

THE DISPUTE
RESOLUTION
REVIEW

ELEVENTH EDITION

Editor
Damian Taylor

THE LAWREVIEWS

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REVIEW

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PREFACE

The Dispute Resolution Review provides an indispensable overview of the civil court systems of 36 jurisdictions. It offers a guide to those who are faced with disputes that frequently cross international boundaries. As is often the way in law, difficult and complex problems can be solved in a number of ways, and this edition demonstrates that there are many different ways to organise and operate a legal system successfully. At the same time, common problems often submit to common solutions, and the curious practitioner is likely to discover that many of the solutions adopted abroad are not so different to those closer to home.

I wrote with hope in last year's preface that in 2019 we would have increased certainty about the future laws and procedures that will apply to cross-border litigation in the United Kingdom and across the European Union. But despite the huge volume of analysis and commentary across the legal sector, we seem to be no further forward. Instead, the UK Parliament is to vote on the proposed deal by the end of January 2019. Given the interwoven nature of UK and EU law, the next few months will be of huge importance to the legal profession in my home jurisdiction and have a long-lasting impact on how disputes (many of which are between international parties) are resolved in the United Kingdom. This edition includes an updated Brexit chapter that charts the progress (or lack thereof) made over the past year

This 11th 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.

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 573 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.

Damian Taylor

Slaughter and May

London

February 2019

UNITED STATES: DELAWARE

Elena C Norman, Lakshmi A Muthu and James M Deal¹

I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

Delaware courts resolve many of the United States' highest-profile commercial and corporate disputes, which often 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 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 relating to limited liability companies (LLCs)⁴ and partnerships,⁵ including limited partnerships.⁶ Seven judges – one chancellor and six 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

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

2 10 Del. C. Section 341.

3 8 Del. C. Section 111.

4 6 Del. C. Section 18-111.

5 6 Del. C. Section 15-122.

6 6 Del. C. Section 17-111.

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.

The Superior Court is a court of law where litigants have the right to elect trial by jury. The Superior Court has original jurisdiction over criminal cases meeting a threshold level of seriousness and civil cases involving amounts in excess of US\$50,000 – other than equity matters and domestic relations matters (which are heard by the Delaware Family Court).⁷ Absent certain exceptions, where such a civil case involves an amount in controversy of US\$1 million or more, it will generally be assigned to the Superior Court's Complex Commercial Litigation Division (CCLD).⁸ CCLD litigants may receive priority in setting trial dates and, if requested, expedited case schedules.⁹ Since its establishment in May 2010, the CCLD has become an increasingly popular forum for filing business disputes where legal remedies are sought.

II THE YEAR IN REVIEW

The past 12 months witnessed several Delaware decisions regarding the ability of litigants to pursue claims in Delaware against foreign defendants. These decisions provided insight into the Delaware courts' application of the doctrine of *forum non conveniens* (a common law doctrine that gives courts discretion to decline jurisdiction over an action when a defendant demonstrates that it would face overwhelming hardship); their exercise of personal jurisdiction over foreign defendants under the 'conspiracy theory' of personal jurisdiction; and the courts' ability to compel foreign parties' compliance with court orders through sanctions, findings of contempt, and even, in the case of individuals found in contempt, through orders of arrest.

In *Aranda v. Philip Morris USA Inc.*,¹⁰ the Delaware Supreme Court addressed the narrow issue of whether, before dismissing a case under the doctrine of *forum non conveniens*, 'the trial court must first determine that an available alternative forum exists'. Although most other American jurisdictions, including United States federal courts, do consider availability of an alternative forum to be a threshold requirement for dismissal under this doctrine, the Delaware Supreme Court held in *Aranda* that 'an available alternative forum should be considered as part of the *forum non conveniens* analysis, but is not a threshold requirement', thereby joining the minority of American jurisdictions.¹¹

The dispute in *Aranda* arose from an Argentine tobacco brokerage company requiring its tobacco-growing clients to use a particular company's herbicide in their Argentine farming operations. These clients, the owners and operators of small family farms, brought suit in

7 Delaware also has a Court of Common Pleas, which has jurisdiction over, among other things, misdemeanours and civil disputes where the amount in controversy does not exceed US\$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 US\$15,000.

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

9 See 2017 Annual Report of the Delaware Judiciary, at 27 (2017), available at <https://courts.delaware.gov/aoc/AnnualReports/FY17/index.aspx>.

10 183 A.3d 1245 (Del. 2018).

11 *id.* at 1247.

the Delaware Superior Court against numerous United States and foreign entities, including the tobacco brokerage, its parent entities, and the maker of the herbicide, alleging that they ‘willfully and recklessly ignored knowledge . . . of the health hazards’ related to the use of these herbicides.¹² Two of the defendant entities – one incorporated in Delaware and headquartered in Virginia, and the other incorporated and headquartered in Delaware – brought a motion to dismiss based on *forum non conveniens*. The Superior Court granted the motion, ‘finding that those defendants would face overwhelming hardship if forced to litigate in Delaware’.¹³ After the Superior Court denied a motion for clarification or, alternatively, for reargument, holding in relevant part that the finding of an available alternative forum is just one consideration, but not a requirement, under the doctrine of *forum non conveniens*, and that the Superior Court had considered that factor regardless, the plaintiff appealed the Superior Court’s ruling, and the Delaware Supreme Court affirmed.

In affirming the ruling, the Delaware Supreme Court acknowledged that ‘the federal courts and most state courts require an available alternative forum before dismissing for *forum non conveniens*’.¹⁴ Nonetheless, the Court, with one of its five justices disagreeing in a concurrence, found that ‘treating the issue as a factor to be considered, rather than as a requirement, gives the issue the weight it deserves in the *forum non conveniens* analysis’, given that ‘[m]uch has changed in the *forum non conveniens* landscape’ since its recognition by the US Supreme Court in 1947, and that ‘[i]t is not unfair to suggest that, rather than requiring cases to proceed in Delaware in the absence of an alternative forum, the Superior Court should consider, on a case-by-case basis, whether the court’s resources should be deployed to resolve cases with little connection to Delaware – as the court did here’.¹⁵ The Court added that, ‘[a]lthough we are in the minority on the issue, we are not alone in our concern over the court’s use of limited judicial resources by litigants who, along with their disputes, have no meaningful contact with the forum state’, citing as an example the New York Court of Appeals.¹⁶ Although there remains the concern that ‘plaintiffs who have been injured by Delaware corporations might not be able to bring cases in Delaware against those defendants’, the Delaware Supreme Court stated that the concern ‘has not been ignored’ as the availability of an alternative forum does remain a factor in the *forum non conveniens* analysis, and as ‘[t]he degree of the Delaware corporate defendant’s connection to the alleged wrong will still be considered’.¹⁷

In *Reid v. Siniscalchi*,¹⁸ the Delaware Court of Chancery granted a motion for summary judgment based on lack of personal jurisdiction over a necessary party, even though the plaintiff had overcome a much earlier motion to dismiss brought on the same basis. The dispute arose from a single agreement relating to a commercial satellite venture entered between nominal defendant US Russian Telecommunications LLC (USRT), an entity formed under Delaware

12 id. at 1248.

13 id. at 1248.

14 id. at 1251.

15 id. at 1252 and 1253. While the Delaware Supreme Court referenced only the Superior Court in this opinion (given the Superior Court’s involvement in this action), the holding applies equally to the doctrine of *forum non conveniens* as applied in the Court of Chancery.

16 id. at 1253 (citing *Islamic Republic of Iran v. Pahlavi*, 467 N.E.2d 245 (N.Y. 1984)).

17 id. at 1254.

18 2018 Del. Ch. LEXIS 37, C.A. No. 2874-VCS (Del. Ch. Jan. 30, 2018). A previous ruling in this case, relating to Delaware courts’ strict construal of choice-of-law provisions, was summarised in last year’s Delaware chapter of *The Dispute Resolution Review*.

law, and defendant Finmeccanica, SpA (FIN), an Italian state-controlled entity. USRT had engaged the plaintiff, Dennis Reid, to assist in obtaining financing, and USRT thereafter pursued financing from the Italian government through the services of defendants Vincenzo Davide Siniscalchi and Giorgio Capra. The upshot of these negotiations was the agreement at issue, which was expressly governed by the laws of the United Kingdom and provided for dispute resolution through binding arbitration under the International Chamber of Commerce's Rules of Conciliation and Arbitration, with venue in London. Despite these express choice-of-law and venue provisions, the plaintiff initiated suit in Delaware, alleging, *inter alia*, a civil conspiracy among Capra, Siniscalchi and FIN to misappropriate the subject satellite development programme for FIN's benefit.

The plaintiff's earlier success in defeating a motion to dismiss was based on his alleging a 'conspiracy theory' of personal jurisdiction. Under such a theory, as recognised in Delaware courts, 'a substantial Delaware act by a conspirator in furtherance of the conspiracy may be attributed to non-resident co-conspirators if the co-conspirators knew or had reason to know of that act and the act in [Delaware] was a direct and foreseeable result of the conduct in furtherance of the conspiracy. In turn, if a conspirator's conduct in furtherance of the conspiracy subjects him to the jurisdiction of Delaware's courts, then the attribution of that conduct to non-resident co-conspirators will subject all of the conspirators to the jurisdiction of the Delaware courts'.¹⁹ Although, at that earlier stage, the Court had found that the evidence of a conspiracy was 'not especially strong', the Court had nonetheless held that the plaintiff's factual allegations, taken as true at that stage of the proceedings, were sufficient to survive the motion to dismiss.²⁰

That was not the case on summary judgment review. 'As if to reveal the shocking twist in the final pages of a lengthy thriller novel', the Court explained, 'the now-developed evidence demonstrates that Plaintiff has managed . . . to misdirect the Court by projecting onto FIN his own scheme to exclude the former members of USRT from the satellite project's benefits.'²¹ Because 'the only jurisdictional hook proffered by Plaintiff . . . ha[d] been revealed in the competent undisputed evidence to be a fiction', the Court granted the motion for summary judgment based on lack of personal jurisdiction over necessary party FIN.

In *Deutsch v. ZST Digital Networks, Inc.*,²² the Delaware Court of Chancery addressed whether to hold in contempt and order the arrest of two foreign executives of a Delaware corporation, both citizens of the People's Republic of China, for failure to comply with directions of a receiver appointed to enforce the corporation's compliance with a default judgment entered in the underlying action. Although the Court ultimately determined that, based on due process concerns, further proceedings were required before issuing arrest warrants, this decision underscores that, by becoming an executive in a Delaware corporation – no matter one's citizenship, a lengthy chain of holding companies, or any attempt to avoid litigation relating to corporate conduct – an individual may be subject to personal jurisdiction in Delaware and therefore could be disciplined, even arrested, for failure to obey a Delaware court's orders, within the confines of due process.

19 id. at *29–30 (emphasis and alteration in original) (quoting *Istituto Bancario Italiano SpA v. Hunter Eng'g Co.*, 449 A.2d 210, 225 (Del. 1982)).

20 id. at *6.

21 id. at *6–7.

22 2018 Del. Ch. LEXIS 191 (Del. Ch. 14 June 2018).

ZST Digital Networks, Inc (ZST), the defendant in this action, was incorporated in Delaware and served as the ultimate parent entity in an extensive holding company structure, with a father and son, both citizens of the People's Republic of China, serving as its principal directors and officers. At the base of the tower of corporate ownership was Zhenzhou Shenyang Technology Company, an entity organised under the laws of China that served as the various holding companies' operating entity. The plaintiff was one of the chief investors in ZST and brought suit against ZST, seeking inspection of books and records under Delaware law (8 Del. C. Section 220), after the company allegedly went 'dark' and stopped disclosing financial information.²³ ZST, however, did not respond to the litigation, and default judgment was entered. After ZST failed to comply with the default judgment, the Court of Chancery held the company in contempt, and, among other forms of relief, appointed a receiver with broad powers to compel the company's compliance. Ultimately, despite extensive efforts by the receiver, the executives did not comply with the receiver's directions, and the receiver filed a motion to hold the executives in contempt and to issue a bench warrant for their arrest.

As the Court of Chancery explained, '[t]he senior officers previously ignored this action', but '[f]aced with the current motion, they hastily appeared and raised a slew of objections, which this decision rejects'.²⁴ The Court noted that '[a]n order issued to a corporation is identical to an order issued to its officers, for incorporeal abstractions act through agents',²⁵ and that 'the [executives] have continued to exercise actual, real-world control over the Company's property and have used that control to resist the authority of the receiver', which is 'sufficient to make them subject to a potential finding of contempt'.²⁶ The Court also stated that it was 'not even a close call' that the executives were subject to personal jurisdiction in Delaware,²⁷ for "by becoming a director and officer of a Delaware corporation" each of [them] "purposefully availed himself of certain duties and protections under our law", and "[t]his action and the potential imposition of contempt sanctions arises from [their] acceptance of those position[s]".²⁸ Nonetheless, the Court held that 'the facts of the case call for additional proceedings before issuing arrest warrants'.²⁹ That was because 'the Constitution sets a floor, not a ceiling' when it comes to the requirements of due process,³⁰ and while these executives' 'opportunity to brief and argue the receiver's motion satisfied their due process rights', additional steps were warranted because 'the receiver's request for a coercive sanction requires careful scrutiny' and could require elaborate factfinding.³¹ For these

23 For ease of reference, this summary recites the facts as stated in the opinion, but notes that such facts are based solely on the plaintiff's allegations, which the Court of Chancery treated as true for purposes of this decision based on the default judgment entered against the defendant. See *id.* at *3 (citing *Whitwell v. Archmere Acad., Inc.*, 2008 Del. Super. LEXIS 141 (Del. Super. Apr. 16, 2008)).

24 *id.* at *2.

25 *id.* at *24–25 (quoting *Reich v. Sea Sprite Boat Co., Inc.*, 50 F.3d 413, 417 (7th Cir. 1995) (Easterbrook, J.)).

26 *id.* at *25.

27 *id.* at *29.

28 *id.* (quoting *Hazout v. Tsang Mun Ting*, 134 A.3d 274, 292 (Del. 2016)).

29 *id.*

30 *id.* at *35 (quoting *Robinson v. Govt. of the Dist. of Columbia*, 234 F. Supp. 3d 14, 24 (D.D.C. 2017)).

31 *id.*

reasons, the Court of Chancery provided the executives 60 days to comply with the Court's order, meaning 'the [executives] will be able to purge the sanction of coercive imprisonment' through such compliance.³²

As shown in the above described cases, over the past year, Delaware courts have refined the doctrine of *forum non conveniens* to permit flexibility in balancing the overwhelming hardship faced by a defendant with the availability of an alternative forum and have iterated that the 'conspiracy theory' of personal jurisdiction will be narrowly interpreted and will not be upheld on falsehoods. Further, it remains true that foreign individuals who agree to serve as directors or officers of a Delaware entity may be subjecting themselves to personal jurisdiction for entity-related litigation and, when under such jurisdiction, must comply with court orders or face the risk of contempt, including the potential for arrest, as long as such measures fall within the confines of constitutionally guaranteed due process.

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 Procedure³³ and the Federal Rules of Evidence.³⁴

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.

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.³⁵ 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'.³⁶ After filing the complaint, service of the complaint and a summons must be made on the defendant.³⁷ The defendant must generally respond to the complaint within

32 id. at *36–37.

33 See Super. Ct. R. 1-300; Super. Ct. Civ. R. 1-140; 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.

34 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.

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

36 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).

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

20 days of service.³⁸ In the Superior Court, civil cases are subject to compulsory alternative dispute resolution.³⁹ 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.⁴⁰

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.⁴¹ 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.⁴² Delaware state courts have discretion to limit the scope of discovery if, for example, it is unreasonably burdensome.⁴³

Delaware state courts have recognised the importance of electronic discovery. Effective 1 January 2013, the Court of Chancery amended its discovery rules to specifically address electronically stored information (ESI).⁴⁴ 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.⁴⁵

Trial

Delaware has an adversarial system of trial in which the opposing parties have the responsibility and initiative to find and present proof.⁴⁶ Lawyers are expected to act as zealous advocates for

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

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

40 The Superior Court rules do not mandate that compulsory alternative dispute resolution occur at any particular stage of litigation. Instead, litigants typically negotiate a date by which they will conduct alternative dispute resolution and include such date in proposed scheduling orders presented to the Superior Court.

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

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

43 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. 5 August 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. Hensey*, 2007 Del. Super. LEXIS 105, at *8–9 (Del. Super. 13 April 2007) (limiting discovery to make it ‘reasonable and without undue burden’).

44 Press Release, Court of Chancery Announces Rule Changes and New Discovery Guidelines (4 December 2012), available at <https://courts.delaware.gov/Forms/Download.aspx?id=65878>. These changes are consistent with similar amendments to the Federal Rules of Civil Procedure, and they became effective on 1 January 2013. *id.*

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

46 *In re Appraisal of Shell Oil Co*, 1990 Del. Ch. LEXIS 199, at *14 (Del. Ch. 11 December 1990), *aff’d*, 607 A.2d 1213 (Del. 1992).

their clients' positions.⁴⁷ In particular, courts view adequate cross-examination as critical.⁴⁸ 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 of either six or 12 jurors.⁴⁹ In the Court of Chancery, however, there are no juries, and a party therefore does not have a right to a trial by jury.⁵⁰ In jury trials, jurors make findings of fact while judges make findings of law.⁵¹ In non-jury trials, judges make findings of both fact and law.⁵²

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.⁵³ Alternatively, a party can move for summary judgment.⁵⁴ The court will grant summary judgment if the pleadings, discovery and 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'.⁵⁵ 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'.⁵⁶

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.⁵⁷ 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.⁵⁸

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.⁵⁹ 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;

47 Del. Lawyers' R. Prof'l Conduct pmbl.

48 See *Allen v. Div of Child Support Enf't*, 575 A.2d 1176, 1184 (Del. 1990).

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

50 See Ct. Ch. R. 38.

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

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

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

54 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); Ct. Ch. R. 12(c).

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

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

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

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

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

- 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.⁶⁰

Class action settlements require the approval of the court.⁶¹ 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.⁶² But the Court of Chancery has questioned such settlements. Though, in *BVF Partners LP v. New Orleans Employees' Retirement System*,⁶³ 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.⁶⁴

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.⁶⁵ Legal entities cannot represent themselves.⁶⁶

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

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

62 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 *BVF P'rs LP v. New Orleans Empls Ret Sys*, 59 A.3d 418 (Del. 2012); *In re Sauer-Danfoss Inc S'holders Litig*, 65 A.3d 1116, 1136, 1141–42 (Del. Ch. 2011) (awarding attorney's fees for efforts in obtaining a class action settlement based purely on supplemental disclosures, but noting that '[a]ll 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').

63 59 A.3d 418 (Del. 2012).

64 id. at 436–37.

65 See, e.g., *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)).

66 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 practi[s]e law in Delaware'); *Caldwell Staffing Servs v. Ramrattan*, 2003 Del. Super. LEXIS 23, at *12 (Del. Super. 29 January 2003) (noting that 'corporations must be represented by an attorney in court proceedings') (citation omitted).

v Service out of the jurisdiction

Natural persons and legal entities may be served with legal process outside Delaware. Delaware's primary vehicle for service of process outside the state is its long-arm statute.⁶⁷

This statute authorises service of process outside 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 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;
- 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.⁶⁸

vi Enforcement of foreign judgments

Parties seeking to enforce a foreign judgment in Delaware have two options. First, a party can bring an action requesting 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'.⁶⁹

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.⁷⁰ To seek enforcement of a foreign-country judgment under this Act, a party must file an action seeking recognition of the foreign-country judgment.⁷¹ 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.⁷²

vii Assistance to foreign courts

The rules of the Delaware state courts do not include specific provisions on assisting foreign courts.⁷³ 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

67 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.

68 10 Del. C. Section 3104.

69 *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').

70 10 Del. C. Section 4802(a).

71 10 Del. C. Section 4809(a).

72 10 Del. C. Section 4810(1) and (2).

73 See generally Super. Ct. Civ. R. 1-140; Ct. Ch. R. 1-207.

obtaining discovery in the United States.⁷⁴ 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’.

viii Access to court files

Members of the public have the general right of access to ongoing judicial proceedings and to records thereof.⁷⁵ Delaware courts, however, will sometimes limit access to judicial proceedings and records regarding sensitive information.⁷⁶ The Court of Chancery emphasised the importance of the public’s right of access to information about judicial proceedings by adopting Court of Chancery Rule 5.1.⁷⁷ Court of Chancery Rule 5.1 makes clear that most information presented to the Court should be available to the public. 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.

ix Litigation funding

The law on third-party litigation funding is sparse, but evolving, 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*⁷⁸ the US District Court for the District of Delaware held that attorney–client and work-product privileged information will lose its protection from discovery if it is shared with litigation-funding companies that have not yet been retained.⁷⁹

IV LEGAL PRACTICE

i Conflicts of interest and ethical 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.⁸⁰ 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

74 *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).

75 See, e.g., *NewRadio 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’) (citing *Cantor Fitzgerald Inc v. Cantor*, 2001 Del. Ch. LEXIS 48, at *2–3 (Del. Ch. 17 April 2001)); *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’).

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

77 Court of Chancery Announces Rule Change to Ensure Better Public Access to Court Filings, at 1, available at <https://courts.delaware.gov/Forms/Download.aspx?id=65078>.

78 719 F. Supp. 2d 373 (D. Del. 2010).

79 See id. at 376.

80 Del. Lawyers’ R. Prof’l Conduct 1.7(a).

clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer'.⁸¹ 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.⁸²

Where a lawyer is associated with a firm, a lawyer's conflicts of interest are generally imputed to the other members of that firm.⁸³ 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'.⁸⁴ Also, subject to certain conditions, a member of a firm can avoid such an imputation by obtaining the informed consent of the former client.⁸⁵

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.⁸⁶ 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.⁸⁷

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 framework in the European Union.⁸⁸ 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 by certain persons, and that confidential information, such as social security numbers, not be disclosed.⁸⁹ Additionally, parties can redact confidential information from public court documents.⁹⁰

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

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

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

84 Del. Lawyers' R. Prof'l Conduct 1.10(c)(1) and (2).

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

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

87 Del. Lawyers' R. Prof'l Conduct 1.6(b)(2) and (3).

88 See, e.g., A Burt & D Geer, 'The End of Privacy', *NY Times*, 5 Oct 2017, available at www.nytimes.com/2017/10/05/opinion/privacy-rights-security-breaches.html (noting that 'the European Union's new regulatory framework, known as the General Data Protection Regulation . . . stands in stark contrast to the way data is protected in the United States'); 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-laws-an-ocean-apart.html?_r=0.

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

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

iv Other areas of interest

Delaware court procedure requires lawyers from outside Delaware who want to practise in Delaware courts to associate with lawyers admitted to the Delaware Bar.⁹¹ 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*.⁹² 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.⁹³ 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,⁹⁴ 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’.⁹⁵ The Delaware Supreme Court amended Rule 502 to clarify that it ‘shall include persons who are employed or engaged by a business entity, to serve as “in house” counsel to that entity and/or to any of its wholly owned or controlled affiliates’.⁹⁶ Therefore, 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.⁹⁷ The privilege is not, however, accorded to communications that render business advice as opposed to legal advice.⁹⁸

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

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

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

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

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

95 DRE 502(a)(3).

96 Order Amending Del. Unif. R. Evid., Del. Supr. (28 November 2017).

97 See also *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).

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

privilege.⁹⁹ In *Kalisman v. Friedman*, the Court of Chancery 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’.¹⁰⁰

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 withheld communications 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.¹⁰¹

Delaware courts also recognise the attorney work product doctrine (protecting information prepared in anticipation of litigation)¹⁰² 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’).¹⁰³

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 action, whether it relates to the claim or defense’.¹⁰⁴ 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 it would be without the evidence’.¹⁰⁵ 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’.¹⁰⁶ The request must specify where, when and how the documents should be produced.¹⁰⁷

99 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.’).

100 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.

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

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

103 *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 th[e 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) (second alteration in original).

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

105 DRE 401.

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

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

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.*¹⁰⁸

Delaware courts often adjudicate disputes where the evidence is located outside Delaware and require parties to produce documents located in foreign jurisdictions.¹⁰⁹ 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.¹¹⁰ Indeed, the Supreme Court of Delaware has held that requiring a party to litigation in Delaware to produce documents that 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.¹¹¹ 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"'.¹¹²

A party must produce all documents that are responsive to a proper document request and in its 'possession, custody or control'.¹¹³ 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.¹¹⁴

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

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

110 US Dep't of State, Obtaining Evidence, available at <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internal-judicial-asst/obtaining-evidence.html>.

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

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

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

114 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).

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

Parties seeking to resolve a dispute outside the courtroom may do so through arbitration and mediation. As noted above, the Superior Court has a compulsory alternative dispute resolution (compulsory ADR) programme.¹¹⁵ Every civil case filed in the Superior Court is subject to this compulsory ADR programme.¹¹⁶ The programme permits parties to choose the format of the ADR, 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.¹¹⁷ Finally, the Delaware Rapid Arbitration Act provides Delaware business entities with a streamlined and cost-effective process by which to resolve business disputes through voluntary arbitration.¹¹⁸ These programmes allow parties to resolve their disputes efficiently while maintaining a greater level of confidentiality than litigation typically affords.

ii Arbitration

In 2015, Delaware's legislature enacted the Delaware Rapid Arbitration Act (DRAA) to provide 'businesses around the world a fast-track arbitration option'.¹¹⁹ 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.¹²⁰ 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

115 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).

116 Superior Court, Alternative Dispute Resolution, available at <https://courts.delaware.gov/superior/adr/>.

117 10 Del. C. Section 349.

118 10 Del. C. Section 5802.

119 'New Delaware Arbitration Law Offers Fast, Efficient Dispute Resolution' (4 May 2015), available at <https://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 & P Brickley, 'Supreme Court Declines to Revive Delaware Arbitration Program', *Wall Street Journal*, 24 March 2014, available at www.wsj.com/articles/SB10001424052702304179704579459200411054082.

120 10 Del. C. Section 5808.

an organisation that maintains public areas within a residential community.¹²¹ Parties to a DRAA arbitration may select their arbitrator by agreement or petition the Court of Chancery to appoint one or more arbitrators.¹²² The arbitration ‘can be held anywhere in the world’¹²³ and is a confidential proceeding in the absence of any agreement to the contrary.¹²⁴ Further, with the exception of a narrow appeal from the issuance of a final award, the arbitrator’s determinations may not be challenged or appealed.¹²⁵ This aspect of the DRAA 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’.¹²⁶

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.¹²⁷ The Supreme Court ‘may only vacate, modify, or correct the final award in conformity with the Federal Arbitration Act’,¹²⁸ 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.¹²⁹ 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.¹³⁰ 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.¹³¹

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.¹³² Further, the parties can agree to make the arbitrator’s decision binding.¹³³ If the parties agree to binding arbitration, the matter will be removed from the Superior Court’s docket.¹³⁴ The arbitration process itself consists of the

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

122 10 Del. C. Section 5805.

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

124 See Delaware Rapid Arbitration Rule 5.

125 See 10 Del. C. Section 5804.

126 Delaware’s Options for Alternative Dispute Resolution, available at <https://corplaw.delaware.gov/alternative-dispute-resolution/>.

127 10 Del. C. Section 5809(b).

128 10 Del. C. Section 5809(c).

129 10 Del. C. Section 5809(d).

130 10 Del. C. Section 5810(a).

131 10 Del. C. Section 5810(b)-(c). Final awards for solely monetary damages may only be entered by the Superior Court and all other final awards may be entered by the Court of Chancery. *id.*

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

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

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

arbitrator reviewing evidence, hearing arguments from the parties, and rendering a decision based on the facts and the law.¹³⁵ ‘Every party has trial *de novo* appeal rights if they are not satisfied with the arbitrator’s decision’.¹³⁶

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 District of Delaware has heard and granted motions to confirm foreign arbitral awards pursuant to the Federal Arbitration Act¹³⁷ and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention¹³⁸).¹³⁹

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 ADR. The parties may select the mediator by agreement from the Superior Court’s approved Mediator Directory, which ‘consist[s] of members of the Delaware Bar and others who have completed [the] Superior Court’s 20-hour mediation training’,¹⁴⁰ or, if no such agreement can be reached, the Superior Court will appoint a mediator from its Mediator Directory.¹⁴¹ The mediator’s role in the mediation process is to help the parties reach ‘a mutually acceptable resolution of a controversy’.¹⁴² 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, including, without limitation, to impeach the testimony of any witness’.¹⁴³

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. § 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’.¹⁴⁴ 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

135 id.

136 Superior Court, Alternative Dispute Resolution: Guidelines for Superior Court Arbitration, available at https://courts.delaware.gov/superior/adr/adr_arb_guideline.aspx.

137 9 USC Section 1, et seq.

138 The United States has been a party to the New York Convention since 1970. NY Convention, Contracting States, available at www.newyorkconvention.org/countries.

139 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).

140 Superior Court Alternative Dispute Resolution: Mediator Directory, available at https://courts.delaware.gov/superior/adr/adr_mediator_all.aspx.

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

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

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

144 Court of Chancery of the State of Delaware: Mediation Guideline Pamphlet, at 2, available at <https://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.

things, must be met: at least one party is a business entity; at least one party is a business entity formed in 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 US\$1 million.¹⁴⁵

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.¹⁴⁶ 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.¹⁴⁷ 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.¹⁴⁸

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'.¹⁴⁹ The neutral assessment process consists of the parties providing the neutral assessor with confidential statements and participating in a confidential neutral assessment hearing. 'The neutral assessor may use mediation and/or arbitration techniques to aid the parties in reaching a settlement.'¹⁵⁰ Moreover, the parties can agree to make the neutral assessment outcome binding.

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, the Superior Court and the Delaware Supreme Court involving alternative entities.

145 10 Del. C. Section 347(a)(1)–(5).

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

147 *id.*

148 See *id.* at 4.

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

150 *ibid.*

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