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# US Litigation Risks for UK Businesses

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# Why UK businesses need to understand US litigation

- Companies are in more regular contact with US entities through:
  - Globalisation
  - Heavier international trade
  - The internet and contracts concluded over it
  - Increasing foreign litigants in London
- Disputes can be fought be litigated in *both* England and the US – *Conducive Inkjet Technology v Uni-Pixel (2013)*
- The long arm of US law:
- Statutes with extra-territorial effect
- The long reach of US Personal Jurisdiction:
  - US courts may extend “personal” jurisdiction to foreign companies based on contracts and corporate relationships with a US-based entity
  - Connections can be tenuous – eg transactions through dollar accounts or an uninvolved US company in a wider group structure

# Sufficient nexus to justify US jurisdiction?

- The 22 plaintiffs were resident in Argentina; the defendant was a German corporation which manufactures cars in Germany, with no facilities in the US; none of the alleged wrongs (human rights violations during Argentina's "Dirty War") took place in the US
- Bus accident in France in which two North Carolina teenagers died. Accident attributed to a defective tyre manufactured in Turkey by a subsidiary of the defendant. The defendant's subsidiaries in Turkey, France and Luxembourg did not design, manufacture or advertise or sell their tyres in North Carolina
- An employee was injured in New Jersey operating a metal-shearing machine and sued the manufacturer of the machine, a company incorporated and operating in the UK. The defendant did not market its machines in or sell them directly to New Jersey – they arrived there via an independent distributor

# UK and US litigation: similarities

- Similarities
  - Adversarial systems with a procedural code (CPR and FRCP)
  - Privilege
  - Preservation of documents
  - Discovery / Disclosure
  - Witnesses
  - Trials

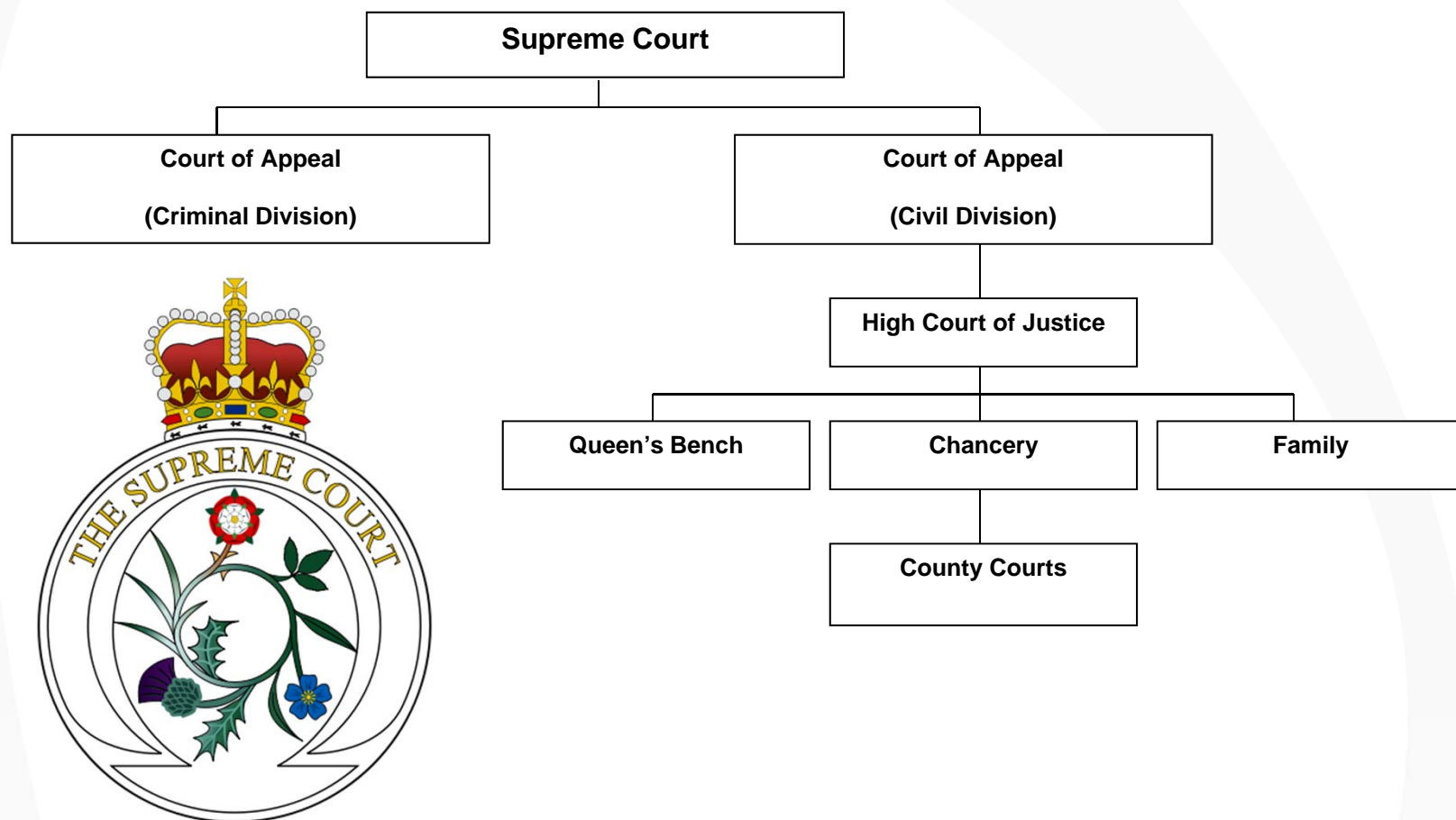


# UK and US litigation: differences

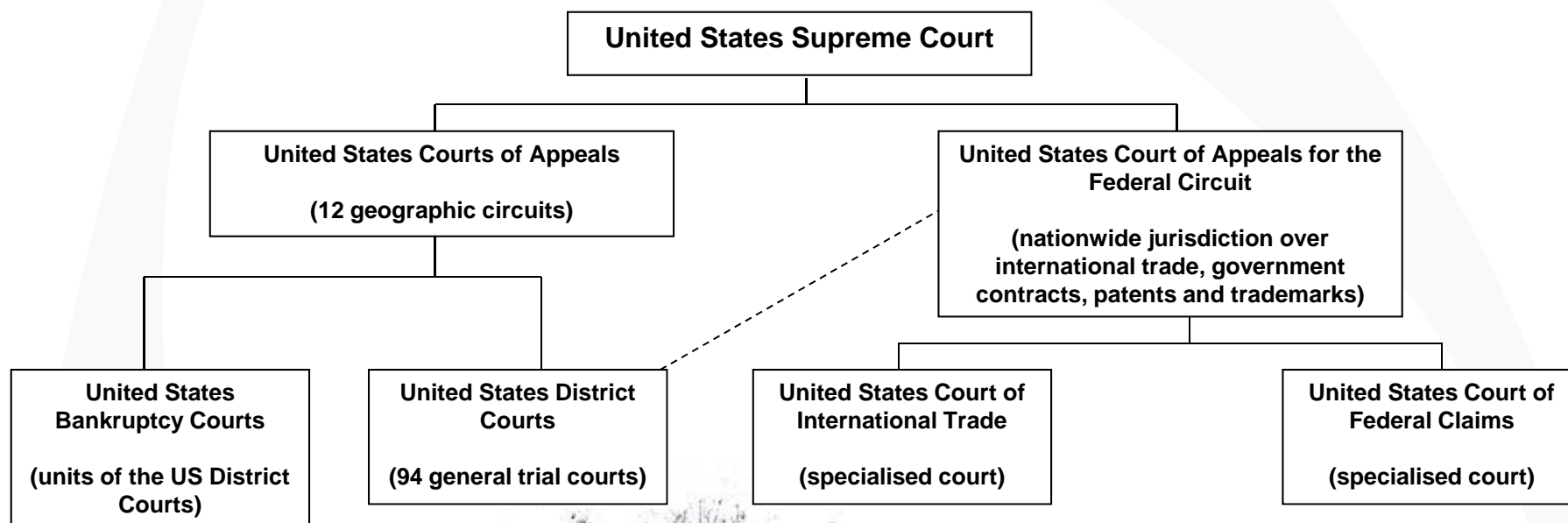
- Differences
  - Pre litigation
  - Pleadings and particulars
  - Witness statements v depositions
  - Civil juries
  - Punitive damages in tort claims
  - Costs



# The UK Court System

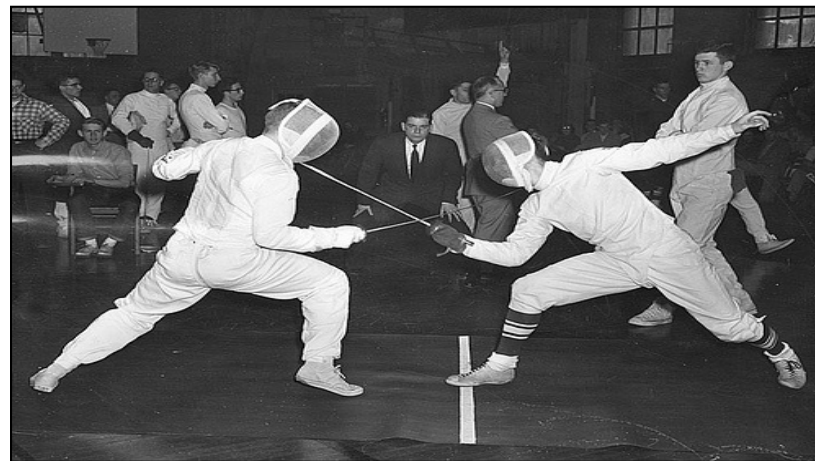


# The US Federal Court System



# Overview of the litigation process

- The procedure for suing a defendant on either side of the Atlantic is fairly similar – a common adversarial approach



- US Federal Rules of Civil Procedure (FRCP) contained in the appendix to Title 28 of the US Code (USC)
- Civil Procedure Rules 1998 (excludes insolvency and family proceedings)

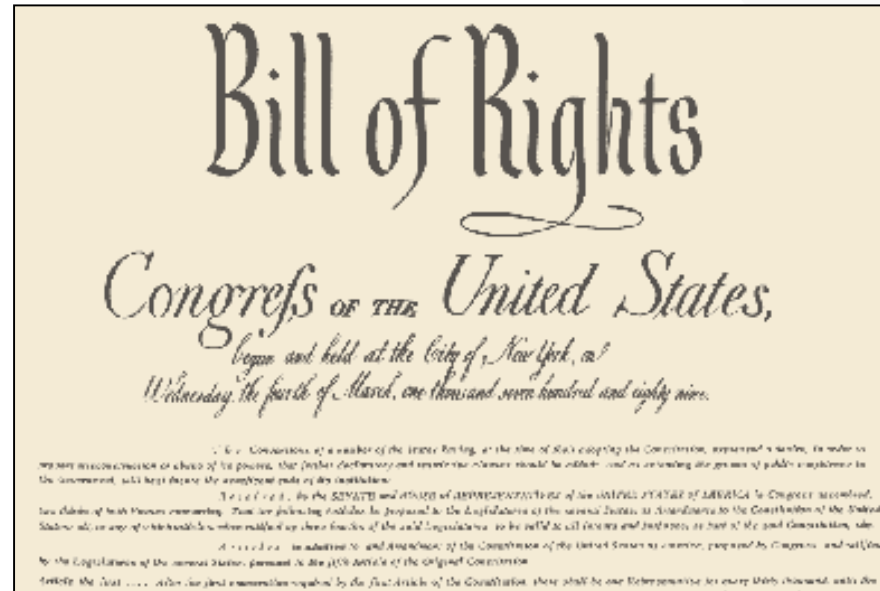
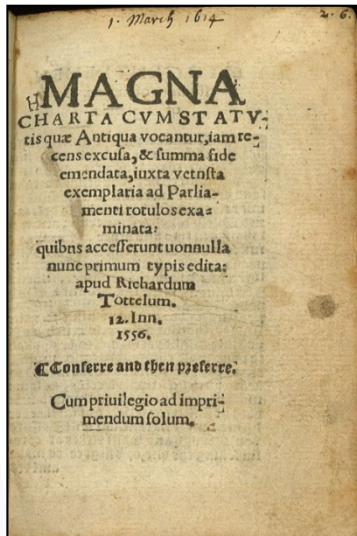
# Statements of Case

- UK: file and serve a claim form which must have essential details of the claim including cause of action and remedy sought. **Fuller particulars** either given in claim form at outset or served and filed separately
- File defence or apply for strike out/summary judgment
- US: file a complaint at court which contains a “short and plain statement” of the facts, the basis for jurisdiction and the relief sought
- Allegations of fraud – more extensive pleading standard, including alleging “conditions of a person’s mind”
- **Details of the claim ascertained from discovery**
- Answer from defendant or move to dismiss



# Preservation of Documents

- Similar obligations but more onerous in the US



# Privilege

- UK: strict tests
  - Legal Advice Privilege – between lawyer and client, who is tightly defined
  - Litigation Privilege – created for the dominant purpose of actual or reasonably contemplated litigation
- US: arguably wider than in the UK
  - Attorney privilege
  - Work product privilege

Confidential Document  
Attorney-Client Privilege

# Discovery or Disclosure

- UK: reasonable and proportionate, potentially to the extent of *no* disclosure
- US: broad train of inquiry. 'Peruvian guano' and fishing expeditions in one?



- Electronically Stored Information (ESI) critical in both jurisdictions

# Evidence – US Depositions

- UK: tightly controlled by court directions – no cross-examination until trial
- US: Depositions – out of court and pre-trial; incredibly powerful tool



# Trial: different

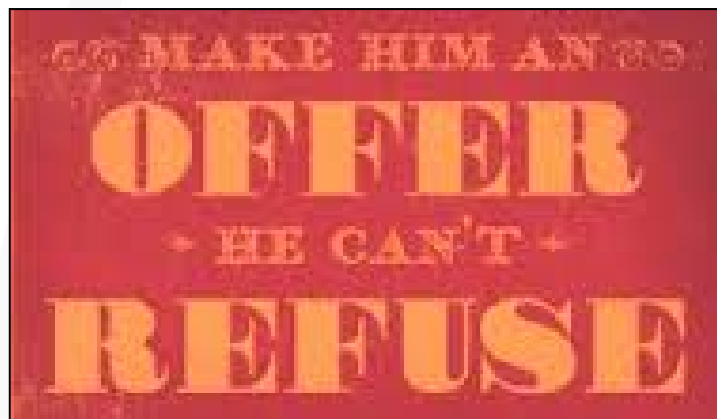
- US: Right to opt for civil trial by jury



- UK: just judge(s)



# Settlement: similar



- FRCP 68 or Part 36
- Open or without prejudice?

# Damages

- How real a threat are punitive damages?



# Costs: does the loser pay?

- Each party bears its own costs in the US; in the UK a successful party will generally recover about 65% of expenditure





# THE LONG ARM OF US LAW

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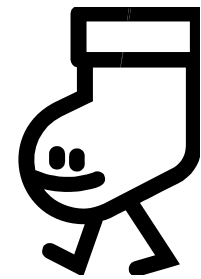
# RICO

- RICO - (Racketeering Influenced Corrupt Organizations Act 1970)
  - a civil remedy
  - “predicate acts” constituting a *pattern* of racketeering activity conducted by an “enterprise”
  - attorneys’ fees and treble damages
  - suitable for multinational claims with little connection with the US



# SOX

- Sarbanes-Oxley Act 2002
  - Effective corporate governance for public companies
  - Applies to all companies with a U.S. listing, affecting both U.S. and non-U.S. companies
  - 11 sections ranging from additional corporate board responsibilities to criminal and civil penalties
  - clawbacks of executive compensation
- Son of SOX?



# FCPA

- FCPA compliance guidance
- Prohibits corrupt payments to foreign public officials for purpose of obtaining or keeping business
- Extension to non-US corporates since 1998
- Includes corrupt payments via intermediaries, if it is known payments will be directed to FPOs (or if a party is wilfully blind to this)
- Differences to UK law?
- Commercial bribery



# FCPA Quiz

- Siemens: \$800 million in 2008
- KBR/Halliburton: \$579 million in 2009
- BAE: \$400 million in 2010
- Total S.A.: \$398 million in 2013
- Alcoa: \$384 million in 2014
- Snamprogetti B.V. / ENI S.p.A: \$365 million in 2010
- Technip S.A.: \$338 million in 2010
- JGC Corporation: \$218.8 million in 2011
- Daimler AG: \$185 million in 2010
- Weatherford International: \$152.6 million in 2013

# US litigation: summary

- Some US statutes have extra-territorial effect: you are not immune outside the US!
- The jurisdictional reach of US state and federal laws has, however, been reigned in during the last few years
- The US litigation process takes longer, frontloads witness evidence and carries a greater burden of disclosure
- Civil US cases can be heard by a jury
- US litigation can involve paying out huge sums in punitive damages but only if a tortious wrong is proven – not as common as popular myth would have it
- Damage prevention: draft your governing law and jurisdiction clause with great care!

# Any Questions?

- Please email any of the speakers:
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They will be happy to respond to you by email to any questions you may have following issues raised in today's webinar.