

UNITED STATES: DELAWARE

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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

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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 and civil cases 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 involving foreign actors. These decisions provided insight into Delaware courts' application of constitutional principles concerning foreign policy determinations by the United States President and acts by foreign governments; their 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 and that another jurisdiction is a more appropriate place for the action to be heard); and their consideration of issues subject to foreign laws, including foreign jurisdictional regulations.

In *Jiménez v. Palacios*,¹⁰ the Delaware Court of Chancery addressed the question of who comprised the rightful boards of Venezuela's state-owned oil company – Petróleos de Venezuela, SA (PDVSA) – and its directly and indirectly owned Delaware subsidiaries. The parties agreed that 'the President of Venezuela ha[d] the power to appoint the members of the board of PDVSA and, indirectly, determine the composition of the boards' of the subsidiaries, but disagreed as to who held the title of President of Venezuela.¹¹ That disagreement arose out of a controversial 2018 presidential election. Venezuela's then President, Nicolás Maduro, sought a second term as President, 'disqualified the opposition parties from participating' in the election, and then claimed to win the election.¹² In January 2019, Venezuela's National

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\$75,000, 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 (26 April 2010), 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 *Jiménez v. Palacios*, 2019 WL 3526479, at *1 (Del. Ch. 2 August 2019), as revised (12 August 2019). The plaintiffs have appealed the Court of Chancery's ruling in *Jiménez* to the Supreme Court of Delaware.

11 *id.* at *1.

12 *id.* at *3.

Assembly declared Maduro's presidency illegitimate, and the National Assembly's president, Juan Guaidó, was named the Interim President of Venezuela.¹³ That same day, the US President recognised Guaidó as the Interim President of Venezuela.¹⁴ In February 2019, the Guaidó government appointed directors to the board of PDVSA, who in turn reconstituted the board of PDVSA's subsidiaries through written consents. Before the Court of Chancery, the plaintiffs, who were appointed as directors to the boards of PDVSA's subsidiaries during Maduro's first term, challenged the appointments made under the Guaidó government.

Applying US constitutional law doctrines, the Court of Chancery 'accept[ed] as binding the US President's recognition' of the Guaidó government and assume[d] the validity of the Guaidó government's appointments to the PDVSA board.¹⁵ In so ruling, the Court first applied the political question doctrine which provides that recognising a foreign sovereign is a function exclusively of the Executive Branch and is non-justiciable.¹⁶ Next, the Court applied the act of state doctrine which presumes the validity of official acts taken by a foreign government when the act performed occurs on that foreign government's own territory.¹⁷ The Court noted that although the dispute between the parties concerned the validity of the boards of PDVSA's Delaware subsidiaries, the official act of the Venezuela government was the appointment of the PDVSA board.¹⁸ The resulting appointments of directors to PDVSA's subsidiaries outside Venezuela did not preclude the application of the act of state doctrine.¹⁹

While finding the Guaidó government's appointments to the PDVSA board valid, the Court did not immediately resolve the question of whether the resulting appointments of directors to PDVSA's subsidiaries were also valid. Instead, the Court provided the plaintiffs an opportunity to point to any deficiencies in the written consents reconstituting the boards of PDVSA's subsidiaries. The plaintiffs ultimately did not point to any deficiencies, and the Court ruled that the boards of PDVSA's subsidiaries had been lawfully reconstituted.²⁰

In *AlixPartners, LLP v. Giacomo Mori*,²¹ the Court of Chancery analysed the interplay between the Court's subject matter jurisdiction, contractual forum selection clauses requiring certain disputes to be heard in Delaware, and foreign laws requiring similar disputes to be heard in a foreign jurisdiction. A dispute arose between an employee located in Italy and his employer, an Italian subsidiary of a Delaware entity.²² An employment agreement governed the employee's employment, while a partnership agreement and equityholders' agreement governed aspects of the employee's compensation. The employment agreement contained an Italian choice of law provision and did not contain a forum selection clause. The partnership and equityholders' agreements contained Delaware choice of law provisions and Delaware forum selection provisions.²³ The Italian employer, its parent company and their affiliate filed suit against the employee in the Court of Chancery for downloading confidential company information and other activity in violation of the employment agreement, the partnership

13 id.

14 id. at *4.

15 id. at *1.

16 id. at *9-11.

17 id. at *11-20.

18 id. at *18-20.

19 id.

20 *Jiménez v. Palacios*, 2019 WL 3974923 (Del. Ch. 21 August 2019).

21 2019 WL 6327325, at *1 (Del. Ch. 26 November 2019).

22 id. at *1-2.

23 id. at *1.

agreement, and the equityholders' agreement. The plaintiffs specifically asserted claims for breach of contract, misappropriation of trade secrets, and conversion. The employee moved to dismiss the lawsuit, primarily on the ground that 'a European Union regulation and an Italian procedural law require Italian employers to bring proceedings concerning all employment-related disputes exclusively in Italian courts, thus divesting this Court of subject matter jurisdiction.'²⁴

The Court of Chancery denied the employee's motion to dismiss, ruling that the foreign laws at issue did not divest the Court of subject matter jurisdiction.²⁵ The Court explained that '[t]he laws of a foreign country cannot unilaterally deprive an American court of the power to hear a dispute' and that '[t]here are only limited circumstances in which Delaware courts will not exercise subject matter jurisdiction over a dispute that is predicated on foreign law where the foreign state has vested jurisdiction exclusively in its own courts.'²⁶ For example, where a claim derives solely from a remedy conferred by a foreign statute and the foreign statute requires the claim to be filed in the corresponding foreign jurisdiction, the Court of Chancery may lack subject matter jurisdiction. In contrast, where a claim is 'transitory in nature' – meaning that 'the right and the remedy [are] not so inseparably united as to make the right dependent upon its being enforced in a particular tribunal' – a foreign state cannot destroy the right to sue on that transitory claim in any court having jurisdiction.²⁷ Applying these principles, the Court held that the common law rights the plaintiffs sought to enforce were transitory in nature and 'not the sort of statutorily-created rights so inseparably united with statutorily-created remedies that they must be enforced in a particular tribunal.'²⁸

Despite ruling that it had subject matter jurisdiction over the plaintiffs' claims, the Court stayed claims related to the employee's employment agreement on *forum non conveniens* grounds. The employee had argued that the *forum non conveniens* doctrine supported dismissal of all of the plaintiffs' claims. The Court rejected the application of the *forum non conveniens* doctrine to claims arising out of the partnership and equityholders' agreement, finding that it had been displaced by those agreements. The Court explained that the employee had 'bound himself to the Delaware forum selection provisions in the [partnership] [a]greement and [e]quityholders' [a]greement' and therefore 'unconditionally accept[ed] the jurisdiction and venue of the Delaware Court of Chancery with respect claims arising out of those agreements.'²⁹ However, the Court's analysis differed for the claims arising exclusively from the employment agreement, which did not contain a Delaware forum selection provision. Applying the *forum non conveniens* doctrine to the employment agreement claims, the Court held that the facts of the case warranted a stay of the employment agreement claims in favour of litigation in Italy. In support of this ruling, the Court noted that the employment agreement had an Italian choice of law provision, Italy had the most substantial relationship to the facts, the issues, and witnesses, and that the Court may not be able to compel witnesses

24 id.

25 id. at *5-9.

26 id. at *6 (internal quotation marks omitted).

27 id. at *7.

28 id. at *8 (internal quotation marks omitted).

29 id. at *12 (internal quotation marks omitted).

to appear in the Delaware action.³⁰ Recognising a potential for significant overlap between the stayed claims and the sustained claims, the Court directed the parties to meet and confer as to a practical way to stage proceedings to promote efficiency in both Delaware and Italy.³¹

In *Lynch v. Gonzalez*,³² the Court of Chancery considered whether an employee had a right to privacy over emails sent using an email server owned by his employer's affiliate. Critical to the Court's analysis was an Argentine law governing privacy expectations over corporate emails.

Plaintiff Carlos Eduardo Lorefice Lynch was an employee of Grupo Belleville Holdings, LLC (Belleville), a Delaware limited liability company. Employees of Belleville and its subsidiaries were given email accounts for professional use that were hosted by an affiliate of Belleville, defendant Televideo Services, Inc (Televideo). Lynch used his Televideo-hosted email account to communicate with his lawyers regarding the acquisition of 65 per cent of Belleville's membership interests.³³ Lynch and his attorneys 'all understood that the [a]ttorneys were acting as Lynch's personal attorneys' and not on behalf of Belleville.³⁴ Lynch and his attorneys stopped using the Televideo-hosted email accounts in early 2018 and thereafter, Belleville migrated its employee's email from Televideo's servers to another company's servers.³⁵ This migration rendered Lynch unable to access the emails he sent using his Televideo-hosted email account.

A dispute arose in the Court of Chancery as to whether Lynch properly acquired a 65 per cent stake in Belleville. It was undisputed that before that litigation began, a member of Belleville, defendant R Angel Gonzalez, searched Lynch's Televideo-hosted email account. Lynch contended that 'by searching and then refusing to turn over the [Televideo-hosted] emails, defendants violated plaintiffs' attorney-client privilege under Delaware and Argentine law.'³⁶ Defendants countered that 'Plaintiffs did not have any expectation of privacy' in emails they sent and received on Televideo's server, knowing that Gonzalez and Televideo could access and control those emails.³⁷

Noting that use of a company's email system does not, without more, destroy privilege, the Court conducted a four-factor analysis to determine whether Lynch had a reasonable expectation of privacy in work emails.³⁸ The four factors considered by the Court included: '(1) does the corporation maintain a policy banning personal or other objectionable use, (2) does the company monitor the use of the employee's computer or e-mail, (3) do third parties have a right of access to the computer or e-mails, and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?'³⁹ The Court found that the factors suggested that the Televideo-hosted emails were 'not confidential to

30 id. at *14.

31 The Court reserved the right to revisit its *forum non conveniens* analysis in the event the parties were unable to agree upon a mode of staging the potentially competing cases.

32 2019 WL 6125223, at *1 (Del. Ch. 18 November 2019).

33 id. at *3.

34 id.

35 id.

36 id. at *4.

37 id.

38 id. at *6.

39 id. (quoting *In re Info. Mgt. Servs. Inc. Derivative Litig.*, 81 A.3d 278, 286-87 (Del. Ch. 2013)).

Lynch.⁴⁰ But the Court's inquiry did not end there. The Court noted that '[i]f a controlling jurisdiction has a statute on the confidentiality of work emails, that statute may alter the common law results' of the [four-factor] analysis.⁴¹

Finding that 'Televideo conduct[ed] its business, at least in relevant part, in Argentina[,]' the Court concluded that 'Argentine law must be the source of any statutory override.'⁴² The Court further concluded that Argentine law provides a statutory override: 'Plaintiffs have demonstrated that the Argentine Constitution and other Argentine laws establish that an individual has a broad right of privacy in his written correspondence, especially when the individual would assume that the correspondence would remain private or when another's interception of the correspondence would be improper.'⁴³ Thus, the Court held that 'Defendants may not access pre- and post-migration emails between Lynch and his counsel that related to Lynch's personal legal matters, such as his Belleville acquisition.'⁴⁴

As shown in the above described cases, over the past year, Delaware courts have provided insight into how they will review and analyse foreign policy determinations by the Executive Branch and acts of foreign states, clarified what claims Delaware courts can and cannot adjudicate in the face of foreign laws requiring such claims to be heard in a foreign jurisdiction, and refined the doctrine of *forum non conveniens* to permit flexibility in balancing the potential overwhelming hardship faced by a foreign defendant in a Delaware proceeding with the availability of an alternative forum. Further, the courts have clarified the potential for a foreign statute to impact electronic discovery disputes pending in Delaware.

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 Procedure⁴⁵ and the Federal Rules of Evidence.⁴⁶

Of particular importance to business and commercial law practitioners are the rules of the Court of Chancery and the rules of the Superior Court. Both courts regularly update their procedures to address the needs of practitioners.

40 id.

41 id.

42 id. at *7.

43 id. at *10.

44 id. at *11.

45 See Supr. Ct. R. 1-300; Ct. Ch. R. 1-207; Super. Ct. Civ. R. 1-140; Fam. Ct. Civ. R. 1-509; Ct. Com. Pl. Civ. R. 1-113; J.P. Ct. Civ. R. 1-112.

46 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.

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.⁴⁷ 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’.⁴⁸ After filing the complaint, service of the complaint and a summons must be made on the defendant.⁴⁹ The defendant must generally respond to the complaint within 20 days of service.⁵⁰ In the Superior Court, civil cases are subject to compulsory alternative dispute resolution.⁵¹ 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.⁵²

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.⁵³ 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.⁵⁴ Delaware state courts have discretion to limit the scope of discovery if, for example, it is unreasonably burdensome.⁵⁵

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).⁵⁶ Opposing parties and their counsel should confer

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

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

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

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

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

52 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.

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

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

55 Ct. Ch. R. 26(b)(1); Super. Ct. Civ. R. 26(b)(1). See, e.g., *Sokol Hldgs, Inc v Dorsey & Whitney LLP*, 2009 WL 2501542, at *9-10 (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 WL 1152159, at *3 (Del. Super. 13 April 2007) (limiting discovery to make it ‘reasonable and without undue burden’).

56 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

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.⁵⁷

Trial

Delaware has an adversarial system of trial in which the opposing parties have the responsibility and initiative to find and present proof.⁵⁸ Lawyers are expected to act as zealous advocates for their clients’ positions.⁵⁹ In particular, courts view adequate cross-examination as critical.⁶⁰ 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.⁶¹ In the Court of Chancery, however, there are no juries, and a party therefore does not have a right to a trial by jury.⁶² In jury trials, jurors make findings of fact while judges make findings of law.⁶³ In non-jury trials, judges make findings of both fact and law.⁶⁴

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.⁶⁵ Alternatively, a party can move for summary judgment.⁶⁶ 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’.⁶⁷ 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’.⁶⁸

changes are consistent with similar amendments to the Federal Rules of Civil Procedure, and they became effective on 1 January 2013. *id.*

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

58 *In re Appraisal of Shell Oil Co*, 1990 WL 201390, at *5 (Del. Ch. 11 December 1990), *affd*, 607 A.2d 1213 (Del. 1992).

59 Del. Lawyers’ R. Prof’l Conduct pmb1.

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

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

62 See Ct. Ch. R. 38.

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

64 See *Willy v. Wilbank*, 567 A.2d 424, 1989 WL 126935, at *3 (Del. 1989).

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

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

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

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

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.⁶⁹ 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.⁷⁰

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.⁷¹ 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.⁷²

Class action settlements require the approval of the court.⁷³ 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.⁷⁴ But the Court of Chancery has questioned such settlements. Though, in *BVF Partners LP v. New Orleans Employees' Retirement System*,⁷⁵ 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.⁷⁶

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

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

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

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

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

74 See, e.g., *In re Celera Corp S'holder Litig*, 2012 WL 1020471, at *1 (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 WL 2595739, at *3, *4 (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'), aff'd sub nom. *Arkansas Teacher Ret. Sys. v. Caiafa*, 996 A.2d 321 (Del. 2010).

75 59 A.3d 418 (Del. 2012).

76 *id.* at 436–37.

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.⁷⁷ Legal entities cannot represent themselves.⁷⁸

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.⁷⁹ 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.⁸⁰

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'.⁸¹

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.⁸² To

77 See, e.g., *Sloan v. Segal*, 2008 WL 81513, at *7 (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 WL 36716, at *1 (Del. 1987)).

78 See *Harris v. RHH P'rs LP*, 2009 WL 891810, at *2 (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 WL 194734, at *3 (Del. Super. 29 January 2003) (noting that 'corporations must be represented by an attorney in court proceedings') (citation omitted).

79 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.

80 10 Del. C. Section 3104.

81 *Kingsland Hldgs v. Bracco*, 1996 WL 422340, at *5 (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').

82 10 Del. C. Section 4802(a).

seek enforcement of a foreign-country judgment under this Act, a party must file an action seeking recognition of the foreign-country judgment.⁸³ 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.⁸⁴

vii Assistance to foreign courts

The rules of the Delaware state courts do not include specific provisions on assisting foreign courts.⁸⁵ 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.⁸⁶ 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.⁸⁷ Delaware courts, however, will sometimes limit access to judicial proceedings and records regarding sensitive information.⁸⁸ 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 5.1.⁸⁹ 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.

83 10 Del. C. Section 4809(a).

84 10 Del. C. Section 4810(1) and (2).

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

86 *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).

87 See, e.g., *NewRadio Grp LLC v. NRG Media LLC*, 2010 WL 935622, 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 WL 422633, at * 1 (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’).

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

89 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>.

For example, in *Leader Technologies Inc v. Facebook Inc*⁹⁰ 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.⁹¹

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.⁹² 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 client, a former client or a third person or by a personal interest of the lawyer’.⁹³ 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.⁹⁴

Where a lawyer is associated with a firm, a lawyer’s conflicts of interest are generally imputed to the other members of that firm.⁹⁵ 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’.⁹⁶ Also, subject to certain conditions, a member of a firm can avoid such an imputation by obtaining the informed consent of the former client.⁹⁷

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.⁹⁸ 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.⁹⁹

90 719 F. Supp. 2d 373 (D. Del. 2010).

91 See id. at 376.

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

93 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.

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

95 Del. Lawyers’ R. Prof’l Conduct 1.10.

96 Del. Lawyers’ R. Prof’l Conduct 1.10(c)(1) and (2).

97 Del. Lawyers’ R. Prof’l Conduct 1.10(d).

98 Del. Lawyers’ R. Prof’l Conduct 1.16(b)(3).

99 Del. Lawyers’ R. Prof’l Conduct 1.6(b)(2) and (3).

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.¹⁰⁰ 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.¹⁰¹ Additionally, parties can redact confidential information from public court documents.¹⁰²

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.¹⁰³ 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*.¹⁰⁴ 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.¹⁰⁵ 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,¹⁰⁶ 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’.¹⁰⁷ The Delaware Supreme Court amended Rule 502 to clarify that it ‘shall include persons who are employed or engaged by

100 See, e.g., A Burt & D Geer, ‘The End of Privacy’, *NY Times*, 5 October 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.

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

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

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

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

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

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

107 DRE 502(a)(3).

a business entity, to serve as “in house” counsel to that entity and/or to any of its wholly owned or controlled affiliates’.¹⁰⁸ 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.¹⁰⁹ The privilege is not, however, accorded to communications that render business advice as opposed to legal advice.¹¹⁰

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.¹¹¹ 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’.¹¹²

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.¹¹³

Delaware courts also recognise the attorney work product doctrine (protecting information prepared in anticipation of litigation)¹¹⁴ 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’).¹¹⁵

ii Production of documents

During the course of discovery, parties may obtain non-privileged documents and electronically stored information that are ‘relevant to any party’s claim or [defence] and proportional to the needs of the case’.¹¹⁶ 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

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

109 See also *Grimes v. LCC Int’l Inc*, 1999 WL 252381, at *3 (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).

110 *Khanna v. McMinn*, 2006 WL 1388744, at *37 (Del. Ch. 9 May 2006).

111 See *Kirby v. Kirby*, 1987 WL 14862, at *7 (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.’).

112 2013 WL 1668205, at *4 (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 *5.

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

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

115 *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 WL 4859125, at *4 (Del. Ch. 12 October 2012) (second alteration in original).

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

more probable or less probable than it would be without the evidence'.¹¹⁷ 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'.¹¹⁸ The request must specify where, when and how the documents should be produced.¹¹⁹

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 sought is not proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.*¹²⁰

Delaware courts often adjudicate disputes where the evidence is located outside Delaware and require parties to produce documents located in foreign jurisdictions.¹²¹ 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.¹²² 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.¹²³ 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"'.¹²⁴

117 DRE 401.

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

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

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

121 *IM2 Merch & Mfg., Inc. v. Tirez Corp.*, 2000 WL 1664168, at *10 (Del. Ch. 2 November 2000).

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

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

124 *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'.¹²⁵ 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.¹²⁶

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.¹²⁷ Every civil case filed in the Superior Court is subject to this compulsory ADR programme.¹²⁸ 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.¹²⁹ 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.¹³⁰ 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'.¹³¹ The DRAA requires arbitrators to issue final awards within 120 days of the arbitrator's acceptance of his or her

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

126 See *Dawson v. Pittco Capital P'rs L.P.*, 2010 WL 692385, at *1 (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 WL 15479, at *1 (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 WL 411795, at *2-3 (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').

127 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).

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

129 10 Del. C. Section 349.

130 10 Del. C. Section 5802.

131 '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->

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.¹³² 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.¹³³ Parties to a DRAA arbitration may select their arbitrator by agreement or petition the Court of Chancery to appoint one or more arbitrators.¹³⁴ The arbitration 'can be held anywhere in the world'¹³⁵ and is a confidential proceeding in the absence of any agreement to the contrary.¹³⁶ 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.¹³⁷ 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'.¹³⁸

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.¹³⁹ The Supreme Court 'may only vacate, modify, or correct the final award in conformity with the Federal Arbitration Act',¹⁴⁰ 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.¹⁴¹ 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

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*, 894 F. Supp. 2d 493, 503-04 (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.

132 10 Del. C. Section 5808.

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

134 10 Del. C. Section 5805.

135 '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/>.

136 See Delaware Rapid Arbitration Rule 5.

137 See 10 Del. C. Section 5804.

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

139 10 Del. C. Section 5809(b).

140 10 Del. C. Section 5809(c).

141 10 Del. C. Section 5809(d).

on the fifth business day following the expiry of the challenge period.¹⁴² 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.¹⁴³

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.¹⁴⁴ Further, the parties can agree to make the arbitrator's decision binding.¹⁴⁵ If the parties agree to binding arbitration, the matter will be removed from the Superior Court's docket.¹⁴⁶ 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.¹⁴⁷ 'Every party has trial de novo appeal rights if they are not satisfied with the arbitrator's decision'.¹⁴⁸

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 Act¹⁴⁹ and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention¹⁵⁰).¹⁵¹

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',¹⁵² or, if no such agreement can be reached, the Superior Court will appoint a mediator from its Mediator Directory.¹⁵³ The mediator's role in the mediation process is to help the parties reach 'a mutually acceptable resolution of a controversy'.¹⁵⁴ If the mediation is unsuccessful,

142 10 Del. C. Section 5810(a).

143 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.*

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

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

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

147 *id.*

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

149 9 USC Section 1, et seq.

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

151 See, e.g., *Ilyich Mariupol Iron & Steel Works v. Argus Devs Inc.*, 2013 WL 1222699, at *1,*2 (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).

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

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

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

‘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’.¹⁵⁵

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’.¹⁵⁶ 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 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.¹⁵⁷

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.¹⁵⁸ 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.¹⁵⁹ 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.¹⁶⁰

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’.¹⁶¹ 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.’¹⁶² Moreover, the parties can agree to make the neutral assessment outcome binding.

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

156 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.

157 10 Del. C. Section 347(a)(1)–(5).

158 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>.

159 *id.*

160 See *id.* at 4.

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

162 *id.*

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.

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