

Common Law Civil Procedure



Univ.- Prof. Dr. Walter Buchegger
walter.buchegger@jku.at

Chapter 5

Challenges to Court Selection

I. Challenges to Court Selection

Direct Attack

- ▶ attack of lack of jurisdiction alone

Collateral Attack

- ▶ attack of judgment upon enforcement proceeding or following proceeding (i.e. in a different state) upon lack of jurisdiction
note: disfavored way of attack!

Chapter 6

Pretrial Stage

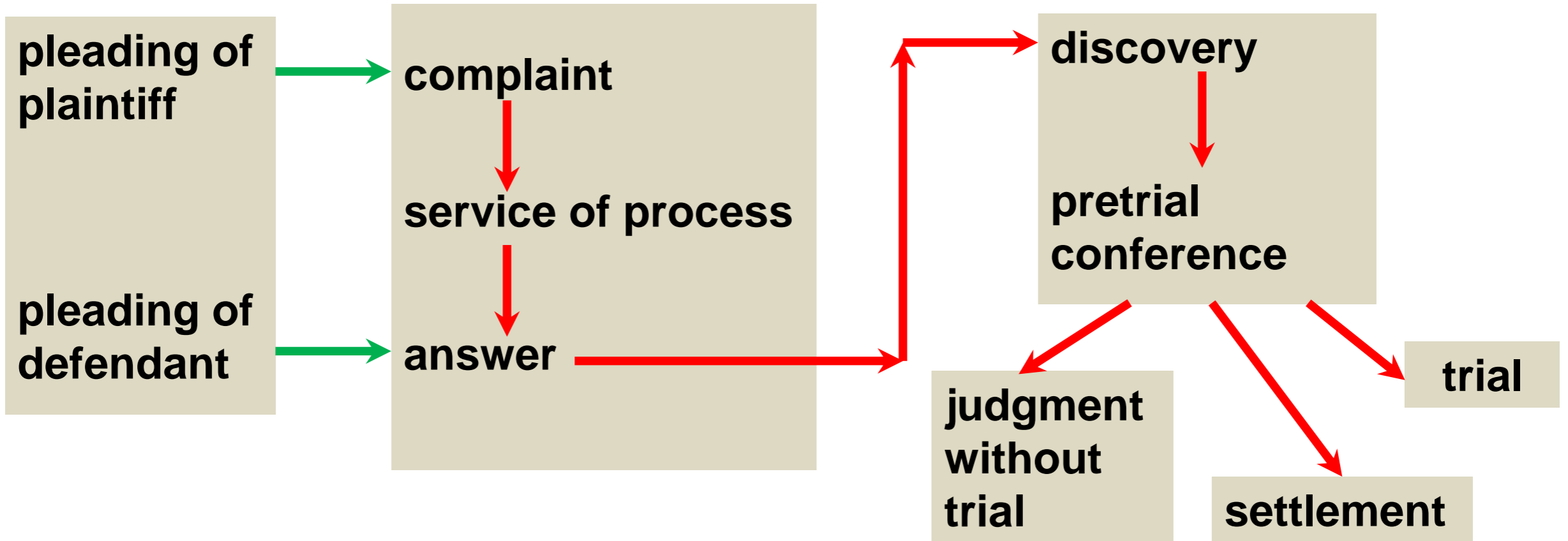
Chapter 6 Section 1

Pretrial Stage
Trial Stage
Judicial Remedies

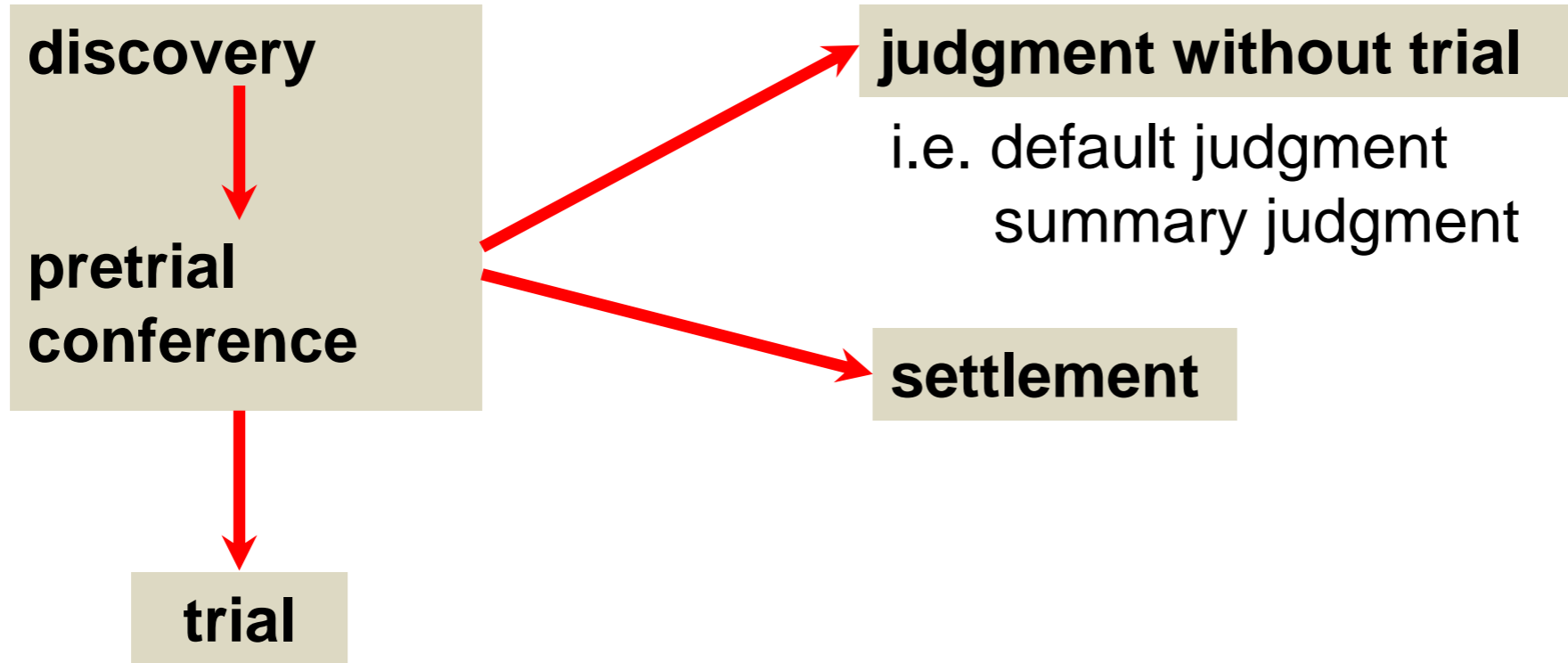
Chapter 6 Section 1 Subsection 1

Pretrial Stage

I. Pretrial Stage



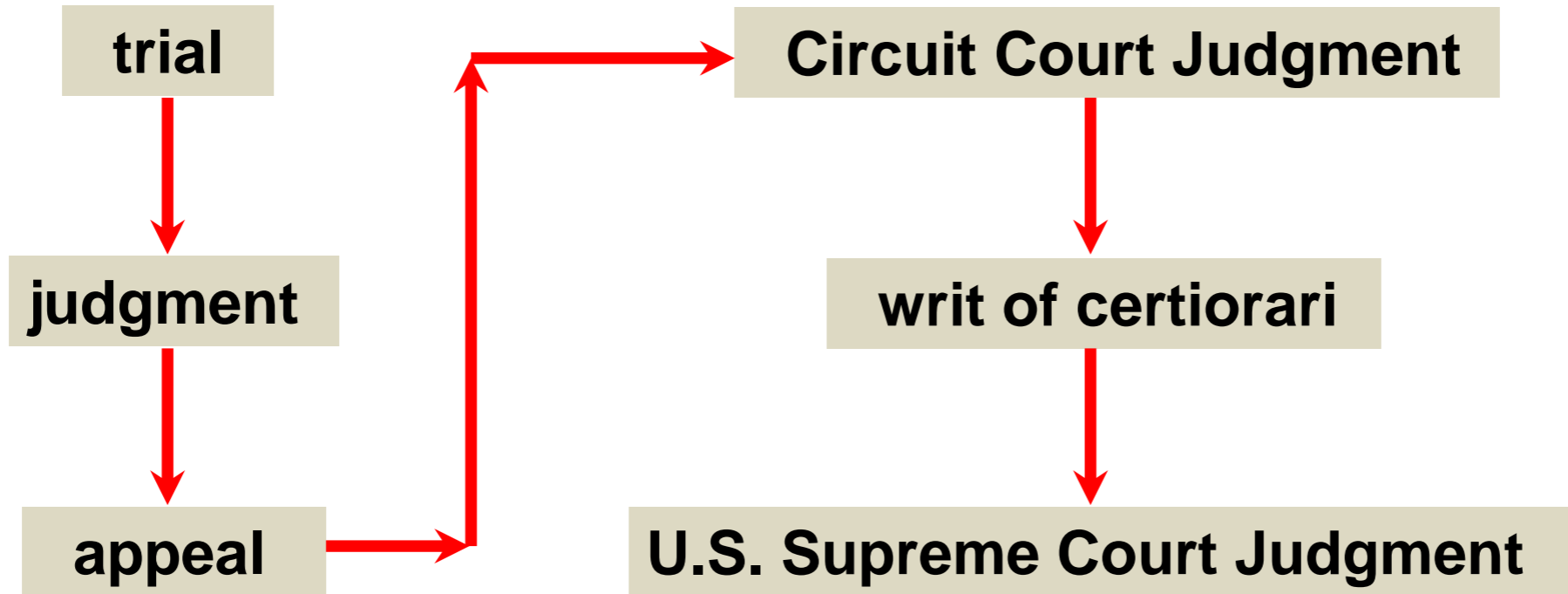
I. Pretrial Stage 2



Chapter 6 Section 1 Subsection 2

Trial Stage and Judicial Remedies

II. Trial, Judgments and Remedies



Chapter 6 section 2

Pleadings

I. Pleadings 1. Common Law Pleading

Development of Pleading

▶ Common Law Pleading

- rigid and formalistic writ system – court issued a writ for the defendant to appear and defend
- every type of action had own rules how to plead, so pleadings were tied to a single action and thus to substantive law
- failure to comply with rules of pleading led to dismissal
- no alternative pleading in complaint
- no alternative or multiple defenses permitted

I. Pleadings 2. Code Pleading

Development of Pleading

▶ Code Pleading

- first adopted with the Field Code 1848 in New York
many states followed and introduced code pleading
- litigant is required to allege a plain and concise statement of the facts constituting each cause of action without unnecessary repetition
- fact allegations have to fit in some pattern of established rights to allow the case to continue
- alternative and accumulated pleading allowed

I. Pleadings 2. Code Pleading

▶ Code Pleading and differing theories

- facts and cause of action; **what constitutes a cause of action?**
 - **primary rights theory:** cause of action is to be defined by the nature of the injury suffered, therefore facts have to be alleged showing each injury
 - **primary facts theory:** pleader has to set forth the aggregate and operative facts that have led to the injury

I. Pleadings 2. Code Pleading

▶ Code Pleading and its problems

■ which level of fact allegation is required?

- **ultimate facts alone:** facts that show the cause of action
- **no evidentiary facts?** they would provide greater detail with the setback of fact allegations becoming more vague

■ no legal conclusions?

a pleading consisting of legal conclusions alone will be dismissed for being defective

but: pleading to be dismissed if ultimate facts and legal conclusions are contained?

I. Pleadings 2. Code Pleading

▶ Code Pleading and use of Common Counts

- Common Counts will be allowed in some contract cases and plaintiff does not have to state further facts
- examples:
 - unjust enrichment (money had and received)
 - labor performed (quantum valebant)
 - good sold and delivered or services rendered and no payment received (quantum meruit)
- common counts are an exception to the code pleading system and serve the prevention of unjust enrichment

I. Pleadings 3. Federal Notice Pleading

▶ **Federal Notice Pleading**

- most modern type of pleading
- introduced by the FRCP and by the states which adopted the federal rules for their state courts
- complaint has to contain enough information for the defendant to understand, why he/she is sued
- plaintiff has to allege a short and plain statement of a claim and show entitlement to some relief

I. Pleadings 3. Federal Notice Pleading

▶ Federal Notice Pleading

- liberal factual notice pleading was tied to higher standards since *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007) USSC
 - complaint has to contain sufficient facts to state a claim „plausible on its face“
- following ruling of the USSC in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)
 - facts plead have to infer more than just the possibility of recovery

I. Pleadings 4. Answer

▶ Answer

- is the pleading of the defendant
- defendant can
 - enter a plea in abatement (either by motion or answer)
 - introduce an affirmative defense
 - seek independent relief from plaintiff
 - enter a denial

I. Pleadings 4. Answer

▶ **Answer – plea in abatement**

defendant does not respond on the merits but solely raises procedural issues

- jurisdiction of the court
 - venue
 - other procedural issues
- in some systems a plea in abatement has to be filed as a separate motion (to dismiss) to be filed prior to any statement on the merits, in other systems it is treated as a form of affirmative defense

I. Pleadings 4. Answer

▶ **Answer – affirmative defense**

defendant does not contest the plaintiff's fact allegations but presents additional facts to defend

- in the majority of cases and court systems the burden of proof lies with the defendant
 - payment, statute of limitations, but also res judicata (though the latter is rather to be considered a plea of abatement)
- Note! As a matter of substantive law the same allegation may be considered an affirmative defense in jurisdiction A whereas not in jurisdiction B

I. Pleadings 4. Answer

- ▶ **Answer – independent/affirmative relief from plaintiff**
 - counterclaim or cross-complaint: has to meet the pleading standards of a complaint
 - special form of affirmative defense
 - defendant is considered counter-claimant, plaintiff and counter-defendant will usually have to file a reply
 - when other affirmative defenses are used, a reply will not be allowed in most of the court systems

I. Pleadings 4. Answer

▶ Answer – denial

- general denial: all the issues raised by plaintiff are contested
- specific denial: defendant lists the paragraphs in the complaint she is contesting, paragraphs not listed are admitted
- qualified denial: contesting specific fact allegation within one and the same paragraph of the complaint
- insufficient knowledge to form a belief as to the truth of plaintiff's fact allegations (dangerous denial for reasons of standards of care on the side of the defendant)
- denial on information and belief: often used by defendant corporations sued for activities of their employees

I. Pleadings 5. Challenges

▶ Challenges to Pleadings

- objections to the court's power to hear and decide the case
- challenge to the pleading (general demurrer or motion to dismiss):
 - plaintiff has failed to state a claim for relief or a cause of action
 - defendant has failed to present a defense
- pleading defects: challenge is intended to have cured alleged deficiencies in the other party's pleading; i.e. motion to strike
- attack to the substantive sufficiency of pleading by way of motion for judgment on the pleadings (only possible after the pleadings have been completed)

Chapter 6 Section 3

Joinder of Parties and Claims

I. Joinder of Parties

▶ Parties who must be joined

- real party in interest
- necessary and indispensable party
- restrictions to the plaintiff's freedom on whom to sue or whether a second plaintiff has to enter the procedure

I. Joinder of Parties

- ▶ **Real Parties in Interest – Capacity to Sue**
 - real party plaintiff possesses substantive right to sue upon
 - capacity to sue or being sued
is the party qualified to appear as a party at court?
 - absence of a real party may result in dismissal of the case

I. Joinder of Parties

▶ **Necessary and Indispensable Parties**

- compulsory party joinder
- for protection of persons who may possibly suffer harm by a judgment entered in their absence
- legal interest in the litigation which would inevitably be affected
- Rule 19

I. Joinder of Parties

Rule 19(a) Persons Required to Be Joined if Feasible.

- (1) *Required Party.* A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
 - (A) in that person's absence, the court cannot accord complete relief among existing parties; or
 - (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
 - (i) as a practical matter impair or impede the person's ability to protect the interest; or
 - (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.
- (2) *Joinder by Court Order.* If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.
- (3) *Venue.* If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

I. Joinder of Parties

Rule 19(b) When Joinder Is Not Feasible.

If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

- (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
- (2) the extent to which any prejudice could be lessened or avoided by:
 - (A) protective provisions in the judgment;
 - (B) shaping the relief; or
 - (C) other measures;
- (3) whether a judgment rendered in the person's absence would be adequate; and
- (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

I. Joinder of Parties

Rule 20(a) Persons Who May Join or Be Joined.

- (1) **Plaintiffs.** Persons may join in one action as plaintiffs if:
 - (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
 - (B) any question of law or fact common to all plaintiffs will arise in the action.
- (2) **Defendants.** Persons—as well as a vessel, cargo, or other property subject to admiralty process in rem—may be joined in one action as defendants if:
 - (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
 - (B) any question of law or fact common to all defendants will arise in the action.
- (3) **Extent of Relief.** Neither a plaintiff nor a defendant need be interested in obtaining or defending against all the relief demanded. The court may grant judgment to one or more plaintiffs according to their rights, and against one or more defendants according to their liabilities.

I. Joinder of Parties

▶ Proper Parties

- persons the plaintiff may permissively join as parties to the action
- failure to bring in a proper party does not constitute danger of dismissal
- i.e. two persons injured in the same car accident
- plaintiff 1 needs no legal interest in recovery of plaintiff 2 and vice versa (such was the case in prior joinder practice)

I. Joinder of Parties

▶ **Impleaded Parties**

- third party defendants brought in by an impleading defendant
- two requirements:
 - person is not already a party to the lawsuit
 - third party is or may be liable to the defendant, if the defendant is found liable
- impleaded parties may raise defences both to the impleader claim as well as to the main cause of action

▶ **Interveners**

Rule 24

II. Joinder of Claims

▶ **Joinder of Claims**

- usually permissive
- even unrelated claims can be joined

▶ **Counter Claims and Cross Claims**

brought into the procedure

- ▶ usual approach is to decide claims, counter claims and cross claims in one procedure, restraints on counter and cross claims arise
 - from jurisdictional questions
 - from Rule

Chapter 6 Section 4

Discovery

I. Discovery

Discovery is the pretrial factfinding device in Civil Procedure

- ▶ it is carried out by the attorneys of either party
- ▶ in the presence of the attorney of the opponent
- ▶ in cases of lack of cooperation the courts may render an order
i.e. for a witness to appear, to present documents etc.
if the person or party will not comply with the court order she is in
contempt of court
- ▶ **principle of mandatory disclosure (with exemptions)**

I. Discovery

Mandatory Disclosure in the Federal System (Rule 26)

Three steps of Discovery

- ▶ **Initial disclosure** - naming persons likely to have information, provide the other party with copies of documents to be used, electronically stored information, tangibles, computation of damages sought, any insurance agreements
- ▶ **Expert Testimony** - identify experts to be used at trial to the other party
- ▶ **Pretrial Disclosure** - identity of witnesses to be presented at trial, depositions, documents and exhibits to be used

I. Discovery

The „Work-Product“ Doctrine, Rule 26(b)(3)

- ▶ Hickman v. Taylor, 329 U.S. 495 (1947) USSC
- ▶ today in Rule 26(b)(3)
- ▶ a tool to prevent „parasitism“: letting one attorney do all the inquiry and then have all the documents presented by way of
- ▶ Work-Product Rule will give way to exceptions from discovery of such documents and property, if the party demanding disclosure cannot show a need for this information to prepare for the case, especially if obtaining this information is not possible otherwise or would impose a hardship upon the party

I. Discovery

Discovery Devices

- ▶ **oral depositions**
- ▶ **depositions upon written questions**
- ▶ **interrogatories**
- ▶ **discovery and production of property** (documents and things)
- ▶ **physical and mental examination**
- ▶ **requests for admission**

I. Discovery

Oral Deposition

- ▶ in the presence of a court officer and both attorneys
- ▶ party or witness (deponent) has to answer all questions, unless they would touch privileged information; cross examination; the scope of evidence is not limited by the rules of evidence; oath is taken
- ▶ costly way of discovery, a small trial
- ▶ used for witnesses outside the court's power of subpoena, in federal procedure for witnesses more than 100 miles away from the court
- ▶ allows the attorneys to get a good impression of the individual

I. Discovery

Written Deposition

- ▶ attorney develops a list of questions to the deponent
- ▶ list is sent to opposing attorney, who will insert questions for cross examination (redirect and recross questions may also be inserted)
- ▶ court summons the deponent before a court officer, the written questions are answered under oath and transcribed

I. Discovery

Interrogatory

- ▶ written questions to a party which are answered in writing under oath
- ▶ interrogatories will usually not be allowed as a means of evidence at trial
- ▶ interrogatories rather give attorneys first information about the case, they are often used as a first step
- ▶ burdensome use of interrogatories especially in business context is restricted under the FRCP and many state systems

I. Discovery

Discovery and Production of Property (documents and things)

- ▶ requesting parties may inspect files, make copies, inspect premises, take photographs or use any other form of record
- ▶ exchange of document copies almost immediately after the commencement of the proceeding
- ▶ problem of „control“ over property: *Societe Internationale v. Rogers*, 357 U.S. 197 (1958) USSC (documents ruled to be produced; this constituted a criminal offense in Switzerland; court had knowledge that party might be able to influence Swiss government – which changed the law!)

I. Discovery

Physical and Mental Examination

- ▶ necessary request as opposing party will on himself not produce medical reports as this is privileged information
- ▶ examination of: other party, injured child the parents sue for, an employee, whose condition is in controversy
- ▶ discovery device under complete court control!
- ▶ only issued, when necessity to the case is shown
- ▶ examinee is handed out any report the examining person has put together

I. Discovery

Requests for Admission

- ▶ party serves upon the other the request, that facts essential to the case be admitted
- ▶ request is filed without the court intervention
- ▶ responding party either has to admit, to deny or to give a statement, why he/she cannot truthfully admit or deny the facts questioned
- ▶ response is under oath
- ▶ device is used to make clear upon which facts there is no dispute