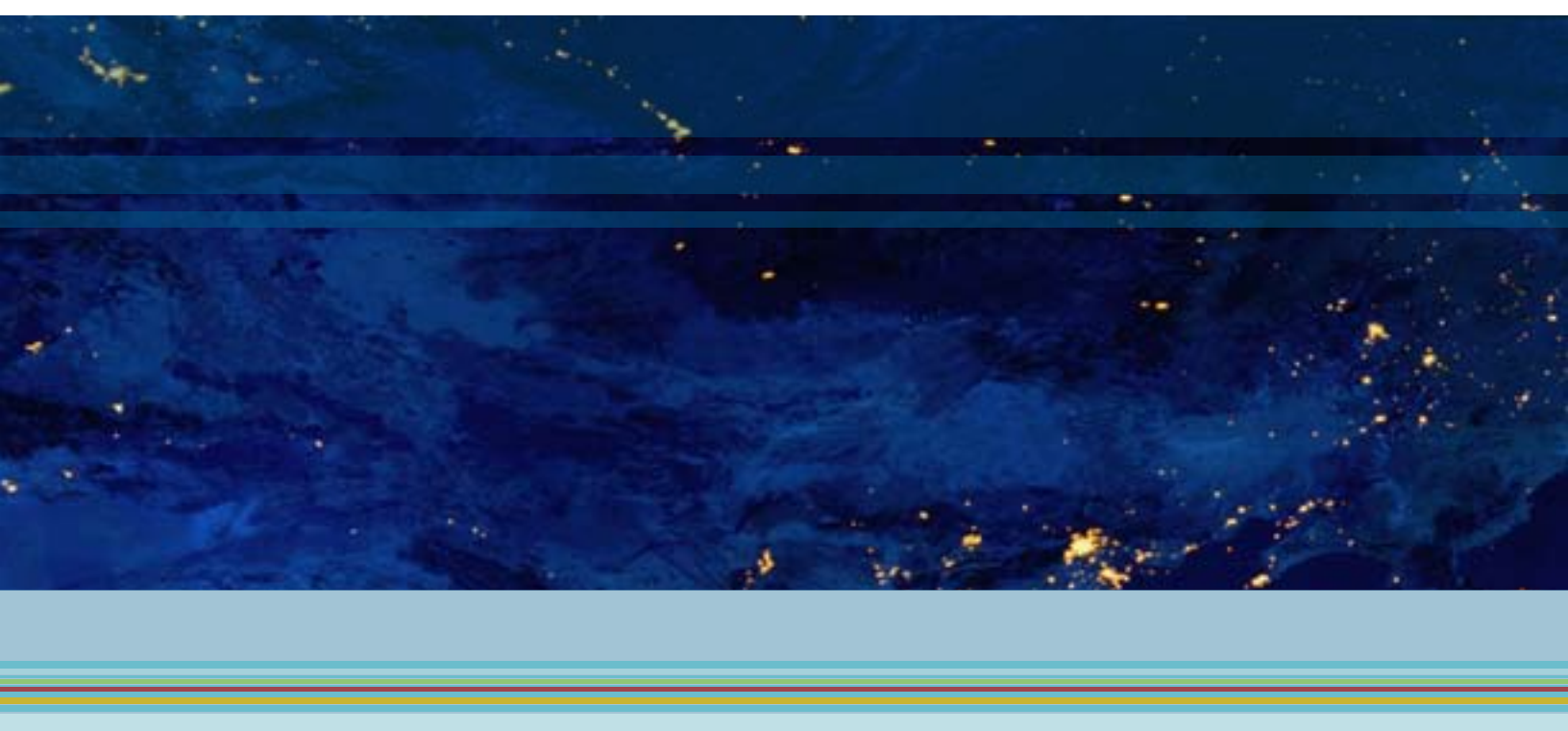
## FOREIGN PRIVACY LAW ISSUES

Obtaining discovery outside the U.S. is made even more complex in the context of e-discovery by the presence of foreign privacy and data protection laws that impose restrictions on the collection, review, and dissemination of various forms of “personal data.” Personal data is defined broadly enough to include business emails with identifiable email addresses—one of the most voluminous forms of e-discovery.

For example, the E.U.’s Directive on Data Protection (which has been implemented in all E.U. member states) generally limits the collection and review of personal data to that for “legitimate purposes,” which does not ordinarily include compliance with foreign legal requirements. Even if a legitimate ground can be found to support review and collection of personal data, national laws implementing the Directive prohibit the disclosure and export of personal data to countries, such as the U.S., that do not meet the Directive’s minimum standards of “adequate” data protection. Foreign parties faced with a need to export protected personal data to the U.S. also will need to establish a legal basis for the transfer, as well as for the subsequent possible disclosure of such information to third parties once the transfer has taken place. In addition, data protection laws require transparency, which may require providing notice to affected individuals prior to any potential document review.

Local regulatory authorities also may impose injunctions to prohibit the transfer of personal data where there are concerns that local data protection

obligations have not been complied with. Although the authorities may be approached directly for advice, the practical reality is that it often is difficult—and time consuming—to obtain approval from local authorities to proceed with a data transfer. Sometimes, the local authorities provide no guidance at all, leaving companies to independently balance the risks of failing to comply with either an order of a U.S. court or local laws. Earlier this year, the French data protection authority (the “CNIL”) expressed concern over the ever-increasing amount of data—both personal and proprietary—that European companies are being asked to transfer across the Atlantic as part of preparation for litigation in the U.S. The CNIL has said that it will ask the Article 29 Working Party (an independent advisory body made up of data protection commissioners from the 27 E.U. member states) to discuss the issues. It is possible that the European Commission also may launch direct negotiations with the U.S. in an attempt to find a solution. Despite these “real-life” quandaries, U.S. courts often are loathe to relieve parties of their discovery obligations based on discovery restrictions abroad. Those restrictions do not “shield” parties from U.S. discovery, so it becomes very important to involve counsel early in the discovery process to address these issues. Adopting some precautionary measures, such as comprehensive internal privacy policies, will enable companies to give themselves some measure of advance protection when a speedy response is required.



## DISPOSITIVE MOTIONS AND TRIAL PRACTICE

Litigation in the U.S. is often a slow and expensive process. Discovery can take many months or even years, and can be a constant distraction for a company's business. As litigation drags on, legal fees and the burdens of litigation can take a substantial toll.

Because of this, a significant part of the legal strategy in U.S. litigation revolves around assembling enough information to support a preliminary motion seeking dismissal of the case at some point before a trial on the merits. Even where such a motion is not successful, it may provide an opportunity to present the case in a way that informs your opponent of the potential strengths of your position and the weaknesses of theirs. It also may provide an opportunity to educate the judge about the case which may help with other rulings as the litigation progresses.

There are two primary opportunities to ask the court to dismiss a lawsuit: a motion to dismiss at the outset of the litigation, and a motion for summary judgment after discovery has been completed.

### Motions to Dismiss

The first type of dispositive motion occurs at the very outset of litigation. This is called a "motion to dismiss" and usually is based on the argument that the plaintiff has failed to allege enough facts to support its claim. A motion to dismiss also may be filed on the ground that the court lacks jurisdiction over the case for one of the reasons discussed above. A motion to dismiss for lack of personal jurisdiction must be brought at the outset of the case because once a party appears in the case, it may be deemed to have waived that objection. A motion to dismiss for subject matter jurisdiction, on the other hand, is never waived and may be brought at any time.

Because they generally occur before any discovery has been taken, motions to dismiss are difficult to win. Indeed, when ruling on the motion, the court is required to assume that all of the plaintiff's allegations are true (the assumption only applies at this preliminary stage for determining whether discovery may proceed). Remember, the entire U.S. legal system is designed in such a way as to facilitate the opportunity for parties to have their "day in court." This is not to say that motions to dismiss are never granted or that they should not be attempted. In fact, it is rare that such a motion is not filed at the beginning of a case because the rewards—avoiding costly discovery and the uncertainty of trial—are great.

Even when a motion to dismiss is granted, the court often will give the losing party an opportunity to

re-plead its case to cure whatever defects existed in the original complaint. Or, the losing party may appeal an order dismissing the case. Even in these circumstances, there may be an opportunity to explore a more favorable settlement.

### Motions for Summary Judgment

When a case is permitted to proceed to discovery, parties still have the opportunity to ask the court to dismiss the case before proceeding to trial. This motion, typically brought at the close of discovery, is called a motion for summary judgment. Unlike a motion to dismiss which is based only on the allegations in the complaint, a summary judgment motion is based on all of the evidence gathered during discovery. A request for summary judgment may be filed by either party. In ruling on a motion for summary judgment, the court must determine, based on the information gathered through documents, interrogatories, and depositions, whether one party is entitled to judgment as a matter of law.

As with motions to dismiss, the standard for obtaining summary judgment is difficult to meet. Still, the process gives all of the parties an opportunity to "preview" what likely will be presented at trial and to weigh the risks of going forward. This, too, can present additional opportunities for settlement.

### Trial

In reality, very few cases actually proceed to trial in the U.S. Most cases are resolved by motions or by settlement. This is because trial in the U.S. is expensive, and carries with it tremendous uncertainty for both sides. Many trials are held before a jury of citizens with no legal background who must decide the outcome of the case based on the evidence presented and instructions provided by the judge. Usually, the burden is on the plaintiff to prove to the jury that it is more likely than not, based on the evidence presented, that the defendant should be held liable. The jury then determines the amount of damages to be awarded.

Trials can vary substantially in length based on the complexity of the case. All trials, however, are governed by comprehensive rules of evidence that determine what information may be presented during the proceedings. It is extremely important that these evidentiary rules be understood and considered when preparing the case. The outcome of a case may hinge on whether a particular document or piece of evidence may be seen or heard by the judge or jury. These sorts of questions further add to the uncertainty that may factor into the decision whether to settle in advance of trial or go forward with the case.

## APPEALS

Even a completed trial may not mean the end of the litigation. Appeal rights in the U.S. are quite liberal and parties may have multiple opportunities to challenge the decisions of the courts or juries that find against them. This process adds to the length, expense, and uncertainty of litigation. Some cases are settled even at this late stage in order to avoid any further

proceedings (normally at a discount for the party that won the trial). It is important from the very outset of the case, and at all stages throughout, to consider how long and difficult a complete litigation can be. All of this information must be balanced carefully before proceeding to each successive step of the case.



## ENFORCING JUDGMENTS IN THE U.S. AND ABROAD

The final step in any litigation is the enforcement of a judgment. In most cases, where a U.S. court enters a judgment for money damages against a party, that party will go ahead and pay the judgment. Should the party refuse to comply and pay the sum specified, the prevailing party may seek to enforce that judgment by filing a “writ of attachment” and seizing assets of the losing party located in the U.S. The Full Faith and Credit Act provides that judgments in the courts of one state of the U.S. may be enforced in courts of all other states. The procedures and requirements for executing judgments in the various states in most cases depend on the law of the forum state. In most cases, they involve submission of a “writ of attachment” which directs an officer of the court to seize the debtor’s property or income. A party seeking to attach assets may also request discovery if deemed necessary to determine whether the attachment is appropriate under the law.

U.S. courts not only have authority to enforce U.S. court judgments, they may also enforce judgments issued by foreign courts and arbitral tribunals. Most courts recognize and enforce foreign court judgments pursuant the Uniform Foreign Country Money-Judgment Recognition Act (adopted by most states pursuant to state statutes). The enforcement of a foreign judgment is more challenging than that of a U.S. court judgment, and various defenses can be raised, including lack of notice, fraud, and public policy concerns.

U.S. courts also may recognize and enforce certain foreign arbitral awards under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the “New York Convention”) to which the U.S. is a signatory. The New York Convention prescribes very limited narrow

grounds for refusing to recognize and enforce such awards, including incapacity of a party, illegality of agreement, lack of due process in the arbitration, award outside the scope of arbitration, improper arbitration panel, and vacated or not-yet-binding award. In addition, the U.S. is a signatory to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention), and the Inter-American Convention on International Commercial Arbitration (the Panama Convention), both of which allow for enforcement in U.S. courts of arbitral awards made under those respective conventions. Enforcement of arbitral awards under the New York Convention generally is easier than enforcing a foreign court judgment.

Where a judgment is entered against a company that is majority-owned or controlled by a foreign state, the attachment of the company’s assets is governed by the Foreign Sovereign Immunities Act, which provides that the property of state agencies and instrumentalities are immune from attachment unless one of the specified exceptions applies (including, e.g., where the agency conducts business in the U.S. or contractually waives attachment immunity). In addition, the assets of a state-owned company may be attached to enforce a judgment against the foreign state, at least where the company is subject to “extensive control” by the state.

A U.S. court judgment also may be enforced by courts abroad. The requirements for recognition and enforcement of U.S. judgments vary from country to country. Companies seeking to enforce a U.S. judgment abroad should consult not only U.S. counsel, but also local counsel in the country in which judgment is sought to be enforced.

# responding to a lawsuit in the United States

*This guide identifies some of the basic issues and considerations a non-U.S. business may face when contemplating litigation in the U.S. It is clear that companies engaged in commercial activity in the U.S. or with U.S. counterparties may be subject to litigation in U.S. courts. U.S. litigation is complex and presents many risks, especially for companies not familiar with the legal process. It is important to make sure you have competent U.S. legal counsel available to assist you in the event a problem arises.*

*We close this guide with a series of practical tips for any non-U.S. litigant that has received notice that it is being sued in the U.S. This list is not comprehensive, and you will need to consult your legal representatives to develop a litigation strategy that considers all of the risks and available options.*

## CONTACT U.S. AND LOCAL COUNSEL

The most important thing to do when you receive notice that you have been sued in the U.S. is to contact experienced counsel—both in the U.S. and in the jurisdiction where you are located. Especially in cross-border disputes, there often are strategies that you will need to consider that are impacted by the laws of multiple jurisdictions. The best opportunities for early resolution, dismissal, or transfer to a more favorable jurisdiction come at the outset of litigation and it is important to identify those opportunities immediately.

When providing information to your attorneys, also remember to disclose *all* relevant information regarding

the subject matter of the lawsuit. You never know what information may open additional doors for you in the context of the litigation. The greater the information available, the better the opportunity for your attorneys to provide the best guidance possible.

Finally, once you have contacted counsel, it is important that you follow their advice. Your attorneys are experienced in handling these issues, especially at the delicate preliminary stages of the case. What you do during these first days and weeks often will set the tone for the entire litigation and your attorneys will know how best to direct you toward the path of greatest success.

## CONTACT YOUR INSURANCE COMPANY

In many cases, companies have insurance coverage that will help with the cost of litigation as well as any potential judgment in the case. To avoid the possibility of lost or diminished coverage, it is important to contact each of your insurance companies immediately, and notify them of the claims asserted against your company.

## PRESERVE DOCUMENTS

Courts in the U.S. are particularly hostile to the deletion or destruction of documents after notice of a lawsuit has been received. This includes hard-copy materials, electronic files, and even emails. It is important that you send notice to all relevant employees that they must preserve all documents relevant to the lawsuit. Your attorneys can help you draft an appropriate “hold order” to send to your workforce that will accomplish your purposes without creating unnecessary panic.

You also will need to shut down any “auto-delete” functions for emails or other electronic materials. Depending on the scope of the case, you may need to retain a forensic vendor to help you extract relevant information from your company’s servers. Make sure to keep a detailed record of all actions taken to preserve documents in case your opponent tries to argue at some future point that you have taken actions to obstruct the case.

## BEGIN A CASE FILE

As soon as you receive the first document or pleading in a lawsuit, begin to compile a litigation file. In particular, you should make sure to keep copies of all pleadings, and record how and when they were

delivered, who delivered them, and to whom they were delivered. Especially in cross-border disputes where international service requirements may be an issue, you want to preserve every opportunity to challenge the lawsuit for failure to follow applicable procedural rules.

## IDENTIFY ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

It is possible that you have a contractual right to have the dispute resolved in some forum other than the one noticed in the lawsuit. For example, many contracts have clauses requiring the parties to submit disputes to arbitration or to litigate the disputes in a particular forum. You will want to determine at the very beginning of the lawsuit—and especially before you respond—whether there is a way you can get the lawsuit dismissed or transferred to a more favorable jurisdiction because it should have been brought somewhere else.

## BE REALISTIC

It seems obvious, but it is important that you consider seriously all of the risks, strategies, and possible outcomes in the case from the outset. You should never assume that you will win or lose a case until you have had the opportunity to analyze carefully all of the circumstances with the assistance of your counsel. It also is important to assume that your opponent similarly has retained experienced and competent counsel and is devising strategies of its own. By remaining realistic, diligent, and open-minded, you will provide yourself the greatest opportunity to place yourself in the best possible situation from the very beginning of the litigation.

WASHINGTON, DC

CALIFORNIA

NEW YORK

LONDON

BRUSSELS

[WWW.CROWELL.COM](http://WWW.CROWELL.COM)

**crowell**  **moring**