I. ORGANIZATION/STRUCTURE

1. What law applies to commercial activities in your legal system? Are there special statutory provisions?

The United States has a federal system; that is, there are two distinct entities that exercise power in their respective spheres of influence. The federal government is one of limited, enumerated powers. It may not exceed those powers expressly delineated in the U.S. Constitution. All authority not given to the federal government rests with the individual states. Accordingly, each entity’s judiciary exercises jurisdiction pursuant to its delineated authority.

Not surprisingly, the laws applicable to commercial activities in the U.S. vary according to whether the state or federal government maintains jurisdiction. States are the primary source of commercial law; commercial disputes that fall under federal jurisdiction must invoke a specific federal statute that covers the activity. States still use common law systems\(^1\) to solve some disputes—mainly those involving contracts. To encourage consistency and uniformity across the country, the Uniform Commercial Code (UCC) was developed and proffered to the individual states for adoption. To date, all fifty states, as well as the District of Columbia and the Virgin Islands, have adopted at least part of the UCC. It has become the primary legal standard by which commercial activities are measured. Finally, because the U.S. has ratified the United Nations Convention on Contracts for the International Sale of Goods (CISG), this body of law may trump the UCC if the commercial activity involves an international transaction.

2. How are your courts structured to hear commercial cases? (For example, are your commercial cases heard in courts where the judge’s are generalists, regularly adjudicating on a broad range of topics; do judges with more extensive commercial experience hear your commercial cases; or, do you have “specialist” courts where judges with special expertise adjudicate exclusively commercial cases?)

Depending on the commercial activity, either a state or federal court may hear the case. In the federal judicial system, bankruptcy courts—specialized courts within the federal

\(^1\) The only exception is Louisiana, which relies solely on a civil code system.
district courts—act as “specialists” to hear cases that fall under the purview of federal bankruptcy laws.

3. Do you have special arbitration tribunals for commercial disputes? Are there circumstances where a matter must proceed to mediation or arbitration before the parties can access the courts or continue with a case after starting it?

No; there are no special arbitration tribunals for commercial disputes. However, in accordance with the Alternative Dispute Resolution Act of 1998, litigants are encouraged to pursue resolution of a matter outside the courtroom to the greatest extent possible. Furthermore, a matter must proceed to arbitration before the parties are granted access to the courts if a disputed contract contains an arbitration clause.

4. What kinds of commercial cases do your courts hear? (e.g. contracts, intellectual property, securities, insolvency/bankruptcy, corporate reorganizations etc.) What kind of commercial cases do your courts hear most frequently?

Federal district courts hear every kind of commercial case, most frequently those cases involving intellectual property disputes.

II. PROCESS/PROCEDURE

1. Do you have special procedural rules for commercial disputes (for example those dealing with pre-trial document discovery, questionnaires, depositions)? Are these rules judge-made or statute-based? Are the rules sufficient to deal with complex commercial cases?

The only special rules in place concerning commercial disputes are local rules that govern intellectual property cases. All other procedural rules are both judge-made and statute-based. For example, the aforementioned local rules for intellectual property cases are judge-made and may differ depending on which federal court is trying a particular suit. Conversely, some procedural rules, like the Federal Rules of Civil Procedure, are promulgated to every federal court pursuant to congressional statutory authorization. There are also sufficient rules in place to deal with complex commercial cases. The most effective tool for these cases is multi-district litigation (MDL). Multiple cases are designated for MDL by a judicial panel if they contain common questions of fact. The panel consolidates these cases and assigns them to one judge for pretrial proceedings. If a case survives the pretrial phase, it is transferred back to its district of origin for trial.

2. Where the plaintiff’s claim in a commercial case is not a particularly large monetary value, are there different procedural rules that apply? Would the matter be heard by a different court?

A commercial case that is not overly complex and that has a smaller monetary value may fall under special local procedural rules. For example, the newest copy of the District of Minnesota’s local rules will contain a “fast track” provision that will allow parties involved in less complex matters to expedite their trials.
3. a) Does your system list commercial matters for trial more quickly than other matters? If so, is there also an expedited process for listing appeals?

No; commercial matters are not tried any more quickly than any other matter in the federal judiciary. The “fast track” exception stated in the previous answer is available to a case of any subject matter, not just commercial disputes.

b) Do your courts generally schedule evidentiary hearings from day to day or are hearings scheduled far apart? Is the practice any different for commercial litigation?

In the U.S. system, the court which has jurisdiction over a case will hear that case to completion. Additionally, should a civil case go to trial, parties have the right to demand a trial by jury. This procedure is not unique to commercial litigation.

4. Do you have any time limits for the release of commercial judgments (informal judicial policy, judge-made, or statutory imposed time limits)?

There is no time limit for the release of commercial judgments.

5. Do your courts have the power to impose time limits on pre-trial proceedings or in the trial itself for commercial cases? (e.g. setting time-frames for when certain pre-trial matters must be complete, or setting time limits for opening argument, examination of witnesses, etc.) What are the consequences of failure to comply with such limits, if any?

Pursuant to a court’s local rules, it has the power to impose time limits on pretrial proceedings and in the trial itself. For example, in the District of Minnesota parties have ten days to file an objection to a magistrate judge report and recommendation. The consequences of failing to comply with such deadlines range from the issuance of a court order, to fines, to an entry of default judgment against a party.

6. Do your courts ever assign more than one judge to a commercial case where it is anticipated to be particularly complex?

One judge is all that sits on a case, regardless of its anticipated complexity.

7. a) Do special rules of evidence apply in commercial litigation (e.g. admissibility, cogency)?

There are no special rules of evidence that govern commercial litigation.

b) Do your courts place special weight on "expert opinions" and testimony in commercial litigation?

Courts place special weight on “expert” opinions and testimony in all trials, not just commercial litigation. Accordingly, specific criteria must be met in order for a witness to
be allowed to testify as an expert. He must submit a report that includes the basis for his testimony and the method he used to arrive at his conclusion. That method must conform to a specific set of standards outlined in the *Daubert* test; namely, it must (1) be testable, (2) be subject to peer review and publication, (3) have a known rate of error, (4) be governed by a set of standards, and (5) be accepted by a relevant scientific community.

### III. INTERNATIONAL/CROSS-BORDER

1. Do you have special courts to deal with international commercial disputes?

   There are no special courts that deal with international commercial disputes.

2. Roughly what proportion of your commercial cases have at least one party from another country?

   Very few (fewer than 1%) of commercial cases involve a party from another country.

3. Do the parties in your international commercial cases take issue with whether the case would be better tried elsewhere? If so, roughly how often does this become an issue?

   There are parties in international commercial cases who take issue with whether the case would be better tried elsewhere. In such instances, a party may file a motion for a change of venue and assert its arguments accordingly.

4. Are your courts equipped to provide professional interpreters in examination of foreign nationals?

   U.S. courts are equipped to provide professional interpreters.

5. Do your courts permit the special appearance of foreign attorneys in international litigation and, if so, what special rules, if any, apply?

   No special appearances are allowed by foreign attorneys, even in international litigation. However, if that attorney is admitted to practice in a U.S. court, he may then be admitted *pro hac vice* to try a particular case in another U.S. jurisdiction.

### IV. MISCELLANEOUS

1. a) Do your courts have the power to award costs and attorneys’ fees to discourage the parties from behaving unreasonably? If so, do your courts make use of that power in commercial cases?

   U.S. courts do have the power to award costs and attorneys’ fees in the event a party behaves unreasonably by bringing a frivolous action, by blatant misrepresentations of law or fact, or by failing to comply with a court order. Additionally, statutory provisions
grant judges the discretion to award costs and fees in certain types of suits (e.g., sex discrimination).

b) Do your courts generally make use of this power and if so on what basis are costs and attorneys’ fees awarded?

Courts rarely make use of their power to award costs and attorneys’ fees simply because the adversarial system which the U.S. operates demands that all parties pay their own litigation expenses. It is only in extreme circumstances, when the opposing party (or the court) has been harmed by some especially egregious and outrageous action, that a court will award costs and/or attorneys’ fees.

2. Does your highest court deal with commercial issues frequently? Are any of your highest court judges specialists in commercial law?

The U.S. Supreme Court deals with commercial issues relatively frequently. None of the current Supreme Court justices are “specialists” in commercial law.

3. To what extent does technology play a role in your commercial cases? For example, do you have any “paperless” trials, or have they been considered? Do you allow parties to appear by satellite video?

The role of technology in commercial cases (and in cases of any subject matter) varies a great deal. Pursuant to the Federal Rules of Civil Procedure, a court may adopt an electronic filing procedure under its own local rules. Accordingly, a party may now file documentation electronically in the District of Minnesota unless otherwise ordered. Courtrooms are now equipped with state-of-the-art audio/visual equipment that affords a more efficient means of disseminating information. While no trial has been rendered completely paperless, access to documents online has helped reduce the voluminous paper trails of old. Finally, while appearance of witnesses and parties by video satellite is not unheard of, it is still a relatively infrequent occurrence.

Case Study

Jean, a citizen of France but resident in Switzerland, is the sole shareholder and general manager of B Corporation registered in Germany but which has offices in Italy and Latvia. Working out of his Italian office he placed an order for machinery with X Ltd., a company registered in Spain, that is a distributor of E Ltd., the Swedish manufacturer of the machinery.

At the time of placement of the order, Jean emphasized that timely delivery of the machinery was essential in order for B. Corporation to produce and timely deliver to D. Inc., an American company, a large quantity of a copper wire manufactured by Jean's company. X Ltd. Promised to ship the machinery no later than June 1 by ship from a port in Sweden. The contract stated that Spanish law would apply to the transaction but made no specification as to the venue for hearing any dispute that might arise.
Due to a strike of the general labour union in Sweden, the machinery ordered was not ready for shipment by June 1 and the next available cargo ship was to sail only on August 1. As a result, Jean was in breach of his contract with D. Inc.

D. Inc filed a lawsuit against B Corporation in the federal court for the Southern District of New York.

Questions

1. B. Corporation wants to file a third party claim against X Ltd. Is such a procedure possible in your court system? If so, could X Ltd. file a fourth party claim against the Swedish manufacturer for failing to deliver the machinery by the date stipulated in the purchase order?

This is an issue of subject matter jurisdiction. First, the Southern District of New York must determine whether it has jurisdiction over the primary matter at hand; that is, the lawsuit filed by D Inc. filed against B Corp. There is no federal law in question here, therefore, if jurisdiction is to be found it must rest in the diversity of citizenship provision of 28 U.S.C. § 1332. Pursuant to that provision, a federal district court may exercise jurisdiction over a matter (1) where the parties are not located in the same State, and (2) where the amount in controversy exceeds $75,000 exclusive of interest and costs. Here, because one party is a foreign entity, § 1332 specifically provides for a federal court’s exercise of diversity jurisdiction. Assuming that the amount in controversy requirement is met, the base suit may be heard by the court in which it was filed.²

Next, the court must determine whether it may exercise jurisdiction over a third-party complaint. In this case, Federal Rule of Civil Procedure 14 allows the defendant, B Corp., to bring in a third-party defendant and thus join X Ltd. to the suit. This is true unless X Ltd. would destroy diversity of citizenship. Under 28 U.S.C. § 1367, the court may not exercise supplemental jurisdiction over a third-party defendant if that third-party defendant is a citizen of the same State as one of the other parties. In this case, because X Ltd. is also a foreign corporation, diversity of citizenship exists and the court may exercise jurisdiction over the third-party complaint.

2. If D. Inc. was a company registered in your country rather than in the USA, would your courts require each of the parties wishing to file a lawsuit against a foreign defendant to serve the lawsuit in the language of the defendant?

The U.S. requires that service on a foreign entity be (1) in accordance with international agreement, or, if one does not exist, (2) by standards dictated by the country in which service is to be effected, or (3) as the court orders. No specific provision exists requiring that service be in the language of the defendant.

² Here, if D Inc. is incorporated in New York, personal jurisdiction is probably satisfied as well because B Corp. established sufficient contacts with the state such that it could have anticipated being haled into court there. Venue is similarly appropriate although B Corp. may have an outside chance at changing locations based on the doctrine of forum non conveniens.
3. What special rules for service of process to the various parties in the different countries would apply, if any?

As between D Inc. and B Corp., the only parties over whom jurisdiction may be exercised, international agreement would govern service of process. Absent an international agreement, the laws of the country where B Corp. is to be served will govern.

4. Would your courts grant additional time for filing and/or responding to the various pleadings, motions etc. because the parties are residents of different countries?

Ordinarily, a complaint must be served on the defendant within 120 days after being filed. This time limit is waived, however, when a foreign entity is the party being served. Additionally, a defendant who waives the service requirements and who is outside any judicial district of the U.S. is accorded ninety days to file an answer to a complaint instead of the usual sixty.

5. Are their special rules and procedures in your countries for honouring judgments issued by foreign courts? What rules apply for honouring foreign arbitration awards?

Out of comity, U.S. courts may honor judgments issued by foreign courts so long as those judgments are not repugnant to established law or public policy. There are no special rules for honoring either these judgments or foreign arbitration awards.