
THE DISPUTE RESOLUTION REVIEW

EIGHTH EDITION

EDITOR
JONATHAN COTTON

LAW BUSINESS RESEARCH

THE DISPUTE RESOLUTION REVIEW

The Dispute Resolution Review
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Eighth Edition

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EDITOR'S PREFACE

The Dispute Resolution Review provides an indispensable overview of the civil court systems of 45 jurisdictions. In a world where commercial disputes frequently cross international boundaries, it is inevitable that clients and practitioners across the globe will need to look for guidance beyond their home jurisdictions. *The Dispute Resolution Review* offers the first helping hand in navigating what can sometimes, at first sight, be an unknown and confusing landscape, but which on closer inspection often deals with familiar problems and adopts similar solutions to the courts closer to home.

This eighth edition follows the pattern of previous editions where leading practitioners in each jurisdiction set out an easily accessible guide to the key aspects of each jurisdiction's dispute resolution rules and practice, and developments over the past 12 months. *The Dispute Resolution Review* is also forward looking and the contributors offer their views on the likely future developments in each jurisdiction.

Collectively, the chapters illustrate the continually evolving legal landscape, responsive to both global and local developments. For instance, over the past year the EU has adopted a new regulation on jurisdiction which fortifies the freedom of parties of any nationality to choose to litigate in their preferred forum and grants Member State courts discretion to stay proceedings in favour of proceedings already on foot in non-Member State courts. At the other end of the spectrum, 2015 saw the Supreme Court in the United Kingdom clarify the law on penalty clauses 101 years after the seminal House of Lords' case on this issue (see the review of *ParkingEye Ltd v. Beavis* and *Cavendish Square Holding BV v. El Makdessi* [2015] UKSC 67 at page 181). But even seemingly local decisions such as this have a broad audience and can have far-reaching consequences in global commerce. It is always a pleasure – and instructive for my own practice – to observe the different ways in which jurisdictions across the globe tackle common problems – sometimes through concerted action under an umbrella international organisation and sometimes individually by adopting very different, but often equally effective, local solutions.

Over the lifetime of this review the world has plunged into deep recession and seen green shoots of recovery emerge as some economies begin to prosper again, albeit

uncertainly. One notable development over the course of 2015 has been the sharp and sustained fall in the oil price (along with commodities more generally). This has had, and will continue to have, far-reaching economic and geo-political effects which may take some time to manifest themselves fully. As many practitioners will recognise from previous global shocks, these pressures typically manifest themselves in an increased number of disputes; whether that is joint venture partners choosing to fight over the diminishing pot of profits, customers seeking to exit what have become hugely expensive long-term contracts, struggling states renegotiating or exiting their contracts (or simply expropriating commercial assets) or insolvency-related disputes as once-rich parties struggle to meet their obligations. The current economic climate and short to medium term outlook suggests that dispute resolution lawyers operating in at least the energy and commodities sectors will continue to be busy and tasked with resolving challenging multi-jurisdictional disputes for years to come.

Finally, I would like to express my gratitude to all of the contributors from all of the jurisdictions represented in *The Dispute Resolution Review*. Their biographies start at page 747 and highlight the wealth of experience and learning from which we are fortunate enough to benefit. I would also like to thank the whole team at Law Business Research who have excelled in managing a project of this size and scope, in getting it delivered on time and in adding a professional look and finish to the contributions.

Jonathan Cotton
Slaughter and May
London
February 2016

Chapter 45

UNITED STATES: DELAWARE

*Elena C Norman and Lakshmi A Muthu*¹

I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

Delaware courts resolve many of the United States' highest-profile commercial and corporate disputes, which frequently involve foreign individuals or entities. Businesses and legal practitioners throughout the United States and abroad hold Delaware state and federal courts in high regard, based on the sophistication of the judges and the ability of the courts to move as quickly as necessary to grant meaningful relief.

Delaware is the site of one federal district court, the US District Court for the District of Delaware. A disproportionate number of the patent cases in the United States are heard in the US District Court for the District of Delaware. Appeals from the US District Court are heard by the US Court of Appeals for the Third Judicial Circuit and, if warranted, by the US Supreme Court. There is also a US Bankruptcy Court in the District of Delaware.

The Delaware state court system is a two-tier system, meaning that decisions of the state's trial courts – the Superior Court and the Court of Chancery – are appealed directly to the Delaware Supreme Court. In contrast, many of the states in the United States have an intermediate appellate court between the trial courts and the highest state court of appeal.

The Court of Chancery is a court of equity, conferred with statutory jurisdiction to hear and determine all matters and causes in equity.² It also has jurisdiction to interpret, apply, enforce or determine the validity of corporate instruments³ and to hear actions

1 Elena C Norman is a partner and Lakshmi A Muthu is an associate at Young Conaway Stargatt & Taylor, LLP.

2 10 Del. C. Section 341.

3 8 Del. C. Section 111.

relating to limited liability companies (LLCs)⁴ and partnerships,⁵ including limited partnerships.⁶ Five judges – one chancellor and four vice chancellors – sit on the Court of Chancery. Two Masters in Chancery assist the Chancellor and Vice Chancellors in adjudicating and managing disputes before the Court of Chancery. There are no juries in Court of Chancery proceedings, and the Court does not hear criminal cases.

Based on the Court of Chancery's statutory jurisdiction to hear corporate disputes, and the fact that Delaware is the domicile of many major corporations, the Court of Chancery hears numerous business and corporate disputes of wide significance. Over the past decade, with the increased popularity of LLCs and other 'alternative entities', the Court of Chancery has heard a growing number of cases relating to such entities. In addition, because it is a court of equity, litigants frequently apply to the Court of Chancery for preliminary injunctions and status quo orders pending final resolution of a matter. Many cases in the Court of Chancery are tried on an expedited schedule, particularly when the parties seek preliminary equitable relief.

Delaware's court of general jurisdiction is the Superior Court, which has original jurisdiction over criminal cases meeting a threshold level of seriousness and civil cases involving amounts in excess of \$50,000 – other than equity matters and domestic relations matters (which are heard by the Delaware Family Court).⁷ The Superior Court is a court of law, and litigants have the right to elect trial by jury.

II THE YEAR IN REVIEW

The past 12 months witnessed several Delaware decisions involving cross-border issues, including cases involving litigation against China-based companies.⁸

China Agritech involved a Delaware company whose operations and directors were located in China.⁹ After failing to file updated financial statements with the Securities Exchange Commission (SEC), the company was deregistered by the SEC and delisted by NASDAQ.¹⁰ Thereafter, plaintiff shareholders brought class and derivative claims alleging that insiders of the corporation, who held approximately 36 per cent of the corporation's stock and managed the corporation, 'benefited themselves by allowing the company to

4 6 Del. C. Section 18-111.

5 6 Del. C. Section 15-122.

6 6 Del. C. Section 17-111.

7 Delaware also has a Court of Common Pleas, which has jurisdiction, among other things, over misdemeanours and civil disputes where the amount in controversy does not exceed \$50,000, and a Justice of the Peace Court, which has jurisdiction over civil cases involving debt, trespass and replevin where the amount in controversy does not exceed \$15,000.

8 See *In re China Agritech, Inc. S'holders Deriv. Litig. (China Agritech)*, C.A. No. 7163-VCL (Del. Ch. 13 February 2015) (TRANSCRIPT); *Southpaw Credit Opp. Master Fund LP v. Advanced Battery Techs., Inc. (Southpaw)*, 2015 Del. Ch. LEXIS 54 (26 February 2015) (Final Report by Master LeGrow).

9 C.A. No. 7163-VCL, at 8-11 (TRANSCRIPT).

10 *Id.* at 8.

go dark to the detriment of the stockholders, who would no longer be able to effectively dispose of their stock,¹¹ and by diverting proceeds of a \$23 million secondary securities offering.¹² Following a mediation, the parties reached a settlement agreement that would provide approximately \$3.25 million in cash to the class members.¹³ Upon reviewing the merits of the settlement, the Court of Chancery approved the settlement.¹⁴ The Court indicated that the settlement amount of \$3.25 million was relatively low given the ‘fairly striking’ alleged wrongdoing, including allegations of a possible diversion of \$23 million. It recognised, however, that ‘the potential net recovery for the class/company could have been very small or non-existent’ as a result of novel legal issues, the likely high cost of travelling to China to obtain discovery, and the difficulty of enforcing and collecting a judgment in China.¹⁵ Thus, the Court ultimately commented that ‘this is actually probably an exemplary result,’ given that people have not ‘gotten very much money at all out of these delisted companies and the fiduciaries who formed them and took advantage of Delaware law and federal law and then seemed to have resulted in an awful lot of delistings and problems.’¹⁶

In *Southpaw*, the Court addressed the interplay between Delaware and Chinese law. *Southpaw*, like *China Agritech*, involved a Delaware company based in China, which was delisted from the NASDAQ.¹⁷ Beginning in 2011, the company stopped regularly filing public reports and disclosures in accordance with SEC regulations and the shareholders stopped receiving financial information prepared in accordance with the United States Generally Accepted Accounting Principles.¹⁸ In 2014, a hedge fund purchased shares of the company with knowledge of the company’s delisting, believing that the stock was undervalued.¹⁹ Thereafter, the hedge fund filed an action in the Court of Chancery demanding to inspect the books and records of the company and its subsidiaries in order

11 Id. at 9-10.

12 Id. at 22. The plaintiff shareholders’ claims included ‘Caremark’ claims, which alleged that the company’s insiders acted in bad faith. Id. at 25-26. The Court described these claims as ‘fairly striking’ and, in a previous stage of the proceeding, denied a motion to dismiss the claims, despite recognising that such claims ‘are one of the most difficult types of claims to prove under Delaware law’. Id. at 25-27. The Court concluded that the factual allegations of the complaint, taken together, ‘support[ed] a reasonable inference that the members of the [company’s] Audit Committee acted in bad faith in the sense that they consciously disregarded their duties.’ *In re China Agritech, Inc. S’holder Deriv. Litig.*, 2013 Del. Ch. LEXIS 132, at *58 (Del. Ch. 21 May 2013).

13 See C.A. No. 7163-VCL, at 28, 31 (TRANSCRIPT). The Court approved an award of \$750,000 from the settlement fund to the class’s counsel for attorneys’ fees and costs. Id. at 29-30.

14 Id. at 21.

15 Id. at 27-28.

16 Id. at 29.

17 2015 Del. Ch. LEXIS 54, at *1.

18 Id. at *3-4.

19 Id. at *4.

to value the hedge fund's shares, among other things.²⁰ The company argued that Chinese accounting laws and regulations precluded it from 'producing for inspection or copying outside mainland China any accounting records of [the company's] subsidiaries.'²¹ The Court rejected this defence, holding that the hedge fund was entitled to inspect the books and records necessary and essential to valuing its stock.²² The Court explained that (1) the company only showed that Chinese law may preclude production of some undefined set of its subsidiaries' books and records (as opposed to the specific books and records that the Court ordered the company to produce), and (2) the company failed to show that Chinese law would render it unable to 'comply with an inspection order from this Court'.²³ The Court noted that making the 'records available in China and bear[ing] [the hedge fund's] associated travel expenses' would (although atypical and likely a 'last resort') be 'preferable to excusing [the company] altogether from its obligations under Delaware law'.²⁴ These two cases illustrate how the Delaware courts have addressed some of the challenges raised by litigation involving companies based in China and how they have attempted to provide plaintiffs with meaningful relief in the face of such challenges.

The past year was also marked by decisions applying the doctrine of *forum non conveniens*. In *VTB Bank v. Navitron Projects Corp.*,²⁵ the Court of Chancery dismissed claims for fraudulent transfer and for the appointment of a receiver against a Delaware limited liability company on *forum non conveniens* grounds because the claims would more properly lie in Ukrainian courts.²⁶ The Court explained that dismissal on grounds of *forum non conveniens* is a 'drastic remedy'.²⁷ The Court nevertheless found that the defendant had met its burden to overcome Delaware's presumption favouring a plaintiff's choice of forum because requiring it to litigate in Delaware would subject it to 'overwhelming hardship'.²⁸ Before making its ruling, the Court allowed the parties the chance to present expert testimony regarding the application of Ukrainian law to the alleged facts.²⁹ The Court reviewed these submissions and explained that it 'experience[ed] difficulty 'applying the law of Ukraine to the facts in the complaint [...] The positions taken by the experts are in many instances diverging and in others irreconcilable.'³⁰ 'Given the civil law structure of the Ukrainian legal system [...], the absence of a direct counterpart under Ukrainian law to Delaware's fraudulent transfer and unjust enrichment causes of action, and the experts' starkly divergent opinions regarding the applicability of the

20 Id. at *4-6.

21 Id. at *8.

22 Id. at *18-22.

23 Id. at *24-26.

24 Id. at *28-29.

25 C.A. No. 8514-VCN (Del. Ch. 29 December 2015) (Letter Opinion).

26 See id. at 20-24.

27 Id. at 10.

28 Id. at 21.

29 Id. at 7.

30 Id. at 15-16.

Civil Code of Ukraine to the facts of the case – indicating unsettled foreign law and its uncertain application to the facts’, the Court held that Ukraine was the proper forum in which to litigate the dispute.³¹

In contrast, in *Pipal Tech Ventures Private Ltd. v. MoEngage, Inc.*,³² the Court rejected the plaintiff’s motion to dismiss based on *forum non conveniens* grounds, even though the case involved ‘underlying tort and contract issues solely related to India’.³³ The Court explained that under the applicable standard, it was charged with determining whether, ‘on balance, litigation in Delaware would represent a manifest hardship to the defendant’.³⁴ Weighing multiple factors, including ‘relative ease of access to proof’, ‘availability of compulsory process for witnesses’, ‘whether the controversy is dependent upon the application of Delaware law’, and ‘the pendency or nonpendency of a similar action or actions in another jurisdiction’, the Court ultimately concluded that the defendant had ‘failed to demonstrate that fundamental concerns of the administration of justice overwhelmingly support[ed] dismissal of [the] action’.³⁵ However, the Court suggested that the result might have been different had an actual action been pending in an Indian court.³⁶

III COURT PROCEDURE

i Overview of court procedure

Every court in Delaware has its own rules governing procedure. The Federal Rules of Civil Procedure and the Federal Rules of Evidence govern civil practice and procedure in the US District Court for the District of Delaware, and are supplemented by the Court’s Local Rules of Civil Practice and Procedure. The rules governing civil practice and procedure in Delaware’s state courts are largely based on the Federal Rules of Civil Procedure³⁷ and the Federal Rules of Evidence.³⁸

Of particular importance to business and commercial-law practitioners are the rules of the Superior Court and the rules of the Court of Chancery. Both courts regularly update their procedures to address the needs of practitioners. For example, in May 2010, the Superior Court created a complex commercial litigation division to manage cases with amounts in controversy of \$1 million or more.³⁹

31 Id. at 18-19.

32 2015 WL 9257869 (Del. Ch. 17 December 2015).

33 See id. at *1, *10.

34 Id. at *5.

35 Id. at *5, *10.

36 See id. at *9-10.

37 See Supr. Ct. R. 1-300; Super. Ct. Civ. R. 1-139; Ct. Ch. R. 1-207; Fam. Ct. Civ. R. 1-509; Ct. Com. Pl. Civ. R. 1-113; J.P. Ct. Civ. R. 1-112.

38 See D.R.E. 101-1103. The Delaware Uniform Rules of Evidence govern proceedings in all Delaware state courts. See D.R.E. 101, 1101.

39 See Administrative Directive of the President Judge of the Superior Court of the State of Delaware, No. 2010-3 (26 April 2010), available at http://courts.delaware.gov/superior/pdf/Administrative_Directive_2010-3.pdf.

ii Procedures and time frames

In all Delaware state courts, there are generally four phases of litigation: pleadings, discovery, trial and judgment.

Pleadings

Litigation in Delaware is typically commenced by filing a complaint electronically.⁴⁰ A complaint must contain '(1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which the party deems itself entitled'.⁴¹ After filing the complaint, service of the complaint and a summons must be made on the defendant.⁴² The defendant must generally respond to the complaint within 20 days of service.⁴³ In the Superior Court, civil cases are subject to compulsory alternative dispute resolution.⁴⁴ This means that before a civil case can go to trial in the Superior Court, the parties must attempt to resolve their dispute through arbitration, mediation or neutral assessment.⁴⁵

Discovery

As under the Federal Rules, the scope of permissible discovery in Delaware state courts is broad; parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to a claim or defence.⁴⁶ Many types of discovery are authorised: depositions, written interrogatories, production of documents or electronically stored information, permission to enter upon land for inspection, physical and mental examinations, and requests for admission.⁴⁷ Delaware state courts have discretion to limit the scope of discovery if, for example, it is unreasonably burdensome.⁴⁸

40 See Super. Ct. Civ. R. 3(a); Ct. Ch. R. 3(a).

41 Super. Ct. Civ. R. 8(a); Ct. Ch. R. 8(a); however, when pleading fraud, negligence, or mistake, the pleader must state the circumstances constituting such claims with particularity. Super. Ct. Civ. R. 9(b); Ct. Ch. R. 9(b).

42 Super. Ct. Civ. R. 4(j); Ct. Ch. R. 4(d).

43 Super. Ct. Civ. R.12(a);Ct. Ch. R. 12(a).

44 Super. Ct. Civ. R. 16(b)(4).

45 History of Alternative Dispute Resolution (ADR) in Superior Court of Delaware, available at http://courts.delaware.gov/Superior/ADR/adr_history.stm.

46 Super. Ct. Civ. R. 26(b)(1); Ct. Ch. R. 26(b)(1).

47 Super. Ct. Civ. R. 26(a); Ct. Ch. R. 26(a).

48 Super. Ct. Civ. R. 26(b)(1); Ct. Ch. R. 26(b)(1). See, e.g., *Sokol Hldgs., Inc v. Dorsey & Whitney LLP*, 2009 Del. Ch. LEXIS 142, at *38–42 (Del. Ch. 2009) (limiting discovery in a fee dispute case to particularly relevant individuals and reasonable time periods, because, *inter alia*, 'discovery into compensation structure [of attorneys] is somewhat duplicative of knowledge that is already available to the court, namely that any attorney billing by the hour has some incentive to increase the hours billed'); *Spanish Tiles Ltd v. Hensley*, 2007 Del. Super. LEXIS 105, at *8–9 (Del. Super. 13 April 2007) (limiting discovery to make it 'reasonable and without undue burden').

Over the past few years, Delaware state courts have recognised the importance of electronic discovery. The Court of Chancery recently amended its discovery rules to specifically address electronically stored information (ESI).⁴⁹ Opposing parties and their counsel should confer regarding the preservation of ESI early in the litigation and attorney oversight of the identification and preservation processes is very important. In *Eorhb, Inc v. HOA Holdings, LLC*, the Court of Chancery directed parties to use technologies such as ‘predictive coding’ to select documents for production when a large quantity of electronically stored documents is involved.⁵⁰

Trial

Delaware has an adversarial system of trial in which the opposing parties have the responsibility and initiative to find and present proof.⁵¹ Lawyers are expected to act as zealous advocates for their clients’ positions.⁵² In particular, courts view adequate cross-examination as critical.⁵³ Trials are presided over by a single judge and, in some instances, may be before a jury in addition to a judge. In the Superior Court, any party may demand a trial by jury.⁵⁴ In the Court of Chancery, however, there are no juries, and a party therefore does not have a right to a trial by jury.⁵⁵ In jury trials, jurors make findings of fact while judges make findings of law.⁵⁶ In non-jury trials, judges make findings of both fact and law.⁵⁷

Judgment

There are numerous ways to obtain a judgment in Delaware state courts. One is a judgment entered after a trial. In addition, a party can seek judgment from the court by making a motion for judgment on the pleadings after the pleadings are closed but within such time as not to delay the trial.⁵⁸ Alternatively, a party can move for summary judgment.⁵⁹ The court will grant summary judgment if the pleadings, discovery, and

49 Press Release, Court of Chancery Announces Rule Changes and New Discovery Guidelines (4 December 2012), available at <http://courts.delaware.gov/chancery/rulechanges.stm>. These changes are consistent with similar amendments to the Federal Rules of Civil Procedure, and they became effective on 1 January 2013. *Id.*

50 See *Eorhb Inc v. HOA Hldgs LLC*, C.A. No. 7409-VCL, at 66–67 (Del. Ch. 15 October 2012) (TRANSCRIPT).

51 *In re Appraisal of Shell Oil Co*, 1990 Del. Ch. LEXIS 199, at *14 (Del. Ch. 11 December 1990) (internal quotation marks omitted).

52 Del. Lawyers’ R. Prof’l Conduct pmbl.

53 See *Allen v. Div. of Child Support Enforcement*, 575 A.2d 1176, 1184 (Del. 1990).

54 Super. Ct. Civ. R. 38(b).

55 See Ct. Ch. R. 38.

56 See *Herring v. State*, 805 A.2d 872, 876 (Del. 2002).

57 See *Willey v. Wiltbank*, 567 A.2d 424, 1989 Del. LEXIS 377, at *7 (Del. 1989).

58 Super. Ct. Civ. R. 12(c); Ct. Ch. R. 12(c).

59 Super. Ct. Civ. R. 56; Ct. Ch. R. 56. When deciding whether to grant a motion for summary judgment, a Delaware court can consider matters outside of the pleadings. See Super Ct. Civ. R. 12(c); Ch. Ct. R. 12(c).

affidavits show that there is ‘no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law’.⁶⁰ In the Superior Court a party can move for a directed verdict, which is also known as a judgment as a matter of law. Specifically, ‘[i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the Court may determine the issue against the party’.⁶¹

If a party receives an adverse final determination in a civil action in Superior Court or the Court of Chancery, that party has an absolute right to appeal the determination to the Delaware Supreme Court.⁶² Subject to certain rules, a party may seek an interlocutory appeal to the Delaware Supreme Court, which has discretion over whether to accept such appeal.⁶³

iii Class actions

Delaware courts allow class actions. In considering a motion for class certification, the court first considers whether the moving plaintiff has demonstrated numerosity of the potential class, commonality of claims, typicality of claims, and adequacy of the class representative.⁶⁴ The moving plaintiff must also show one of the following factors:

- a* that separate actions by or against individual class members would create a risk of inconsistent adjudications or would have an impact on class members not part of the adjudications by impairing their ability to protect their interests;
- b* that the party opposing the class has acted or refused to act on grounds generally applicable to the class; or
- c* that common questions of law or fact predominate over any questions affecting only individual members, and a class action is superior to other methods for adjudication of the controversy.⁶⁵

Class action settlements require the approval of the court.⁶⁶ Notably, the Court of Chancery, in a number of disputes between plaintiff shareholders and corporate defendants, has approved class action settlements and fee awards to plaintiff attorneys based solely on therapeutic benefits, as opposed to monetary benefits.⁶⁷ Though, in *BVF*

60 Super. Ct. Civ. R. 56(c); Ct. Ch. R. 56(c).

61 Super. Ct. Civ. R. 50(a)(1).

62 *Reid v. Spazio*, 970 A.2d 176, 181 (Del. 2009).

63 Supr. Ct. R. 42(a).

64 Super. Ct. Civ. R. 23(a); Ct. Ch. R. 23(a).

65 Super. Ct. Civ. R. 23(b); Ct. Ch. R. 23(b).

66 Super. Ct. Civ. R. 23(e); Ct. Ch. R. 23(b).

67 See, e.g., *In re Celera Corp. S'holder Litig*, 2012 Del. Ch. LEXIS 66, at *2–6 (Del. Ch. 23 March 2012) (approving a settlement of a class's claims in connection to a merger based solely on therapeutic benefits), rev'd in part on other grounds by *BVP P'rs L.P. v. New Orleans Empls Ret Sys*, 59 A.3d 418 (Del. 2012); *In re Sauer-Danfoss Inc S'holders Litig*, 65 A.3d 1116, at 1136, 1141–42 (Del. Ch. 29 April 2011) (awarding attorney's fees for efforts in obtaining a class action settlement based purely on supplemental disclosures, but noting that '[a]ll

Partners LP v. New Orleans Employees Retirement System,⁶⁸ the Delaware Supreme Court held that it was an abuse of discretion not to permit a significant shareholder with a claim for monetary damages to opt out of a class-action settlement that was based solely on non-monetary consideration.⁶⁹

iv Representation in proceedings

Litigants who are natural persons may represent themselves in civil proceedings in Delaware state courts. Delaware courts have stated that they will provide *pro se* litigants with some leniency regarding compliance with court procedures.⁷⁰ Legal entities cannot represent themselves.⁷¹

v Service out of the jurisdiction

Natural persons and legal entities may be served with legal process outside of Delaware. Delaware's primary vehicle for service of process outside the state is its long-arm statute.⁷² This statute authorises service of process outside of Delaware on any individual or entity that:

- a* transacts any business or performs any work or service in Delaware;
- b* contracts to supply services or things in Delaware;
- c* causes tortious injury in Delaware by an act or omission in Delaware;
- d* causes tortious injury in or outside of Delaware by an act or omission outside of Delaware if the person or entity engages in a persistent course of conduct in Delaware or derives substantial revenue from services or things used or consumed in Delaware;

supplemental disclosures are not equal'); *In re Countrywide Corp S'holders Litig*, 2009 Del. Ch. LEXIS 155, at *15, *26 (Del. Ch. 24 August 2009) (approving a proposed settlement and finding that 'settlement for only therapeutic disclosures is neither unfair nor unreasonable' because the party's 'potential federal securities law claims possess no obvious value').

68 59 A.3d 418 (Del. 2012).

69 *Id.* at 436-37.

70 For example, *Sloan v. Segal*, 2008 Del. Ch. LEXIS 3, at *26 (Del. Ch. 3 January 2008) ('Delaware courts, at their discretion, look to the underlying substance of a *pro se* litigant's filings rather than rejecting filings for formal defects and hold those *pro se* filings to "a somewhat less stringent technical standard" than those drafted by lawyers' (footnote omitted) (quoting *Vick v. Haller*, 522 A.2d 865, 1987 Del. LEXIS 1046, at *3 (Del. 1987)).

71 See *Harris v. RHH P'rs LP*, 2009 Del. Ch. LEXIS 42, at *6 (Del. Ch. 3 April 2009) (reminding 'the parties of the general rule that artificial business entities may appear in Delaware courts only through an attorney admitted to practice law in Delaware'); *Caldwell Staffing Servs v. Ramrattan*, 2003 Del. Super. LEXIS 23, at *11 (Del. Super. 29 January 2003) (noting that 'corporations must be represented by an attorney in court proceedings' (citation omitted)).

72 10 Del. C. Section 3104. Other statutes, with narrower scopes, provide alternative bases for service of process on non-residents. See, e.g., 8 Del. C. Section 321; 10 Del. C. Sections 3111, 3114.

e has an interest in, uses or possesses real property in Delaware; or
f contracts to insure or act as surety for, or on, any person, property, risk, contract, obligation or agreement located, executed or to be performed within Delaware at the time the contract is made.⁷³

vi Enforcement of foreign judgments

Parties seeking to enforce a foreign judgment in Delaware have two options. First, a party can bring an action asking a Delaware court to recognise and enforce the foreign judgment. A Delaware court will recognise a foreign judgment if it concludes that a foreign court with jurisdiction rendered the judgment after a full and fair trial.⁷⁴

Second, a party can utilise Delaware's Uniform Foreign-Country Money Judgments Recognition Act. This Act applies to foreign judgments that: grant or deny recovery of money and are final, conclusive and enforceable under the law of the country where rendered.⁷⁵ To seek enforcement of a foreign-country judgment under this Act, a party must file an action seeking recognition of the foreign-country judgment.⁷⁶ If a court finds that the foreign-country judgment is entitled to recognition, then, to the extent that the foreign-country judgment grants or denies recovery of a sum of money, the foreign-country judgment is: conclusive between the parties and enforceable in the same manner and to the same extent as a judgment rendered in Delaware.⁷⁷

vii Assistance to foreign courts

The rules of the Delaware state courts do not include specific provisions on assisting foreign courts.⁷⁸ However, Delaware courts have acknowledged that 28 USC Section 1782, a federal statute, exists to provide foreign tribunals with assistance from American federal courts in obtaining discovery in the United States.⁷⁹ Under 28 USC Section 1782(a), 'The district court of the district in which a person resides or is found may order [that person] to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal.'

73 Id.

74 *Kingsland Hldgs v. Bracco*, 1996 Del. Ch. LEXIS 90, at *15 (Del. Ch. 22 July 1996) (citing *de la Mata v. Am Life Ins Co*, 771 F. Supp. 1375, 1381 (D. Del. 1991)); see also *Bata v. Bata*, 163 A.2d 493, 503 (Del. 1960) ('[A] foreign judgment, given by a court under a system of law reasonably insuring notice and hearing [...] is *res judicata* in Delaware').

75 10 Del. C. Section 4802(a).

76 10 Del. C. Section 4809(a).

77 10 Del. C. Section 4810(1)–(2).

78 See generally Super. Ct. Civ. R. 1-139; Ct. Ch. R. 1-207.

79 *Diedenhofen-Lennartz v. Diedenhofen*, 931 A.2d 439, 441, 449, 452 (Del. Ch. 2007) (granting defendant's motion to stay the Delaware action in favour of earlier-filed actions pending in Germany, Canada and California).

viii Access to court files

Members of the public have the general right of access to ongoing judicial proceedings and to records thereof.⁸⁰ Delaware courts, however, will sometimes limit access to judicial proceedings and records regarding sensitive information.⁸¹ The Court of Chancery emphasised the importance of the public's right of access to information about judicial proceedings by adopting Chancery Rule 5.1.⁸² Chancery Rule 5.1 makes clear that most information presented to the Court should be available to the public.⁸³ Rule 5.1 accomplishes this by, among other things, reducing the categories of information that are entitled to protection and making it clear that if a public version of a confidential document is not filed in a timely manner, the confidential document will lose its confidential status.⁸⁴

ix Litigation funding

The law on third-party litigation funding is sparse in Delaware. Questions have arisen as to whether any protection from discovery may apply to communications between a party to litigation and litigation-funding companies that the party is considering retaining. For example, in *Leader Technologies Inc v. Facebook Inc*⁸⁵ the US District Court for the District of Delaware held that attorney–client work product will lose its protection from discovery if it is shared with litigation-funding companies that have not yet been retained.⁸⁶

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

Under the Delaware Lawyers' Rules of Professional Conduct, a lawyer generally cannot represent a potential client if the representation involves a concurrent conflict of interest.⁸⁷ A concurrent conflict of interest exists if: '(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another

80 See, e.g., *NewsRadio Gp. LLC v. NRG Media LLC*, 2010 Del. Ch. LEXIS 49, at *1 (Del. Ch. 27 January 2010) (noting that there is a presumption that the press and public have a common law right of access to judicial proceedings and court records); *Kronenberg v. Katz*, 872 A.2d 568, 608 (Del. Ch. 2004) (noting that the Court of Chancery has a legal duty to honour the legitimate interest of the public and the press in access to judicial proceedings).

81 See *Kronenberg*, 872 A.2d at 605.

82 Court of Chancery, Protecting Public Access to the Courts: Chancery Rule 5.1, at 3, available at <http://courts.delaware.gov/rules/ChanceryMemorandumRule5-1.pdf>.

83 *Id.* at 4.

84 *Id.*

85 719 F. Supp. 2d 373 (D. Del. 2010).

86 See *id.* at 376.

87 Del. Lawyers' R. Prof'l Conduct 1.7(a).

client, a former client or a third person or by a personal interest of the lawyer'.⁸⁸ In certain circumstances, a lawyer can represent a client in spite of a concurrent interest if the clients or former clients give the lawyer informed consent to do so.⁸⁹

Where a lawyer is associated with a firm, a lawyer's conflicts of interest are generally imputed to the other members of that firm.⁹⁰ Members of a firm can avoid imputation of a new colleague's conflicts of interests arising from surviving duties to former clients if '(1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and (2) written notice is promptly given to the affected former client'.⁹¹ Also, subject to certain conditions, a member of a firm can avoid such an imputation by obtaining the informed consent of the former client.⁹²

ii Money laundering, proceeds of crime and funds related to terrorism

Where a lawyer learns that a 'client has used the lawyer's services to perpetrate a crime', such as money laundering, the lawyer may withdraw from representing the client.⁹³ Furthermore, where a client has used a lawyer's services to further the client's criminal conduct, the lawyer 'may reveal information relating to the representation of [the] client to the extent the lawyer reasonably believes necessary' to (1) prevent the client from committing a crime that is reasonably certain to result in substantial financial injury to another or (2) prevent, mitigate, or rectify substantial financial injury to another that is reasonably certain to result.⁹⁴

iii Data protection

The United States does not possess a legal or regulatory framework governing the processing of personal data that is comparable to the proposed European Data Protection Regulation.⁹⁵ Nevertheless, in Delaware, parties and their lawyers have a variety of methods for ensuring that personal data processed and produced during discovery is protected. Notably, a party can move for a protective order from a Delaware court. Where good cause is shown, a Delaware court may order, among other things, that discovery only take place at a certain time and place, that discovery only be conducted

88 Del. Lawyers' R. Prof'l Conduct 1.7(a)(1)-(2). Other types of conflicts of interest are outlined in Rule 1.8 of the Delaware Lawyers' Rules of Professional Conduct.

89 Del. Lawyers' R. Prof'l Conduct 1.7(b)(1)-(4), 1.9(a)-(b)(2).

90 Del. Lawyers' R. Prof'l Conduct 1.10.

91 Del. Lawyers' R. Prof'l Conduct 1.10(c)(1)-(2).

92 Del. Lawyers' R. Prof'l Conduct 1.10(d).

93 Del. Lawyers' R. Prof'l Conduct 1.16(b)(3).

94 Del. Lawyers' R. Prof'l Conduct 1.6(b)(2)-(3).

95 See, e.g., N Singer, 'Data Protection Laws, an Ocean Apart', *NY Times*, 2 February 2013, available at www.nytimes.com/2013/02/03/technology/consumer-data-protection-law-s-an-ocean-apart.html?_r=0.

by certain persons, and that confidential information, such as social security numbers, not be disclosed.⁹⁶ Additionally, parties can redact confidential information from public court documents.⁹⁷

iv Other areas of interest

Delaware court procedure requires lawyers from outside of Delaware who want to practise in Delaware courts to associate with lawyers admitted to the Delaware Bar.⁹⁸ Specifically, in order for a non-Delaware attorney to temporarily practise in a Delaware court, a member of the Delaware Bar must file a motion to admit the non-Delaware attorney *pro hac vice*.⁹⁹ In connection with the motion, the attorney seeking admission must certify, *inter alia*, that he or she will be bound by all rules of the court.¹⁰⁰ Furthermore, after a member of the Delaware Bar makes a *pro hac vice* motion on behalf of a non-Delaware attorney, he or she remains responsible to the court for the positions taken in the case and the presentation of the case,¹⁰¹ and must continue to make all filings with the court. These requirements for ‘local’ counsel are stricter than those of many other jurisdictions within the United States.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

The attorney–client privilege is a common-law protection for communications between an attorney and his or her client made for the purpose of rendering legal advice. Delaware law codifies the attorney–client privilege in Delaware Rule of Evidence 502. Under this privilege rule, an attorney ‘is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation’.¹⁰² Therefore, in Delaware, the attorney–client privilege applies to foreign lawyers. Furthermore, the privilege applies regardless of whether the attorney involved in the communications is outside counsel to a client or in-house counsel to a client.¹⁰³ The privilege is not, however, accorded to communications that render business advice as opposed to legal advice.¹⁰⁴

96 Super Ct. Civ. R. 26(c); Ct. Ch. R. 26(c).

97 Super. Ct. Civ. R. 5(g)(2); Ct. Ch. R. 5.1(d)(1).

98 See Super Ct. Civ. R. 90.1(a); Ct. Ch. R. 170(b).

99 Super Ct. Civ. R. 90.1(a); Ct. Ch. R. 170(b).

100 Super Ct. Civ. R. 90.1(b); Ct. Ch. R. 170(c).

101 *State Line Ventures LLC v. RBS Citizens NA*, CA No. 4705-VCL, at 2 (Del. Ch. 2 December 2009) (LETTER).

102 DRE 502(a)(3).

103 See, e.g., *Grimes v. LCC Int’l Inc.*, 1999 Del. Ch. LEXIS 64, at *5 (Del. Ch. 23 April 1999), (applying attorney–client privilege to communications between a company’s general counsel and the company, its directors and/or its officers); see also *Texaco Inc. v. Phoenix Steel Corp.*, 264 A.2d 523, 525 (Del. Ch. 1970 (‘[a]ssuming without deciding that attorney–client privilege is applicable in Delaware to house counsel’)).

104 *Khanna v. McMinn*, 2006 Del. Ch. LEXIS 86, at *165 (Del. Ch. 9 May 2006).

The attorney–client privilege belongs to the client, not the attorney, and can be waived only by the client. Corporate officers or directors who receive legal advice on behalf of the corporation they serve are deemed to be joint clients with the corporation for purposes of the privilege.¹⁰⁵ In *Kalisman v. Friedman*, the Court of Chancery recently held that a corporation ‘cannot pick and choose which directors get information by asserting the attorney–client privilege against [one director] but not against the [other] directors’.¹⁰⁶

In many circumstances, litigants will be required to provide opposing counsel with a privilege log, which must contain sufficient information to enable the adverse party to test the privilege asserted. The log must set out basic information about the communication withheld and the nature of the legal advice that was being provided. To ensure that the privilege is invoked properly, Delaware courts have required the senior Delaware lawyers on both sides of litigation to certify entries on privilege logs.¹⁰⁷

Delaware courts also recognise the attorney work-product doctrine (protecting information prepared in anticipation of litigation)¹⁰⁸ and ‘business strategy immunity’ (protecting confidential business information where there is risk that the information ‘may not be used for proper legal purposes, but rather for practical business advantages’).¹⁰⁹

ii Production of documents

During the course of discovery, parties may obtain non-privileged documents and electronically stored information that are ‘relevant to the subject matter involved in the pending actions, whether it relates to the claim or defense’.¹¹⁰ The standard of relevance is whether the evidence has ‘any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than

105 See *Kirby v. Kirby*, 1987 Del. Ch. LEXIS 463, at *19 (Del. Ch. 29 July 1987) (‘The directors are all responsible for the proper management of the corporation, and it seems consistent with their joint obligations that they be treated as the “joint client” when legal advice is rendered to the corporation through one of its officers or directors.’).

106 2013 Del. Ch. LEXIS 100, at *10–11 (Del. Ch. 17 April 2013); however, the Court of Chancery recognised that there were limitations to a director’s ability to access privileged information, including, among other things, a showing of ‘sufficient adversity between the director and the corporation such that the director could no longer have a reasonable expectation that he was a client of the board [of directors] counsel’. *Id.* at *14.

107 *Intel Corp v. Nvidia Corp*, CA No. 4373-VCS, at 13 (Del. Ch. 5 April 2010) (TRANSCRIPT).

108 See, e.g., Super. Ct. Civ. R. 26(b)(3); Ct. Ch. R. 26(b)(3).

109 *Hexion Specialty Chems Inc v. Huntsman Corp*, 959 A.2d 47, 53 (Del. Ch. 2008) (citation and internal quotation marks omitted). The Court of Chancery ‘most commonly protects information under the business strategy immunity when a ‘target corporation [seeks] to shield itself from discovery of time-sensitive information in the takeover context’. *Glassman v. Crossfit Inc*, 2012 Del. Ch. LEXIS 248, at *12 (Del. Ch. 12 October 2012).

110 Ct. Ch. R. 26(b)(1); Super. Ct. Civ. R. 26(b)(1).

it would be without the evidence'.¹¹¹ Under these liberal discovery policies, a party may serve on any other party a request to produce the following types of documents or electronically stored information: 'books, papers, writings, drawings, graphs, charts, photographs, sound recordings, images, electronic documents, electronic mail, and other data or data compilations from which information can be obtained, either directly or, if necessary, after conversion by the responding party into a reasonably usable form'.¹¹² The request must specify where, when and how the documents should be produced.¹¹³

When a document request seems oppressive or unduly burdensome to a party, the party can object to that request. A Delaware court will limit or narrow the document request if it determines that:

*(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.*¹¹⁴

Delaware courts often adjudicate disputes where the evidence is located outside Delaware and require parties to produce documents located in foreign jurisdictions.¹¹⁵ The United States' status as a party to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters helps facilitate the collection of evidence from foreign jurisdictions.¹¹⁶ Indeed, the Supreme Court of Delaware has held that requiring a party to litigation in Delaware to produce documents, which in large part would need to be obtained from the United Kingdom through the Hague Convention, does not present that party with an overwhelming hardship.¹¹⁷ Further, one Delaware court has noted that '[w]here litigants are large national or international corporations which [...] have both the knowledge and means to locate and transport [...] evidence across state lines, particularly "in an age where air travel, express mail, electronic data transmissions and videotaped depositions are part of the normal course of business for [such] companies[,]'" the burden created by the fact that 'evidence [is] located far from Delaware is "substantially attenuated"'.¹¹⁸

111 DRE. 401.

112 Ct. Ch. R. 34(a); see also Super. Ct. Civ. R. 34(a).

113 Ct. Ch. R. 34(b) & (d); Super. Ct. Civ. R. 34(b).

114 Ct. Ch. R. 26(b)(1).

115 *IM2 Merch. & Mfg Inc v. Tirex Corp*, 2000 Del. Ch. LEXIS 156, at *35 (Del. Ch. 2 November 2006).

116 US Department of State, Obtaining Evidence, available at <http://travel.state.gov/content/travel/english/legal-considerations/judicial/obtaining-evidence.html>.

117 *Ison v. EI DuPont De Nemours & Co*, 729 A.2d 832, 843 (Del. 1999).

118 *In re Asbestos Litig.*, 929 A.2d 373, 384 (Del. Super. 2006).

A party must produce all documents that are responsive to a proper document request and in its 'possession, custody or control'.¹¹⁹ Consequently, a party must only produce documents held by a subsidiary, parent or other third party if the party can be deemed to be in control of such documents.¹²⁰

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

Parties seeking to resolve a dispute outside of the courtroom may do so through arbitration and mediation. As noted above, the Superior Court has a compulsory alternative dispute resolution (compulsory ADR) programme.¹²¹ Every civil case filed in the Superior Court is subject to this compulsory ADR programme.¹²² The programme permits parties to choose the format of the alternative dispute resolution, which may include one of the following options: arbitration, mediation and neutral assessment. If parties cannot agree upon a format, the default format is mediation. In addition, in the Court of Chancery, judges are authorised to sit as mediators in disputes that are pending in the Court of Chancery or have been filed for the purpose of court mediation.¹²³ Finally, the recently enacted Delaware Rapid Arbitration Act provides Delaware business entities with a streamlined and cost-effective process by which to resolve business

119 Ct. Ch. R. 34(a); Super. Ct. Civ. R. 34(a).

120 See *Dawson v. Pittco Capital P'rs LP*, 2010 Del. Ch. LEXIS 28, at *3 (Del. Ch. 15 February 2010) (holding that defendants must produce documents of the wholly-owned subsidiary, which was not a party to the litigation, where the documents were 'deemed controlled by [the subsidiary's] defendant parent'); see also *Boxer v. Husky Oil Co.*, 1981 Del. Ch. LEXIS 611, at *3 (Del. Ch. 9 November 1981) (finding that plaintiffs had not offered evidence to justify compelling a defendant-subsiary to produce documents of its non-party parent where defendants claimed that plaintiffs, to discover such documents, were required to show that the boards of directors of the subsidiary and the parent are 'identical or that the respective business operations of the two are so intertwined as to render their separate corporate identities meaningless'); *Hoechst Celanese Corp v. Nat'l Union Fire Ins Co.*, 1995 Del. Super. LEXIS 319, at *6-7 (Del. Super. 31 March 1995) (denying plaintiffs' request for documents relating to and held by the parent of defendant-subsiary where the court found that the facts did not establish the necessary level of corporate closeness between the subsidiary and the parent and, therefore, did not show that the defendant-subsiary had the 'requisite level of control over the documents' plaintiffs sought).

121 The following civil actions are generally not subject to the Superior Court's compulsory alternative dispute resolution programme: class actions; special proceedings such as those involving name changes, eminent domain and contested elections; replevin; foreign or domestic attachment; statutory penalty and mortgage foreclosure actions; and *in forma pauperis* actions. Super. Ct. Civ. R. 16(b)(4)(g) & 81(a).

122 Superior Court, Alternative Dispute Resolution, available at <http://courts.delaware.gov/Superior/ADR/index.stm>.

123 10 Del. C. Section 349.

disputes through voluntary arbitration.¹²⁴ These programmes allow parties to efficiently resolve their disputes while maintaining a greater level of confidentiality than litigation typically affords.

ii Arbitration

Delaware's legislature enacted the Delaware Rapid Arbitration Act (DRAA) (effective as of 4 May 2015) to provide 'businesses around the world a fast-track arbitration option'.¹²⁵ The DRAA requires arbitrators to issue final awards within 120 days of the arbitrator's acceptance of his or her appointment or within a time agreed upon by the parties prior to the arbitrator's acceptance of his or her appointment; neither deadline can be extended by more than 60 days.¹²⁶ To utilise the DRAA, parties to a dispute must meet the following requirements: (1) the parties must have a written agreement to submit their controversy to arbitration, (2) the agreement to arbitrate must expressly reference the DRAA, (3) the agreement to arbitrate must be governed by Delaware law, (4) at least one of the parties must be an entity formed in Delaware or have its principal place of business in Delaware, and (5) no party may be a consumer or an organisation that maintains public areas within a residential community.¹²⁷ Parties to a DRAA arbitration may select their arbitrator by agreement or petition the Court of Chancery to appoint one or more arbitrators.¹²⁸ The arbitration 'can be held anywhere in the world'¹²⁹ and is a confidential proceeding absent any agreement to the contrary.¹³⁰ Further, with the exception of a narrow appeal from the issuance of a final award, the arbitrator's determinations may not be challenged or

124 10 Del. C. Section 5802.

125 New Delaware Arbitration Law Offers Fast, Efficient Dispute Resolution (4 May 2015), available at <http://news.delaware.gov/2015/05/04/new-delaware-arbitration-law-offers-fast-efficient-dispute-resolution/>. The DRAA was enacted as an alternative to a Court of Chancery arbitration programme struck down as unconstitutional in 2012. The now-defunct programme allowed Court of Chancery judges to conduct confidential arbitrations. The US District Court for the District of Delaware found that the programme violated the First Amendment to the US Constitution because a Court of Chancery arbitration was sufficiently like a civil trial and therefore should not be closed to the public and press. *Del Coal for Open Gov't v. Strine*, 2012 US Dist. LEXIS 123980, at *28–31 (D. Del. 30 August 2012), *aff'd*, 733 F.3d 510, 521 (3d Cir. 2013). The Supreme Court of the United States declined to review the constitutionality of the programme. See B Kendall, 'Supreme Court Declines to Revive Delaware Arbitration Program', *Wall Street Journal*, 24 March 2014, available at www.wsj.com/articles/SB10001424052702304179704579459200411054082.

126 10 Del. C. Section 5808.

127 See 10 Del. C. Section 5803(a).

128 10 Del. C. Section 5805.

129 New Delaware Arbitration Law Offers Fast, Efficient Dispute Resolution (4 May 2015), available at <http://news.delaware.gov/2015/05/04/new-delaware-arbitration-law-offers-fast-efficient-dispute-resolution/>.

130 See Delaware Rapid Arbitration Rule 5.

appealed.¹³¹ This aspect of the DRAA is a key benefit of the act, because it limits parties' ability to delay arbitration by raising challenges in the courts. For example, parties to a DRAA arbitration 'may not seek a determination in the courts about the scope of the disputes that may be arbitrated; only the arbitrator may make that determination'.¹³²

If a party wishes to challenge a final award issued in a DRAA arbitration, the challenging party must do so within 15 days of the award's issuance before the Supreme Court of Delaware.¹³³ The Supreme Court 'may only vacate, modify, or correct the final award in conformity with the Federal Arbitration Act',¹³⁴ which sets forth extremely narrow grounds for appeal, essentially limited to fraud or other misconduct. And, under the DRAA, when executing an agreement to arbitrate, parties can eliminate potential review by the Supreme Court by either agreeing that there shall be no review of a final award or that review of a final award shall be conducted by one or more arbitrators.¹³⁵ If the parties do not seek review of a final award, the award will be deemed to have been confirmed by the Court of Chancery on the fifth business day following the expiry of the challenge period.¹³⁶ After a final award has been confirmed, the parties can apply to the Court of Chancery or the Superior Court depending on the nature of the award for a final judgment in conformity with the award.¹³⁷

In addition to the DRAA, the Superior Court's compulsory ADR programme continues to offer parties to a Superior Court action an opportunity to agree to undergo arbitration. The parties may select the arbitrator by agreement or, if no such agreement can be reached, the Superior Court will appoint an arbitrator.¹³⁸ Further, the parties can agree to make the arbitrator's decision binding.¹³⁹ If the parties agree to binding arbitration, the matter will be removed from the Superior Court's docket.¹⁴⁰ The arbitration process itself consists of the arbitrator reviewing evidence, hearing arguments from the parties, and rendering a decision based on the facts and the law.¹⁴¹ 'Every party has trial *de novo* appeal rights if they are not satisfied with the arbitrator's decision.'¹⁴²

The rules of the Delaware courts do not contain specific provisions regarding the enforcement of foreign arbitral awards. However, the United States District Court for the

131 See 10 Del. C. Section 5804.

132 Delaware's Options for Alternative Dispute Resolution, available at <http://corplaw.delaware.gov/eng/options.shtml>.

133 10 Del. C. Section 5809.

134 10 Del. C. Section 5809(c).

135 10 Del. C. Section 5809(d).

136 10 Del. C. Section 5810 (a).

137 10 Del. C. Section 5810(b)-(c). Final awards for solely money damages may only be entered by the Superior Court and all other final awards may be entered by the Court of Chancery. Id.

138 Super. Ct. Civ. R. 16(b)(4)(a).

139 Super. Ct. Civ. R. 16(b)(4).

140 Super. Ct. Civ. R. 16(b)(4)(f)(i).

141 Id.

142 Superior Court, Alternative Dispute Resolution: Guidelines for Superior Court Arbitration, available at http://courts.delaware.gov/Superior/ADR/adr_arb_guideline.stm.

District of Delaware has heard and granted motions to confirm foreign arbitral awards pursuant to the Federal Arbitration Act¹⁴³ and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention¹⁴⁴).¹⁴⁵

iii Mediation

Mediation is available as an alternative to litigation in both the Superior Court and the Court of Chancery. In the Superior Court, under the compulsory ADR programme, mediation is the default format for alternative dispute resolution. The parties may select the mediator by agreement from the Superior Court's approved Mediator Directory, which 'consists of members of the Delaware Bar and others who have completed the Superior Court's mediation training', or, if no such agreement can be reached, the Superior Court will appoint a mediator from its Mediator Directory.¹⁴⁶ The mediator's role in the mediation process is to help the parties reach 'a mutually acceptable resolution of a controversy'.¹⁴⁷ If the mediation is unsuccessful, 'no party may use statements made during the mediation or memoranda, materials or other tangible evidence prepared for the mediation at any point in the litigation in any way, without limitation, to impeach the testimony of any witness'.¹⁴⁸

The Court of Chancery offers two types of non-mandatory mediation: '(i) mediation pursuant to Court of Chancery Rule 174, which provides for mediation in an ongoing case pending in the Court of Chancery (Rule 174 Mediations), and (ii) mediation pursuant to 10 Del. C. Section 347 and [Court of Chancery] Rules 93 to 95, which provide for "mediation only" dispute resolution for certain types of business disputes where there is no pre-existing pending action'.¹⁴⁹ To participate in either of these mediation programmes, the parties to a dispute must agree to undergo mediation and have Delaware counsel. Furthermore, to participate in the 'mediation only' programme, the following requirements, among other things, must be met: at least one party is a business entity; at least one of the parties to the dispute is a business entity formed in

143 9 USC Section 1, et seq. (2013).

144 The United States has been a party to the New York Convention since 1970. New York Convention Countries, available at <http://newyorkconvention.org/contracting-states/list-of-contracting-states>.

145 See, e.g., *Ilyich Mariupol Iron & Steel Works v. Argus Devs Inc*, 2013 US Dist. LEXIS 42226, at *1, *5 (D. Del. 26 March 2013); *SEI Societa Esplosivi Industriali SpA v. L-3 Fuzing & Ordnance Sys Inc*, 843 F. Supp. 2d 509, 517 (D. Del. 2012).

146 Super. Ct. Civ. R. 16(b)(4)(a); Superior Court Alternative Dispute Resolution: Mediator Directory, available at http://courts.delaware.gov/Superior/ADR/adr_mediator_all.stm.

147 Super. Ct. Civ. R. 16(b)(4)(f)(ii).

148 Super. Ct. Civ. R. 16(b)(4)(e).

149 Court of Chancery of the State of Delaware: Mediation Guideline Pamphlet, at 2, available at <http://courts.delaware.gov/forms/download.aspx?id=15478>. In addition to voluntary mediation programmes in the Court of Chancery, 'mandatory mediation is required in certain guardianship and estate cases'. *Id.* at 2 n.2.

Delaware or having its principle place of business in Delaware; no party is a consumer with respect to the business dispute; and in disputes involving solely a claim for monetary damages, the amount in controversy is no less than \$1 million.¹⁵⁰

In a Rule 174 mediation, the Chancellor or Vice Chancellor presiding over the filed case will refer the case to another judge or master sitting on the Court of Chancery.¹⁵¹ In a mediation where a case has not been filed in the Court of Chancery, the parties to the dispute may request a particular member of the Court of Chancery to serve as a mediator.¹⁵² These mediation programmes are highly regarded as they provide parties with the assistance of current members of the Court of Chancery at a fraction of the cost of litigation and with the added benefit of confidentiality.¹⁵³

iv Other forms of alternative dispute resolution

In addition to arbitration and mediation, parties with disputes in the Superior Court can, under the compulsory ADR programme, agree to undergo neutral case assessment. Neutral case assessment 'is a process by which an experienced neutral assessor gives a non-binding, reasoned oral or written evaluation of a controversy, on its merits, to the parties'.¹⁵⁴ The parties may select a neutral assessor from a list of approved neutral assessors by agreement, or, if no such agreement can be reached, the Superior Court will select a neutral assessor from the approved list.¹⁵⁵ The neutral assessment process consists of the parties providing the neutral assessor with confidential statements and participating in a confidential neutral assessment hearing.¹⁵⁶ 'The neutral assessor may use mediation or arbitration techniques to aid the parties in reaching a settlement.'¹⁵⁷ Moreover, the parties can agree to make the neutral assessment outcome binding.¹⁵⁸

VII OUTLOOK AND CONCLUSIONS

Delaware courts are at the forefront of complex litigation in the United States, including overseeing complex litigation involving foreign individuals and entities. In the coming year, one can expect increasing numbers of decisions involving foreign litigants and cross-border issues, as well as more cases from the Court of Chancery and the Delaware Supreme Court involving alternative entities. One can also expect to see business entities around the world begin to utilise the DRAA as a streamlined and confidential alternative to litigation.

150 10 Del. C. Section 347(a)(1)–(5).

151 Court of Chancery of the State of Delaware: Mediation Guideline Pamphlet, at 2-3, available at <http://courts.delaware.gov/forms/download.aspx?id=15478>.

152 *Id.*

153 *Id.* at 4.

154 Super. Ct. Civ. R. 16(b)(4)(f)(iii).

155 Superior Court Alternative Dispute Resolution: Guidelines for Superior Court Neutral Assessment, available at http://courts.delaware.gov/Superior/ADR/adr_neutral_guideline.stm.

156 *Id.*

157 *Id.*

158 *Id.*

Appendix 1

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