

THE DISPUTE  
RESOLUTION  
REVIEW

THIRTEENTH EDITION

Editor  
Damian Taylor

THE LAWREVIEWS

THE  
DISPUTE  
RESOLUTION  
REVIEW

THIRTEENTH EDITION

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# PREFACE

*The Dispute Resolution Review* provides an indispensable overview of the civil court systems of 28 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, as well as overcoming challenges that life and politics throw up along the way. 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 from those closer to home.

Looking back over 2020 from my study at home (this will provide a clue to the theme of this Preface), I cast my eye over words I wrote in last year's Preface:

*All this leaves me writing this preface five days before 'Brexit Day', after an exhausting 2019 in which clients have not known whether to plan for the 'May deal', 'No deal', 'Boris's deal', a referendum (on Brexit and/or Scottish independence), no Brexit, or the extensive nationalisation of private industries and tax rises outlined in Labour's manifesto.*

Not a word about a pandemic about to sweep across the globe.

If 2019 was the year of Brexit, this year was undoubtedly the year of covid-19; the year of lockdowns, tiers, furlough and, finally and thankfully, unprecedented mainstream media scrutiny of the safety and efficacy of various vaccines. Lives have tragically been lost and many more have suffered from covid-19-related illness. Restrictions on personal freedoms that would have been unthinkable this time last year have been imposed, relaxed and imposed again. In the UK, we have seen everything from virtual total lockdown to being encouraged to 'eat out to help out' as the government picked up half the bill to support the hospitality industry. Throughout this period of enormous change, the law, courts and tribunals have had to adapt to rapidly changing circumstances and, for the most part, have kept pace.

Perhaps the most noticeable change in the legal sector has been the move to online and home working, which has emphasised the need to have strong and reliable IT systems. We have seen disputes increase around force majeure and cancellation and termination clauses, and businesses have had more cause than usual to check their insurance arrangements. The latter development is best illustrated in the UK though the Financial Conduct Authority test case to determine the scope of cover afforded by business interruption insurance policies to businesses that were affected by covid-19 and a variety of government advice and restrictions, a case that saw your editor spend an uncomfortably hot British summer 'attending' court from home and promising he would never complain about being cramped in court again, so long as it had air conditioning. See Chapter 6 for further details of the case.

The question on many lawyers' lips is 'will we ever go back to life as it was before?' Some firms confidently predict the end of the working week and office environment (giving up their leases in the process); others talk of offices becoming the 'hub' with flexible working 'spokes'; and yet others urge a return to the status quo. Certainly courts and tribunals will have learned a lot during the pandemic, not least that electronic filing and short remote hearings can be efficient; but perhaps also that even the best video link cannot replace the special atmosphere that lends something intangible, but of great importance, to live, physically present advocacy and testimony. Perhaps one of the best lessons learned is that if you don't try something, you won't know which parts work and which parts don't.

A last word has to go to Brexit, as the UK and EU agreed a deal at the end of the year with only days to spare. This will have a lasting impact on the legal and political relationship, much of which is explored in more depth in the updated Brexit chapter.

This 13th 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 a continually evolving legal landscape responsive to both global and local developments.

As always, 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 can be found in Appendix 1 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

Harpenden

January 2021

# UNITED STATES: DELAWARE

*Elena C Norman, Lakshmi A Muthu and Michael A Laukaitis II*<sup>1</sup>

## 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 Court of Chancery and the Superior Court – 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.<sup>2</sup> It also has jurisdiction to interpret, apply, enforce or determine the validity of corporate instruments<sup>3</sup> and to hear actions relating to limited liability companies (LLCs)<sup>4</sup> and partnerships,<sup>5</sup> including limited partnerships.<sup>6</sup> 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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1 Elena C Norman is a partner, Lakshmi A Muthu is a senior associate and Michael A Laukaitis II 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 and civil cases other than equity matters and domestic relations matters (which are heard by the Delaware Family Court).<sup>7</sup> 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).<sup>8</sup> CCLD litigants may receive priority in setting trial dates and, if requested, expedited case schedules.<sup>9</sup> Since its establishment in May 2010, the CCLD has become an increasingly popular forum for filing complex 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 involving foreign actors. These decisions provided insight into circumstances under which Delaware courts will apply foreign laws and 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 and that another jurisdiction is a more appropriate place for the action to be heard).

In *Germaninvestments AG v. Allomet Corp.*,<sup>10</sup> the Delaware Supreme Court reversed the Court of Chancery's application of foreign law to the analysis of a forum selection provision because the party seeking the application of foreign law failed to carry its burden to establish the substance of the law. The parties in this action had executed a restructuring and loan agreement (R&L agreement), which provided that the agreement 'is subject to Austrian law' and that '[t]he place of jurisdiction is Vienna'.<sup>11</sup> The plaintiff filed suit in the Court of Chancery seeking, among other things, to enforce the R&L agreement.<sup>12</sup> The defendants moved to dismiss the action primarily arguing that 'the court should grant the motion so that the parties may litigate th[e] claims in Vienna, Austria'.<sup>13</sup>

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7 Delaware also has a Court of Common Pleas, which has jurisdiction over, among other things, misdemeanors 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\$25,000. The jurisdiction of the Justice of the Peace Court previously was limited to disputes where the amount in controversy did not exceed US\$15,000. The increase became effective on 23 November 2020.

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](https://courts.delaware.gov/superior/pdf/Administrative_Directive_2010-3.pdf).

9 See 2019 Annual Report of the Delaware Judiciary, at 30 (2019), available at <https://courts.delaware.gov/aoc/AnnualReports/FY19/doc/AnnualReport2019.pdf>.

10 225 A.3d 316 (Del. 2020).

11 id. at 321.

12 id. at 324.

13 id.

The defendants sought the application of Austrian law to the Court of Chancery's analysis of the forum selection provision set forth in the R&L agreement, but offered 'scant information to the Court of Chancery on Austrian law in their opening brief in support of their motion to dismiss'.<sup>14</sup> They attached Article 25 of the European Regulation on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels Regulation), but offered no cases, secondary sources or expert testimony on the substance of Austrian law. With their reply brief, the defendants attached some secondary sources, but again cited no case law and proffered no expert testimony. The plaintiffs in turn argued that Delaware law should govern the Court of Chancery's analysis. Without seeking additional information from the parties, the Court of Chancery held that Austrian law applied and determined that the forum selection provision was governed by Article 25 of the Brussels Regulation. The Court of Chancery further determined that under Article 25 of the Brussels Regulation, the forum selection provision was mandatory and granted the defendants' motion to dismiss, in favour of the Vienna, Austria forum.

The Delaware Supreme Court affirmed the Court of Chancery's ruling that Austrian law applied to the Court of Chancery's analysis of the forum selection provision because, among other things, 'this action is undeniably about Plaintiffs' claims to enforce the Austrian law-governed R&L agreement'.<sup>15</sup> However, the Supreme Court ruled that the Court of Chancery erred in applying foreign law. The defendants, as the parties seeking to apply foreign law, bore the burden of raising the issue and establishing that foreign law should apply to the dispute.<sup>16</sup> Although the Court of Chancery is afforded latitude in determining whether to apply foreign law, 'the movant's initial submission should be fulsome . . . in the context of the specific circumstances at issue, and the parties and the court should carefully evaluate the need for expert input, particularly if the parties disagree as to the substance of the foreign law'.<sup>17</sup> Based on its review of the record, the Supreme Court determined that the defendants did not meet this burden.

Given the defendants' failure to establish the substance of foreign law, the Supreme Court considered whether to apply Delaware law to the analysis of the forum selection provision or to remand the action to the Court of Chancery to allow it to further consider the foreign law issue.<sup>18</sup> The Supreme Court determined that the latter approach was neither efficient nor equitable and directed the Court of Chancery to apply Delaware law to analyse the forum selection provision.<sup>19</sup>

In *Roe v. Wyndham Worldwide, Inc.*,<sup>20</sup> the US District Court for the District of Delaware declined to dismiss on *forum non conveniens* grounds claims arising out of conduct in Turkey against Wyndham Worldwide, Inc, Wyndham Hotel Group (UK) Ltd (Wyndham UK) and related entities, as well as Özdilek Hotel Tourism and Trade Limited Company (Ozdilek). During a stay at the Wyndham Grand Istanbul Levent, a hotel in Turkey, the plaintiff, a US citizen and resident, was sexually assaulted by a hotel massage therapist. She thereafter asserted claims for negligence and vicarious liability against the defendants. While the decision to

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14 id.

15 id. at 330-32.

16 id. at 333.

17 id. at 337.

18 id.

19 id. at 337-38.

20 2020 WL 707371, at \*5 (D. Del. 12 Feb. 2020).

grant or deny a *forum non conveniens* motion was within the discretion of the District Court, four factors guided the court's analysis: '(1) the availability of an adequate alternative forum, (2) the amount of deference to be afforded to plaintiffs' choice of forum, (3) the balance of private interest factors, and (4) the balance of public interest factors.'<sup>21</sup>

The District Court determined that the first factor weighed in favour of dismissal, as Turkey is an adequate alternative forum. Although it did not offer the same vicarious liability claim, the defendants showed through the affidavit of an attorney admitted to the Istanbul Bar and licensed to practice law in Turkey that Turkish law 'provide[s] a mechanism by which plaintiffs can assert claims against employers based on negligence of an employee'.<sup>22</sup>

The District Court determined that the second factor weighed against dismissal. The Court explained that where, as here, 'a plaintiff is not foreign, her choice of forum is accorded great deference', which 'deference can only be overcome when the balance of the public and private interests clearly [favours] an alternate forum'.<sup>23</sup>

Finally, the District Court determined that the third factor (the private interest factors) weighed in favour of dismissal and that the fourth factor (the public interest factors) marginally weighed in favour of dismissal. The Court explained that the private interest factors are:

*(1) the relative ease of access to sources of proof; (2) the availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; (3) the possibility of viewing premises, if viewing would be appropriate to the action; and (4) all other practical problems that make a trial easy, expeditious and inexpensive.*<sup>24</sup>

In determining that these factors, taken together, favoured dismissal, the Court highlighted that two of the defendants – Wyndham UK and Ozdilek – were not subject to the Court's jurisdiction. The Court further explained that the

*public interest factors are: (1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized controversies decided at home; (3) the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; (4) the avoidance of unnecessary problems in conflict of laws, or in application of foreign laws; and (5) the unfairness of burdening citizens in an unrelated forum with jury duty.*<sup>25</sup>

The Court determined that the third and fourth public interest factors favoured dismissal because 'the court would [otherwise] be burden[ed] with resolving conflict of law issues and applying foreign law to the claims at issue . . .'.<sup>26</sup> The Court determined that the remaining factors were neutral or did not favour dismissal.

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21 id.

22 id.

23 id. at \*5 (internal quotation marks omitted).

24 id. at \*6.

25 id.

26 id. at \*8.

While the first, third and fourth factors favoured dismissal, the District Court determined that this was ‘not enough to overcome the great deference afforded to [the] [p]laintiff’s choice of forum’.<sup>27</sup> Therefore, the Court denied the defendants’ motion to dismiss.

In *Otto Candies, LLC v. KPMG, LLP*,<sup>28</sup> the Court of Chancery granted a motion to dismiss a claim against KPMG LLP (KPMG US) brought by the plaintiffs under a theory of vicarious liability that sought to hold KPMG US liable for the acts of its Mexican subsidiary (KPMG Mexico). The plaintiffs sought recourse from the KPMG entities for allegedly negligent misrepresentations made by KPMG Mexico in connection with an audit opinion it issued. After the Court of Chancery dismissed KPMG Mexico from the case for lack of personal jurisdiction, KPMG US moved to dismiss the negligent misrepresentation claim against it, arguing that the plaintiffs had failed to plead any theory under which the Court of Chancery could find KPMG US vicariously liable.

The Court of Chancery analysed the plaintiffs’ theory of vicarious liability under the laws of Mexico, Delaware and New York to determine whether a conflict of law existed. The Court of Chancery determined that the plaintiffs failed to plead an agency theory of vicarious liability under the law of each jurisdiction because the plaintiffs failed to plead the existence of a written agreement, as required under Mexico law, and failed to plead that KPMG US had control over the audit opinion, as required under Delaware and New York law. Similarly, the plaintiffs failed in each jurisdiction to plead a theory of vicarious liability under a joint venture theory.

Having determined that no conflict of law existed, the Court of Chancery applied Delaware law. The Court of Chancery determined that the plaintiffs had failed to plead that KPMG US ‘had control over the wrongdoing at issue[,]’ as required by Delaware law.<sup>29</sup> The Court of Chancery therefore dismissed the plaintiffs’ claim.

As shown in the above-described cases, over the past year, Delaware courts have provided guidance into the showings parties must make in seeking the application of foreign law as well as the dismissal of claims on *forum non conveniens* grounds.

### 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 Procedure<sup>30</sup> and the Federal Rules of Evidence.<sup>31</sup>

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27 id.

28 2020 WL 4917596 (Del. Ch. 21 Aug. 2020).

29 id. at \*8, \*14.

30 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.

31 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.

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.

## 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.<sup>32</sup> 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'.<sup>33</sup> After filing the complaint, service of the complaint and a summons must be made on the defendant.<sup>34</sup> The defendant must generally respond to the complaint within 20 days of service.<sup>35</sup> In the Superior Court, civil cases are subject to compulsory alternative dispute resolution.<sup>36</sup> 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.<sup>37</sup>

### *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.<sup>38</sup> 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.<sup>39</sup> Delaware state courts have discretion to limit the scope of discovery if, for example, it is unreasonably burdensome.<sup>40</sup>

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

33 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).

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

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

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

37 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.

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

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

40 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').



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).<sup>41</sup> Opposing parties and their counsel should confer regarding the preservation of ESI early in a litigation and attorney oversight of the identification and preservation processes is very important. In *EORHB, Inc v. HOA Holdings, LLC*, the Court of Chancery encouraged parties to use technologies such as predictive coding to select documents for production where a large quantity of electronically stored documents was involved.<sup>42</sup>

### ***Trial***

Delaware has an adversarial system of trial in which the opposing parties have the responsibility and initiative to find and present proof.<sup>43</sup> Lawyers are expected to act as zealous advocates for their clients' positions.<sup>44</sup> In particular, courts view adequate cross-examination as critical.<sup>45</sup> Trials are presided over by a single judge and, in some instances, may be before a jury in addition to a judge. In the District Court and Superior Court, a party may demand a trial by jury.<sup>46</sup> In the Court of Chancery, however, there are no juries, and a party therefore does not have a right to a trial by jury.<sup>47</sup> In jury trials, jurors make findings of fact while judges make findings of law.<sup>48</sup> In non-jury trials, judges make findings of both fact and law.<sup>49</sup>

### ***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.<sup>50</sup> Alternatively, a party can move for summary judgment.<sup>51</sup> 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'.<sup>52</sup> 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

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41 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.*

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

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

44 Del. Lawyers' R. Prof'l Conduct pmb1.

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

46 District of Delaware LR 48.1; Super. Ct. Civ. R. 38(b).

47 See Ct. Ch. R. 38.

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

49 See *Willey v. Wiltbank*, 567 A.2d 424, 1989 WL 126935, at \*3 (Del. 1989).

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

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

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

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'.<sup>53</sup>

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.<sup>54</sup> 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.<sup>55</sup>

### 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.<sup>56</sup> 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.<sup>57</sup>

Class action settlements require the approval of the court.<sup>58</sup> 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.<sup>59</sup> However, the Court of Chancery has questioned such settlements, although, in *BVF Partners LP v. New Orleans Employees*,

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

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

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

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

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

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

59 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 attorneys' 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).

*Retirement System*,<sup>60</sup> 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.<sup>61</sup>

#### 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.<sup>62</sup> Legal entities cannot represent themselves.<sup>63</sup>

#### 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.<sup>64</sup> 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.<sup>65</sup>

#### 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'.<sup>66</sup>

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60 59 A.3d 418 (Del. 2012).

61 id. at 436–37.

62 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)).

63 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).

64 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.

65 10 Del. C. Section 3104.

66 *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

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.<sup>67</sup> To seek enforcement of a foreign-country judgment under this Act, a party must file an action seeking recognition of the foreign-country judgment.<sup>68</sup> 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.<sup>69</sup>

### vii Assistance to foreign courts

The rules of the Delaware state courts do not include specific provisions on assisting foreign courts.<sup>70</sup> 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.<sup>71</sup> 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.<sup>72</sup> Delaware courts, however, will sometimes limit access to judicial proceedings and records regarding sensitive information.<sup>73</sup> 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.<sup>74</sup> 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.

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foreign judgment, given by a court under a system of law reasonably insuring notice and hearing [. . .] is res judicata in Delaware').

67 10 Del. C. Section 4802(a).

68 10 Del. C. Section 4809(a).

69 10 Del. C. Section 4810(1) and (2).

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

71 *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).

72 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').

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

74 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>.

## **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*,<sup>75</sup> 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.<sup>76</sup>

## **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.<sup>77</sup> 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'.<sup>78</sup> 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.<sup>79</sup>

Where a lawyer is associated with a firm, a lawyer's conflicts of interest are generally imputed to the other members of that firm.<sup>80</sup> 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'.<sup>81</sup> In addition, subject to certain conditions, a member of a firm can avoid such an imputation by obtaining the informed consent of the former client.<sup>82</sup>

### **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.<sup>83</sup> 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

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75 719 F. Supp. 2d 373 (D. Del. 2010).

76 See id. at 376.

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

78 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.

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

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

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

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

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

reasonably believes necessary' to prevent the client from committing a crime that is reasonably certain to result in substantial financial injury to another, or prevent, mitigate or rectify substantial financial injury to another that is reasonably certain to result.<sup>84</sup>

### 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.<sup>85</sup> 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.<sup>86</sup> Additionally, parties can redact confidential information from public court documents.<sup>87</sup>

### 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.<sup>88</sup> Specifically, 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*.<sup>89</sup> 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.<sup>90</sup> 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,<sup>91</sup> 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

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 attorney–client privilege in Delaware Rule of Evidence (DRE) 502. Under this

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

85 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](http://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](http://www.nytimes.com/2013/02/03/technology/consumer-data-protection-laws-an-ocean-apart.html?_r=0).

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

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

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

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

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

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

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’.<sup>92</sup> 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’.<sup>93</sup> 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.<sup>94</sup> The privilege is not, however, accorded to communications that render business advice as opposed to legal advice.<sup>95</sup>

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.<sup>96</sup> 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’.<sup>97</sup>

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.<sup>98</sup>

Delaware courts also recognise the attorney work product doctrine (protecting information prepared in anticipation of litigation)<sup>99</sup> and ‘business strategy immunity’ (protecting confidential business information where there is a risk that the information ‘may not be used for proper legal purposes, but rather for practical business advantages’).<sup>100</sup>

92 DRE 502(a)(3).

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

94 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 its officers).

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

96 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.’).

97 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.

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

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

100 *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).

## 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’.<sup>101</sup> 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’.<sup>102</sup> 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’.<sup>103</sup> The request must specify where, when and how the documents should be produced.<sup>104</sup>

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.*<sup>105</sup>

Delaware courts often adjudicate disputes where the evidence is located outside Delaware and require parties to produce documents located in foreign jurisdictions.<sup>106</sup> 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.<sup>107</sup> 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.<sup>108</sup> Further, one Delaware court has noted that ‘where 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.”’<sup>109</sup>

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

102 DRE 401.

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

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

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

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

107 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>.

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

109 *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'.<sup>110</sup> 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.<sup>111</sup>

## 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.<sup>112</sup> With limited exceptions, every civil case filed in the Superior Court is subject to this compulsory ADR programme.<sup>113</sup> 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.<sup>114</sup> 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.<sup>115</sup> These programmes allow parties to resolve their disputes efficiently while maintaining a greater level of confidentiality than litigation typically affords.

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

111 See *Dawson v. Pittco Capital P'rs LP*, 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').

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

113 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).

114 10 Del. C. Section 349.

115 10 Del. C. Section 5802.

## 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'.<sup>116</sup> 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.<sup>117</sup> To utilise the DRAA, parties to a dispute must meet the following requirements:

- a the parties must have a written agreement to submit their controversy to arbitration;
- b the agreement to arbitrate must expressly reference the DRAA;
- c the agreement to arbitrate must be governed by Delaware law;
- d at least one of the parties must be an entity formed in Delaware or have its principal place of business in Delaware; and
- e no party may be a consumer or an organisation that maintains public areas within a residential community.<sup>118</sup>

Parties to a DRAA arbitration may select their arbitrator by agreement or petition the Court of Chancery to appoint one or more arbitrators.<sup>119</sup> The arbitration 'can be held anywhere in the world'<sup>120</sup> and is a confidential proceeding in the absence of any agreement to the contrary.<sup>121</sup> 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.<sup>122</sup> 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'.<sup>123</sup>

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

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116 '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*, 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 and P Brickley, 'Supreme Court Declines to Revive Delaware Arbitration Program', *Wall Street Journal*, 24 March 2014, available at [www.wsj.com/articles/SB10001424052702304179704579459200411054082](http://www.wsj.com/articles/SB10001424052702304179704579459200411054082).

117 10 Del. C. Section 5808.

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

119 10 Del. C. Section 5805.

120 '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/>.

121 See Delaware Rapid Arbitration Rule 5.

122 See 10 Del. C. Section 5804.

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

Court of Delaware.<sup>124</sup> The Supreme Court ‘may only vacate, modify, or correct the final award in conformity with the Federal Arbitration Act’,<sup>125</sup> which sets forth extremely narrow grounds for appeal, essentially limited to fraud or other misconduct. In addition, 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.<sup>126</sup> 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.<sup>127</sup> 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.<sup>128</sup>

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.<sup>129</sup> Further, the parties can agree to make the arbitrator’s decision binding.<sup>130</sup> If the parties agree to binding arbitration, the matter will be removed from the Superior Court’s docket.<sup>131</sup> 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.<sup>132</sup> ‘Every party has trial de novo appeal rights if they are not satisfied with the arbitrator’s decision’.<sup>133</sup>

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 Act<sup>134</sup> and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention<sup>135</sup>).<sup>136</sup>

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124 10 Del. C. Section 5809(b).

125 10 Del. C. Section 5809(c).

126 10 Del. C. Section 5809(d).

127 10 Del. C. Section 5810(a).

128 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.*

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

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

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

132 *id.*

133 Superior Court, Alternative Dispute Resolution: Guidelines for Superior Court Arbitration, available at [https://courts.delaware.gov/superior/adr/adr\\_arb\\_guideline.aspx](https://courts.delaware.gov/superior/adr/adr_arb_guideline.aspx).

134 9 USC Section 1, et seq.

135 The United States has been a party to the New York Convention since 1970. NY Convention, Contracting States, available at [www.newyorkconvention.org/countries](http://www.newyorkconvention.org/countries).

136 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).

### 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',<sup>137</sup> or, if no such agreement can be reached, the Superior Court will appoint a mediator from its Mediator Directory.<sup>138</sup> The mediator's role in the mediation process is to help the parties reach 'a mutually acceptable resolution of a controversy'.<sup>139</sup> If a 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'.<sup>140</sup>

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'.<sup>141</sup> 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:

- a* at least one party is a business entity;
- b* at least one party is a business entity formed in Delaware or having its principle place of business in Delaware;
- c* no party is a consumer with respect to the business dispute; and
- d* in disputes involving solely a claim for monetary damages, the amount in controversy is no less than US\$1 million.<sup>142</sup>

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.<sup>143</sup> 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.<sup>144</sup> These

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137 Superior Court Alternative Dispute Resolution: Mediator Directory, available at [https://courts.delaware.gov/superior/adr/adr\\_mediator\\_all.aspx](https://courts.delaware.gov/superior/adr/adr_mediator_all.aspx).

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

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

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

141 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.

142 10 Del. C. Section 347(a)(1)–(5).

143 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>.

144 *id.*

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.<sup>145</sup>

#### **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'.<sup>146</sup> 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.'<sup>147</sup> 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, we can expect increasing numbers of decisions involving foreign litigants and cross-border issues.

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145 See *id.* at 4.

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

147 *id.*

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